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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Boschi

-v-

F. J. Sciame Construction

INDEX NO. 117462/09

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for Summ. Judgment to dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JUN 14 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 6/15/12

, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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ALBERT BOSCHI,

Plaintiff,

Index No. 117462/2009

-against-

F.J. SCIAME CONSTRUCTION CO., INC.,

Defendant.

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LOUIS B. YORK, J.:

Currently in this Labor Law action, defendant moves for summary judgment dismissing plaintiff's complaint, which asserts claims under Labor Law §§ 200, 240(1), 241(6), and OSHA. At oral argument, plaintiff conceded that he has not stated a claim under Labor Law § 240(1). Therefore, the Court grants that portion of the motion without opposition, and turns to the remaining claims.

The accident in question occurred on July 2, 2009 at Cooper Union's New Academic Building, where plaintiff Albert Boschi, an electrician, worked on a construction project. According to plaintiff, while climbing stairs from the basement to the first floor lobby, he stepped on an improperly constructed step and stumbled. In his bill of particulars, plaintiff specified that the stairway did not have proper wood pillars and/or slats, had an accumulation of debris and contained a protruding lip on the step in question which created a tripping hazard.

Plaintiff sued defendant, the general contractor, based on his alleged injuries. Defendant commenced a third-party action against plaintiff's direct employer, Polo Electric Corporation ("Polo Electric"), but discontinued this action by stipulation in May of 2011. The Note of Issue

was filed on November 2, 2011, shortly after the Court denied defendant's untimely motion to commence a new third-party action.

At his deposition, plaintiff described the incident in more detail. He claimed that his left boot came into contact with a piece of plywood that overhung a step, and this contact caused him to stumble but not fall, and to twist and jam his knee. He stated there was no accumulation of debris and that the lighting was adequate. He indicated that he previously fell on a staircase at the site, but could not recall whether it was this staircase or another one. Plaintiff did not seek immediate medical treatment due to the accident in dispute here, but he did fill out an incident report. When plaintiff returned to the work site after the July 4 holiday break, he informed his supervisor that he was not going to work, but instead was leaving to seek medical treatment and file a worker's compensation claim.

The parties also deposed defendant's employee John Fitzpatrick, a superintendent at the project from start to finish. At the deposition Fitzpatrick stated that there were no other accidents or complaints relating to the staircase in question. He specified that there were no problems to his knowledge with the plywood which had been placed there to protect the stairs until the work was complete.[1]

As a preliminary matter, the Court addresses defendant's objections to plaintiff's late submission of his opposition papers and to the affidavits contained in those papers. The Court considers the opposition despite defendant's objection that plaintiff submitted it approximately 9

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[1]In its motion papers, defendant notes that this was plaintiff's third alleged injury at the work site, over the course of six months. Defendant also states that in July 2008 plaintiff allegedly sustained back and knee injuries when, as an employee of Volpe Electric, he was shocked by an electric volt and fell from a ladder. However, as neither the prior accidents nor the prior lawsuit relate to the question of whether plaintiff has alleged valid causes of action under the Labor Law and OSHA, the Court shall not discuss them.

days late. Defendant had sufficient time to prepare and submit his comprehensive reply papers, and thus has not shown prejudice. Its statement that the lateness is prejudicial simply because plaintiff knew about the actual deadline makes no sense. Moreover, although the original submission date was February 29, the motion was not argued before this Court until April 11. Thus, defendant had ample opportunity to request additional time for its response if necessary.

The Court further notes that there is no suggestion that plaintiff delayed in providing defendant with expert disclosure in compliance with the terms of this Court's discovery orders, or that defendant lacked access to the bill of particulars and plaintiff's deposition testimony. Though it received the opposition a little late, defendant was aware of the general substance that would be in them. Given the slight delay and the lack of prejudice, the fundamental principle that litigants should have the right to their day in court prevails.

However, this does not mean that every annexed affidavit should be considered. The Court agrees with defendant that the affidavit of plaintiff's co-worker John Coover is improper as plaintiff gave no notice that Mr. Coover would be a witness. Therefore, the Court does not consider the document. Moreover, though the Court does not exclude the affidavit of plaintiff's expert Nicholas Bellizzi – for the reasons set forth above and because there is no allegation that plaintiff was untimely in providing defendant with its expert disclosure – after reviewing the affidavit Court nevertheless finds it lacks evidentiary value. As defendant notes, the affidavit simply states that based on various deposition transcripts and on the site safety and accident reports plaintiff has articulated a legal basis for his claims. Bellizzi does not indicate that he review photographs or otherwise used his engineering knowledge in reaching this conclusion, and his affidavit does not formulate any nonlegal arguments which require an engineer's expertise. Moreover, his affidavit adds nothing to the materials already before the Court.

