[* 1]

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

PRESENT: HON. MILTON A. TINGLING J.S.C. PART 44

Index Number : 115062/2006
WHELAN, DAVID
VS.
INTERNATIONAL PLAZA ASSOCIATES
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 115062/06
MOTION DATE 5/3/10
MOTION SEQ. NO. 5
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: ☑ Yes ☐ No

RECEIVED
AUG 9 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Upon the foregoing papers, it is ordered that this motion

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

The plaintiff David Wheelan ("Wheelan") moves for summary judgment on the issue of liability as against the defendants. The defendants third-party plaintiffs International Plaza Associates, L.P. ("International") and J.T. Magen Construction Company, Inc. ("Magen") cross-move for summary judgment dismissing the plaintiff's complaint and further for summary judgment on their third-party claim for contractual indemnification against the third-party defendant Techno Acoustics Holding, LLC ("Techno"). The third-party defendant Techno cross-moves for summary judgment dismissing the third party complaint. The respective parties oppose the motion and cross-motions.

This matter arises out of a workplace accident wherein Wheelan alleges a steel door that was leaning against a wall directly across from an elevator fell and landed on Plaintiff allegedly causing him injuries. Wheelan was employed by techno which a sub-contractor of the General Contractor Magen who was in turn contracted to perform a project by International, the owner of the premises.

The movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. Section 3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The proponent of a summary judgment

Dated: 8/4/10

Mat
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. *Zuckerman, supra.*

Once the movant has established a *prima facie* case that it is entitled to summary judgment, the burden then shifts to the party opposing the motion to tender sufficient evidence in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

This motion entails the plaintiff's causes of action under Labor Law §241(6), 200 and 241(b).

Labor Law §241(6) provides as follows:

> "All contractors and owners and their agents, except owners of one or 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:
>
> ***
>
> (6) 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 subdivisions, 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."

It is well settled that this section of the Labor Law was enacted to provide reasonable and adequate safety protection for all workers engaged in construction, demolition or excavation without regard to any height differential. *Ross v. Curtis-Palmer Hydro-0Electric Co.*, 81 N.Y.2d at 501-502. In order to accomplish this result, a non-delegable duty of compliance was imposed upon owners, general contractors and their agents to comply with the specific rules and regulations regarding safety set forth in the New York State Industrial Code, with liability predicated upon proof that a worker's injuries were approximately caused by the violation of a specific command of said Code regarding safety. *Id. At 502-504.* It must be noted that comparative negligence is a valid defense under this section, as the violation thereof is merely some evidence of negligence. *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154. In addition, liability under Labor Law §241(6) is not limited to accidents that occur on an actual building site. *Mosher v. State of New York*, 80 N.Y.2d 286. Same applies to all construction work as defined in the Industrial Code. *Jock v. Fien*, 80 N.Y.2d 965, including "all work of the types performed I the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures." 12 NYCRR 23-1.4(b)(13).

Initially this court finds the movant's reliance upon alleged OSHA violations as a basis for imputing liability is insufficient on two grounds: One, the aforementioned are only applicable to employers, not general contractors or owners; and second, it is well settled that OSHA violations will not support a cause of action under Labor Law §241(6).

Contrary to the defendants' arguments, the Industrial Code provisions which violations Plaintiff cites as a predicate for his Labor Law §241(6) claims, his 12 NYCRR 23-1.7(e0(2) and 12 NYCRR 23-2.1(a)(1) are applicable to the facts at bar and are sufficiently concrete and specific in their requirements to support such a claim. *Farina v. Plaza Construction Co.*, 238

A.D.2d 158. The 12 NYCRR 23-1.7(e0(2) does not exempt any construction site "passageways" from its scope; it clearly requires that all passageways be kept free from accumulation of debris, etc. 12 NYCRR 23-2.1(a) requires that 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, etc. The relevant testimony herein establishes the steel door was propped against a wall directly across from the freight elevator which the workers used to transport themselves and materials. It is undisputed that same steel door was there before the plaintiff's accident. No efforts were apparently made to secure the door or for it to be placed in a different location or manner to make the passageway safe. The plaintiff's accident clearly falls within the gambit of Labor Law §241(6) and accordingly Plaintiff is granted summary judgment on this cause of action and the defendants' cross-motions to dismiss this cause of action are denied.

Labor Law §200 represents a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work. *Jock v. Fein, supra; DeBlase v. Herbert Construction Co.*, 5 A.D.3d 624. Thus liability is limited to parties who exercise supervision or control over the work of which the injury arises, or who have actual or constructive notice of an unsafe condition which causes an accident. *Lozado v. Felice*, 8 A.D.3d 633; *Aranda v. Park E. Construction*, 4 A.D.3d 315; *Saverino v. Reiter*, 1 A.D. 3d 427. Liability is based upon control of the condition of the workplace as opposed to the method in which a plaintiff may perform his/her work. *Murphy v. Columbia University*, 4 A.D.3d 200.

The reasoning in granting the plaintiff's motions on his Labor Law §241(6) claims are the same basis for granting the plaintiff summary judgment on the Labor Law §200 claims. The defendants' cross-motions seeking dismissal of this cause of action are denied accordingly.

Labor Law §240(1) is designed to protect employees on construction sites from elevation-related risks. Elevation risks covered by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509. The duty imposed by Labor Law §240(1) is nondelegable and a contractor, owner, or their agent, is liable for a violation of this section even where he exercises no supervision or control over the work. *Rocovich, supra.* Moreover, Labor Law §240(1) is to be liberally construed so as to accomplish the purpose for which it was enacted, the protection of workers from such gravity-related accidents as falling from a height or being struck by falling objects improperly hoisted or secured. *Misseritti v. Mark IV Construction Co.*, 86 N.Y.2d 487; *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494; *Rocovich, supra.*

In the case at bar, the plaintiff's allegations are insufficient to maintain a cause of action under labor Law §240(1). Simply put, the facts of this case do not give rise to any claims involving elevation-related risks. Accordingly the plaintiff's motion seeking summary judgment on this cause of action is denied and the defendants' cross-motions seeking dismissal of the causes of action under Labor Law §240(1) are granted and same are hereby dismissed.

Finally, the third-party defendant's summary judgment cross-motion to dismiss the third-party complaint is denied at this time. The facts of the case as previously stated, demonstrate the condition that caused the accident and the alleged injuries was the steel door. It is apparent that Techno did not place the door there. However, it is not apparent whether same had the authority

to request and have the door moved. It appears that no action was taken by same concerning the placement of the door. The issue of whether that triggers liability and the subsequent indemnification sought by the third-party complaint is an issue of fact in dispute and therefore bars the granting of summary judgment at this time.

Accordingly, the plaintiff's motion and the defendants' cross-motions are granted to the extent that Plaintiff si awarded summary judgment on the Labor Law §§ 200 and 241(6). The defendants are granted summary judgment concerning the plaintiff's claims under Labor Law §240(1) and same are hereby dismissed. The third-party defendant's cross-motion is denied.

Parties are to proceed with the scheduled mediation.

DATED: August 4, 2010

HON. MILTON A. TINGLING
J.S.C.