White v Avalon Bay Community, Inc.
2010 NY Slip Op 32169(U)
July 20, 2010
Supreme Court, Suffolk County
Docket Number: 5367/2007
Judge: Paul J. Baisley
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 5367/2007
CALENDAR NO.: 200901273OT
MOTION DATE: 5/27/2010
MOTION NO.: 001 MOT D
002 MOT D

---X
JAMES WHITE,

Plaintiff,

-against-

AVALON BAY COMMUNITY INC., GLENCHI, LLC and S.J. ELECTRIC, INC.,

Defendants.
---X
AVALON BAY COMMUNITIES INC.,

Third-Party Plaintiff,

-against-

S.J. ELECTRIC, INC.,

Third-Party Defendant.
---X

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Upon the following papers numbered 1 to 54 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers 22-39; Answering Affidavits and supporting papers 40-48; 49-50; Replying Affidavits and supporting papers 51-53; Other 54; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant/third-party plaintiff, Avalon Bay Communities s/h/a Avalon Bay Community, Inc., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint, is granted as to those causes of action premised upon common law negligence, Labor Law §200, §240 (1), and §241(a) and is denied as to the cause of action premised upon Labor Law §241(6); and for further order granting a conditional order of summary judgment over and against the defendant/third-party defendant S.J. Electric, Inc. for contractual and common law indemnification is denied without prejudice; and for further order dismissing any and all cross-claims against Avalon Bay is denied; and it is further

ORDERED that this cross-motion (002) by the defendant/third-party defendant, S.J. Electric, Inc., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted as to those causes of action premised upon common law negligence, Labor Law §200 and §240(1), and is denied as to the cause of action premised upon Labor Law §241(6).

This is an action for damages for personal injuries claimed to have been sustained by the plaintiff, James White, on May 1, 2006, while working as a carpenter for his employer, Sobara Contracting, at the premises known as Cedar Sways Road, located at 14 Glen Street, City of Glen Cove, County of Nassau, State of New York. It is claimed that the defendants, Avalon Bay Community, Inc. (Avalon) and S.J. Electric, Inc. (S.J. Electric), were negligent in the maintenance

of the premises during the construction, demolition, erection, excavation, repair, alteration, painting, cleaning and/or pointing work, and failed to provide proper equipment, ladders, and safety devices, causing the plaintiff to fall between the foundation and the bulkhead. It is claimed the defendants violated common law, New York State Labor Law Sections 200, 240, and 241-a. By way of the verified bill of particulars, the plaintiff claims that the defendants violated 12 NYCRR 23-1.5(a); 23-1.7(d)(e)

In its answer, S.J. Electric has asserted cross claims for breach of contract and negligence premised upon acts of omission and commission against Avalon and seeks judgment over against Avalon for contribution on the basis of apportionment of responsibility.

Avalon has asserted a cross-claim against S.J. Electric wherein its seeks contribution, common law and contractual indemnification against S.J. electric on the basis of apportionment of damages as may be recoverable against S. J. Electric. Avalon further asserts a cross claim against Glenchi.

Although Avalon has asserted a cross-claim against defendant Glenchi, LLC, this action was discontinued against the defendant Glenchi by stipulation dated July 16, 2008, which stipulation has not been signed by S.J. Electric. No proof of filing of the stipulation has been submitted pursuant to CPLR 3217. It is further noted that Glenchi did not serve an answer in this action and no motion for default judgment has been made by any party. CPLR 3217 (a)(2) provides in pertinent part that "[a]ny party asserting a claim may discontinue it without an order...by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties..." CPLR 3217(b) "By order of court" provides [e]xcept as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action. In the instant action the Stipulation of Discontinuance has not been filed with the Clerk (*see generally, Matter of Michael T.*, 188AD2d 1090, 593 NYS2d 471 [4th Dept 1992]; *Noble v O'Leary*, 165 Misc2d 231, 628 NYS2d 930 [Sup. Ct New York County 1995]), and it is not signed by all parties as required by CPLR 3217(b) (*see, C.W. Brown et al v HCE, Inc. et al*, 8 AD3d 520, 779 NYS2d 514 [2nd Dept 2004] in that counsel for the defendant S.J. Electric has not signed it. The motion for summary judgment or final disposition of the action pending is now before this court, and therefore there is a prohibition imposed upon this court against discontinuing the action against the defendant Glenchi as S.J. Electric has a cross-claim against Glenchi and has not consented to discontinuance (see. *Farkas v Farkas*, 47 Misc2d 827, 263 NYS2d 214 [Sup. Ct. New York, New York County 1965]).

A third-party action has been commenced by the third-party plaintiff Avalon against the third-party defendant S.J. Electric with a first cause of action for contractual indemnification, and a second cause of action for common law indemnification/contribution based upon any apportionment of fault against S.J. Electric, and a third cause of action for breach of agreement/contract for judgment over against S.J. Electric.

In motion (001), the moving defendant/third-party plaintiff, Avalon, seeks summary judgment dismissing the complaint on the basis it bears no liability for the accident and that there

are no triable issues of fact. In motion (002), the defendant, S.J. Electric, seeks summary judgment dismissing the complaint on the basis that Avalon was the general contractor for the project and that S.J. Electric was the electric subcontractor and bears no liability for the occurrence.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (001), Avalon has submitted, inter alia, an attorney's affirmation; copies of the supplemental complaint and answers and third-party pleadings and bill of particulars; and copies of the transcripts of the examinations before trial of James White dated December 12, 2008, Andrew Baranello on behalf of Avalon dated April 24, 2009, Kevin P. Krennan on behalf of S.J. Electric dated April 24, 2009; a copy of a contract dated December 5, 2005 between Avalon and S.J. Electric; Certificate of Liability Insurance issued to S.J. Electric dated May 12, 2005; and a letter dated February 27, 2008 from Gallagher Bassett Services, Inc. on behalf of Arch Insurance Company denying coverage on the basis the occurrence did not arise out of S.J. Electric's work and failure to notify them as soon as practicable.

In support of motion (002) S.J. Electric has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, supplemental summons and amended complaint, third-party summons, answers, verified bill of particulars; stipulation discontinuing the action against defendant Glenchi; copies of the transcripts of the examinations before trial of James White dated December 12, 2008, Andrew Baranello on behalf of Avalon dated April 24, 2009, Kevin P. Krennan on behalf of S.J. Electric dated April 24, 2009; and a copy of the General Incident Report by Avalon Bay.

In opposing this application, the plaintiff has submitted an attorney's affirmation; copy of the examination before trial of Andrew Baranello on behalf of April 24, 2009; daily job reports; one page of testimony of Kevin P. Krennan of S.J. Brennan dated April 24, 2009. The plaintiff, by counsel, as set forth in the affirmation of Cody McCone dated January 28, 2010, concedes that

the facts of this action do not support causes of action for common law negligence or Labor Law §200 or §240, however, counsel does not withdraw those claims premised upon common law negligence, or Labor Law §200 or §240. Therefore, this court will make a determination accordingly.

James White testified to the effect that he began working with Sorbora in the middle of March, 2005 and worked with them until the date of the accident on May 1, 2006. He was working on Glen Cove Avenue on a new construction project, a combination parking garage with ground level store fronts with apartments above. Peter Marks, an employee of Sorbora, was his general foreman to whom he reported. Mike Vechhinone was the supervisor from Sorbora for the job. On the date of the accident he was working with his partner, Ricky, also a Sorbora employee. After lunch, as previously directed, he and his partner were to put waterproofing on the foundation wall on the east side of the job closest to the street so the backfill could be put in. The work was being done in a six foot wide space between the foundation wall and the dirt wall. The space was approximately fourteen to fifteen feet deep. He put his thirty to forty pound ladder supplied by his employer on his shoulder, and started to walk on the area between the foundation and the bulkhead along the exterior foundation, to the area they were going to work. The area upon which he was walking had a pile of about forty gray, plastic pipes, each about twenty-feet long and about four and a half to five inches in diameter. He testified he had to traverse this area to gain access to the area he was to work in. He decided to walk over the pile of pipes. After taking two steps, the pile gave way, his right foot stayed in one spot and he landed flat on his back with his right foot under his buttocks. It was his intention after walking across the pipes to place the ladder into the space between columns, garbage (described as general debris), dirt and rock, and climb down the ladder to get into the work area. He did not report the presence of the pipes to anyone or advise anyone that they were in the area where he needed to work. He did not know who owned the pipes or who placed the pipes in that area. He did not know who the general contractor was. He received no job instructions from anyone but his employer.

