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

PRESENT: WALTER B. TOLUB Justice PART 15

Index Number : 111187/2004
BENNICI, VINCENZO
VS
277 PARK AVENUE, LLC
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is consolidated with sequence 002 + 004 and

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/29/07

WALTER B. TOLUB J.S.C.

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

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 15

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VINCENZO BENNICI and ADRIANNA BENNICI,

Plaintiffs,

-against-

277 PARK AVENUE, LLC, STANLEY STAHL d/b/a STAHL PARK AVENUE COMPANY, COLLIERS ABR, INC. and JP MORGAN CHASE & CO.,

Defendants.

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JP MORGAN CHASE BANK,

Third-Party Plaintiff,

-against-

CAULDWELL-WINGATE COMPANY, INC.,

Third-Party Defendant.

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Index No.: 111187/05
Motion Seq. 002, 003, 004

Tolub, J.:

Motion sequence numbers 002, 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages sustained by a worker when he slipped and fell while cleaning a stairwell at a construction site located at 277 Park Avenue in Manhattan on September 24, 2001.

In motion sequence number 002, defendant and third-party plaintiff JP Morgan Chase Bank (Chase) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Vincenzo Bennici and Adrianna Bennici's (plaintiff) complaint, as well as all cross claims as against it. In addition, Chase moves for summary judgment in its favor on its third-party

complaint against third-party defendant Cauldwell-Wingate Company, Inc. (Cauldwell).

In motion sequence number 003, defendant Colliers ABR, Inc. (Colliers) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, as well as all cross claims as against it, or, in the alternative, granting Colliers conditional summary judgment as against co-defendants 277 Park Avenue, LLC and/or Stanley Stahl d/b/a Stahl Park Avenue Company (collectively, Stahl) and Chase on its contractual indemnity and breach of contract claims.

In motion sequence number 004, defendant Stahl moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, as well as all cross claims as against it. In addition, defendant Stahl moves for summary judgment in its favor on its common-law and contractual indemnification, as well as breach of contract claims as against Chase.

Third-party defendant Cauldwell cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint.

BACKGROUND

Defendant Stahl is the owner of a commercial office building (the building), which it leased to tenant and defendant and third-party plaintiff Chase.[1] A formal lease agreement between Stahl and Chase consolidated all prior lease agreements and had a commencement date

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[1]It should be noted that, in the year 2000, the Chase Manhattan Corporation merged with JP Morgan Chase & Company to become JP Morgan Chase Bank. Contrary to the assertions of Cauldwell, evidence in the record suggests that Cauldwell was well-aware of the merger. In addition, also contrary to the assertion of Cauldwell, defendants' motions for summary judgment are timely, as they were filed within 120 days of the Note of Issue as required by the CPLR, the rules of New York County Supreme Court and as instructed by this court at the preliminary conference of July 28, 2006.

of April 1, 2001. Chase began to occupy the building in the early part of the year 2001. Since August 1, 1987, pursuant to a management agreement, defendant Colliers has served as Stahl's real estate manager with respect to the building. Pursuant to the management agreement between Stahl and Colliers, Colliers agreed to "hire, discharge and supervise the work of all operation and service employees performing services in or about the Building, subject to Owners' approval" (Stahl's Notice of Motion, Exhibit J, Stahl/Collier Agreement).

On January 1, 2001, Chase entered into an agreement with third-party defendant Cauldwell for Cauldwell to provide general contracting services to renovate certain offices to be used by Chase. Pursuant to this agreement, Cauldwell would be responsible for initiating, maintaining and supervising all safety programs in connection with the renovation. In addition, during the construction project, Cauldwell would be responsible for cleaning the entire construction site, including the interior stairwells.

At the time of plaintiff's alleged accident, plaintiff was an employee of Cauldwell. Plaintiff received all of his work assignments from a Cauldwell foreman, supervisor or superintendent, and no other entity. On the date of his alleged accident, plaintiff and another Cauldwell laborer, non-party Giuseppe Urso (Urso), were assigned to clean stairwell J (the stairwell) in its entirety, including any garbage, dirt, standing water, juice or other liquids. The stairwell was available to a variety of tenants and accessible from every floor in the building. At the time of plaintiff's alleged accident, there was no work being performed in the stairwell and no equipment was being stored there, though plaintiff stated that the construction workers would use the area for their coffee breaks. In addition to internal elevators and hoists, construction workers also used the stairwell to travel between floors of the building.

Plaintiff testified that while he and Urso were cleaning debris, such as bottles, glasses and paper bags, from the stairwell with a shovel and pail, he was caused to slip on a wet step and fell down the stairs, sustaining injuries.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

Initially, it should be noted that in his affirmation in opposition to defendants' motions, plaintiff withdrew his Labor Law § 240 (1) claim as against all defendants in this action.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as

follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Initially, defendants contend that, as evidence in the record suggests conflicting causes for plaintiff's alleged accident, defendants cannot be held liable for proximately causing plaintiff's injuries. It is well-settled that "[w]here the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was a result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury [quotation marks and citations omitted]" (McNally v Sabban, 32 AD3d 340, 341 [1st Dept 2006]; Lynn v Lynn, 216 AD2d 194, 195 [1st Dept 1995]).

In support of their contention, defendants point out that Thomas Durbin (Durbin), plaintiff's supervisor, testified that Urso told him that he thought that plaintiff's foot was caused to slip because plaintiff had stepped on his shovel. In addition, Cauldwell's accident report to the Workers' Compensation Board, signed by Durbin, noted that plaintiff "slipped over his shovel and fell down flight of stairs" (Stalh Notice of Motion, Exhibit Q, Workers' Compensation Board Accident Report).

However, Durbin also acknowledged that he did not conduct an investigation to determine how plaintiff's accident occurred, and that he filled out various accident reports using the information he had received from Urso. To this effect, Urso testified that he did not see

whether plaintiff was holding a shovel at the time of his accident, because he was looking at plaintiff falling.

Defendants also note that Octavio Olivieri (Olivieri), the emergency medical technician who responded to plaintiff's accident, testified that he based the information in the ambulance call report on plaintiff's statement that his foot had gotten entangled with the shovel, causing him to fall forward. However, a review of the record indicates that Olivieri's testimony is sometimes inconsistent. Olivieri stated that, even though plaintiff was not unconscious at the time that Olivieri was attempting to obtain information from him regarding his accident, the blow to plaintiff's head was "severe enough that [it] caused him some altered mental status," which means that plaintiff was confused and unable to recollect events (Cauldwell's Notice of Cross Motion, Exhibit A, Olivieri Deposition, at 29). In addition, Olivieri testified that plaintiff was only alert and oriented with respect to his name and location. Thus, Olivieri's testimony is insufficient to raise a triable issue of fact as to whether plaintiff was injured as a result of tripping on his shovel or as a result of slipping on a wet step.

Plaintiff maintains that no one witnessed his accident, and that he never told any hospital staff, or anyone else for that matter, that he was injured as a result of tripping over his shovel. In fact, plaintiff did not have any recollection of traveling to the hospital in the ambulance, and asserted that he did not regain consciousness until he had arrived at the hospital. It should be noted that various testimony in the record indicates that, as plaintiff does not read English, plaintiff signed documents and reports regarding his accident which were filled out by other parties.

Importantly, plaintiff has clearly and consistently maintained that he slipped and fell as a

result of water which was present on the step at the time of his alleged accident. Plaintiff testified that he was on his way to empty the shovel that he had filled with debris when his left foot slipped on a wet step. Specifically, plaintiff testified that "[d]own there when I slipped and I turned like this and my foot slipped. The step was wet" (Chase Notice of Motion, Exhibit G, Bennici Deposition, at 23). Plaintiff further testified, "[w]hen I lift[ed] [the shovel] up to put the stuff in the pail with the shovel ... my foot ... I felt my foot slip" (id. at 110). Moreover, plaintiff testified that he saw the wetness on the step at the same time that his left foot slipped, stating, "I see all wet and at the same time my foot slips" (id. at 112).

Urso testified that the area where plaintiff was standing was wet, though he did not know where the water came from. Urso also stated that he believes that plaintiff "started rolling because it was slippery where it was wet" (Chase's Notice of Motion, Exhibit L, Urso Deposition, at 49-50). However, Urso noted that he did not actually see the plaintiff slip on the water on the steps, as plaintiff was already rolling down when he first came to observe plaintiff's accident. Urso also testified that when he reached the location of plaintiff's accident, he only saw the water and no garbage, dust or anything else.

Although the parties in this case discuss at length the issue of supervision, or lack thereof, on the part of defendants, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries arose from an unsafe condition present at the construction site. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not

necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, defendants Chase, Stahl and Colliers are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 complaint as against them, as none of these defendants either created or had actual or constructive notice of the unsafe condition that caused plaintiff's alleged accident.

