SHORT FORM ORDER

INDEX No. 02-17499
CAL. No. 07-01108-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/17/07
ADJ. DATE 12/28/07
Mot. Seq. # 005 - MotD
006 - MD
007 - MotD

ARNOLD J. DISCORSI, Plaintiff, - against - RECKSON ASSOCIATES REALTY CORP., BLUMENFELD DEVELOPMENT GROUP, LTD. and BLUMENFELD DEVELOPMENT GROUP CONSTRUCTION CORP., Defendants.	SIBEN & FERBER Attorneys for Plaintiff Staller Office Park 1495 Veterans Memorial Highway Hauppauge, New York 11749 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP Attorneys for Defendants Reckson Associates & Blumenfeld Development Group 150 East 42nd Street New York, New York 10017-5639
BLUMENFELD DEVELOPMENT GROUP CONSTRUCTION CORP., Third-Party Plaintiff, - against - VITA PAINTING & CONSTRUCTION, INC., Third-Party Defendant.	SMITH MAZURE DIRECTOR WILKINS YOUNG & YAGERMAN, P.C. Attorneys for Defendant/Third-Party Plaintiff/ Second Third-Party Plaintiff Blumenfeld Development Group Construction Corp. 111 John Street, 20th Floor New York, New York 10038-3198 JOEL P. STOLOWITZ, ESQ. Attorney for Third-Party Defendant Vita Painting & Construction 140 Fell Court Hauppauge, New York 11788
BLUMENFELD DEVELOPMENT GROUP CONSTRUCTION CORP., Second Third-Party Plaintiff, - against - V & M CONTRACTING, Second Third-Party Defendant.	BREEN & CLANCY Attorneys for Second Third-Party Defendant V & M Contracting 1355 Motor Parkway, Suite 2 Hauppauge, New York 11749

Upon the following papers numbered 1 to 69 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 34; 35 - 57 ; Answering Affidavits and supporting papers 58 - 61; Replying Affidavits and supporting papers 62 -63; 64-65; 66-6;7 68-69 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#005) by defendants, Reckson Associates Realty Corp. and Blumenfeld Development Group, Ltd., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1) and 241(6), and common-law negligence causes of action as against them; summary judgment on their cross claim for contractual indemnification over and against Vita Painting & Construction; and summary judgment on their cross claim for common-law and contractual indemnification over and against V & M Contracting, is granted to the extent that plaintiff's Labor Law §§ 200 and 240(1), and common-law negligence causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that the motion (#006) by second third-party defendant, V & M Contracting, for an order pursuant to CPLR 3212 granting summary judgment dismissing the second third-party complaint and any cross claims asserted against it, is denied; and it is further

ORDERED that the motion (#007) by defendant/third-party plaintiff, Blumenfeld Development Group Construction Corp., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as against it, and summary judgment on its claim for breach of contract against both third-party defendants, is granted to the extent that plaintiff's Labor Law §§ 200 and 240(1), and common-law negligence causes of action are dismissed, and is otherwise denied.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence, for injuries he allegedly sustained in an accident at a renovation site on March 26, 2001. The property was owned by Reckson Associates Realty Corp. (hereafter Reckson), which leased space to Blumenfeld Development Group, Ltd. (hereafter BDG). BDG in turn hired Blumenfeld Development Group Construction Corp. (hereafter BDG Constr.) to renovate the space. V & M Contracting (hereafter V & M) was the subcontractor hired by BDG Constr. to perform demolition and carpentry work, including removing some partitions and constructing other partitions. Plaintiff, an experienced painter, was employed by Vita Painting & Construction (hereafter Vita), the painting subcontractor hired by BDG Constr.

Plaintiff testified at his deposition that, on the day of his accident, he was using a roller to paint the walls at the space renovated for BDG. Previously, Vita's employees had performed spackling, sanding, and caulking in preparation for painting. Plaintiff was dipping a roller on a long handle into a five gallon bucket partially filled with paint, rolling the paint onto the wall, and moving the bucket along the cement floor by pushing it with his left leg. At some point, as plaintiff was pushing it with his leg, the bucket "hit a snag on the concrete" which caused the bucket to stop abruptly, and plaintiff testified that he simultaneously felt a sharp pain in his knee, the injury alleged herein. Plaintiff did not lose his balance or fall but twisted his knee or bent it backward. The bucket was caused to stop short because of a "shot pin" protruding ½ to ¾ of an inch from the concrete floor. A shot pin is nail that is fired into a metal stud to secure it, when constructing a wall. Apparently, a cubicle or knee wall or walls had previously been removed in the area and plaintiff

testified that this shot pin must have remained after that removal. Plaintiff did not know who removed the wall. Plaintiff testified that he did not see the shot pin prior to his accident, that he did not complain about the presence of shot pins, and that he did not stop to remove it after the incident, but rather kept on painting.

Initially, the Court notes that there is no view of the evidence which would bring the accident under the absolute liability imposed by Labor Law § 240(1), and plaintiff has not opposed dismissal of this claim. Therefore, plaintiff's Labor Law § 240(1) claim is dismissed.

Labor Law § 241(6) requires owners and general contractors or their agent 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 (Industrial Code). The duty imposed by Labor Law § 241(6), to comply with the Commissioner's regulations, is nondelegable (***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*).

Plaintiff asserts that defendants violated the Industrial Code provision found at 12 NYCRR § 23-1.7 (e). Section 23-1.7 (e) entitled, "Tripping and other hazards," 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.

Here, plaintiff's testimony established that the accident did not occur in a passageway but in a working area. Therefore, the Court concludes that subsection (1) is not applicable. Defendants argue that since plaintiff testified that he did not fall to the floor but only came to a sudden stop, he did not "trip," for the purposes of section 23-1.7 (e). Although a trip often leads to a fall,[1] it can also result in only a stumble, without a fall to the floor. Moreover, there is no requirement in section 23-1.7(e) that the trip must result in a fall and the Court cannot impose such an outcome where it is unsupported by the statute or by case law. Defendants also rely on the holding in ***Dalanna v City of New York*** (308 AD2d 400, 764 NYS2d 429 [2003]) wherein the Court found that a bolt which was embedded in the ground (cement slab) was not "dirt,"

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[1] In ***Sergio v Benjolo N.V.***, (168 AD2d 235, 562 NYS2d 476 [1990]), for example, a plaintiff was injured when stacked cartons fell beneath the wheels of his tool box, causing it to come to a sudden stop and throw plaintiff to the ground.

"debris," "scattered tools and materials," or a "sharp projection[]," as required by 23-1.7(e)(2). However, in ***Dalanna***, the injured plaintiff's employer was instructed to cut down the protruding bolts so that they would be level with the surrounding surface. The bolts had been placed to temporarily anchor a tank and plaintiff's employer, when directed to cut them level with the cement slab, had apparently missed the one upon which plaintiff tripped. Therefore, the bolt was an integral part of the work being performed by plaintiff's employer and Labor Law § 241(6) was inapplicable (*see*, ***O'Sullivan v IDI Constr. Co.***, 7 NY3d 805, 822 NYS2d 745 [2006]). Here, there is at least a question of fact as to whether the shot pin that plaintiff alleges caused his accident could be considered a "sharp projection" and whether it was part of the completed demolition project (*see*, ***Murphy v WFP 245 Park Co.***, 8 AD3d 161, 162, 779 NYS2d 69 [2004]), wherein the Court found questions of fact as to "whether the studding over which plaintiff tripped was part of new drywall construction or whether they were studs that had yet to be demolished"). Accordingly, summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action is denied to defendants.

Further, the Court of Appeals has held that a violation of the Industrial Code, while not conclusive on the question of negligence, would constitute some evidence of negligence, leaving 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*). Here, 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]; ***Pilch v Board of Educ. of City of New York***, 27 AD3d 711, 815 NYS2d 617, *lv denied* 8 NY3d 958, 836 NYS2d 537 [2007]).

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees 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***, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercise 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, defendants established that they had no supervision or control over plaintiff's work and had no notice of the alleged hazardous condition (***Comes v New York State Elec. & Gas Corp.,*** 82 NY2d 876, 877, 609 NYS2d 168 [1993]), and plaintiff did not offer any evidence to the contrary. Accordingly, defendants are granted summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action.

Defendants Reckson and BDG also seek summary judgment on cross claims asserted against Vita and V & M. The cross claim against Vita, which is asserted only by BDG, seeks contractual indemnification based upon an agreement executed on May 2, 2001. The agreement provides, among other things, that the contractor (Vita) would indemnify and hold harmless BDG and BDG Constr. against loss incurred for liability imposed by law or contract "due to any act of [sic][2] omission of the Contractor . . .". However, plaintiff's accident occurred on March 26, 2001, and BDG has not submitted evidence that the parties intended the agreement to apply retroactively (*cf.* ***Stabile v Viener***, 291 AD2d 395, 737 NYS2d 381, *lv denied* 98 NY2d 727, 749 NYS2d [2002]). Moreover, while BDG's liability, if any, will be vicariously imposed pursuant to Labor Law § 241(6), BDG has not established, as a matter of law, that plaintiff's accident was caused by the negligent act or omission of Vita (***Moss v McDonald's Corp.,*** 34 AD3d 656, 825

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[2] It would appear that this is a misprint, since the standard phrase is "act *or* omission."

NYS2d 497 [2006]; ***Kader v City of N.Y. Hous. Preserv. & Dev.***, 16 AD3d 461, 463, 791 NYS2d 634 [2005], quoting ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [1995])). Therefore, summary judgment on BDG's cross claim against Vita is denied.

BDG's cross claim over and against V & M seeks only common-law indemnification, although BDG's motion speaks to both contractual and common-law indemnification. To the extent that BDG seeks contractual indemnification, the agreement with V & M was executed on April 17, 2001, weeks after plaintiff's accident, and BDG has not submitted evidence that the parties intended the agreement to apply retroactively or that plaintiff's accident was caused by the negligent act or omission of V & M (***Moss v McDonald's Corp.***, *supra*; ***Kader v City of N.Y. Hous. Preserv. & Dev.***, *supra*). As to the cross claim for common-law indemnification, to establish a claim for common-law indemnification "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 685, 790 NYS2d 25 [2005]; ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [2004]; ***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1999]). Here, BDG has not been found vicariously liable to plaintiff nor has it established that some negligence on the part of V & M contributed to causing plaintiff's accident (***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2006]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 818 NYS2d 546 [2006]). Accordingly, summary judgment on BDG's cross claim against V & M is also denied.

BDG Constr.'s motion also seeks summary judgment on its claims that the third-party defendants failed to procure insurance coverage which named BDG Constr. as an additional insured, as mandated in the separate agreements signed by each third-party defendant (the same agreements which contain the indemnification provisions which BDG seeks to enforce). The agreements provide that each subcontractor would furnish BDG Constr. with copies of certificates of insurance naming BDG Constr. (as well as BDG), as additional insureds. The agreement executed by V & M is dated April 17, 2001 and the agreement executed by Vita is dated May 2, 2001. However, as stated above, plaintiff asserts that his accident occurred on March 26, 2001. Therefore, on the evidence submitted, BDG Constr. has not established that the agreements were in effect at the time that plaintiff alleges he was injured or that it suffered any damage as the result of the alleged breach. Accordingly, summary judgment on its breach of contract claims is denied to BDG Constr.

Plaintiff's Labor Law § 241(6) cause of action is severed and shall continue.

Dated: FEB 27 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**