Montes v Collins Enters., LLC
2011 NY Slip Op 31893(U)
July 8, 2011
Sup Ct, NY County
Docket Number: 106308/08
Judge: Saliann Scarpulla
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SCANNED ON 7/12/2011

[* 1]

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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 106308/2008

MONTES, TEDDY

vs

COLLINS ENTERPRISES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. Submit proposed order

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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, it is ordered that this motion

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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court.

Dated: 7/8/11

[signature] J.S.C.

SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-- X

TEDDY MONTES,

Plaintiff,

-against-

COLLINS ENTERPRISES, LLC and TURNER CONSTRUCTION CORP.,

Defendants.

-- X

Index No. 106308/08
Submission Date: 2/2/2011
Sequence Numbers: 001, 002

DECISION AND ORDER

For Plaintiff:
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150 Broadway, 4th Floor
New York, New York 10038

For Defendants:
Malapero and Prisco LLP
295 Madison Avenue
New York, New York 10017

Papers considered in review of this motion for change of venue:

Notice of Motion........................ 1
Opp of Motion...........................2
Reply Affirm.............................. 3
Notice of Order.......................... 4
Opp of Order............................. 5

HON. SALIANN SCARPULLA, J.:

This case arises out of an alleged construction accident on April 4, 2008, in which plaintiff Teddy Montes ("Montes") was injured. Defendant Collins Enterprises, LLC ("Collins") is the owner of the construction site commonly known as Hudson Park North in Yonkers, New York. Defendant Turner Construction Corp. ("Turner") was hired by Collins to be the general contractor and project manager at Hudson Park North. At the time of the accident, Montes was employed as a taper by non-party subcontractor PAF Painting Systems, Inc. ("PAF").

Montes alleges that he worked as a taper at the above site on April 4, 2008. On that day, Montes arrived at 6:30 am and was directed to work in a specific apartment.

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Upon completing his work in that apartment, Montes carried two five-gallon buckets of compound to another apartment in the building. He entered a room in the apartment and stepped on a round wooden doorknob which caused his right ankle to twist. Montes lost his balance and fell backwards. He attempted to brace himself from falling with his right hand. Montes allegedly injured his right hand/wrist and right ankle.

In his complaint, Montes pleads causes of action for violations of Labor Law §§ 200, 240(1) and 241(6) against both defendants. In motion sequence 001, Collins and Turner move for summary judgment against Montes. Turner and Collins argue that they did not have the requisite level of supervision nor the actual/constructive notice required for liability in a Labor Law §200 claim. Turner and Collins also argue that because the injury did not result from an elevation-related risk §240(1) does not apply. Finally, they argue that some of the industrial codes listed by Montes in his §241(6) cause of action are legally insufficient to support the cause of action and that other codes are inapplicable because the event did not involve a slippery surface or a passageway.

On reply and at oral argument, Montes agreed to dismiss his §200 claim against Collins as well as his §240(1) claims against both Turner and Collins. In opoosition to the remainder of the motion, Montes argues that Turner had a duty to maintain a safe workplace and that actual/constructive notice was not necessarily required if Turner had authority to control the performance of the work. With regard to the Labor Law §241(6) cause of action, Montes contends that §23-1.7(e) and §23-2.1 of the Industrial Code do apply because a doorknob is "debris" or "material." On this motion Montes has

abandoned his reliance upon the other sections of the Industrial Code, so the court does not address them. [1]

In motion sequence 002, Collins and Turner move for the issuance of an open commission for the deposition of Vincent Palumbo, who resides in Allentown, Pennsylvania. Turner and Collins seek to depose Mr. Palumbo because Mr. Palumbo has indicated that Montes has worked for him since the date of the accident. Montes argued that the motion is improper because a note of issue has been filed and that under CPLR 3214, a summary judgment motion stays discovery. Both motions are consolidated for disposition herein.

Discussion

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, there can be no material issue of fact to be presented at trial. *Epstein v. Scally*, 99 A.D.2d 713 (1st Dep't 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v. Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v. Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to

[1] In his verified bill of particulars, Montes alleges that defendants violated rules 23-1.5, 23-1.7, 23-2.1 and 23-1.30 of the State Industrial Code (12 NYCRR), as well as Article 1926 of O.S.H.A..

either warrant or defeat summary judgment. *McGahee v. Kennedy*, 48 N.Y.2d 832, 834 (1979).

