

**Stier v One Bryant Park LLC**

2012 NY Slip Op 32535(U)

September 28, 2012

Sup Ct, NY County

Docket Number: 103134/09

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**LOUIS B. YORK**  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 2

Index Number : 103134/2009  
STIER, CHRIS  
vs.  
ONE BRYANT PARK  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

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**  
OCT 04 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 9/28/12

Luy, 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

**LOUIS B. YORK**

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

-----X  
CHRIS STIER,

Plaintiff,

Index No. 103134/09

-against-

ONE BRYANT PARK LLC, ONE BRYANT PARK  
DEVELOPMENT PARTNERS LLC, THE DURST MANAGER  
LLC, and TISHMAN CONSTRUCTION CORPORATION OF  
NEW YORK,

Defendants.

-----X

**LOUIS B. YORK, J.S.C.:**

Defendants bring this motion for summary judgment dismissing plaintiff's complaint in its entirety. Plaintiff opposes the motion. For the reasons set forth below, the court grants defendants' motion in its entirety.

**FILED**  
OCT 04 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

FACTS

The court draws the following pertinent facts from the record. The construction site at issue, known as "One Bryant Park," is located at 1111 Avenue of the Americas, in Manhattan. Defendant One Bryant Park LLC (hereinafter "OBPLL"), holder of the 99-year ground lease, consists of defendant One Bryant Park Development Partners LLC (hereinafter "OBP Development") (majority interest holder and manager of OBPLL) and nonparty Bank of America, N.A. Defendant The Durst Manager LLC (hereinafter "Durst") manages OBP Development and maintains the ground lease. Defendant Tishman Construction Corporation of New York (hereinafter "Tishman") is the construction manager for the One Bryant Park project.

Tishman hired nonparty Total Safety as a site safety consultant. Plaintiff was employed by nonparty Almar Plumbing and Heating Corporation (hereinafter "Almar"), a subcontractor hired by Tishman to perform plumbing work.

On September 2, 2008, at approximately 10:00 A.M., plaintiff and a coworker were transporting 10 to 12-foot pipes to the C-2 level of the site, which had been leased by Bank of America in June 2008. Outside the elevator on the C-2 level, pieces of Masonite covered the vinyl laminate floor, which in turn covered the poured concrete floor; