Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** IAS TERM, PART 33
Justice

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QUENTIN JONES, Index No: 12819/09

Plaintiff(s), Motion Date: 02/03/11

-- against -- Cal. No: 20

GRANITE CONSTRUCTION NORTHEAST, INC., GRANITE HALMAR CONSTRUCTION COMPANY, INC., A.J. MCNULTY & COMPANY, INC., TISHMAN CONSTRUCTION CORPORATION, WASHINGTON GROUP INTERNATIONAL, INC. AND TISHMAN CONSTRUCTION CORPORATION/ WASHINGTON GROUP INTERNATIONAL, INC., A JOINT VENTURE, Sequence No. 1

Defendant(s).

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The following papers numbered 1 to 19 were read on this motion by defendants for summary judgment dismissing plaintiff's causes of action alleging violations of Labor Law §§ 240(1), 241(6) and common law negligence; an order striking plaintiff's "Supplemental Bill of Particulars" and an order granting partial summary judgement on the grounds that plaintiff did not sustain a discernible injury.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 14
Answering Affirmation, Affidavit and Exhibits.....	15 - 17
Reply Affirmation and Affidavit.....	18 - 19

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is a labor law claim based on Labor Law §§ 200, 240(1) and 241(6). Defendants move this court for an order dismissing the complaint, striking the plaintiff's supplemental bill of

particulars and awarding partial summary judgment on the issue of plaintiff's alleged injuries.

The branch of the motion seeking to strike plaintiff's Supplemental Bill of Particulars is denied. Plaintiff served a "Supplemental Bill of Particulars" in April 2010 which included additional alleged industrial code violations. Although labeled, "Supplemental Bill of Particulars", the April 10, 2010 bill of particulars is actually an amended bill of particulars. A party may amend a bill of particulars once, as of course, prior to the filing of a note of issue (see CPLR § 3042). As plaintiff amended his bill of particulars once, prior to the filing of the note of issue, the amended bill of particulars was timely served and defendant has failed to establish a basis for striking the pleading.

Based on the amended bill of particulars, plaintiff alleges violation of Labor Law §§ 200 and 241(6) based on Industrial Code §§ 23-1.7(d) and (e) and 23-1.28(a) and (b).

The branch of the motion seeking to dismiss the cause of action based on Labor Law § 240(1) is granted, without opposition. Labor Law § 240(1) was not alleged in the amended bill of particulars. Moreover, on the record before the court there is no elevation differential alleged to have caused the injury. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY 2d 494).

Section 200 of the Labor Law codifies the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work (Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]).

To be charged with liability under Labor Law § 200, an owner or general contractor must perform more than their "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192, 757 N.Y.S.2d 527 (1st Dept 2003). Monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200, nor is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons. (*Dalanna v City of New York*, 308 AD2d 400, 400, 764 N.Y.S.2d 429 (1st Dept 2003)). Instead, it must be shown that the owner had authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition. (*Hughes v. Tishman Construction Corp.*, 40 AD3d 305, 836 N.Y.S.2d 86 (1st Dept 2007))

If an injury is caused by the manner in which a subcontractor performs its work, an owner or general contractor will be liable pursuant to Labor Law §200 only if it had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]; *Cook v Orchard Park Estates, Inc.*, 2010 NY Slip Op 3822, 2 (3d Dep't 2010))

Where a worker's injuries result from an unsafe or dangerous condition existing at a work site, rather than from the manner in which the work is being performed, the liability of a general contractor, and of an allegedly negligent subcontractor, depends upon whether they had notice of the dangerous condition and control of the place where the injury occurred. (*Wolfe v KLR Mech., Inc.*, 35 AD3d 916, 918, 826 N.Y.S.2d 458 [2006]

Here, plaintiff, an iron worker, alleges that while moving a cart carrying siding he slipped on grease, the cart toppled over and the siding fell on him. Plaintiff also alleges that the cart toppled over because a wheel on the cart was defective. Relying on the sworn statement of James Wedding, project manager for defendant Granite Construction Northeast, Inc., defendants argue that they did not have notice of the dangerous condition or control of the place where the injury occurred, however, there is no testimony or other evidence before the court to support that contention. Therefore, the branch of the motion seeking to dismiss plaintiff’s common law negligence and Labor Law §200 claims is denied.

The branch of the motion seeking to dismiss the cause of action based on Labor Law §241(6) is granted only to the extent that plaintiff’s claim pursuant to Industrial Code §23-1.7(e) is dismissed.

Labor Law § 241 (6) imposes a non-delegable 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 [1993]). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code. In this action plaintiff alleges that defendant violated 12 NYCRR 23-1.7(d), and (e), 12 NYCRR 23-1.28(a) and(b).

Industrial Code 12 NYCRR 23-1.7(d) states as follows:

“Slipping hazards.

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other 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."

Plaintiff testified that while moving a cart carrying siding he slipped on a patch of grease, plaintiff also testified that the cart toppled and the siding in the cart fell on him causing him personal injury. Defendant argues that plaintiff's allegation that he slipped on grease cannot be considered the proximate cause of his injuries.

In support of their contention defendant relies on the sworn statements of Ed McCloskey, a former co-worker of plaintiff's and Robert Neff, the foreman at the site at the time of the incident. Ed McCloskey's affidavit provides conclusory statements about the happening of the accident and Robert Neff testifies that he did not witness the alleged incident and was unaware of any broken wheels on the cart. These statements are insufficient to establish, as a matter of law that plaintiff's injuries were not substantially related to the alleged slip. Therefore, plaintiff's claim pursuant 12 NYCRR 23-1.7(d) survives.

Industrial code 12 NYCRR 23-1.7(e) reads as follows:

"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."

The location where the plaintiff fell, was not a passageway as defined by the Industrial Code (See, 12 NYCRR § 23-1.7[e][1]). The section covering Working areas, 12 NYCRR § 23-1.7[e][2], includes "floors, platforms and similar areas where persons work or pass", however, there is no allegation or evidence that the grease which the plaintiff claims caused him to slip was an integral part of the work being performed by the plaintiff.

Therefore, plaintiff's claim based on 12 NYCRR § 23-1.7[e] is dismissed.

Industrial Code §23-1.28(a) and (b)

(a) Maintenance. Hand-propelled vehicles shall be maintained in good repair. Hand-propelled vehicles having damaged handles or any loose parts shall not be used.

(b) Wheels and handles. Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles. Buggy handles shall not extend beyond the wheels on either side.

The sworn statements and deposition testimony submitted by defendants fail to make a prima facie showing entitling them to judgment as a matter of law as the evidence offers contradictory statements raising of issues of fact that must be resolved at trial.

The branch of defendants motion seeking to dismiss the complaint on the grounds that plaintiff did not sustain a discernible injury is denied. The affirmation of Dr. Roger Berg, defendants expert, lacks probative value as Dr. Berg never examined the plaintiff.

Accordingly, the defendant's motion is granted only to the extent that plaintiff's Labor Law §240(1) claim is dismissed without opposition and the Labor Law 241(6) claim based on a violation of Industrial Code §23-1.7(e) is dismissed. Plaintiff's common law negligence and Labor Law §§200 and 241(6) based on violations of Industrial Codes §§ 23-1.7(d) and 23-1.28(a) and (b) survive

This constitutes the Order of the court.

Dated: May 23, 2011

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JAMES J. GOLIA, J.S.C.