

Roell v Velez Org.

2010 NY Slip Op 30972(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 111919/06

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Roell, Ronald

INDEX NO. 111919/06

MOTION DATE 4/12/10

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Velez Organization

The following papers, numbered 1 to _____ were read on this motion for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Metropolitan Steel Industries, Inc.'s motion bearing sequence number 004, Velez Organization's motion bearing sequence number 005, and Calcedo Construction Corporation's motion bearing sequence number 006 are consolidated for joint disposition and are decided herein.

In accordance with the accompanying Memorandum Decision, it is hereby

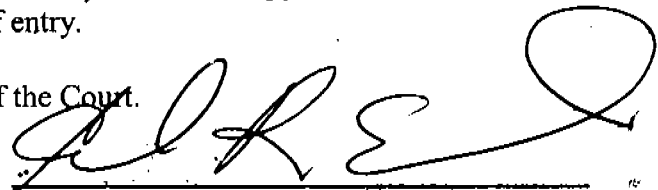
ORDERED that the motions by Metropolitan Steel Industries, Inc., Velez Organization, and Calcedo Construction Corporation for summary judgment dismissing the Amended Complaint is granted; and it is further

ORDERED that the motion by Velez Organization for dismissal of plaintiff's Amended Complaint pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that Metropolitan Steel Industries, Inc. 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: 4/16/10



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

-----X
RONALD ROELL,

Plaintiff,

Index No.: 111919/06

-against-

VELEZ ORGANIZATION, TCL CONTRACTORS
CORP., METROPOLITAN STEEL INDUSTRIES, INC.,
and CALCEDO CONSTRUCTION CORPORATION,
CALCEDO CONSTRUCTION,

Defendants.

-----X
VELEZ ORGANIZATION,

Third-Party Plaintiff,

Index No.: 590793/07

-against-

CALCEDO CONSTRUCTION CORPORATION and
METROPOLITAN STEEL INDUSTRIES, INC.

Third-Party Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendant/third-party defendant Metropolitan Steel Industries, Inc. ("Metropolitan"), defendant/third-party plaintiff Velez Organization ("Velez") and defendant/third-party defendant Calcedo Construction Corporation ("Calcedo"),¹ move for summary judgment and dismissal of plaintiff's Amended Verified Complaint and all cross-claims.²

¹ Defendant TCL Contractors Corp. never appeared in this action.

² Metropolitan's motion bearing sequence number 004, Velez's motion bearing sequence number 005, and Calcedo's motion bearing sequence number 006 are consolidated for joint disposition and are decided herein.

Factual Background

In connection with the construction of a new Ambulatory Care Pavillion at Queens Hospital Center (the "Project"), in May 2004, the Dormitory Authority of the State of New York ("DASNY") entered into a contract with Metropolitan for Metropolitan to erect and "provide all Structural Steel" including steel deck, metal stairs and miscellaneous steel items (the "Metropolitan Contract"). Metropolitan fabricated the steel at its plant in Pennsylvania. Metropolitan, in turn, entered into a subcontract (or "Purchase Order") with the plaintiff's employer Midlantic Erectors, for Midlantic to "furnish all necessary labor" and install the structural steel (Purchase Order ¶4).

In August 2004, DASNY entered into a contract with Velez as the "Construction Manager" to provide "certain General Conditions Work during the Construction Phase of the Project" in addition to it obligations under a separate contract to provide "Oversight and Administrative Services" during this phase.

In October 2004, DASNY entered into a contract with Calcedo as the "General Construction Contractor" at the Project ("Calcedo Contract") (see contract page 1). As the General Construction Contractor, Calcedo was to "Provide and perform all Work of every kind or nature whatsoever required and all other things necessary to complete" the Project.

Plaintiff testified that as a Midlantic ironworker, he received all his instructions and assignments from his foreman, "Casper," who also provided the materials plaintiff needed. Plaintiff testified that on January 11, 2005, he slipped and fell on a "thin sheet of ice" as he was walking on the "Q deck." A "Q deck" was a "metal deck" that Midlantic placed upon steel before concrete would be poured. According to plaintiff, Q decks have holes in them created by

the Midlantic workers during the installation process, and generally, when the water comes through the Q decks, it freezes in patches on the Q deck below. Plaintiff also stated that it was snowing on the morning of the accident. However, he did not believe it was still snowing by the time he got to work. He did not know how long the ice had been present in that location and no one ever told him how long the ice had been present. Plaintiff did not know where the water had come from which formed the alleged ice. He never saw any water dripping down and forming ice on the floor and no one ever told him that ice formed after water dripped from above. He never complained to anyone about the ice condition prior to his accident, and did not know if anyone else might have made such complaints. Finally, he testified that he “walked by” the area where he fell at least twice in the two hours prior to the accident, and he did not observe any ice present, but that he “wouldn’t notice anything on that floor” as he “wasn’t working on that floor until he got down there.”

Consequently, plaintiff alleges that defendants caused and created the ice condition, had actual or constructive notice of the condition, and violated Labor Law §§ 200 and 241(6) along with Industrial Code Rule (“12 NYCRR”) 23-1.7 (d) (slipping hazards), and 23-1.7(e) (tripping hazards), and 23-2.1(b) (disposal of debris).

In support of dismissal, Metropolitan argues that *res judicata* forecloses plaintiff from relitigating his Labor Law §§ 200 and 241(6) against it. On July 10, 2009, Justice Kevin Kerrigan, Supreme Court, Queens County, granted Metropolitan summary judgment in an action which involves an alleged slip and fall on snow by another Midlantic ironworker, at the same

Project (the "Dawes action").³ Velez, Calcedo and Metropolitan were defendants in the *Dawes* action and the ironworker was represented by plaintiff's counsel, which had a full and fair opportunity to contest Metropolitan's motion and opposed and reargued same. Metropolitan's responsibilities are the same in both actions and are governed by the Metropolitan Contract and the Purchase Order. As herein, plaintiff Dawes, alleged that the existence of snow/ice at the Project site created a dangerous condition and, as such, Labor Law §§ 200 and 241(6) along with 12 NYCRR 23-1.7(d) and 23-1.7(e) were violated. Justice Kerrigan held that Metropolitan did not supervise or control, or have the authority to supervise or control, the ironworker's work, and as such, Metropolitan may not be held liable under common law or Labor Law §§ 200 and 241(6). Thus the issues as to Metropolitan's liability under Labor Law §§ 200 and 241(6) and were already decided in *Dawes*.

Metropolitan further argues that plaintiff's Labor Law § 200 claim fails as Metropolitan did not exercise supervision or control over the injury producing activity of the building that allegedly had patches of ice. The "injury producing activity" was plaintiff walking on "Q" decking and the alleged dangerous/defective condition is ice/snow or oil on a walkway. The Metropolitan Contract, coupled with the deposition testimony of its President, Stephen Hynes, and Elizabeth Velez, Executive Vice President for Velez, demonstrates that Metropolitan did not have any snow removal responsibilities on site, did not voluntarily undertake snow removal responsibility for the site, and, in fact, did not have any on-site presence at all. Metropolitan argues that since Calcedo was charged with snow removal duties, Metropolitan was unable to

³ *Scott Dawes v. New York City Health and Hospitals Corporation, Velez Organization, TCL Contractors Corp., Metropolitan Industries, Inc. and Calcedo Construction Corporation*, Index Number 23836/06.

* 6]

avoid or correct the alleged unsafe condition as required by the Labor Law since Calcedo was not under Metropolitan's control. The alleged dangerous condition of ice on the Q deck existed due to the methods or negligent acts of the contractor Calcedo. And, plaintiff testified that he does not know how long the condition existed and conceded that, if his foreman was aware of said condition, he would not have allowed plaintiff to work in that area.

Metropolitan also argues that plaintiff's Section 241(6) claim also fails since it did not have control over the injury producing activity, none of the specific Industrial Code Regulations alleged apply, and plaintiff failed to establish a violation of a specific standard of the Industrial Code. The First Department has held that 12 NYCRR 23-1.7(e)(1) and (2) are inapplicable to cases where the accident occurred on a Q deck since these areas are considered to be an "open area." Although plaintiff also relies on 12 NYCRR 23-1.7(d), and caselaw has addressed 23-1.7(e)(1) and (2), this is a distinction without a difference since the Appellate Division determined that "Q" decking constitutes an "open area." Like section 23-1.7 (e), section 23-1.7(d) does not list an "open area" as the type of area covered by the regulation.

Further, Metropolitan owed plaintiff no duty to provide a safe work environment (ice-free "Q" decking) and Metropolitan may not be held liable for permitting the existence of the ice on "Q" decking, where it did not own, occupy, control or make a special use of the Project site. Metropolitan neither possessed nor controlled the area nor created the ice on "Q" decking . Thus, Metropolitan did not breach a duty owed to plaintiff.

In support of its motion,⁴ Velez argues that in order for a party designated a construction manager, such as Velez, to be held liable under Labor Law §200, plaintiff must demonstrate that

⁴ Velez also moves to dismiss under CPLR § 3211(a)(7).

the construction manager exercised control or supervision over the activity bringing about the injury to enable it to avoid or correct an unsafe condition and/or had actual or constructive notice of the allegedly dangerous condition. A construction manager's mere contractual duty to coordinate, supervise or inspect the construction work is insufficient to establish liability pursuant to Labor Law §200. There is no proof that Velez exercised control or supervision over the work performed by plaintiff. Velez did not have the authority to stop work deemed unsafe. Its "authority" was limited to informing DASNY of the condition so that DASNY, in turn, could order a halt to the work. Further, there is no proof that Velez had notice of the ice allegedly present on the Q deck. Velez similarly argues that plaintiff's Labor Law §241(6) claim must also be dismissed as the accident did not occur in an area defined by 12 NYCRR 23-1.7.⁵

In support of Calcedo's motion, Calcedo argues that the decision in *Dawes* has collateral estoppel effect in its favor. The Court found that Calcedo did not have the authority to supervise or control the plaintiff's work and had no responsibility to clear snow and ice from the area where the plaintiff fell. Since Calcedo was found to be a prime contractor and not a proper Labor Law defendant, that issue is precluded from being re-litigated. Although the plaintiffs in both cases are different, the issue of Calcedo's responsibility at the Project is the same. Calcedo points out that the plaintiffs' attorney in both cases did not oppose its motion in *Dawes* or dispute that Calcedo was a prime contractor.

Calcedo argues that it cannot be held liable under Labor Law §200 and common law negligence as Calcedo did not owe a duty to the plaintiff. Calcedo had no authority to control the

⁵ Velez asserts that its Executive Vice President Ms. Velez testified at a deposition that Calcedo was the general contractor. Calcedo insists that it was not the general contractor, but instead, a prime contractor, as noted by Judge Kerrigan and indicated by Ms. Velez later in her deposition.

activity bringing about the injury or the area where the plaintiff's accident occurred. Joseph Tomei, a Vice President with Calcedo testified that Calcedo did not direct, supervise or control the workers of other prime contractors. Calcedo was not the general contractor at this jobsite and Velez was the construction manager for the Project. And, Tomei testified that Calcedo's concrete work would not be started in any given area of the Project until the steelwork was 100% complete. At the time of the accident, steel erection work was still being performed in that area, had not been turned over to Calcedo, and was still under the control of the steel erection prime contractor. Further, under its contract, Calcedo was only responsible for maintaining and removing snow from the parking lot that was to be used only by DASNY and Velez, and also to remove snow from access roads and to create paths to the building in addition to paths to the owners and construction managers' trailers. Calcedo had no contractual obligations to remove any snow in the area plaintiff claimed his accident occurred.

Further, it is pure speculation that the ice condition arose as the result of weather conditions. Mr. Tomei testified that Calcedo had no notice of any complaints of ice on the first floor/ground floor Q deck prior to the date of the alleged accident or on the day of the alleged accident.

Thus, Calcedo had no duty or responsibility with regard to the plaintiff or any duty to control the area of the construction site where plaintiff's accident is alleged to have occurred.

Finally, Calcedo, as a prime contractor, cannot be held liable under Labor Law § 241(6) as Calcedo was not an agent of the owner. Since Calcedo was not delegated the specific responsibility to control the work being performed by the plaintiff or the conduct of the plaintiff himself at the time of the accident, and Calcedo did not have the authority to supervise or control

the work of any of the other prime contractors at the site, it cannot be liable under 241(6).

Calcedo also adds that 12 NYCRR 23-2.1, entitled "Maintenance and Housekeeping," is inapplicable, since plaintiff's accident was allegedly caused by ice. And, even assuming they apply, Calcedo is a prime contractor and not a proper Labor Law defendant.

Plaintiff's only possible remedy against Calcedo would be for common law negligence, which fails since, based on plaintiff's testimony, Calcedo had no notice of the alleged condition.

In opposition, plaintiff, argues that the motions for summary judgment by Metropolitan and Calcedo are untimely. This Court extended the summary judgment time until July 3, 2009 in order for the parties to redepose Velez's witness due to a faulty transcript. Velez's deposition was conducted 20 days after this deadline, and the motions by Metropolitan and Calcedo were made in March 2010, more than seven months after Velez's deposition. Even with the problem with the Velez transcript, these defendants utterly disregarded any time frame for making summary judgment motions. The excuse involving the transcript expired long ago and that plaintiff would not agree to extensions way beyond the time period imposed by the court and by the CPLR is not persuasive.

Plaintiff further argues that Metropolitan and Velez cannot rely on Justice Kerrigan's decision. Such decision is subject to two appeals, and thus, is not final. Also, plaintiff was not a party to the *Dawes* action, and lacked standing and interest to participate in that lawsuit. Additionally, in *Dawes* the owner New York Health and Hospital Corporation, was a party, further making the responsibilities of the respective private defendants less important for the establishment of Labor Law liability. An individual party has never been bound by *res judicata* or collateral estoppel based upon a finding against a different party and the cases cited by

Metropolitan are distinguishable; any such finding would violate the right of a party to be heard on an issue as plaintiff had no opportunity to litigate the *Dawes* case.

As to Metropolitan, plaintiff concedes that there is no evidence that Metropolitan was negligent or exercised any control over the worksite. However, argues plaintiff, when Metropolitan contracted as prime contractor, it was delegated the authority to install the steel and it became the "third-party" having nondelegable duties and liability as an agent under section 241(6) for the work delegated to it. Under its contractual authority, Metropolitan is a Labor Law defendant for the subcontractor workers performing work that was part of the work that Metropolitan originally contracted to perform. The obligation to provide a safe place to work for steel erection was undertaken by Metropolitan by contract. Metropolitan is a statutory agent of the owner and is itself a general contractor and therefore subject to Labor Law §241, although it did not supervise or control the work. There was no portion of the Project that was not subject to the agency of Metropolitan for workers performing steel erection. That Metropolitan did not actually supervise the steel erection or control plaintiff's work is irrelevant to its status as a Labor Law defendant. Thus, Metropolitan had the authority to enforce compliance with the Labor Law and/or to select subcontractors that would enforce compliance with the Labor Law for the protection of the workers performing that work.

Plaintiff also argues that as to its Labor Law § 200 claim against Velez, plaintiff testified that it was snowing on the date of the accident and that there were slippery conditions on the level where he began working on the day of the accident and on the main floor where his accident occurred. It cannot be said as a matter of law that Velez, through its on-site employees and superintendent, was not aware that the conditions on the project were not contributing to an

[* 11]

unsafe condition on the project. A question of fact exists regarding whether the entire work site should have been closed by Velez based on the working conditions that defendant was aware of or should have been aware of. As to Velez's attempt to dismiss plaintiff's Labor Law § 241(6) claim, Velez overlooked the fact that 12 NYCRR 23-1.7(d) entitled Slipping Hazards pertains to floors, passageways, walkways, applies to plaintiff's accident which occurred on the main floor of the building under construction, such as the floor at issue herein. The argument that Q decking is open space is out of context.

Further, since Velez testified that Calcedo was responsible for snow removal within the building, there are issues of fact concerning the control and responsibility for snow and ice removal at the location where the accident occurred.

In partial opposition to Metropolitan's motion, Calcedo argues that in the event, the Court does not grant its motion, then Metropolitan's motion should not be granted. Judge Kerrigan found that Calcedo had a prime contract with the DASNY for general construction at the site, but was not the general contractor, did not have authority to supervise or control the plaintiff's work and had no responsibility to clear snow and ice from the area where the plaintiff fell. It was held that Calcedo could not be held liable under Labor Law §§200, 241(6) or 240 or under the common law. The issue of Calcedo's role vis-a-vis this construction project has already been established by Judge Kerrigan's order. Its contractual obligations for the project have already been litigated and it was found that its duties as to snow removal only applied to those distinct areas stated in the contract, *i.e.*, the parking lot and pathways. Since Calcedo was found to be a prime contractor and not a proper labor law defendant, that issue is precluded from being re-litigated in this action. Further, as to its contractual obligations, that issue too has been

decided and that issue is precluded from being re-litigated in this case. Calcedo further argues that Metropolitan's attorney in the Dawes action raised the same arguments raised in its motion regarding Calcedo's role at the site, and since Metropolitan had a full and fair opportunity to litigate the question of Calcedo's contractual obligations for the Project, it is estopped from re-litigating them in this action. Further, any allegation by Metropolitan against Calcedo for the plaintiff's alleged accident in this matter is barred by the doctrine of *res judicata*. The issues raised by Metropolitan in both actions are identical. The Court's decision in the *Dawes* action is binding on Metropolitan in this action and forecloses Metropolitan from relitigating those issues here.

Ms. Velez's testimony as to what she believed Calcedo's contractual responsibilities were at the site should be disregarded as she never saw or reviewed the Calcedo Contract. Ms. Velez's testimony that it was Calcedo's responsibility to protect the building from the elements was based on hearsay, as she was told this by one of Velez's employees. She has no personal knowledge of this alleged responsibility. Even assuming, *arguendo*, that Calcedo was responsible for protecting the building, Ms. Velez' testimony shows that it was only if there was a "large storm or large event, weather event was coming . . ." There is no evidence in the record that a "large weather event" was happening on the date of the accident, such that it would trigger what Ms. Velez believed to be Calcedo's contractual obligations. The weather on the day of the alleged accident was simple winter weather and not a "large weather event." As such, even if Calcedo had any contractual responsibility to protect the building, which is contested and is not contained within the contract, the weather on the day in question would not have triggered it. Furthermore, there is no evidence that the alleged ice was caused by precipitation rather than some other

source.

Metropolitan also submits no proof that the ice that plaintiff claimed he slipped on was due to the methods or negligent acts of Calcedo. Metropolitan failed to show where the alleged ice came from. Plaintiff testified snow did not come through the Q deck on the second floor but water did. However, he never saw any water dripping from the Q-decking at or before his alleged accident. Plaintiff did not know where the ice had come from. Plaintiff also did not know how long that ice was present at the site. Based upon the plaintiff's testimony, it is sheer speculation to assume that the ice was due to weather conditions or from snow. Further, since plaintiff did not know how long the ice was present or where it came from, there is no basis to conclude that it was there due to any fault of or was created by Calcedo, especially since Calcedo did not control the area where the alleged accident occurred or have any responsibility to remove snow from the interior of the building. Any attempt by Metropolitan to implicate Calcedo is a red herring.

If anyone had responsibility for the area where the accident occurred, where the steel erection work was still ongoing it would have been Midlantic or Metropolitan as the prime contractor for the steel erection. If any of the parties had the authority to control and prevent plaintiff's accident, it was Metropolitan as it was the only party with the contract with Midlantic and the party in charge of the steel erection portion of the Project.

In reply, Metropolitan contends that plaintiff's opposition is the only untimely submission before this Court. After plaintiff filed his Note of Issue, Velez timely moved for summary judgment. Since it was unclear when defendant, Velez, would be available for the retaking of its deposition, the Court informed the parties that motions for summary judgment could be filed on a

date agreed upon by the parties. After the deposition of Velez was completed and the transcript was received, Metropolitan made several attempts to obtain upon an agreed upon date for the filing of the defendants' respective motions. Velez and Calcedo were amenable to all proposed dates. Plaintiff, however, initially failed to respond to the undersigned inquiries and then thereafter, refused to consent to a date. The Court later gave all parties a full and fair opportunity to discuss their positions regarding the filing of the motions for summary judgment and the Court's prior directive for the parties to choose an agreed upon date for such filing. During the 25-minute telephone conference, plaintiff's counsel admitted that he refused to agree on date for the defendants to file the motion even though he was required to do so by the Court. At that time, the Court directed the defendants to make their motion for summary judgment by March 4th and directed plaintiff to file its opposition on March 11th. Plaintiff, however served his opposition via facsimile on March 19th and Metropolitan objected to the opposition papers. While Metropolitan's motion was timely pursuant to this Court's directive, plaintiff's opposition was untimely, and such opposition should not be considered by the Court. Thus, Metropolitan's motion for summary judgment should be deemed unopposed.

As to Justice Kerrigan's order, the "two appeals" referred to by plaintiff are actually only Notices of Appeal that were supposed to be perfected in early March 2010. To date, said appeals have not yet been perfected nor has there been a request from the appellants to enlarge the time to do so. Further, only plaintiff's Notice of Appeal challenges the Court's granting of summary judgment to Metropolitan. The other Notice Appeal, which was filed by Velez, challenges the Court's denial of its motion for summary judgment on procedural grounds. Plaintiff has offered no evidence, let alone, evidence in admissible form, or supporting case law that rebuts

Metropolitan's *prima facie* showing of entitlement to res judicata/issue preclusion on plaintiff's Labor Law claims.

Plaintiff also failed to rebut the *prima facie* showing that his Labor Law § 200 claim fails as a matter of law as Metropolitan did not exercise supervision or control the injury producing activity. Plaintiff fails to refer to any evidence whatsoever that the defendants had notice of the ice on the "Q" decking of the main floor. In fact, plaintiff conceded that, if his foreman was aware of said condition, he would not have allowed plaintiff to work in that area.

Further, plaintiff completely failed to rebut Metropolitan's *prima facie* showing of entitlement of dismissal of plaintiff's Labor Law § 200 claim. Even if it is assumed that Metropolitan is a prime contractor, prime contractors can be liable under the Labor Law "only if they are acting as the "agents" of the owner or the general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at the time of the injury. Thus, plaintiff's Labor Law §241 claim must be dismissed against Metropolitan.

In further support of its motion, Velez requests that its motion be granted without any opposition on plaintiff's part as it was eight days late, even assuming service by fax was appropriate. In any event, argues Velez, plaintiff is unable to prove notice of the allegedly dangerous condition on anyone's part. All plaintiff has proven is that it snowed yet failed to prove that the area was allegedly wet as a result of the snowfall and someone in the employ of Velez know or should have known of it. Thus, there is no liability on the part of Velez pursuant to Labor Law § 200. Plaintiff also fails to raise an issue of fact in contravention of the position taken by Velez that: (a) it did not have the authority to stop work deemed unsafe; (b) that its "authority" was limited to informing DASNY of the condition so that DASNY, in turn, could

order a halt to the work; and (c) that it did not exercise control or supervision over the work performed by plaintiff. Additionally, plaintiff's 241(6) claim must also be dismissed as against Velez as the First Department had already ruled that an accident on Q-decking is not one which gives rise to a 241(6) action. Beyond the foregoing, as a construction manager, who did not have the authority to control the methods and means of the work, Velez is not liable under 241(6). It is only where the construction manager assumes the duties of a general contractor, that it can be held liable pursuant to Labor Law §241(6).

In reply, Calcedo contends that any argument raised by the plaintiff as to the timeliness of the motion is moot. In any event, if the Calcedo motion is late then every defendant's motion is late, including the Velez motion, which was made at the same time as Calcedo's motion. If the Velez motion is considered timely, as the plaintiff seems to concede then Calcedo's motion should also be considered timely. The Court has the discretion to hear untimely motion, and has held that an untimely cross-motion may be adjudicated in the course of deciding a timely motion as it can search the records and grant summary judgment to any party without the necessity of a cross motion. However, a Court's search of the record is limited to those causes of action or issues that are the subject of the timely motion. While not a cross motion, the various motions in this matter are similarly situated and the Court can still apply the holding to the case at bar.

Calcedo points out that plaintiff is not appealing any portion of Judge Kerrigan's decision as it applies to Calcedo. As such, Judge Kerrigan's decision as to Calcedo and its contractual obligations for the Project are not being challenged. Even assuming that *res judicata* or collateral estoppel was not applicable with regards to the *Dawes* decision, Calcedo can still cite to that case as persuasive authority.

Further, plaintiff does not contest that Calcedo was a prime contractor and did not control the plaintiff, his work or the area where the plaintiff was working, and as such did not control or supervise the plaintiff or his work or the area where the plaintiff was working and claimed the accident occurred. Since plaintiff has conceded that Calcedo was a prime contractor, he has also conceded that Calcedo is not a proper labor law defendant and as such, the Labor Law does not apply.

Plaintiff failed to raise an issue of fact as to notice of the alleged dangerous condition and plaintiff's common law negligence and Labor Law §200 claim, if applicable, must fail. Further, Calcedo owed no duty to the plaintiff under these theories. Plaintiff fails to set forth what he represents to be conflicting testimony as to ultimate control and responsibility for snow removal.

Discussion

In determining a motion to dismiss under CPLR § 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true,

accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Although Velez cites to CPLR § 3211(a)(7) as a basis for dismissal, Velez does not set forth any arguments in support of same. Further, accepting the allegations of the Amended Complaint as true, it cannot be said that plaintiff fails to state a cause of action for the claims alleged. Therefore, dismissal under CPLR § 3211(a)(7) is unwarranted.

As to dismissal under CPLR 3212, 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]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). 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 (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

If the defendant 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; CPLR §3212[b]). Like the 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]).

In *Brill v City of New York* (2 NY3d 648 [2004]), the Court of Appeals made clear that the statutory deadline should be strictly enforced, in order to prevent the filing of “[e]leventh-hour summary judgment motions,” a practice that “ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice” (*Fofana v 41 West 34th Street, LLC*, 71 AD3d 445, --- N.Y.S.2d ---- [1st Dept 2010] citing *Brill* at 650-651, 781 NYS2d 261). It concluded that the “good cause” called for by CPLR 3212(a) requires a “satisfactory explanation for the untimeliness-rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Fofana*, citing *Brill* at 652, 781 NYS2d 261). The First Department observed that “courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure” (*Fofana* citing *Azcona v Salem*, 49 AD3d 343, 343 [2008]).

Here, the motions by defendants demonstrated good cause for the untimeliness of their motions. Due to the unreliability of the transcript generated from the initial deposition of Velez’s witness, the Court extended the defendants’ time to move for summary judgment to July 3, 2009 in order for the parties to redepose Velez’s witness. However, Velez’s deposition was conducted 20 days after this deadline. Therefore, at the time of Velez’s second deposition, the deadline to file summary judgment motions had already expired. From the completion of Velez’s second

deposition until the filing of defendants' instant motions, defendants, out of courtesy, sought plaintiff's cooperation to set a new schedule. Defendants sought plaintiff's cooperation several times to no avail. Plaintiff will not be rewarded for thwarting defendants' attempts to seek summary relief by his noncooperation. The sole purpose of extending the parties' time to move for summary relief was to reconduct the deposition of Velez, which, at no apparent fault of the parties, did not occur until after the Court's deadline. The Court thereafter considered these factors and set a new deadline for the parties to move for summary judgment, to which defendants complied. The Court notes that on the other hand, plaintiff himself failed to submit his opposition papers in accordance with the Court's express order and the CPLR, rendering his standing to assert an untimeliness argument questionable. Therefore, defendants' motions are deemed timely. However, notwithstanding plaintiff's untimely opposition papers, the Court, in the interest of justice, and consistent with the policy of resolving issues on their merits, will consider plaintiff's untimely opposition papers.

