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

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

Julio Blanco

INDEX NO. 114222/05

MOTION DATE

- v -

MOTION SEQ. NO. 001

CRP/Amoco 350 W 42nd St, L.P. et al

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion ~~to~~/for summary judgment and cross-motion

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 1/11/08

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

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JULIO BLANCO,

Plaintiff(s),

- against -

Index No.: 114222/05

CRP/IMOCO 350 WEST 42ND STREET, L.P. and
BOVIS LEND LEASE LMB, INC.,

DECISION/ORDER

Defendant(s).

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This is a Labor Law action in which plaintiff sues for injuries that occurred while he was working at a construction site on February 25, 2005 in Manhattan. Defendants CRP/IMOCO 350 West 42nd Street, L.P. ("CRP"), the owner of the premises, and Bovis Lend Lease LMB, Inc. ("Bovis"), the construction manager for the project, move for summary judgment dismissing the complaint against them. Plaintiff cross-moves for partial summary judgment as to liability on his Labor Law § 240(1) and 241(6) claims against CRP and Bovis.

The following relevant facts are undisputed: Plaintiff was employed by non-party Pinnacle Industries as a carpenter. At the time of the accident, plaintiff was working on the 11th floor of the premises. (See P.'s Dep. at 34.) The 11th floor was the highest completed floor and was open to the elements. Plaintiff alleges that the floor was covered with snow (id. at 95), that he stepped into a hole that he did not see, and that his right leg fell into the hole up to his knee. (Id. at 33-34, 44.) The hole in which plaintiff fell was open, uncovered, and otherwise unprotected. (See id. at 95-97.) The hole had been intentionally created as part of the construction (id. at 35; Dep. of Chris James [Bovis' Superintendent] at 20.) Pursuant to Pinnacle's contract with Bovis, Pinnacle was responsible for safety, perimeter protection, and snow removal. (See James Dep. at 19-20, 35.)

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.)

Labor Law § 240 (1) provides:

> All contractors and owners and their agents, * * * in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) The hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich, 78 NY2d at 514. See also Narducci v Manhasset Bay Assocs.,

96 NY2d 259 [2001].)

There is no minimum elevation differential which must be met for the statute to apply. (See Rocovich, 78 NY2d at 514.) Moreover, in determining whether an opening or hole constitutes an elevation-related hazard, there is no requirement that plaintiff fall entirely through the opening. (See e.g. Gomez v 2355 Eighth Ave., LLC, 2007 NY Slip Op 09498 [1st Dept], 2007 WL 4198580; O'Connor v Lincoln Metrocenter Partners, L.P., 266 AD2d 60 [1st Dept 1999]; Carpio v Tishman Constr. Corp., 240 AD2d 234 [1st Dept 1997].) In this Department, there does not appear to be a minimum dimension which an opening must have in order for section 240(1) to apply. Thus, holes of relatively small dimensions have been found to constitute elevation-related hazards, rather than the ordinary hazards at a construction site that are not covered under the section, at least where the holes presented the risk of a fall to a lower elevation. (See Alvia v Teman Elec. Contr., Inc., 287 AD2d 421, 423 [2001] [holding that Labor Law § 240[1] is inapplicable where a hole is not of sufficient dimensions to pose a risk of a fall to the floor below]. Compare O'Connor v Lincoln Metrocenter Partners, L.P., 266 AD2d 60, supra [fall by worker, while crossing the floor, into 3 by 4 foot hole up to chest – covered by Labor Law § 240[1]]; and Carpio v Tishman Constr. Corp., 240 AD2d 234, supra [fall by worker, while painting ceiling, into "riser" hole, 10-14 inches wide and 3 feet deep, up to groin – covered]; and Serino v Miller Brewing Co., 167 AD2d 917 [4th Dept 1990] [fall by worker into an 18 inch wide hole in the floor with one of his legs – covered] with Rocovich v Consolidated Edison Co., 78 NY2d 509, supra [slip and fall into trough 18 to 36 inches wide and 12 inches deep, up to ankle - not covered by Labor Law 240[1]]; and Piccuillo v Bank of NY, 277 AD2d 93 [1st Dept 2000] [step into "hand-hole" in floor – i.e., opening used for access to wiring and

ducts – approximately 12 inches wide and 8 inches deep – not covered]; and Alvia v Teman Elec. Contr., Inc., 287 AD2d 421, supra [step with one leg into hole in floor approximately 12 inches by 16 inches – not covered]; and D'Egidio v Frontier Ins. Co., 270 AD2d 763 [3d Dept 2000], lv denied 95 NY2d 765 [step into hole in raised floor 5 inches by 12 inches and 15 to 24 inches deep – not covered].)

On this record, triable issues of fact exist requiring denial of the motion and cross-motion. It is undisputed that the hole in which plaintiff fell was open to the floor below. However, while plaintiff's version of the accident is undisputed, plaintiff's equivocal testimony that the hole "could be 2 feet by 2 and a half feet" (see P.'s Dep. at 35) raises a triable issue as to the dimension of the hole in which he fell. Thus, the court cannot determine as a matter of law that the subject hole posed an elevation-related hazard, rather than an ordinary hazard at a construction site that is not covered by section 240(1).

Turning to plaintiff's Labor Law § 241(6) claim, triable issues of fact exist as to whether defendants violated that section, and whether the violation was a proximate cause of plaintiff's injuries. Plaintiff alleges that defendants violated Industrial Code sections 23-1.7(b)(1)(i), 23-1.7(d), and 23-1.7(e)(1) (12 NYCRR).[1] As to section 23-1.7(b)(1)(i), in light of the triable issue as to the dimensions of the hole, an issue also exists as to whether the hole was of a sufficient size for plaintiff to have fallen through to the floor below and therefore a "hazardous opening" which required a protective covering pursuant to this section. (See Messina v City of New York, 300 AD2d 121 [1st Dept 2002]; Alvia, 287 AD2d at 423.) However, plaintiff's claim must be

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[1] It is undisputed that the sections relied upon by plaintiff are specific safety instructions that support defendants' liability under section 241(6). (See O'Connor, 266 AD2d at 61 [§ 23-1.7[b][1][i]]; Carty v Port Auth. of New York and New Jersey, 32 AD3d 732 [1st Dept 2006], lv denied 8 NY3d 814 [2007] [§§ 23-1.7 [d] & [e]].)

dismissed to the extent it is based upon Industrial Code section 23-1.7(d), which concerns slipping hazards. There are no allegations in plaintiff's complaint or bill of particulars that he slipped into the hole. Rather, plaintiff testified that he fell in the hole because he didn't see it. (P.'s Dep. at 35.) Plaintiff's claim must also be dismissed as to section 23-1.7(e)(1), which concerns tripping hazards in passageways. This section is inapplicable on the facts, as the area where plaintiff fell was an open working area not a passageway. (See Meslin v New York Post, 30 AD3d 309 [1st Dept 2006]; Dalanna v City of New York, 308 AD2d 400 [1st Dept 2003].)

As to plaintiff's Labor Law §200 claim, it is well settled that this section is a codification of the common law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993].) "An implicit precondition to this duty * * * is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (Russin v Picciano & Son, 54 NY2d at 317.) However, supervision or "control or direction is not necessary to establish liability under Labor Law § 200 where the injury arises from the condition of the workplace created by or known to the owner, rather than the method used in performing the work." (Griffin v New York City Tr. Auth., 16 AD3d 202 [1st Dept 2005].)

In cross-moving for summary judgment on his claims under Labor Law § 200 and for common law negligence, plaintiff does not argue that defendants exercised supervision and control over his work. Rather, plaintiff contends that the accident did not arise out of Pinnacle's methods, that the alleged defective condition was the snow that covered the hole, and that defendants had constructive notice of that condition. Contrary to plaintiff's contention, triable

issues of fact exist as to whether the accident occurred due Pinnacle's methods. Indeed, it is undisputed that Pinnacle was responsible for covering holes at the construction site, including the hole in which plaintiff fell, as well as for snow-removal at the site. However, even assuming arguendo that the accident did not occur due to Pinnacle's methods at the site, plaintiff fails to demonstrate as a matter of law that defendants had constructive notice of either the open hole or the snow condition. (See Griffin v New York City Tr. Auth., 16 AD3d 202 [1st Dept 2005]; Gaisor v Gregory Madison Ave., LLC, 13 AD3d 58 [1st Dept 2004].) Accordingly, this branch of the motion of the cross-motion must be denied.

It is accordingly hereby ORDERED that defendants' motion is granted only to the extent that plaintiff's Labor Law 241(6) claim is dismissed to the extent that it is based on Industrial Code sections 23-1.7(d) and 23-1.7(e)(1), and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
January 11, 2008

MARCY FRIEDMAN, J.S.C.