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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

RICHARD W. MCSPEDON,
Plaintiff(s),

- v -

TRIZECHAHN ONE NY PLAZA, LLC, TRIZECHAHN OFFICE PROPERTIES, INC. TRIZEC HOLDINGS, INC., TRIZEC REALTY INC., ONE NY PLAZA CO., INC., THE ONE NY PLAZA CONDOMINIUM, A NY CONDOMINIUM CONSISTING OF TRIZECHAHN ONE NY PLAZA, LLC, GOLDMAN SACHS & CO. NY L.P. AND THE ONE NY PLAZA CONDOMINIUM, GOLDMAN SACHS AND GOLDMAN SACHS GROUP, INC.,
Defendant(s).

INDEX NO. 115629/07
MOTION DATE 03-23-2011
MOTION SEQ. NO. 003
MOTION CAL. NO.

THE GOLDMAN SACHS GROUP, INC. s/h/a GOLDMAN SACHS GROUP, INC. and GOLDMAN SACHS & CO. s/h/a GOLDMAN SACHS,
Third-Party Plaintiff(s),

- v -

AMERICAN BUILDING MAINTENANCE CO.,
Third-Party Defendant(s).

The following papers, numbered 1 to 12 were read on this motion and cross-motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2,
Answering Affidavits — Exhibits _____cross motion _____	3, 4, 7- 10
Replying Affidavits _____	5, 6, 11, 12

Cross-Motion: X Yes No

Upon the foregoing papers, it is Ordered that defendants, TRIZECHAHN ONE NY PLAZA, LLC, TRIZECHAHN OFFICE PROPERTIES, INC. TRIZEC HOLDINGS, INC.,TRIZEC REALTY INC., ONE NY PLAZA CO., INC., THE ONE NY PLAZA CONDOMINIUM, A NY CONDOMINIUM CONSISTING OF TRIZECHAHN ONE NY PLAZA, LLC's (herein after referred to as "Trizechahn"), motion for summary judgment is granted. Defendants, THE GOLDMAN SACHS GROUP, INC. s/h/a GOLDMAN SACHS GROUP, INC. and GOLDMAN SACHS & CO. s/h/a GOLDMAN SACHS' (hereinafter referred to as "Goldman Sachs"), cross-motion for summary judgment is partially granted concerning the plaintiff's claims pursuant to Labor Law §200, §241 and §241 [6], the second and third causes of action are severed and dismissed.

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

The plaintiff was employed as a journeyman electrician as part of Local # 3, I.B.E.W. retained by IPC, which was a subdivision of Kleinknect Electric, a non-party entity contracted to perform routine electrical maintenance work for Goldman Sachs. Plaintiff claims that on November 22, 2004, he slipped on water, waxed paper, or both, in the freight elevator lobby area on the 49th floor approximately one hour after 12:00 pm, causing him to skid into vending machines and fall, resulting in injuries. At the time of the accident the plaintiff was carrying a telephone "turret," which was part of a telephone system used by employees of Goldman Sachs, to a workstation located near the freight elevators for repair. Plaintiff claims that the defendants failed to properly clean and maintain the freight elevator lobby area so that it was free of debris and violated Labor Law §200, §241 and §241 [6] . The 49th floor was leased to Goldman Sachs and the building was owned by Trizechahn . American Building Maintenance Company (hereinafter referred to as "ABM"), was the cleaning and maintenance company that serviced the 49th floor.

Trizechan seeks summary judgment claiming that it is an out of possession landlord that did not create the condition, or have constructive notice of the condition that caused the accident. Trizechan also claims that it had no contractual relationship with the plaintiff and that he was merely on the premises for purposes of conducting routine maintenance on behalf of Goldman Sachs therefore, Labor Law §200, §241 and §241 [6] , do not apply.

Goldman Sachs partially opposes Trizechan's motion and cross-moves for summary judgment claiming that there was no constructive notice of the condition. Goldman Sachs claims the plaintiff was merely on the premises for purposes of conducting routine electrical maintenance, therefore, Labor Law §200, §241 and §241 [6], do not apply. Goldman Sachs partially opposes Trizechan's motion for summary judgment claiming the accident occurred in an area that was not leased to them.

The plaintiff opposes both the motion and cross-motion claiming that notice exists, the defendants created or caused the condition that caused his injuries, and Labor Law §200, §241 and §241 [6] , do apply.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996] and Ayotte v. Gervasio, 81 N.Y. 2d 1062, 601 N.Y.S. 2d 463 [1993]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman v. Silver, 90 N.Y. 2d 204, 659 N.Y.S. 2d 250 [1997], Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

An owner or landlord that leases the property transferring possession and control to the tenant, is not liable for injuries sustained on the premises. The landlord is not liable absent retention of control in the lease, or a course of conduct that establishes the assumption of responsibility (Dallas v. ZCWK Associates, LP, 287 A.D. 2d 304, 731 N.Y.S. 2d 428 [N.Y.A.D. 1st Dept., 2001] and Lane v. Fisher Park Lane Co., 276 AD 2d 136, 718 N.Y.S. 2d 276 [N.Y.A.D. 1st Dept., 2000]). An out of possession landlord with a general right of reentry is not liable for general maintenance defects (Del Rosario v. 114 Fifth Avenue Associates, 266 A.D. 2d 162, 699 N.Y.S. 2d 19 [N.Y.A.D. 1st Dept., 1999]).

The lease agreement allows Trizechahn to have a cleaning contractor with access to the premises between 6:00pm and 6:00am (Mot. Exh. L, ¶ 15.07[c]). The Rules and Regulations annexed as Exhibit H to the lease, states at paragraph 1, that the tenant, "at its risk, may place its garbage receptacles in the freight elevator lobby..." (Mot. Exh. L). Trizechan had a maintenance contract with ABM that included dusting, cleaning and maintaining the 49th floor after 6:00pm and before 6:00am (Mot. Exh. M,¶. 2.2). Trizechahn did not retain ABM to clean during working hours, did not perform a walk through of the floor with an ABM representative, or otherwise maintain a presence on the 49th floor after 6:00am. ABM was not required to report to Trizechahn concerning the 49th floor (Mot. Exh. I, p. 85).

The lease agreement provides that Goldman Sachs was required to, and did separately retain ABM to clean and maintain the premises (Mot. Exh. L). The agreement was between ABM and Jones, Lang, Lasalle Americas Inc., the managing company on behalf of Goldman Sachs. The agreement provides for two utility day porters to remove trash and recycling from trading areas, as well as remove wet trash accumulated after breakfast and lunch on the 49th floor. ABM was also to scrub, apply a resinous floor wax, and spray buff all flooring in the freight elevator lobbies including the 49th floor once a month (Mot. Exh. L and Exh. N). The vending machines located on the 49th floor elevator lobby were stocked and utilized by employees of Goldman Sachs. An individual was sent from Jones, Lang, Lasalle Americas Inc., to walk through the 49th floor with a supervisor from ABM, inspect the premises and make changes in maintenance procedure. The day porters retained on behalf of Goldman Sachs deposited wet trash in dumpsters or bins located in the freight elevator lobby for removal (Mot. Exh. H and Exh. K, pp 26-29).

The plaintiff testified that he was injured between one and two o'clock in the afternoon (Mot. Exh.G pp 10, 37- 40, 43, 47), at the time when the premises were fully possessed by Goldman Sachs. ABM was performing maintenance pursuant to the agreement with Jones, Lang, Lasalle Americas Inc. . Wet trash and recycled trash bins or dumpsters had been deposited at least once and possibly twice into the freight elevator lobby by the day porters employed on behalf of Goldman Sachs. The bins or dumpsters used to transport trash down the freight elevators were owned by Goldman Sachs (Mot. Exh.I, pp 36,50-51, 59). The plaintiff did not observe any liquid or debris in the freight elevator lobby when he first returned from lunch at twelve o'clock (Exh.G, p. 58-59).

Trizechahn has met its burden of proof that it was out of possession and had no agreement with ABM covering the period when the accident occurred and had no constructive notice. The day porters responsible for depositing trash in the freight lobby elevator were there pursuant to the agreement with Jones, Lang, Lasalle Americas Inc.. Goldman Sachs had agreed to assume the risk for the garbage receptacles in the freight elevator lobby. Trizechahn's motion for summary judgement is granted.

A defendant seeking summary judgment in a slip and fall case has the burden of proving the condition was not visible and apparent for a sufficient length of time prior to the accident to permit its employees to discover and remedy it, and that it did not create the condition (Healy v. ARP Cable, Inc., 299 A.D. 2d 152, 753 N.Y.S. 2d 38 [N.Y.A.D. 1st Dept., 2002] and Gordon v. American Museum of Natural History, 67 N.Y. 2d 836, 501 N.Y.S. 2d 646, 492 N.E. 2d 774 [1986]). Testimony concerning observation of a dangerous or wet condition on the premises on many prior occasions raises a triable issue of fact concerning whether there was constructive notice of the condition (Talavera v. New York City Transit Authority, 41 A.D. 3d 135, 836 N.Y.S. 2d 610 [N.Y.A.D. 1st Dept., 2007]). Whether the defendant created or was aware of the condition is a material issue of fact (Para v. 167 Allison Meat Corp., 7 A.D. 3d 451, 776 N.Y.S. 2d 804 [N.Y.A.D. 1st Dept. 2004]). To the extent the defendant created the condition which caused the plaintiff to fall the notice requirement is negated (Ohanessian v. Chase Manhattan Realty Leasing Corp., 193 A.D. 2d 567, 598 N.Y.S. 2d 204 [N.Y.A.D. 1st Dept. 1993]).