Res Judicata and Collateral Estoppel

Res judicata, or claim preclusion, is invoked when parties seek to relitigate entire causes of action between them and applies to matters which were actually litigated or could have been litigated in the earlier action (*DaimlerChrysler Corp. v Spitzer* --- NYS2d ----, 2004 N.Y. Slip Op. 24357; see *Hyman v Hillelson*, 79 AD2d 725, 726, affd 55 NY2d 624). Pursuant to the doctrine of *res judicata*, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357; see also, *Smith v Russell Sage Coll.*, 54 NY2d 185; *Matter of Reilly v Reid*, 45 NY2d 24; *Feigen v Advance*

Capital Mgt. Corp., 146 AD2d 556, 558; Restatement [Second] of Judgments § 24). In order for the doctrine of *res judicata* to apply, the party to be precluded in the current action must have been a party to the prior action where the claim at issue was litigated or could have been litigated.

Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer, supra*). It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*DaimlerChrysler Corp. v Spitzes*).

Neither doctrine precludes plaintiff herein from pursuing and litigating defendants' alleged liability under common law negligence and Labor Law §§ 200 and 241. Plaintiff herein was not a party in the Dawes action, had no interest or standing to appear in that action, and was not united in interest with the plaintiff in the Dawes action. Thus, plaintiff did not have a full and fair opportunity to litigate the issues of defendants' liability in the Dawes action. As such, Justice Kerrigan's decision has no *res judicata* or collateral estoppel effect on the plaintiff herein.

Labor Law § 200 and Negligence

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 (*Reilly v Newireen Associates*, 303 AD2d 214, 756 NYS2d 192 [1st Dept 2003]; *Nevins v Essex Owners Corp.*, 276

AD2d 315 [1st Dept 2000], citing *Blessinger v Estee Lauder Companies, Inc.*, 271 AD2d 343 [2000]). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury’ (*Reilly citing Russin v Picciano & Son*, 54 NY2d 311, 317). Where “the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law ((*Reilly*). Similarly, where the dangerous condition arises from a subcontractor's methods or materials, “recovery against the . . . general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation (*Reilly citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505, 601 NYS2d 49). In accordance with a landowner's common-law duty to provide workers with a reasonably safe place to work, which has been codified by Labor Law § 200, “liability will attach to a landowner . . . only when the injuries were sustained as the result of a dangerous condition at the work site . . . and then only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe condition causing the accident” (*Vaneer v 993 Intervale Ave. Housing Dev. Fund Corp.*, 5 AD3d 161, 773 NYS2d 7 [1st Dept 2003]).

Metropolitan

Plaintiff concedes that there is no evidence that Metropolitan, the steel prime contractor, was negligent or had control over plaintiff's work or the alleged accident area. The record establishes that Metropolitan was not responsible for supervising, controlling and directing Midlantic's employees, *i.e.*, plaintiff herein, or the means and methods by which such employees were to perform their work. Metropolitan fabricated steel at their plant in Pennsylvania and

subcontracted the erection of its steel to plaintiff's employer, Midlantic. There is no evidence that Metropolitan was responsible for snow removal services. Metropolitan also established that it had not received any complaints or had actual or constructive notice of the icy condition that allegedly caused plaintiff's accident. Therefore, as there is no issue of fact as to Metropolitan's nonliability under theories of common law negligence or Labor Law §200, plaintiff's claim and all cross claims against Metropolitan in this regard are dismissed.

Velez

It is uncontested that Velez, as the Construction Manager, was responsible for general oversight to ensure that the Project was built in accordance with the plans and specifications (see Velez's affidavit ¶3). The record establishes that Velez had no supervision or control over Midlantic employees, or plaintiff's work. Plaintiff only argues that Velez, as the Construction Manager, had or should have had notice of the ice condition which allegedly caused plaintiff's injuries. However, plaintiff failed to identify any evidence indicating that Velez had notice of the alleged ice condition. Plaintiff testified that he did not see or hear of any complaints concerning the ice patch prior to his accident, and Velez's witness stated in her affidavit that Velez did not receive any prior complaints about the alleged condition. Therefore, as plaintiff failed to raise an issue of fact as to Velez's nonliability under negligence or Labor Law § 200, such claims as against Velez are dismissed.

