

McComber v W2001Z/1 SCPW Realty, LLC

2008 NY Slip Op 32343(U)

August 20, 2008

Supreme Court, New York County

Docket Number: 0104132/2006

Judge: Judith J. Gische

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

PRESENT: _____
Justice

PART 10

Index Number : 104132/2006
MCCOMBER, TYLER
vs
W2001Z/15CPW REALTY
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for § 3212

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

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

*It shall serve a copy of decision on
Office of Trial Support so trial can
be scheduled*

Dated: August 20, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

Tyler McComber,

Plaintiff,

DECISION/ ORDER
Index No.: 104132-2006
Seq. No.: 003

-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

W2001Z/15CPW Realty, LLC,
Terra Holdings, LLC, and
Bovis Lend Lease LMB, Inc.,

Defendants.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

FILED

AUG 22 2008

Papers	Numbered
Defs' n/m 3212 w/NF affirm, exhs	1
Pltf's x/m 3212 w/JSD affirm, TMcC affid, exhs	2
Defs' opp and reply w/NF affirm	3
Pltf's reply w/JSD affirm	4
Transcript 6/19/08	5

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action arising from alleged violations of the Labor Law. Issue has been joined by the moving defendants who now seek summary judgment dismissing the complaint against them. Plaintiff cross moves for summary judgment on those same claims. The claims against Terra Holdings LLC were discontinued by the parties as per the written stipulation among them dated September 6, 2006. The note of issue was filed. These motions are timely; they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Arguments

On February 23, 2006 plaintiff Tyler McComber ("McComer" or "plaintiff") was injured while working on a construction project at 15 Central Park West, New York City ("the project"). At the time of his accident, McComber was employed by non-party DiFama Concrete ("DiFama"). DiFama was hired or otherwise retained by defendant Bovis Lend Lease LMB, Inc. ("Bovis") as the concrete subcontractor on this project. Bovis was hired or otherwise retained as the construction manager by defendant W2001Z/15CPW Realty, LLC, the owner of the real property where the construction was underway ("owner").

McComber and the defendants were all deposed. At his deposition ("EBT"), McComber testified that his job was to install rebar so that concrete could then be poured and a permanent floor created. He testified that his accident happened on the 11th floor while carrying a size eleven (11) rebar. The rebar was heavy and several feet long (16 - 18 feet).

McComber testified that as he was walking towards his destination with the rebar, he stepped onto the corner of a wooden or plywood board. The board bent down "like a diving board" and then gave way exposing a hole or opening beneath. His left leg went into this opening, or hole, three (3) feet or so, up to his knee. McComber provides his sworn affidavit that the hole was three (3) feet wide, and therefore big enough to accommodate his body. The defendants did not ask him at the deposition about the size of the hole. When asked other questions, however, he responded that he could see the floor below (e.g. the 10th floor) and that he noticed there were workers on that floor. He also testified that he struggled to keep the rebar on his shoulder

because he was afraid if he dropped it through the hole, the workers below would be hurt.

According to McComber, he noticed something under the board that resembled scaffolding, but he was not sure what it was and could not describe it. He testified at his EBT that he was a novice at this kind of work, and really did not know much, except how to tie rebar together ("I just learned to tie knots"). McComber also testified that on the day of the accident, the 11th floor had a lot of "exposed, open areas to go down to the tenth floor. There were gaps in the floors." EBT p170.

According to McComber's EBT testimony, he pulled his leg out of the hole, wrenching his knee, and while still struggling with the rebar so as not to drop it downstairs. He walked a few feet away where he then dropped it. McComber then went downstairs to Bovis' "MedCor" office and reported the accident. He then went home by taxi. McComber did not report to work the next day (Friday) nor Monday, calling in sick each day. He went to see a doctor on that Tuesday. He had an MRI and was diagnosed with a torn meniscus of the left knee.

The accident was witnessed by a fellow DiFama employee, ("Kidstar") whom the defendants deposed. According to Kidstar he, plaintiff and another worker were carrying rebar; McComber was in the middle. Kidstar saw McComber step and fall into a hole. According to Kidstar, plaintiff's fall was 2-3 feet. Kidstar testified that these holes were "all over" and there were "many, many holes you can fall into . . ." EBT p. 15. Kidstar testified that Bovis knew about these holes because they were all over the place.

Plaintiff contends that his accident was due to violations of the Labor Law,

sections 240 (1) and 241 (6), and also that the defendants were negligent (Labor Law § 200).

McComber claims that because his work involved a risk related to differences in elevation, and he fell from one elevation towards another, he entitled to summary judgment on his Labor Law § 240 (1) claims against both defendants, regardless of any actual negligence on their part. Plaintiff argues that assuming the plywood floor covering was itself a safety device, within the meaning of Labor Law § 240 (1), he had no backup safety protection to prevent him from falling through to the level below when the covering failed. In the alternative, plaintiff argues the floor was like a scaffold because the plywood areas were impermanent and constructed to allow work on the 11th floor which, in effect, was suspended over the 10th floor.

McComber claims that he is entitled to summary judgment on his Labor Law § 241 (6) claims because defendants violated several Industrial Code Rules and Regulations, including the following: 23-1.7 (b) (1) (i) ["falling hazards; hazardous openings"]; 23-5.1(c) and [f] ["scaffolding"]; 23-2.2 [a] and [b] ["concrete work; general requirements" and "inspection"]; and 23-1.5 (c) (2) ("general responsibility of employers - condition of equipment and safeguards"). Plaintiff also cites other regulations in his bill of particulars, that he has not cross moved on, and therefore defendants maintain he has abandoned them, among them: 23-1.15 ["safety railings"]; 23-1.7 ["vertical passage"], and 23-1.33 ["protection of persons passing by construction operations"].

Plaintiff alleges that the defendants were negligent (under the common law and Labor Law § 200) because not only did they exercise control over and supervise the injury producing work at the premises, they also had notice of a recurring problem with

holes at the work site being inadequately or improperly covered. Plaintiff contends that Bovis was responsible for site safety and that Robert Wright, Bovis' site safety manager, was onsite daily. Plaintiff deposed Wright who testified at his EBT that Bovis had the power to stop work and issue fines, if necessary. Wright also testified that there were areas of wooden temporary flooring over areas known as "penetrations." Penetrations were holes for duct work, for example. Although DiFama was responsible for laying down the wood to cover any openings, and making sure it was laid safely, Wright himself also checked the work when doing daily work throughs. Wright testified that "eventually" Bovis had its own carpenters fix improperly laid temporary flooring because of the numerous complaints it received. Wright received weekly complaints about DiFama's work. EBT p. 35.

The defendants deny all of plaintiff's claims. They contend that plaintiff's account of how his accident happened is "implausible," if not a fabrication, pointing to plaintiff's delay in seeing a doctor and the conflicting accounts about whether any rebar installation was being done on the 11th floor.

Defendants argue further that the floor plaintiff was working on was not a temporary floor at all, but a permanent and stationary floor made of concrete, and therefore plaintiff did not need any of the safety devices enumerated in Labor Law § 240 (1). D'Egido v. Frontier Insurance, 270 AD2d 763 (3rd dept. 2000); Rocovich v. Con Edison, 78 NY2d 509, 514-515 (1991). They rely upon the EBT testimony of Wright who testified about the daily reports for the day of the accident. According to Wright, the daily report for February 23, 2006 shows the 11th floor was being stripped which means that concrete had already been poured and there was no reason to be installing

rebar at that point. Wright has testified that stripping can only be done after the concrete has been poured and it is cured. Thus, according to Wright's testimony, while there might have been some wooden planking on the 11th floor, you could only see and access it from under the concrete.

Defendants further allege that plaintiff did not "fall," and therefore his accident does not come within the protections of Labor Law § 240 (1). They argue that plaintiff stepped into an opening, but he lifted his leg out, without falling and therefore his accident had no difference in elevation component.

Defendants urge the court to grant them summary judgment on plaintiff's Labor Law § 241 (6) claim because he relies on Industrial Code regulations that are either inapplicable, or only set forth general requirements, and therefore he has not set forth the predicate basis for a Labor Law § 241 (6) claim. Defendants maintain that they provided plaintiff with the safety gear he needed to safely perform his job, such as goggles, gloves, and a hard hat. They deny that he needed any safety devices, such as a safety belt, harness, tail line or lifeline because plaintiff was not working on a platform, or temporary structure when the alleged accident occurred.

Defendants argue that they are entitled to summary judgment dismissing plaintiff's Labor Law § 200 (common law negligence) claims because they did not instruct plaintiff on how to perform his job, nor supervise his work. They rely on plaintiff's EBT testimony that he took his assignments from DiFama's foreman, and he did what the foreman told him to do. Defendants further contend that any general supervisory rights they maintained are well below the threshold degree of supervision necessary to expose them to liability under Labor Law § 200.

Standard applied to motions for summary judgment

Each proponent seeking summary judgment its favor has the initial burden of setting forth evidentiary facts to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the opposing party who must establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

Labor Law § 240 (1)

Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. Carpio v. Tishman Const. Corp. of New York, 240 AD2d 234, 234 (1st Dept 1997) (*citing* Rocovich v. Consolidated Edison Co., 78 NY2d 509, 513 [1991]); Bland v. Manocherian, 66 N.Y.2d 452, 459 [1985]; Singh v. Barrett, 192 AD2d 378, 379 [1st Dept 1993]). The statute is directed at elevation-related hazards and 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. Carpio v. Tishman Const. Corp. of New York, 240 AD2d at 235 (*internal citations omitted*). Since the purpose of Labor Law § 240 (1) is to protect workers from elevation-related risks, it is liberally construed so as to accomplish the purpose for which it was enacted. Misseritti v. Mark IV Constr. Co., 86 NY2d 487 (1995); Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*; Rocovich v. Consolidated Edison, *supra*.

It is well established law that a risk of injury exists when there is a difference in elevation between the level where a worker is performing a required task and a lower level where, for example, the worker falls down to. Carpio v. Tishman Construction Corporation of New York, *supra*; O'Connor v. Lincoln Metrocenter Partners, L.P., 266 AD2d 60 (1st dept. 1999). It is also well established law that even a partial fall through a hole in a flat surface is within the protections of Labor Law § 240 (1). Carpio v. Tishman Construction Corporation of New York, *supra*; O'Connor v. Lincoln Metrocenter Partners, L.P., *supra*. Thus, whether a worker falls from a flat or permanent surface is irrelevant; the deciding factor is whether a properly placed safety device could have prevented the worker's fall. Ross v. Curtis-Palmer Hydro Electric Co., *supra*.

To establish liability, and therefore his entitlement to summary judgment on his Labor Law § 240 claim, plaintiff must set forth a violation of the statute, and that such violation was a proximate cause of his injuries. Consolidated Edison Co., 78 NY2d 509, 513 (1991); Comes v. New York State Electric & Gas Co., 82 NY2d 876 (1993).

Plaintiff has proved that he was working on the 11th floor at the time of his accident and that the building was still under construction. Plaintiff has also proved that

he was required to walk across an area where there was plywood. He has proved through his own testimony and that of an eyewitness (Kidstar) that he stepped onto a piece of plywood and it gave way. The board was covering an opening in the surface. When it gave way, he stepped and fell into the hole directly beneath the board. His leg went into the hole up to his knee. Plaintiff reported the accident to Bovis after it happened.

