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

PRESENT: HON. JANE S. SOLOMON PART 55
*Justice*

Index Number : 108065/2005
MAHER, WAYNE
VS
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGEMENT



| | |
|---|---|
| INDEX NO. | 108065/2005 |
| MOTION DATE | 12 - 10 - 2007 |
| MOTION SEQ. NO. | 001 |
| MOTION CAL. NO. | |

The following papers, numbered 1 to 6 were read on this motion to/for summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 3 |
| Answering Affidavits — Exhibits | 4 - 5 |
| Replying Affidavits | 6 |

**Cross-Motion:** ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. Pre-trial conference scheduled for Monday, April 28, 2008 at 2:00 PM in Part 55, Room 432, 60 Centre Street.

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

Dated: 3/26/08

HON. JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----------X

WAYNE MAHER,

INDEX NO. 108065/2005

Plaintiff,

-against-

THE CITY OF NEW YORK,

DECISION and ORDER

Defendant.

----------X



JANE S. SOLOMON, J.

In this personal injury action, defendant the City of New York moves for summary judgment to dismiss the Complaint. Plaintiff Wayne Maher ("Maher") opposes the motion, which is decided as follows.

On February 28, 2005, Maher was employed by non-party Shiavone Construction Company ("Schiavone") at a jobsite on Houston Street in Manhattan. Schiavone was one of three contractors that contracted with New York City for a water tunnel project at this jobsite. Maher was assigned to work at ground level and to prepare large steel forms into which concrete would later be poured. Maher's work involved using a jackhammer to dig a trench into which the steel forms would be placed, and then fastening the steel forms together so that they would hold wet concrete as it cured. In order to fasten the steel forms

together, he first affixed thick wire ties to them, and then hammered steel wedges into precut openings in the forms. Each steel wedge was one inch by four inches and was in the shape of an arrowhead or nail. The narrow end was placed first into the precut form opening and the larger end would then be hammered into the opening.

All tools at the site were provided by Schiavone. Maher alleges that he was not provided with safety goggles or other protective eyewear, and that he received no instructions to wear any. Maher states that while he was hammering one of the steel wedges, he suddenly felt a sharp pain in his left eye. Prior to this incident, Maher and his partner had driven approximately three or four such wedges into the steel forms. He did not see what struck his eye, but believes it to be one of the wedges. He claims to have suffered permanent damage to his eye, which has resulted in decreased vision. He commenced this action in or around June 2005 against the City of New York, alleging violations of Labor Law §§ 200 and 241(6). The City now moves under CPLR § 3212 for summary judgment dismissing the Complaint.

**Labor Law § 200**

Labor Law § 200 is a "codification of the common-law duty imposed on an owner or general contractor to provide construction-site workers with a safe place to work." Comes v.

N.Y. State Elec. and Gas Corp., 82 N.Y.2d 876, 877 (1993). In order for liability to attach to the owner, it must be shown that it exercised supervisory control over the operation (Lombardi v. Stout, 80 N.Y.2d 290, 295 [1992]) and had "actual or constructive notice of the allegedly unsafe condition that caused the accident." Mitchell v. N.Y. Univ., 12 A.D.3d 200, 201 (1st Dep't 2004). Here, there is no evidence that anyone from the City was aware of the "[s]pecific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (Id. at 201), or that anyone from the City supervised, directed or controlled Maher's work. Consequently, there is no basis to sustain the Labor Law § 200 claim and it must be dismissed.

**Labor Law § 241(6)**

In order for a plaintiff to prevail under Labor Law § 241(6), he must set forth a specific provision of the New York State Industrial Code which was allegedly violated and so proximately caused the injury, and demonstrate that the rule sets forth a specific safety standard rather than a general duty of care. *See* Rizuto v. L.A. Wenger Constr. Co., 91 N.Y.2d 343 (1998). Here, Maher has alleged breaches of three rules, 12 NYCRR §§ 23-1.5, 23-2.2 and 23-1.8.

According to Carty v. Port Auth. of N.Y. & N.J. (32 A.D.3d 732, 733 [1st Dep't 2006]), the first rule on which Maher

relies, 12 NYCRR §§ 23-1.5(a), "sets forth an employer's general responsibility for health and safety in the workplace, and is insufficiently specific to support a § 241(6) claim." The only provision of the next rule, 12 NYCRR §§ 23-2.2, which deals with concrete work, that arguably is applicable here, is "(a) General Requirements," which requires that "[f]orms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." Since Maher was in the process of constructing the form when the accident happened, this subsection has no applicability. *See* Morris v. Pavarini Const., 30 A.D. 3d 165 (1st Dep't 2006).

The third, 12 NYCRR §§ 23-1.8(a), requires that "approved eye protection suitable for the hazard involved" be provided to and used by "all person while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or *while engaged in any other operation which may endanger the eyes*" (emphasis added). Maher is clearly not covered by the named hazardous jobs. The issue is whether the activity in which he was engaged is covered by the catchall phrase.

Significantly, a carpenter making a similar claim defeated a motion to dismiss where the court stated that the foreseeability of the incident presented a triable issue of fact.

See Cappiello v. Telehouse Int'l Corp., 193 A.D.2d 478 (1st Dep't 1993). As a result, the City's motion must be denied with respect to this claim.

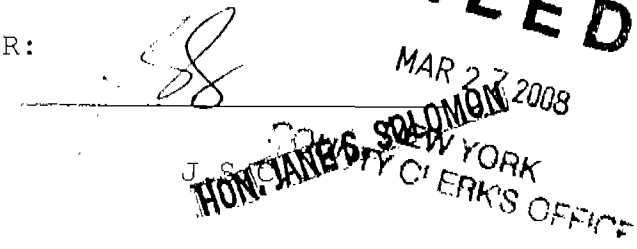
Accordingly, it hereby is

ORDERED that the City of New York's motion for summary judgment is granted to the extent of dismissing the Labor Law § 200 claim, and the Labor Law § 241(6) claims for violations of 12 NYCRR §§ 23-1.5 and 23-2.2, and otherwise is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY on Monday, April 28, 2008 at 2:00 PM.

Dated: March 26, 2008

ENTER:




HON. JAMES G. SOLOMON
J.S.C.