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

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 112196/2006

EIMER, ALLAN

VS.

731 COMMERCIAL

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 ...	1 + B
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
APR 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/12/10

HON. EILEEN A. RAKOWER

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 5

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ALLEN EIMER and JUDY EIMER,

Plaintiffs,

- against -

731 COMMERCIAL LLC, BLOOMBERG, L.P., STRUCTURE-TONE, INC., BOVIS LEND LEASE LMB, INC.,

Defendants.

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Index No.
112196/06

DECISION and ORDER

Mot. Seq.
002 & 003

HON. EILEEN A. RAKOWER

Plaintiff Allen Eimer ("Plaintiff") brings this action to recover for personal injuries allegedly sustained by Plaintiff when he tripped and fell over a 2" concrete lip in the course of performing work at a construction site at 731 Lexington Avenue in New York, New York on April 8, 2004. Judy Eimer, Plaintiff's wife, sues derivatively for loss of services.

The project involved the construction of the Bloomberg Tower, a 54-story retail, commercial and residential building. Bloomberg Tower is owned by Defendant 731 Commercial LLC ("731 Commercial"). 731 Commercial entered into a contractual agreement with Defendant Bovis Lend Lease LMB, Inc. ("Bovis"), whereby Bovis would act as construction manager for the construction of the core and shell of the building. This included the base building, facade, elevators and bathrooms. Defendant Bloomberg, L.P. ("Bloomberg") is a tenant in the building which occupies floors 3-19, as well as several of the basement levels. Bloomberg entered into a contractual agreement with Defendant Structure-Tone, Inc. ("Structure-Tone") whereby Structure-Tone would build out the floors leased by Bloomberg once construction of a floor was completed by Bovis. When a floor was completed by Bovis and turned over to Bloomberg and Structure-Tone, Structure-Tone became responsible for safety on the floor. Prior to turning over a floor to Bloomberg and Structure-Tone, representatives from Bloomberg and Structure-Tone would take a

walk-through of the floor to ensure that Bovis's work was complete. Bovis turned over control of the 19th floor to Structure-Tone on December 26, 2003. On each floor, the concrete slabs in the elevator bank were poured 2" higher than the remainder of the floor to accommodate the eventual installation of tile by Bloomberg.

Plaintiff was an electrician employed by Forest Electric, which was subcontracted by Bovis and Structure-Tone to provide certain electrical work at the premises. On April 8, 2004, Plaintiff arrived at the work site at around 7:00 or 7:30 a.m. At approximately 11:00 a.m., Plaintiff took one of the core elevators up to the 19th floor, where his company maintained a shanty, in order to retrieve some screws for his work. Plaintiff testified in his deposition that the elevator bank consisted of a concrete floor approximately 15'X40'. After getting off the elevator, Plaintiff turned left and walked 15' to the end of the elevator bank, and made another left and walked to Forest's shanty. Plaintiff testified that he did not observe any obstructions as he walked to the shanty. He further testified that the lighting on the 19th floor consisted of temporary strings with a bulb every 20', as per the Industrial Code, and that it was daylight out and he could see in front of him. Plaintiff described the 19th floor as being open, except for the area where the shanties were located. After Plaintiff retrieved screws from the shanty, he headed back towards the elevator bank. As he was walking toward the elevator bank, his left foot caught the 2" lip separating the elevator bank from the remainder of the 19th floor, causing him to fall on his right knee. Plaintiff testified that he had walked from the elevator bank to the shanty on six or seven occasions prior to the accident, but had never observed the 2" height differential.

Plaintiff subsequently commenced this action, seeking damages pursuant to Labor Law §§200 & 241(6) and under a theory of common law negligence. Presently before the Court are separate motions for summary judgment by Bloomberg and Structure-Tone on the one hand, and 731 Commercial and Bovis on the other. Attached to Bloomberg/Structure-Tone's affirmation as exhibits are copies of the following: Plaintiff's Summons and Complaint; Bloomberg/Structure-Tone's Answer; Bovis/731 Commercial's Answer; Plaintiff's Bill of Particulars; Plaintiff's deposition transcript; the deposition transcript of Richard Cunningham on behalf of Structure-Tone; the deposition transcript of Anthony Guzzone on behalf of Bloomberg; the deposition transcript of Leonard Pepi on behalf of Bovis; and Plaintiff's Note of Issue.

Annexed to 731 Commercial/Bovis' affirmation as exhibits, not duplicative of Bloomberg/Structure-Tone's exhibits, are copies of the following: a June 29 Preliminary Conference Order; the "turn-over" letter from 731 Commercial to

Bloomberg documenting its delivery of the 19th floor, among others, to Bloomberg.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Labor Law §241(6) confers a non-delegable duty upon owners and contractors to provide a safe work environment (*see Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 484, 501-502 [1993]). "In order to prevail on a claim that an owner or a contractor breached the nondelegable duty imposed by Labor Law §241(6), plaintiff must prove that a specific provision of the Industrial Code was violated" (*Yellen v. Rockaway Realty Assocs.*, 243 A.D.2d 338, 339 [1st Dept. 1997]) (citations omitted). Plaintiff's Bill of Particulars alleges violations of Industrial Code §§23-1.5, 23-1.7(e)(1) & (e)(2), and 23-1.30.

The Court finds that all defendants are entitled to summary judgment on Plaintiff's Labor Law §241(6) claims. First, it is well settled that Industrial Code §23-1.5 is a general safety directive and, as such, cannot form the basis of a Labor Law §241(6) claim (*see Meslin v. New York Post*, 2006 NY Slip Op 5126 [1st Dept. 2006]; *Sajid v. Tribeca North Assocs.*, 20 A.D.3d 301, 302 [1st Dept. 2005]). Accordingly Plaintiff cannot predicate his §241(6) on this section of the Industrial Code.

As for Plaintiff's claims that defendants violated Industrial Code §23-1.7(e), that section provides, in pertinent part,

> (e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

> (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.

Plaintiff cannot maintain a claim for violation of §23-1.7(e), as it is undisputed that the 2" lip was an integral part of the construction (*see O'Sullivan v. IDI Constr. Co.*, 2006 NY Slip Op 2614, *2 [1st Dept. 2006]) (*see also Dann v. City of Syracuse*, 231 A.D.2d 855, 856 [4th Dept. 1996) (§23-1.7(e) inapplicable because "[t]he two-inch lip between the finished and unfinished portions of the roof was an integral part of the roof being installed").

Plaintiff's claim that defendants violated §23-1.30 of the Code also fails, as Plaintiff's own testimony indicates that the accident location had adequate lighting under the Industrial Code. Moreover, Plaintiff's testimony also indicates that it was light out at the time of the accident, and that he was able to see where he was going. Accordingly, Plaintiff's claims under Labor Law §241(6) must be dismissed as against all defendants.

Turning now to Plaintiff's claims under common law and under Labor Law §200, which merely codifies an owner or general contractor's common law duty to maintain a safe construction site, the Court rejects defendants' argument that these claims must be dismissed on the grounds that none of the within defendants' exercised control of the manner of Plaintiff's work. It is well settled that a plaintiff need not demonstrate a defendant's control or direction of his or her work to sustain a Labor Law §200/common law negligence claim where the injury arises from a defective condition in the workplace, rather than the plaintiff's method of performing his or her work (*see Urban v. No. 5 Times Square Development, LLC*, 2009 NY Slip Op 3997, *2 [1st Dept. 2009]) (citations omitted).

Defendants also claim that they are entitled to judgment as a matter of law because the 2" lip was an open and obvious condition of which Plaintiff should have been aware, particularly since he walked the same path six or seven times, before his accident. Generally, the question of whether a condition is a latent hazard (which gives rise to a duty to warn or protect) or open and obvious (which confers no such duty) is a fact-specific inquiry to be decided by a jury (*see Tagle v. Jakob*, 97 N.Y.2d 165, 169 [2001]). Here, a jury could rationally find that the 2" lip constituted a

tripping hazard which gave rise to a duty to protect or warn (*compare with Bretts v. Lincoln Plaza Assoc.*, 2009 NY Slip Op 8771, *1 [2nd Dept. 2009]) (no duty to protect or warn in trip and fall case where single-step riser had gold-colored nosing, and the pattern of the tiles on top of the step differed from the pattern below the step).[1]

Accordingly, the Court finds that issues of fact preclude the award of summary judgment to Bovis (which created the 2" lip), and Bloomberg and Structure-Tone (both of which had actual knowledge of the condition). While Bovis claims that it should be awarded summary judgment since it handed the floor over to Bloomberg and Structure-Tone three months prior to Plaintiff's accident, this too is an issue for a jury when assessing the comparative liability (if any) of the parties.

However, the Court finds that 731 Commercial is entitled to summary judgment on Plaintiff's Labor Law §200 and common law claims, as it was an out-of-possession landlord at the time of Plaintiff's accident. As the First Department has observed,

> Generally, an out-of-possession landlord cannot be held liable for a third party's injuries on the premises unless it had notice of the defect and consented to be responsible for repairs or maintenance (*Velazquez v Tyler Graphics, 214 AD2d 489, 489, 625 NYS2d 537 [1995]*). Notice can be constructive, when the landlord 'reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists' (*id.*). However, in that case, 'only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord' (*id.*)

(*Gomez v. 192 E. 151st St. Assoc.*, 2006 NY Slip Op 1367 [1st Dept. 2006]). There being no showing that 731 Commercial had either actual notice of the condition, or constructive notice of a violation of a specific statutory safety provision, 731 Commercial is entitled to dismissal of Plaintiff's Labor Law §200 and common law claims.

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[1]The Court notes that, while the photographs of the 2" lip taken by Plaintiff contain an orange stripe at the top of the lip, Plaintiff states in his accompanying affidavit that the stripe was not present on the day of his accident.

Wherefore it is hereby

ORDERED that Plaintiff's Labor Law §241 claims are dismissed as against all defendants; and it is further

ORDERED that 731 Commercial's motion is granted in its entirety and the complaint is hereby severed and dismissed as against 731 Commercial, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that defendants Bovis, Bloomberg, and Structure-Tone's motions for summary judgment are denied to the extent that they seek dismissal of Plaintiff's Labor Law §200 and common law claims.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 12, 2010

EILEEN A. RAKOWER, J.S.C.