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

PRESENT: DEBRA A. JAMES **PART** 59
Justice

SACARIAS LEON,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSIT AUTHORITY, LEHRER MCGOVERN BOVIS, INC., SUGRUE CONTRACTING CORP., BOOM CONSTRUCTION CORP., BOOM CONSTRUCTION ENTERPRISES, DONALDSON ACOUSTICS COMPANY, INC., TRADELINE CONTRACTING CORP., K. MYERS and SONS ROOFING, LIBERTY MUTUAL INS. CO., TASC CONSULTING SERVICES, LLC, FASANO ACCHIONE & ASSOCIATES, DONALDSON INTERIORS, INC., HUGHES ASSOCIATES FIRE & SAFETY ENGINEERS OF NEW YORK, P.C., FMB SYSTEMS, INC., MAINCO ELEVATOR & ELECTRICAL CORP., PEM ELECTRICAL CORP., RGBS ENTERPRISES INC., PREFERRED MECHANICAL INC., CDS INDUSTRIES INC., CDS & CO. LLC, BELROSE FIRE SUPPRESSION, INC., YORK SCAFFOLD EQUIPMENT CORP., IDA CONSTRUCTION LLC, IDA DEVELOPMENT CORP., JANSONS ASSOCIATES, INC., POWER CONSULTING AND MANAGEMENT, INC., POWER CONSULTING LLC, POWER CONSULTING SERVICES CORP., POWER CONSULTING, INC., JB ELECTRIC CORP., "front runner" (full name unknown, but intended to represent a party doing telephone work), "S&C PRODUCTS" (full name unknown, but intended to represent a party doing glass work).,

Defendants.

Index No.: 400978/04

Motion Date: 03/16/10

Motion Seq. No.: 17

Motion Cal. No.: _____

BOVIS LEND LEASE LMB, INC. i/s/h/a LEHRER MCGOVERN BOVIS, INC.,

Third-party Plaintiff,

- v -

GRENADIER CORPORATION,

Third-Party Defendant.

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

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2 - 4
Replying Affidavits - Exhibits	5, 6

Cross-Motion: ☒ Yes ☐ No

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Upon the foregoing papers,

Defendant Boom Construction Enterprises, Inc. s/h/a Boom Construction Enterprises (Boom) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. Defendant Sugrue Contracting Corp. (Sugrue) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it with respect to plaintiff's claims pursuant to Labor Law §§ 240 (1) and 241 (6), and dismissing all cross claims as against it.

This is an action for personal injuries arising from an alleged accident that occurred on November 16, 2001, at approximately 11:30 P.M. on the premises known as 333 West 53d Street, New York, New York, and 354 West 54th Street, New York, New York. The case involves plaintiff, a worker employed by third-party defendant Grenadier Corp. (Grenadier) as a mason at the job site, who allegedly tripped on a piece of plywood, causing him to fall down a staircase. Allegedly, the plywood was not properly fitted as a cover over a hole located on the top landing of an interior staircase at the aforementioned premises.

At plaintiff's examination before trial (EBT), plaintiff testified that, while he was working at the premises, he had regular safety meetings with an employee of defendant Bovis Lend Lease, LMB, Inc. i/s/h/a Lehrer McGovern Bovis, Inc. (Bovis),

once every two, three or four weeks. Plaintiff's foreman on the job was Joe Sabato (Sabato), another Grenadier employee and foreman for the company. Plaintiff stated that Sabato instructed him about the type of work that he needed to do, and that no one else ever told him what his job duties or responsibilities were.

Plaintiff further stated that, on the day of the accident, Sabato told him where he was to work, which required him go to different floors at the job site. Plaintiff also said that he was aware that a piece of plywood had been placed over a hole located at the end of a staircase (landing) that had yet to be completed. According to plaintiff, on the two occasions that he had to pass that area, he saw a Bovis employee adjusting or placing plywood on the staircase landing. Plaintiff testified that, on the day of the accident, his foot went forward with the plywood because the plywood was loose. Allegedly, there were no tools or construction equipment on the plywood at the time of the accident.

Russell Reeder (Reeder), the Safety Manager for Bovis, testified at his EBT that he was the Safety Manager on the job site that is the subject of this action, and that Bovis was initially brought in to complete the construction project that had been started by another company. Reeder said that he did not

know who had the responsibilities of the general contractor or construction manager on the site.

According to Reeder, his job duties included being responsible for public safety and making sure that the work and construction site did not endanger the public. Further, Bovis would look to subcontractors to make sure that they were installing and maintaining safety equipment that they were paid to install and maintain. As part of his job, Reeder would attend safety meetings, walk the job site and review the site's safety conditions, and give safety orientations to new hires. Reeder testified that if there was an unsafe condition, including unsafe hole penetration covers, it would be corrected. If he noticed an unsafe condition, he would stop the work, and, if the unsafe condition could not be resolved, he would go to the general superintendent, who also worked for Bovis. Reeder further averred that Sugrue had the responsibility for hole cover work, both before and after plaintiff's accident.

Reeder attested to the fact that he was personally aware of the hole cover at the subject location, and that the plywood was used as the hole cover with cleats to fasten it in position. Reeder also testified that Boom was engaged to perform insulation work as it referred to the walls, and that the work done by Boom would not include work adjacent to the steps of the stairway where the accident occurred.

James Sugrue testified for Sugrue, and stated that Sugrue hired Boom as a subcontractor to perform carpentry and sheetrock work on the project pursuant to an oral contract. Sugrue was hired to provide interior carpentry/masonry/ alterations/renovations and debris removal. Sugrue further testified that it would place protection and/or barricades at the site's stairways only if directed to by TASC, another defendant. Placing plywood on the stairs would have been done either by Sugrue or Boom. However, Sugrue's review of company documents did not indicate that Boom placed the plywood sheet on the landing in question.

According to project work sheets, for the two days prior to the accident, Boom worked on Stair # 2, Stair # 3; and the fourth and fifth floors. The accident allegedly occurred on Stair # 1.

Plaintiff asserts claims for common-law negligence and violation of Labor Law § 200; violation of Labor Law § 240 (1); and violations of Labor Law § 241 (6) and Industrial Code §§ 23-1.7, 23-1.30, 23-1.32, 23.2.1, 23-2.2, 23-2.4, 23-2.5 and 23-2.7.

"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 v Ceppos, 46 NY2d 223, 231 (1978).

Plaintiff and Boom have stipulated to discontinue this action against Boom and Boom has withdrawn the portions of its motion related to Labor Law § 241 (6) and Industrial Code §§ 23-1.7, 23-2.4, and 23-2.7. Plaintiff in opposition has withdrawn the Labor Law 240 (1) claims. Bovis opposed Boom's motion only as to the Labor Law 200 and negligence claims.

Sugrue opposes Boom's motion in its entirety, alleging that Boom has failed to meet the requirements of CPLR 3212 in that its motion is not supported with an affidavit from an individual with personal knowledge of the facts, merely the affirmation of Boom's attorney, which is used to introduce EBTs and other evidentiary documents. The fact that this evidence was submitted by an attorney's affirmation rather than by the affidavit of an individual with personal knowledge is not fatal to the motion. Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Olan v Farrell Lines Inc., 64 NY2d 1092 (1985); Spierer v Bloomingdale's, 43 AD3d 664 (1st Dept 2007). Therefore, the court finds this

argument posited by Sugrue to be unavailing, and the court may consider Boom's motion on its merits.

Sugrue also cross-moves for summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 240 (1) and 241 (6), and all cross claims as against it. It is noted that Sugrue has not moved to have plaintiff's claims based on common-law negligence and Labor Law § 200 dismissed as against it.

Labor Law § 200 is a codification of duties imposed under a theory of common-law negligence (O'Sullivan v IDI Construction Company, Inc., 28 AD3d 225 [1st Dept], affd 7 NY3d 805 [2006]), and, therefore, the same standards of proof apply to both theories.

Section 200 (1) of the Labor Law states:

> 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.

"It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [internal quotation marks and citation omitted]." Rizzuto v L.A. Wenger Contracting co., Inc., 91 NY2d 343, 352 (1998).

> "Where, as here, a plaintiff's injuries stem not from the manner in which the work was being performed but, rather, from an alleged dangerous condition on the premises, an owner or contractor may be liable in

> common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition."

Astarita v Flintlock Construction Services, LLC, 69 AD3d 888, 888 (2d Dept 2010); Singh v Black Diamonds LLC, 24 AD3d 138, 140 (1st Dept 2005).

According to the testimony and work records provided, there is no evidence that Boom had any responsibility, supervision or control with respect to the work site, nor did it have any actual or constructive notice of the alleged dangerous condition that caused plaintiff's injuries, and so that portion of Boom's motion seeking to dismiss plaintiff's claims based on common-law negligence and Labor Law § 200 and cross-claims is granted against all parties.

Section 241 (6) of the Labor Law states:

> "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."

In order to have a violation of Labor Law § 241 (6), there must also be a violation of one of the regulations promulgated under the Industrial Code, 12 NYCRR Part 23. Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993). Plaintiff's verified bill of particulars enumerates the following sections of the Industrial Code that he alleges were violated: 23-1.7, 23-1.30, 23-1.32, 23.2.1, 23-2.2, 23-2.4, 23-2.5 and 23-2.7. In

addition to alleging Industrial Code violations, a plaintiff must also evidence that the sections alleged to have been violated establish a concrete specification as the predicate for sustaining a cause of action pursuant to Labor Law § 241 (6). Misicki v Caradonna, 12 NY3d 511 (2009).

Section 23-1.7 (b) of the Industrial Code states:

> Falling hazards. (1) Hazardous openings. (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." [emphasis added]

Since plaintiff slipped on a plywood hole cover, this section of the Industrial Code applies to the case at bar. This section of the Industrial Code has been held sufficient to maintain a cause of action under Labor Law § 241 (6). Farina v Plaza Construction Company, 238 AD2d 158 (1st Dept 1997). The court notes that Sugrue does not challenge the applicability of Industrial Code Sections 23-2.4 and 2.7

Based on the foregoing, it is hereby

ORDERED that defendant Boom Construction Enterprises, Inc. s/h/a Boom Construction Enterprises' motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted, the complaint and cross claims are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Sugrue Contracting Corp.'s cross motion for summary judgment dismissing plaintiff's cause of action based on violations of Labor Law § 240 (1) and § 241 (6) and section 23-1.7 of the Industrial Code and all cross claims as asserted against it is denied.

This is the decision and order of the court.

Dated: January 19, 2010 ENTER:

J.S.C.

DEBRA A. JAMES