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

PRESENT: HON. CAROL EDMEAD PART 36

Index Number : 104834/2007
LAYNE, LIONEL
VS
METROPOLITAN TRANSPORTATION
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 104834/07
MOTION DATE 12/8/09
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

_____ ... ...is 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Capital Construction Co., and Granite Construction Northeast, Inc., pursuant to CPLR §3212, for summary judgment against plaintiff Lionel Layne as to plaintiff's Labor Law §240 claim is granted on the ground that plaintiff has withdrawn such claim, and plaintiff's Labor Law §240 claim is hereby severed and dismissed; and it is further

ORDERED that defendants' motion, pursuant to CPLR §3212, for summary judgment on plaintiff's common law negligence and Labor Law §200 claims is granted as to Metropolitan Transportation Authority, New York City Transit Authority, and Granite Construction Northeast, Inc.; and it is further

ORDERED that defendants' motion, pursuant to CPLR §3212, for summary judgment on plaintiff's common law negligence and Labor Law §200 claims is denied as to MTA Capital Construction Co., is denied, without prejudice; and it is further

ORDERED that plaintiff's cross-motion to compel a second deposition of Hanssy Joseph, pursuant to CPLR §3124 is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: ~~This constitutes the decision and~~ order of the ~~Court~~

2/3/10

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

LIONEL LAYNE,

Index No. 104834/07

Plaintiff,

-against-

DECISION/ORDER

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION CO., GRANITE CONSTRUCTION NORTHEAST, INC., and SLATTERY SKANSKA INC.,

Defendants.

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants Metropolitan Transportation Authority ("MTA"), New York City Transit Authority ("NYCTA"), MTA Capital Construction Co. ("MTACC"), and Granite Construction Northeast, Inc. ("Granite Construction") (collectively "defendants")[1] move pursuant to CPLR §3212 for summary judgment dismissing the common law negligence and Labor Law §§200 and 240 claims of plaintiff Lionel Layne ("plaintiff").

In response, plaintiff cross moves pursuant to CPLR §3124 to compel defendants to produce a witness for a second deposition.

Background

The joint venture of Granite Halmar and Schiavone Construction Co. ("Schiavone") was a contractor on an MTA/NYCTA project, titled "Contract A-35976, Design and Construction of the South Ferry Terminal Structural Box, 7th Avenue/Broadway Line, "A" Division [IRT] in the

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[1]The Complaint and all cross claims against defendant Slattery Skanska, Inc. were dismissed, pursuant to an April 25, 2008 decision and order by this Court.

Borough of Manhattan" (the "South Ferry Tunnel project").

On April 29, 2006, plaintiff, an employee of Schiavone, was performing construction work at the South Ferry Terminal Station at the north end of a subway tunnel (the "job site"). Plaintiff alleges that while he was attempting to lift a Nolan Cart (the "cart") off a track with other workers at the job site, the cart fell onto plaintiff's left foot causing him injuries. In his Complaint, plaintiff alleges that defendants are liable for common law negligence as well as violations of Labor Law §§200 and 240.[2]

Relying on the depositions of plaintiff and Joseph Vieitez ("Mr. Vieitez"), an MTA/NYCTA field engineer, defendants first argue that plaintiff's Labor Law §200 and common law negligence claims should be dismissed (*see* the "Layne EBT" and the "Vieitez EBT"). Defendants contend that plaintiff fails to demonstrate that defendants had the authority to control Schiavone's means and methods of directing its employees to lift the cart. Rather, the testimony of Mr. Vieitez and Mr. Layne demonstrates that Schiavone directed plaintiff to lift the cart, and that neither defendants nor representatives of defendants were present to witness the activity or had any knowledge of the activity.

Defendants further argue that Mr. Vieitez's testimony about defendants' limited supervisory authority with respect to safety standards and the power to stop work in the event of a safety violation is insufficient as a matter of law to establish defendants' liability for a violation of Labor Law §200 or common law negligence. Defendants contend that there is no evidence that defendants were involved in any way with the safety aspects of Schiavone's means and

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[2] On January 15, 2008, plaintiff served a Supplemental Bill of Particulars, wherein he withdrew his Labor Law §241(6) claim.

methods. To the contrary, the evidence indicates that Schiavone had a site safety plan and safety professionals at the job site. Mr. Vieitez testified that other than Schiavone's safety professionals, no other people charged with worker safety were present at the job site.

In addition, defendants contend that although property owners often have general authority to oversee the progress of the work on their property, "the mere general supervisory authority" at a job site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law §200. Here, plaintiff's accident did not involve a dangerous or defective condition on defendants' premises. Instead, the accident involved the manner in which the plaintiff performed his work, which was not supervised by defendants, and which was performed on equipment provided by Schiavone. Thus, the failure to provide a hoist to lift the cart is at best a negligent act by Schiavone and not a violation of Labor Law §200 by defendants, defendants argue.

Further, defendants argue that they did not and could not have had any notice of the alleged dangerous condition. Defendants contend that there must be proof that defendants had prior notice of any allegedly dangerous lifting of the cart; however, there is no evidence that defendants had any opportunity to be aware of such. As defendants maintained only a "modicum of presence" at the job site, and exercised no control or direct supervision over the work being performed, they could not possibly have had any notice of the allegedly dangerous activity or condition, so that liability under Labor Law §200 would attach.

Finally, defendants argue that plaintiff's Labor Law §240(1) claim must be dismissed, because there is no evidence that plaintiff was subjected to elevation-related work hazards; he was exposed only to the usual and ordinary dangers of a construction site.

In his opposition, plaintiff first withdraws his Labor Law §240 claim because, as the cart was on the same level as plaintiff, the protective provisions of Labor Law §240 do not apply.

Second, plaintiff contends that, based on defendants' submissions, he is unable to discern "any theory or grounds for dismissing this action" against MTACC or Granite Construction. As such, plaintiff will not address the liability of those defendants.

Third, plaintiff argues that the motion should be denied as to MTA and NYCTA (the "moving defendants"). Plaintiff contends that since he does not claim that the accident arose from a defective condition on the premises, actual and constructive notice are not at issue. Rather, plaintiff asserts, the accident was caused by Schiavone's method of performing the work, which the moving defendants were authorized to oversee and correct.

Plaintiff argues that, according to Mr. Vieitez's testimony, the moving defendants were authorized to supervise the contractor's safety procedures, to report safety violations to the contractors' foreman, and to stop work if proper safety practices were not followed. Mr. Vieitez also indicated that the moving defendants were authorized to specify the proper safety practices to be followed. Hence, the moving defendants possessed sufficient authority as to the safety practices at the job site to subject them to potential liability for their breach of Labor Law §200, plaintiff argues. Although Mr. Vieitez has no personal knowledge as to the particulars of plaintiff's accident, Vieitez's acknowledgment in his deposition testimony that he would have intervened to stop a heavy cart from being manually lifted, and his power to direct that a different practice be followed for safety reasons, at a minimum, create a question of fact as to whether MTA and NYCTA possessed the requisite supervisory control over the work activity that resulted in plaintiff's injury, namely the unsafe manual lifting of the cart, plaintiff argues.

Plaintiff further contends that Hanssy Joseph ("Mr. Joseph"), whom plaintiff describes as MTA's and NYCTA's civil engineer assigned to monitor and oversee the construction and the safety practices at the job site, was not even present when the accident happened and, therefore, was not performing his duty (*see* the "Joseph EBT").

Finally, plaintiff cross moves to compel defendants to produce Mr. Joseph for a further deposition to answer questions to which he was not permitted to respond at his first deposition. Defense counsel prevented Mr. Joseph from responding to questions about whether Mr. Joseph regarded the practice of having six laborers manually lift a heavy Nolan cart to be dangerous, and whether he, as the supervising engineer, would have intervened to stop that procedure and to insist that another method be used to remove the cart. Mr. Joseph's testimony is highly relevant to this case, plaintiff argues. Defendants should not be entitled to summary dismissal of plaintiff's Labor Law §200 claim where the engineer assigned to the job site has not testified as to what he would have done if he had actually observed the practices being followed.

Plaintiff further argues that the refusal by defendants' attorney to permit Mr. Joseph to answer the questions posed to him violates §221.2 of the Uniform Rules for the Conduct of Depositions, a copy of which is set forth at the beginning of the deposition transcript. Plaintiff contends that a witness can decline to answer a question posed to him only to preserve a privilege or right of confidentiality, to enforce a limitation set forth in an order of the court, or when the question is plainly improper and would, if answered, cause significant prejudice. Here, defendants do not identify any privilege or right of confidentiality with respect to whether Mr. Joseph considers the manual lifting of the cart a dangerous practice, or what he would have done in response if he had observed such practice. Mr. Joseph's testimony has not been limited by a

Court order. Finally, the question is not plainly improper, and Mr. Joseph's response would not prejudice the defendants. Therefore, plaintiff argues, defendants should produce Mr. Joseph for a second deposition to answer questions previously posed to him and any follow-up questions.

In response to plaintiff's cross-motion,[3] defendants first argue that their motion was made on behalf of *all* defendants, including MTACC and Granite Construction. Defendants contend that in their moving papers, they maintained that *none* of the defendants is liable for common law negligence or a violation of Labor Law §200. In support thereof, they alleged that only plaintiff's employer, Schiavone, had the authority to control the means and methods of the activity that caused plaintiff's injury, and that other than Schiavone's safety professionals, there were no other people charged with worker safety at the job site. As such, plaintiff incorrectly assumes that he need not respond to the motion as it applies to MTACC and Granite Construction. Further, since Mr. Vieitez's testimony was not contradicted by anything pleaded in plaintiff's opposition, and plaintiff "has produced no evidence of any involvement in this case of any defendant other than NYCTA," at the very least, defendants' motion should be granted as to all defendants except NYCTA, defendants argue.

Second, defendants contend that in order for plaintiff to establish his remaining common law negligence and Labor Law §200 claims, plaintiff must show that defendants (1) had an active role in causing the accident and (2) that defendants had authority to control the activity that brought about plaintiff's injury. However, plaintiff fails to produce any "admissible evidence" in response to their motion. Instead, plaintiff submits inadmissible hearsay, opinion, and answers to

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[3]Defendants' response comprises an affirmation in opposition to plaintiff's cross-motion and in further support of their motion, which was followed by a supplemental affirmation in opposition to the cross-motion and in further support of their motion.

leading questions.

Defendants further contend that plaintiff asked Mr. Vieitez and Mr. Joseph, "who were not qualified to testify as expert witnesses on safety issues or work practices issues, and who did not witness the accident, and who did not even know about the accident until after it happened," to give expert opinions based on improper hypothetical questions that can only be propounded to a qualified expert. Neither of these resident engineers were offered as expert witnesses, and neither has been designated as such, pursuant to CPLR §3101. In fact, each has had no more than a routine course in safety procedures.

Defendants contend that, pursuant to CPLR §3115(a), an objection may be made at a trial or hearing to receiving in evidence any deposition or part thereof for any reason that would require the exclusion of the evidence if the witness were then present and testifying. Pursuant to CPLR §3115, defendants' counsel had every right to instruct Mr. Joseph not to answer questions that called for clearly inadmissible testimony, as such testimony would "irrevocably prejudice" defendants. Citing CPLR §3107, defendants further contend that a fact witness, even one qualified to express an expert opinion, may not be compelled to give an expert opinion without his consent and without notice to him that such testimony is being requested. Here, NYCTA was never put on any notice that its employees were going to be deposed and asked for expert opinions. Had there been such notice, defendants would have sought plaintiff's compliance with CPLR §3101(d)(iii), which requires a court order upon a showing of special circumstances for the deposition of an expert witness.

Defendants further contend that as lay witnesses, as opposed to expert witnesses, Mr. Vieitez and Mr. Joseph are precluded from drawing conclusions or offering opinions particularly

with respect to the ultimate issues in a case, such as whether a particular course of conduct was necessary, reasonable, proper, or dangerous. To permit such testimony from lay witnesses would invade the province of the jury, defendants argue. Accordingly, plaintiff's motion to compel Mr. Joseph to answer questions at a deposition calling for an opinion on safety issues must be denied. For the same reasons, the court may not consider the opinion testimony of Mr. Vieitez as to whether utilizing manpower instead of a mechanical lift was a safe method for getting the cart off the tracks. Mr. Vieitez's opinion, given over the objection of counsel, cannot be considered in opposition to defendants' motion.