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners of premises and general contractors hired to perform renovations "to provide reasonable and adequate protection and safety to the persons" employed in all areas in which construction, excavation, or demolition work is being performed. Both an owner and a general contractor may be vicariously liable for injuries sustained due to another party's negligence in failing to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501-502 (1993).

To support a claim under Labor Law §241(6), the particular regulation relied upon by the plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles. *See Misicki v. Caradonna*, 12 N.Y.3d 511, 515 (2009). Here, Montes claims that Collins and Turner violated three specific safety regulations, 12 NYCRR §23-1.7(e)(1), 12 NYCRR §23-1.7(e)(2), and 12 NYCRR §23-2.1.

12 NYCRR §23-1.7(e)(1) states that "all passageways must be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." The courts have held that an alleged violation of this rule is sufficient to support a Labor Law §241(6) cause of action. *See* Rosenberg *v. Ben Krupinski General Contractors, Inc.*, 284 A.D.2d 523 (2nd Dep't 2001); *see also*

Dougherty v. Queens Ballpark Co., LLC, 2011 NY Slip Op 50334U, *4 (Sup. Ct., New York County, February 8, 2011).

Collins and Turner argue that §23-1.7(e)(1) does not apply here because the accident occurred in an open area and not in a passageway as is required in Industrial Code §23-1.7(e)(1). In Montes' deposition he stated that the accident did not occur in the hallway but rather within a room in the apartment. Def. Mot. Exhibit F, 39-41. Industrial Code §23-1.7(e)(1) does not apply here because the room itself is not a passageway. Collins and Turner are granted summary judgment dismissing Montes' Labor Law §241(6) cause of action based upon an alleged violation of this code section.

12 NYCRR §23-1.7(e)(2) states that "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." The courts have held that an alleged violation of this rule is sufficient to support a Labor Law §241(6) cause of action. *See Smith v. Hines GS Properties, Inc.*, 29 A.D.3d 433 (1st Dep't 2006); *see also Roman v. Hudson Telegraph Associates*, 15 A.D.2d 227 (1st Dep't 2005); *Maza v. University Avenue Development Corp.*, 13 A.D.3d 65 (1st Dep't 2004); *Canning v. Barney's New York*, 289 A.D.2d 32 (1st Dep't 2002).

Collins and Turner argue that §23-1.7(e)(2) is inapplicable because the doorknob was not intended to be used at the site, nor is one doorknob an "accumulation" of dirt and debris. Collins and Turner cite *Vital v. City of New York*, 43 A.D.3d 309 (1st Dep't 2007), where the plaintiff slipped on a sandwich wrapper. In *Vital*, the First Department held that a transient piece of paper was not the type of work-related debris contemplated

in the statute. *Vital*, 43 A.D.3d at 310-311. Montes argues that there is a difference between a doorknob and a sandwich wrapper, and the court in *Vital* dismissed the §241(6) cause of action because the transparent sandwich wrapper, and that *Vital* is therefore inapplicable.

Industrial Code §23-1.7(e) is meant to protect workers from tripping hazards while working. Subsection 2 specifically enumerates four types of items that workers may fall over: debris, dirt, tools, and materials. While it is clear that a doorknob is not dirt or a tool, it could be considered debris or a material. The drafters of the statute sought to prevent tripping and a round doorknob in the middle of a room may be deemed a tripping hazard by a jury, which is consistent with the intent of the regulation. Turner's and Collins' motion for summary judgment is therefore denied with respect to the Labor Law §241(6) cause of action predicated on an alleged violation of Industrial Code 23-1.7(e)(2).

12 NYCRR §23-2.1 states that "all building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." The courts have held that an alleged violation of this section of the Industrial Code is sufficient to support a Labor Law §241(6) cause of action. *See Scannell v. Mt. Sinai Medical Center*, 256 A.D.2d 214 (1st Dep't 1998); *see also Randazzo v. Consolidated Edison Company of New York*, 271 A.D.2d 667 (2nd Dep't 2000). Collins and Turner argue that the doorknob was not a building "material" because it was not being used at the construction site, that the doorknob was not being "stored" and that there were no

material "piles" here because there was only one object. The Court agrees that, under the circumstances presented herein-- a stray doorknob not being stored-- Industrial Code §23-2.1 is not applicable, and Collins and Turner are granted summary judgment dismissing Montes' Labor Law §241(6) claim based upon an alleged violation of this code section.

Labor Law §200

Labor Law §200 is a statutory representation of the common law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work. *Singh v. Black Diamonds LLC*, 24 A.D.3d 138, 139 (1st Dep't 2005). Liability can only be imposed if the defendant exercised control or supervision specifically over the work that resulted in the accident and had actual or constructive notice of the purportedly unsafe condition. *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352 (1998). General supervisory control is insufficient to impute liability. *O'Sullivan v. IDI Construction Co.*, 28 A.D.3d 225, 226 (1st Dep't 2006), *aff'd by* 7 N.Y.3d 805 (overall responsibility for the safety of the work was insufficient to raise a question of fact as to negligence). Actual supervisory input into the way work is performed is required for §200 liability. *Hughes v. Tishman Construction Corp.*, 40 A.D.3d 305 (1st Dep't 2007).

If an accident is caused by a dangerous condition at the premises, rather than the methods used in the work, the plaintiff "need not establish that the defendant owners exercised supervision and control over his work in order to prevail on Labor Law §200 cause of action." *See Espinosa v. Azure Holdings II, LP*, 58 A.D.3d 202, 203 (1st Dep't 2008); *see also Griffin v. New York City Transit Authority*, 16 A.D.3d 202, 203 (1st Dep't

2005). In that circumstance, plaintiff need only show that the defendant owner/general contractor had either actual or constructive notice of the defective condition. *See Griffin*, 16 A.D.3d at 203.

Here, Montes claims that his injury was caused by Turner's failure to clean up the work area. Turner has denied actual or constructive notice of the stray doorknob. In opposition, Montes has not submitted any evidence to show that Turner knew about the wooden doorknob resting on the floor. Additionally, Montes has not submitted any evidence to show that the doorknob was in the room for long enough to support a finding of constructive notice. Thus, Montes' Labor Law §200 cause of action may not be maintained on the theory of actual or constructive notice of a dangerous condition.

With respect to Montes' claim that Turner had actual supervision and authority over the workers' methods of performing the work, George Kenna testified that if the site safety supervisor saw an unsafe situation he could cordon off the area, stop the worker or notify the subcontractor and have the subcontractor remedy the issue. Def. Mot. Exhibit G, 27-29. In addition, each morning, Mr. Kenna met with the foremen of the subcontractors to go over the project and what progress the subcontractors had made. Def. Mot. Exhibit G, 27.

This level of supervision, however, is not sufficient to impute Labor Law §200 liability on Turner. There is no evidence in the record that Turner instructed the subcontractors how the work had to be done. While Turner gave housekeeping instructions to the subcontractors, it exercised no control over the way the subcontractors

complied with these instructions and had no say in the manner in which the work was done.

Because Montes has not raised a material issue of fact as to whether Turner exercised sufficient control or supervision for liability under Labor Law §200, Turner's motion for summary judgment is granted on the Labor Law §200 claim.

Open Commission

Even though a note of issue has been filed, the Court grants Turner's and Collins' motion for the deposition of Vincent Palumbo, as there are sufficient special circumstances to warrant this small amount of post-note discovery.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendants Collins Enterprises LLC and Turner Construction Corporation is granted to the extent that plaintiff Teddy Montes' Labor Law §200 cause of action and Labor Law §240(1) causes of action are dismissed, and the motion is otherwise denied in accordance with the above decision; and it is further

ORDERED that the defendants' motion for an open commission is granted.

Submit proposed order on notice for Open Commission.

This constitutes the decision and the order of the Court.

Dated: New York, New York
July 8, 2011

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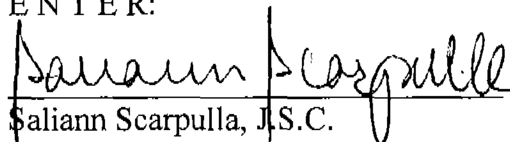

Saliann Scarpulla, J.S.C.