SHORT FORM ORDER

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INDEX No. 05-12884

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9/26/07
ADJ. DATE 1/2/08
Mot. Seq. # 003 - MotD

ROBERT HOWARD,

Plaintiff,

- against -

SOUTHERN CONTAINER CORP.,

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 16; Replying Affidavits and supporting papers 17 - 18; Other 19-21 (stipulations of adjournment); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment is granted to the extent that all claims alleged for violation of the New York State Labor Law §§200, 240, 241 and under the Industrial Code are dismissed (***Padula v Lilarn Props. Corp.***, 84 NY2d 519, 620 NYS2d 310 [1994]; Labor Law §242; CPLR 3212[e]; ***Feris v Port Authority of New York and New Jersey***, 40 AD3d 276, 835 NYS2d 150 [2007]); and it is

ORDERED that summary judgment on the remaining claims for negligence is denied absent prima facie proof of entitlement and the existence of issues raised for trial regarding the defendant's nondelegable duty to maintain the premises in a reasonably safe condition under the circumstances so as to prevent foreseeable harm to the persons who may frequent the site (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NYS2d 557, 427 NYS2d 597 [1980]; ***S.J. Capelin Associates v Globe Mfg.***, 34 NY2d 338, 357 NYS2d 478 [1974]; CPLR 3212[b]); and it is

ORDERED that the parties are directed to confer and stipulate in writing, within twenty (20) days of entry of the within order, as to a choice of law between Tennessee and New York to expedite the

disposition of the negligence and premises liability claims. Defendant has expressly discussed the prevailing standards under Tennessee law without discussion or comparison with New York law. Upon cursory review the difference between New York and Tennessee law appears negligible. Both states require that there be a duty to plaintiff, a breach, or the existence of a dangerous, defective condition created by the defendant/owner, or on notice, actual or constructive, with sufficient time for the defendant to remedy the defect. This record does not reflect that a conflict of law or prejudice from either state law despite the fact that "conduct regulation" aspect favors the use of Tennessee law. Both of the named parties are New York domiciliaries. Defendant's subcontractor, RCR, is a Tennessee corporation, which admits construction of the offending steps. Although RCR is not a named party to this action, the corporation may be subject to third-party or independent action by the defendant herein. However, in the event a stipulation is not signed and filed as directed, the standards provided by Tennessee law for premises liability shall be imposed to determine the issue (***Cooney v Osgood Mach., Inc.***, 81 NY2d 66, 595 NYs2d 919 [1993]; ***Padula v Lilarn***, *supra;* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Mangum v Golden Gallon Corp.***, 1999 Tenn App Lexis 138); and it is further

ORDERED that the claims for which summary judgment has been granted are severed from the remaining causes of action, which continue for prosecution and trial (CPLR 3212[e]).

This action between New York domiciliaries arises out of a work-related accident which occurred on June 15, 2004 at a construction site in Murfreesboro, Tennessee. Plaintiff was a driver/laborer employed by Nassau Printing Machinery, a New York corporation located in Copiague, NY. Nassau Printing is a subcontractor of Bobst Machinery, a Roseland, New Jersey, corporation which sells and installs machinery. Bobst, in turn, was subcontracted to the RCR Building Corp., a Nashville, Tennessee, corporation. The latter is general contractor of the construction project involving defendant/owner's manufacturing plant located in Tennessee. Defendant is also licensed to do business in New York and owns plants located in Hauppauge and Deer Park, New York. In addition, the defendant owns plants in Massachusetts, Pennsylvania, South Carolina, North Carolina and Murfreesboro, Tennessee. Defendant, which manufactures corrugated boxes, has been in business at least fifty-five years. Pursuant to the contract of July 24, 2003 and the testimony of Engineering Vice President John Telesca, the owner affirmatively oversaw the Tennessee project. Telesca testified that upon successful bid, RCR was chosen general contractor for the construction of a 280,000 square-foot facility with 5,000 square feet of office space. RCR employed Juan DeLeon, who fabricated the stairs at the loading dock of the new plant for trailer parking.

RCR commenced the Murfreesboro construction in 2003. Defendant subcontracted with RCR and separately with Bobst Machinery to purchase and install machinery at the Tennessee site. Bobst then subcontracted with Nassau Printing for machinery delivery and installation. Southern Container Vice President Telesca testified he was on work site of the plant for two days, one week prior to the accident, on or about June 8, 2004. RCR was on site, and Bobst installed the machinery. Deliveries were made by Nassau Printing at the loading dock into the structure and wooden steps constructed by RCR provided access to either end of the loading dock. The steps were flush to the floor of the 4' x 6' platform and approximately 4' wide. Telesca recalls that both sides of the steps had wood handrails, which were nailed or bolted to the frame of the steps.

Alternate access to the building was available from the other side of the building, where a truck could drive into the building at the rear to deliver large pieces of machinery. The ramp was grade level. Telesca held weekly and biweekly job site meetings for progress reports from RCR. Photos were taken of the progress. Tilesca was also on site on June 16, 2004 and observed that the temporary staircase was in the same condition as before and recalled that handrails existed, with no side enclosure but for "stringers" on both sides. "Stringers" are two side boards that hold the step planking in place.

On June 15, 2004 plaintiff arrived at the site loading dock with a tractor-trailer to deliver printing machinery. A forklift unloaded the equipment inside the building from the truck parked on a concrete ramp inside the building. At 11:30 a.m. plaintiff attempted to exit the building from the loading dock area by the temporary wood stairs. The outside steps were wet from rain and the plaintiff slipped on the exposed steps, fell to the ground, and was injured. Plaintiff claims there were no handrails on the 2' x 6' steps and that the steps were open on both sides.

Three coworkers, Joe Incarnato, Wayne Signorelli and Donnie Signorelli, assisted the plaintiff to a van. Joe Incarnato drove plaintiff to the hospital, where he was x-rayed, splinted and provided with crutches. Three hours later plaintiff returned to the work site for two hours. The men reported the incident. Plaintiff remained at a local hotel for a day and proceeded to drive the tractor-trailer from Tennessee to New York. During the 41-hour drive he stopped, slept in the truck and arrived in New York on June 18, 2004. He left the truck at the Island Printing Yard, 19 Dixon Avenue, Copiague, picked up his car and returned to his home. On Monday, June 21, 2004, the plaintiff sought further medical attention from Dr. Fabishaw at Suffolk Orthopedic. New x-rays were taken, and the plaintiff was casted.

This action commenced on June 13, 2005. Plaintiff alleges violation of the Labor Law, Industrial Code and negligence by defendant/owner. Defendant answered, asserting general denials and six affirmative defenses, for contribution, assumption of apparent risks, shared liability and for non-economic loss pursuant to CPLR Art. 16, collateral source indemnity, pursuant to CPLR 4545[c], dismissal for non-conveniens, CPLR 327, and for failure to name as necessary parties defendant the RCR Corp. and Bobst, Inc.

The Labor Law of New York is local state law not applicable to breaches of statute outside the state. Thus, partial judgment is warranted on all relevant claims alleged in the amended verified complaint based on the New York Labor Law and the Industrial Code (CPLR 3212[b]; Labor Law §242). However, the cause of action under OSHA and for owner negligence and premises liability is proper under New York and Tennessee law.

When a choice of law issue is raised, New York employs an interest analysis to determine which of competing jurisdictions has a greater interest. This is determined by an evaluation of facts relating to the purpose of a particular law. Two separate inquiries are applied to ascertain the greater interest: (1) significant contacts, location; and (2) whether the purpose of the law is the regulation of conduct or the allocation of the loss. When conduct is involved, the law of the place where the incident occurred is predominant, since the interest of the jurisdiction at stake is for the protection of reasonable expectations relied on to govern present and future conduct within the jurisdiction. This outweighs interests of

common domicile unless remedial rules are frustrated or public policy is violated (***Cooney v Osgood Mach., Inc.***, *supra*; ***Padula v Lilarn***, *supra*). Therefore, in the event the parties fail to stipulate to law in either jurisdiction, Tennessee law will prevail (***Mangum v Golden Gallon Corp.***, *supra*).

In this case the defendant clearly describes Tennessee standards for premises liability without comparison to New York law. The owner of the premises is not an absolute insurer of safety in either jurisdiction, provided there is no breach of the nondelegable duty to maintain the property in reasonably safe condition under the relevant circumstances. There is no dispute that the staircase in issue was constructed by an agent of defendant RCR. As general contractor, RCR's employee constructed the steps. Notice is not an issue. Nevertheless, actual notice existed pursuant to the testimony of John Telesca, who observed the steps one week prior to and one day after the accident while on site. However, questions are raised as to whether reasonably safe premises were provided under the circumstances, based on the nature of the project, the frequency of use, the contradictory evidence regarding handrails, and open sides (***Basso v Miller***, *supra*; ***Mangum v Golden Gallon Corp.***, *supra*).

The joinder of RCR Corp., a Tennessee corporation , and Bobst Corp., a New Jersey corporation, is neither indispensable nor within the jurisdiction of this court. However, neither is a necessary party, and no prejudice is shown since effective remedy is available to the defendant pursuant to contract, third-party or independent actions in the respective states of corporate domicile (CPLR 1001, 1007, 1008).

Dated: 3/ March 08

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION