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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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VIDAL CADIZ and ROSA OCHOA,

Index No.:31110/07

Plaintiff(s),

Motion Date:11/15/11

- against -

Motion Cal. No.: 5
Motion Seq. No: 2

BOVIS LEND LEASE LMB, INC. and LOWER MANHATTAN DEVELOPMENT CORPORATION,

Defendant(s).

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BOVIS LEND LEASE LMB, INC. and LOWER MANHATTAN DEVELOPMENT CORPORATION,

Third-Party
Index No.: 350134/08

Third-party Plaintiff(s),

- against -

THE JOHN GALT CORP.,

Third-Party Defendant(s).

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The following papers numbered 1 - 16 read on this motion by the defendants/third-party plaintiffs for an order granting summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Support-Service.....	5 - 6
Affirmation in Opposition-Service.....	7 - 8
Affirmation in Support/Opposition-Exhibits-Service...	9 - 11
Reply Affirmation-Exhibits-Service.....	12 - 14
Reply Affirmation-Service.....	15 - 16

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on May 7, 2007 when he was injured while working at the premises located at 130 Liberty Street in the City, County and State of New York. It is uncontested that, at the time of the accident, plaintiff was employed by third-party defendant The John Galt Corp. ("Galt") and conducted asbestos abatement at the subject premises. It is also uncontested that defendant/third-party plaintiff Bovis Lend Lease, LMB, Inc. ("Bovis") was the construction manager and defendant/third-party plaintiff Lower Manhattan Development Corporation ("LMDC") was the owner of the property. This action was commenced on December 18, 2007 by the filing of a summons and complaint. On or about March 7, 2008, defendants Bovis and LMDC commenced a third-party action against Galt.

Defendants/third-party plaintiffs Bovis and LMDC now move, pursuant to CPLR §3212, for an order granting summary judgment. CPLR §3212(b) requires that for a court to grant summary judgment the court must determine, as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see, Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

It is well-settled that the proponent of a summary judgment motion 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 (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

Defendants/third-party plaintiffs Bovis and LMDC assert that summary judgment is warranted in this action because, pursuant to Labor Law §200, §240 and §241(6), plaintiff cannot maintain this action. Defendant/third-party plaintiff LMDC also avers that the complaint against it must be dismissed because plaintiff failed to file a notice of claim as required by the Urban Development Corporation Act. Finally, the movants assert that they are entitled to contractual indemnification from third-party defendant Galt.

Notice of Claim

Defendants/third-party plaintiffs Bovis and LMDC assert that the instant complaint must be dismissed as against LMDC for plaintiff's failure to serve a notice of claim in accordance with the Urban Development Corporation Act. In support of this contention, the movants submit the affirmation of Andrew Wu, Esq., General Counsel of LMDC. In his affirmation, Mr. Wu states that

LMDC is a wholly owned subsidiary of the New York State Urban Development Corporation. Pursuant to §31-a of the Urban Development Corporation Act, a party may only commence an action against the New York State Urban Development Corporation, or any of its subsidiaries, after a notice of claim has been filed. Plaintiff, in opposition to the motion, offers this court no evidence that a notice of claim was filed within the 90 day time period required by statute. Accordingly, that portion of the instant motion which seeks summary judgment as against defendant LMDC is granted and the complaint is hereby dismissed as against this defendant.

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Russin v Picciano & Son*, 54 NY2d 311 [1981]). However, there is no liability under the common-law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed *(see Comes v New York State Elec. & Gas Corp., supra; Russin v Picciano & Son, supra; Schuler v Kings Plaza Shopping Ctr. & Mar.*, 294 AD2d 556 [2002]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392 [1997]).

In his deposition, plaintiff testified that he was given his daily work instructions by an employee of Galt, not by the employees of the movants. Plaintiff offers no evidence that either LMDC or Bovis exercised supervision or control over his work. Accordingly, that portion of the instant which seeks dismissal of plaintiff's Labor Law §200 claims is granted.

Labor Law § 240(1)

Section 240(1) of the Labor Law provides, in pertinent part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

This section was enacted for the protection of workers from injury and "'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'"

(Zimmer v Chemung County Performing Arts, 65 NY2d 513, 521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

The purpose of Labor Law § 240(1) is to protect workers from elevation-related risks (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Joblon v Solow*, 91 NY2d 457 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). To establish liability under Labor Law §240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries *(see Blake v Neighborhood Hous. Servs. of N.Y. City, supra; Rocovich v Consolidated Edison Co., supra*). In the instant case, it is alleged that plaintiff was injured when his foot slipped on plastic covering on the floor of the scaffold on which he worked. Plaintiff does not assert that this was an elevation-related accident, nor is there any allegation that the scaffold itself was defective or that the scaffold caused plaintiff's injuries. Thus, it is clear that the instant action does not fall under the category of cases contemplated by Labor Law §240(1). Accordingly, that portion of the instant motion which seeks summary judgment and dismissal of plaintiff's causes of action pursuant to Labor Law §240(1) is granted.

Labor Law § 241

Finally, defendants/third-party plaintiffs Bovis and LMDC seek summary judgment and dismissal of plaintiff's causes of action alleged pursuant to Labor Law §241. Labor Law §241(6) imposes a nondelegable duty on owners and contractors regardless of their control or supervision of the work site, and plaintiff need not prove that defendant had actual or constructive notice of the dangerous condition in issue (*See, Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 [1998]). The statute requires that safeguards be taken in all areas in which construction, excavation, or demolition work is being performed (*See, Labor Law §241*).

In order to prove liability pursuant to Labor Law §241(6), plaintiff must plead and prove specific violations of the Industrial Code. A review of the pleadings and the Verified Bill of Particulars reveals that plaintiff has failed to plead any specific violations of the Industrial Code. Although plaintiff's counsel refers to several sections of the Industrial Code in his Affirmation in Opposition to the motion, he does not specifically state how the defendants violated these sections. Moreover, plaintiff does not move, pursuant to CPLR §3025, to amend his complaint or Bill of Particulars to include specific violations of the Industrial Code. Thus, as plaintiff has failed to plead and prove that the defendants violated specific sections of the

Industrial Code, his causes of action, pursuant to Labor Law §241 must be dismissed by this court (See, *Smith v. Hercules Construction Corporation*, 274 AD2d 467 [2d Dept.2000]). Accordingly, it is,

ORDERED, that the complaint is dismissed in its entirety as against defendants/third-party plaintiffs Bovis Lend Lease, LMB, Inc. and Lower Manhattan Development Corporation.

Indemnification

As the complaint has now been dismissed in its entirety as against defendants/third-party plaintiffs Bovis and LMDC, that portion of the instant motion which seeks indemnification from the third-party defendant is denied as moot.

Dated: January 13, 2012

JANICE A. TAYLOR, J.S.C.

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