SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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RALPH GUCCIONE,

Plaintiff,

-against-

WEST 44TH STREET HOTEL LLC c/o TISHMAN HOTEL CORP, and TISHMAN CONSTRUCTION COMPANY OF N.Y.,

Defendant(s).

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WEST 44TH STREET HOTEL LLC s/h/a WEST 44TH STREET HOTEL LLC c/o TISHMAN HOTEL CORP. and TISHMAN CONSTRUCTION COMPANY OF NY s/h/a TISHMAN CONSTRUCTION COMPANY OF NY,

Third-Party Plaintiffs,

-against-

FERRARA BROTHERS BUILDING MATERIALS CORP.,

Third-Party Defendants.

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DCM PART 5
Present:

HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 101358/2009
Motion Nos. 004, 005

The following papers numbered 1 through 3 were used on this motion this 1st day of March, 2011:

[004]Notice of Motion (Affirmation in Support)(Defendant/Third Party Plaintiffs)	**1**
[005]Notice of Cross Motion (Affirmation in Support)(Plaintiff)	**2**
Reply Affirmation (Defendant/Third Party Plaintiffs)	**3**

On January 20, 2009, the plaintiff allegedly sustained injuries[1] when he fell on a patch of ice at the construction site of a 36-story hotel located at West 44th Street, New York, New York. At the time of accident the plaintiff was acting as a flagman and moving

[1]The plaintiff sustained, *inter alia*, a tear of his right shoulder and wrist.

pedestrian barriers surrounding the work site to allow construction vehicles egress/ingress. As he was moving a barrier, the plaintiff slipped and fell on a patch of ice. Plaintiff contends that the accident resulted because water was freezing over after being used to rinse down the concrete trucks. The plaintiff was employed at the time of the accident by non-party Regal USA Construction Inc., who was subcontracted by defendant and "construction manager" Tishman Construction Company of NY [hereinafter referred to as "Tishman"]. Defendant West 44th Street Hotel LLC s/h/a West 44th Street Hotel LLC c/o Tishman Hotel Corp. [hereinafter referred to as "West 44th"] was the owner of the property where the work was being performed. Defendant West 44th contracted with Tishman to act as "construction manager" of the project.

The plaintiff commenced this action on or about May 15, 2009. Issue was joined on or about July 2009. The court notes that the third-party action was dismissed pursuant to this court's order dated March 1, 2011. Presently, defendants West 44th and Tishman are moving for summary judgment seeking to dismiss plaintiff's complaint in its entirety. In addition, plaintiff is moving for leave to serve an amended bill of particulars to add the Industrial Code violation of 12 NYCRR 23-1.7(d).

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable

inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Initially, the Court notes that plaintiff does not oppose and in fact, consents to dismissal of the second and fifth causes of action, namely, those alleging violations of Labor Law § 240. It is clear the instant facts do not support a cause of action under Labor Law § 240[2], as the accident occurred on ground level. As such, the plaintiff's second and fifth causes of action are hereby dismissed, without opposition.

Defendants' summary judgment motion against the plaintiff based upon Labor Law § 200 "is but a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (Hunter v. R.J.L. Dev., LLC, 44 AD3d 822 [2d Dept., 2007]; Haider v. Davis, 35 AD3d 363 [2d Dept., 2006]; Basso v Miller, 40 NY2d 233, 241

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[2] **"To recover under Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (Chang v. Homewell Owner's Corp., 38 AD3d 625, 626 [2d Dept., 2007]). Further, a nondelegable duty is imposed upon "owners and contractors to provide or cause to be furnished certain safety devices for workers at an elevated work site, and the absence of appropriate safety devices constitutes a violation of the statute as a matter of law" (Riccio v. NHT Owners, LLC, 51 AD3d 897, 898-899 [2d Dept. 2008]). New York Labor Law § 240(1) imposes liability upon owners and contractors who fail, in accordance with the statute, to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (Bonilla v State of New York, 40 AD3d 673 [2d Dept., 2007]). "In the scaffold situation, if a worker had no protective devices, such as a harness or a guardrail, and suffered injuries in a fall from a shifting scaffold, Labor Law § 240(1) clearly would offer the worker its protection" (Dooley v. Peerless Importers, Inc., 42 AD3d 199, 204 [2d Dept., 2007]).**

[1976]). There exists two categories of cases under Labor Law § 200 "those where workers were injured as a result of dangerous or defective conditions at a work site and those involving the manner in which the work was performed" (LaGiudice v. Sleepy's Inc., 67 AD3d 969, 971-972 [2d Dept., 2009]). When an injury occurs "[i]f the allegedly dangerous condition arises from the contractor's methods and the owner or general contractor exercises no supervisory control over the operation, liability does not attach under the common law or under Labor Law § 200" (Ferrero v. Best Modular Homes Inc., 33 AD3d 847, 849-850 [2d Dept., 2006]). "The determinative factor on the issue of control is not whether a [defendant] furnishes equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed" (Eldoh v Astoria Generating Co., L.P., 81 AD3d 871, 875 [2d Dept., 2011]). When the injury occurs because of a premises condition "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (LaGiudice v. Sleepy's Inc., 67 AD3d at 972).

Here, to the extent that plaintiff's common-law negligence claims are based upon an allegedly defective condition or the existence of ice, both defendants West 44th and Tishman have established their right to summary judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]; Ferrero v. Best Modular Homes Inc., 33 AD3d 847, 849-850 [2d Dept., 2006]). Specifically, defendant West 44th has established that, as the owner of the property, it did not create the alleged condition, nor did it posses any actual or constructive notice.

Defendant Tishman as "construction manager", has established that it sub-contracted the removal of ice/snow to the plaintiff's employer, Regal, and safety company CRSC. In addition, Tishman contends there was no actual or constructive notice that ice was accumulating in the area where plaintiff fell.

In opposition, the plaintiff has failed to raise an issue of fact with respect to defendant West 44th but has successfully established issues of fact with respect to defendant Tishman (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The plaintiff failed to provide the court with any evidence that, as owner, defendant West 44th created the condition or had any notice, whatsoever, that ice was forming in a certain area. West 44th contracted with Tishman to oversee the construction of the hotel, was not on site at anytime, had absolutely no day-to-day interaction with any employees and in no way had any knowledge of the formation of ice.

With respect to defendant Tishman however, the plaintiff has presented sufficient evidence to establish that defendant Tishman was aware that concrete trucks were rinsed off in a 'staging area' and the water was running down into the area where plaintiff, as a flagmen, was standing. Defendant Tishman, as the "construction manager" had a duty to provide a safe workplace for the plaintiff and as such, summary judgment on plaintiff's Labor Law § 200 and negligence causes of action is inappropriate.

To the extent that plaintiff's common-law negligence claims are based upon defects or dangers in the method of work, plaintiff has again only raised triable issues of fact with respect to defendant Tishman. As the "construction manager" defendant Tishman was present on the worksite daily, responsible for the safety of the workers, and had knowledge

of the staging area where concrete trucks would be hosed down, resulting in water accumulation. It is clear that Tishman had supervisory control over the worksite and the ability to ensure that proper safety procedures were being followed. However, there is no such evidence for defendant West 44th. There is no evidence that West 44th exercised any sort of control over the worksite or its employees and as such, Labor Law § 200 causes of action against defendant West 44th are dismissed.

With respect to plaintiff's Labor Law § 241(6)claims; Labor Law § 241(6) requires

> **[a]ll areas in which construction, excavation or demolition work is being performed [to] 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.**

Encumbering owners and contractors, the statute "imposes a nondelegable duty of reasonable care upon [such entities] to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto v. Wenger Contr Co., 91 NY2d 343, 348 [1998][emphasis and internal quotation marks omitted]). To support a cause of action pursuant to Labor Law § 241(6), the plaintiff must allege that a specific and concrete provision of the Industrial Code was violated and that the alleged violation was proximate cause of plaintiff's injuries (Rosado v. Briarwood Farm, Inc., 19 AD3d 396 [2d Dept. 2005]).

Contrary to defendants' opposition papers, plaintiff's cross motion to serve a supplemental bill of particulars alleging specific Industrial Code violations, in accordance with § 241(6), is not fatal to his claim (Latino v. Nolan & Taylor-Howe Funeral Home, Inc.,

300 AD2d 631, 633-34 [2d Dept. 2002]; D'Elia v. City of New York, 81 AD3d 682, 683-684 [2d Dept., 2011]). Where leave to amend the bill of particulars to allege specific Industrial Code violations is requested after the note of issue has been filed, the motion may be granted upon a showing of its meritorious nature and that the amendment does not allege any new theories of liability or facts that would prejudice the defendants (Dowd v. City of New York, 40 AD3d 908, 911 [2d Dept., 2005]).

Here, if permitted to amend, plaintiff would assert a violation of section 23-1.7(d) of the Industrial Code. While section 23-1.7 is distinct enough to support a cause of action under Labor Law § 241(6), (Carty v. Port Authority of N.Y. & N.J., 32 AD3d 732, 733 [1st Dept. 2006][section 23-1.7(e) is "specific enough to support a cause of action" under Labor Law § 241(6)]), plaintiff nevertheless, to avoid summary judgment, must establish the potential meritorious nature of the violation with respect to this accident (Biafora v. City of New York, 27 AD3d 506, 508 [2d Dept. 2006]). Section 23-1.7[d] of the Industrial Code states:

> **Slipping Hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or 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. 12 NYCRR 23-1.7(d).**

However, Industrial Code 23-1.7(d) has been found to not apply when the accident occurs in an open area on ground level (Roberts v. Worth Construction, Inc., 21 AD3d 1074, 1077 [2d Dept., 2005][holding a slip and fall on ice on ground level did not constitute 12 NYCRR 23-1.7(d) violation]; McKee v. Great Atl. & Pac. Tea Co, 73 AD2d 872, 875 [2d Dept.,

2010][finding that "the open, ground-level worksite" was not the type of location contemplated under 12 NYCRR 23-1.7(d)]). In this case, the accident occurred in an open area on the ground level and is not contemplated under Industrial Code § 23-1.7(d) and as such, plaintiff's request to amend the bill of particulars to add a violation of Industrial Code § 23-1.7(d) is denied. The portion of defendants' motion that requests summary judgment on the causes of action alleging violations of Labor Law § 241(6) is hereby granted, as plaintiff has failed to pled a specific and meritorious Industrial Code violation (Kowalik v. Lipschultz, 81 AD3d 782, 783-784 [2d Dept., 2011][affirming lower courts dismissal of plaintiff's Labor Law § 241(6) claim where, while plaintiff's first particularity of Industrial Codes was in opposition to the summary judgment motion, plaintiff failed to prove the alleged Industrial Code violations were meritorious]).

Accordingly, it is

ORDERED that the defendants West 44th Street Hotel LLC c/o Tishman Hotel Corp., and Tishman Construction Company's motion [004] requesting summary judgment is granted with respect to plaintiff's second and fifth causes of action alleging violations of New York Labor Law § 240, without opposition, and it is further

ORDERED that plaintiff's second and fifth causes of action are hereby dismissed, and it is further

ORDERED that the defendants West 44th Street Hotel LLC c/o Tishman Hotel Corp., and Tishman Construction Company's motion [004] requesting summary judgment is granted with respect to the plaintiff's fourth and seventh causes of action alleging violations of New York Labor Law § 241(6), and it is further

ORDERED that the plaintiff's fourth and seventh causes of action are hereby dismissed, and it is further

ORDERED that the portion of defendants West 44th Street Hotel LLC c/o Tishman Hotel Corp., and Tishman Construction Company's motion [004] requesting summary judgment with respect to plaintiff's first, third and sixth causes of action alleging negligence and violations of Labor Law § 200 is granted with respect to defendant West 44th Street Hotel LLC c/o Tishman Hotel Corp ONLY, and denied with respect to defendant Tishman Construction Company, and it is further

ORDERED that plaintiff's first, third and sixth causes of action are hereby dismissed as against defendant West 44th Street Hotel LLC c/o Tishman Hotel Corp., ONLY, and it is further

ORDERED that plaintiff's motion [005] to amend the bill of particulars is hereby denied, and it is further

ORDERED that any and all additional requests for relief are found to be completely without merit and denied, and it is further

ORDERED that the Clerk enter judgment accordingly.

Dated: April 21, 2011 **E N T E R:**

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Hon. Judith N. McMahon
Justice of the Supreme Court