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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Justice

Joseph ORLINO

- v -

2 GOLD LLC

INDEX NO. 110110/04

MOTION DATE 10/14/08 SOS

MOTION SEQ. NO. 02

MOTION CAL. NO. 89

The following papers, numbered 1 to 4 were read on this motion to/for SJ

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED
MAR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/6/09

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: I.A.S. PART 7

----------X

JOSEPH ORLINO,

Plaintiff,

- against -

2 GOLD, LLC,

Defendant.

----------X

Index No.: 110110/04

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

This is an action to recover damages for personal injuries sustained by a laborer when he tripped on a piece of lumber while working at a construction site located at 2 Gold Street, New York, New York on March 2, 2004.

Defendant 2 Gold, LLC moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Joseph Orlino's common-law negligence and Labor Law §§ 200 and 241 (6) claims against it.

BACKGROUND

On the date of the accident, defendant was the owner of a 52-story reinforced concrete residential building, which was being built floor by floor from the ground up, where plaintiff's accident took place (the building). Non-party 2 Gold GC LLC (GC) served as the general contractor on the project. GC hired plaintiff's employer, non-party Sorbara Construction Corporation (Sorbara), to erect the underlying concrete structure of the building.

Plaintiff testified that, in order to erect the concrete structure of the building, Sorbara would first erect a plywood deck on each floor, and then lathers, hired by Sorbara, would lay rebar on top of that deck. Plaintiff further explained that, utilizing a crane and a bucket, which were supplied by

Sorbara, Sorbara laborers would then pour concrete over the rebar. In addition, columns, which would ultimately bear the weight of the building, would be be poured with concrete. Sorbara carpenters placed woodwork underneath the plywood deck to reinforce it until the concrete was poured.

Plaintiff testified that, on the day of his accident, he was working as a signal man on the seventh floor of the building. As the signal man, it was plaintiff's job to direct the crane operator as to where to release the bucket of concrete. When he was not acting as a signal man, plaintiff maintained that it was one of his duties to clean up debris, which included picking up and stacking lumber to be reused.

When he first arrived on the seventh floor, plaintiff alleges that he noticed that the lathers were present and in the process of laying down rebar on top of the deck, and that he also noticed that the area contained a lot of debris, describing it as "a mess, more messy than average" (Defendant's Notice of Motion, Exhibit D, Orlino Deposition, at 69). Plaintiff stated that the debris included three-by-four pieces of lumber, steel rebar, which was tied off in bunches, plumbers' boxes and electrical pipe.

Plaintiff testified that, at the time of his accident, he had just signaled the crane to bring in a bucket of concrete. As he was moving out of the way of the swinging bucket, plaintiff tripped on a piece of loose lumber, which caused him to then step backwards and slip on a piece of steel rebar that had not been properly tied off with wire. Plaintiff maintained that he does not remember the size of the piece of lumber that he tripped on, and that he did not look for it after his accident.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In his opposition papers, plaintiff states that he does not oppose those parts of defendant's motion which seek to dismiss plaintiff's common-law negligence and Labor Law § 200 claims. In addition, plaintiff does not oppose that part of defendant's motion which seeks to dismiss plaintiff's Labor Law § 241 (6) claim, with the exception of that part of plaintiff's Labor Law § 241 (6) claim predicated on defendant's alleged violation of Industrial Code 12 NYCRR 23-1.7 (c) (2). Thus, defendant is entitled to summary judgment dismissing those claims that plaintiff does not oppose.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIM PREDICATED ON A VIOLATION OF INDUSTRIAL CODE § 23-1.7 (c) (2) AGAINST DEFENDANT

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, 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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Industrial Code 12 NYCRR 23-1.7 (e) (2) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see O'Sullivan v IDI Constr. Co.*, 28 AD3d 225, 225 [1st Dept], *affd* 7 NY3d 805 [2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]).

Industrial Code 12 NYCRR 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.

Initially, it should be noted that, in his opposition papers, plaintiff conceded that the rebar that he slipped on was integral to the work being performed in the area where his accident occurred. In addition, defendant demonstrated its prima facie entitlement to judgment as a matter of law by submitting evidence that Industrial Code regulation 12 NYCRR 23-1.7 (e) (2) is inapplicable to the

piece of lumber that plaintiff allegedly tripped on, as it was also an integral part of the work being performed at the site of his accident, and not "debris" or "scattered materials" within the meaning of the code (*Dubin v S. DiFazio & Sons Constr., Inc.*, 34 AD3d 626, 626 [2d Dept 2006]; *O'Sullivan v IDI Constr. Co.*, 28 AD3d at 226; *Appelbaum v 100 Church*, 6 AD3d at 310; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed]).

Plaintiff testified that, prior to his accident, he had observed lumber similarly situated like the lumber on the seventh floor, as "there's lumber all over the deck during erection" (Defendant's Notice of Motion, Exhibit D, Orlino Deposition, at 79). Plaintiff stated that the lumber would have been used by the Sorbara carpenters to build the frame and some protection rails. With respect to the wooden structure that held up the plywood, plaintiff testified that "[t]here's legs, four by four legs, hundreds of them underneath the deck that's holding the stringers and ribs, all reinforced underneath holding up the floors" (*id.* at 44). Approximately two days after the columns were poured, Sorbara laborers would strip and remove woodwork that was holding up the plywood deck and which served as a form for the concrete. Plaintiff maintained that it was one of his duties to clean up debris, which included picking up and stacking lumber to be reused.

In opposition, plaintiff failed to raise a triable issue of fact as to whether the piece of lumber that plaintiff tripped on was, in fact, debris left behind by other trades, and not an integral part of the work to going on at the site of the accident. To that effect, plaintiff merely opined that the lumber also "could have been" used by the plumbers and electricians to "chop up certain things" (*id.* at 71). Notably, Peter DePalma, construction manager for GC, testified that Sorbara was solely in charge

of erecting the concrete structure of the building, and that Sorbara "basically own[ed] the top floors" (Defendant's Notice of Motion, Exhibit E, DePalma Deposition, at 16). DePalma also testified that Sorbara was responsible for all housekeeping on the top three floors "one hundred percent," which included keeping the floor clear of lumber (*id.* at 40).

DePalma explained that, with the exception of an electrician to install the conduit inside the deck and a steamfitter and plumber to install sleeves, Sorbara employees were "the only ones allowed to work on those floors until they finish[ed] their work, then the other trades move in to take over" (*id.* at 16). Importantly, DePalma asserted that GC's daily report listed only Sorbara and GC's steel inspector, who was always on deck when the rebar and concrete were being installed, as being present on the seventh floor on the day of the accident.

Thus, defendant is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant 2 Gold, LLC's motion for summary judgment is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment in favor of this defendant.

Dated: March 6, 2009
New York, New York

ENTER:

J.S.C.

FILED
MAR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK