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

PRESENT: HON. KAREN SMITH PART 62

Index Number : 404357/2004

PEREZ, SANTIAGO

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 06/14/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion/cross-motion for Summary judgments dismissing the complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Notice of Cross-Motion - Affidavits - Exhibits	1 2
Answering Affidavits — Exhibits	3
Replying Affidavits on Motion	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and "cross-motion" are decided in accordance with the annexed memorandum decision and order

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

FILED

JUN 22 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/13/07

HON. KAREN SMITH 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 62

----------X

SANTIAGO PEREZ,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

----------X

Index no.: 404357/2004
Motion seq.: 002
Motion date: 06/14/2007

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant, New York City School Construction Authority's, motion for summary judgment dismissing the complaint as against it is denied and defendant, City of New York's, motion, improperly denominated as a cross-motion, seeking similar relief is also denied.

Plaintiff (hereafter referred to as "Perez") brought this action seeking to recover for personal injuries he allegedly sustained on February 21, 2002 while he was working as a construction laborer on a construction project involving the renovation of the bathrooms at a Public School in Manhattan. Perez was working for a sub-contractor who had been contracted to install bathroom stall dividers/panels in the bathroom. Perez had been assigned to bring panels from where they and some doors had been stacked against a wall, in the hallway of the school, to the individual who was installing them in the bathroom. The panels, which were approximately six feet in height, had been placed with the doors, leaning upright, against the wall of the hallway. The panels and doors had been placed against each other in a stack protruding outward from the wall. Perez was attempting to retrieve a specific panel from within the stack. While he was attempting to do so, the entire stack of panels and doors fell on Perez fracturing his leg.

In his complaint, Perez asserts claims against the defendants, sounding in common law negligence and pursuant to Labor Law §200, §240(1) and §241(6).

Defendant, New York City School Construction Authority (hereafter referred to as "NYCSCA") now moves for summary judgment dismissing Perez's complaint as against it. NYCSCA contends that it cannot be held liable to Perez pursuant to Labor Law §200 for any injuries he may have sustained because NYCSCA did not supervise or control Perez's activities at the construction site. NYCSCA further contends any injuries Perez sustained are not the result of an elevation related hazard so that Labor Law Section 240(1) does not apply to his claims and, even if Labor Law Section §240(1) did apply, Perez was the sole and proximate cause of his injuries. Finally, NYCSCA contends that Perez has failed to allege NYCSCA violated an Industrial Code section which sufficiently mandates compliance with concrete specifications in order to establish any liability pursuant to Labor Law §241(6).

In response to NYCSCA's motion, Perez has withdrawn his claims pursuant to Labor Law §240(1). However he opposes the branches of the motion seeking dismissal of his Labor Law §§200 and 241(6) claims. Perez contends that questions of fact exist with respect to; 1) whether NYCSCA sufficiently supervised and controlled the activities at the construction site to render it liable pursuant tho Labor Law § 200, and 2) NYCSCA violated the provisions of 12 NYCRR §23-2.1(a)(1) pertaining to the safe storage of materials at a construction site which regulation contains sufficiently specific mandates to trigger the protections of Labor Law §241(6).

NYCSCA replies that, at the time of Perez's accident, the materials involved in the accident were "in use" and not being "stored". Thus, NYCSCA argues that 12 NYCRR §23-

2.1(a)(1) does not apply to Perez's accident. NYCSCA also re-asserts that it did not supervise or control Perez's activities at the construction site so Labor Law §200 does not apply.

Defendants, City of New York and the New York City Board of Education (hereafter collectively referred to as "CNY"), have submitted what their counsel denominates a "cross-motion" to dismiss the complaint and "all cross-claims" against them pursuant to CPLR §3211 or, in the alternative, for summary judgment, pursuant to CPLR §3212, granting the same relief. For the most part, CNY merely adopts the facts and arguments presented by NYCSCA in its moving papers. The only additional information provided by CNY in its moving papers consists of the arguments of its counsel and an affidavit by a custodian in the school at the time of the renovations involved in Perez's accident. The affidavit states that neither the custodian nor any other employee of the Department of Education supervised either the general contractor of the renovations or any of its employees or subcontractors.

Perez's opposition to NYCSCA's motion addresses the arguments CNY raises in its motion. Perez also asserts that NYCSCA is an agent of CNY and that CNY owned the property which houses the school involved in this matter. As CNY has not submitted a reply on the motion, CNY has not contested Perez's factual assertions and they must be deemed admitted for purposes of the instant motion.

To the extent CNY's motion seeks dismissal of all cross-claims asserted by NYCSCA against CNY or, in the alternative, summary judgment dismissing all such claims, CNY's motion papers have not offered any information or argument addressing such cross-claims. Therefore, the branch of CNY's motion seeking dismissal of any cross-claims asserted against it or summary judgment dismissing said claims is denied.

To the extent CNY's motion seeks the dismissal of Perez's complaint as against CNY and/or summary judgment dismissing the complaint, the motion is improperly denominated a cross-motion because Perez is not the moving party in the primary motion (see: CPLR §2215). For these purposes, the motion should have been brought as a separate motion. Nevertheless, as CNY's motion for summary judgment is completely intertwined with NYCCSA's motion for summary judgment and since Perez has submitted opposition addressing the issues raised in CNY's cross-motion, the court sees no prejudice in addressing both motions. Under these circumstances, the court views CNY's improper denomination of its papers as a "cross-motion" to be a defect in form which will be overlooked in order to address the substance of the issues in question.

Since CNY has failed to make a pre-answer CPLR §3211 motion and has failed to specify which CPLR §3211 objections it is now attempting to assert, it has not met its burden of showing it preserved and has properly asserted any basis for the dismissal of the complaint pursuant to CPLR §3211. Therefore, the branch of CNY's motion seeking dismissal of the complaint as against it pursuant to CPLR §3211 is denied.

The remaining issues for resolution are whether or not NYCSCA and CNY should be granted summary judgment dismissing Perez's claims under Labor Law §§ 200 and 241(6).

In order to prevail on a motion for summary judgment, the moving parties must make a *prima facie* showing of their entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact demonstrating (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]).

With respect to Perez's claim pursuant to Labor Law §200, NYCSCA contends that there

has been no showing that it directed or controlled Perez's activities at the construction site. However, in the Examination Before Trial of Michael Eitingon, an employee of NYCSCA (Exhibit K to NYCSCA's moving papers), Mr. Eitingon testified that, 1) there were three (3) individuals who regularly visited the construction site on behalf of NYCSCA, to wit: Mr. Paul Castro, Mr. Peter D'Andrilli and Mr. Ed Reluzco, 2) each of these individuals had the authority to stop the job in the event that any issues impacting upon safety were observed and 3) Mr. Reluzco was the "safety manager" for NYCSCA with respect to the job site. Additionally, both Perez's testimony (Exhibits I and J to NYCSCA's motion papers) and Mr. Etingon's testimony establishes that NYCSCA and the School Security Officer controlled both the access to the job site and the hours that the contractors had access to the school to perform the renovations. This testimony is sufficient to demonstrate the existence of a question of fact as to whether NYCSCA and NYC exercised direction or control over the subcontractors activities at the job site. Therefore NYCSCA and NYC have not met their burden of demonstrating the absence of any triable questions of fact concerning Perez's claim pursuant to Labor Law §200.

With respect to Perez's claim pursuant to Labor Law §241(6), it has been held that 12 NYCRR §23-2.1(a)(1); "...is specific enough to support ... Labor Law § 241(6) causes of action" (*Lehner v Dormitory Authority of the State of New York et al*, 221 AD2d 958, 959 [4th Dept, 1995], internal citations omitted). Nevertheless, NYCSCA contends 12 NYCRR §23-2.1(a)(1) does not apply to the instant matter because 12 NYCRR §23-2.1(a)(1) relates only to materials that are being stored and the materials involved in Perez's accident were "in use" rather than being "stored" (see NYCSCA's Reply Affirmation, Paragraph 4). In support of its contention, NYCSCA cites the case of *Castillo v Starret City, Inc.*, 4 AD3d 320 [2nd Dept, 2004]). This case,

however, favors Perez's position rather than NYCSCA's position. In *Castillo*, the court stated: "...the accident did not involve a 'material pile' but rather a single, small piece of insulation..." (*supra* at 321). Perez's accident clearly involved an entire stack of materials that had been placed by others in a hallway until such time as they would be moved to the location or locations in which they would be used. Perez was injured when the material stack fell upon him. The mechanism of Perez's injury involved much more than the single panel which he was attempting to remove from the material stack. Therefore, NYCSCA and NYC have not met their burden of showing that 12 NYCRR §2302.1(a)(1) does not apply to Perez's accident and this branch of their motions must also be denied. Accordingly, it is;

ORDERED that NYCSCA's and NYC's instant motions are both denied.

The foregoing constitutes the decision and order of this court.

Counsel for all parties are reminded that this matter is scheduled for an appearance in Mediation 1 on June 26, 2007.

Dated: June 13, 2007

ENTER:

Hon. Karen S. Smith, J.S.C.