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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 106486/2006

MONAGHAN, PATRICK

VS.

540 INVESTMENT LAND

SEQUENCE NUMBER : 002

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

motion is decided in accordance with accompanying memorandum decision

FILED
JUN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

JUN 05 2009

Dated: _____

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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PATRICK MONAGHAN,

Plaintiff,

Index No.
106486/06

- against -

540 INVESTMENT LAND COMPANY LLC and
540 ACQUISITION CO., L.L.C.

Defendants.

EDWARD H. LEHNER, J.;

Before me is another case where the principal legal issue presented in determining whether plaintiff's claim is encompassed within the coverage of Labor Law § 240 (1) is whether the task plaintiff was performing at the time of his injury was a "repair" or "routine maintenance." The second issue raised herein is whether, as an employee of the managing agent for the owner of the subject building, plaintiff's claim against the owner is barred under the Worker's Compensation Law by reason of the "special employee" doctrine.

Here, the plaintiff states that he was on a ladder seeking to remove a ballast in a fluorescent light fixture when the ladder slipped causing him to fall. No construction was being performed at the time. Plaintiff was an engineer employed by Macklowe Management Co., Inc. ("Macklowe"), the managing agent of the large commercial building at 540 Madison Avenue (the "Building"). Having determined

on April 18, 2006, the day before his accident, that the problem with the subject light fixture was not a defective bulb, he was instructed by his supervisor, Thomas Pantano, to obtain the model number of the ballast so that a new one could be procured. Plaintiff testified that on the next day he was told by Pantano that he needed the ballast in order to be able to order a new one, and that it should be removed from the fixture and placed on his desk (EBT pp. 36-37). Plaintiff stated that then in order to remove the ballast he obtained a six-foot A-frame ladder and, carrying a lineman's plier, a flashlight and a screwdriver, he climbed onto the ladder, removed a 2 foot by 2 foot tile from the ceiling, and sought to trace the conduit leading to the light fixture when the ladder slipped. Plaintiff claims when he started falling with the ladder he grabbed onto the ceiling tile, but received an electric shock and then fell to the floor on top of the ladder (Id. pp. 44-50). He stated that in his two years working at the Building he had changed over 30 ballasts (Id. p. 116). He further claims that he requested another employee to aid him by holding the ladder he was to use, but such request was not acceded to (Id. pp. 34, 37). Pantano denies that he ever told plaintiff to remove the ballast (EBT pp. 36-37), or that plaintiff ever asked for assistance (Id. p. 43).

Defendant 540 Investment Land Company, LLC owns the land under the Building, and defendant 540 Acquisition Company, LLC owns the Building (which

defendants are jointly referred to hereinafter as the "Owner").

The management agreement between Macklowe and the Owner relating to the Building dated January 11, 2005 (the "Agreement") provides in article II, section (h) that Macklowe:

> "Agrees on behalf of Owner to supervise the work of, and to hire and discharge employees ... (but) that all employees are in the employ of Owner solely and not in the employ of (Macklowe) and that (Macklowe) is in no way liable to employees for their wages or compensation nor to Owner or others for any act or omission on the part of such employees."

Plaintiff stated that he believed that payroll checks he received were from Macklowe and that his supervisor, Pantano, was also employed by Macklowe. However, under the Agreement, Macklowe was to be reimbursed by the Owner for payroll expenses advanced by it.

Defendants have now moved for summary judgment dismissing the complaint, and plaintiff has cross-moved for summary judgment on liability on his claim under Labor Law § 240 (1).

I have very recently examined the constantly recurring issue under § 240 (1) as to whether a worker is performing a "repair" and thus covered by the section, or merely performing "routine maintenance" and not covered. In Nakis v. Apple Computer, Inc., – Misc 3d – , 2009 WL 1444643, I concluded that the principle that has evolved under the case law is that the changing of components that require replacement in the course of normal wear and tear constitutes "routing maintenance,"

but would be a "repair" where the object being worked upon was inoperative or malfunctioning for other reasons. The principle may be easy to state, but often difficult to apply, as evidenced by the numerous cases involving the issue.

Plaintiff concedes that merely changing a light bulb would constitute maintenance but, relying on the First Department holding in Piccione v. 1165 Park Avenue, Inc., 258 AD2d 357, 358 (1999), lv. to ap. dism. 93 NY2d 957 (1999), argues that changing a ballast in a light fixture constitutes a repair. There the court stated that the "repair work consisted of replacing the ballast and sockets, disconnecting the wires, stripping them and reconnecting them (and that) [s]uch repairs, which entailed much more than merely changing a light bulb, constituted 'repairs' within the meaning of Labor Law § 240(1)." However, last year the Second Department, without citing Piccione, came to a seemingly contrary conclusion, holding that the "task of replacing a ballast in a fluorescent light fixture falls within the category of routine maintenance ... (as) plaintiff's work involved the replacement of a worn-out component in a nonconstruction and nonrenovation context" [Deoki v. Abner Properties Co., 48 AD3d 510].

If plaintiff is to be believed that he was intending to remove the ballast it may, depending on what was involved in effecting the removal, constitute a repair under the First Department interpretation of § 240(1), but if Pantano is to be believed that plaintiff was merely proceeding to get the model number of the ballast, then the task

plaintiff was performing when he fell may well not constitute a repair under the statute. It is noted that the deposition testimony showed that at times the task of changing ballasts was performed by outside electricians, as was the work eventually performed on the ballast involved herein (Pantano EBT, p. 39), and that now the procedure is always performed by licensed electricians (Id. p. 63). This would tend to support the First Department position that changing ballasts involves significantly more work than changing a light bulb.

In view of the conflict in the testimony as to the work plaintiff was in the process of performing, a triable issue has been raised as to whether plaintiff was engaged in a repair as that term is employed in § 240(1). Hence, the motions directed to this claim, on the grounds discussed above, are both denied.

The motion of the Owner to dismiss the claim under § 241(6) is granted as the accident did not occur in the course of "construction, demolition or excavation." See, Nagel v. D&R Realty Corp., 99 NY2d 98, 102 (2002); Esposito v. New York Industrial Development Agency, 1 NY3d 526, 528 (2003); Maes v. 408 W. 39 LLC, 24 AD3d 298 (1st Dept. 2005). Also dismissed are the claims under § 200 and common-law negligence as there is no evidence that Owner exercised any control over plaintiff's work nor is there any proof that a dangerous condition caused the ladder to fall.

I now come to the issue as to whether plaintiff should, as requested by Owner,

be considered a general employee of the Owner. Here, plaintiff was hired and employed by Macklowe; he was paid by Macklowe; the Worker's Compensation form submitted with respect to the accident listed Macklowe as the employer; Macklowe had the right to hire and fire Building employees; and plaintiff's supervisor, Pantano, is a Macklowe employee, as is the Building manager who supervised Pantano (see, EBT of Felicia Di Paola, pp. 9-11). Ms. Di Paola further agreed "that only Macklowe employees directed and supervised" plaintiff (id. p. 11). There is no indication that the Owner exercised any control over the activities of plaintiff or his supervisors.

In light of the foregoing, there is no basis to find that plaintiff was the general employee of Owner and only a special employee of Macklowe. That Macklowe, as managing agent for the Building, was reimbursed by Owner pursuant to the Agreement for salaries paid to the employees engaged in the management of the Building and that Owner was therein referred to as the employer does not alter this conclusion. See, Thompson v. Grumman Aerospace Corporation, 78 NY2d 553 (1991); Fung v. Japan Airlines, 9 NY3d 351 (2007); Villanueva v. Southeast Grand Street Guild Housing Development Fund Company, 37 AD3d 155 (1st Dept. 2007). Thus, the application Owner to dismiss on the grounds that Owner was the general employee of plaintiff is denied.

The foregoing constitutes the order of the court.

Dated: June 5, 2009

J.S.C.