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

PRESENT: HON. PAUL WOOTEN Justice PART 7

CHRISTOPHER COUGHLIN and KATHLEEN COUGHLIN,

Plaintiffs,

- against-

205-209 EAST 57th STREET ASSOCIATES, LLC and BOVIS LEND LEASE LMB, Inc.,

Defendants.

INDEX NO. 100976/09

MOTION SEQ. NO. 004

205-209 EAST 57th STREET ASSOCIATES, LLC and BOVIS LEND LEASE LMB, Inc.,

Third-Party Plaintiffs,

- against-

FIVE STAR ELECTRIC CORP.,

Third-Party Defendant.

THIRD-PARTY INDEX NO. 590284/09

The following papers were read on this motion by defendants 205-209 East 57th Street Associates, LLC (Associates) and Bovis Lend Lease LMB, Inc. for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3, 4
Replying Affidavits (Reply Memo)	5, 6

Cross-Motion: ☐ Yes ■ No

205-209 East 57th Street Associates, LLC (Associates) and Bovis Lend Lease LMB, Inc. (Bovis) (together, defendants) move for summary judgment dismissing Christopher Coughlin's (plaintiff) first cause of action for common-law negligence, second cause of action for violation of Labor Law § 200, third cause of action for violation of Labor Law § 240, portions of the fourth cause of action for violation of Labor Law § 241 as to certain sections of the Industrial Code of the State of New York (the Code) and OSHA standards, and the fifth cause of action for violation of certain sections of the Code, as being duplicative of the fourth cause of action. Plaintiff's sixth cause of action for loss of services on behalf of Kathleen Coughlin was

discontinued by stipulation dated February 18, 2010 (*see* Notice of Motion, exhibit B). Defendants also seek summary judgment against third-party defendant Five Star Electric Corp. (Five Star) on their claim for contractual indemnity.

BACKGROUND

Plaintiff was an electrician employed by Five Star, who was working at a building located at 207 East 57th Street, New York, New York (the Building), when he fell in the stairway between the 15th and 16th floors (bill of particulars, items 1-3). Associates was the owner of the Building (Answer, ¶ 5), and Bovis was the general contractor, pursuant to a contract dated September 10, 2004, for the construction of the Building (the Project) (Hyers EBT, exhibit I at 12; Halpern EBT, exhibit K at 9). Five Star was the electrical subcontractor on the Project, pursuant to a contract dated October 4, 2004 (the Five Star Contract) (*id.* at 18; Boyle EBT, at 13).

Defendants have sought partial dismissal of plaintiff's claim under Labor Law § 241(6) for the following alleged violations of Code sections: 23-1.5, 23-1.7(a), (b), (d), 23-1.16, 23-1.22, 23-1.28, 23-1.30, 23-1.31, 23-2.1, 23-11.3, 5, 6, and 7 and for alleged violations of OSHA standards (Shapiro affirmation, ¶¶ 22-33). Defendants are not seeking dismissal of all of the alleged Code violations contained within plaintiff's fourth cause of action (*id.*, n 2). Plaintiff only submits opposition to defendants' motion regarding dismissal of his claims under Code sections 23-1.7(d), 23-1.30 and 23-2.1 and, therefore, the unopposed portions of defendants' motion as to the other Code sections and OSHA standards are granted and those code violations dismissed (Hansen affirmation, ¶¶ 10-13).

Defendants also sought dismissal of plaintiff's claim under Labor Law § 240(1), as inapplicable to this case (Shapiro affirmation, ¶ 21). Plaintiff has not opposed this application, and accordingly, this claim is also dismissed (*see* Hansen affirmation). Defendants also seek dismissal of the fifth cause of action as duplicative. Since, in order to establish a claim under

Labor Law § 241(6), a plaintiff must show that the owner, general contractor or their agent violated a section of the Code that sets forth a specific, rather than a general, safety standard and that this violation was a proximate cause of his accident (*Ross v Curtis-Palmer Hydro-Elec. Co., Inc.*, 81 NY2d 494, 501-505 [1993]), the fifth cause of action for violations of certain sections of the Code is dismissed as duplicative.

Plaintiff alleges that on February 10, 2006 he was in the Building installing electrical outlets and guiding a co-axial cable through electrical risers as part of Five Star's work on the Project (plaintiff EBT, exhibit H at 18-19, 22). He states that he had been in the Building that morning since 7 a.m. and that, with a co-worker at the top of the Building, he was guiding the co-axial cable down each floor by going down the stairway (*id.* at 29, 31). He further states that at about 10:30 a.m., he was going down between the 16th and 15th floors, on the sixth step, when he slipped on a couple of metal screws which were an inch and a quarter to an inch and five-eights in length (*id.* at 26, 50-51).

Plaintiff asserts that he went forward, fell and twisted his right leg (*id.* at 53-54). He states that he did not see the screws before he fell and that he had not been in that portion of the stairway before that day (*id.* at 39, 55, 120). He also states that the stairs were made of concrete, the stairway was dusty, dirty, and dry and it was "not very bright" (*id.* at 44, 46, 126). Plaintiff contends that as a result of his fall he suffered a torn meniscus in his right knee requiring surgical repair in March 2006 and July 2007, as well as physical therapy (*id.* at 68, 85).

Defendants contend that they neither controlled nor supervised plaintiff's work and did not provide him with any equipment (*id.* at 36, 41, 43). They also state that Bovis was responsible for cleaning and debris removal on the Project, that Bovis had a staff of laborers employed to clean the Building and that the passageways and stairways were "cleaned daily" (Hyers EBT, exhibit I at 27-29). Defendants allege that the Bovis site supervisor walked the

stairways three times daily, between 7 and 8 a.m., after lunch and in the evening before wrapping up work for the day and that the Bovis laborers cleaned the stairways by sweeping the early morning every day (*id.* at 32-33, 36-37, 70, 94-96). They further state that there were light bulbs on every landing of the stairway, providing "more than enough light to see" (*id.* at 51, 103).

Five Star, in its affirmation in partial opposition, states that it was the electrical subcontractor on the Project and that, as general contractor Bovis was responsible for cleaning up on the Project (Halpern EBT, exhibit K at 9, 15-16, 19). It further states that Bovis cleaned regularly and that Five Star was unaware of any complaints as to the condition of the stairways (Hyers EBT, exhibit I at 55-56, 61; Halpern EBT, exhibit K at 41, 43). Five Star avers that the portion of Bovis' motion seeking summary judgment on the third-party complaint for contractual indemnification should be denied as Bovis has failed to establish its prima facie case, namely that it is free of negligence.

STANDARDS

Labor Law § 241(6)

Labor Law § 241 provides:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
>
> [6] All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] ... [in accordance with rules promulgated by the Commissioner of Labor]."

A cause of action under Labor Law § 241(6) must allege violation of a specific, rather than a general, safety standard set forth in the Code and that this violation was a proximate cause of the accident (*Ross,* 81 NY2d at 501-505).

Code Provisions at Issue

Code § 23-1.7(d) (the Slippery Condition Rule) provides:

> (d) 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.

Code § 23-1.30 (the Illumination Rule) provides:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction ... but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, staircase, landing or similar area where persons are required to pass.

Code § 23-2.1 (the Storage and Disposal Rule) provides:

> (a) Storage of material or equipment.
> (1) 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, staircase or other thoroughfare.
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to the edge of a floor, platform or scaffold as to endanger any person beneath such edge.
> (b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

DISCUSSION

The Slippery Condition Rule, by its terms, applies to a "passageway ... which is in a slippery condition ... [and it requires] [i]ce, snow, water, grease and any other foreign substance [to be] removed, sanded or covered to provide safe footing." "[E]xtensive debris" has been held to constitute a violation of the Slippery Condition Rule (*see Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259 [1st Dept 2005]; *Farina v Plaza Constr. Co.*, 238 AD2d 158 [1st Dept 1997]; *cf.*,

Aguilera v Pistilli Constr. & Dev. Corp., 63 AD3d 763, 765 [2d Dept 2011] [holding that an "accumulation of debris on the stairwell did not constitute a 'slippery condition' within the meaning of this code section"]). Generally, to sustain a claim under this regulation, a plaintiff must present "evidence of a slippery condition" (*Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008]). Plaintiff stated that the stairway was "dirty, dusty ... [and] dry" (plaintiff EBT, exhibit H at 46). The two screws that plaintiff allegedly stepped on do not fit within the term "foreign substance" as contemplated by this Code provision. As The Slippery Condition Rule is not applicable to this case, plaintiff's claim pursuant to Code § 23-1.7(d) is dismissed.

The only evidence on the record supporting plaintiff's allegation that defendants violated the Illumination Rule is plaintiff's own statement at his EBT that the light at every landing "wasn't very bright" (plaintiff EBT, exhibit H at 126). Defendants have presented evidence that the light bulbs in the stairwell were 100 watt bulbs and that they were in working order, providing enough light to see (Halpern EBT, exhibit K at 15; Hyers EBT, exhibit I at 103). Since plaintiff has not proffered any evidence that the lighting in the stairway fell below the requirements of the Illumination Rule, his claim under Code § 23-1.30 is dismissed (*see Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 349 [1st Dept 2006]).

The Storage and Disposal Rule contains two distinct provisions, one refers to the storage of material or equipment, and other to disposal of debris (*see* 12 NY ADC 23-2.1). Section 23-2.1(a) refers to storage of materials so that they are "orderly," or not so heavy that they exceed the carrying capacity of the floor, or are too close to the edge that they might fall and endanger a person beneath the edge. Additionally, it has been repeatedly held that section 23-2.1(b) governing disposal of materials "lacks the specificity required to support a cause of action under Labor Law § 241(6)" (*Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 452

[2d Dept 2004]]; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2d Dept 2008]; *Quinlan v City of New York*, 293 AD2d 262 [1st Dept 2002]). Both provisions of Section 23-2.1 of the Industrial Code are inapplicable to this case (*Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2008]; *see also Cody v State of New York*, 82 AD3d 925 [2d Dept 2011]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 452 [2d Dept 2004]). Accordingly, plaintiff's claims under the Storage and Disposal Rule are dismissed.

Labor Law § 200

Labor Law § 200 is a codification of common-law negligence and, to be held liable, a party must have the authority to control the activity that caused the plaintiff's injury (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878 [1993]). There is no liability for an owner that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*see Lombardi v Stout*, 80 NY2d 290, 294 [1992]).

Defendants state that they did not supervise or control the manner in which plaintiff performed his work (Hansen affirmation dated December 23, 2011, ¶ 5). Plaintiff does not contend that there was any supervisory control and, instead, asserts that there was a defective condition of two screws in the stairway between the 16th and 15th floors of the Building (plaintiff EBT, exhibit H at 36, 41, 43). Consequently, any claims under Labor Law § 200 as to the method or manner in which plaintiff performed his work are barred (*see Lombardi,* 80 NY2d at 294).

Property owners have been held responsible for a defective or dangerous condition on the premises (*see Widawski v 217 Elizabeth St. Corp.*, 40 AD3d 483, 485 [1st Dept 2007]; *Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]; *see also Bridges v Wyanddanch Community Dev. Corp.*, 66 AD3d 938 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). Labor Law § 200 "is tantamount to a common-law negligence claim

in a workplace context" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*see Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In this case, defendants have presented evidence that the stairway was inspected and then swept three times daily and that this cleaning was done for the first time between 7 and 8 a.m. (Hyers EBT, exhibit I at 32-33, 36-37, 70, 94-96). Plaintiff stated that he first saw the screws after he fell at about 10:30 a.m. and that he had not been in the stairway at that location previously (plaintiff EBT, exhibit H at 39, 55, 120). Defendants have, therefore, shown that they neither created nor had actual or constructive notice of the allegedly hazardous condition (*see Gordon*, 67 NY2d at 837), and plaintiff has failed to proffer any proof as to how long the purportedly dangerous condition existed, so as to show that defendants had an opportunity to observe and correct it, or that they were actually aware of it or that they created the condition (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480 [1st Dept 2010]; *Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469 [1st Dept 2008]). Accordingly, the portion of defendants' motion that seeks to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is granted.

Contractual Indemnity

In contractual indemnity, a party seeking to impose indemnity must show that it is free

from negligence, but need not show that the proposed indemnitor is negligent, and must show that the indemnification provision applies (*see Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]). In the Five Star Contract, Five Star agreed "to defend, indemnify and save harmless [defendants] ... from and against any claim ... attributable to bodily injury ... caused by, arising out of, resulting from or occurring in connection with [Five Star's work on the Project]." Five Star's opposition is based upon "Bovis' own active negligence" (Diamantis affirmation, ¶ 4). However, the Court has dismissed plaintiff's claims under Labor Law § 200 and common-law negligence and, therefore, plaintiff's claims against defendants is based upon their statutory status, rather than any "active negligence." Consequently, defendants' motion for partial summary judgment on contractual indemnity against Five Star and dismissing Five Star's counterclaims against them is granted.

CONCLUSION

It is, therefore,

ORDERED that the portion of defendants' motion that seeks to dismiss plaintiff's third cause of action for violating Labor Law § 240(1) is granted without opposition; and it is further

ORDERED that the portion of defendants' motion that seeks to dismiss the portion of plaintiff's fourth cause of action for violation of Labor Law § 241(6) as to 22 NYCRR 23-1.5, 23-1.7 (a) and (b), 23-1.16, 23-1.22, 23-1.28, 23-1.31, 23-11.3, 5, 6, and 7 and violations of OSHA is granted without opposition; and it is further

ORDERED that the portion of defendants' motion that seeks to dismiss plaintiff's first cause of action for negligence, second cause of action for violation of Labor Law § 200, the portion of plaintiff's fourth cause of action for violation of Labor Law § 241(6) as to 22 NYCRR 23-1.7(d), 23-1.30 and 23-2.1 and fifth cause of action for violation of the New York State Industrial Code is granted; and it is further

ORDERED that the portion of defendants' motion that seeks summary judgment on

contractual indemnity against Five Star Electric Corp. is granted; and it is further,

ORDERED that 205-209 East 57th Street Associates, LLC is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

Dated: 6/15/12

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**