Michael Tierney, a non-party, was deposed and claims that he made regular verbal complaints, "at least four or five times,"concerning leaks from trash bags and bins as well as garbage left on the floor, to an individual identified as "Jimmy" an employee of ABM. He made no written complaints or complaints directly to Goldman Sachs. Michael Tierney testified that the trash was not always placed in the bins left in the freight elevator lobby. He also testified that he observed bags with wet trash left in the freight elevator lobby for pick up because the bins were full (Mot. Exh. J, pp 21-22, 30, 32-33). The plaintiff also claimed that he had previously seen garbage bags and other trash on the floor near the vending machines in the freight elevator lobby and that he verbally complained to employees of ABM and his foreman who complained to Goldman Sachs (Mot. Exh. G,pp 48-53,152-153). Sefer Papraniku, the project manager for ABM admitted to observing a full garbage bag around a full dumpster but claimed it was not a regular occurrence (Mot. Exh. I, pp 60-61). The plaintiff was able to recall that the condition that caused him to fall was not present when he returned from lunch at twelve o'clock in the afternoon. He observed the waxed paper and wet condition after he fell somewhere between one and two in the afternoon (Mot. Exh. G, pp 10, 37- 40, 43, 47, 57-59).

There were no witnesses to the accident. Whether the employees of ABM, acting on behalf of Goldman Sachs, created the condition which caused the plaintiff to fall, negating the need for notice, is an issue of fact.

Labor Law §240(1) does not apply to repair work that involves replacement of parts that wear out in the course of normal wear and tear, or to repairs that are actually routine maintenance and not construction. Labor Law §241(6) does not apply outside of construction, demolition or excavation contexts (Esposito v. New York City Industrial Development Agency, 305 A.D. 2d 108, 760 N.Y.S. 18 [N.Y.A.D. 1st Dept., 2003] aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 [2003] and Chuchuca v. Redux Realty, LLC, 303 A.D. 2d 239, 757 N.Y.S. 2d 8 [N.Y.A.D. 1st Dept. 2003]. Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site. An implicit precondition to the common law duty is the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury, mere directions as to the time and quality of the work is not enough to impose liability (Esposito v. New York City Industrial Development Agency, 305 A.D. 2d 108, 760 N.Y.S. 18 [N.Y.A.D. 1st Dept., 2003] aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 [2003] and Dalanna v City of New York, 308 A.D. 2d 400, 764 N.Y.S. 2d 429 [N.Y.A.D. 1st Dept., 2003]).

The defendants seek summary judgment claiming that the plaintiff was not involved in any form of construction, demolition or excavation on the date of the accident, therefore there were no violations of the New York State Industrial Code.

Plaintiff in opposition provides his deposition testimony which states that "60 percent" of the work load for Goldman Sachs involved new installation and repair work for an existing telephone system, which would at times require pulling wire or chopping walls, and he wore a tool belt. The plaintiff could not recall whether he was performing any repair work or work that required chopping walls, pulling wiring, construction, or excavation on the date of the accident. Plaintiff testified that the work assignments varied from day to day (Mot. Exh. G pp 21, 23-28,36-37 117-119, 135-137, 148). The non-party witness Michael Tierney did not recall whether there was any construction or excavation work being performed on the date of the accident (Mot. Exh.J). The plaintiff cites New York State Industrial Code, § 23-17(d), §23-1.7(e),§ 23-6.1 and §23-2.1, as being violated, requiring the application of Labor Law §240(1) and §241(6). The New York State Industrial Code only applies to "construction, demolition and excavation operations" (New York State Industrial Code § 23-1.3).

The plaintiff was carrying a telephone "turret" that was malfunctioning, to the workshop near the freight elevator lobby on the 49th floor, for repair at the time of his accident. He has not provided sufficient evidence that he had to chip through walls, run wiring or perform any construction, demolition or excavation related tasks in removing the "turret" from the traders desk on the day of the accident. The plaintiff has provided insufficient proof that there was any construction debris in the freight elevator lobby on the date of the accident. The plaintiff has also failed to sufficiently demonstrate that Goldman Sachs had authority or direct supervisory control over his work.

Plaintiff has provided insufficient evidence that he was involved in anything other than routine maintenance of the Goldman Sachs telephone system. Labor Law §200, §240(1) and §241(6), do not apply.

Accordingly, it is ORDERED that defendants TRIZECHAHN ONE NY PLAZA, LLC, TRIZECHAHN OFFICE PROPERTIES, INC. TRIZEC HOLDINGS, INC.,TRIZEC REALTY INC., ONE NY PLAZA CO., INC., THE ONE NY PLAZA CONDOMINIUM, A NY CONDOMINIUM CONSISTING OF TRIZECHAHN ONE NY PLAZA, LLC's motion for summary judgment is granted, all causes of action, cross-claims and counterclaims against said defendants, are severed and dismissed, and it is further,

ORDERED that defendants THE GOLDMAN SACHS GROUP, INC. s/h/a GOLDMAN SACHS GROUP, INC. and GOLDMAN SACHS & CO. s/h/a GOLDMAN SACHS' cross-motion for summary judgment is partially granted, the plaintiff's second and third causes of action for violation of Labor Law §200, §241 and §241 [6], are severed and dismissed, and it is further,

ORDERED that the action shall continue to mediation and/or trial with the remaining defendants solely as to the plaintiff's first cause of action for negligence.

This constitutes the decision and order of this court.

Dated: April 1, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE