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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

KENNETH T. YORK and MARIA YORK,
Plaintiff,

INDEX NO: 109645/05

-against-

Motion Sequence # 003

MS HARRISON LLC, MORGAN STANLEY DW INC., PLAZA CONSTRUCTION CORP., FRANK COMPO, FRANK COMPO & SONS, INC., FRANK COMPO CRANE & RIGGING, CONSTRUCTION REALTY SAFETY GROUP, and HINES PROPERTY MANAGEMENT GROUP, LTD.,
Defendants.

The following papers, numbered 1 to 2 were read on this motion by defendant(s) for an order and Judgement pursuant to CPLR 3212 for summary judgement.

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

FILED
NOV 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ■ No

BACKGROUND

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence number 002, defendants Frank Compo, Frank Compo & Sons, Inc. and Frank Compo Crane & Rigging (collectively, Compo) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against them.

In motion sequence number 003, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on their cause of action under Labor Law § 241 (6) asserted as against defendants MS Harrison LLC (Harrison), Morgan Stanley Dean Witter & Co. s/h/a Morgan Stanley DW Inc. (Morgan Stanley), Plaza Construction Corp. (Plaza) and Compo.

In motion sequence number 004, defendants Harrison, Morgan Stanley and Construction Realty Safety Group (CRSG) move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims asserted as against them.

This cause of action arose out of a slip and fall that occurred on May 15, 2003,[1] at the loading dock of the Morgan Stanley office complex located at 2000 Westchester Avenue, Purchase, New York. At the time of the occurrence, plaintiff Kenneth T. York (York) was assisting in the moving of a switchgear across the loading dock of the office complex. While in the process of pushing the switchgear, a piece of a metal plate moved from under York, causing his right leg to hyper-extend behind him, resulting in an injury to his hip. A switchgear is a 2500-3000-pound, seven-foot tall piece of electrical equipment. It is noted that York never fell, and that he continued to work immediately after the occurrence.

At the time of the alleged accident, the office complex was undergoing a renovation and reconstruction project. Morgan Stanley and Harrison are the owners of the complex, and Plaza was the general contractor on the site. York was employed by Belway Electric, Inc. (Belway),[2] one of the subcontractors engaged by Plaza as an electrical contractor at the job site. Compo was Belway's rigging subcontractor, and was the entity that delivered the switchgear to the site.

According to the complaint,[3] defendant Harrison was an owner in possession of the property at the time of the occurrence, and Hines Property Management Group, Ltd. (Hines) was the property manager of the premises at the time of the occurrence. Hines has not filed any motion, nor has any moving party made any reference to it.

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[1]In the bill of particulars, York alleges that the accident took place on May 13, 2003, but he testified that it took place on May 15, 2003. The accident report indicates that the date of the accident is May 15, 2003, and so that is the date that the court is using.

[2]York's employer is referred to as both Bellway and Belway in the various papers, and the court is using Belway for convenience.

[3]The plaintiffs have filed three complaints, the initial complaint and two supplemental complaints. The court is using the singular for the purpose of simplicity.

At his examination before trial (EBT), York testified that he was supervised by John Huff (Huff), another Belway employee, who instructed him to assist the Compo workers in moving the switchgear into an electrical closet where Belway would install and wire it to the building. York EBT, May 3, 2006, at 52-54. According to York, there was a slight elevation gap of approximately less than one inch between the concrete and steel portions of the loading dock where the switchgear was delivered, and a small steel plate was placed on top of the steel portion of the loading dock to bridge the gap. *Id.* at 73-75. York said that he did not know who owned the steel plate, who placed it over the gap, or from where the plate came. *Id.* at 76.

York stated that, in moving the switchgear, he stood at the rear of the switchgear and was instructed to push it along the loading dock. York EBT, November 14, 2008, at 75-77. Other workers helped York push the switchgear, while other individuals in the front of the switchgear helped to pull and guide it. York EBT, May 3, 2006, at 71. After the switchgear passed over the steel plate onto the concrete portion of the loading dock, York, who was still at the rear of the switchgear, remained on the steel plate to continue to push the switchgear. *Id.* at 78. As York continued to push the switchgear with pressure from his legs, the steel plate that was used to bridge the gap moved backwards and out from under his feet, causing his right leg to hyper extend backwards. *Id.* at 78-79; York EBT, November 14, 2008, at 90-95. York testified that there was no water, oil or other slippery condition on the steel plate that caused him to trip. York EBT, May 3, 2006, at 80-81.

The workers stopped moving the switchgear to ask York if he was all right, and, within five minutes, the moving of the switchgear continued, with York completing his pushing task. *Id.* at 34.

After the occurrence, York completed an accident report. Plaintiffs' Motion, Ex. N.

Frank Compolattaro (Compolattaro) testified on behalf of Compo. According to Compolattaro, the supervision and control of the removal and moving of the switchgear was

undertaken by Compo. Compolattaro EBT, at 68. Compolattaro confirmed that Compo uses steel plates on occasion to bridge gaps in order to move the switchgear, which, he stated, is standard procedure. *Id.* at 29-30, 68-69, 123. However, Compolattaro averred that, at the date in question, he used a forklift to get the switchgear to the hallway (*id.* at 52), although he did say that he used a metal plate in the area of the loading platform, but not on the loading dock itself. *Id.* at 69.

Scott Compolattaro (Scott) also testified on behalf of Compo. Scott stated that, although metal plates are sometimes used in the movement of heavy equipment, he had no recollection of using metal plates in the loading dock area of the site. Scott EBT, at 27. Scott also said that no Belway employees assisted him, his brother and his father in the moving of the switchgear. *Id.* at 45-46.

Chris Compolattaro (Chris) testified on behalf of Compo as well. Chris confirmed Scott's version of the facts, and stated that he was unaware of the accident in question. Chris EBT, at 15, 23-24.

Paul Camerato (Camerato), the superintendent at the job site at the time of the accident, testified on behalf of Plaza. Camerato stated that, although he was at the job site at the time of the accident, he had no personal knowledge of the occurrence. Camerato EBT, at 42-44. According to Camerato, no renovation work was being performed to the building's loading dock where the accident took place, since it was already in working condition. *Id.* at 37-38. Camerato also stated that the contractors provided all of their own equipment for the project. *Id.* at 30-31.

Charles Kersting (Kersting), the project supervisor, also testified on behalf of Plaza. Kersting confirmed that Plaza was the general contractor for the renovation project, and that CRSG was the on-site safety consultant hired by Morgan Stanley. Kersting EBT, at 19. According to Kersting, neither Plaza, Morgan Stanley nor CRSG had any role in overseeing the

manner in which Belway unloaded equipment at the site, and that Belway had the exclusive responsibility for establishing the means and methods utilized by its workers in unloading equipment for the project. *Id.* at 26-27, 46-47. Kersting also indicated that he had no personal knowledge of the occurrence.

Ken Kaiser (Kaiser), the safety consultant and safety manager for the project, testified on behalf of CRSG. Kaiser stated that his duties included walking the job site to inspect for unsafe work practices, and, if he observed an unsafe work practice, he would notify Plaza. Kaiser EBT, at 15-17. Kaiser said that he would walk the work site three times each day. *Id.* at 30-31. Kaiser also averred that he was unaware of any complaints or other accidents involving metal plates at the job site. *Id.* at 60.

Huff, York's foreman, testified that he has no recollection of York's accident, even though he signed the accident report. Huff EBT, at 11. Huff stated that an injured worker would prepare the report, which he would then sign. *Id.* at 13. Huff stated that he never witnessed any Belway employees assist with the rigging company in bringing heavy equipment to the site, and that he never directed York to assist Belway while Compo was on the site. Huff further maintained that he did not assign electrical workers to assist riggers. *Id.* at 14-15, 23, 70-72.

Thomas Larkin, Jr. (Larkin), York's co-worker who was allegedly assisting in the moving of the switchgear at the time of the accident, was also deposed in this matter. Larkin confirmed that Belway was exclusively responsible for directing his work performance, and that he only received directions from Belway. Larkin EBT, at 14-15. Larkin stated that he did not observe any unsafe condition with respect to the loading dock at the time of the occurrence. *Id.* at 37-38. In addition, Larkin said that, although he saw York slip, he did not know what caused York to slip, nor was he aware of anything slippery on the loading dock. *Id.* at 29. Larkin also averred that he did not recall Compo using metal plates while moving the switchgear. *Id.* at 52.

On March 26, 2008, almost five years after the occurrence that is the subject of this litigation, plaintiffs' engineers, LGI Forensic Group, Inc. (LGI), performed a site inspection at the loading dock where the accident took place. Based on this site inspection, along with all of the pleadings, transcripts and photographs produced during discovery, LGI expressed an expert opinion that the cause of York's accident was the use of a steel plate on a steel surface, which, LGI opined, created insufficient friction between two slippery surfaces, steel being alleged by LGI to be "slippery." Plaintiffs' Motion, Ex. N.

In the complaint, plaintiffs allege five causes of action: (1) negligence; (2) violation of Labor Law § 200; (3) violation of Labor Law § 240; (4) violation of Labor Law § 241 (6); and (5), a derivative action on behalf of Maria York. In the bill of particulars, plaintiffs allege violations of the following sections of the Industrial Code: 23-1.5, 23-1.7, 23-1.15, 23-1.19, 23-1.22, 23-1.33 and 23-6.1.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' motion seeking partial summary judgment on the issue of liability under their Labor Law § 241 (6) cause of action is denied.

Labor Law § 241 (6) states:

> "Construction, excavation and demolition work. All 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998).

Plaintiff has alleged violations of several provisions of the Industrial Code, but has only argued the applicability of three of those sections in these motions.

12 NYCRR 23-1.7 (d) states:

> "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."

This section of the Industrial Code has been held to be a proper predicate for a Labor Law § 241 (6) cause of action. *Cooper v State of New York*, 72 AD3d 633 (2d Dept 2010).

However, if the object that caused the worker to slip is an integral part of the work being performed, this section of the Industrial Code is inapplicable to a Labor Law § 241 (6) cause of

action. *Galazka v WFP One Liberty Plaza Co., LLC,* 55 AD3d 789 (2d Dept 2008); *Stafford v Viacom, Inc.,* 32 AD3d 388 (2d Dept 2006). All of the evidence submitted indicates that the metal plate that allegedly caused York to injure himself was an integral part of moving the switchgear, and, as a consequence, is insufficient to support plaintiffs' Labor Law § 241 (6) claim.

The court also finds the expert affidavit regarding the slippery nature of the metal plate to be without probative value. Not only did this expert never view the metal plate that allegedly caused the accident, it did not visit the site until five years after the accident, and the photographs submitted to the expert and the court fail to depict a metal plate. Therefore, this expert's opinion is pure speculation. *See LaTronica v F.N.G. Realty Corp.,* 47 AD3d 550 (1st Dept 2008); *Saborido-Calvo v New York City Transit Authority,* 11 AD3d 216 (1st Dept 2004); *McGarvey v Bank of New York,* 7 AD3d 431 (1st Dept 2004); *Kruimer v National Cleaning Contractors,* 256 AD2d 1 (1st Dept 1998).

12 NYCRR 23-1.22 (b) "applies to ramps used by 'motor trucks or heavier vehicles,' 'wheelbarrows, power buggies, hand carts or hand trucks' or by 'persons only.'" *Torkel v NYU Hospitals Center,* 63 AD3d 587, 590-591 (1st Dept 2009). The ramp in question does not fall within these parameters, and, therefore, is insufficient to sustain plaintiffs' Labor Law § 241 (6) cause of action. Similarly, 12 NYCRR 23-1.22 (c) pertains to platforms used for the above-referenced vehicles, and is also inapplicable.

Moreover, plaintiffs appear to argue that the metal plate was the ramp in question, to bridge a short gap in a height differential of less than one inch, an argument that the court finds unpersuasive.

All of the other sections of the Industrial Code referenced by plaintiffs in their bill of particulars and not argued in these motions are deemed abandoned.

Therefore, based on the foregoing, the court grants that portion of Harrison's, Morgan

Stanley's, Plaza's and CRSG's motion for summary judgment, and Compo's motion for summary judgment, dismissing plaintiffs' Labor Law § 241 (6) cause of action asserted as against them.

That portion of Harrison's, Morgan Stanley's, Plaza's and CRSG's motion for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 causes of action asserted as against them is granted.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company,* 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. *See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints,* 41 AD3d 796 (2d Dept 2007).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant either created the unsafe condition, or that it had actual or constructive knowledge of the unsafe condition that caused the accident. *See Murphy v Columbia University,* 4 AD3d 200 (1st Dept 2004). Moreover, to constitute constructive notice, the alleged defect must be visible and apparent for a sufficient length of time before the accident in order to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History,* 67 NY2d 836 (1986).

Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.,* 82 NY2d 876 (1993); *McFadden v Lee,* 62 AD3d 966 (2d Dept 2009).

In the case at bar, no evidence has been submitted to indicate that Harrison and Morgan Stanley, as owner, Plaza as construction manager, or CRSG as safety consultant either created an allegedly unsafe condition, had actual or constructive notice of an unsafe condition, or exercised any supervision or control over plaintiff's work. All of the deposition testimony indicates that representatives of these defendants were not present at the time of the occurrence, and no evidence has been submitted to indicate that the metal plate was in place for a sufficient period of time so as to constitute constructive notice to them. *Gordon v American Museum of Natural History,* 67 NY2d 836, *supra.* Furthermore, according to York's own testimony, he was only supervised and directed in his work by Belway.

> "[T]here is no evidence in the record that [these defendants] actually directed, controlled or supervised plaintiff's work or [were] responsible for doing so. Nor was there any proof that [these defendants were] on notice of any dangerous condition regarding the use of the [metal plate] or that [they] supplied the [plate] in question. Rather, the record shows that [Compo] was contractually obligated to supply the necessary equipment for the ... work and it was plaintiff's employer ... that actually directed [him] [internal citations omitted]."

Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 (1st Dept 2005).

Further,

> "The Labor Law § 200 and common-law negligence claims [are] properly dismissed as against the [CRSG], because the evidence that [CRSG] coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if [it] observed an unsafe condition is insufficient to raise a triable issue whether [it] exercised the requisite degree of supervision and control over the work to sustain those claims. Moreover, there is no evidence that [CRSG] had actual notice of the unsafe condition [internal citations omitted]."

Geonie v OD & P NY Limited, 50 AD3d 444, 445 (1st Dept 2008).

In addition, the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability ... in the absence of proof of ... *actual* control." *See Brown v*

New York City Economic Development Corp., 234 AD2d 33, 33 (1st Dept 1996).

As a consequence of the foregoing, that portion of these defendants' motion seeking to dismiss plaintiffs' common-law negligence and Labor Law § 200 claims as against them is granted.

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "All 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."

As stated by the Court in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Labor Law § 240 (1) was designed to protect workers against elevation-related risks. In the case at bar, according to York's own testimony, the "elevation" was less than an inch, making this Labor Law provision inapplicable to the facts of the case. Moreover, York did not fall, and plaintiffs have failed to oppose defendants' motion on this issue.

Based on the foregoing, the complaint is dismissed as against Harrison, Morgan

Stanley, Plaza and CRSG.

Since all of the causes of action asserted as against Harrison, Morgan Stanley, Plaza and CRSG are herewith dismissed, all cross claim asserted by and against them are similarly dismissed.

That portion of Compo's motion for summary judgment on plaintiffs causes of action for common-law negligence and violation of Labor Law § 200 as against them is denied.

The court finds unavailing Compo's argument that it does not fall within the purview of Labor Law § 200 because it is neither an owner nor a general contractor. Compo does not deny that it was given full authority with respect to the rigging operations at the project site, and, as such, Compo was acting as the agent of the owner and/or general contractor. *Walls v Turner Construction Company,* 4 NY3d 861 (2005). Therefore, liability for a violation of Labor Law § 200 may be asserted as against it.

However, too many material questions of fact exist at present to grant Compo's motion to dismiss these causes of action as against them. There is conflicting testimony as to whether or not a metal plate was actually used on the date of the accident, as well as to who placed it there and who owned it.

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility [internal citations omitted]." *Meridian Management Corp. v Cristi Cleaning Service Corp.,* 70 AD3d 508, 510-511 (1st Dept 2010). In the case at bar, sufficient evidence as been presented so as to raise a question regarding what actually took place. Therefore, the court cannot grant Compo's motion for summary judgment on the issue of liability for plaintiffs' Labor Law § 200 and common-law negligence claims asserted as against them.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion (motion sequence number 004) for summary judgment of defendants MS Harrison, LLC, Morgan Stanley Dean Witter & Co. s/h/a Morgan DW Inc., Plaza Construction Corp. and Construction Realty Safety Group is granted and the complaint and all cross claim are dismissed as against these defendants, with costs and disbursement to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' motion (motion sequence number 003) for partial summary judgment on the issue of liability on their Labor Law § 241 (6) cause of action is denied; and it is further

ORDERED that the portion of the motion (motion sequence 002) of defendants Frank Compo, Frank Compo & Sons, Inc. and Frank Compo Crane & Rigging seeking summary judgment dismissing plaintiffs' causes of action based on alleged violations of Labor Law §§ 241 (6) and 240 (1), as well as the cross claims asserted as against them, is granted; and it is further

ORDERED that the portion of the motion of defendants Frank Compo, Frank Compo & Sons, Inc. and Frank Compo Crane & Rigging seeking summary judgment dismissing plaintiffs' causes of action based on common-law negligence and violations of Labor Law § 200 is denied.

This constitutes the Decision and Order of the Court.

Dated: 11/4/2010 **Enter:**

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**