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

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

Index Number : 103521/2005
PAVELCHAK, ANTON
VS
ANTAR-COM INTERNATIONAL
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. 103521/05

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

motion to/for summary judgment

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

Memorandum of Law M1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 9/12/07

MARCY S. FRIEDMAN 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

ANTON PAVELCHAK,

Plaintiff(s),

Index No.: 103521/2005

- against -

ANTAR-COM, INCORPORATED, ACX SYSTEMS INC., and DIEBOLD INCORPORATED,

DECISION/ORDER

Defendant(s).

In this Labor Law action, plaintiff sues for injuries that occurred on April 10, 2002 while he was working at a construction site at the Westchester County Executive Building in White Plains, New York. Defendants Antar-Com Incorporated ("Antar") and ACX Systems, Inc. ("ACX") move for summary judgment dismissing the complaint.[1] Plaintiff asserts claims under Labor Law §§ 200 and 241(6) and for common law negligence.

The following material facts are undisputed: Antar was a contractor, pursuant to a written contract with non-party County of Westchester, for installation of a security system at the premises. Antar subcontracted the work to plaintiff's employer, non-party Absolute Power and Technology ("Absolute"). At the time of plaintiff's accident, the premises was undergoing renovation and other trades were also present. There is no claim that Antar was a general contractor for the renovation.

At the time of the accident, plaintiff was descending a staircase that led from the first floor to the basement. Plaintiff tripped as he went from the landing to the basement and fell three steps to the basement floor. (See P.'s Dep. at 94-96.) At the time of his accident, plaintiff

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[1] The action was discontinued against defendant Diebold, Incorporated ("Diebold") by stipulation dated November 22, 2006.

did not know what caused his fall (id.), and after his fall, plaintiff saw debris that looked like pieces of metal studs on the landing. (Id. at 97-98.) The landing was used as a storage area by other trades for building materials, including sheet rock, conduit, and metal studs; there was also construction debris. (Id. at 68-69.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is further settled that generally "prime contractors incur no liability for personal injuries arising out of work not specifically delegated to them." (Russin v Picciano & Son, 54 NY2d 311, 315 [1981]; Musselman v Gaetano Constr. Corp., 285 AD2d 868 [3d Dept 2001].) "Prime contractors are liable only if they are acting as the 'agents' of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at the time of the injury." (Musselman, 285 AD2d at 869 [internal quotation marks and citation omitted] [emphasis in original].)

In moving for summary judgment, Antar contends that it was a prime contractor on the project and therefore was not an agent of the owner for purposes of liability under Labor Law § 241(6). Antar also argues that it did not exercise supervision and control over the area of the premises in which plaintiff fell. Antar misperceives its burden on the motion. In particular,

Antar fails to address whether, under its contract with the County, it had authority to supervise and control plaintiff's work. It is the authority or right to supervise and control, regardless of whether it is actually exercised, that provides a basis for liability under the Labor Law. (See Futo v Brescia Bldg. Co., 302 AD2d 813 [3d Dept 2003]. See also Russin v Picciano & Son, 54 NY2d 311, supra.) Here, Antar wholly ignores the specific terms of the contract governing its supervisory and safety responsibilities at the site. Thus, Antar fails to address the scope of those contractual obligations and whether they apply to plaintiff's work at the premises. Accordingly, Antar fails to demonstrate as a matter of law that it was not the owner's agent for purposes of Labor Law liability. (Cf. Walls v Turner Constr. Co., 4 NY3d 861 [2005].)

Antar also fails to eliminate issues of fact as to whether it may be held liable under Labor Law § 241(6) for a violation of the Industrial Code. While Antar emphasizes that plaintiff's accident occurred on a stairwell rather than in the area under the contract where work was to be performed, Antar ignores that a section 241(6) claim may be predicated upon a violation of Industrial Code § 23-1.7(d) (12 NYCRR) regarding slipping hazards in a passageway used in the provision and storage of tools. (See Linkowski v City of New York, 33 AD3d 971 [2d Dept 2006].)

The court reaches a different result as to plaintiff's Labor Law § 200 and common law negligence claims. Antar argues that it did not supervise or control plaintiff's work, did not create the condition, and did not have actual or constructive notice of it. Antar makes a prima facie showing that it did not supervise plaintiff's work, based on plaintiff's own deposition testimony that Antar did not direct his work or tell him what to do. (P.'s Dep. at 222-223.) Moreover, it is undisputed that Antar had no laborers at the project who were assigned to do clean up (Putnam Dep. at 61), and that the condition that caused plaintiff's accident was not the result of work performed by Antar. Antar also makes a prima facie showing that it had no notice

of the condition. Antar's principal gave testimony that he had no knowledge of debris on the stairs prior to plaintiff's accident. (See Putnam Dep. at 100-101.) Plaintiff asserts that he and his crew complained to Absolute's foreman about the filthy condition at the site the day before the accident. (P.'s Dep. at 98-100.) However, this conclusory assertion is plainly insufficient to raise a triable issue of fact as to whether Antar had notice of the condition, given that Antar's supervisor was not on the site on a daily basis (see Putnam Dep. at 53-55), and that there is no evidence that Absolute conveyed the complaint to Antar.

Finally, to the extent that plaintiff's claims are permitted to stand against Antar, they should also be permitted to stand against ACX. In arguing that the complaint should be dismissed against it in its entirety, ACX contends that it did not exist at the time of plaintiff's accident and was formed for transactional purposes as a result of the acquisition of Antar by Diebold. (See Putnam Dep. at 11-12.) Antar's principal testified that ACX was formed after plaintiff's accident. (See Putnam Dep. at 9-11.) However, this testimony is insufficient to demonstrate as a matter of law that ACX did not assume or acquire responsibility for Antar's liabilities.

Accordingly, it is hereby

ORDERED that defendant ACX's and Antar's motion for summary judgment is granted to the extent of dismissing plaintiff's claims under Labor Law § 200 and common law negligence, and is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 12, 2007

MARCY FRIEDMAN, J.S.C.