Even accepting defendants' facts, that there was poured concrete on the 11th floor, and plaintiff was not installing rebar, it is unrefuted that there were openings throughout the construction site, including on the 11th floor. According to Wright these openings or penetrations were there to allow for materials to pass through from floor to floor. Those openings were holes, not gaps, troughs or "potholes." Compare Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 (1991) (fall into 12 inch deep trough with hot oil); Kulovany v. Cerco Products, Inc., 26 AD3d 224 (1st Dept 2006) (leg plunged through defective trailer floor); Piccuillo v. Bank of New York, 277 AD2d 93 (1st Dept 2000) (fall into a finite hole or opening used to access wiring embedded into the floor); Serna v. WFP Tower A Co., L.P., 11 Misc3d 1083(A) (Sup. Ct. NY Co. 2006) (foot through a small hole). The holes were varied in size, able to accommodate anything from an elevator shaft to plumbing, etc.

Although defendants challenge how plaintiff's accident happened, regardless of whether the 11th floor was being stripped or concrete had been poured, plaintiff has proved that he fell through an opening in the surface of the 11th floor. John v. Baharestani, 281 A.D.2d 114 (1st Dept 2001). Thus, whether the floor was being stripped (as defendants contend), or plaintiff was still installing rebar (as he contends),

there were still temporary hole covers on the 11th floor.

Plaintiff admittedly did not fall all the way through the hole after the temporary covering failed, but he has proved that he did fall part way through. Even a partial fall through a hole in a flat surface is within the protections of Labor Law § 240 (1). Carpio v. Tishman Construction Corporation of New York, supra; O'Connor v. Lincoln Metrocenter Partners, L.P., supra; see also Robertti v. Chang, 227 A.D.2d 542 (2nd Dept 1996) (*partial fall through a collapsed floor*). The court has considered defendants' argument that plaintiff has embellished his factual account of the accident to avoid summary judgment in their favor. They argue his sworn supporting affidavit states facts that are inconsistent with his EBT testimony. The court disagrees.

At his EBT, defendants did not ask McComber how wide or big the hole was that he stepped and fell into. They did ask him about the accident, however. In response to the questions they posed, plaintiff testified that he could see through the hole workers on the 10th floor below. He noticed some kind of criss crossed structure that looked like scaffold, but he could not really pinpoint what it was. McComber testified that he struggled to keep holding onto the load of rebar because he was afraid it would land on the workers below if he dropped it. His sworn affidavit is not inconsistent with his testimony and therefore, plaintiff has established the opening was big enough for him to have fallen into. In opposition defendants raise no triable issue of fact that the hole was not as plaintiff has described it. Carpio v. Tishman Construction Corporation of New York, supra.

The court has also considered defendants' argument, that plaintiff did not need any protective devices to protect him from falling because the 11th floor was

"permanent." It is unrefuted that there were holes "all over the place" on the 11th floor because of the ongoing construction and the need to allow for later penetrations by such things as ducts, pipes, and even elevator shafts. Wright has testified about an ongoing, chronic, problem with holes throughout the construction site being improperly covered or open. These holes posed a risk subject to the protections of Labor Law § 240 (1), whether the floor was concrete or not. see Robertti v. Chang, supra.

Application of the statute is not triggered by the permanency of the structure but by whether the risks related to differences in elevation. Carpio v. Tishman Construction Corporation of New York, supra; O'Connor v. Lincoln Metrocenter Partners, L.P., supra.

Plaintiff does not have the burden of presenting evidence of which particular safety device would have prevented his injury in order to win his motion for summary judgment. Noble v. AMCC Corp., 277 AD2d 20 (1st Dept 2000). Defendants, on the other hand, have failed to raise a triable issue of fact whether a safety device was provided to the plaintiff. It is unrefuted that other than the plywood, nothing protected plaintiff from falling into the opening.

Plaintiff has established the necessary predicate for liability under Labor Law § 240 (1) which is that he stepped and partially fell into an improperly protected opening or hole on the 11th floor. Although he did not fall all the way through, but managed to keep his balance, his accident was an elevation-related accident. see O'Connor v. Lincoln Metrocenter Partners, supra; Carpio v. Tishman Construction Corporation of New York, supra. In opposition, defendants have failed to raise triable issues of fact that they provided him with any safety device that would prevented his fall. The plywood or wooden covering that was provided to keep the hole safe was not attached

properly to the opening to prevent a fall, or it failed to meet its intended purpose. see Carpio v. Tishman Construction Corporation of New York, supra. Therefore, plaintiff has proved he is entitled to summary judgment on his section 240 (1) claim. There are no material factual disputes that require a trial before the issue of liability can be decided. Therefore, his cross motion is granted and defendants' motion for summary judgment is denied.

Labor Law 241 (6)

Labor Law § 241 (6) imposes upon an owner or general contractor a nondelegable duty to provide construction site workers with a safe work place. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). The elements of a *prima facie* cause of action under Labor Law §241 (6) are that: 1) the plaintiff was engaged in an enumerated activity, 2) defendant is an owner, contractor or agent, and 3) that defendant violated the Industrial Codes of the State of New York. Like Labor Law § 240 (1), Labor Law § 241 (6) imposes vicarious liability on an owner, contractor and agent, even if they are not active tortfeasors, and irrespective of notice. Rizzuto v. L.A. Wenger Contracting Co., Inc., supra.

The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

Industrial Code provision 23-1.7 (b) (1) (i) requires that every hazardous opening be guarded by a substantial fastened cover or safety railing. It is sufficiently specific to support a section 241 (6) claim. The regulation, however, does not define "hazardous

opening,” and the determination of whether a particular condition is within the scope of the regulation is a question of law for the court to decide. Messina v. City of New York, supra. Generally, if this regulation is applicable to larger openings where a person’s body could fit through. Id.

As has been addressed at greater length in this decision (above), plaintiff has established that the opening involved in his accident was large enough for him to fall into, even though he only fell in part of the way. Plaintiff has also established that the temporary cover or plywood that was placed over the openings to cover it, either bent or gave way (“like a diving board”), causing the opening or hole to become uncovered.

Defendants have failed to raise a triable issue of fact that the plywood was properly fastened and substantial. Having proved the defendants violated a specific regulation (see Ross v Curtis-Palmer Hydro-Elec. Co., supra), plaintiff has also proved he is entitled to summary judgment against the defendants on the issue of liability.

In opposition, defendants have not proved their defenses, nor have they set forth any triable issues of fact. Therefore, plaintiff’s motion for partial summary judgment against the defendants on the issue of liability, based upon the 12 NYCRR 23-1.7 (1) (i), is granted.

The court goes on to consider whether any of the other code provisions plaintiff cites serve as additional predicates for his Labor Law § 241 (6) claim. The court finds that they are not, either because they are inapplicable to the facts of this case or set forth only general, not specific requirements.

12 NYCCR 23-5.1 (c) and (f) set forth regulations pertaining to scaffolding. Plaintiff’s accident did not involve a scaffold, but a floor or surface that had covered

openings. Although plaintiff analogizes the 11th floor as an impermanent surface similar to a scaffold, the analogy fails.

12 NYCRR 23-2.2 states methods by which forms and shores in concrete work have to be made structurally safe, including tying or bracing them together. This section does not apply to plaintiff's accident either because the concrete (if it had been poured) was on a flat surface.

12 NYCRR 23-1.5 (c) (2) is a general section; it does not set forth specific requirements, and therefore, is not a predicate basis for a Labor Law § 241 (6) claim.

Although plaintiff identified other regulations in his amended bill of particulars, that he claims were violated, he appears to have now abandoned them.

Based upon the foregoing, plaintiff has proved that the defendants violated 12 NYCRR 23-1.7 (b) (1) (i), and therefore established the predicate basis for his Labor Law § 241 (6) claims against the defendants. In opposition, defendants have failed to raise triable issues of fact. Plaintiff's cross motion for partial summary judgment on the issue of defendants liability on his Labor Law § 241 (6) claim must be, and hereby is, granted. Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claims is granted to the extent that plaintiff has pled the inapplicable, general, or now abandoned claims that the court has identified above.

