SHORT FORM ORDER

INDEX No. 05-28055

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 9-26-07
ADJ. DATE 1-28-08
Mot. Seq. # 001 - MG

HARRY DOWLING and JEANINE DOWLING,

Plaintiffs,

- against -

BURNS-PEARSON REALTY CORP. and AUDI OF HUNTINGTON, INC.,

Defendants.

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Upon the following papers numbered 1 to 12 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 8 - 11 ; Replying Affidavits and supporting papers 12 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Burns-Pearson Realty Corp. and Audi of Huntington, Inc., for summary judgment dismissing the complaint is granted.

Injured plaintiff Harry Dowling commenced this action to recover damages pursuant to Labor Law §200, §240(1), and §241(6), and for common-law negligence, for injuries he allegedly sustained while moving building materials on a hydraulic scissor lift at a premises owned by defendant Burns-Pearson Realty Corp. (hereinafter "Burns") and leased to defendant Audi of Huntington, Inc. (hereinafter "Audi"). His wife, Jeanine Dowling, sues derivatively. At the time of his accident, plaintiff was employed by Bergon Construction Corp., who had been retained by Audi to act as a general contractor and construction manager for a new automobile dealership.

The defendants now move for summary judgment dismissing the action against them. In support of their motion, they submit, *inter alia*, the injured plaintiff's deposition testimony wherein he testified that on the morning of his accident, he and a coworker were putting pieces of yellow board, a dense glass that is heavier than sheet rock, on the outside of the building. The plaintiff described the yellow board pieces as being approximately four feet by eight feet. He further testified that he was moving about eight

or nine pieces of the yellow board by transporting them on the platform of a scissor lift. He explained that the yellow boards were leaning up against the rail of the lift, and that even though the lift was positioned all the way down, the platform of the lift was still approximately seven feet from the ground. The plaintiff testified to the effect that he was operating the lift, intending to turn the lift to go around the corner of the building, when the lift jerked because of a rut, causing the stacked yellow board to fall onto his leg. The plaintiff stated that at no point did he fall off the lift. He also stated that his boss, a supervisor of Bergon Construction Corp., gave him his work assignments. Lastly, the plaintiff testified to the effect that except for "maybe" saying "hi," he did not recall speaking to anyone from defendant Audi, and that he was not familiar with defendant Burns.

The defendants also submit the deposition testimony of John Burns, who is president of both defendant Audi and defendant Burns. Mr. Burns testified in pertinent part that he only visited the premises approximately once a month while construction was being performed and that the maintenance of the property was under the direction of Bergon Construction Corp. The defendants argue that based upon the evidence herein, plaintiff's claim under Labor Law §200 and common-law negligence should be dismissed because defendants did not control or supervise the plaintiff's work. The defendants also maintain that plaintiff's claim under Labor Law §240(1) should be dismissed as plaintiff's accident was not the type contemplated by the Labor Law. Finally, the defendants assert that the plaintiff's claim under Labor Law §241(6) should be dismissed as there is no evidence that they violated any provision of the New York State Industrial Code.

In opposition, the injured plaintiff and his father-in-law submit affidavits stating that about a week after the accident they went back to the job site and the rut in the dirt was still there. They describe the rut as being about two to three feet long, a foot and a half wide, and three to six inches deep. The plaintiff maintains that the rut constituted a tripping hazard pursuant to §23-1.7(e)(2) of the Industrial Code. The plaintiff also argues that he was struck and injured by a falling object, the sheets of yellow board at an elevated height. The plaintiff contends that the defendants have failed to demonstrate that he was provided with a safe place to work or that the unsafe conditions at the job site were not the proximate cause of his injuries.

Labor Law §200 is a codification of the common-law duty imposed upon an owner or contractor to provide workers with a reasonably safe work environment (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]). "It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (***Rizzuto v L.A. Wenger Contracting Co., Inc.***, 91 NY2d 343, 352; 670 NYS2d 816, 821 [1998]; *quoting* ***Russin v Picciano & Son***, 54 NY2d 311, 317). In this matter, the defendants have met their initial burden of establishing that they lacked the requisite supervision and control over plaintiff's activity, and plaintiff has failed to refute this with evidence of any supervision and control (*see*, ***Mancini v Pedra Construction***, 293 AD2d 453, 740 NYS2d 387 [2002]; ***Magnuson v Syosset Community Hospital***, 283 AD2d 404, 725 NYS2d 55 [2001]). Accordingly, that portion of the defendants' motion for summary judgment seeking to dismiss the plaintiffs' claims pursuant to Labor Law §200 and common-law negligence, is granted.

Labor Law §240(1), commonly known as the "scaffold law," creates a duty that is nondelegable,

and an owner, contractor, or lessee who breaches that duty may be held liable for damages regardless of whether they had actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro-Electric Company***, 81 NY2d 494, 601 NYS2d 49 [1993]; *see also*, ***Sinzieri v Expositions, Inc.***, 270 AD2d 332, 704 NYS2d 293 [2000]). Labor Law §240(1) was designed to provide exceptional protection for workers against the special hazards that "are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured " (***Ross v Curtis-Palmer Hydro-Electric Company***, *supra* 81 NY2d at 501). Thus, Labor Law §240(1) applies in cases "where the accident is the result of a difference in elevation between the worker and the work being performed, or a difference between the elevation level where the worker is positioned and the higher level of the material being hoisted or secured" (***Jacome v State of New York***, 266 AD2d 345, 346; 698 NYS2d 320, 322 [1999]). It does not apply simply because the injury is caused by the effects of gravity on an object (***Melo v Consolidated Edison Company of New York, Inc.***,92 NY2d 909, 680 NYS2d 47 [1998]). In this case, since the plaintiff did not fall from an elevated work site and since there was no height differential between the plaintiff and the sheets of yellow board, the plaintiff may not recover under Labor Law §240(1) as a matter of law (*see*, ***Peay v New York City School Construction Authority***, 35 AD3d 566, 827 NYS2d 189 [2006]; ***Millard v Hueber-Breuer Construction Company, Inc.***, 4 AD3d 817, 772 NYS2d 173 [2004]; ***Kocurek v Home Depot, U.S.A.P., Inc.***, 286 AD2d 577, 730 NYS2d 74 [2001]). Accordingly, that portion of the defendants' motion for summary judgment seeking to dismiss the plaintiffs' claims pursuant to §240(1) is granted.

Labor Law §241(6) requires all contractors and owners and their agents when constructing or demolishing buildings or doing any excavating in connection therewith, 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. As is the duty imposed by Labor Law §240(1), the duty to comply with the Commissioner's regulations imposed by §241(6) is nondelegable (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*). Therefore, a plaintiff who asserts a viable claim under §241(6) need not demonstrate that defendants exercised supervision or control over the work site in order to establish his case (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*). However, in order to make out a prima facie cause of action pursuant to Labor Law §241 (6), a plaintiff must allege that "the defendants violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (***Adams v Glass Fab, Inc.***, 212 AD2d 972, 973; 624 NYS2d 705, 707[1995]).

Here, plaintiff has confined his argument to the defendants' alleged violation of the Industrial Code found at 12 NYCRR § 23-1.7(e)(2), entitled "Tripping and other hazards" which provides in relevant part:

> (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.

Initially, the court notes that this provision is sufficiently specific to support a Labor Law §241(6) cause of action (*see*, ***Lambert v J.A.Jones Construction Group, LLC***, 18 Misc3d 800, 850 NYS2d 323

[2007]; ***Calabrese v Frank Corigliano Contracting, Inc.***, NYLJ, Mar. 28, 2002, at 24, col 6). However, the court also notes that since the plaintiff herein did not trip, but rather was driving a four-wheel drive scissor lift, this provision appears to be inapplicable. Furthermore, even assuming *arguendo* that a driving hazard falls within this provision, the other facts of this case still do not come within the purview of 12 NYCRR 23-1.7(e)(2). The accident herein occurred out-doors, on the open ground surrounding the building and not on a floor, platform or other similar working surface as provided in the cited regulation (*see*, ***Meslin v The NewYork Post***, 30 AD3d 309, 817 NYS2d 279 [2006]; ***Scofield v Trustees of Union College***, 288 AD2d 807, 734 NYS2d 262 [2001]; ***Bauer v Niagara Mohawk Power Corp.***, 249 AD2d 948, 672 NYS2d 567 [1998]; ***Gavigan v Bunkoff General Contactors Inc.***, 247 AD2d 750, 669 NYS2d 69 [1998]). Moreover, a rut in the ground is not an accumulation of "dirt and debris," "scattered tools and materials," or a "sharp projection" as required by the regulation (*see*, ***Lambert v J.A.Jones Construction Group, LLC***, *supra*; ***Calabrese v Frank Corigliano Contracting, Inc.***, *supra*). Indeed, a depression or rut in the ground "would seem to be the opposite of a sharp projection" (***Calabrese***, *supra*). Accordingly, the alleged violation of 12 NYCRR 23-1.7(e)(2) may not serve as the grounds for the plaintiffs' Labor Law 241(6) claim, and the defendants' motion to dismiss the plaintiffs' complaint is granted.

Dated: March 27, 2008

DENISE F. MOLIA
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION