SHORT FORM ORDER

INDEX No. 03-25309
CAL. No. 07-00337-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-30-07
ADJ. DATE 7-11-07
Mot. Seq. # 008 - MotD
009 - MD
010 - XMotD

MALCOLM C. SARGENT, Plaintiff, - against - KLEIN & EVERSOLL, INC., PINEWOOD ESTATES PARTNERS, LLC and PINEWOOD ESTATES MANAGEMENT, LLC., Defendants.	EWALL & EWALL Attorneys for Plaintiff 946 Park Avenue Huntington, New York 11743 BURNS, RUSSO, TAMIGI & REARDON, LLP Attys for Defts/3rd Party Pltf Pinewood 390 Old Country Road Garden City, New York 11530 PICCIANO & SCAHILL, P.C. Attorneys for Defendant Klein & Eversoll, Inc. 900 Merchants Concourse, Suite 310 Westbury, New York 11590
PINEWOOD ESTATES PARTNERS, LLC and PINEWOOD ESTATES MANAGEMENT, LLC, Third-Party Plaintiffs, - against - HANGING ROOM ONLY INC., d/b/a ANTHONY'S CUSTOM CLOSETS and ALL ISLAND CLEANING CORP., Third-Party Defendants.	COZEN O'CONNOR Attys for 3rd Party Deft Hanging Room Only, Inc. 45 Broadway, 16th Floor New York, New York 10006 MILBER MAKRIS PLOUSADIS & SEIDEN Attys for 3rd Party Deft All Island Cleaning Corp. 1000 Woodbury Road, Suite 402 Woodbury, New York 11797

Upon the following papers numbered 1 to 125 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 47 ; Notice of Cross Motion and supporting papers 48 - 56 ; Answering Affidavits and supporting papers 57 - 59; 60 - 62; 63 - 71; 72 - 74; 75 - 81; 82 - 95; 96 - 103; Replying Affidavits and supporting papers 104 - 106; 107 - 108; 109 - 111; 112 - 113; 114 - 116; 117 - 118; 119 - 122; 123 - 125 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#008) by defendants/third-party plaintiffs Pinewood Estates Partners, LLC and Pinewood Estates Management, LLC, for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint and any counterclaims against them, and summary judgment over and against the third-party defendants, is granted to the extent that the complaint is dismissed as to Pinewood Estates Management, LLC, and that plaintiff's Labor Law §§ 200, 240(1), 241-a, and common-law negligence causes of action are dismissed as to Pinewood Estates Partners, LLC, and is otherwise denied; and it is further

ORDERED that the motion (#009) by third-party defendant All Island Cleaning Corp. for an order pursuant to CPLR 3212 granting it summary judgment dismissing the third-party complaint, is denied; and it is further

ORDERED that the cross motion (#010) by plaintiff for leave to serve a supplemental bill of particulars, is granted to the extent that plaintiff may serve a supplemental bill of particulars adding the alleged violation of 12 NYCRR § 23-1.7(d) and (e)(1), and § 23-2.7(e), and is otherwise denied, and it is further

ORDERED that these motions are consolidated for the purpose of this determination.

Plaintiff commenced this action to recover damages, pursuant to Labor Law §§ 200, 240(1), 241-a, and 241(6), and for common-law negligence, for injuries he suffered in a slip and fall accident at defendant's residential development. Plaintiff was employed by Anthony's Custom Closets (hereafter Anthony's), a subcontractor hired by the general contractor, Klein & Eversoll (hereafter Klein), employed by the property owner, Pinewood Estates Partners, LLC (hereafter Pinewood). Klein also hired All Island Cleaning Corp. (hereafter All Island) to supply laborers and equipment for keeping the site clean. All Island's contract provided a schedule of cleaning for the units to coincide with the completion of various phases of construction, and provided that it would have on-site personnel to monitor and direct its work. There is also evidence that Klein expressed continued complaints about debris and trash to All Island and that Klein had concerns that All Island was unable to handle the volume of debris at such a large development.

