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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10
Justice

Perrino, Anthony

- v -

Entergy

INDEX NO. 116288/03

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/14/07

J.S.C.
JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

ANTHONY PERRINO,

Plaintiff,

-against-

ENTERGY NUCLEAR INDIAN POINT 3 LLC, ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR NORTHEAsT INDIAN POINT ENERGY CENTER,

Defendants.

Decision/Order

Index#116288/03

Mot. Seq. #004

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion, ARP affd., exhibits	1
DH affd., exhibits	2
DJS affirm., exhibits	3

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff, Anthony Perrino (sometimes "Perrino") has brought an action for personal injuries based upon violation of Labor Law §§ 200, 240(1) and 241 (6). Defendants, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc. and Entergy Nuclear Northeast Indian Point Energy Center (collectively "Entergy") move for summary judgment dismissing each and every claim. Perrino opposes the motion to the extent it seeks dismissal of his Labor Law §§ 200 and 241(6) claims. He is mute regarding the Labor Law §240(1) claim.

Issue has been joined; discovery is complete; the note of issue has been filed and the motion is otherwise brought timely. CPLR § 3212; Brill v. City of New York, 2

NY3d 648 (2004). The court will therefore consider the motion on its merits

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003). Once a factual dispute is identified, however, the courts inquiry ends. Brunetti v. Musallam, 11 AD3d 280 (1st dept. 2004).

Many facts are not disputed on this motion. Entergy owns and operates the Nuclear Power Plant located at Indian Point in Westchester, New York. On or about January 9, 2003 Entergy entered into a written contract with Siemens Westinghouse Power Corporation ("Siemens") to complete certain specified work. Insofar as the Main Boiler Feed Pumps at the Nuclear Power Plant are concerned, the contract expressly provided that the services to be provided are to: "Disassemble Clean Inspect, Reassemble."

Siemens employed Perrino as an operating engineer. On April 9, 2003 plaintiff was working at the Nuclear Power Plant, operating a mezzanine level crane that was being used to disassemble an electrical turbine, boiler feed and boiler feed pump (collectively "boiler feed pump"). The boiler feed pump is an extremely large apparatus, measuring 20 feet long by 10 feet wide and 6 to 8 feet high. As it was being disassembled, its component parts were supposed to set down in a designated area, commonly referred to as a "lay down area".

The crane is on a moveable trolley and extends up over the height of the boiler feeder pump. A control box is connected to the crane by a cord and support cable. Plaintiff operated the control box. At the end of the work day plaintiff was responsible to "clean the hook", which means to maneuver the hook in a stored position. It involved plaintiff using the control box and walking along with the crane trolley until the crane was in the desired location. Plaintiff claims that while he was walking along side the trolley using the control box and looking up to determine how to move the crane and maneuver it into its proper storage spot, he walked into steam valve that was part of the disassembled boiler feed pump. Plaintiff claims that he injured himself on a protruding bolt from the valve. The parties dispute whether the area where the offending valve was located was cordoned off with yellow caution tape or not. Plaintiff claims there was no such tape and Entergy claims there was.

Daniel Hickory the project manager for Siemens has submitted an affidavit stating that the work done by them at the project was routine maintenance and that it did not concern any construction or repairs. Entergy also relies on the testimony of Siemens' Project Engineer, Richard Rosenberg, and Millright Supervisor, Joe

Vandernoth, to support this position. Both of these Siemens' employees testified at their depositions that the work done at the time of the accident involved scheduled maintenance of the equipment at the Nuclear Power Plant that was performed on a periodic basis. Entergy also claims that it did not supervise the work done by Perrino.

In opposition, Perrino submits his own sworn statement that the work being done was in the nature of emergency repairs due to outages. Perrino also claims that Entergy supervised safety at the project. In addition to his own statement, he also relies on the deposition testimony of Vandernoth and Rosenberg to demonstrate the extent of Entergy's participation in safety at the job.

Labor Law §240(1)

Labor Law §240(1) only applies to elevation related injuries, those being either cases where a worker falls or is struck by an object that has fallen from above. Sajid v. Tribeca North Associates, LP, 20 AD3d 301 (1st dept. 2005). Entergy argues that since the undisputed facts show that the claimed injury occurred while Perrino was walking in a walkway, it is not an elevation related injury. Perrino does not oppose this aspect of the motion. The motion to dismiss the Labor Law §240(1) claim is, therefore, granted.

Labor Law §241(6)

Entergy argues that Labor Law § 241(6) does not apply because the work being done by Siemens at the time was only routine maintenance. It also argues that there is no specified industrial code provision that relates to the hazard claimed.

