Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **LAWRENCE V. CULLEN** IAS PART 6
Justice

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WALTER VARGAS, Index No.:7488/05

Plaintiff, **ORDER**

-against-

APPLEBAUM REALTY, LLC, 27 EAST 65TH STREET OWNERS CORP., RESIDENTIAL MANAGEMENT GROUP, SUTTON MADISON INC.,

Defendants.

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APPLEBAUM REALTY, LLC, and SUTTON MADISON, INC.,

Third-Party Plaintiffs,

-against -

STELL MAR-GARAGE,

Third-Party Defendant.

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That the following papers numbered 1 to 17 read on this motion by defendants/third-party plaintiffs APPLEBAUM REALTY, LLC and SUTTON MADISON, INC., for summary judgment, and cross motion of defendants, 27 EAST 65TH STREET OWNERS CORP. and RESIDENTIAL MANAGEMENT GROUP, for summary judgment.

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That pursuant to a prior Order of this Court dated November 19, 2007, this matter was conferenced with the Court, and no resolution having been reached, the aforesaid motions are decided as follows:

Defendant/Third Party Plaintiffs, APPLEBAUM REALTY and SUTTON MADISON LLC, (hereinafter referred to as "APPLEBAUM/SUTTON"), move this Court for an Order granting permission to file the instant motion for summary judgment, and granting summary judgment dismissing all claims and cross-claims against APPLEBAUM/SUTTON, and/or granting summary judgment on their cross claim against co-defendant.

Defendants, 27 EAST 65TH STREET OWNERS CORP. and RESIDENTIAL MANAGEMENT GROUP (hereinafter referred to as "27 EAST/RESIDENTIAL"), cross move this court for an Order granting summary judgment dismissing the plaintiff's complaint and all cross-claims against 27 EAST/RESIDENTIAL.

REQUEST FOR PERMISSION TO FILE THE INSTANT MOTION:

Defendants, APPLEBAUM/SUTTON and 27 EAST/RESIDENTIAL, seek permission to file the instant summary judgment motions, and to deem the same timely.

There was a So Ordered Stipulation entered into on January 18, 2007 which provided that summary judgment motions were to be made returnable not later than May 8, 2007. The instant Order to Show Cause, filed on an expedited basis, was marked returnable May 8, 2007. The cross motion was also marked returnable May 8, 2007.

Plaintiff does not oppose the timeliness of the Order to Show Cause, but does oppose the cross motion, contending the same it not timely.

Defendants, APPLEBAUM/SUTTON, submit to the Court that the parties were engaged in active settlement negotiations, which fell apart on or about May 1, 2007. Accordingly, they submitted the Order to Show Cause on May 4, 2007 requesting that the same be heard on an expedited basis.

Defendants, 27 EAST/RESIDENTIAL, contend that since the original motion was timely, that the cross motion is also timely.

Inasmuch as plaintiff does not oppose the timeliness of the original motion, and does not dispute that the parties were engaged in settlement negotiations, the Court hereby holds that the aforesaid motions shall be deemed timely.

BACKGROUND:

Plaintiff, WALTER VARGAS, in this negligence/labor law actions seeks damages for personal injuries sustained on May 11, 2004. Plaintiff was an employee of Mountain Air Mechanical who was hired by defendants, 27 EAST/RESIDENTIAL, to install an air conditioning unit in the mechanical room in the basement/sub-basement of the premises located at 27 East 65th Street, New York, New York.

Defendant, APPLEBAUM, was the owner of said premises, and defendant, SUTTON, was the managing agent of the commercial portion of the premises, defendant, 27 East 65th Street Owners Corp., was the cooperative of the residential portion of the premises, and defendant, RESIDENTIAL, was the managing agent of said residential portion.

Mountain Air Mechanical was hired by defendant, 27 EAST 65th to replace an air conditioner absorber, which was for the benefit of the owners/residents of the building.

As it appears from the papers, the action by third-party plaintiffs, APPLEBAUM/SUTTON against third-party defendant, STELL MAR GARAGE, was discontinued by stipulation dated February 8, 2007.

Plaintiff testified that he was injured while he in a machine room and attempting to remove a metal panel/door so as to provide an opening large enough to accommodate the unit to be installed. Plaintiff testified he was directed and supervised by Mountain Air Mechanical employees only, and did not receive any direction from the defendants herein.

Plaintiff averred that as he removed the screws in order to remove the panel/door, the panel/door fell thereby causing plaintiff injury to his arm and shoulder. Plaintiff stated that the panel/door was approximately 40 inches from the ground, and it is undisputed that plaintiff was on ground level and was not elevated.

Plaintiff's Verified Complaint and Verified Bill of Particulars allege a violations of Labor Law §200, 240(1), and 241(6), as well as common law negligence and negligence based upon res ipsa loquitur. Accordingly, each cause of action shall be addressed separately to determine if the granting of summary judgment is warranted herein.

Labor Law §200:

Labor Law §200 codifies an owner and general contractor's common law duty to provide workers with a safe place to work. (*See*, Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]). In order to impose liability under this section, the party against whom liability is sought must have had the authority to control the activity causing the injury so as to enable it to avoid or correct said unsafe condition; had caused or created the dangerous condition; or had actual or constructive notice of the unsafe condition. (*See*, Ross v. Curtis-Palmer Hydro-Electric Company, 81 ny2d 494 [1993]).

However, if the defect or dangerous condition arose from the contractor's methods and the owner or general contractor did not exercise control or supervision over the activity causing the injury, the owner and general contractor will not be liable under Labor Law §200, even if said parties had notice of faulty methods or the dangerous condition alleged. (*See*, Comes v. New York State Electric and Gas Corporation, 82 NY2d 876 [1993]). In other words, liability shall only be established when the owner had the ability to control the work/activity that caused the injury, or actually exercised control or supervision over the same. (*See*, Allen v. Cloutier Construction Corp., 44 NY2d 290 [1978]).

In the instant matter, there is no evidence, and the plaintiff does not claim, that the defendants herein controlled or supervised plaintiff's activity which caused his injuries. There is no evidence that the defendants had notice of any defect which caused plaintiff's injury, nor that they created the condition. In fact, plaintiff does not oppose that branch of the defendants' motions seeking summary judgment pursuant to Labor Law §200. Accordingly, no liability attaches under section §200 of the Labor Law, and plaintiff's cause of action under said section is dismissed.

Common Law Negligence:

Labor Law §200 is a codification of the common law duty imposed upon owners and general contractors to provide a safe place to work. It is well established that no liability will attach absent evidence that the owner/general contract actually created the dangerous condition or, had actual or constructive notice of the same. (*See*, Piacquadio v. Recine Realty Corp., 84 NY2d 967 [1994]).

As heretofore stated, there is evidence presented that the defendants herein had notice of the condition which caused plaintiff's injury, no that they created the same. Accordingly, plaintiff's cause of action based upon common law negligence is dismissed.

Res Ipsa Loquitur:

It is well settled that the general rule in New York is that *res ipsa loquitur* applied only when the plaintiff can establish the following elements: (1) the event is one that ordinarily does not happen in the absence of negligence; (2) it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it was not due to any voluntary action or contribution by the plaintiff. (*See*, Bodnarchuk v. State of New York, 856 NYS2d 143 [2008]; Dermatossian v. New York City Tr. Auth., 67 NY2d at 226 [1986]).

Here, there is no evidence to support that the defendants had exclusive control nor that the accident was due to the defendants' negligence. Accordingly, the doctrine of *res ipsa loquitur* does not apply herein.

Labor Law §240(1):

This section of the Labor Law imposes absolute liability on owners, contractors, and their agents, for injuries sustained by workers who are engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building, as a result of the failure to provide proper protection to those involved where there are risks related to elevation differentials. (*See*, Melo v. Consolidated Edison of New York, Inc., 92 NY2d 909 [1998]).

It is well settled that this provision applies equally to instances of injuries caused by falling objects, as well as injuries caused by people falling. (See, Narducci v. Manhasset Bay Associates, 96 NY2d 259 [2001]).

Where there is a "falling object" claim, in order to prevail the plaintiff must establish that while the object was being hoisted or secured, it fell because of the absence or inadequacy of safety devices as enumerated in the statute. (*Narducci* at 268).

In addition, the "falling object" must be either be improperly hoisted or inadequately secured, and must be elevated above the work site or otherwise involve the extraordinary elevation-related risks envisioned by that statute. (*See*, Ramos v. Champion Combustion, Inc., 1 AD3d 287 [2003]). In *Ramos* the Court dismissed the plaintiff's Labor Law §240(1) claim in that the metal plates that fell on the plaintiff, were not elevated above the work site and his activities did not otherwise involve any extraordinary elevation-related risks.

In *Melo*, a metal plate fell on plaintiff's foot. The Court noted that just prior to falling, the plate was either resting on the ground or hovering slightly above the ground, and not elevated above the work site. The *Melo* Court held that the plaintiff's activities did not fall within the purview of §240(1) in that it did not involve the special elevation risks encompassed by said statute.

In Peay v. New York City School Construction Authority, 35 AD3d 566 [2006]), a wall collapsed on the plaintiff causing injury. It was held that since the wall was at the same level as the plaintiff, the same did not constitute a falling object for the purposes of Labor Law §240(1).

In the case at bar, there is no evidence that the metal plate/door that fell upon plaintiff was being improperly hoisted or inadequately secured. Further, plaintiff testified that said metal plate/door was approximately 40 inches from the ground, or in otherwise at the same level. Accordingly, the plaintiff's claim under Labor Law § 240(1) must be dismissed.

Labor Law §241(6):

In order to establish a violation of Labor Law §241(6), the claimant must plead failure to comply or adhere to a specific rule and/or statute. A plaintiff proceeding under §241(6) must establish that some "concrete specification" of the Industrial Code was violated, and that it was a substantial factor in causing the accident. (*See*, Ross v. Curtis-Palmer Hydro-Electric Company, *supra*).

The plaintiff herein has failed to plead a violation of any specific Industrial Code provision. Rather, plaintiff pleads failure to "comply with the requirement of OSHA, the New York City Building Code and Rules and Regulations of the New York Board of Standards and Appeals, 12 NYCRR §23, et seq." (Plaintiff's Verified Bill of Particulars, paragraph 14).

Inasmuch as OSHA regulations do not impose a non-delegable duty upon an owner or contractor, a violation of the same may not serve as a predicate for a §241(6) claim. (*See*, Rizzuto v. L.A. Wenger Contracting Co., Inc., *supra*).

Furthermore, plaintiff does not specify the Industrial Code that is alleged to have been violated, and therefore his cause of action pursuant to Labor Law §241(6) must be dismissed.

Accordingly, based upon the foregoing, it is hereby

ORDERED that the defendants', APPLEBAUM REALTY, LLC and SUTTON MADISON, INC., motion for summary judgment dismissing the complaint of the plaintiff is hereby granted; and it is further

ORDERED that the defendants', 27 EAST 65TH STREET OWNERS CORP and RESIDENTIAL MANAGEMENT GROUP, motion for summary judgment dismissing the complaint of the plaintiff is hereby granted; and it is further

ORDERED that the complaint of the plaintiff, WALTER VARGAS, is hereby dismissed;

ORDERED, that the Clerk of the Court is authorized to enter judgment in accordance with the foregoing.

A copy of this Order is being faxed to all parties herein.

Dated: February 11, 2009

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LAWRENCE V. CULLEN, J.S.C.