Now, the Court turns to defendant's motion. As stated, plaintiff concedes his Labor Law § 240(1) claim has no merit. Therefore, the Court addresses the next issue, whether a cause of action exists under Labor Law § 241(6). Under this provision a nondelegable duty of reasonable care is placed on owners and contractors. To state a viable claim a plaintiff must demonstrate that the defendant has violated an Industrial Code rule or regulation which does not impose per se liability but may be considered in evaluating the defendant's negligence. If negligence exists, the statutorily responsible parties are vicariously liable without regard to fault. Keegan v. Swissotel New York, Inc., 262 A.D.2d 111, 113-114, 692 N.Y.S.2d 39, 42 (1st Dept. 1999)(citations omitted). Moreover, the rule must involve a specific, positive command. A general directive relating to work site safety is insufficient. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 55 (1993). For liability to exist the plaintiff also must show proximate cause between the alleged violation and the ensuing accident. Padilla v. Francis Schervier Housing Devel. Fund Corp., 330 A.D.2d 194, 196, 758 N.Y.S.2d 3, 5 (1st Dept. 2003).

Here, plaintiff earlier alleged that defendant violated Industrial Code §§ 23-1.5, 23-1.7, 23-1.15, 23-2.1, and 23-2.7. Defendant is correct that plaintiff does not challenge defendant's argument as to this provision or to Industrial Code §§ 23-1.5, 23-1.7 (except for subsection (e)(1)), 23-1.15, 23-2.1, and 23-2.7. However, defendant's suggestion that plaintiff has abandoned *all* of his Industrial Code claims is inaccurate. Indeed, plaintiff's memorandum in opposition devotes several pages to an argument that Industrial Code § 23-1.7(a)(1) applies to the case at hand. After careful consideration the Court finds plaintiff's argument as to this provision persuasive.

Primarily, Industrial Code § 23-1.7(e)(1) refers to tripping hazards in passageways. This provision is specific enough to support a Labor Law § 241(6) claim, and also can include a stairway. See Morris v. City of New York, 87 A.D.3d 918, 919, 929 N.Y.S.2d 585, 586 (1st Dept. 2011). At the same time, it is broad enough to include "any . . . conditions which could cause tripping." Industrial Code § 23-1.7(e)(1). Here, plaintiff alleges that he tripped while on the stairs. Therefore, the allegation comes within the statute's purview.

In addition, defendant's overly restrictive discussion, which focuses entirely on debris and sharp projections,[2] fails to consider plaintiff's claim that the step was covered with plywood in an unsafe fashion and that the plywood therefore created an obstruction or condition which could cause tripping. See Polanski-Tarnawa v. J. Grace Co., Inc., Index No. 12936/04 (Sup. Ct. Richmond County May 22, 2007)(avail at 2007 WL 1500950, at *2)(issue of fact existed under Industrial Code § 23-1.7(e)(1) as to whether board placed on elevator service floor to protect the floor created a tripping hazard, causing plaintiff to trip and then fall through unfinished flooring). As defendant has failed to show the absence of a triable issue of fact concerning whether the plywood created a tripping hazard, denial of summary judgment is proper. See Torres v. Forest City Ratner Co., LLC, 89 A.D.3d 928, 929, 933 N.Y.S.2d 71, 73 (2nd Dept. 2011).

Plaintiff also argues that Industrial Code §23-1.7(e)(1) applies because the plywood itself is a sharp projection. As plaintiff points out, in Giza v. New York City School Constr. Auth., 22 A.D.3d 800, 801, 803 N.Y.S.2d 162, 163 (2nd Dept. 2005), the Second Department found an issue of fact as to whether a warped plywood board supported a claim under Industrial Code §

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[2] Plaintiff at times has mentioned debris, but it appears that his claim, as focused following the completion of discovery, centers on the condition and placement of the plywood.

23-1.7(e)(2). Plaintiff also cites Lenard v. 1251 Americas Assoc., 241 A.D.2d 391, 393, 660 N.Y.S.2d 416, 418 (1st Dept. 1997), in which the First Department found that a doorstop was a "sharp projection" which, in the proper circumstances, would support a claim under Industrial Code § 23-1.7(e)(1). In the case before this Court, there is no evidence that the board was warped, and plaintiff has not shown that the protrusion of the plywood was as pronounced as a doorstop. However, the Court concludes that given the judicial predisposition to resolve cases on their merits, this issue of whether the protrusion was "sharp" is properly reserved for the trier of fact.

Defendant also moves to dismiss plaintiff's Labor Law § 200 and common law negligence claims. Labor Law § 200 is a codification of the common law of negligence. Coyago v. Mapa Prop., Inc., 73 A.D.3d 664, 665, 901 N.Y.S.2d 616, 618 (1st Dept. 2010). Therefore, the Court's determination as to the viability of one of these claims should apply to the other one as well. See Vargas v. New York City Transit Auth., 60 A.D.3d 438, 440, 874 N.Y.S.2d 446, 449 (1st Dept. 2009). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed." Ortega v. Puccia, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 (2nd Dept. 2008).

Defendant first argues that plaintiff's Labor Law § 200 and common law negligence claims must be dismissed because it did not control or supervise plaintiff's work. Defendant is correct that, if the alleged defect or dangerous condition stemmed from plaintiff's employer's methods — that is, the manner in which the employer directed its employees to conduct their work – the claims would be dismissed absent such a showing. See Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 272, 841 N.Y.S.2d 249, 257-58 (1st Dept. 2007).

Moreover, "it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed." Hughes v. Tishman Const. Corp., 40 A.D.3d 305, 306, 836 N.Y.S.2d 86, 89 (1st Dept. 2007)(citations and internal quotation marks omitted). To the extent that plaintiff ever intended to raise an argument on this theory, defendant is correct that the argument would lack merit. See Zieris v. City of New York, 93 A.D.3d 479, 479, 940 N.Y.S.2d 72, 73 (1st Dept. 2012).

In his opposition papers, however, plaintiff clarifies that his Labor Law § 200 and common law negligence claims do not rest on this theory. Instead, plaintiff argues that defendant is liable because a dangerous or defective premises condition existed at the work site. Therefore, these arguments of defendant do not apply. See Cordiero v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906, 931 N.Y.S.2d 41, 44 (1st Dept. 2011). Instead, in a case alleging that a dangerous or defective condition existed, "no liability lies absent proof that a defendant created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant has prior actual or constructive notice of the same." Makarius v. Port Authority of New York and New Jersey, 76 A.D.3d 805, 808, 907 N.Y.S.2d 658, 660 (1st Dept. 2010). This principle applies under both Labor Law § 200 and the common law. Id. Plaintiff argues that under its general supervisory powers defendant should have been aware of the condition and therefore an issue of fact exists as to its liability under both Labor Law § 200 and common law negligence. Defendant counters that it lacked both actual and constructive notice of the alleged dangerous condition.

According to the deposition testimony of plaintiff, there had been other incidents and/or complaints relating to this or other sets of stairs in the building and that the problems had been raised during at least three of the weekly safety meetings. He noted that he had tripped in

another stairwell, and that "a few people complained about it, including myself, because I heard them complain . . . at the safety meetings." Boschi Dep. p 92, ll 10-12. He indicated that other individuals discussed problems with the staircases as well; when asked about the specifics of the complaints, he elaborated that he thought people had tripped on them before. He was not sure whether there had been prior incidents on the particular staircase on which he fell, but noted that there had been "problems with a lot of the staircases . . . . There was constant complaints between welding and the debris on the upper floors. What do they call it, staircases not being finished that were being used for egress and so forth." Id. p 94, ll 1-9. He noted that the project was massive and that the condition of the plywood and the stairs in general was only one of many issues raised at the safety meetings. He further suggested that, as the area was adequately lit and the plywood did not shift when he stepped on it, the problem was entirely with the overhang. He stated that he used the stairs instead of the elevator because employees were not allowed to use the service elevators unless they were traveling more than three flights up or down.[3] He knew that other subcontractors and workers were at the site, but did not know how many and could not speak to their purpose. Instead, he was familiar only with his own responsibilities with Polo Electric.

As earlier indicated, the parties also conducted a deposition of John Fitzpatrick, a superintendent at the project. He reported directly to the project manager, who was off site. Fitzpatrick noted that, as plaintiff stated, other contractors were on site – and, in addition, he specified their identities. He indicated that Site Safety, LLC provided reports on the safety of the work site. However, he noted that there was no safety manager based at the site because the law did not require in this instance. Unlike plaintiff, who could only speak generally to the

[3] Plaintiff states "three stairs," Boschi Dep. p 100, ll 3-4, but he the Court concludes he meant three flights of stairs rather than three steps.

layout of the work site, Fitzpatrick was familiar with the layout and knew how many different staircases there were in the building. He also knew the approximate dimensions of the steps in each staircase. In addition, Fitzpatrick spoke at great length about the staircases and their construction and makeup. He noted that the finished precast was covered with plywood "to protect it from damage." Id. p 30, ll 8-9. According to Fitzpatrick, a subcontractor called Donaldson[4] installed the plywood on the stairs. He also stated that he used the stairway every day.