Labor Law § 200 (common law negligence)

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., *supra*. Unlike Labor Law § 241 (6), liability can be imposed only if the defendant has actually been negligent. At trial, plaintiff must prove the defendant

exercised supervisory and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1st dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., *supra* at 352; Gonzalez v. United Parcel Serv., 249 AD2d 210 (1st dept. 1998).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200. Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 (1993).

Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007); Brown v. New York City Economic Dev. Corp., 234 AD2d 33 (1st dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

Plaintiff took orders from his foreman and was under the supervision of DiFama personnel on the day of the accident. However, Bovis had a daily presence at the construction site. Wright, Bovis' site safety manager, was regularly present, checking to see whether there were any safety violations. Wright did more than just inspect the work, however. He had the power to stop any work he thought was dangerous. Wright could even remove contractors from the work site and issue them fines if he saw any unsafe practices. At times he would use yellow "caution" tape to cordon off a

dangerous. He would then radio the appropriate contractor to fix the problem.

According to Wright, open or inadequately covered holes were a recurring, if not chronic, problem at the construction site. Wright testified that he received numerous complaints about such open/uncovered holes. The problem was so prevalent that eventually Bovis had to enlist its own carpenters to cover these holes or openings.

Although plaintiff has proved that defendant Bovis maintained a general supervisory presence at the construction site, and even that Bovis took steps to correct unsafe conditions that it encountered [O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]], Bovis has raised triable issues of fact whether such supervision and control is sufficient to impute liability pursuant to Labor Law § 200 because Bovis did not supervise or control the injury producing work being performed by McComber at the time of his accident. Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007). Moreover, Bovis also raises issues of fact whether it took "reasonable care" in making sure the construction site was safe. According to Bovis, it took aggressive steps in addressing the problem with holes by using its own staff of carpenters once it became aware of the recurring problems with hole. There is also the issue of whether Bovis had notice of this particular opening so that it could remedy the problem. Therefore, plaintiff's cross motion for summary judgment on his Labor Law § 200 claims against Bovis is denied.

Plaintiff's cross motion for summary judgment on his Labor Law § 200 claims against the owner is not supported by any facts tending to show that the owner had any presence at the construction site, or that it supervised or controlled the injury producing work. Defendants seek summary judgment dismissing the claims against the owner on

the basis that W2001Z/15CPW did not exercise any supervisory control. Defendants' have prove their defense as to the owner. Plaintiff has failed to raise any triable issue of fact. Therefore, plaintiff's Labor Law § 200 (common law negligence) claims against W2001Z are severed and dismissed. The defendants' motion for summary judgment in favor of Bovis, however, on the Labor Law § 200 (common law negligence) negligence claims is denied.

Conclusion

Plaintiff's cross motion for partial summary judgment on the issue of liability is granted as to Labor Law §§240 (1) and 241 (6) claims against both defendants. However, the claims predicated upon the inapplicable, general, or abandoned Industrial Code provisions (discussed, *supra*), are hereby severed and dismissed for the reasons stated.

Plaintiff's cross motion for partial summary judgment on his Labor Law § 200 claim is denied as to both defendants for the reasons stated.

Defendants' motion for summary judgment on plaintiff's Labor Law § 240 claim is denied. Defendants' motion for summary judgment on plaintiff's Labor Law § 241 (6) claim is granted to the extent that this claim is predicated upon Industrial Code provisions that the court has decided are inapplicable, general, or abandoned by the plaintiff (as discussed, *supra*); those claims are hereby severed and dismissed against both defendants. Otherwise defendants' motion with respect to plaintiff's section 241 (6) claim is denied.

Defendants' motion for summary judgment on plaintiff's Labor Law § 200 (common law negligence) claims is granted as to the owner W2001Z/15CPW only, but

denied as to Bovis.

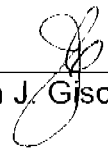
This case is ready to be tried since the note of issue has been filed. Plaintiff shall serve a copy of this decision/order upon the Office of Trial Support so that the case can be scheduled for a trial on damages and on the remaining claims.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 20, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK