[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Orellana et al

Plaintiff (s),

INDEX NO. 603775/08

MOTION DATE

MOTION SEQ. NO. 001

-v-

Consolidated Edison of New York Defendant(s).

The following papers, numbered 1 to ____ were read 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

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

JUN 17 2011

Dated: June 17, 2011

Hon. Judith J. Gische, *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Rolando Orellana and Laura Sequera,

Plaintiff (s),

-against-

Consolidated Edison of New York, Inc.,

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 603775-08
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Con Ed n/m (3212) w/CMR affirm, exhs	1
Pltf opp w/BEC affirm,	2
Con Ed reply w/CMR affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action based upon claimed violations of the New York State Labor Laws ("Labor Law § ___"), sections 240 [1], 241 [6], 200 and common law negligence. Co-plaintiff Laura Sequera has asserted a derivative claim for loss of services. Defendant Con Ed has answered and now moves for post note of issue summary judgment. Plaintiff opposes the motion insofar as his Labor Law §§ 241 [6] and 200 claims, but has agreed to withdraw his Labor Law § 240 [1] claim. Since this motion is timely, it will be decided on the merits (CPLR 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]).

Arguments and Facts

Plaintiff contends he was injured when, on December 5, 2008 ("day of the accident"), as he was sweeping construction debris, he attempted to move a barrel or barricade and it fell on him. Plaintiff's employer, non-party Namow, had a contract with Con Ed to act as its casting contractor. "Castings" are apparently another term for street or sidewalk openings which Con Ed uses to install boxes that contain Con Ed equipment. In this case the work was being done in the roadway of Atlantic Avenue in Queens, New York.

Plaintiff was deposed and asked questions about how his accident happened. His testimony was with the assistance of a Spanish language interpreter. Plaintiff described the barrel as being a "cone" because the bottom was broader than the top. The barrel, which was orange and white, was approximately 3.5 - 4 feet tall. There were no markings on it indicating who it belonged to. There were several other barrels in the area that plaintiff was cleaning.

According to plaintiff, when he tried to move the barrel, it and the cement inside, toppled onto him: "I was cleaning with a broom and also with a shovel. There were some cones. I tried moving them to keep cleaning. They had cement inside so it came on top of me, so I slipped and fell." Plaintiff explained that he had been using handles on the barrel to grab it "with force and it collapsed on top of me" striking his right foot, dislocating his ankle and knocking him down. Plaintiff has provided a sworn affidavit in opposition to Con Ed's motion, elaborating that "slipped and fell while attempting to move a barrel barrier that surprisingly had dried cement" in it. He now explains that: "I was aware of the debris in this work area and was in the process of sweeping certain

portions away when I was caused to slip and fall due in part to an accumulation of construction debris consisting of small bits of cement, rock, stone and street pieces created by street opening and the casting replacement. During this process I slipped and fell while attempting to move a barrel barrier that surprisingly had dried cement inside . . ."

On the day of the accident, plaintiff was transported by a Namow truck to the work site. The truck was loaded with supplies and materials for the work to be performed that day. When he arrived there was an excavating machine on site. The routine was that the machine would dig a hole and then he and his fellow workers would remove the old "box" from the hole and replace it with a new box. Plaintiff did not know who owned the machine, but it was being operated by Namow workers. No one from Con Edision was present at the job. He did, however, see "Charlie" his supervisor who is also a Namow employee.

Sammy Iorio, was deposed on behalf of Con Ed and has also provided his sworn affidavit in support of Con Ed's motion. Iorio is Con Ed's Construction Representative and in charge of overseeing work that contractors perform for Con Ed. He testified that he was in charge of inspecting the open holes being made for Con Ed and that he also made sure Con Ed paid its contractors. Iorio was not present when the accident occurred and learned about it from "Charlie," Namow's foreman.

According to Iorio, contractors sometimes uses barrels in addition to other types of barricades. Con Ed does not require that contractors use barrels, only some kind of barricade for safety reasons. The barrels he saw being used were orange and white and did not belong to Con Ed. If Iorio observed an unsafe condition, he could halt the

work being done but he did not interact with the workers. According to Iorio, it was up to the contractors' foremen to tell their workers what to do. Iorio states that he kept a checklist and marked certain things "satisfactory" if they were. In his sworn affidavit explains that he "did not direct or instruct the means and methods of the contractor's work, but generally oversee their work to ensure that it is being completed in accordance with the plans and on a timely basis."

Con Ed contends that it is entitled to summary judgment because the industrial code regulations that plaintiff relies upon are either not specific or do not apply and, therefore, plaintiff has not predicate basis for his Labor Law § 241 [6] claim. Con Ed also denied having any supervisory direction or control over the work being performed by plaintiff when he was injured or that it had notice of a dangerous condition. Con Ed denies that it created a dangerous condition because the barrels were set up by Namow and Con Ed had no involvement where they were placed or whether they were filled or empty. Thus, Con Ed seeks the dismissal of plaintiff's Labor Law § 200 and common law negligence claims on that basis. Con Ed also urges the court to disregard plaintiff's sworn affidavit as being a self-serving, last ditch effort to convince the court debris played any part in the happening of his accident.

Plaintiff denies that he was provided with a safe working environment and claims the Industrial Code sections he relies on apply. He also claims that Con Ed has the authority and duty to decide which tools and equipment plaintiff used to do his work and that had it properly supervised the work being done, he would have not been injured. Plaintiff points out that barrels and barricades were checked off Iorio's checklist as being "satisfactory."

Law Applicable to Motions for Summary Judgment

A movant seeking summary judgment in its favor 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 " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (*See*: Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

Discussion

Since plaintiff agreed to withdraw his Labor Law § 240 [1] claim, it is severed and dismissed. The court has to decide, however, whether Con Ed has proved it is entitled to summary judgment on plaintiff's remaining claims under Labor Law §§ 241 [6] and 200 which are, respectively, for violations of the Industrial Code and common law negligence.

Labor Law § 241 [6] imposes a non-delegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Comes v. New York State Electric & Gas Co., 82 NY2d 876 [1993]; Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; Ross v. Curtis-

Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]). To properly state a claim under Labor Law § 241(6), the plaintiff must identify a specific and applicable Industrial Code provision that has been violated (Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*). The question of whether the plaintiff has alleged a specific provision of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide (Messina v. City of New York, 30 AD2d 121 [1st Dept 2002])

Industrial Code 12 NYCRR § 23-1.4 et seq is insufficient to support a Labor Law § 241 [6] claim because it only provides definitions to terms used throughout the code. Industrial Code 12 NYCRR § 23-1.5 is not a predicate basis for a Labor Law § 241 [6] claim because it is only a general safety provision (Sajid v. Tribeca North Associates L.P., 20 A.D.3d 301 [1st Dept 2005]). Therefore, defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 [6] cause of action based on those code sections is granted.

The other sections that plaintiff relies on are 12 NYCRR §§ 23-1.7 [d], 1.7 [e] and 2.1 [b]. Section 23-1.7 [d] pertains to "slipping hazards" and Section 23-1.7[e] pertains to "tripping hazards." Each section requires that the area where work is being performed be kept free from slippery conditions (23-1.7 [d]) and accumulations of debris and other tripping hazards (23-1.7 [e]). Each section is specific enough to support a Labor Law § 241 [6] claim. Industrial Code 12 NYCRR 23-2.1 [b] is also specific enough to support a Labor Law § 241 [6] claim, requiring the disposal of debris. The issue is whether these sections apply to the facts of this case.

Plaintiff has always stated that he "slipped/tripped" as he was trying to move a

barrel so he could finish cleaning up the area where he was working. Assuming he is correct, that there was debris underfoot, the debris he describes is the natural consequence of the excavation work being done by Namow. This was not random debris consisting of discarded materials, but "cement, rock, stone and street pieces created by [the] street opening and the casting replacement" which was the job he was working on. The debris was not caused by Con Ed, but was the result of Namow's own work. Thus even if plaintiff slipped on debris under foot, his injuries were due to the work he was instructed to do (Gaisor v. Gregory Madison Avenue, LLC, 13 AD3d 58 [1st Dept 2004]). Consequently, although these code sections apply, defendant has proved it did not violate them and, therefore, Con Ed's motion for summary judgment dismissing plaintiff's Labor Law § 241 [6] cause of action is granted. There are no triable issues of fact.

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site and unlike Labor Law §§ 240 [1] and 241 [6], liability can only be imposed if the defendant has actually been negligent. The elements of a prima facie Labor Law § 200 claim are that the defendants: 1) exercised supervision and control over the work performed or 2) had actual or constructive notice of the dangerous condition alleged, or 3) created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st Dept. 1998]).

Con Ed has shown that it did not exercise supervision or control over the work performed by plaintiff when he was injured. Plaintiff was supervised by "Charlie," a

fellow Namow employee. Although Iorio inspected the holes being made and he kept a checklist on which he marked the barrels being used by Namow as "satisfactory," Con Ed neither required that such barrels be used nor did Iorio testify that he looked inside any of these barrels. Plaintiff's testimony was that the barrel was "surprisingly" heavy not that it was defective in any way. Thus, the notation "satisfactory" on the checklist is of no moment under the facts of this case.

Con Ed has also established that it did not have notice of a dangerous condition and that it did not create one. Plaintiff never made any complaints to Con Ed about a dangerous condition in the area where he was working nor are there any claims by plaintiff that Con Ed created a dangerous condition.

Although Iorio inspected the site and could stop anything he viewed as beeing dangerous, simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on Con Ed under Labor Law § 200 or for a common law negligence claim (Hughes v. Tishman Construction Corp., 40 AD3d 305 [1st Dept 2007]; Brown v. New York City Economic Dev. Corp., 234 AD2d 33 [1st Dept. 1996]; Gonzalez v. United Parcel Serv., *supra*).

Since Con Ed has proved it is entitled to summary judgment dismissing plaintiff's Labor Law § 200 claims, defendant's motion is granted and this claim is dismissed.

Conclusion

Defendant's motion for summary judgment dismissing plaintiff's Labor Law §§ 241 [6], 200 and common law negligence claims. Plaintiff has withdrawn his Labor Law § 240 [1] cause of action and that claim is also dismissed. Therefore, the complaint is

dismissed in its entirety. The clerk shall enter judgment in favor of Con Ed against plaintiff dismissing this action.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 17, 2011

So Ordered:

Hon. Judith J. Gische, JSC