Plaintiff also cites generally to the deposition transcript of Peter Pothos, plaintiff's supervisor from Polo Electric. Pothos testified that he reported his general safety concerns or issues to defendant's representatives. However, Pothos did not discuss any problems with the stairs with defendant's representatives. He further noted that he participated in job related meetings with Sciame at which safety issues, among other things, were addressed. Plaintiff points out that Pothos said stair safety was the general responsibility of defendant; however, the Court notes that Pothos actually stated, "I guess [defendant], I guess." Pothos Dep p 88 l 16.[5]

Based on the above, defendant has not shown the absence of an issue of fact as to constructive or actual knowledge. Plaintiff has sworn that problems with the stairway was discussed at the general meetings, and Pothos indicated that defendant attended some meetings at which safety issues were discussed. Fitzpatrick acknowledged a general familiarity with the

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[4]Donaldson is introduced at this juncture in the transcript but not further identified here.

[5]In the future, plaintiff should tell the Court where the critical statements appear, as defendant does, rather than require the Court to hunt for the information to which he vaguely refers. It would also be helpful if half of the pages plaintiff annexed were not upside down. Finally, counsel should take care that the pagination on the transcript is accurate. Here, for example, page 88, which the Court cites above, is followed by page 82. The pages are in the correct order but the page numbers are not accurate. As a result of these problems, the Court may not have found all of the critical pages.

construction and condition of the stairs, including the plywood on the steps. Based on the above and on the fact that Pothos reported safety problems (though not the one in dispute) to defendant's representatives, it is possible that if there was excessive overhang or protrusion defendant would have known about it. See Gallagher v. Levien & Co., 72 A.D.3d 407, 409, 898 N.Y.S.2d 35, 37 (1st Dept. 2010). Currently, defendant has the burden of establishing through the evidence that it had no constructive notice as a matter of law – that the condition was not apparent and had not existed long enough prior to the incident in question for defendant to discover and fix the alleged problem. See Finger v. Cortese, 28 A.D.3d 1089, 1091, 815 N.Y.S.2d 801, 803 (4th Dept. 2006). It has not satisfied this high burden. However, at trial it is plaintiff who has the burden of showing constructive or actual notice by a preponderance of the evidence. See id.

Last, defendant seeks to dismiss plaintiff's claims to the extent that they arise under the Occupational Safety and Health Act (OSHA). The Court grants this prong of its motion. As the First Department has stated, OSHA governs employer/employee relationships. Delaney v. City of New York, 78 A.D.3d 540, 541, 911 N.Y.S.2d 57, 59 (1st Dept. 2010). Moreover, OSHA violations by the employer do not create a nondelegable duty applicable to the owner or general contractor; instead, OSHA regulates the employer-employee relationship. Pelleski v. City of Rochester, 198 A.D.2d 762, 762, 605 N.Y.S.2d 692, 694 (4th Dept. 1993), lv denied, 83 N.Y.2d 752, 611 N.Y.S.2d 134 (1994); see Bernardi v. Getty Refining & Marketing Co., 107 Misc. 2d 451, 456, 435 N.Y.S.2d 212, 216 (Sup. Ct. Richmond County 1980)(comparing the Labor Law, which often holds a general contractor or owner liable, to OSHA, which uses a "system . . . to promote safety [which] consists of inspections of worksites and citations and penalties conferred upon the employer"). Defendant was not plaintiff's employer. Therefore, "the OSHA

regulations do not provide a specific statutory duty, the violation of which would result in [defendant's] liability." Khan v. Bangla Motor and Body Shop, Inc., 27 A.D.3d 526, 529, 813 N.Y.S.2d 126, 129 (2nd Dept.), lv dismissed, 7 N.Y.3d 864, 824 N.Y.S.2d 608 (2006). Plaintiff's arguments to the contrary lack merit.

For all of the above reasons, it is

ORDERED that the part of the motion that seeks to dismiss plaintiff's Labor Law § 240(1) claim is granted and that claim is severed and dismissed; and it is further

ORDERED that the prong of the motion that seeks to dismiss plaintiff's Labor Law § 241(6) claim is granted in part and denied in part; and it is further

ORDERED that the portion of the Labor Law § 241(6) claim that rests on Industrial Code §§ 23-1.5, 23-1.7 (except for subsection (e)(1)), 23-1.15, 23-2.1, and 23-2.7 is dismissed, and the part of the claim that rests on Industrial Code § 23-1.7(e)(1) shall continue; and it is further

ORDERED that the prong of the motion that seeks to dismiss plaintiff's Labor Law § 200 and common law negligence claims is denied; and it is further

ORDERD that the part of the motion that seeks to dismiss plaintiff's OSHA claim is granted and that claim is severed and dismissed.

FILED

JUN 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 25, 2012

Enter:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.