As to Chase, Manuel Raffo (Raffo), vice president in the corporate real estate and general services group for Chase, testified that none of his five or six project managers, which were hired to walk the site, observe the progress of the work and make sure it was being done in accordance with specifications, ever advised him that any areas of the site had not been properly cleaned. He also had no knowledge as to whether the stairwell was being used by workers during their coffee breaks. In addition, he never noticed any debris in the stairwell during his walk-throughs of the building. He also stated that Chase was not responsible for cleaning up debris in the stairwells, and no procedure was in place by Chase for reporting any sightings of debris to Cauldwell.

As to Stahl, David Kramer (Kramer), mechanical supervisor for defendant Stahl in charge of overseeing the engineering staff at the building, testified that Stahl did not hire any of the contractors at the site and did not check on the progress of the work. Architectural plans were only provided to him so that he could determine whether any work would adversely affect a building system. Kramer noted that at the time of plaintiff's alleged accident, he was not aware of any work being performed in the building's stairwells, and he did not recall any problems with the cleanliness of the work site.

As to Colliers, Gary Rosenberg (Rosenberg), vice president of finance for Colliers, a leasing and management firm for commercial real estate, testified that Colliers is the managing agent for the building. Rosenberg's duties include managing the financial affairs of the building, including handling budgets, billing and managing tenant leases. Rosenberg stated that he had no specific knowledge of the nature of the renovation work being done by Cauldwell for Chase, and that Colliers had no role in hiring contractors or approving them.

In addition, while the renovation project was going on, neither Rosenberg nor any one else from Colliers, with the exception of office staff, ever personally observed the progress of the work or approved any work. Further, Kramer testified that Colliers did not have any staff who worked at the job site.

Further, plaintiff's testimony indicates that even he had no prior actual or constructive notice of the unsafe wet condition on the steps that allegedly caused his accident. In fact, plaintiff stated that he did not even notice that the step was wet until that moment that his left foot began to slip. Plaintiff stated that he never made any complaints about the wet condition of the stairwell before his accident, and that he does not know if anyone else ever complained about the wet condition of the steps.

Urso also stated that he did not know how long the water had been in the stairwell, and that he had never complained to anyone about water in the stairwell before plaintiff's alleged accident. Likewise, Durbin testified that he was unaware of any complaints of water being made prior to the date of plaintiff's accident or of workers eating or congregating in the stairwell.

Thus, as plaintiff has failed to raise a triable issue of fact as to whether defendants Chase, Stahl and Colliers created or had actual or constructive notice of the unsafe condition at issue in

this case, sufficient to defeat defendants' motions for summary judgment, defendants are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against them.

Another reason for which defendants are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is that the water on which plaintiff slipped was the very condition which he was charged with removing (Appelbaum v 100 Church L.L.C., 6 AD3d 310, 311 [1st Dept 2004] [plaintiff had no viable Labor Law § 200 claim since the hazard for which he would hold defendants accountable was the very hazard he had undertaken to remedy]; Lindstedt v 813 Associates, 238 AD2d 386, 386-387 [2d Dept 1997] [where plaintiff was injured while operating an elevator he was directed to repair, Court held that summary judgment under Labor Law § 200 should have been granted since the plaintiff was injured by the same dangerous condition he was called upon to remedy]; Wolfe v Teele, 223 AD2d 854, 854 [3d Dept 1996] [owners of real property not responsible to one injured through a dangerous condition which the injured individual had set about to remedy]).

Here, plaintiff testified at one point that he was provided with a mop and pail, and that his job duties included cleaning up debris, including spills. Urso also testified that Cauldwell workers cleaned the floors of the building, and every month, when told to do so, they would also clean approximately 50 floors of stairwells in the building. In addition, Urso noted that if Cauldwell workers saw water on the steps, it would be their job to get a mop from the Cauldwell shanty and clean it up.

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation and demolition work (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Here, Stahl, as owner of the building at issue, is subject to liability under Labor Law § 241 (6) if a violation of an Industrial Code rule is shown. In addition, Chase, as a tenant who contracted for the renovation work, is also subject to liability as an owner within the meaning of Labor Law § 241 (6) if a violation of an Industrial Code rule is shown (see Walp v ACTS Testing Labs, Inc./Division of Bureau Veritas, 28 AD3d 1104, 1104-1105 [4th Dept 2006]). However, as there is no evidence that defendant Colliers had any authority to supervise and control plaintiff's

work, so as to be a statutory agent of the owner, this defendant is not subject to liability under Labor Law § 241 (6) (see Walls v Turner Construction Company, 4 NY3d 861, 864 [2005]; Russin v Louis N. Picciano & Son, 54 NY2d at 318).

In his bill of particulars, plaintiff alleges violations of Industrial Code 12 NYCRR 23-1.2 (a), 1.5 (a), 1.7 (d) and 1.7 (e) (1) and (2). Initially, it should be noted that Industrial Code 12 NYCRR 23-1.2 (a) and 1.5 (a) relate to general safety standards, and thus, do not provide a basis for a claim under Labor Law § 241 (6) (Sihly v New York City Transit Authority, 282 AD2d 337, 337 [1st Dept 2001]; Hawkins v City of New York, 275 AD2d 634, 635 [1st Dept 2000]; Doyne v Barry, Bette & Led Duke Inc., 246 AD2d 756, 756 [3d Dept 1998]; Stairs v State Street Associates L.P., 206 AD2d 817, 818 [3d Dept 1994]). In any event, it should be noted that plaintiff does not address these Industrial Code violations in his affirmation in opposition to defendants' motions. Thus, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.2 (a) and 1.5 (a).

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (Lopez v City of New York Transit Authority, 21 AD3d 259, 259-260 [1st Dept 2005]).

Here, as discussed prior, testimonial evidence in the record is clear and consistent that

plaintiff's accident was the result of plaintiff slipping on water which was present on a step in the stairwell that plaintiff was assigned to clean. In addition, contrary to defendants' contentions, testimony in the record indicates that the stairwell was used by workers to go between floors, and thus, it is to be considered a passageway for the purposes of Industrial Code 12 NYCRR 23-1.7 (d) (see Linkowski v City of New York, 33 AD3d 971, 974 [2d Dept 2006]; Brown v Brause Plaza, LLC, 19 AD3d 626, 629 [2d Dept 2005]; compare Bruder v 979 Corporation, 307 AD2d 980, 981 [2d Dept 2003]). Thus, Industrial Code 12 NYCRR 23-1.7 (d) applies to the facts of this case.

However, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (d), as the water on which plaintiff slipped was the very condition which he was charged with removing (Gaisor v Gregory Madison Avenue, LLC, 13 AD3d 58, 60 [1st Dept 2004]; Gist v Central School District Number 1, 234 AD2d 976, 976 [4th Dept 1996] [water sealant was not foreign substance within meaning of regulation, but was integral part of new roof that was being constructed]).

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2), which deal with hazards which may cause "[t]ripping," do not apply to the instant case. Here, plaintiff's injuries were not caused by plaintiff tripping on dust or debris. Instead, plaintiff's injuries were caused when he slipped on water which was present on a step in the stairwell. Thus, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2).

As defendants Chase, Stahl and Collier are entitled to summary judgment dismissing plaintiff's complaint as against them, it is not necessary to consider the various cross claims for

common-law and contractual indemnification and breach of contract claims as between defendants. For the same reasons, that part of Chase's motion for summary judgment in its favor on its third-party claims against Cauldwell is denied (see Turchioe v AT&T Communications, Inc., 256 AD2d 245, 246 [1st Dept 1998]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motions of defendant and third-party plaintiff JP Morgan Chase Bank (Chase) in motion sequence number 002, defendant Colliers ABR, Inc. (Colliers) in motion sequence number 003, and defendants 277 Park Avenue, LLC and Stanley Stahl d/b/a Stahl Park Avenue Company's (collectively, Stahl) in motion sequence number 004, for summary judgment, pursuant to CPLR 3212, dismissing plaintiffs Vincenzo Bennici and Adrianna Bennici's (plaintiff) complaint as against them is granted and the complaint is dismissed as to these defendants; and it is further

ORDERED that third-party defendant Cauldwell-Wingate Company, Inc.'s (Cauldwell) cross motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint is granted; and it is further

ORDERED that the portions of Chase, Stahl and Collier's motions for summary judgment, pursuant to CPLR 3212, dismissing all cross claims as against them is granted; and it is further

ORDERED that the portion of defendant Chase's motion, pursuant to CPLR 3212, which seeks summary judgment in its favor on its third-party claims against Cauldwell is denied as moot; and it is further

ORDERED that the portion of Stahl's motion, pursuant to CPLR 3212, which seeks summary judgment in its favor as against Chase on its indemnification and breach of contract claims is denied as moot; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: 5/29/07

ENTER:

Hon. Walter B. Tolub, J.S.C.