It is widely accepted that labor Law § 241(6) covers construction related accidents and that also includes work done in the context of repairs. Equally well

established is that routine maintenance is not covered under this provision of the labor law. Anderson v. Olympia & York Tower B Co., 14 AD3d 520 (2nd dept. 2005).

Generally, work is considered a repair if it involves fixing something that is malfunctioning, inoperable, operating improperly or involves making a significant physical change to the configuration of the structure. Bruce v. Fashion Square Associates, 8 AD3d 1053 (4th dept. 2004); Faulkner v. Allied Manor Road Company, 306 AD2d 224 (1st dept. 2003). It is routine maintenance if it is caused by a common problem, is the result of wear or tear or is done as part of scheduled maintenance. Kirk v. Outokumpu American Brass, Inc., 33 AD3d 1136 (3rd dept. 2006); Wein v Amato Properties, LLC., 30 AD3d 506 (2nd dept. 2006). See generally: Bissell v. Town of Amherst, 13 Misc2d 1216(a) (Sup. Ct. Erire Cty 2005). Component replacement in the course of normal wear and tear is still routine maintenance. Esposito v. New York City Industrial Development Agency, 1 NY3d 526 (2003); Arevalo v. NASDAQ Stock Market, Inc., 28 AD3d 242 (1st dept. 2006).

At bar, Entergy has shown in support of its motion that the scope of the contract pursuant to which the work was being done was regularly scheduled maintenance, routine for a Nuclear Power Plant. Notwithstanding that the scope of the project was large, it primarily the disassembly, cleaning and reassembly of the Boiler feeder Pumps. Repairs were done only as needed upon examination and while the apparatus was disassembled and cleaned. The contract did not call for the repair of any known malfunction.

Although plaintiff himself indicates that the scope of the work was emergency repairs, other than his brief, conclusory statements, there is no evidence to support his

contention. This is insufficient to raise any issue of fact. Arevalo v. NASDAQ Stock Market, Inc, *supra*. The fact that the work actually done was complicated, involved the use of heavy machinery and many skilled laborers, does not change the fundamental nature of the work done or create an issue of fact about whether it was a repair.

Entergy's motion for summary judgment dismissing the claim made under Labor Law § 241(6) is, therefore, granted. Since the court finds that the claims brought under Labor law §241(6) must be dismissed, because they involve routine maintenance, the court does not reach the issues raised with respect to the applicability of certain provisions of the Industrial Code.

Labor Law § 200

Entergy contends that plaintiff has no cause of action under Labor Law §200 or for common law negligence because it did not exercise supervisory control over the injured plaintiff's work, and that it neither created nor had actual or constructive knowledge of the allegedly dangerous condition. Russin v. Louis N. Picciano & Son, 54 NY2d 311 (1981); Huges v. Tishman Construction Corp., __ AD3d __; 2007 WL 1364685 (1st dept. 2007); DeBlase v. Herbert Construction Company, Inc., 5 AD3d 521 (2nd Dep't 2004).

Although Entergy claims that Siemens supervised Perrino's work, there are facts from which a jury can conclude that Entergy supervised the safety aspects of any and all work done at this Nuclear Power Plant, including the conditions that resulted in plaintiff's accident. There is no sworn statement from any Entergy personnel denying safety supervision of plaintiff's work. The Siemens employees, including Rosenberg and Vandernoth, support plaintiff's contention that Entergy oversaw safety. Entergy

strictly controlled all personnel entering the facility and depending upon the level of security clearance, mandated escorts. It also strictly controlled those areas to which any Siemens employee had access and designated and controlled all pathways in the facility. Entergy designated the lay down areas for equipment and disassembled parts fo the boiler feed pumps. It established the policy for cordoning off lay down areas. Very significant it the fact that Entergy employed Outage Coordinators whose job it was to regularly walk the job site to inspect for safety issues and quality performance and to take corrective measures.

Under these circumstances the court finds that there are issue of fact precluding the dismissal fo the labor Law § 200 claims.

Conclusion

In accordance wherewith, it is hereby:

ORDERED that the motion for summary judgment dismissing the claims in the complaint based upon violations of Labor Law §240(1) is hereby granted and such claims are hereby severed and dismissed, and it is further

ORDERED that the motion for summary judgment dismissing the claims in the complaint based upon violations of Labor Law §241(6) is hereby granted and such claims are hereby severed and dismissed, and it is further

ORDERED that the motion for summary judgment dismissing the claims in the complaint based upon violations of Labor Law §200 is hereby denied, and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon the Office of Trial Support so that this case may be restored to its rightful place on the trial

calendar and assigned for trial in the regular course, and it is further

ORDERED that an requested relief not otherwise expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York
May 14, 2007

SO ORDERED:

J.G. J.S.C.