SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

PATRICK PLAZA,

Plaintiff,

SUBMISSION DATE: 7/17/08
INDEX No.: 3604/05

-against-

STOP & SHOP SUPERMARKET, CO. LLC,
MELITO CONSTRUCTION CORP.
A.A.A. REFRIGERATION SERVICE, INC.
JUST PLUMBING CORP.

MOTION SEQUENCE #
2,3,4,5

Defendants.

The following papers read on this motion:

Notice of Motion/Cross-Motion.....	XXXX
Answering Papers.....	XXXX
Reply.....	XXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

This motion by defendant A.A.A. Refrigeration Service, Inc., for an order pursuant to CPLR 3401 and 22 NYCRR § 202.21(e) vacating the Note of Issue and striking this matter from the trial calendar is denied as moot.

This motion by defendants Stop & Shop Supermarket Co., LLC, Melito Construction Corp. and Just Plumbing Corp. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them is granted to the extent provided herein.

This cross-motion by plaintiff Patrick Plaza for an order pursuant to CPLR 3025(b) granting him permission to amend his complaint to specify the Industrial Code regulations allegedly violated by the defendant Just Plumbing Corp. is denied as moot.

This motion by defendant A.A.A. Refrigeration Service, Inc., for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it is granted.

On March 22, 2004, the plaintiff Patrick Plaza was working as an employee of DGC Capital Contracting Corp. in the construction of a new Stop & Shop at 65 Shore Road in Port Washington, N.Y. In this action, the plaintiff seeks to recover damages for personal injuries he sustained that day when he slipped on ice upon entering the meat freezer in Stop & Shop to rehang a butcher's coat rack which he had already hung but had fallen. At his examination-before-trial, the plaintiff described the ice he fell on as smooth and transparent.

In his complaint, the plaintiff has advanced claims sounding in negligence and violations of Labor Law § § 200, 241(6).

The defendant Melito Construction Corp. ("Melito") was the Construction Manager of the project. Melito contracted with Just Plumbing Corp. ("Just Plumbing") to do the plumbing work, including installing the condensation piping, floor drain and attaching the piping to the blower in the store's meat freezer. Stop & Shop contracted with the defendant A.A.A. Refrigeration Service, Inc. ("A.A.A.") to install, *inter alia*, the refrigerator equipment in the meat freezer, the frozen food aisle, the dairy aisle, etc. The plaintiff's employer DGC Capital Contracting Corp. had contracted directly with Stop & Shop.

This action was originally commenced against Stop & Shop and Melito. The law firm of Ahmuty, Demers & McManus originally answered on their behalf. By way of Stipulation, the caption was amended to add Just Plumbing and AAA Refrigeration Service, Inc. (A.A.A.) as defendants. The law firm of Ahmuty, Demers & McManus then answered on behalf of Stop & Shop, Melito and Just Plumbing. A Bill of Particulars was served on Stop & Shop and Melito before the caption was amended. While a Bill of Particulars was served on A.A.A., one was never served upon Just Plumbing. The plaintiff accordingly seeks to amend his complaint to advance claims against Just Plumbing specifying the sections of the Industrial Code it allegedly violated, specifically § § 23-1.7(b), (d), (e)(1), (e)(2) and 23-1.8(c). These violations have already been pled as against Stop & Shop and Melito who are represented by the same attorney as Just Plumbing. Should plaintiff be denied leave to amend, he seeks permission to serve a late Bill of Particulars upon Just Plumbing identifying these Code regulations.

All of the defendants seek summary judgment dismissing the complaint and any and all cross-claims against them.

The facts pertinent to the summary judgment motions are as follows: Melito's contract with Stop & Shop provided:

> "if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death

> to persons resulting from a material or substance encountered but not created on the site by the Construction Manager, the Construction Manager shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing. . . ."

Section 3.1.1(a) entitled "Contractor's Responsibilities" provided that "[t]he Contractor shall be responsible for initiating, maintaining and supervising safety, property loss prevention and anti-substance abuse precautions and programs in connection with the Work."

Melito's contract with Just Plumbing provided:

> The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime contract.

A.A.A. contracted with Stop & Shop to perform the "mechanical refrigeration installation" for the store. Their contract provided:

> The Contractor shall supervise and direct the Work using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

It also provided:

> The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

And, it provided that:

> The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees and other persons performing portions of the Work under a contract with the Contractor.

Cliff O'Reilly testified at his examination-before-trial on behalf of Melito that Melito was responsible for scheduling and the coordination of the construction as well as for inspecting the site for safety. O'Reilly testified that not only was Melito responsible for making sure that the work was done in accordance with the blueprints, but that safety rules and regulations were followed, too. He testified that it was Melito's responsibility to address safety concerns with the subcontractor(s) and to stop work if unsafe conditions were not remedied. He testified that Melito did weekly walk-throughs to inspect for safety and held weekly meetings where safety concerns were addressed. He testified that Melito had daily contact with Stop & Shop regarding the construction site's safety and notified it of any problems. O'Reilly testified that it was Melito's responsibility to manage the subcontractors' daily activities.

O'Reilly testified that after the plaintiff's fall, he accompanied him to the freezer and observed the clear ice himself. Although he checked to see if someone had spilled a drink; if the condenser pan was full and overflowing; and, whether there was a roof leak, he was unable to determine where the ice came from. He had the area cleaned up and there was never a recurrence. He testified that he never observed nor was he ever told about ice in the freezer before the plaintiff's accident. He testified that A.A.A. was doing work at the time of plaintiff's accident.

Tony Moscarella testified at his examination-before-trial on behalf of Stop & Shop that Melito's duties included making sure that the subcontractors were making progress on their jobs. However, Melito did not supervise or direct the subcontractors' employees. He testified that Melito's duties applied to the meat freezer; that the drain was Just Plumbing's responsibility; and, that the blowers in the freezer were installed by a number of people. Both Isola, of A.A.A., and Moscarella explained that A.A.A. installed the refrigeration equipment, piping and blowers to cool the air in the same manner that an air conditioning system would. They further explained, along with Calma of Just Plumbing and O'Reilly, that as a result of the condensers, water would form, pass through one set of pipes into a pan underneath the condenser units, and then travel into a pump which would pass the water through copper piping into the freezer's floor drain. Moscarella testified that he was not aware of any plumbing problems in the freezer during Stop & Shop's construction.

Moscarella and both Migliano and Calma on behalf of Just Plumbing testified that Just Plumbing was responsible for installing the condensation piping and the floor drain. The piping would initially be soldered and then screwed directly into the blower to establish a solid connection. Moscarella testified, as did Calma and Migliano, that they were never notified of any problems with the drainage system.

Doug Rejek, on behalf of Stop & Shop, gave a sworn statement after the plaintiff's accident in which he stated:

> "The freezer had a problem with a water leak, the plumbers knew of the leak for at least a day or so and were fixing it, but the water got on the floor, turned to ice and Patrick fell/slipped on it causing his injury."

Rojek has submitted an affidavit in support of Stop & Shop's summary judgment motion in which he now attests that it was his "understanding that there was some problem with the freezer unit that would spill water onto the floor" and that while he "was not sure of the specific problem with the freezer unit at the time. . . [he] understood the problem to be simply a plumbing problem." He has now further attested that he knew that there was a problem with water spilling on the freezer floor and when it was seen, it was cleaned up, however, he never saw or heard about ice forming.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

"Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees a safe work place." Molyneaux v City of New York, 28 AD3d 438, 439 (2nd Dept. 2006), lv denied 7

NY3d 705 (2006), citing Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 (1998); Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993); see also Locicero v Princeton Restoration, Inc., 25 AD3d 664, 665-666 (2nd Dept. 2006). "For an owner to be held liable for common-law negligence or pursuant to Labor Law § 200, a plaintiff must show that the owner supervised or controlled the work, **or** had actual or constructive notice of the unsafe condition causing the accident (emphasis added)." Acosta v Hadjigavriel, 18 AD3d 406, 407 (2nd Dept. 2005); see also Wynne v State, ___ AD3d ___, 2008 WL 2907004 (2nd Dept. 2008). Thus, "[l]iability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." Markey v C.F.M.M. Owners Corp., 51 AD3d 734 (2nd Dept. 2008), citing Keating v Nanuet Bd. of Educ., 40 AD3d 706 (2nd Dept. 2007); Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681(2nd Dept. 2005)."Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." Comes v New York State Elec. and Gas Corp., supra, citing Lombardi v Stout, 80 NY2d 290, 295 (1992); see also, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 (1993). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner] controlled the manner *in which the plaintiff performed his or her work*, i.e., how the injury producing work was performed." Hughes v Tishman Const. Corp., 40 AD3d 305, 306 (1st Dept. 2007), citing O'Sullivan v IDI Constr. Co., Inc., 7 NY3d 805 (2006); see also, Comes v New York State Elec. & Gas Corp., supra. However, "[w]here a claimant's injuries stem not from the manner in which the work was being performed, but, rather from a dangerous condition in its property, an owner may be liable for common-law negligence and violation of Labor Law § 200 if it has actual or constructive notice of the dangerous condition, irrespective of whether it supervised the claimant's work." Wynne v State, supra, citing Payne v 100 Motor Parkway Assoc., LLC., 45 AD3d 550, 553 (2nd Dept. 2007); Kerins v Vassar College, 15 AD3d 623, 626 (2nd Dept. 2005); Blanco v Oliveri, 304 AD2d 599 (2nd Dept. 2003); see also, Smith v Cari, LLC, 50 AD3d 879 (2nd Dept. 2003).

Similarly, in order to prevail in a Labor Law § 200 claim against a general contractor, a plaintiff must prove that it "had authority or control over the activity causing the injury, thus enabling it to award or correct an unsafe condition." O'Sullivan v IDI Const. Co., Inc., 28 AD3d 225, 226 (1st Dept. 2006), aff'd. 7 NY3d 805 (2006). Evidence that a general contractor "coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition is insufficient to raise a triable issue of fact as to whether the

general contractor exercised the requisite degree of supervision and control over the work to sustain [such a] claim." Geonie v OD&P NY Ltd., 50 AD3d 444 (1st Dept. 2008), citing O'Sullivan v IDI Constr. Co., Inc., supra, at p. 226; Hughes v Tishman Const. Corp., supra; Singh v Black Diamonds, LLC., 24 AD3d 138 (1st Dept. 2005). "Where . . . the challenged methods are those of a subcontractor, and the owner or general contractor exercises no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200." Kajo v E.W. Howell Co., Inc., 52 AD3d 659 (2nd Dept. 2008), citing Haider v Davis, 35 AD3d 363 (2nd Dept. 2006); Ferrera v Best Modular Homes, Inc., 33 AD3d 847 (2nd Dept. 2006), lv dism., 8 NY3d 841 (2007).. Where the plaintiff's injuries arose not from the manner in which the work was being performed but rather from an allegedly dangerous condition on the property, "a general contractor may be liable in common law negligence and under Labor Law § 200 if it has control over the work site and actual constructive notice of the dangerous condition." Wynne v B. Anthony Const. Corp., 2008 WL 2907035, citing Payne v 100 Motor Parkway Associates, LLC, supra, citing Keating v Nanuet Bd. of Educ., supra.

To recover from a subcontractor under Labor Law § 200, a plaintiff must establish that it had supervisory authority or control over his work where the accident occurred at the time of his injury. Vieira v Tishman Const. Corp., 255 AD2d 235 (1st Dept. 1998), citing Comes v New York State Elec. & Gas Corp., supra; see also, Zerros v City of New York, 8 AD3d 477 (2nd Dept. 2004), citing Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981); Murphy v Herbert Const. Co., Inc., 297 AD2d 503 (1st Dept. 2002). Prime contractors who are responsible for only distinct portions of a job, as opposed to owners and general contractors, do not bear statutory liability under Labor Law § § 200, absent a direct role in an accident, i.e., the ability to supervise and control the activity which brought about the plaintiff's injury. Kulaszewski v Clinton Disposal Services, Inc., 272 AD2d 855 (4th Dept. 2000).

This action arose not from the manner in which the plaintiff performed his work, but rather, from a dangerous condition on the property. There is evidence that Stop & Shop had actual or constructive notice of the dangerous condition that caused the plaintiff's fall, i.e., ice on the meat freezer's floor, which the evidence suggests may have been a recurring condition. While Stop & Shop maintains that only water had been observed previously, water left in a freezer becomes ice: There is an issue of fact as to whether the cause of plaintiff's fall was a recurring condition of which Stop & Shop had notice. See, Chrisler v Spencer, 31 AD3d 1124 (4th Dept. 2006); see also, Sewitch v LaFrese, 41 AD3d 695 (2nd Dept. 2007); Osorio v Wendell Terrace Owners Corp., 276 AD2d 540 (2nd Dept. 2000). Stop & Shop's motion to dismiss the plaintiff's claim pursuant to Labor Law § 200 is denied.

While there is some evidence that Melito had control over the worksite, there is no evidence that it had actual or constructive notice of the dangerous condition on the premises. Melito's motion for summary judgment dismissing the plaintiff's Labor Law § 200 claim is granted. Smith v Cari, LLC, supra.

Neither A.A.A. nor Just Plumbing, as subcontractors or prime contractors, instructed, directed or controlled the plaintiff's work. Therefore, liability may not be imposed on Just Plumbing or A.A.A. under Labor Law § 200. Zervos v City of New York, supra. Moreover, there is no evidence that the source of the ice was a leak from the refrigeration system installed by A.A.A. or the work done by Just Plumbing. Thus, there is no evidence that Just Plumbing or A.A.A. created or increased an unreasonable risk or harm to plaintiff. See, Regatta Condominium Ass'n. v Village of Mamaroneck, 303 AD2d 739 (2nd Dept. 2003), citing Church v Callanan Indus., 99 NY2d 104, 111 (2002); Espinal v Melville Snow Contrs., 98 NY2d 136, 138-139 (2002); Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220 (1990). Nor is there evidence that the plaintiff reasonably relied on Just Plumbing or A.A.A.'s performance of their contractual obligations. See, Regatta Condominium Assn. v Village of Mamaroneck, supra, at p. 740, citing Church v Callanan, supra, at p. 141-142. And, there is no evidence that Just Plumbing or A.A.A. entirely displaced the owner and general contractor's duties to ensure safety at the premises. See, Regatta Condominium Assn. v Village of Mamaroneck, supra, citing Espinal v Melville Snow Contrs., supra; Church v Callanan Indus., supra; Palka v Servicemaster Mgt. Servs. Corp., 83 NY2d 579 (1994). Labor Law § 241(6).

Labor Law § 241(6) imposes absolute liability on an owner and/or general contractor even in the absence of control or supervision (Rizzuto v L.A. Wenger, supra) and notice is not required to advance a claim under Labor Law § 241(6) (Wrighten v ZHN Contracting Corp., 32 AD3d 1019 [2nd Dept. 2006]). However, to hold a party responsible under Labor Law § 241(6), the plaintiff must show the breach of a specific safety rule or regulation applicable to his work which proximately caused their injury. Rizzuto v Wenger Contr. Co., supra, at p. 348-349. A violation of general safety standards does not apply. Ross v Curtis-Palmer Hydro-Elec. Co., supra.

Plaintiff's reliance on 12 NYCRR 23-1.5 is misplaced because it has not been interpreted to be a general safety standard. Verrieri v Empire Realty Co., 219 AD2d 593 (2nd Dept. 1995); see also, Cun-En Lin v Holy Family Monuments, 18 AD3d 800 (2nd Dept. 2005); Sparkes v Berger, 11 AD3d 601 (2nd Dept. 2004). Plaintiff's reliance on 12 NYCRR 23-1.7(b) ("Hazardous Openings") is also misplaced as there was no "hole or hazardous opening" involved here. Rookwood v Hyde Park Owners' Corp., 48 AD3d 779 (2nd Dept.

2008); Alvia v Elec. Contracting, Inc., 287 AD2d 421 (2nd Dept. 2001). Similarly, plaintiff's reliance on 12 NYCRR 23-1.7(e)(1), (2) fails, too, as plaintiff did not trip. As for plaintiff's claim that defendants violated 12 NYCRR 23-1.8(c)(2), foot protection has not been shown to be involved in the plaintiff's accident. Thus, plaintiff's claims that any of the defendants violated 12 NYCRR §§23-1.5, 23-1.7(b); 23-1.7(e)(1), (2); and 23-1.8(c)(2) and are subject to liability under Labor Law § 241(6) fails.

Nevertheless, Industrial Code § 23-1.7(d) provides that:

> 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 other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Plaintiff slipped and fell on the floor of a freezer, not an open area. And, he testified that it was ice that he fell on. Section 23-1.7(d) clearly applies and there is a question of fact as to whether the owner Stop & Shop and Construction Manager Melito violated that section. Temes v Columbus Centre, LLC, 48 AD3d 281 (1st Dept. 2008).

Neither Just Plumbing nor A.A.A. Refrigeration Service were the owners or general contractors nor did either have any control or supervision over plaintiff's work. His claim against them pursuant to Labor Law § 241(6) is also dismissed. See also, Smith v McClier Corp., 22 AD3d 369, 371 (1st Dept. 2005) citing Russin v Louis N. Picciano & Son, supra; see also, Zolotar v Krupinski, 36 AD3d 802 (2nd Dept. 2007).

In sum, defendants Just Plumbing and A.A.A. Refrigeration's motions for summary judgment are granted and this action and any and all cross-claims against Just Plumbing and A.A.A. Refrigeration are dismissed. Permission to serve a late Bill of Particulars on Just Plumbing is denied as moot.

Plaintiff's Labor Law § 200 claim against Melito is dismissed.

This decision constitutes the order of the court.

Dated: AUG 12 2008

KENNETH A. DAVIS J.S.C.