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SCANNED ON 2/29/2008

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

PRESENT: WALTER B. TOLUB PART 15

Index Number : 102946/2007
BARKER, JAMES
VS.
MARINE ESTATES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

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 ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/19/08

WALTER B. TOLUB J.S.C.

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

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 15

----------X

JAMES BARKER,

Plaintiff,

-against-

Index No. 10[illegible]46/07

MARINE ESTATES LLC and PLAZA CONSTRUCTION CORP.,

Defendants.

----------X

TOLUB, J. :

Defendants Marine Estates LLC (Marine Estates) and Plaza Construction Corp. (Plaza) now move for summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action against them. Plaintiff cross-moves for summary judgment on the complaint.

For the reasons set forth below, defendants' motion for summary judgment is granted, and plaintiff's cross motion for summary judgment is denied.

FACTS

This personal injury action arises out of a construction accident that occurred on January 19, 2006, at 55 West 25th Street, New York, New York, where plaintiff James Barker was employed by non-party Val Floors to do bathroom work at a new condominium project.

Plaintiff was employed as a tile setter by Val Floors, to perform kitchen and bathroom tile work (Barker Dep., at 11, 21-22 [Aff. of Christopher J. Murray, Exh D]). The construction site was owned by Marine Estates, which retained Plaza as construction manager (*id.* at 8). Plaza, in turn, retained Val Floors to perform tiling and flooring work at the construction site (*id.* at 22).

On the date of the accident, plaintiff was assigned to perform bathroom tiling work in the "A" line bathrooms on either the 25th or 26th floor (*id.* at 28-29). While performing the task,

plaintiff spread glue on the pipe wall of the tub, and commenced tiling work, by first standing in the tub itself, and then by standing on the lip of the bathtub in order to reach the top of the wall by the seven-foot ceiling (*id.* at 29-32). Plaintiff admitted that he was standing on the lip of the tub while performing his work, and that the tub was "probably two feet" above the floor (*id.* at 31-33). The inside of the bathtub had construction debris consisting of compounding construction debris from the sheet rock workers (*id.* at 49-50). Plaintiff testified that, while standing on the lip of the tub, he slipped, "possibly" due to construction debris on the bottom of his shoe, falling inside of the tub, and sustaining injuries (*id.* at 45-47).

DISCUSSION

Labor Law § 240 (1)

Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to provide or erect ladders, scaffolds and other safety devices in order to protect workers engaged in tasks associated with elevation-related risks (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). Thus, Labor Law § 240 (1) affords special protection to workers who sustain personal injuries as a result of elevation-related risks such as falling from a height, or being struck by a falling object that was improperly hoisted (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order to prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must prove a violation of the statute, i.e., that an enumerated device was required and not provided, and that the violation was a proximate cause of the accident (*see Bland v Manocherian*, 66 NY2d 452 [1985]).

However, this section of the Labor Law extends "only to a narrow class of special hazards and [does] 'not encompass any and all perils that may be connected in some tangential way with

the effects of gravity'" (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999] [citation omitted]). Merely because "a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by Section 240 (1) of the Labor Law" (*Striegel v Hillcrest Heights Dev. Corp.*, 100 NY2d 974, 977 [2003]). The statute does not impose liability for minimal elevation differentials, even if the injury is caused by an inadequate or malfunctioning enumerated safety device (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, *supra*; *see also Misseritti v Mark IV Constr. Co.*, 86 NY2d at 491 [the statute addresses only "exceptionally dangerous conditions posed by elevation differentials"]).

"The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). Here, plaintiff fails to meet that burden, and his Labor Law § 240 claim must be dismissed, because this accident did not present an elevation-related risk of the type intended to be covered by the statute.

To recover under section 240 (1), plaintiff must establish that he stood on the lip of the bathtub because he was obliged to work at an elevation in order to tile the bathroom (*see Broggy v Rockefeller Group, Inc.*, 8 NY3d 675 [2007], *supra;* Gallagher v. New York Post, 55 AD3d 488 [1st Dept 2008]; Ferluckaj v. Goldman Sachs & Co., 53 AD3d 422 [1st Dept 2008]; Jones v. 414 Equities LLC, 866 NYS2d 165 [1st Dept 2008]). However, plaintiff, who stands six feet tall, was admittedly seeking to tile a seven-foot wall (*see* Barker Dep., at 32), and thus was not required to stand on an elevated surface to reach an area merely 12 inches above his head.

Guercio v MetLife, Inc. (15 AD3d 153 [1st Dept], *lv denied* 5 NY3d 714 [2005]) is

directly on point. In that case, the plaintiff, who stood five feet 11 inches tall, was installing wall tile to a point five feet above the rim of a bathtub, when he fell from his perch on the rim, sustaining injuries. The Court found that the record "clearly shows that to complete the required task, plaintiff had to reach, at most, 13 inches above his head, if standing on the floor or in the tub, in order to apply grout to the uppermost section of the work area," and thus, "[s]tanding on the bathtub rib was unnecessary (*id.* at 154). In granting the defendants' motion and cross motion to dismiss the plaintiff's Labor Law § 240 (1) claim, and in denying the plaintiff's cross motion for summary judgment, the Court "conclude[d], under these circumstances, that plaintiff was not exposed to the elevation-related risks contemplated by the statute" (*id.*).

Similarly, in *Brooks v City of New York* (212 AD2d 435 [1st Dept 1995]), the plaintiff tile installer, who was six feet one and a half inches tall, was required to apply grout to tile that reached between six and seven feet from the floor of the bathroom at its highest point. The Court determined that "[t]he record clearly shows that to complete the required task plaintiff, at most, had to reach ten and one half inches above his head" (*id.* at 436). In dismissing the plaintiff's Labor Law § 240 (1) claim, the Court concluded that "plaintiff was not exposed to the elevation-related risks contemplated by the statute, as the relative elevation at which plaintiff was required to apply grout could easily have been reached by this plaintiff without the use of a ladder, step stool or other device" (*id.*).

Likewise, here, it is evident that, in order to accomplish the tiling of the bathroom, plaintiff had to reach, at most, 12 inches above his head, and was thus not required to stand on the bathtub lip in order to apply the glue to the tiles. While, in opposition to the motion, plaintiff now states that "[d]ue to the height of the bathroom ceiling, I could not reach the top of the wall

by standing inside the bathtub" (Barker Aff., at 2), that statement is contradicted by plaintiff's admissions that he stands six feet tall, and that the height of the bathroom wall was seven feet (*see* Barker Dep., at 32), and that he was not required to tile the ceiling (*see id.*, at 22). As such, plaintiff fails to raise a triable issue of fact (*see Brooks v City of New York*, 212 AD2d 435, *supra*).

It is thus clear that, as a matter of law, plaintiff did not require a safety device or the use of a two-foot bathtub lip to apply glue to the wall. Accordingly, plaintiff was not exposed to an elevation-related hazard within the meaning of Labor Law § 240 (1), and his claim under this section must be dismissed (*see Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823 [2008] [dismissing Labor Law § 240 (1) claims on ground that worker's injuries were not result of an elevation-related hazard]; *Toefer v Long Is. R.R.*, 4 NY3d 399 [2005] [same]; *Snellman v Village of Port Chester*, 54 AD3d 371 [2d Dept 2008] [same]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008] [same]).

Labor Law § 241 (6)

Labor Law § 241 (6) mandates that owners and contractors provide reasonable and adequate protection and safety for workers by requiring them to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor, known as the Industrial Code (12 NYCRR 23 et seq; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, *supra*). In order to prevail under Labor Law § 241 (6), a plaintiff is required to plead and prove that the defendant violated a specific provision or provisions of the Industrial Code, and that such violation was a proximate cause of the accident (*Ares v State of New York*, 80 NY2d 959 [1992]).

Plaintiff initially alleged that defendants violated Industrial Code §§ 23-1.5, 23.1.7 (b), 23-

1.7 (d) and 23-1.7 (e) (2). In opposition to the motion, plaintiff concedes that sections 23-1.5 and 23-1.7 (b) are inapplicable. Accordingly, any claims based upon the alleged violations of these rules must be dismissed.

> Industrial Code § 23-1.7 (d) provides:
>
> (d) Slipping hazards. 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 any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> Industrial Code § 23-1.7 (e) (2) provides:
>
> (e) Tripping and other hazards
>
> (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.

Thus, section 23-1.7 (d) requires scaffolds and platforms to be free from slippery conditions, and section 23-1.7 (e) (2) requires platforms to be free from accumulations of debris.

However, Industrial Codes §§ 23-1.7 (d) and 23-1.7 (e) (2) do not apply in this case, as plaintiff specifically testified that the bathtub rim, or "scaffold" or "platform," did not contain any debris that would cause slipping or tripping:

> Q. Was there anything on top of the tub, any debris or dust or anything like that, where you were doing your work?
>
> Mr. Falkoff: Any substance where he was standing at the time that he fell?
>
> Mr. Murray: I will adopt that form.

The witness: No

(Pl Dep., at 44). Although plaintiff speculated that he may have fallen because construction debris in the tub may have become attached to the bottom of his shoes (*id.* at 47; *see also* Barker Aff., at 1), he specifically conceded that none of the alleged slippery substances were present on the surface of the bathtub lip where he was standing at the time of his fall. Accordingly, defendants are entitled to summary judgment as a matter of law on plaintiff's Industrial Code §§ 23-1.7 (d) and 23-1.7 (e) (2) claims, since there is no evidence that the bathtub lip itself was slippery, or contained debris that would cause plaintiff to slip or to trip (*see Riley v J.A. Jones Contr., Inc.*, 54 AD3d 744 [2d Dept 2008]; *Santo v Scro*, 43 AD3d 897 [2d Dept 2007]; *Guercio v MetLife, Inc.*, 15 AD3d 153, *supra*). As plaintiff has failed to cite an Industrial Code section that is factually and legally applicable to his claim, his cause of action pursuant to Labor Law § 241 (6) must be dismissed (*see Panetta v Paramount Communications, Inc.*, 255 AD2d 568 [2d Dept 1998], *lv denied* 93 NY2d 806 [1999]).

Labor Law § 200

Defendants argue that plaintiff's Labor Law § 200 and/or common-law negligence claims should be dismissed because defendants Marine Estates and Plaza, as owner and construction manager, had absolutely no control over the means and methods of plaintiff's work. Plaintiff concedes that defendants have no liability under Labor Law § 200, and consents to the dismissal of this cause of action (*see* Aff. of Steven C. Falkoff, at 8).

The court has considered the remaining arguments, and finds them to be without merit. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is

dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 12/19/08

ENTER:

WALTER B. TOLUB J.S.C.