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

PRESENT: HON. JUDITH J. GISCHE J.S.C. *Justice* PART 10

Index Number : 117103/2005
MANZANO, ANTONIO
VS.
RIVERBEND HOUSING
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: JUL 27 2010

HON. JUDITH J. GISCHE J.S.C.

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 10

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ANTONIO MANZANO,

Plaintiff,

-against-

RIVERBEND HOUSING COMPANY, INC.,

Defendant.

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RIVERBEND HOUSING COMPANY, INC.,

3rd Party Plaintiff,

-against-

PROTO CONSTRUCTION AND DEVELOPMENT CORPORATION,

3rd Party Defendant.

----------x

DECISION/ORDER
Index No.: 117103/05
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Third Party
Index No.: 59[illegible]08/06

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m (3212) w/ DCZ affirm, exhs	1
Pltf's opp w/ MEF affirm, exhs	2
Def's reply w/ DCZ	3

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, Antonio Manzano ("Manzano" or "plaintiff"), claims he sustained personal injuries proximately caused by defendant, Riverbend Housing Company, Inc.'s ("Riverbend"), violation of various Industrial Code provisions (Labor Law § 241 [6]) and

Riverbend's negligence (common law negligence and Labor Law § 200).

Riverbend's third party action against Proto Construction and Development Corporation ("Proto") has been discontinued by the parties.

Issue has been joined and defendant seeks summary judgment dismissing the claims against it. This motion was timely brought after plaintiff filed his note of issue on July 30, 2009. Since the motion is timely, it can and will be decided on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004).

Arguments Presented

On June 24, 2005, the date of the accident, Manzano was employed by Proto as a mason laborer. He was injured while working on a construction project at 2289 Fifth Avenue, New York, New York (the "Premises"). Riverbend is the owner of the Premises and Proto was Riverbend's contractor on this project.

Manzano provided a bill of particulars and was deposed on three different occasions. During his examination before trial ("EBT"), Manzano testified through an interpreter, that he began working at the Premises in March of 2004. Manzano testified that on the date of his accident, he was working for Proto and that his supervisor/boss/foreman was Juan Pineiro ("Pineiro"). When asked at his EBT, "from February 2005 to the date of your accident, did anyone else tell you how to do your work other than Juan Pineiro?" Manzano responded, "No." (Exh. F., pg.70 - 71).

Manzano testified that at the time of his accident, he was carrying a bag of gravel that weighed between 50 and 90 pounds when he slipped and fell on the concrete floor

in the storeroom[1]. (Exh. F, pg. 99-100). Manzano stated that, although he does not know what he exactly slipped on, after he fell, he observed an accumulation of construction materials, including "gravel, sika, sand, cement . . . ropes . . . and steel cables" on the floor. Manzano testified that "I took my first step, the second, and as I took the third step, I slipped, and then my right leg moved backwards, the left leg touched on the ground." (Exh. F. pg. 100). Manzano further stated that "there were accumulations of material all over the room, not just there. There were accumulations all over . . . they were all around. [The accumulations] ha[ve] always been there." (Exh. F, pg. 118).

Pineiro testified at his deposition that he was on the Premises daily and that he "personally" communicated with Proto's employees, instructing them what to do each day. Pineiro stated that nobody else directed Proto's employees how to perform their work, only him. (Exh. J, pg. 20 - 21).

Taky Yokovon ("Yokovon"), Vice President of Proto, was also deposed. Yokovon stated at his deposition that he has been Vice President of Proto for 17 years and that Proto was hired by Riverbend to "perform concrete repairs on the facade of the buildings, brick pointing, some brick replacement, coating applications and some caulking." Yokovon testified that the material used on the job site was purchased by Proto and Proto supplied all the equipment necessary to do the work. (Exh. I, pg .25, 34). Yokovon stated that Riverbend did not provide any of the equipment that was used on the job site by Proto's employees. (Exh. I, pg . 34). According to Yokovon, Pineiro

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[1] Sometimes "paint room."

was in charge of the site and there was no safety officer or other person overseeing Proto's employees on this project. (Exh. I, pg. 36-37).

John Chen ("Chen"), a site manager for Riverbend Housing, testified that he was responsible for the day-to-day operations of the housing complex, including supervising maintenance staff, collecting rent, maintaining the budget, and making sure the properties were cleaned on a daily basis. Chen stated that Riverbend had cleaned out everything from the room before Proto was going to use it. (Exh. E, pg. 108). Chen testified that nobody ever complained or reported a safety or cleanliness problem concerning the paint room. (Exh. E, pg. 124; 156-57). Chen further testified that while Proto was using the paint room, the Riverbend staff was instructed not to enter that room and nobody on Riverbend's staff, other than the super and assistant super, had a key to the room. (Exh. E, pg. 124-25, 130-31).

Plaintiff contends that defendant violated various sections of the Industrial Code, including 12 NYCRR §§ 23-1.7(d), (e)(1), (e)(2) (slipping / tripping hazards); 23-2.1 (a), (b) (maintenance and housekeeping / storage); and 23-3.3 (b), (c), (e), (f), (g), (k), (l) (demolition). Plaintiff further argues that defendant was negligent (common law and Labor Law § 200) because it either created or had notice of the alleged dangerous condition.

Defendant argues that the Industrial Code regulations relied upon by plaintiff are inapplicable to the facts of this case, as alleged, because, *inter alia*, plaintiff's accident did not occur in an elevated area; plaintiff states that he "slipped" (not "tripped"); the storage room is not a "passageway," "working area," "stairway," or "walkway" within the meaning of the Industrial Code; and plaintiff was not engaged in demolition work at the

time of his accident. Defendant further argues that it was not negligent because it did not create nor have notice of the alleged dangerous condition.

Applicable Law

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64 (1980). Only if this burden is met, will it then shift to the opposing party, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See* Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

Discussion

Labor Law § 241 (6)

Labor Law § 241 (6) imposes a non-delegable duty upon owners and contractors

to provide reasonable and adequate protection and safety to construction workers. Comes v. New York State Electric & Gas Co., 82 N.Y.2d 876 (1993); Rizzuto v L.A. Wenger Contr. Co., 91 N.Y.2d 343, 348 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993). To properly state a claim under Labor Law § 241(6), the plaintiff must identify a specific and applicable Industrial Code provision that has been violated. Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*. The question of whether the plaintiff has alleged a specific provision of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 A.D.2d 121 (1st Dept. 2002).

Plaintiff is relying on the following provisions of the Industrial Code in seeking liability under Labor Law § 241(6): 12 NYCRR §§ 23-1.7(d), (e)(1), (e)(2); 23-2.1 (a), (b); and 23-3.3 (b), (c), (e), (f), (g), (k), (l). Defendant claims that each and every provision has no application, under the facts of this case.

12 NYCRR § 23-1.7 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.
>
> (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.

Although defendant contends that 12 NYCRR § 23-1.7(d) does not apply to the facts of this case because the storage room was not an "elevated working surface;" it is not necessary for the surface to be elevated for this provision to apply. *See* Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 (Ct. App. 1998) (§ 23-1.7[d] applied where plaintiff slipped on fuel that was accidentally sprayed on floor); Conklin v. Triborough Bridge and Tunnel Authority, 49 A.D.3d 320 (1st Dept. 2008) (§ 23-1.7[d] applied where plaintiff slipped on ramp covered with a slippery substance).

Additionally, defendant's argument that plaintiff did not slip on "ice, snow, water, grease" or any other "foreign substance" is also unavailing. Manzano testified that he was unaware of what he slipped on, but that he observed an accumulation of construction materials, including "gravel, sika, sand, cement . . . ropes . . . and steel cables" near where he fell. *Cf* Gielow v. Rosa Coplon Home, 251 A.D.2d 970 (4th Dept. 1998) (plaintiff did not slip on a foreign substance, but slipped on muddy ground that was exposed to the elements). There are enough facts presented from which a jury could conclude that plaintiff due fell to a slippery condition. 12 NYCRR § 23-1.7(d) is therefore applicable to the facts of this case and whether plaintiff slipped on a "foreign object" is a material issue of fact for the jury to decide.