Calcedo

There is no evidence that Calcedo had control over plaintiff's work or over the area where plaintiff's accident occurred at the time of plaintiff's accident. It is uncontested that Calcedo's concrete work would not be started at the Project until the steelwork by Midlantic, plaintiff's

employer, was 100% complete. At the time of the accident, steel erection work was still being performed in that area and was still under the control of Midlantic.

Under its contract, Calcedo was responsible for snow removal: "from the site access roads and path for safe egress to the building, owners and construction managers' trailers and guard booths." Calcedo was responsible for snow removal of the pathways and parking areas, but not for the area in which plaintiff's alleged accident occurred. Ms. Velez's testimony regarding snow removal inside the subject building is insufficient, as her testimony was not based on personal knowledge; she never read the Calcedo Contract and only saw snow removal operations outside the building. Ms. Velez testified that she "wasn't on site to specifically know the methodology for removal of snow at any one given time." And although she stated that Calcedo was responsible for protecting the building against a large storm event, there is no indication that a large snow event occurred at the time of plaintiff's alleged accident. Therefore, as no issue of fact exists as to Calcedo's liability to plaintiff under negligence or Labor Law § 200, such claims are dismissed against Calcedo.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*Ross* at 501-502). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor that sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*Ross* at 502-504).

The Court notes that contrary to plaintiff's contention, Metropolitan was not a statutory

agent of the owner or general contractor under the principle set forth in *Russin v Louis N. Piccian & Son*, 54 NY2d 311 [1981]). As *Russin* states, and as quoted in plaintiff's opposition papers:

Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections . . . , the duties themselves may in fact be delegated. . . . When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. *Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under sections 240 and 241. To hold otherwise and impose a nondelegable duty upon each contractor for all injuries occurring on a job site and thereby make each contractor an insurer for all workers regardless of the ability to direct, supervise and control those workers would lead to improbable and unjust results and would directly contravene the express legislative history accompanying the 1969 amendments to these provisions.* (Emphasis added) (internal citations omitted).

There is no showing, and plaintiff failed to identify, any evidence indicating that Metropolitan had the "authority to supervise and control" the work of *Midlantic or Midlantic's employees, to wit: the plaintiff*.

Nor can it be said that Metropolitan was a statutory agent of the owner or general contractor under the principle set forth in *Williams v Dover Home Improvement, Inc.* (276 AD2d 626 [2d Dept 2000]), notwithstanding Metropolitan's lack of control over plaintiff's work. Therefore, it cannot be said that Metropolitan was a statutory agent under Labor Law § 241(6). There is no indication that Metropolitan had "the authority to enforce safety standards" so as to render it a statutory agent (*Williams* at 626).

As to the applicability of the Industrial Code Regulations alleged, it is uncontested, and the record establishes, that 12 NYCRR 23-1.7(e) (tripping hazards), and 12 NYCRR 23-2.1(b) (disposal of debris) are inapplicable to the facts of this case. Plaintiff merely argues that the cases to which defendants cite involved 12 NYCRR 23-1.7(e) and did not support dismissal of

23-1.7(d), and that this latter section applied because it involves slipping hazards.

12 NYCRR 23-1.7 (d) provides:

(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Although 12 NYCRR 23-1.7(d) is sufficiently specific to support a Labor Law § 241(6) claim, the area where plaintiff was injured was not the type of floor, passageway, walkway, scaffold, or platform contemplated by this section (*see Jennings v Lefcon Partnership*, 250 AD2d 388, 673 NYS2d 85 [1st Dept 1998] ((where plaintiff was injured in an open area between two high-rises under construction, it was not in the sort of passageway, walkway and/or working area contemplated by 12 NYCRR 23-1.7(d); *see also, Vieira v Tishman Const. Corp.*, 255 AD2d 235, 679 NYS2d 618 [1st Dept 1998] [where plaintiff *tripped* over wire mesh installed on top of “Q-decking,” 12 NYCRR 23-1.7[e] applicable to tripping hazards held not applicable however, because for one reason, plaintiff was injured “not in a passageway but *while working in an open area*) (emphasis added).

Temes v Columbus Centre (48 AD3d 281 [1st Dept 2008) is distinguishable, in that the accident in *Temes* occurred while plaintiff was walking on the “floor” in a “big, open area” of the basement inside of a building. Here, plaintiff testified that his accident occurred in an open area, where it is “open on the outsides. . . . There were no walls up on the side (Plaintiff EBT, p. 33).

Since none of the Industrial Code Regulations cited by plaintiff apply to his alleged accident to support his Labor Law § 341(6) claim, such claim is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motions by Metropolitan Steel Industries, Inc., Velez Organization, and Calcedo Construction Corporation for summary judgment dismissing the Amended Complaint is granted; and it is further

ORDERED that the motion by Velez Organization for dismissal of plaintiff's Amended Complaint pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that Metropolitan Steel Industries, Inc. 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: April 16, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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