SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HONORABLE KENNETH A. DAVIS
Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ERIC WEINSTOCK and ELLEN WEINSTOCK,

Plaintiff,

-against-

K. CAPOLINO DESIGN AND RENOVATION, LTD.,GLENPLACE EQUITIES, LTD., and REMI COMPANIES,

Defendants.

Index No. 019024/07

Motion Submission Date: 5/23/08

MOTION SEQ. # 1

The following papers read on this motion:

Notice of Motion	X
Memorandum of Law in Support of Remi Companies' motion to dismiss	X
Affirmation in Opposition to Motion	X
Affirmation in Further Support of Motion to Dismiss	X

Upon the foregoing papers, defendant REMI COMPANIES' motion to dismiss, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), is decided as follows.

This action involves a claim for injuries sustained by ERIC WEINSTOCK while conducting a Phase-I Environmental Site Assessment at the Glenwood Power Plant which is located in Yonkers, New York. The injuries were allegedly sustained when ERIC WEINSTOCK fell through the floor at the premises. ERIC WEINSTOCK has brought causes of action against the defendants for common law negligence and violation of the Labor Law of the State of New York §§ 241(6), 200 and 240(1). The Plaintiff ELLEN WEINSTOCK brings a cause of action for loss of consortium. The action was commenced by the filing of a Summons and Complaint dated October 23, 2007. In response, the defendant REMI COMPANIES has submitted this motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and 3211(a)(7).

Defendant REMI COMPANIES maintains that the second, third and fourth causes of action against them should be dismissed since the plaintiff, ERIC WEINSTOCK, is not a member of the protected class of persons addressed in Labor Laws §§ 200, 240(1) and 241(6). Furthermore, REMI COMPANIES maintains that the first, second, third and fourth causes of action should be dismissed since it is not an owner of the Glenwood Power Plant. Rather, REMI COMPANIES purports that it is merely a "potential purchaser" or "contract vendee" of the premises and therefore had no control of the operation, maintenance or safety practices at the subject location. Additionally, REMI COMPANIES maintains that since ERIC WEINSTOCK's causes of action fail then ELLEN WEINSTOCK's cause of action for loss of consortium must be dismissed as a matter of law.

The plaintiff, ERIC WEINSTOCK alleges that by performing the Phase-I Environmental Site Assessment he is a member of the statutorily protected class under Labor Law §§ 241(6), 200 and 240(1). The plaintiff also asserts that the defendant REMI COMPANIES was a legal occupier, equitable owner, general contractor and construction manager of the premises with respect to certain office renovations and construction work to be done on the property and is therefore liable.

The Court must accept every allegation in a plaintiff's complaint as true when evaluating a motion to dismiss pursuant to CPLR § 3211(a)(7). Furia v. Furia, 116 A.D.2d 694 (App. Div. 2nd Dept. 1986). "[U]nder CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 88 (1994).

In order to make a claim under Labor Law §240(1) elevation must be a factor in the resulting injury. Linkowski v. City of New York, 33 A.D.3d 971, 974 (App. Div. 2nd Dept. 2006)(holding that an injury of slipping on wet staircase and falling through plastic netting on the landing was not an injury that resulted from an elevated risk). Elevated risks according to Labor Law § 240(1) are ". . . those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514 (1991). It has been held that falling through a floor at a work site constitutes an

elevated hazard as contemplated in Labor Law §240(1) when the plaintiff has provided evidence of an unsafe condition. See Richardson v. Matarese, 206 A.D.2d 353, 353 (App. Div. 2nd Dept 1994) (injury of falling through floor while moving a radiator was supported by evidence that the floor was not properly supported.)

Moreover, the purpose of Labor Law 240(1) was to put the responsibility of maintaining a safe workplace on the owners, contractors, and their agents. Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 559 (1993). Therefore, the duty to provide a safe workplace is non-delegable to independent contractors even if the owner, contractor or their agent is not present at the time of the injury. Id. Furthermore, contributory negligence is not a defense to a violation of Labor Law 240(1) unless the injured party was a "recalcitrant worker" who refused to use safety devices provided. Id. at 661. Additionally, the term "owner" is not limited to the titleholder and also includes those who have an interest in the property, contract to have work done on said property for his benefit, and have the "right to insist that proper safety practices were followed. . ." Lacey v. Long Island Lighting Co., 293 A.D.2d 718, 718 (App. Div. 2nd Dept. 2007) citing Copertino v. Ward, 100 A.D.2d 565. In Lacy v. Long Island Lighting Co., (Long Island Lighting Co. was not found to be the owner of the residential telephone lines which were being repaired although it was the owner of the utility pole upon which the repairman leaned his ladder). It is the duty of the plaintiff to prove that the defendant both violated the statute and that such violation was the cause of the injuries. Sprague v. Peckham Materials Corp., 240 A.D.2d 392, 393 (App. Div. 2nd Dept 1997).

The Court of Appeals has also stated that the task in which an injured employee was engaged must have been "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" in order to recover under Labor Law § 240(1). Martinez v. City of New York, 93 N.Y.2d 322, 325 (1999). In this decision, the Court of Appeals specifically ruled that when the work of an environmental inspector is to investigate and identify problem areas, and removal and correction is to be done at a time after said inspection, the work of the inspector does not fall under the class of persons protected by Labor Law §240(1) even if there are some elevation risks. Id. The argument that since the environmental assessment was part of a larger project that would be protected by Labor Law §240(1) and therefore the environmental assessment

was necessarily protected was rejected by the Court of Appeals. Id. at 326.

In the case at bar, ERIC WEINSTOCK's was performing a Phase-I Environmental Site Assessment, pursuant to a signed proposal dated May 11, 2006, when he was injured. According to said proposal ERIC WEINSTOCK's Phase-I Environmental Assessment did not include "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Although the plaintiff contends that taking and evaluating property samples from the property constitutes an act that is protected by Labor Law §240(1), this Court disagrees. In addition, the fact that the defendant REMI COMPANIES was considering participating in the NYSDEC Brownfield Cleanup Program does not change the fact that ERIC WEINSTEIN's conduction of a Phase-I Environmental Site Inspection does not constitute the type of work that was intended to be protected by Labor Law § 240(1).

Furthermore, defendant REMI COMPANIES is not the titled owner of the Glenwood Power Plant. The defendant REMI COMPANIES had contracted with co-defendant GLEN PLACE EQUITIES PARTNERS and co-defendant K. CAPOLINO DESIGN AND RENOVATION LTD. to purchase the Glenwood Power Plant in Yonkers. Pursuant to section 5(a) of said contract, REMI COMPANIES was given the ability to ". . . investigate, review and inspect any and all property, building and grounds of the Property which Buyer shall deem appropriate, including, but not limited to conducting Phase I and Phase II Environmental Site Assessments of the Property and environmental testing of the Property for the presence of environmental containments." Therefore, REMI COMPANIES was only given the ability to "investigate" the property and was not given the ability to make any changes to the property. Accordingly, REMI COMPANIES had no control to correct the alleged unsafe condition that brought about ERIC WEINSTOCK's injury. Therefore, REMI COMPANIES cannot be deemed an owner of the Glenwood Power Plant according to the criteria set forth by Labor Law §240(1). Therefore, the fourth cause of action is dismissed as against defendant REMI COMPANIES.

As to the second and third causes of action, the Court of Appeals of New York held in Gibson v. Worthington Division of McGraw-Edison Co. that a design engineer who fell through a damaged roof while inspecting for damage was not protected by Labor Law §§ 200(1) and 241(6) because "at the time the accident occurred, plaintiff was not a person "employed" to carry out the repairs as that term is used in section 200(1), . . .and section

241 (6) of the Labor Law." 78 N.Y.2d 1108, 1109 (1991). Therefore, it is understood that a worker who is retained to only inspect a piece of property is not protected by Labor Law §§ 241(6) and 200 and can only recover by proving traditional negligence. Id. at 1108-09. In the case at bar, ERIC WEINSTOCK was performing a Phase-I Environmental Site Inspection when he was injured. Accordingly, ERIC WEINSTOCK is not a member of the statutorily protected class as intended by Labor Law §§241(6) and 200 and the causes of action are dismissed.

Additionally, the Second Department relied on Copertino v. Ward when stating the criteria for a non-title holder to be deemed responsible under Labor Law §240(1). See Lacey v. Long Island Lighting Co., 293 A.D.2d 718, 718 (App. Div. 2nd Dept. 2007). However, the Court of Appeals in that decision was determining the requirements for a non-titleholder in regards to Labor Law § 241(6). Therefore, it is clear that the requirements for a non-titleholder to be deemed responsible under §240(1) are the same as Labor law §241(6). The Second Department also relied on Copertino v. Ward when deciding that the key factor when determining if a non-titleholder is liable under Labor Law § 200 is "the 'right to insist that proper safety practices were followed . . ." Ryba v. Almeida, 27 A.D.3d 718, 719 (App. Div. 2nd Dept. 2006) citing Copertino v. Ward, 100 A.D.2d 565. Here, defendant REMI COMPANIES did not have the capacity to ensure that proper safety practices were followed or to remedy the situation that brought about the injury to plaintiff ERIC WEINSTOCK. Accordingly, defendant REMI COMPANIES cannot be deemed an owner as contemplated by Labor Law §§ 241(6) and 200.

As to the first cause of action, the court finds that the claim shall be dismissed pursuant to CPLR § 3211(a)(1). "To prove a prima facie case of negligence, the plaintiff must establish the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff . . . Absent a duty of care, there can be no breach and no liability." Gordon v. Mushnick, 180 A.D.2d 715, 715 (App. Div. 2nd Dept. 1992). Section 200 of the Labor Law is a "codification of the common-law duty of an owner or general contractor to provide a safe workplace." Maes v. 408 W. 39 LLC, 24 A.D.3d 298, 301 (App. Div 2nd. Dept. 2005). Since, defendant REMI COMPANIES is not the titleholder of the Glenwood Power Plant nor had the ability to rectify the condition that brought about the injury to plaintiff ERIC WEINSTOCK the Court finds that it did not owe a duty to the plaintiff.

The fifth cause of action brought by ELLEN WEINSTOCK against defendant REMI COMPANIES must be dismissed. The cause of action for loss of consortium is dependent upon the spouse's primary cause of action. Holmes v. City of New Rochelle, 190 A.D.2d 713, 714 (App. Div. 2nd Dept. 1993). Therefore, when the primary cause of action brought by one's spouse fails, the action of loss of consortium must be dismissed. Id. In this case, ERIC WEINSTOCK's causes of actions as against defendant REMI COMPANIES fail and therefore ELLEN WEINSTOCK's claim is dismissed.

This decision constitutes the Order of the Court.

Dated: JUL 09 2008

J.S.C.

KENNETH A. DAVIS