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

PRESENT: HON. MILTON A. TINGLING J.S.C. PART 44

Index Number : 113806/2005
SPECCHIO, JOSEPH
VS
720 FIFTH RETAIL
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/3/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with adjoining decision.

FILED
APR 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/16/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ DO NOT POST ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

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JOSEPH SPECCHIO and NANCY SPECCHIO,

Plaintiff,

-against-

720 FIFTH RETAIL, LLC, E-J ELECTRIC INSTALLATION CO., E-J COMMUNICATION SYSTEMS, MacKENZIE KECK, INC., and MUTUAL ELECTRIC,

Defendants.

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Index No.
113806/05

Motion Sequence No.
002

MILTON TINGLING, J.:

In this action to recover monetary damages for a workplace injury allegedly suffered by Joseph Specchio (Specchio), defendant MacKenzie Keck, Inc. (MacKenzie) moves for partial summary judgment: (1) dismissing plaintiffs' common-law negligence and Labor Law §§ 200 and 241 (6) causes of action against it; as well as (2) on its cross-claims against co-defendants E-J Electric Installation Co. (E-J Electric), E-J Communication Systems (E-J Communication), and Mutual Electric (Mutual). Finally, MacKenzie seeks an inquest to determine the amount of legal fees it may recover from its co-defendants.

Plaintiffs cross-move for partial summary judgment on their Labor Law § 240 (1) claims against all defendants.

For the reasons stated below, McKenzie's motion is granted only to the extent of dismissing plaintiffs' Labor Law § 240 (1) claim, and is otherwise denied. Plaintiffs' cross motion is denied.

Background

Plaintiffs allege that, on September 2, 2005, Specchio, an employee of non-party Garrison Keck, Inc, was working on a construction project at 720 Fifth Avenue, New York New York (the project), when he was struck by a previously hoisted falling BX cable.

According to Specchio, he was walking on the first floor of the building being renovated, toward a co-worker, when he heard the banging of metal. Plaintiffs allege that immediately thereafter, Specchio was struck in the eye by sharp edge of a roll of BX cable that was falling from above. There is no dispute that, at the time of Specchio's accident, an E-J Electric electrician named "Kurt" was standing on a ladder a few feet from Specchio, and was working with BX cable in the ceiling above.[1]

In their September 23, 2005 complaint, plaintiffs seek monetary damages under common-law negligence, as well as for

[1] It is uncontroverted that Specchio was not supplied with or wearing protective eyewear at the time of his accident, and that the accident was not witnessed by anyone working on the project.

violations of Labor Law §§ 200, 240 (1), and 241 (6)[2] as against 720 Fifth Retail, LLC (720 Fifth), the alleged owner;[3] MacKenzie, the general contractor; Mutual, the electrical subcontractor; and both E-J Electric and E-J Communication, sub-subcontractors. In its November 29, 2005 answer, MacKenzie denies all allegations and seeks common-law and contractual indemnification against all co-defendants.[4]

Discussion

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

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[2] Plaintiffs predicate their Labor Law § 241 (6) claims on violations of Industrial Code sections 23-1.7, 23-1.8, 23-1.13, 23-1.21, 23-1.30, and 23-2.1, as well as OSHA violations.

[3] Pursuant to a January 3, 2008 Order of this Court, plaintiffs' complaint as against 720 Fifth is dismissed.

[4] E-J Electric, E-J Communication, and Mutual seek common-law indemnification and contribution from MacKenzie and 720 Fifth in their May 15, 2006 answer.

Common-Law Negligence and Labor Law § 200

To establish a prima facie case of common-law negligence in any action, a plaintiff is required to establish that: (1) a defendant either created or had notice of the alleged dangerous or defective condition, and (2) that the alleged dangerous condition was the proximate cause of the injury. See LaRose v Resinick Eighth Ave. Associates, LLC, 26 AD3d 470 (2d Dept 2006); see also Gatto v Turano, 6 AD3d 390 (2d Dept 2004). Absent proof of such notice, allegations of negligence must be dismissed. See Linares v United Management Corp., 16 AD3d 382 (2d Dept 2005).

Labor Law § 200 is a codification of an owner and general contractor's common-law duty to maintain a safe workplace. See Gasper v Ford Motor Co., 13 NY2d 104 (1963); see also Buckley v Columbia Grammar and Preparatory, 44 AD3d 263 (1st Dept 2007). In the context of a Labor Law case, if a defective condition is alleged to be the cause of a worker's injuries, the worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it. See Higgins v 1790 Broadway Assocs., 261 AD2d 223 (1st Dept 1999); see also Balaj v Equitable Life Assur. Soc. of U.S., 211 AD2d 487 (1st Dept), lv denied 85 NY2d 811 (1995). Supervision and control of the injured worker is not required when a claimant alleges the existence of defective condition. See Murphy v Columbia University, 4 AD3d 200 (1st Dept 2004).

If, however, the accident is the result of the injured worker's methods, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition" to be held liable under Labor Law § 200. Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981); see also McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796 (2d Dept 2007).

Plaintiffs' contend that Specchio was struck by the dropping of BX cable (see Notice of Motion, Exh. C, Specchio Examination Before Trial [EBT] at 55-56; Notice of Cross-Motion, Affidavit of Chris DeCicco). The only electrician in the vicinity at the time of the accident, defendant E-J Electric's employee, Kurt Cruikshank (Cruikshank), testified, however, that he was not "pulling" the BX cable on that day. According to Cruikshank, on the day in question, he was installing fixture boxes for lighting in the open ceiling. See Notice of Motion, Exh. E, Cruikshank EBT at 22, 65. Cruikshank additionally testified that the cable near Specchio at the time of his accident had been hanging there at least for one day, and its end was only 1-2 feet above ground level, i.e., the floor. Finally, Cruikshank stated that just prior to hearing Specchio scream, Cruikshank saw him bending down close to ground level. See id. at 23, 29, 32, 47, 53-54, 62-64, and 78.

Clearly, plaintiffs and defendants disagree as to how Specchio's accident occurred. They all do agree, however, that at the time of the accident, there was at least one BX cable in Specchio's vicinity either hanging out of the open ceiling or falling from it.

Whether one accepts as true either Specchio or Cruikshank's version of the events leading up to Specchio's accident, the BX cable, which did not have tape covering its sharp metal edge, was involved. In either version, it is an alleged dangerous or defective condition that was involved. Therefore, any liability that may be assessed against MacKenzie will be because the general contractor either created or had actual or constructive notice of the alleged dangerous or defective condition.[5]

There is no proffered evidence that MacKenzie created the alleged dangerous condition, however, there are questions of fact as to whether the general contractor had actual or constructive notice of the hanging or dropping BX cable. MacKenzie's job superintendent at the building, Raymond Meajher (Meajher), testified that he checked safety hazards "constantly. ... [i]f a cable came down and wasn't put back I would get some[one] to put

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[5] "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836 (1986).

the cable back or ... would personally do it [himself]." See Notice of Motion, Exh. D, Meajher EBT at 23. It was unclear from his testimony whether or not Meajher was at the building every day (see Meajher EBT at 22-23), and specifically on the days leading up to and day of Specchio's accident (see id. at 31), or whether another McKenzie employee was doing walkthroughs in the building on those days. However, if a trier of fact finds credible Cruikshank's testimony that the BX cables had been hanging over the floor for at least one day, there would be material questions of fact as to whether MacKenzie had actual or constructive notice of a possible dangerous condition, and would, therefore, be liable under common-law negligence or a violation of Labor Law § 200. Thus, that portion of MacKenzie's motion to dismiss those claims is denied.

Labor Law § 240 (1) Claims

Under Labor Law § 240 (1), owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. See Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991); see also Rizzo v Hellman Elec. Corp., 281 AD2d 258 (1st Dept 2001).

In all such cases, a plaintiff must show that the statute

was violated and the such violation was the proximate cause of the victim's injuries. See Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004).

That section of the Labor Law "applies to tasks that ... involve a significant inherent risk 'because of the relative elevation ... at which materials or loads must be positioned or secured " (Cammon v City of New York, 21 AD3d 196, 200 (1st Dept 2005) [citing Rocovich v Consolidated Edison Co., supra, 78 NY2d at 514]), and is applicable to "falling object" cases, as well as to those where the injured party falls from a height (and that load was required to be secured). See Narducci v Manhasset Bay Associates, 96 NY2d 259 (2001). "[F]alling object liability is not limited to cases in which the falling object is being actively hoisted or secured at the time it falls." Quattrocchi v F.J. Sciame Const. Corp., 44 AD3d 377, 380 (1st Dept 2007); see also Outar v City of New York, 5 NY3d 731 (2005). However, "not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." Narducci v Manhasset Bay Associates, 96 NY2d at 267. However, "[t]he statute does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction

site." Buckley v Columbia Grammar and Preparatory, 44 AD3d at 267.

Even if the BX cable fell on Specchio in the manner plaintiffs' contend, there is no proffered evidence that any of the devices listed in Labor Law § 240 (1), i.e., "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed," would have prevented the BX cable from accidently falling and injuring him. If it happened in the manner postulated by Cruikshank, that the BX cables had been hanging for more than a day in the same position, as a matter of law, such cables were not "falling objects" within the meaning of the Statute.

Therefore, this court holds that Labor Law § 240 (1) is inapplicable to the facts of this action, and that, therefore, plaintiffs' cross motion for summary judgment on their Labor Law § 240 (1) claims are denied. Additionally, searching the record, because plaintiffs cannot, as a matter of law, be successful on their Labor Law § 240 (1) claims as against any of the defendants, all such claims are dismissed.

Labor Law § 241 (6) Claims

MacKenzie further seeks summary judgment dismissing all of plaintiffs' Labor Law § 241 (6) claims. Plaintiffs do not seek

summary judgment on these claims in their Notice of Motion (as required by CPLR 2214), however, they do contend that they are entitled to summary judgment on those statutory claims predicated by violations of Industrial Code sections 23-1.7 (a) (1) and 23-1.8 (a) in both their Memorandum of Law and reply papers. Because the matters are fully briefed by both sides, this court will exercise its discretion (see Pace v Perk, 81 AD2d 444, 440 N.Y.S.2d 710 [2d Dept 1981]) and a discussion and decision on the issue follow.

Labor Law § 241 (6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The section requires owners and contractors at a construction site 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." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 (1993).

Plaintiffs predicate their Labor Law § 241 (6) claims on violations of Industrial Code sections 23-1.7, 23-1.8, 23-1.13, 23-1.21, 23-1.30, 23-2.1, as well as OSHA violations.

Because "[o]nly a violation of the State Industrial Code and

regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under that statutory section" (Heller v 83rd Street Investors Ltd. Partnership, 228 AD2d 371, 372 [1st Dept], lv denied 88 NY2d 815 [1996]; see also Messina v City of New York, 300 AD2d 121 [1st Dept 2002]), alleged violations of OSHA Regulations cannot serve as a predicate to liability under Labor Law § 241 (6). See Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 (1998).

As respects sections of the Industrial Code allegedly violated, plaintiffs first seek to predicate their Labor Law 241 (6) claims on 12 NYCRR 23-1.7 (a) (1). That section, which relates to "Overhead Hazards," states:

> Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

That section is sufficiently specific to support a Labor Law § 241 (6) claim. See Murtha v Integral Const. Corp., 253 AD2d 637 (1st Dept 1998); see also Zuluaga v P.P.C. Const., LLC, 45 AD3d 479 (1st Dept 2007). However, "where an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply." Buckley v Columbia Grammar and Preparatory, 44 AD3d at 271.

Both Specchio and his co-worker testified that there was a large noise just prior to Specchio being hit in the eye. Whether or not the BX cable fell or Specchio banged into a cable already hanging is a question of fact to be determined at trial. But plaintiffs have proffered no evidence that Specchio was normally exposed to falling BX cable. Cruikshank testified that he was not cutting or "pulling" the cable just prior to the accident. Even if the BX cable accidently fell, there is no proffered evidence that cable is dropped in the regular course of installing lighting fixture boxes. Thus, this Court holds that, under the facts of this action, 12 NYCRR 23-1.7 (a) (1) cannot be used to support their Labor Law § 241 (6) claims.

Plaintiffs additionally seek to predicate their Labor Law § 241 (6) claims on 12 NYCRR 23-1.8 (a). Under that section, "[a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons 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."

Neither Specchio or his co-worker were wearing protective goggles on the day of the accident. Specchio testified that although he had worn such protection on other jobs, he was not issued any on this project. See Specchio EBT at 34-38; see also

DeCicco Affidavit. According to Specchio, at the time of his accident, he was crossing the floor to assist DeCicco with layout. See id. at 49. Whether in fact, in doing so, Specchio was engaging in activities within the Industrial Code's catch-all phrase, "any other operation which may endanger the eyes" is a question of fact for trial. See Badzmierowski v PBAK, LLC., 5 Misc 3d 1005(A) (Sup Ct, New York County 2004); see also Fresco v 157 East 72nd Street Condominium, 2 AD3d 326 (1st Dept 2003).

Finally, MacKenzie seeks dismissal of plaintiff's Labor Law § 241 (6) claims predicated on Industrial Code sections 23-1.13, 23-1.21, 23-1.30, and 23-2.1.

Industrial Code section 12-1.13 concerns electrical hazards at a demolition and excavation site. Although such section is sufficiently specific to support a Labor Law § 241 (6) claim (see Hernandez v Ten Ten Co., 31 AD3d 333 [1st Dept 2006]), it is not applicable to the facts at issue in this action.

Plaintiffs' claims based upon 12 NYCRR 23-1.21 are similarly dismissed, due to the inapplicability of the facts of this action to the regulation. See Hart v Turner Const. Co., 30 AD3d 213 (1st Dept 2006).

Section 23-1.30 requires:

> [i]llumination sufficient for safe working conditions ... wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or

similar area where persons are required to pass.

Specchio testified that the lighting was not very good, but that he could see his co-workers, tools, where he was walking, and other people's faces. Further, he stated that he had made no complaints previously about the lack of sufficiency of the temporary lighting in the building. See Specchio EBT, at 46-48. Although the section is sufficiently specific to support a Labor Law § 241 (6) claim, such vague testimony that the lighting was "not very good" is insufficient to support a Labor Law § 241 (6) claim predicated on 12 NYCRR 23-1.30. See Carty v Port Authority of New York and New Jersey, 32 AD3d 732 (1st Dept 2006), lv denied 8 NY3d 814 (2007).

Industrial Code section 23-2.1 concerns maintenance and housekeeping on construction sites. Particularly, the section regulates the storage of material and equipment and disposal of debris. Although this section too is sufficiently specific to support a Labor Law § 241 (6) claim (see Castillo v 3440 LLC, 46 AD3d 382 [1st Dept 2007]), it is not applicable to the facts at issue in this action.

Therefore, all of the Industrial Code sections plaintiffs seek to use as predicates for their Labor Law § 241 (6) claims except 12 NYCRR 23-1.8 are dismissed. There are material questions of fact as to whether 12 NYCRR 23-1.8 applies to this action. Thus, that portion of MacKenzie's motion that seeks

dismissal of plaintiffs' Labor Law § 241 (6) claims is denied. That portion of plaintiffs' cross motion that seeks summary judgment on its Labor Law § 241 (6) claims based upon 12 NYCRR §§ 23-1.7 and 1.8 is denied.

Common-law and Contractual Indemnification Claims

In its answer, MacKenzie alleges entitlement to both common-law and contractual indemnification from all co-defendants. Although in its Notice of Motion, MacKenzie seeks summary judgment on all of its cross-claims against E-J Electric, E-J Communication and Mutual, it only provides evidence of entitlement to common-law indemnification in its motion papers. It is not until its reply papers that MacKenzie asserts that it is also entitled to contractual indemnification from those parties. This court will address all issues below.

Common Law Indemnification

MacKenzie would be entitled to indemnification under the common-law if it both proved that it was not negligent in Specchio's accident, and that E-J Electric, E-J Communication and Mutual were responsible for such accident. See Priestly v Montefiore Medical Center/Einstein Medical Center, 10 AD3d 493 (1st Dept 2004). Because there has, as yet, been no such finding, an order of entitlement to common-law indemnification is premature.

Contractual Indemnification

MacKenzie additionally seeks an order of entitlement to contractual indemnification. This defendant predicates its request based upon the language of a May 3, 2005 one-page agreement between MacKenzie and E-J Electric (the agreement). See Notice of Motion, Exh. H.

Under that agreement, the section entitled "Indemnification" states:

> [t]o the fullest extent permitted by law, subcontractor shall indemnify and hold harmless MacKenzie ... and owner against all claims and damages, losses and expenses, including legal fees arising out of or resulting from performance of subcontracted work to the extent caused in whole or in part by the subcontractor or anyone directly or indirectly employed by the subcontractor.

As such agreement is only between MacKenzie and E-J Electric, MacKenzie may not use such clause to seek contractual indemnification against either E-J Communication or Mutual. Additionally, as respects E-J Electric, that entity never denies that it signed such agreement, however, it contends that the agreement is hearsay and, additionally, that it was signed after the work on the job began.[6]

In response to E-J Electric's opposition MacKenzie attempts to authenticate the agreement in its reply papers. However, because MacKenzie only addressed issues of common-law indemnification in its original motion papers, and "[i]n the

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[6] E-J Electric also asserts that the agreement is violative of General Obligations Law § 5-3.221.

context of summary judgment a fundamental deficiency in the moving papers may not be remedied by submitting evidentiary material with the reply" (Mushlam Inc. v Nazor, 14 Misc 3d 1219[A], 2007 N.Y. Slip Op. 50089[U], *3 [Civ Ct, New York County 2007]; see also Ritt by Ritt v Lenox Hill Hosp., 182 AD2d 560 [1st Dept 1992]), this court will not presently entertain MacKenzie's contentions regarding entitlement to contractual indemnification.[7]

Order

Accordingly, it is hereby

ORDERED that defendant MacKenzie Keck, Inc.'s motion is granted only to the extent of dismissing plaintiffs' Labor Law § 240 (1) claim, and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is denied.

Dated:

4/16/08

ENTER:

HON. MILTON A. TINGLING
J.S.C.

[7] This court notes that, as of this date, there has been no factual finding that E-J Electric was negligent in the injury of Specchio. Therefore, any contractual indemnification that MacKenzie might have been entitled to had it been moved for properly would be conditional. See Steakin v Voicestream Wireless Corp., 39 AD3d 424 (1st Dept 2007).