Plaintiff testified at his deposition that he had been working at the new residential construction site for a few months. There were many trades present and there were various kinds of building debris and litter present in and around the buildings. It was his job to install shower enclosures and bathroom accessories in the units. On the day of his accident he was installing a shower enclosure in a second floor unit. He had gone up and down this particular stairway a few times that day and it was strewn with trash, including paper coffee cups, pieces of plastic and electric wires, as well as a piece of cardboard. On his third trip down, as he carried a header he needed to replace, he stepped on the piece of cardboard and slipped and fell down the stairs, sustaining the injures complained of herein. As he fell, he attempted to reach out and stop his fall but there were no handrails to assist him.

Initially, the Court notes that there is no view of the evidence which would bring the accident under the protection of Labor Law §§ 240(1) or 241-a, and plaintiff has not opposed dismissal of those claims. Therefore, plaintiff's Labor Law §§ 240(1) and 241-a claims are dismissed.

Labor Law § 241(6) requires owners and general contractors 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. It creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.,*** 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra*).

The Court is troubled by the fact that plaintiff failed to state which sections of the Industrial Code were violated by defendants until his instant cross motion for leave to serve a supplemental bill of particulars, and after filing of his note of issue. Nevertheless, in the absence of unfair surprise or prejudice to defendants (***Ellis v J.M.G., Inc.,*** 31 AD3d 1220, 1121, 818 NYS2d 724 [2006]; ***Walker v Metro-North Commuter R.R.,*** 11 AD3d 339, 783 NYS2d 362 [2004]), leave is granted, as limited below.

Plaintiff's proposed supplemental bill of particulars asserts that defendants violated the Industrial Code at 12 NYCRR § 23-1.7(d), entitled "Slipping hazards," which provides:

> 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.

It also asserts a violation of 12 NYCRR § 23-1.7(e), entitled "Tripping and other hazards," which provides:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

While the stairway is not a "working area" for the purposes of § 23-1.7(e)(2), it is a "passageway" for the purposes of § 23-1.7(d) and (e)(1). Further, the debris which plaintiff alleges

caused his fall was not an integral part of the work and, since plaintiff alleges that he attempted to stop his fall but there were no handrails to help him, § 23-2.7 (e) is also, at least arguably, applicable (***Smith v McClier Corp.***, 38 AD3d 322, 831 NYS2d 413 [2007]; ***Brown v Brause Plaza,*** 19 AD3d 626, 798 NYS2d 501 [2005]; ***Maza v University Ave. Dev. Corp.,*** 13 AD3d 65, 786 NYS2d 149 [2004]; ***Kanarvogel v Tops Appliance City***, 271 AD2d 409, 705 NYS2d 644, *lv dismissed* 95 NY2d 902 [2000]).

The Court of Appeals has held that a violation of the Industrial Code, while not conclusive as to the question of negligence, would constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (***Rizzuto v L. A. Wenger Contr. Co.,*** *supra*; ***Herman v St. John's Episcopal Hosp.,*** 242 AD2d 316, 678 NYS2d 635 [1997]). Plaintiff must still establish that the Code was violated and that this violation was a proximate cause of his injuries (***Bland v Manocherian,*** 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.,*** 240 AD2d 392, 658 NYS2d 97 [1997]), subject to defendants' claims of plaintiff's comparative negligence (***Drago v New York City Tr. Auth.,*** 227 AD2d 372, 642 NYS2d 83 [1996]). Therefore, so much of plaintiff's cross motion which seeks leave to serve a supplemental bill of particulars is granted to the extent that the supplemental bill of particulars may add an alleged violation of 12 NYCRR § 23-1.7(d) and (e)(1) and § 23-2.7(e), and is otherwise denied. So much of defendants' motion which seeks to dismiss plaintiff's Labor Law § 241(6) cause of action is correspondingly denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, *supra*) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, plaintiff alleges that the work site itself was negligently maintained in that debris discarded by the various subcontractors was permitted to accumulate on the stairs (*see generally,* ***Pickering v Lehrer, McGovern, Bovis, Inc.,*** 25 AD3d 677, 811 NYS2d 696 [2006]). The Pinewood defendants established that they had no notice of, or control over, the alleged condition and plaintiff did not refute this with credible evidence to the contrary. Accordingly, plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed against the Pinewood defendants.

Further, defendant Pinewood Estates Management, LLC, established that it was created by the property owner, Pinewood Estates Partners, LLC, to manage the residential development and that it had no ownership interest in the property, and plaintiff did not refute this with any evidence to the contrary. Accordingly, the complaint is dismissed as to Pinewood Estates Management, LLC, in its entirety.

Pinewood also seeks summary judgment on its third-party claims for indemnification against plaintiff's employer, Anthony's, and the cleaning subcontractor, All Island. As a general rule, an owner held vicariously liable for a plaintiff's injuries pursuant to Labor Law § 241(6) is entitled to full common-law indemnification from the "actor who caused the accident" (***Chapel v Mitchell,*** 84 NY2d 345, 618 NYS2d 626 [1994]; ***Rivera v D'Alessandro,*** 248 AD2d 522, 669 NYS2d 877 [1998]; ***Werner v***

East Meadow Union Free School Dist., 245 AD2d 367, 667 NYS2d 386 [1997]). However, pursuant to the amendment to Workers' Compensation Law §11, the Omnibus Worker's Compensation Reform Act (L. 1996, c. 635, §2), plaintiff's employer is exempt from claims for contribution or indemnity in the absence of plaintiff's "grave injury" (*see also*, ***Majewski v Broadalbin-Perth Centr. School Dist.,*** 91 NY2d 577, 673 NYS2d 966 [1998]) unless there is a specific contractual obligation for such. Here, there does not appear to be a dispute that plaintiff did not suffer a grave injury. Therefore, any claims for indemnification against Anthony's will depend on its contractual obligation (***Martelle v City of New York,*** 31 AD3d 400, 817 NYS2d 504 [2006]).

Anthony's contract with Klein provides, at paragraph13, that Anthony's acknowledges and agrees that prevention of accidents to workers is its responsibility, that it will comply with safety standards and directives of the builder, and that it will indemnify and hold harmless the owner from any and all claims which the owner may suffer or incur due to Anthony's "failure to comply with the foregoing." At paragraph 15 Anthony acknowledges its responsibility for safety and agrees to indemnify and hold harmless the owner against all claims and expenses resulting from "any act of any employee" of [Anthony] or any injury or damage "caused by unsafe or negligent act or occurrence resulting from the [Anthony's] work." Therefore, the obligation to indemnify is dependant upon a finding that Anthony's was actively negligent by not complying with a safety directive or that plaintiff's own actions were a proximate cause of his accident[1] (***Robinson v City of New York,*** 8 Misc3d 1012(A), 801 NYS2d 781 [2005], *affd* 22 AD3d 293, 802 NYS2d 48 [2005]; ***Rodrigues v N&S Bldg. Contrs.***, 5 NY3d 427, 433, 805 NYS2d 299 [2005]). Such determinations cannot be made here on summary judgment. Accordingly, summary judgment on Pinewood's claim for contractual indemnification over and against Anthony's is denied.

As to Pinewood's claims for common-law and contractual indemnification over and against All Island, such claims must await the jury's resolution of whether Pinewood is vicariously liable pursuant to Labor Law § 241(6), whether All Island was negligent in the performance of its work and whether such negligence was a proximate cause of plaintiff's accident (***Nelson v Chelsea GCA Realty,*** 18 AD3d 838, 796 NYS2d 646 [2005]), and also whether the contract between All Island and Klein contained the disputed pages which provided for indemnification. None of these issues can resolved herein. Accordingly, summary judgment on Pinewood's third-party claim for common-law and contractual indemnification over and against All Island is denied, and All Island's motion to dismiss the third-party complaint against it is also denied.

Dated: AUG 2 3 2007

J.S.C.

_____**FINAL DISPOSITION** **X** **NON-FINAL DISPOSITION**

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[1] There is conflicting testimony from plaintiff's employer that plaintiff was not expected to clean up after other contractors and that plaintiff would be expected to clear (enough) trash on the steps to permit safe passage. The speculation that plaintiff slipped on cardboard from his own materials is without support.