Finally, in their Supplemental Affirmation, defendants add that Schiavone's contract with "MTA/NYCTA/MTACC" for the South Ferry Tunnel project (the "Contract"), and affidavits from David Michaelian ("Mr. Michaelian"), MTACC's Chief of Quality, Safety and Site Security, and Jayne Czik ("Ms. Czik"), MTACC's Deputy General Counsel demonstrate that Schiavone, not MTA/NYCTA/MTACC had the duty to supervise and control the means and methods of the work performed at the job site. Also, according to the affidavit of Richard Carlyle ("Mr. Carlyle"), Granite Construction's Business Manager, prior to January 3, 2006, Granite Halmar Construction Company, Incorporated was a wholly owned subsidiary of Granite Construction. In 2004, Granite Halmar and Schiavone formed a joint venture. On January 3, 2006, Granite Halmar's name was changed to Granite Construction, and continued to be a member of the joint venture. Since plaintiff was an employee of the joint venture when he was injured, and the joint venture covered plaintiff's accident under its workers compensation insurance policy, plaintiff's exclusive remedy is under the Workmen's Compensation Law, and

his claim against Granite Construction is barred.[4]

Discussion

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the

[4] The Court notes that based on a conference call with counsel for all parties, plaintiffs' counsel confirmed that upon receipt of defendants' Supplemental Affirmation, he did not contact the Court or submit a response thereto.

proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Labor Law §240

Here, it is uncontested that the cart which fell upon plaintiff's foot was on the same level as plaintiff and plaintiff withdraws his claim under Labor Law §240, which is directed solely at elevation-related hazards (*Dupuy v Hayner Hoyt Corp.*, 221 AD2d 901, 634 NYS2d 17 [4th Dept 1995 citing *Rodriguez v Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). Accordingly, plaintiff's Labor Law §240 claim is dismissed.

Common Law Negligence and Labor Law §200

Labor Law §200 codifies the common-law duty imposed on an owner or general contractor to provide construction-site workers with a safe work site *(Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], *citing Blessinger v Estee Lauder Companies, Inc.*, 271 AD2d 343 [2000]). Liability under common law negligence or Labor Law §200 is limited to defendants exercising supervisory direction or control over the operation that allegedly brought about plaintiff's injury, "rather than possessing merely general supervisory authority" (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]; *Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 556 [1st Dept 2009] ("In the case of a general contractor, this standard makes sense because a general contractor is unlikely to have notice without some

control or supervision over the work site")). "Furthermore, the proponent of a Labor Law §200 claim must demonstrate that the defendant had actual or constructive notice of the allegedly unsafe condition that caused the accident. The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell* at 201; *Gordon v American Museum of Natural Hist.*, 67 NY2d 836, 837-838 [1986]). However, "[w]here an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or §200" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]; *Arrasti v HRH Const. LLC*, 60 AD3d 582, 583 [1st Dept 2009] ("The evidence fails to raise a triable issue of fact that defendants supervised or controlled plaintiff's work at the construction site. . . . Accordingly, the claims based on common-law negligence and violation of Labor Law §200 should have been dismissed")).

Here, defendants establish a *prima facie* case that MTA and NYCTA are entitled to judgment as a matter of law on plaintiff's common law negligence and Labor Law §200 claims. However, the evidence in their motion fails to establish such a case as to MTACC and Granite.

As to MTA and NYCTA, the First Department makes clear that general supervision and coordination of the work site is insufficient to trigger liability under common law negligence or Labor Law §200 (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]). In *O'Sullivan v IDI Const. Co., Inc.* (28 AD3d 225, 227 [1st Dept 2006]), the First Department held that the fact that a general contractor had "'an on-site safety manager with responsibility for the safety of the work done by subcontractors' does not . . . provide any basis for imposing liability on the general contractor based on an injury allegedly caused by a subcontractor's work."

Similarly, in *Cahill v Triborough Bridge & Tunnel Authority* (31 AD3d 347, 350 [1st Dept 2006]), the First Department held that the "testimony of defendant's assistant project manager that he inspected the work site several times a week and would report any safety violations he observed is insufficient to support a finding of supervision or control under Labor Law §200."

In *Singh*, the First Department held that the plaintiff's common-law negligence and Labor Law §200 claims were properly dismissed against defendant Bovis, the construction manager, for the following reasons:

> In this matter, it is undisputed that plaintiff never took orders from Bovis and that Bovis had no responsibility for overseeing the work performed by him or his employer. Moreover, the testimony of Bovis's project superintendent: that he conducted regular walk-throughs and, if he observed an unsafe condition, *had the authority to find whoever was responsible for the condition and have them correct it or, if necessary, stop the work*; that he discussed covering the subject hole in the roof with [the subcontractor's] representative; and that he had inspected the plywood in question after it had been nailed down over the hole, *simply indicates Bovis's general supervision and coordination of the work site and is insufficient to trigger liability.*
> (*Singh* at 140) (emphasis added)

Here, it is undisputed that Schiavone, not MTA or NYCTA, actually directed plaintiff's method of performing the work. Plaintiff testified that he was instructed by his supervisor to manually lift the cart off the tracks and lean it against the wall of the subway tunnel (Layne EBT, p. 80:8 -21). The testimony of Mr. Vieitez, a field engineer for MTA and NYCTA, establishes that MTA and NYCTA exercised only limited supervisory control of the job site. Mr. Vieitez testified that his duties as a field engineer were to go out to the job site and ensure that Schiavone was doing everything according to the specifications in the Contract. With regards to safety of the workers at the job site, Mr. Vieitez testified that if he "saw something wrong," then he would go to Schiavone's foreman and "tell him to correct it" (Vieitez EBT, pp. 6:11-7:14, 14:10-14:25). Mr. Vieitez's testimony demonstrates that MTA's and NYCTA's duties paralleled the duties of

the defendant Bovis in *Singh*. Based on Mr. Vieitez's testimony, MTA's and NYCTA's responsibilities at the job site constituted only limited supervisory control, which is "insufficient to trigger liability" under common law negligence or Labor Law §200 (*Singh* at 140).

Further, defendants establish that neither MTA nor NYCTA had actual or constructive notice of any alleged dangerous activity at the job site that cause the accident. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon* at 837-838). On the day of the accident, Mr. Vieitez was involved with a blasting operation at the south end of the tunnel; the accident occurred at the north end of the tunnel (Vieitez EBT, pp. 8, 18). Mr. Vieitez further testified that he had never heard of workers being told to manually lift a Nolan Cart off a track; usually, a crane is used to remove such a cart from the tracks (*id.* at 22-24). Thus, based on Mr. Vieitez's testimony, MTA and NYCTA had neither actual nor constructive notice of any dangerous activity at the job site. Therefore, as defendants have demonstrated that NYCTA and MTA had no notice, and exercised only limited supervisory control insufficient to trigger liability for common law negligence or Labor Law §200, they have demonstrated a *prima facie* case for summary judgment in MTA's and NYCTA's favor.

Plaintiff fails to raise an issue of material fact defeating defendants' *prima facie* case. First, plaintiff concedes that he is not claiming that the accident arose from a defective condition at the job site, but instead was caused by Schiavone's methods of performing work. Therefore, he is not alleging that defendants had actual or constructive notice (opp., ¶ 8).

Second, neither the caselaw nor the Joseph EBT, on which plaintiff relies, supports plaintiff's proposition that MTA and NYCTA possessed sufficient authority as to the safety

practices at the job site to subject them to liability. For example, in *Rizzuto v L.A. Wenger Contracting Co., Inc.* (91 NY2d 343, 352 [1998]), the Court of Appeals held that the trial court and Appellate Division erred in dismissing the plaintiff's common law negligence and Labor Law §200 claims against the defendant general contractor. David Wenger ("Mr. Wenger"), the defendant's vice president and secretary, testified that "occasionally, he personally supervised the project, interacting with the foremen of the subcontractors to ensure that the physical work progressed in accordance with the plans, specifications and safety rules" (*id.* at 352). However, critical to the Court of Appeals's decision was Mr. Wenger's testimony that defendant "was able to condition access to areas under construction to ensure that an 'area is not going to be utilized in any way by [the Transit Authority] so we can go into that area and work'" (*id.*). The Court of Appeals went on to hold:

> Thus, contrary to the conclusions of the courts below, there exists sufficient record evidence to present a triable issue on whether defendant *had control over the methods of the subcontractors and other worksite employees* in the sense that defendant had the *ability to coordinate the work activity* of its subcontractors and the Transit Authority, had *the capacity to exclude the Transit Authority from working in the fuel station* area of the depot, or *had the authority to direct either its subcontractors or the Transit Authority to not engage in an operation while another potentially hazardous activity, i.e.*, pressure-testing an underground fuel tank, was taking place within the immediate area. (*Id.* at 352-353) (emphasis added)

Here, the Joseph EBT fails to raise an issue of material fact as to whether MTA and NYCTA "had control over the methods" of Schiavone and its workers. Plaintiff's argument that Mr. Joseph was responsible for "job site safety" is insufficient (*O'Sullivan* at 227; *Cahill at* 350; *Singh* at 140). The Joseph EBT demonstrates that Mr. Joseph was responsible for "monitoring construction activities" to protect MTA and NYCTA "from liability," *i.e.,* monitoring the activities at the job site to see whether such activities were being performed according to the

specifications of the Contract (Joseph EBT, pp. 14-15). Mr. Joseph further testified that if he witnessed work being performed in an unsafe way, "I can either stop the job, or I can report it to the . . . safety engineer" (*id.* at 16:1-7). As discussed above, such testimony falls short of demonstrating that MTA or NYCTA had such a level of supervisory control over the work methods at the job site, so as to enable MTA or NYCTA to have prevented the creation of the unsafe condition or plaintiff's exposure to same (*Singh* at 104).

Finally, that Mr. Joseph would have intervened if he observed the foreman tell the workers to lift the cart off the tracks by telling the foreman that such practice was unsafe (Joseph EBT, p. 30), simply indicates general supervision and coordination of the work site and is insufficient to trigger liability (*see Singh*).[5]

As plaintiff fails to raise an issue of material fact as to whether MTA and NYCTA exercised the degree of supervisory control over Schiavone's work methods that would trigger liability under common law negligence and Labor Law §200, defendants' motion is granted as to MTA and NYCTA.

As to MTACC, there is no evidence in the record as to its role, or lack thereof, concerning the work being performed by plaintiff at the time of his accident. Although the subject Contract indicates that the "Contractor" agreed to "furnish all work, design, labor, materials, plant, tools, supplies, equipment and other means of performance and incidentals"

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[5]The Court notes that defendants' arguments contesting the admissibility of plaintiff's evidence lack merit (*see e.g., State v Metz*, 241 AD2d 192, 199 [1st Dept 1998] ["Thus, while a motion for summary judgment must be supported by evidentiary facts, they need not necessarily be in the form used at trial"]; *Navedo v 250 Willis Ave. Supermarket* (290 AD2d 246, 247 [1st Dept 2002] ["Hearsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted"]; *Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 [1st Dept 1999], quoting *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 312 [1972] [holding that "the testimony of plaintiff's brother, although inadmissible at trial, 'may nevertheless be considered in determining whether a triable issue exists to defeat the motion'"]).

necessary to complete the work, and there were no performance obligations assigned to MTA or NYCTA in the Contract having to do with the means and methods of the subject cart, the Contract was between MTA/NYCTA and Schiavone; MTACC was not a party to such Contract. Further, Mr. Michaelian and Ms. Czik, both of MTACC, attest that MTACC is the "Construction Manager" for MTA and NYCTA, and that MTACC provides "general oversight and responsibility for project management" for MTA and NYCTA. Such statements are inconclusive as to MTACC's role at the site, if any. The Court alsó notes that defendants' submissions in their moving papers, *i.e.*, plaintiff's deposition and the various pages of Vieitez's deposition, are silent as to MTACC. Therefore, defendants failed to establish entitlement to summary judgment as to MTACC, and the motion for summary judgment as to said defendant is denied, without prejudice.

However, it is uncontested that plaintiff was employed by the joint venture, Schiavone and Granite Construction, at the time of his accident, and that the joint venture covered plaintiff's claim under the joint venture's workers compensation insurance policy. As Granite Construction was plaintiff's employer, Workers' Compensation law bars plaintiff's claim against Granite Construction (*Hernandez v Sanchez*, 40 AD3d 446, 836 NYS2d 577 [1st Dept 2007] (stating that since "Fresh Direct, plaintiff's employer, and U.T.F. functioned as one company, plaintiff's claims against U.T.F. are barred by the exclusive remedy of Workers' Compensation Law § 11")). It is noted that Granite's argument in this regard was unopposed by plaintiff. Therefore, summary judgment dismissing the complaint against Granite is warranted.

Plaintiff's Cross-Motion to Compel a Second Deposition of Mr. Joseph

Here, plaintiff seeks to conduct a second deposition of Mr. Joseph to elicit testimony

"about what [Mr. Joseph] *regarded as a dangerous condition* and about what *he would have done in response to that dangerous condition*, if he had observed such situation" (opp., ¶ 9) (emphasis added). Specifically, plaintiff's counsel attempted to ask Mr. Joseph the following question: "Now, if you saw a Schiavone foreman direct his men to lift a Nolan cart by hand off the tracks, *would you consider that to be an unsafe activity for those men*?" (Joseph EBT, p. 19: 22-25) (emphasis added). Defendants' counsel prevented Mr. Joseph from answering on the grounds that such a question called for speculation and was inappropriate for a witness not offered as an expert. Plaintiff's counsel continued to press for an answer, and defendants' counsel continued to refuse. Ultimately, plaintiff's counsel ended the deposition (*id.* at 18-25).

CPLR §3115 and the Uniform Rules for the Conduct of Depositions (22 NYCRR §221.2) require a deponent to answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person (*see Mora v Saint Vincent's Catholic Med. Ctr. of New York*, 8 Misc 3d 868, 869, 800 NYS2d 298, 300 [Sup Ct, New York County 2005] ["The proper procedure during the course of an examination before trial is to permit the witness to answer all questions posed, subject to objections pursuant to subdivisions b, c and d of CPLR 3115, unless a question is clearly violative of the witness's constitutional rights or of some privilege recognized in law, or is palpably irrelevant"]; *White v Martins*, 100 AD2d 805, 805 [1st Dept 1984] [holding that "there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered"]).

Here, the objection is not based on a privilege or right of confidentiality or to enforce a limitation set forth in an order of a court. Thus, the issue is whether the question was plainly improper such that the testimony plaintiff's counsel sought to elicit would significantly prejudice defendants.

At his deposition, Mr. Joseph stated, in numerous ways, over defendants' objection, that in performing his duty to monitor construction activities, if he saw "something that was being done in an unsafe way" he "can either stop the job" or "report it to the . . . safety engineer." If he saw a "Schiavone foreman ordering Schiavone employees to something in an unsafe way," Mr. Joseph had "the authority to tell that foreman and tell those men, "No, don't do that." Although Mr. Joseph "can't tell these guys . . . how to do their work," which is the foreman's responsibility, if he saw a foreman from Schiavone tell his employees to do "something that you felt was dangerous to the employees" Mr. Joseph had the authority to "stop the job, if they are doing it." Finally, when asked if he "saw a Schiavone foreman direct his men to lift a Nolan cart by hand off the tracks, would you consider that to be an unsafe activity for those men," Mr. Joseph replied, "If I see a foreman, yes. . . ." (See Joseph EBT, pp. 14-20). The question defendants' counsel directed Mr. Joseph not to answer concerned whether Mr. Joseph would stop men from lifting a Nolan cart off the tracks (p. 22), on the ground of improper expert opinion testimony. Based on the entirety of the above testimony, the objection to this latter question lacked merit. While it is undisputed that Mr. Joseph did not witness plaintiff's accident or the alleged manual lifting of the cart, any opinion testimony by Mr. Joseph would not be based on personal knowledge, and that defendants did not offer Mr. Joseph as an expert witness, pursuant

to CPLR §3101,[6] the last question, if answered, would not prejudice defendants in light of the answers already given. Defendants' objections to the line of questions were preserved, and there was no basis, on the ground of prejudice, for defendants' counsel to direct his witness not to answer.

The Court notes that such testimony concerns Mr. Joseph's purported role at the construction site, and thus, was relevant to plaintiff's common law negligence and Labor Law §200 claims. It is well settled that "New York has long favored open and far-reaching pretrial discovery" (*Anonymous v High School for Environmental Studies*, 32 AD3d 353, 358 [1st Dept 2006]), quoting *DiMichel v S. Buffalo Ry. Co.*, 80 NY2d 184, 193 [1992], *cert denied sub nom Poole v Conraip*, 510 US 816 [1993]). CPLR §3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*see Northway Engineering, Inc. v Felix Indus., Inc.*, 77 NY2d 332, 335 [1991]). "The words 'material and necessary' as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial (*Anonymous* at 358; *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 340-341 [1st Dept 2007] ["What constitutes 'material and necessary' should be construed liberally to require disclosure of any facts bearing on the controversy which assist by sharpening the issues and reducing delay"]). In addition, "[p]retrial disclosure extends not only to admissible proof but also to testimony . . . which may lead to the disclosure of admissible proof" *(Fell v Presbyterian Hosp. in City of New York at Columbia -Presbyterian Med. Ctr.*, 98 AD2d

[6]CPLR §3101(d)(iii) provides in relevant part: "Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate."

624, 625 [1st Dept 1983]).

However, in light of the previous testimony given by Mr. Joseph, it is clear that Mr. Joseph had no control or supervision over the method or manner in which plaintiff performed his work at the site. CPLR §3124 provides that a party seeking disclosure may move to compel compliance "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article" (*Probala v Rian Holding Co., LLC*, 2009 WL 4985695, 2 [Sup Ct, New York County 2009]). However, "the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Espady v City of New York*, 40 AD3d 475, 476 [1st Dept 2007]). Thus, "discovery may be ordered only if the litigant demonstrates, clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available (*Miller v City of New York*, 21 Misc 3d 886, 890-891, 865 NYS2d 523, 526 [Sup Ct New York County 2008], *citing O'Neill v Oakgrove Constr.*, 71 NY2d 521 [1988]; *see also*, *Espady* at 477 [1st Dept 2007] [striking part of trial court's order for disclosure on the ground that "plaintiffs have not shown any purpose to be served by enabling them to depose the [witnesses] in the absence of any indication that [they] could provide noncumulative material evidence"]; *Andon ex rel. Andon v 302-304 Mott Street Associates*, 94 NY2d 740, 746 [2000] [holding that the "Appellate Division did not abuse its discretion in holding that [a doctor's] affidavit – on which defendants' request was based – was insufficient to justify compelling plaintiff-mother to take an IQ test"]). Therefore, although defendants' objection to the last question lacked merit, plaintiff is not entitled to a further deposition of Mr. Joseph. Accordingly, plaintiff's cross-motion is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Capital Construction Co., and Granite Construction Northeast, Inc., pursuant to CPLR §3212, for summary judgment against plaintiff Lionel Layne as to plaintiff's Labor Law §240 claim is granted on the ground that plaintiff has withdrawn such claim, and plaintiff's Labor Law §240 claim is hereby severed and dismissed; and it is further

ORDERED that defendants' motion, pursuant to CPLR §3212, for summary judgment on plaintiff's common law negligence and Labor Law §200 claims is granted as to Metropolitan Transportation Authority, New York City Transit Authority, and Granite Construction Northeast, Inc.; and it is further

ORDERED that defendants' motion, pursuant to CPLR §3212, for summary judgment on plaintiff's common law negligence and Labor Law §200 claims is denied as to MTA Capital Construction Co., is denied, without prejudice; and it is further

ORDERED that plaintiff's cross-motion to compel a second deposition of Hanssy Joseph, pursuant to CPLR §3124 is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 3, 2010

Hon. Carol Edmead, J.S.C.