Defendant contends that 12 NYCRR § 23-1.7(e)(1) and (2) do not apply because

the storage room does not fall under the meaning of "passageway" or "working area" and plaintiff "slipped" (not "tripped"). Manzano states during his EBT that he "slipped" and he does not allege a tripping hazard. 12 NYCRR § 23-1.7(e)(1) is, therefore, inapplicable to the facts of this case.

12 NYCRR § 23-1.7 (e)(2), however, is not limited to tripping hazards and is applicable to the facts of this case. The location where plaintiff's accident occurred is a "working area" as defined under § 23-1.7 (e)(2). Plaintiff stated that the room where his accident occurred was used to store construction materials, such as bags of cement, caulking materials, gravel and sand, and scaffold hooks (Exh. E, pg. 54-55). At the time of plaintiff's accident, he was moving bags of cement from one location to another. Although defendant's classify this area as a "storeroom," there is no indication that this room was used merely for storage. Based on the deposition testimony, it appears as though employees were frequently walking through the room and conducting work inside the room. Even at the time of plaintiff's accident, he and a co-worker were transporting bags of gravel within the room. *Cf* Conway v. Beth Israel Medical Center, 262 A.D.2d 345 (2d Dept. 1999) (the storeroom was not a "working area" where plaintiff slipped on a dolly properly located in the storage room of a hospital). 12 NYCRR § 23-1.7 (e)(2) is, therefore, applicable to the facts of this case.

12 NYCRR § 23-2.1 provides:

> (a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.
>
> (b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

Defendant's argument that § 23-2.1 (a)(1) is inapplicable because the room where plaintiff's accident occurred is not a "passageway, walkway, stairway or other thoroughfare," is also rejected. Yokovon stated in his EBT that he would access the room through the parking lot entrance and would pass through it to attend board meetings. Manzano also stated in his affidavit that the room was used as a main passageway to "enter and exit the building," "reach the boiler room . . . changing room . . . and bathroom." Therefore, the court finds that § 23-2.1 (a)(1) does apply.

However, the court finds that § 23-2.1 (a)(2) does not apply since plaintiff alleges that his accident resulted from slipping on debris; not from storing material/equipment exceeding the safe carrying capacity or from storing material too close to the edge of a floor, platform, or scaffold, as this section requires.

Plaintiff's § 23-2.1 (b) claim is rejected because this provision of the Industrial Code lacks the specificity required to support a cause of action under Labor Law § 241 (6). *See* Madir v. 21-23 Maiden Lane Realty, LLC, 9 A.D.3d 450 (2d Dept. 2004); Salinas v Barney Skanska Constr. Co., 2 A.D.3d 619, 622 (2d Dept. 2003); Fowler v

CCS Queens Corp., 279 A.D.2d 505 (2d Dept. 2001); Lynch v Abax, Inc., 268 A.D.2d 366, 367 (1st Dept. 2000); Mendoza v. Marche Libre Associates, 256 A.D.2d 133 (1st Dept. 1998).

12 NYCRR 23-3.3 and its sub-parts pertain to areas where hand demolition is taking place. The sections plaintiff relies upon provide as follows:

> (b) Demolition of walls and partitions.
>
> . . .
>
> (c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material.
>
> . . .
>
> (e) Methods of operation. Where the demolition of any building or other structure is being performed by hand, debris, bricks and any other materials shall be removed as follows:
>
> . . .
>
> (f) Access to floors. There shall be provided at all times safe access to and egress from every building or other structure in the course of demolition.
>
> . . .
>
> (g) Protection in other areas. Every floor or equivalent area within the building or other structure that is subject to the hazard of falling debris or materials from above shall be boarded up to prevent the passage of any person through such area . . .
>
> . . .
>
> (k) Storage of materials.
>
> (1) General.
>
> (i) Materials shall not be stored on catch platforms, scaffold platforms, floors or stairways of any building or other structure being demolished . . .
>
> (ii) . . . All materials shall be safely piled in such locations as will not interfere with any work operations nor present any hazard to any person employed at or frequenting the demolition site.

(2) Storage of debris or materials in cellars.

. . .

(l) Safe footing required.

. . .

Plaintiff does not allege that his accident resulted or was related to demolition work. The court, therefore, finds that § 23-3.3 and its sub-parts do not apply to the facts of this case.

Plaintiff also claims that various OSHA regulations were violated. However, alleged violations of OSHA regulations are not predicates for a Labor Law § 241 (6) claim. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 (1998).

Based upon the foregoing, defendant's motion for summary judgment, dismissing plaintiff's Labor Law § 241 (6) claim is granted only to the extent that the claims supported by Industrial Code sections 23-1.7(e)(1); 23-2.1 (a)(2); 23-2.1 (b); and 23-3.3 (b), (c), (e), (f), (g), (k), (l), which are either too general or otherwise do not apply to plaintiff's accident, are hereby severed and dismissed. Otherwise, the remaining code sections plaintiff relies upon [23-1.7(d); 23-1.7 (e)(2); and 23-2.1 (a)(1)] are particular specifications that pertain to plaintiff's accident, as alleged, requiring that defendant's motion for summary judgment be denied. The jury will decide whether these sections were violated and whether such violations were a proximate cause of plaintiff's accident.

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger

Contracting Co., *supra*. Unlike Labor Law § 241 (6), liability can be imposed only if the defendant has actually been negligent. Since defendant has moved for summary judgment on this cause of action, defendant must prove it did not exercise supervision and control over injury producing work, or have actual or constructive notice of the dangerous condition alleged, or create the condition. Sheridan v. Beaver Tower Inc., 229 A.D.2d 302 (1st Dept. 1996) *lv den* 89 N.Y.2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 A.D.3d 225 *aff'd* 7 N.Y.3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., *supra*; Gonzalez v. United Parcel Serv., 249 A.D.2d 210 (1st Dept. 1998).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200. Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505 (1993). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., 40 A.D.3d 305 (1st Dept. 2007); Brown v. New York City Economic Dev. Corp., 234 A.D.2d 33 (1st Dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

Defendant has met its initial burden of showing that it did not control the manner in which the plaintiff performed his work, i.e. how the injury producing work was

performed. Hughes v. Tishman Construction Corp., *supra* at 2. Plaintiff has not come forward to present factual disputes that have to be tried for the reasons that follow.

Although Riverbend maintained staff on site, it did not directly supervise, direct or control Proto's employees (including plaintiff) in how they executed their tasks. Riverbend has established, and Proto agrees, that Riverbend did not supervise, instruct, or control how Proto or its employees, including Manzano, did their jobs. The equipment that Manzano used was provided to him by his employer and it was his foreman who told him what to do and how to do it. Furthermore, Manzano did not complain to anyone that their was debris on the floor or that the room was messy.

Therefore, defendant's motion for summary judgment, dismissing plaintiff's causes of action for Labor Law § 200 and common law negligence is granted and these causes of action are hereby severed and dismissed.

Conclusion

It is hereby:

ORDERED that defendant, Riverbend Housing Company, Inc.'s motion for summary judgment on plaintiff's Labor Law § 241 (6) claim is granted only to the extent that the claims supported by Industrial Code sections 23-1.7(e)(1); 23-2.1 (a)(2); 23-2.1 (b); and 23-3.3 (b), (c), (e), (f), (g), (k), (l), are hereby severed and dismissed; and it is further

ORDERED that defendant's motion for summary judgment on plaintiff's Labor Law § 200 and common law negligence claims are granted, and these claims are

hereby severed and dismissed; and it is further

ORDERED that defendant's motion for summary judgment on plaintiff's Labor Law § 241 (6) claim is denied as to Industrial Code sections 23-1.7(d); 23-1.7 (e)(2); and 23-2.1 (a)(1); and it is further

ORDERED that since the note of issue has been filed, and this case is certified for trial, plaintiff shall serve a copy of this decision/order on the Office of Trial Support so that it can be scheduled for trial; and it is further

ORDERED that any relief requested, but not expressly addressed has nonetheless been considered by the court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
July 27, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.