Andrew Baranello testified to the effect that on May 1, 2006, he was employed by Avalon Bay Community, Inc. as a senior project manager. He described Avalon as a real estate investment trust that develops, builds and operates rental apartment communities on the east and west coasts. He stated that Avalon was not involved in the project at 14 Glen Street, Glen Cove, New York, a new rental community consisting of 111 apartments over a parking structure to be built on an empty lot. Avalon Bay Community Incorporated was the owner of the premises. He testified that Avalon had nothing to do with construction or the project at the site and did not have a shanty or an office at the site. Avalon hired contractors to work at the site, including Total Concept Carpentry, S.J. Electric, Sorbara Construction for concrete installation, Lakeville Pace for plumbing, Lofuts for piling (telephone poles), and Mid Island Steel for ironworking. Avalon also hired Sorbara Construction Corp. to install the foundation at the Avalon Glen Cove North where the plaintiff was working. Peter Moosbrugger, an employee of Avalon, was the job superintendent for the project and was responsible for quality control and was present on a daily basis to make sure that the subs were performing their work properly. Moosbrugger filled out daily progress logs or reports indicating the date, weather, head-count of subcontractor employees, daily tasks identifying the subcontractor and their work, and visitors. Baranello further testified that Avalon provided no safety coordinator at the site and that each contractor was responsible for its own safety. Avalon would have been responsible for removal of debris, management of debris, and center piling. The separate contractors were each responsible for making sure the

[* 5]

construction materials were properly stored at the project. No one was responsible for performing an inspection and making sure the contractors were storing their materials properly. Avalon did not supply equipment or materials to any of the contractors. Concerning the contract between Avalon and S.J. Electric dated December 5, 2005, S.J. Electric was to provide and install electric service and distribution and wiring for the project. When shown a photograph of the site, he identified what he believed were electric conduits or plastic PVC pipes for the plumber. He testified that it would be the electricians responsibility to make sure that those pipes are stored properly. Avalon received no complaints about the site concerning the pipes or materials. In April 2006, the job site was at the foundation stage wherein the substructure that supports the building was in. Charlie, the foreman and Bill Swain, the project manager from S.J. Electric and he had discussions about the storage of materials at the site and he knew of no conversations between Moosbrugger and Swain concerning the same. There were site safety meetings at the project, tool box talks, that were probably held weekly by each trade, and weekly job meetings held by Moosbrugger with all the trades and which included a discussion about safety.

Kevin P. Krennan testified to the effect that he is employed by S.J. Electric, as an electrician for twenty five years as a journeyman and sometimes a foreman, depending upon the job. He believed he began working at the Glen Cove, New York project sometime in April 2006. His foreman was Charlie Ambrosio who held weekly safety meetings or "tool box talks." He had no recollection of discussions about storage of materials. He knew of no complaints about the storage of materials made to S.J. Electric. He did not believe Avalon supplied any materials or equipment to S.J. Electric. When shown a photograph which was described as having gray PVC pipes on it, he stated he believed S.J. Electric was using the gray PVC pipe at the site, and he did not believe there were any other electrical contractors working at the site. He believed both the general contractor and the contractor, Avalon and whichever subcontractor, were responsible for making sure materials were stored properly. He did not know James White or anyone working for Sobora. He had no knowledge of the accident at the site involving James White.

COMMON LAW NEGLIGENCE AND LABOR LAW §200

Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Markey et al v C.F.M.M. Owners Corp. et al,* 51 AD3d 734, 858 NYS2d 293 [2nd Dept 2008]; *Aranda v Park East Constr.*, 4 AD3d 315, 772 NYS2d 70 [2004]; *Akins v Baker,* 247 AD2d 562, 669 NYS2d 63 [1998])" (*Marin v The City of New York, et al,* 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]) An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (*Ramos v HSBC Bank et al,* 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail on a claim under Labor Law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (*Mendoza v Cornwall Hill Estates, Inc.*, 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]).

Labor Law §200 provides in pertinent part that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully

frequenting such places. All machinery, equ pment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons...." (*Trbaci v AJS Construction Project Management, Inc, et al*, 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Supreme Court of New York, Kings County 2009). "New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work" (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]).

In considering Common Law Negligence and Labor Law §200, it is determined that no liability has been demonstrated as against the Owner of the premises, Avalon, who is also the general contractor who hired the subcontractors. It has not been demonstrated that Avalon exercised direction and control over the work of the subcontractors and it did not have actual or constructive notice of the alleged unsafe condition of the PVC pipes. It has been further established that the subcontractors were responsible for storing their own materials. It has also been demonstrated that S.J. Electric was a subcontractor and not an owner or contractor charged with the duty to provide employees with a safe place to work. James White was not an employee of S.J. Electric who did not direct, control, or supervise his work. The testimony clearly establishes that James White chose to walk upon the stacked PVC pipes to get to his work area. The pipes were open and apparent to the plaintiff. An owner's duty to provide a safe workplace does not include protecting workers from dangers which, as here, are readily apparent (*Conway et al v Beth Israel Medical Center*, 262 AD2d 345, 691 NYS2d 576 [2nd Dept 1999]).

Accordingly, that part of motion (001) by defendant/third-party plaintiff Avalon for an order dismissing the causes of action premised upon Common Law Negligence and Labor Law §200 is granted.

Accordingly, that part of motion (002) by S. J. Electric for dismissal of the causes of action premised upon Common Law Negligence and Labor Law §200 is granted.

LABOR LAW §240

New York State Labor Law §240. Scaffolding and other devices for use of employees (1) provides "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation" (*see, Plotnick et al v Wok's Kitchen Incorporated, et al*, 21 AD3d 358, 800 NYS2d 37 [2nd Dept 2005]; *Handlovic v Bedford Park Development, Inc.*, 25 AD3d 653, 811 NYS2d 677 [2nd Dept 2006]). Labor Law §240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Cruz v The Seven Park Avenue Corporation et al*, 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]).

In *Ortega et al v Puccia et al,* 2008 NY Slip Op 8350, 2008 NY App Div Lexis 8140 [2nd Dept October 28, 2008], the court set forth that Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable. and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

"Labor Law §240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured (*citations omitted*). These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.... Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured ...." (*Natale v City of New York et al,* 33 AD3d 772, 822 NYS2d 771 [2nd Dept 2006]).

It is well settled that not every hazard or danger encountered in a construction zone falls within the scope of N.Y. Labor Law §240(1) as to render the owner or contractor liable for an injured worker's damages. Rather Labor Law §240(1) is aimed at only elevation-related hazards, and accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of a required safety device. The plaintiff testified to the effect that he fell while stepping onto a pile of PVC pipes which was located near his worksite and across which he was traversing to get to his work area. He did not fall from a height, but fell when the pipes he stepped onto shifted out of position, causing him to fall and sustain injury (see, *Conway et al v Beth Israel Medical Center,* supra.). It is determined that the occurrence complained of herein was "a general hazard of the workplace, not one contemplated to be subject to Labor Law §240(1)" (*O'Keefe v Tishman Westside Construction of New York,* 2007 NY Misc Lexis 4783; 237 NYLJ 125 [Supreme Court of New York, New York County 2007]).

Accordingly, that part of motion (001) by defendant/third-party plaintiff Avalon for dismissal of the cause of action premised upon violation of N.Y. Labor Law §240(1) is granted.

Accordingly, that part of motion (002) by the defendant S.J. Electric for dismissal of the cause of action premised upon violation of N.Y. Labor Law §240(1) is granted

LABOR LAW §241-a and 241(6)

Labor Law §241-a provides protection of workmen in or at elevator shaftways, hatchways and stairwells and is inapplicable to the facts of this case.

New York State Labor Law §241(6) provides in pertinent part that "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

"Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (citing *Ross v Curtis Palmer Hydro-Elec. Co.,* 81 NY2d 494, 601 NYS2d 49). Liability may be imposed under §241(6) even where the owner or

contractor did not supervise or control the worksite (*Navin et al v SJP TS, LLC et al,* 2010 NY Slip Op 30988U, 2010 NY Misc Lexis 1904 [Supreme Court of New York, New York County]). Accordingly, in order to support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State,* 80 NY2d 959, 590 NYS2d 874 [1992]; *see also Adams v Glass Fab.,* 212 AD2d 972, 624 NYS2d 705 [1995])" (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Marin v The City of New York, et al,* 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]; *see, Mahoney v Madeira Associates et al,* 32 AD3d 1303, 822 NYS2d 190 [Supreme Court of New York 4th Dept 2006]).

Unlike Labor Law §200, Labor Law §241(6) does not require the plaintiff to show that the defendant exercised supervision or control over the worksite (*Mendoza v Cornwall Hill Estates,* 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]). New York Labor Law §241(6) merely restates the common-law duty to provide a safe working environment and thus is not sufficiently specific to support a claim (*Craemer v Amsterdam High School et al,* 241 AD2d 589, 659 NYS2d 560 [3rd Dept 1997]). As the Court of Appeals explained in *Rizzuto v L.A. Wegner Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998], "Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault" (*McDevitt et al v Cappelli Enterprises Inc. et al,* 16 Misc3d 1133A, 847 NYS2d 903 [Supreme Court, New York County 2007]).

A claim asserted under Labor Law §241(6) must refer to a violation of a specific standard established by the New York Commissioner of Labor and there must be proof that the violation of such provision was the proximate cause of any claimed injury. In this regard, rules in the New York Industrial Code that mandate compliance with concrete specifications will sustain a claim under Labor Law §241(6), while those establishing general safety standards will not (*Shields v GE,* 3AD3d 715, 771 NYS2d 249 [3rd Dept 2003]). Here, the plaintiff has pleaded that Title 12 NYCRR 23 of the State of New York, Sections 12 NYCRR 23-1.5(a) and 23-1.7(d) and (e) have been violated, and sets forth in response to the defendants' motions for summary judgment that 12 NYCRR 23-2.1 has been violated as well. An allegation of violation of at least one provision of Industrial Code 12 NYCRR §23 which requires compliance with concrete specifications supports a claim under of Labor Law §241(6) (*Cirao'o v Melville Court Assocs.,* 221 AD2d 582, 634 NYS2d 205 [2nd Dept 1955]).

12 NYCRR §23-1.5 has been deemed a general provision that cannot sustain a Labor Law §241(6) cause of action (*Krause et al v Central New York Oil and Gas Comany, LLC,* 16 Misc3d 1106A, 841 NYS2d 826 [Supreme Court of New York, Broome County 2007] citing *McGrath v Lake Tree Vil. Assocs.,* 216 AD2d 877, 629 NYS2d 358 [1955]).

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[1] See, *O'Connor v Lincoln Metrodenter Partners, LP et al* 266 AD2d 60, 698 NYS2d 632 [1st Dept 1999], wherein the specific violations were not pleaded but were alleged, albeit, in response to the summary judgment motion, and were therefore considered in determining the motion as there was no prejudice to the defendant as there were no new facts alleged. The Appellate Court stated that in effect, it was the IAS Court's grant of a motion to amend the pleadings.

Here the plaintiff claims that 12 NYCRR §23-1.7(d) and (e) and 23-2.1 have been violated and are sufficiently specific to support a cause of action under Labor Law §241(6) (*Vieira v Tishman Construction Corporation et al,* 155 AD2d 235, 679 NYS2d 618 [1st Dept 1998]).

12 NYCRR §23-1.7(d) provides "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." 12 NYCRR §23-1.7(e) provides "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...." 12 NYCRR §23-2.1(a)(1) which requires that building materials be "so located that they do not obstruct any passageway, walkway, stairway, or other thoroughfare is specific enough to support an action under Labor Law §241(6) (*Lehner v Dormitory Autho.*, 221 Ad2d 958, 633 NYS2d 911 [4th Dept 1996]).

In the instant action the plaintiff is claiming that the PVC pipes obstructed the passageway, the only means of access to the area he was to work in. Accordingly 12 NYCRR §23-1.7(d) and (e) and §23-2.1 serve as a basis for jury determination as to whether liability may be imposed premised upon Labor Law §241(6). Here the PVC pipes did not belong to the plaintiff's employer and were not being utilized in the performance of the plaintiff's duties to install waterproofing onto the foundation, but instead were equipment utilized and stored by S.J. Electric upon which the plaintiff tripped (see, *Sharrow v Dick Corporation et al,* 233 AD2d 858, 649 NYS2d 281 [4th Dept 1996]). Labor Law §241(6) imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite (*Rizzuto v L.A. Wegner Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998]). The absolute liability imposed upon owners and general contractors pursuant to Labor Law §241(6) does not apply to prime contractors having no authority to supervise or control the work being performed at the time of the injury (*Hornicek et al v Lane, Inc.*, 265 AD2d 631, 696 NYS2d 557 [3rd Dept 1999]), but liability can be imposed upon a subcontractor only when it is in supervision or control of the area involved or the work that gives rise to the injury (*DaSilva v Jantron Industries, Inc.*, 155 AD2d 510, 547 NYS2d 370 [2nd Dept 1989]).

Based upon the foregoing, it is determined that Avalon has failed to demonstrate entitlement to summary judgment premised upon Labor Law §241(6) which places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (citing *Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49), and the particular rules set forth above. Labor Law §241(6) was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections. Here it is asserted that Avalon violated Labor Law §241(6) and specific sections of the Industrial Code. Therefore, this issue must go to the jury for determination as to whether any negligence of some party to, or participant in, the construction project caused plaintiff's injury, and if proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault" (*McDevitt et al v Cappelli Enterprises, Inc. et al*, supra).

Accordingly, that part of motion (001) by the defendant/third-party plaintiff Avalon for summary judgment dismissing that part of the complaint premised upon its alleged violation of

Labor Law §241-a is granted and is denied as to the alleged violation of Labor Law §241(6) and the aforementioned sections of the Industrial Code.

It has been demonstrated that S.J. Electric is not an owner or general contractor and did not exercise any supervision or control over the plaintiff when he was working. However, there are factual issues concerning whether S.J. Electric supervised or controlled the area involved in the accident where the PVC pipes were placed (*DaSilva v Jantron Industries, Inc.*, supra) which was the area the plaintiff was working. The contract dated December 5, 2005 between Avalon Bay Communities, Inc. and S.J. Electric provided for S.J. Electric to supply labor and materials for the construction of Avalon at Glen Cove North. Paragraph 5.4 provides that "Except as otherwise required by the Contract Documents, Owner and Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely Contractor's responsibility." Paragraph 7.1 Supervision and Performance of the Work provides "Contractor shall supervise and direct the Work, using Contractor's best skill and attention. Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Contract, including, including coordination with other contractors, subject to overall coordination of Owner." Paragraph 21.1 provides in applicable part that the Contractor is responsible for the safety of workers engaged on or in the vicinity of the Community.

"Subcontractors may be held liable as agents under NY Labor Law §241(6) when they have been specifically, contractually delegated the duty or obligation to correct unsafe conditions, or maintain work site safety" (*Musillo v Marist College et al*, 306 AD2d 782, 762 NYS2d 663 [3rd Dept 2003]). Here there are factual issues concerning whether S.J. Electric, by contract, was an agent of the owner and chargeable with maintaining the worksite in the area that work was being performed thus precluding summary judgment as to S.J. Electric (*Nienajadio v Informart N.Y., LLC*, 19 AD3d 384, 797 NYS2d 504 [2nd Dept 2005]).

Accordingly, that part of motion (002) by S.J. Electric for summary judgment dismissing the complaint concerning its alleged violation of Labor Law §241(6) is denied.

Avalon further seeks further order granting a conditional order of summary judgment over and against the defendant/third-party defendant S.J. Electric, Inc. for contractual and common law indemnification.

Pursuant to the contract between Avalon and S.J. Electric, dated December 5, 2005, paragraph 31.1 in applicable part provides that the Contractor shall procure and maintain at its own expense, inter alia, policies of insurance naming the Owner, inter alia, in the insurance policies procured, primary and non-contributory to any insurance the Owner may have, a Primary Insurance Endorsement naming the Owner and stating that the insurance is primary, and that any insurance issued to the additional insured applicable to this loss other than the insurance provided by this endorsement shall be excess over this insurance. At paragraph 33, it is provided in pertinent part, the obligation to defendant, indemnify and save harmless shall in no event be construed to require indemnification by the contractor to a greater extent than permitted under public policy of the state in which the Community is located, and that the Contractor shall defend, indemnify and save harmless owner of and from any claims, demands, causes of action in law or in equity, damages, penalties, cost, expenses, actual attorneys' fees, experts' fees, consultants's

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fees, judgments, losses or liabilities, including damages from personal injury to any employees or agents of contractor. Paragraph 33 provides that in New York, the duty to indemnify a particular indemnitee shall not be applicable to claims for damages arising from bodily injury to persons contributed to, caused by, or resulting from, in whole or in part, the active negligence of such indemnitee.

The Certificate of Liability Insurance dated May 12, 2005, issued by Allied North America Insurance, indicates it insures S.J. Electric, and names Avalon Bay Communities, Inc. as an additional insured. Gallagher Basset Services, Inc., the authorized claims administrator of Arch Insurance Company's commercial general liability insurance carrier for S.J. Electric (Policy #11PKG2072002) with effective dates of 2/2/-6 thru 2/2/07, sets forth a disclaimer to Avalon due to the failure to notify Arch as soon as practicable of the occurrence and further sets forth it will not defend nor indemnify Avalon on the basis that they are not entitled to coverage as an additional insured under the policy on the basis that they do not qualify as an additional insured as a result of limitations contained in the policy as the injuries sustained by the claimant and any liability therefore did not arise out of the work being conducted or by the operations of S.J. Electric and does not obligate the policy to respond on your client's behalf as additional insureds. The letter further sets forth that the policy does not provide for contractual coverage to be held harmless and for indemnification except for those items defined as S.J. Electric did not create nor contribute to the conditions complained of and as such would preclude them from any obligation to provide for the defense and/or indemnification of Avalon. Thus there is factual issue concerning coverage to Avalon due to the disclaimer sent by Allied North America Insurance.

There is also factual issue concerning whether or not S.J. Electric has any liability with regard to the cause of action premised upon the alleged violation of Labor Law §241(6). Although owners and general contractors owe nondelegable duties under Labor Law to persons employed at worksites, they can recover in indemnity, either contractual or common-law, from those considered responsible for the accident (see, *Kennelty v Darllind Constr., Inc.*, 260 AD2d 443, 688 NYS2d 584 [1st Dept 2000]). There has been no determination concerning liability or apportionment of damages in this action.

Accordingly, that part of motion (00) which seeks summary judgment over and against the defendant/third-party defendant S.J. Electric, Inc for contractual and common law indemnification is denied without prejudice.

Dated: 1/20/10

PAUL J. BAISLEY, JR.
J.S.C.

_____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION