[* 1]

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

PRESENT: PART 36

Index Number : 106676/2008

SEAVEY, WILLIAM

VS

PLAZA CONSTRUCTION

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	4

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted only to the extent of dismissing all claims except Labor Law § 241(6) + an alleged violation of Ind Code 12 NYCRR 23-1.7(e)(2) as per attached decision.

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

Dated: 1/10/11

JUDGE DORIS LING-COHAN 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 36

----------x

WILLIAM SEAVEY and PAMELA SEAVEY,

Plaintiffs,

-against-

PLAZA CONSTRUCTION CORP. and 735 AVENUE OF THE AMERICAS, LLC.,

Defendants.

Index No.: 106676/08

Motion Sequence No.: 001

Ling-Cohan, J.:

This is an action to recover damages sustained by a worker when he was injured while working at a construction site located at 735 Sixth Avenue, New York, New York on June 19, 2007. Defendants Plaza Construction Corporation (Plaza) and 735 Avenue of the Americas, LLC (735) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs William Seavey (plaintiff) and Pamela Seavey's complaint in its entirety.

BACKGROUND

The subject property where the accident occurred was owned by defendant 735. Defendant 735 hired defendant Plaza to serve as construction manager on the Chelsea Stratus Project (the project). The project entailed constructing a new condominium building consisting of approximately 204 apartments with a retail space on the first floor. Plaza's duties on the project included administering contracts with the various trades, coordinating the work of the different trades, verifying the sequence of the work and being responsible for the project's finances. In addition, Plaza was responsible for housekeeping at the job site and provided laborers to perform that task. Plaza hired non-party Metro Steel to install seismic clips on the

interior block walls of the building. Plaintiff was employed by Metro Steel as its foreman.

Plaintiff testified that, in the weeks prior to his accident, his job at the construction site entailed installing seismic clips in a small mechanical room in the basement of the building. Plaintiff maintained that he did not receive any instructions or directions from anyone other than his fellow Metro Steel employees, and that he knew from past experience how to perform the particular work he was doing at the time of his accident. Plaintiff also noted that his tools and an A-frame ladder were provided to him by Metro Steel.

Plaintiff testified that, after retrieving his tools from the Metro Steel tool box, and after discussing with his co-workers the work that was to be performed that day, plaintiff headed to the basement to perform his work. Just prior to his accident, after installing a seismic clip, plaintiff placed his ladder in a particular spot on the floor in order to install another seismic clip. After installing this clip, plaintiff descended the ladder. Plaintiff explained that, when he began to step off the ladder and onto the floor, his left foot stepped onto a piece of black pipe that was lying on the floor underneath the bottom step of the ladder. The pipe measured three inches by six inches. As a result, plaintiff's "left foot twisted in and [his] knee went out to the left," causing him injury (Defendants' Notice of Motion, Exhibit E, Plaintiff's Deposition, at 39-40, 46).

Plaintiff maintained that, before the accident, he did not observe the subject pipe on the floor, and that he only observed it once he was sitting on the floor after the accident had occurred. Thereafter, plaintiff notified one of the Plaza's superintendents about the accident and asked that an accident report be filled out. It should be noted that the accident report stated that plaintiff injured his left knee when he "stepped on a piece of pipe when he stepped of[f] a ladder" (Defendants' Notice of Motion, Exhibit J, Accident Report dated June 19, 2007).

Plaintiff testified that there were many trades working in the basement, describing it as "a busy basement" (Defendants' Notice of Motion, Exhibit E, Plaintiff's Deposition, at 43). Plaintiff also testified that no one else was working in the small mechanical room where the accident occurred at the time of the accident, other than he and his helper (*id.* at 40). Plaintiff maintained that pipes, similar to the one that he tripped on, may have been installed in the basement mechanical rooms by "Local 638, the steamfitters" (*id.* at 42-43).

Louis DiFusco (DiFusco), Plaza's project manager, testified that Plaza hired laborers to perform housekeeping tasks at the site, and that "[h]ousekeeping just included keeping the site as clean as possible" (Defendants' Notice of Motion, Exhibit F, DiFusco Deposition, at 28). These laborers were on-site every day to inspect and clean the site. DiFusco also stated that pipes were being installed in the basement by "Paramount," the plumbing contractor, and "Alpha," the HVAC contractor (*id.* at 35-37).

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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). 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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba*

Extruders v Ceppos, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM

Initially, it should be noted that plaintiff states in his opposition papers that he does not oppose that part of defendants' motion seeking to dismiss plaintiff's Labor Law § 240 (1) claim against them.[1] Accordingly, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIM

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 502 [1993]). However, Labor Law § 241 (6) is not self-

---

[1] In any event, at the time of the accident, plaintiff was involved in work that did not impose a gravity-related risk, so as to come within the purview of Labor Law § 240 (1), when, while stepping off the ladder onto the ground, he stepped on a pipe (*see Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006] [plaintiff's injuries were not compensable under Labor Law § 240 (1) where plaintiff was allegedly injured when he stepped off a scaffold, which was at ground level, onto a pipe, which then rolled and caused him to fall into a three-foot deep hole]).

executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Initially, although defendants argue that they are entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-2.1 (a) (1) and (b), plaintiff did not assert these violations in his bill of particulars, nor did he address them in his opposition papers.

Plaintiff does, however, premise his Labor Law § 241 (6) claim against defendants on violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2). Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Smith v McClier Corporation*, 22 AD3d 369, 370 [1st Dept 2005]; *Lopez v City of New York Transit Authority*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (e) states, in pertinent part:

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.

Industrial Code 12 NYCRR 23-1.7 (e) (1), which deals with "tripping" hazards in passageways, does not apply to the facts of this case (*see Parker v Ariel Associates Corporation,*

19 AD3d 670, 672 [2d Dept 2005]). Here, plaintiff was not in a passageway at the time of the accident, but instead, he was performing his work in the basement's mechanical room (*Adams v Glass Fab, Inc.*, 212 AD2d 972, 973 [4th Dept 1995]). Thus, defendants are entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code § 23-1.7 (e) (1).

Industrial Code 12 NYCRR 23-1.7 (e) (2), which also deals with tripping hazards, requires that floors or other work areas be kept free from the accumulation of dirt and debris, as well as from scattered tools, materials and sharp projections. It has been held that this regulation does not apply where the object on which the plaintiff fell was determined to be an integral part of the work being performed (*Alvia v. Teman Elec. Contr., Inc.*, 287 AD2d 421, 423 [2nd Dept 2001]; *Harvey v. Morse Diesel Intern., Inc.* 299 AD2d 451 [2nd Dept 2002]).

Here, it is alleged that plaintiff's accident resulted from his fall on a piece of black pipe measuring 3" x 6", which plaintiff argues constitutes "debris" or "scattered materials", as described in to Industrial Code 12 NYCRR 23-1.7 (e) (2). In seeking summary judgment of dismissal of plaintiff's claim based upon a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2), defendants argue that the pipe which plaintiff claims to have caused his accident was, consistent with the work being performed on the day of the accident and therefore Industrial Code 12 NYCRR 23-1.7 (e) (2) is inapplicable to the facts of this case. As detailed below, this court disagrees.

In particular, there are questions of fact as to whether the piece of pipe which allegedly caused the subject accident, was an integral part of the work being performed at the site of the accident, to preclude recovery based upon a violation of Industrial Code 12 NYCRR 23-1.7 (e)

(2) (*see Lenard v. 1251 Americas Assoc., 241 AD2d391* [1st Dept 1997][door stop did not constitute an integral part of the work being performed]; *Kinirons v. Teachers Ins. And Annuity Assn. of America*, 34 AD3d 237 [1st Dept 2006] [no violation of section 23-1.7 (e) (2) as a matter of law where tools which plaintiff tripped over belonged to an electrician who was performing work in the room where the accident occurred - tools held to be "consistent with" work being performed]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created *by him and his coworkers* which was an integral part of the work being performed]). Here, it is undisputed that the pipe which allegedly caused plaintiff to fall was *not* part of the materials or debris created by plaintiff or his coworkers (*cf Salinas v Barney Skanska Constr. Co.*, 2 AD3d at 622 .

Further, while Plaza's witness DiFusco testified that, at the time of the accident, pipes may have been being installed in the basement/ by plumbing and HVAC contractors (Defendants' Notice of Motion, Exhibit F, DiFusco Deposition, at 35-37), significantly, plaintiff testified that at the time of the accident *no one else was working in the small mechanical room where the accident occurred*, other than he and his helper (Defendants' Notice of Motion, Exhibit E, Plaintiff's Deposition, at 40).

Moreover, the Superintendent's Daily Report which defendants submit to support their claim that the piece of pipe which caused the subject accident was an integral part of the work being performed or debris created by ongoing work, does not *conclusively* establish such fact (Defendants' Notice of Motion, Exhibit K). The report dated June 19, 2007, the date of the subject accident, indicates that in addition to the seismic clips being installed in the

basement/cellar, Paramount (another subcontractor) was "doing mechanicals on cellar floor" (*id.*). However, Plaza's witness DeFusco testified that he did not know: (1) exactly what work was being down in the basement/cellar on such date; (2) what type of equipment was being connected; and (3) what was meant by "mechanicals", as it was "too general" (Defendants' Notice of Motion, Exhibit F, DiFusco Deposition, at 35-36, 39).

Moreover, the case of *Burkoski v. Structure Tone, Inc.*, 40 AD3d 378, cited by defendants, is distinguishable. In *Burkoski*, the plaintiff tripped on a "four foot high stack of tiles of the kind that were then in the process of being installed on the floor of the room where the incident occurred" (*id.* at 383). The *Burkoski* court dismissed plaintiff's claim which was based upon a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2), finding that the stack of tiles that the plaintiff tripped over was material being used at the time of the accident by the floor contractor installing them in the room where the accident occurred (*id.*). Here, in contrast, it has not been established as a matter of law that the pipe that allegedly caused plaintiff to fall, was part of the work being done in the room where plaintiff allegedly sustained his injuries. Thus, defendants failed to establish *as a matter of law* that the piece of pipe that caused the subject accident, was actually being installed in the mechanical room where plaintiff was injured and was an integral part of ongoing work. Therefore, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2).

PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or

general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. 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, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]; *Comes v New York State Electric & Gas Corporation*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work

is performed" (*Hughes v Tishman Construction Corporation*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (*see Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

Here, it appears that the subject accident resulted from both the means and methods of the work (the fact that plaintiff placed the ladder without first checking to make sure that the area around it was clear of debris), and an allegedly dangerous condition (the fact that the pipe was lying directly underneath the ladder's lowest rung). In the first instance, there is no indication in the record to support a finding that defendants controlled or supervised the injury-producing work in any way. In addition, plaintiff testified that he was instructed by Metro Steel employees, or he knew from past experience how to perform his work.

There is also no indication in the record to support a finding that defendants created the unsafe condition at issue, or that defendants had actual or constructive notice of the unsafe

condition of the scaffold (*see Geonie v OD & P NY Limited*, 50 AD3d 444, 445 [1st Dept 2008]). A review of the testimonial evidence in the record indicates that the piping for the project was being installed by various steamfitters, plumbers and contractors, and not by defendants. In addition, plaintiff maintained that he did not even see the pipe that caused his accident until after his accident had occurred. Further, there is nothing in the record to demonstrate that defendants received any complaints or reports regarding the subject unsafe condition.

Plaintiff argues that a question of fact exists as to whether defendants had constructive notice of the unsafe condition which caused his accident, due to the fact that the existence of the debris was a recurring condition at the job site. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]).

Specifically, plaintiff puts forth that the lack of good housekeeping at the site had been discussed at a weekly safety meeting just one week prior to plaintiff's accident. In addition, at a safety meeting held two months prior to plaintiff's accident, it was generally recommended that workers keep a small bucket nearby to collect small cutoffs of copper pipe, conduit and other small objects, in order to prevent skate hazards at the job site.

However, a general awareness that a dangerous condition may be present, as put forth in the instant case, is legally insufficient to constitute notice of the particular condition that caused the injury (*see Gordon v American Museum of Natural History*, 67 NY2d at 838; *DeJesus v New York City Housing Authority*, 53 AD3d 410, 411 [1st Dept 2008] [no constructive notice found,

where, on the evidence presented, it was possible that the piece of carpet that caused the plaintiff's fall could have been deposited just prior to the time of the accident]; *Berger v ISK Manhattan, Inc.*, 10 AD3d at 512 [no constructive notice where no evidence was presented on the issue of the length of time the hazardous wet spot was present, as well as plaintiff's admission that two other customers used the stairs in the few minutes prior to the accident]). Moreover, no evidence has been put forth regarding the length of time that the subject unsafe condition existed, or whether defendants had received any prior complaints, so as to establish that defendants had constructive notice of the same (*see Piacquadio v Recine Realty Corporation*, 84 NY2d 967, 969 [1994]; *Murphy v 136 Northern Boulevard Associates*, 304 AD2d 540, 541 [2d Dept 2003] [no constructive notice where plaintiff presented no evidence regarding the length of time the unsafe condition existed, or whether defendant had received any prior complaints about said condition]).

Thus, as defendants have established, as a matter of law, that they did not control or supervise the injury-producing work, nor did they create or have notice of the alleged defective condition, they are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims (*Gallello v MARJ Distributors, Inc.*, 50 AD3d 734, 736 [2d Dept 2008]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants Plaza Construction Corporation and 735 Avenue of the Americas, LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs William Seavey and Pamela Seavey's complaint is granted to the extent that all claims are

dismissed except for plaintiffs' claim based upon Labor Law § 241 (6) and an alleged violation of Industrial Code 12 NYCRR 23-1.7 (e) (2); and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

DATED: January 10, 2011

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Seavey v Plaza Construction Corpkucsma.wpd