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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 113413/2003
MEMBRENO, POLIDECTO
VS
EOP-WORLDWIDE PLAZA, LLC
Sequence Number : 003
SUMMARY JUDGMENT

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

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 needed for calendar

FILED
JUN 07 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/01/07

J.S.C.
EMILY JANE GOODMAN

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
----------x
POLIDECTO MEMBRENO,

Plaintiff,

Index No.
113413/03

-against-

EOP-WORLDWIDE PLAZA, LLC,

Defendant.
----------x
EOP-WORLDWIDE PLAZA, LLC,

Third-Party Plaintiff,

Third-Party
Index No.590628/05

-against-

DP CONSULTING CORP. and ADMIRAL
INSURANCE COMPANY,

Third-Party Defendant.
----------x

EMILY JANE GOODMAN, J.S.C.:

In this motion, third-party defendant DP Consulting Corp. (DP Consulting) seeks an order, pursuant to CPLR 3212, dismissing the claims asserted against it in the Third-Party Complaint by defendant/third-party plaintiff EOP-Worldwide Plaza LLC (EOP-Worldwide). The court limits this decision only to the issues

addressed by the parties-e.g., whether DP Consulting is entitled to dismissal of the claims for contractual and common-law indemnification, which might be assessed against EOP-Worldwide as a result of plaintiff's claims that he was injured at a construction site. DP seeks dismissal of the claims asserted against it on the basis that EOP-Worldwide is not the owner of the premises where the accident occurred (despite the fact that EOP-Worldwide had not disputed that it was the owner), that Worker's Compensation Law § 11 bars any claim for common law indemnification, and that plaintiff has failed to establish a violation of Labor Law Sections 240 (1), 200, or 241(6).

Background

Plaintiff Polidecto Membreno (Membreno) alleges that, on September 3, 2002, he sustained personal injuries while working at a construction site located at 825 Eighth Avenue, New York, New York. Plaintiff was allegedly cut by a power grinder he was using, and, was hit by pieces of flying debris. The accident occurred when he tripped and fell on construction debris, causing him to drop the grinder, which failed to shut off until a co-worker unplugged the tool. Plaintiff claimed to be an employee of DP Consulting, the general contractor retained to renovate the 35,000 sq. ft. courtyard/plaza located at the foot of the

building at said address. DP Consulting denied that it employed plaintiff.

Plaintiff commenced this action by service of a summons and complaint against the alleged owner, EOP-Worldwide, dated July 23, 2003. An answer was served on behalf of EOP-Worldwide, dated December 30, 2003. EOP-Worldwide commenced a third-party action against DP Consulting by service of a third-party summons and complaint, dated May 24, 2005. Plaintiff did not amend his complaint to assert any claims against DP Consulting.

Discussion

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Ownership

Pursuant to CPLR 1008, a third party defendant may raise defenses available to a defendant, even if those defenses were waived by that defendant. Thus, in Cogan v Madeira Assoc., (1 AD3d 1066 [1st Dept 2003]), the employer was entitled to raise the defense of the homeowner's exemption under the Labor Law, even though the owner waived its right to assert the exception.

Here, however, DP Consulting failed to prove that EOP Worldwide was not the owner of the area where the accident occurred. DP Consulting's attempt to proffer a deed, which is not certified, in its reply papers, is not only untimely, but, is not proof entitling it to summary judgment. The attorney's Reply Affirmation asserts that the uncertified deed attached as Exhibit K is the deed covering the area where the accident occurred. However, the court cannot determine this by merely reviewing a deed which refers to a "Condominium Parcel" and "Theatre Parcel" containing block and lot numbers and metes and bounds descriptions. Counsel's assertion that "[t]he "Theatre parcel" is the courtyard where plaintiff was working at the time of his accident," is insufficient as counsel is not an expert.

Workers' Compensation § 11

DP Consulting argues that since plaintiff claims he is employed by it, the claim for common law indemnification is barred by Workers' Compensation § 11. EOP-Worldwide contends that plaintiff is not an employee of DP Consulting, noting that DP Consulting has denied that it employed plaintiff.

Plaintiff's Complaint, Verified Bill of Particulars, and deposition testimony all assert that plaintiff was an employee of DP Consulting. However, DP Consulting failed to provide any evidence to demonstrate that it employed plaintiff, or explain why, in deposition testimony, it denied that it did. Therefore, DP Consulting have failed to demonstrate that EOP-Worldwide common law indemnification claim against it is barred by Workers' Compensation § 11.

Contractual Indemnification

EOP-Worldwide argues that DP consulting is liable to it based on the indemnification provision in the contract pursuant to which DP Consulting was retained. DP Consulting asserts that EOP-Worldwide is not an actual party to the contract because the owner who retained DP Consulting was listed as "Equity Office Properties Management Corp., a Delaware corporation, as agent for New York Communications Center Associates, L.P."

EOP-Worldwide has made no effort to explain or address this argument, and therefore, since the contract, on its face, does not involve it, DP Consulting is entitled to summary judgment dismissing the contractual indemnification claim.

Labor Law § 241 (6) Claims

Labor Law § 241 (6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The section requires owners and contractors at a construction site to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993]).

Plaintiff is required to set forth any sections of the Industrial Code which he contends are predicates for liability (see Reilly v Newireen Associates, 303 AD2d 214 [1st Dept 2003]), which must be sufficiently specific to support such a claim (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 supra; see also O'Sullivan v IDI Constr. Co., Inc., 28 AD3d 225 [1st Dept

2006]), and "must demonstrate that the violation [of the Industrial Code] was a proximate cause of the injury" (Padilla v Frances Schervier Housing Development Fund Corp., 303 AD2d 194, 196 [1st Dept 2003]).

DP Consulting is granted summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, to extent plaintiff alleges that EOP-Worldwide failed to perform the obligations set forth in Sections 12 NYCRR 23-1.5, 23-1.7 (d) and (e) (1), 23-2.1, 23-6.1, 23-9.2, and 23-1.23, which are either not sufficiently specific or not applicable to the facts of this case. However, DP Consulting has not met its burden to demonstrate that the court should dismiss plaintiff's Labor Law 241 (6), to the extent plaintiff alleges violations of 12 NYCRR 23-1.7 (e) (2), 23-1.8 (a), 23-1.10 (b) (1), and 23-1.12 (c) (1) and (f).

Although DP Consulting does not dispute that 12 NYCRR 23-1.7 (e) (2) is sufficiently specific to support a Labor Law § 241 (6) claim, it maintains that the provision was not violated because the debris was an integral part of the work, created by plaintiff while he was using the grinder (see Burkoski v Structure Tone, Inc., 2007 NY App. Div. LEXIS 6078 [1st Dept 2007] [plaintiff who walked into pile of neatly stacked tiles could not allege a

violation of 12 NYCRR 23-1.7 (e) (2) because the tiles were in the process of being installed and were not scattered about the floor, but were intended to be there]). However, plaintiff testified at his deposition that the debris he tripped over was created by other workers and included gravel, concrete, pieces of black laminated metal (which was not of the type plaintiff was cutting) (Membreno Tr. at 33, 35 and 37-38). Accordingly, an issue of fact is raised for trial as to whether this provision was violated.

Similarly, as issue of fact exists as to whether 22 NYCRR 23-1.8 (a) was violated. This provision is sufficiently specific and is relevant to the facts of this case (see Galawanji v 40 Sutton Place Cond., 262 AD2d 55 [1st Dept 1999]). DP Consulting first alleges the provision is inapplicable, without explanation, and then in reply, maintains that plaintiff's reference to the provision was unclear (because plaintiff cited 22 NYCRR 23-1.18), and that the Bill of Particulars failed to specify that plaintiff's eye was injured as a result of flying debris. However, the failure to allege an Industrial Code violation in a complaint or in a Bill of Particulars is not fatal where no prejudice has occurred (see Noetzell v Park Av. Hall Housing Devel. Fund Corp., 271 AD2d 231 [1st Dept 2000]). Plaintiff

testified at his deposition that he was not provided with protection while he was cutting, and that a piece of debris flew into his eye when he fell (Membreno Tr. at 21, 28-29). Accordingly, although the court does not condone the practice of alleging violations of the Industrial Code for the first time to defeat summary judgment, the claim is allowed because DP Consulting is not prejudiced (nor has even alleged that further discovery is needed).

Moreover, an issue of fact exists as to whether 12 NYCRR 23-1.10 was violated. Plaintiff need not support a violation of this provision by expert affidavit because it is DP Consulting's burden to prove its entitlement to summary judgment. Further, DP Consulting has not meet is burden to dismiss this provision based on the lack of proximate cause. Although DP Consulting maintains that a cut-off switch would not have prevented the injury because plaintiff dropped the tool when he fell, the tool was shut off by a co-worker. The evidence is unclear as to whether, assuming a cut-off switch was required but not provided, the injury would have been prevented because the co-worker would have been able to shut the tool off quicker by cut-off switch, rather than by unplugging the tool from its electrical source.

Lastly, an issue of fact exists as to whether 12 NYCRR 23-1.12 (c) (1) and (f) was violated. DP Consulting's attorney affirmation is insufficient to establish that the tool in question is not a power-driven saw or does not include a friction-disc drive.

Common-Law Negligence and Labor Law § 200

DP Consulting contends that plaintiff's common-law negligence and Labor Law § 200 claims should be dismissed. If a defective condition is alleged to be the cause of a worker's injuries, establishment of a prima facie case requires that a plaintiff to show that: (1) a defendant either created or had notice (actual or constructive) of the alleged dangerous condition, and (2) that the alleged dangerous condition was the proximate cause of the injury (see Higgins v 1790 Broadway Assocs., 261 AD2d 223 [1st Dept 1999]; Pouso v City of New York, 177 AD2d 560 [2d Dept 1991]). These common-law negligence requirements are codified in Labor Law § 200, where it has been held that it is an owner's and a general contractor's duty to maintain a safe workplace (see Gasper v Ford Motor Co., 13 NY2d 104 [1963]).

"To constitute constructive notice, a defect must be visible and apparent[,] and it must exist for a sufficient length of time

prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). Additionally, constructive notice "must be of the specific condition and of its specific location." Canning v Barney's New York, 289 AD2d 32, 33 [1st Dept 2001]). Further, the duty of an owner to provide a safe place to work also encompasses the duty to make reasonable inspections to detect unsafe conditions (see DaBolt v Bethlehem Steel Corp., 92 AD2d 70, 73 [1st Dept 1983]; Monroe v City of New York, 67 AD2d 89, 96 [2d Dept 1979]).

Although supervision and control of the injured worker is required to establish liability under the common-law and Labor Law § 200 when it is the worker's methods that are at issue (see Favia v Weatherby Const. Corp., 26 AD3d 165 [1st Dept 2006]), when there is a question of a defective condition, supervision and control by the owner or general contractor is not required (see Murphy v Columbia University, 4 AD3d 200 [1st Dept 2004]). Thus, because the unsafe presence of debris can be a defective condition, supervision or control over plaintiff's work is irrelevant to common-law negligence and Labor Law § 200 claims.

DP Consulting has not met is burden to demonstrate that EOP-Worldwide did not have constructive notice of the condition and

sufficient time to remedy it. DP Consulting merely states that the evidence demonstrates that EOP-Worldwide did not have actual notice of the condition and that it could not have had constructive notice because the debris was created by the plaintiff while cutting. However, plaintiff disputes that the debris was created by him and claims that it was there when he arrived (Membreno Tr. 5/24/05 at 33-39). Further, according to the deposition of Steven Martinek, property manager for Equity Office Properties, Inc., Martinek was part of a team that oversaw the courtyard construction project on behalf of the owner (Tr. Martinek 5/24/05 at 12, 14-15 and 11/1/06 at 7-8), his office was next to the site and he was generally on site daily, walking through several times a week (Tr. Martinek 5/24/05 at 9 and 11/1/06 at 16-17). Accordingly, DP Consulting failed to demonstrate that EOP-Worldwide did not have constructive notice of the condition and sufficient time to remedy it (see Jordan v Musinger, 197 AD2d 889 (4th Dept 1993) [summary judgment dismissing plaintiff's case denied where defendants failed to prove that ice formed so close in time to the accident such that they could not reasonably remedy the condition]). Accordingly, DP Consulting's motion which seeks summary judgment dismissing

EOP-Worldwide's common-law negligence and Labor Law § 200 claims is denied.

Accordingly, it is hereby

ORDERED that third-party defendant DP Consulting's motion for summary judgment is granted with respect to contractual indemnification and is otherwise denied; and it is further

ORDERED that plaintiff Labor Law § 240 (1) claim is dismissed, as unopposed.

This Constitutes the Decision and Order of the Court.

Dated: June 1, 2007

ENTER:

J.S.C.