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

PRESENT: Hon. Marcy S. Friedman PART 57

Justice

Index Number : 115286/2004

SCUDERI, RICHARD

vs.

INDEPENDENCE COMMUNITY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 115286/04

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits~~ — Exhibits ... / Cross-motion	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5-6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12-8-08

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

RICHARD SCUDERI

Plaintiff, Index No.: 115286/2004

- against -

INDEPENDENCE COMMUNITY BANK CORP., 172 EAST 4TH STREET TENANTS CORP., KANE BROTHERS CARPETING, INC. and SHOWPLACE FLOORING,

DECISION/ORDER

Defendants.

In this Labor Law action, plaintiff sues for injuries arising from a fall on November 24, 2003, while he was working on a construction project at a bank. Defendants Kane Brothers Carpeting, Inc. and Showplace Flooring (collectively "Showplace") move for summary judgment dismissing the complaint and all cross-claims. Plaintiff cross-moves for leave to supplement his bill of particulars to add a claim for violation of Industrial Code Regulation 23-1.7(e) (12 NYCRR), and for summary judgment on his Labor Law § 241(6) claim against defendants Independence Community Bank Corp. ("Independence") and 172 East 4th Street Tenants Corp. ("Tenants Corp.").

The following material facts are undisputed: Plaintiff was employed as a carpenter for non-party Peninsula Contracting Corp. ("Peninsula"), the general contractor on a project contracted for by Independence, the tenant of a premises owned by Tenants Corp. Showplace

was the subcontractor on the project for installation of ceramic tile. At the time of plaintiff's accident, the bank was undergoing renovation and other trades were also present.

According to plaintiff, at the time of the accident, he was carrying two spackle compound buckets from the ATM area to the main section of the bank. (See P.'s January 25, 2007 Dep. [P.'s Jan. Dep.] at 32-34.) Plaintiff testified that when he was about 20 feet from the ATM area, he tripped on debris on the floor. (Id. at 35-36.) He described the debris as "boxes with plastic and rope or twine," and identified them as "boxes from the tile." (Id. at 36.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Plaintiff's Motion

At the outset, plaintiff moves to supplement his bill of particulars to plead a violation of Industrial Code Regulation 23-1.7(e).[1] As defendants do not allege prejudice from the delay in pleading the violation of this section, the amendment will be granted. (Compare Padilla v Frances Schervier Hous. Dev. Fund Corp., 303 AD2d 194 [1st Dept 2003] with Reilly v

[1]Although plaintiff's Supplemental Amended Bill of Particulars (P.'s Motion, Ex. J) alleged that defendants violated Industrial Code Regulation 23-2.1(b), plaintiff does not move on this provision of the Code.

Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.)

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
> 6. All 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.

It is well settled that this statute requires owners and contractors and their agents "'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-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law §241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

Industrial Code Regulation 23-1.7(e) provides:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Defendants Independence and Tenants Corp. do not argue that this regulation is not sufficiently specific to support a Labor Law § 241(6) cause of action. Rather, these defendants

assert that there are issues of fact as to whether plaintiff's accident occurred as a result of his tripping on debris. In support of the contention that plaintiff did not trip, Independence and Tenants Corp. rely solely on the affidavit of Anthony Morano, Peninsula's carpenter foreman who observed the accident. In his affidavit, Mr. Morano stated that he saw plaintiff drop spackle buckets that he was carrying, but did "not recall the claimant tripping on any debris/construction materials." He also stated, however, that debris "may have been a contributing factor to his incident." (Morano Aff. ¶ 1.) The fact that Mr. Morano did not recall that plaintiff tripped is insufficient to raise a triable issue of fact as to how plaintiff's accident occurred. (See Pichardo v Urban Renaissance Collaboration Ltd. Partnership, 51 AD3d 472 [1st Dept 2008].) As Independence and Tenants Corp. fail "to set forth a conflicting theory with supporting evidentiary material, other than mere speculation as to how the accident occurred," they do not raise a triable issue of fact. (See id.)[2] Plaintiff's motion for summary judgment as against Independence and Tenants Corp. on his Labor Law § 241(6) claim must therefore be granted.

In light of this holding, the court need not address plaintiff's Labor Law § 200 claim against Independence and Tenants Corp.

Showplace's Motion

Showplace moves to dismiss the complaint and all cross-claims asserted against it. As to the Labor Law § 241(6) claim, "[o]nly upon obtaining the authority to supervise and control does [a] third party fall within the class of those having nondelegable liability as an 'agent' under"

[2]Independence and Tenants Corp. did not seek to raise a triable issue of fact based on an accident report (Showplace, Ex. I) which described the cause of the accident as "pickup spackle bucket." It appears to be undisputed that this report was made by Peninsula's controller, who was not a witness to the accident. Significantly, moreover, there is no indication that the information as to how plaintiff's accident occurred came from plaintiff.

section 241(6). (Russin v Picciano & Son, 54 NY2d 311 [1981].) Plaintiff does not raise a triable issue of fact in response to Showplace's showing that it did not have the authority to supervise and control the project which is necessary for imposition of liability against it under section 241(6).

Defendant Showplace also seeks dismissal of plaintiff's Labor Law § 200 and common law negligence claims. In order to be held liable under Labor Law § 200, or for common law negligence, it must be shown that the "contractor exercised supervisory control over the work performed or had actual or constructive notice of the unsafe condition." (Lally v JGN Constr. Corp., 295 AD2d 148, 149 [1st Dept 2002].) Showplace contends that it did not supervise or control plaintiff's work, was not present at the worksite on the date of the accident, and did not create the debris on which plaintiff tripped.

It is undisputed that Showplace did not have the authority to control plaintiff's activities. As to Showplace's further claim that it did not create the condition on which plaintiff fell, Showplace relies on its project manager's testimony that Showplace completed the tile installation by November 17, 2003, a week before the accident occurred. (See Marshall Dep. at 30.) In contrast, plaintiff relies on the testimony of Peninsula's general manager that laborers were still installing ceramic tile on the weekend before and through the day of the accident, which occurred on a Monday. (See Clark Dep. at 32, 37.) Showplace was unable to produce its daily logs that document its progress on the tile installation because they had been destroyed. (Marshall Dep. at 31.)[3] Thus, the conflicts in the testimony as to the date the work was

[3]In support of its motion, Showplace submits Peninsula's "Revised Construction Schedule" which shows that the ceramic tile installation was scheduled to be completed on November 18, 2003. (See Balson-Cohen Aff., Ex. L.) This document, dated October 22, 2003, a month before plaintiff's

completed raise a credibility issue which should not be resolved on this motion for summary judgment. (See S. J. Capelin Assoc. Inc. v Globe Mfg. Corp., 34 NY2d 338 [1974].)

Showplace next argues that there are inconsistencies in plaintiff's deposition testimony as to whether it was Showplace's product and materials on which plaintiff tripped. Showplace contrasts plaintiff's January deposition testimony in which he described the boxes on which he tripped as "open on one side with tiles showing" (P.'s Jan. Dep. at 39), with plaintiff's July deposition testimony in which he said that the boxes were not in their original shape but "were broken down." (P.'s July Dep. at 68.)

"[C]ourts have occasionally disregarded affidavits or other evidence submitted in opposition to such a motion where they directly contradict the plaintiff's own version of the accident and are plainly tailored to avoid dismissal of the action." (Branham v Loews Orpheum Cinemas Inc., 31 AD3d 319, 324 [1st Dept 2006].) Here, in contrast, to the extent that there are inconsistencies in plaintiff's testimony, they "merely present a credibility issue properly left for the trier of fact." (Yaziciyan v Blancato, 267 AD2d 152 [1st Dept 1999].)[4]

Finally, a triable issue of fact exists as to Showplace's further defense that it was not responsible for keeping the work area free of debris. While Peninsula's manager stated that he had the authority to instruct the workers to "clean debris if [he] felt it was messy" and hired a laborer to clean the work area (see Clark Dep. at 23), he also testified that he did not provide

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accident occurred, is plainly a projection, not evidence as to when Showplace actually finished its work on the project.

[4]It is not clear that serious discrepancies in plaintiff's version of the facts exist, as Showplace's manager also testified that its boxes were actually "cardboard wrapping" that is folded over and discarded, and not freestanding boxes. (Marshall Dep. at 34.)

Showplace with any laborers to clean the weekend before the accident occurred and would have expected its employees to "centrally locate" their debris for pick up by Peninsula. (See id. at 35-38.) Showplace's manager himself acknowledged that Showplace had a duty to "clean [their] own debris that [they] generate, and to throw it away" in dumpsters. (Marshall Dep. at 28.) Accordingly, Showplace's motion to dismiss plaintiff's Labor Law § 200 claim should be denied.

Common Law Indemnification and Contribution Claims

Showplace moves for summary judgment dismissing the cross-claims for common law indemnification or contribution against it.[5] It is settled that a party who is held vicariously liable or liable solely by operation of law may "obtain full [common law] indemnification from the party wholly responsible for the accident." (Kelly v. Diesel Constr. 35 NY2d 1, 6 [1974].) However, "in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240(1) (see, McDermott v City of New York, 50 NY2d 211)." (Correia v. Professional Data Mgt., Inc., 259 AD2d at 65.)

Here, as held above, triable issues of fact exist as to Showplace's negligence. Showplace is therefore not entitled to judgment dismissing Independence's and Tenants Corp.'s common law indemnification or contribution claims against it.

[5]To the extent that Independence and Tenants Corp. assert a cross-claim for contractual indemnification, they fail to produce any contract or other document that supports this claim.

It is accordingly hereby ORDERED that defendants Kane Brothers Carpeting, Inc.'s and Showplace Flooring's motion is granted to the extent of dismissing plaintiff's Labor Law § 241(6) claim as against them; and it is further

ORDERED that the motion of plaintiff Richard Scuderi is granted to the extent of awarding plaintiff judgment as to liability against defendants Independence Community Bank Corp. and 172 East 4th Street Tenants Corp. on his Labor Law § 241(6) cause of action; and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any other disposition of the underlying action, upon the filing of a note of issue and payment of the proper fees, if any; and it is further

ORDERED that, within 30 days from the date of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon defendants, and all other parties or their attorneys, by ordinary first class mail, and shall file same, together with proof of service, with the Clerk of this Court and the Clerk of the Trial Support Office (Room 158).

This constitutes the decision and order of the court.

Dated: New York, New York
December 8, 2008

MARCY FRIEDMAN, J.S.C.

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK