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

PART 36

Index Number : 116314/2004

MCGHEE, VIVIAN M.

VS.

HRH CONSTRUCTION LLC

SEQUENCE NUMBER : 005

SUMMARY JUDGEMENT

1-4

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the attached memorandum decision.

FILED
APR 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 4/14/08

J.S.C.

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

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 36

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VIVIAN M. McGHEE,

Index No.: 116314/04

Plaintiff,

Motion Seq. No.: 005

-against-

HRH CONSTRUCTION LLC,
CARLTON CONCRETE CONSTRUCTION CORPORATION,
CARLTON CONCRETE CORPORATION,
SENTRALE CONTRACTING CORPORATION,
SENTRALE CONSTRUCTION CORPORATION,
PERSICO CONTRACTING & TRUCKING, INC.,
PERSICO INDUSTRIES, INC.,
JOHN PUFF & SONS, INC., VERGONA CRANE CO., INC.,
JEFFERSON AT WHITE PLAINS, L.P.,
JEFFERSON AT WHITE PLAINS, LLC,
WESTCHESTER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, JPI APARTMENT DEVELOPMENT, L.P. and
JPI APARTMENT CONSTRUCTION L.P.,

Defendants.

----------x

Ling-Cohan, J.:

This is an action to recover damages sustained by a crane oiler when she slipped and fell on the tracks of a crane at a construction site located at 300 Mamaroneck Avenue, White Plains, New York. Defendants HRH Construction LLC (HRH), Jefferson at White Plains, L.P., Jefferson at White Plains, LLC, Westchester County Industrial Development Agency, JPI Apartment Development, L.P. and JPI Apartment Construction L.P. (JPI) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Vivian M. McGhee's complaint and all cross claims against them.

BACKGROUND

On December 16, 2003, plaintiff was injured while working at a construction site when she slipped and fell on a grease spot located on the tracks of a crane (the tracks) from which she was descending. Defendant Jefferson at White Plains, LLC (Jefferson) was the owner of the premises where plaintiff's accident occurred (the job site). Defendant HRH served as the general contractor for the project, which entailed the construction of condominiums. Defendant JPI served as the construction manager for the project. From November 3, 2003 until the date of plaintiff's accident, plaintiff was employed as a crane oiler by defendant Carlton Concrete Construction Corporation (Carlton), a subcontractor on the project. Defendant Vergona Crane Company, Inc. (Vergona) leased the crane at issue to Carlton approximately three months before plaintiff's accident.

The crane at issue contained two tracks, each approximately two to three feet wide and two feet high. The tracks had evenly spaced ridges which were about six inches apart. In addition, the crane tracks were about one to two inches thick and about 12 feet long. A foot-wide steel catwalk connected the crane tracks to the body of the crane and ran along the side of the crane. With the exception of the area at the entrance to the cab's door, there was a railing around the entire length of the catwalk.

Plaintiff stated that the only way to access the cab of the crane was to walk over its tracks. In order to mount the tracks, plaintiff had to utilize a set of movable wooden stairs which were placed at the back of the tracks. However, plaintiff would exit the crane by simply jumping off the tracks to the ground.

Plaintiff stated that she received her directions and duties from one of the two crane

operators, though she did not know who employed the crane operators. Plaintiff also noted that she would see her immediate supervisor, Howie, also employed by Carlton, approximately three times a week.

Plaintiff testified that, on the day of her accident, she was asked by one of the crane operators to help unload supplies delivered by a Vergona mechanic. Plaintiff explained that, at the time of her accident, she was making trips with the supplies to the cab of the crane in order to store them. In order to reach the crane's cab, plaintiff had to step up from the crane tracks to the catwalk, and then proceed from the catwalk to the crane's cab, during which time she made a conscious effort to avoid the spots of grease, dirt and oil on the tracks. After putting the last of the supplies into the cab of the crane, and as plaintiff was stepping down from the catwalk to the tracks, her left foot stepped on a spot of dirt and grease, which caused her foot to slip forward and her to fall on her back, sustaining injuries to her back.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba

Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

Initially, it should be noted that although plaintiff asserts that defendants failed to submit evidence in admissible form by attaching unsigned transcripts in support of their application, such argument is unavailing as plaintiff utilized the same unsigned transcripts in support of her opposition (see Morchik v Trinity School, 257 AD2d 534, 535 [1st Dept 1999]). Moreover, CPLR § 3116(a) provides that unsigned depositions may be used "as fully as though signed, where a witness fails to sign and return the deposition within sixty days". Here, plaintiff has not asserted that it is less than sixty days from the date of the relevant depositions or that the depositions were not served upon the witnesses.

LABOR LAW § 240 (1) CLAIM

Plaintiff has not addressed her Labor Law § 240 (1) claim in her opposition papers. Thus, this court deems this claim to be abandoned (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

LABOR LAW § 241 (6) CLAIM

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored,

> equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Although plaintiff alleges multiple violations of the Industrial Code in her bill of particulars, with the exception of Industrial Code sections 12 NYCRR 23-1.7 (d), (e) (1) and (2) and 23-8.1 (b) (1) and (3), plaintiff failed to address these Industrial Code violations in her opposing papers. Thus, this court deems these claims as abandoned as to moving defenants, and such defendants are entitled to summary judgment on those alleged Industrial Code violations (see Genovese v Gambino, 309 AD2d at 833).

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> (d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing

Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (see Lopez v City of New York Transit Authority, 21 AD3d 259, 259-260 [1st Dept 2005]).

In support of their contention that the crane tracks do not fall within the purview of 12 NYCRR 23-1.7 (d), defendants cite the case of Bond v York Hunter Construction, Inc. (270 AD2d 112 [1st Dept], affd 95 NY2d 883 [2000]). In Bond, the Court held that "the vehicle track on which the plaintiff slipped was not a 'floor, passageway, walkway, scaffold, platform or other elevated working surface' within the meaning of 12 NYCRR 23-1.7 (d)" (id. at 113). However, Bond can be distinguished from the case at bar, in that the plaintiff in that case was injured while descending a vehicle that he had been operating to demolish an interior wall. By contrast, in the instant case, the crane's track was a necessary and only means of ingress and egress to the cab where plaintiff was loading supplies. In fact, in her affidavit of October 26, 2007, plaintiff stated that she "regularly traversed the tracks to bring supplies back and forth from the cab of the crane several times during the work day" (Plaintiff's Affirmation in Opposition, Plaintiff's October 26, 2007 Affidavit, Exhibit A, at 3). Thus, the crane tracks may be considered an elevated working surface for the purposes of Industrial Code 12 NYCRR 23-1.7 (d) (see Beltrone v City of New York, 299 AD2d 306, 308 [2d Dept 2002]; Canning v Barneys New York, 289 AD2d 32, 34 [1st Dept 2001]; Cipolla v S.M. Flickinger Company, Inc., 172 AD2d 1064, 1065 [4th Dept 1991] [defendant's truck's running board deemed part of the work site, where it was undisputed that the truck was necessary to the performance of plaintiff's job which entailed loading concrete and dirt from a garage and hauling it away in the truck]).

Defendants also maintain that they are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (d), as the grease spot on which plaintiff slipped was the very condition which she was charged with removing (see Gaisor v Gregory Madison Avenue, LLC, 13 AD3d 58, 60 [1st Dept

2004] [plaintiff's Labor Law § 241 (6) claim based upon an alleged violation of Industrial Code 12 NYCRR 23-1.7 (d) was properly dismissed since the snow on which plaintiff slipped was the very condition he was charged with removing]).

Here, plaintiff testified that, as the sole crane oiler assigned to the crane, it was her responsibility to maintain and inspect the crane on a daily basis. Specifically, plaintiff stated that her job duties included checking the crane's oil and hydraulic system, spraying the cables and starting it up daily. Plaintiff also maintained that she never operated the crane. Plaintiff's inspections included a "walk around" wherein she would look for "[d]ebris in the way of the tracks, in case it moves back or forward" (Defendants' Notice of Motion, Exhibit E, McGhee Deposition, at 300-301). However, although plaintiff testified that she would examine the crane tracks as part of her duties, plaintiff asserted that it was not "part of [her] duties or responsibilities to maintain the tracks of the crane," and that she had been instructed at union meetings "never to touch the tracks" (Plaintiff's Affirmation in Opposition, Exhibit A, Plaintiff's October 26, 2007 Affidavit, at 4).

Documentary and testimonial evidence in the record indicate that plaintiff's employer, Carlton, assumed the exclusive responsibility to maintain and care for the crane once the crane was delivered as per the lease agreement with Vergona, and did, in fact, carry out these duties. Joseph Vergona (Joseph), owner of Vergona, stated that, pursuant to the rental agreement between Vergona and Carlton, Carlton was responsible for the safety of the crane at the job site once it was delivered, as well as any inspections of the crane. Joseph noted that Carlton had "people that are qualified to assemble these cranes, take them apart, repair them, upkeep them" (Plaintiff's Affirmation in Opposition, Exhibit H, Vergona Deposition, at 41-42). Notably,

Joseph stated that Carlton was also responsible for "seeing that the crane is maintained and kept in good working order, clean" (id. at 83).

In his affidavit of May 24, 2007, Miles Eaddy (Eaddy), assigned to work at the job site by HRH, stated that he had observed a Carlton employee cleaning the crane's catwalk and tracks with a product called "Speedy Dry," which is used to quick dry oil to prevent slipping by individuals walking in that area (Plaintiff's Notice of Cross Motion, Exhibit C, Eaddy Deposition, at 2). Eaddy also stated that he had observed the Carlton employee using "sand to dry the oil spots," as well as cleaning the crane's catwalk and treads by hosing those areas with water and by using a shovel to clear the oil that had spilled (id. at 3).

As there is conflicting evidence as to whether plaintiff was charged with the duty to keep the tracks of the crane clean, creating a triable issue of fact, defendants are not entitled to summary judgment on plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (d).

However, Industrial Code sections 12 NYCRR 23-1.7 (e) (1) and (2), which deal with hazards which may cause "[t]ripping," do not apply to the instant case. Here, plaintiff's injuries were not caused by plaintiff tripping on dust or debris. Instead, plaintiff's injuries were caused when she slipped on grease which was present on the track of the crane. Thus, moving defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2).

By cross motion, dated June 11, 2007, plaintiff moved this court to serve a second supplemental bill of particulars alleging violations of Industrial Code 12 NYCRR 23-8.1 (b) (1) and (3), which sections require inspections of cranes at work sites. It should be noted that,

although Industrial Code 12 NYCRR 23-8.1 (b) (1) is specific enough to raise a triable issue (see Howell v Karl Koch Erecting Corporation, 192 Misc 2d 491, 494 [Sup Ct, Bronx County 2002]), these claims as against moving defendants must fail in any event. In plaintiff's bill of particulars, plaintiff stated that she "does not claim defective or improper repair" (Defendants' Notice of Summary Judgment, Exhibit C, Plaintiff's Bill of Particulars, at 9). In addition, evidence in the record indicates that it was plaintiff's responsibility to inspect the crane once it was delivered to the job site, and plaintiff has not demonstrated that any alleged failure to inspect the crane was the proximate cause of her accident.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Although defendants in this case argue the issue of supervision, or lack thereof, on the part of defendants, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. Here, a review of the record reveals that the grease and dirt spot that caused plaintiff's accident was not a result of plaintiff's work in maintaining the crane, but the result of an unsafe condition created by grease and construction

dirt and debris falling onto the tracks of the crane.

In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (see Keating v Nanuet Board of Education, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but, rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200, when it had control over the work site and actual or constructive notice of the same]; In the Matter of NYC Asbestos Litigation, 5 NY3d 486, 494 (2005); Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, there is no evidence in the record to suggest that defendants created the unsafe condition that caused plaintiff's accident. However, defendants have not sufficiently set forth that they did not have actual or constructive notice of the unsafe condition, so as to be entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim as against them. In support of their contention that defendants did not have actual or constructive notice of the unsafe condition at issue, defendants put forth only the deposition of Frank Randazzo (Randazzo), assistant project manager for HRH at the time of plaintiff's accident. Randazzo testified that HRH was responsible for safety at the job site. He noted that if HRH employees observed unsafe conditions during their regular walk-throughs of the job site, they would direct the offending contractor to correct the problem immediately. HRH was notified of unsafe conditions by its

own observation reports or by complaints made by workers or laborers to HRH employees. Randazzo maintained that he never received any complaints about debris in the area of the crane, and he was never aware of any greasy or oily condition on the tracks of the subject crane. In addition, Randazzo stated that HRH did not direct the work of the Carlton employees. It should be noted that, with the exception of defendant HRH, defendants did not submit any evidence to the effect that HRH's co-defendants did not have actual or constructive notice of the unsafe condition at issue.

However, plaintiff testified that, in addition to complaining to her supervisor and to one of the crane operators about the grease and dirt spots on the tracks of the crane, prior to her accident, she had complained several times to an employee of HRH about the subject unsafe condition. To that effect, plaintiff testified that she complained to a representative from HRH, whom she identified by a jacket with an HRH logo on it, about the unsafe condition "often," which she described as "[e]very morning" (Defendants Notice of Motion, Exhibit E, McGhee Deposition, at 89). Plaintiff also told the HRH representative that "the tracks are dirty and it needs to be cleaned," wherein the HRH representative told plaintiff that he would "get around to it" (id. at 93).

A plaintiff may establish constructive notice by demonstrating an ongoing and recurring dangerous condition in the area of the alleged accident (Solazzo v New York City Transit Authority, 21 AD3d 735, 736 [1st Dept], affd 6 NY3d 734 [2005]; Maza v University Avenue Development Corporation, 13 AD3d 65, 65 [1st Dept 2004][general contractor correctly found liable under Labor Law § 200 where it had the authority to direct trades and its own employees to clean up the site, and it was not disputed that construction debris had been present and continued

to accumulate in the area]; O'Connor-Miele v Barhite & Holzinger, Inc., 234 AD2d 106, 106-107 [1st Dept 1996][plaintiff may establish constructive notice by evidence that an ongoing and recurring dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord]).

In her affidavit of October 26, 2007, plaintiff maintained that she noticed dirt, grease and wood embedded in the tracks that appeared to have existed for a very long time prior to the date of her accident. Plaintiff explained that dirt that had accumulated from overhead, and other areas of construction activity had concealed the boundaries of the grease spot, thereby preventing her from avoiding the greasy spot at the time of her accident. To that effect, plaintiff stated that since she had been working at the job site, there had been "construction dirt and debris constantly flying everywhere," and that she would "sometimes see blots of grease fall from the crane" as it would spin around on its pivot (Plaintiff's Notice of Cross Motion, Exhibit A, McGhee Affidavit, at 3).

Eaddy also stated that, during the times that he observed the crane in use, he observed grease flying from the crane onto the crane's catwalk and tracks. Eaddy also noted that, on a daily basis, he would observe sawdust and concrete dust flying from the decks of the building and falling onto the crane, and the Carlton employees would wipe down of the side of the crane to remove it. As such, defendants may also be charged with constructive notice of the unsafe condition which caused plaintiff's accident.

As defendants have not sufficiently established that they did not have actual or constructive notice of the unsafe condition that caused plaintiff's injuries, defendants are not entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law §

200 claims as against them. In addition, liability under Labor Law § 200 "is not negated by the 'open and obvious' nature" of the unsafe condition, as "these factors go to plaintiff's comparative negligence" (see Maza v University Avenue Development Corporation, 13 AD3d at 65, citing Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 73 [1st Dept 2004]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the parts of defendants HRH Construction LLC, Jefferson at White Plains, L.P., Jefferson at White Plains, LLC, Westchester County Industrial Development Agency, JPI Apartment Development, L.P. and JPI Apartment Construction L.P.'s motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Vivian M. McGhee's Labor Law § 240 (1) claim, as well as plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (e) and 23-8.1 (b) (1) and (3) are granted; and it is further

ORDERED that the parts of defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (d) are denied; and it is further

ORDERED that the remainder of the action shall continue; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties with notice of entry.

DATED: April 14, 2008

Hon. Doris Ling-Cohan, J.S.C.