[* 1]

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

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 114010/2004
ADER, JOSEPH A.
VS
TISHMAN CONSTRUCTION
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for 3212

	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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: July 18, 2007

HON. 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

----------x

Joseph A. Ader,

Plaintiff

-against-

Tishman Construction Corporation of Manhattan, *individually and/or as partner and/or Joint Venturer of* Tishman/Harris Whitehall Ferry Terminal JV, Tishman Construction Corporation of New York, *individually and/or as a partner of*, Tishman/Harris Whitehall Ferry Terminal JV, DMJM+Harris, Inc., *and* Tishman/Harris Whitehall Ferry Terminal JV, Total Safety Consulting, LLC, Arena Construction Co., Inc. *and* Arena Construction Company, LLC,

Defendants.

----------x

DECISION/ORDER
Index No.: 114010/04
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Defs' n/m (§3212) w/AHC affirm, LG affid, exhs	1
Defs' exhs (sep back - pt 2)	2
Pltff opp w/RBR affirm, exhs	3
Defs' reply w/AHC affirm	4

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

This is an action for damages arising from alleged violations of Labor Law § 200, 240 (1) and 241 (6). Issue has been joined and the note of issue was filed fewer than

120 days before this motion was brought. Since the court has before it a timely motion by the defendants for summary judgment, it can be considered and will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Although plaintiff opposes summary judgment on his Labor Law §§ 200 and 241 (6) causes of action, he has withdrawn his Labor Law § 240 (1) claims.

The decision and order of the court is as follows:

Background

Plaintiff, a laborer employed by non-party Kenneth J. Herman Aluminum Siding Corporation ("KJH Aluminum"), was working on the construction site of the new Whitehall Ferry Terminal in downtown Manhattan on March 5, 2003. He claims he sustained personal injuries that day when he tripped or fell on stairs while in the process of delivering building materials. The stairs had been cordoned off with yellow cautionary tape, but his foreman (also a KJH Aluminum employee), broke the tape and told him to use the stairs. Plaintiff testified that he did as he was instructed.

Plaintiff and his fellow workers used these stairs for about 45 minutes before the accident. He was instructed to stop bringing up any more materials. Plaintiff testified at his EBT that as he turned around and started to descend the stairs, a tread that had been covered with plywood cracked as he stepped on it and his foot got caught causing him to trip/fall. Plaintiff further testified that although he reached out for the steel railing to stop himself from falling, the railing was not affixed, so it just fell away at an angle, and he could not stop his fall.

Plaintiff contends the stairs where he tripped or fell were maintained in violation of the Industrial Code, therefore he has asserted a Labor Law § 241 (6) cause of action against all the named defendants. The regulations he claims were violated are as follows: 23-1.7 (e) (1); 23-1.7 (f); 23-1.11 (a); 23-1.15 (a); 23-2.7 (e). In addition, plaintiff claims that even if no regulations were violated, the defendants were negligent by failing to maintain a safe work environment, therefore he has asserted a Labor Law § 200 claim against them as well. Plaintiff has voluntarily withdrawn his § 240 (1) cause of action.

The various Tishman defendants are collectively the "construction manager" of the Ferry construction project. There is a Consultant Contract between non-party New York City Economic Development Corporation ("EDC") and Tishman dated January 5, 1998 ("Tishman/EDC contract"). As per the Tishman/EDC contract, Tishman is required to provide EDC with "construction management services" in connection with the Ferry project. EDC has direct or "prime" construction contracts with various contractors on the Ferry project, including Arena Construction Co., Inc. ("Arena") ("Arena/EDC contract"). As per the Arena/EDC contract, Arena was hired to do the interior construction work at the Ferry terminal. Arena entered into a subcontract with plaintiff's employer (KJH Aluminum) to do the sheet-rocking and framing work on the project.

Tishman entered into a Consultancy Agreement dated January 28, 2000 with Total Safety Consulting, LLC ("TSC/Tishman agreement") for TSC to provide services as the Ferry site safety manager, including development and implementation of a site

safety program, coordination with other contractors on the Ferry site, and with Tishman itself. There is clause in the TSC/Tishman agreement requiring that the site safety manager "must be on the job at all times while work is in progress" and the manager is also responsible for holding training meetings.

Mr. Green, TSC's site safety manager, was deposed and he testified that his job was to check for safety problems a the site on a daily basis, up to four times a day. He reported daily to Tishman, and told Mr. Gillmore of any problems he observed. TSC did not correct problems but reported them to Tishman. In turn, Tishman would take care of having one of the contractors correct the problem. Mr. Green also testified at his deposition that on the day of the accident he observed intact yellow cautionary tape at the staircase and that it was intact. Afterwards, when the accident was reported to him, he saw the tape had been broken.

In support of their motion to dismiss the Labor Law § 241 (6) cause of action against them, defendants argue that the Industrial Code regulations that plaintiff claims were violated are inapplicable to the facts of this case. Defendants contend there was no violation of section 23-1.7(f) ("stairways, ramps or runways shall be provided as the means of access to working levels above or below ground") because the stairs were cordoned off and not intended to be used as a vertical passageway.

Defendants contend there was no violation of section 23-1.11 (a) either ("the lumber used in the construction of equipment or temporary structures . . . shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it

is to be used.") because the plywood was sound and not the reason plaintiff fell.

Section 23-2.7 (e) requires that temporary wooden stairways and permanent stairways have a safety railing and that every stairway and landing be "provided with handrails" of a certain dimension. Section 23-1.15 (a) also contains certain safety requirement applicable to railings. Defendants argue both these regulations are inapplicable not only because plaintiff should not have been on those stairs in the first place, the stairs were neither a "temporary" nor "permanent" stairway, within the meaning of these regulations, and therefore in an incomplete form.

Defendants contend that because the plywood (allegedly) broke when plaintiff stepped on it, section 23-1.7 (e) (1) of the regulations is also inapplicable because there was no accumulation of dirt or debris, or any obstruction, within the meaning of this section, and therefore, no trip hazard.

Defendants also argue that, in any event, even if plaintiff can establish violations of the statute, those violations were not the proximate cause of his accident, and what is alleged to have occurred "was not a normal or foreseeable consequence" of such violations.

In support of their motion for summary judgment dismissing plaintiff's Labor Law § 200 (and common law negligence) claims against them, defendants argue that none of them supervised or had control over the method or manner of the work being performed by plaintiff, and that plaintiff took his orders directly and solely from his employer (e.g. the foreman, also a KJH employee). The defendants contend further that even assuming they had overarching responsibility for the project, and they

enforced general safety standards, this does not amount to supervision or control, creating an issue of fact for trial. The defendants also deny having actual or constructive notice of a defective or dangerous condition at the Ferry project. Defendants contend further that the poor condition of the stairs was obvious and they had no duty to protect him against a readily observable condition, or inherent in the work he was performing.

Law applicable to summary judgment motions

"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. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp ., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003). The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

Discussion

Labor Law § 241 (6) cause of action

Section 241(6) of the Labor Law imposes "a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations" in a manner that provides for the reasonable and adequate protection of persons working at the site. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 (1998). Supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent. Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; DeStefano v. Amtad New York, Inc., 269 A.D.2d 229 (1st Dept 2000). To support a cause of action, the plaintiff must plead a concrete specification of the Industrial Code, that it was violated, and that the violation was a proximate cause of his injuries. *Rizzuto v. L.A. Wenger*, supra.

There appears to be no genuine dispute that plaintiff has cited concrete specifications of the Industrial Code, as opposed to general sections that would not be an adequate predicate basis for a Labor Law § 241 (6) cause of action. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). Defendants' motion focuses on whether the regulations plaintiff claims were violated are relevant to the facts of this case, as alleged. They also contend that even if they are relevant and were violated, their violation was not a proximate cause of plaintiff's accident.

Based upon plaintiff's description of how his accident happened, each of the cited regulations are relevant and applicable to the facts of this case, as alleged. Plaintiff contends he used stairs that had improperly fastened plywood on them, that the plywood was broken in a number of places, and that this condition (debris) was dangerous because it was a tripping hazard. He also contends the handrail alongside the stairs was improperly fastened and that he could not stop his fall because he could not regain his balance by grasping the rail, but it fell away. Each code section plaintiff cites is relevant to his section 241 (6) claim, and defendants have not proved their legal argument, that the regulations cited are inapplicable.

Defendants also argue that the stairs are not a "vertical passage" within the meaning of 23-1.7 (f), or that the staircase in question was neither temporary nor permanent. Section 241 (6) applies to "[a]ll areas in which construction, excavation or demolition work is being performed" and it requires that the areas "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." Thus, any argument that the stairs where plaintiff's accident is alleged to have occurred is outside the bounds of section 241 (6), has been considered, but rejected. It applies to areas under construction.

The real issue framed by defendants' argument is not whether the staircase plaintiff used is a "passageway," within the meaning of the regulations, but whether they are liable for plaintiff's injuries because they were not *intended* to be used as a passageway, and plaintiff should not have been using them to transport himself and

building materials up and down between floors. The reason that plaintiff was on those stairs in the first place, however, was that he was instructed to do so by his employer (the foreman for KJH Aluminum), who actually supervised his work as he carried the materials and went up and down. Once defendants' agent (plaintiff's employer) directed use of the stairs in connection with the construction, their actual use controls the outcome of this case.

A related argument by defendants is that there was another staircase which plaintiff could have used - and had previously used for transporting materials - and that it was safer. On the day of the accident, however, plaintiff's foreman cut the tape and instructed him to use the stairs in question. Thus, at that time, the only stairs available to him were the ones that had been marked off. At the time of his accident, plaintiff was engaged in construction work. Since he was working for a subcontractor hired by a prime contractor within the "chain" of construction, this may result in vicarious liability on a wide range of "agents." *See*: Neumire v. Kraft Foods, Inc., 291 A.D.2d 784 (4th Dept. 2002).

Another related argument set forth by defendants is whether the removal of the cautionary tape by the foreman and the ensuing accident was forseeable. This, however, frames a factual dispute for the jury to decide, and does not support the grant of summary judgment to the defendants. Neumire v. Kraft Foods, Inc., supra. Other arguments about the briefness of the interlude between the cutting of the tape and plaintiff's injury are unavailing. It is of no moment that any of the defendants may not have had actual or constructive notice of a dangerous condition, or code violations.

Tuohey v. Gainsborough Studios, Inc., 183 A.D.2d 636 (1st Dept. 1992).

For the reasons set forth above, defendants' have not met their burden on this motion for summary judgment. In any event, plaintiff has presented factual disputes that require a trial. Therefore, defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is denied.

Labor Law § 200 cause of action

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., *supra*. Unlike Labor Law § 241 (6), liability can be imposed only if the defendant has actually been negligent. At trial, plaintiff must prove the defendant exercised supervisory and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1st dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., *supra* at 352; Gonzalez v. United Parcel Serv., 249 AD2d 210 (1st dept. 1998).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200. Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 (1993). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an

owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007); Brown v. New York City Economic Dev. Corp., 234 AD2d 33 (1st dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

Since defendants seek the grant of summary judgment, it is their burden to show none of them controlled the manner in which the plaintiff performed his work, i.e. how the injury producing work was performed. Hughes v. Tishman Construction Corp., *supra* at 2.

Although each defendant maintained staff on the project, none of them directly supervised KJH Aluminum employees (including plaintiff) or told them how to do their jobs. Defendants have established that on the day of the accident, the stairs involved in the accident were cordoned off with yellow caution tape and that the workers were using a different set of stairs to haul their building materials up to the next floor. Through Mr. Gilmore's testimony, defendants have established that the tape was still intact shortly before the accident when he did his inspection of the area. The defendants also established there was an established protocol for how safety problems were addressed. None of them, however, testified that there was anything amiss, therefore there was nothing to report.

Plaintiff's own deposition testimony is that the tape was intact, but his foreman broke it and instructed him to use those stairs, which plaintiff did. Plaintiff also testified at his EBT that this was the first time he had used those stairs. He had been using a different staircase which also led to the next floor. Plaintiff stated that "obviously no one

should have been on there [the staircase]" and although he also testified there was broken plywood, he could not remember whether the plywood broke before he and his fellow workers started bringing up the building materials.

Defendants have proved their defense, which is that none of them supervised, directed or controlled the work plaintiff as doing on the day of his accident. Plaintiff has failed to set forth a factual dispute whether the defendants had anything other than general or contractual duties to supervise safety standards at the work that would require a trial. Therefore, defendants' motion, for summary judgment dismissing plaintiff's Labor Law § 200 common law negligence is granted; the 1st cause of action is hereby severed and dismissed.

Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve a copy of this order on the Trial Support office so that it may be scheduled.

Conclusion

It is hereby

ORDERED that defendants' motion for summary judgment on plaintiff's Labor Law § 241 (6) claim is denied; and it is further

ORDERED that defendants' motion for summary judgment on plaintiff's Labor Law § 200 (common law negligence) claim is granted; the first cause of action is hereby severed and dismissed; and it is further

ORDERED that Plaintiff shall serve a copy of this order on the Trial Support office so that it may be scheduled; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 18, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.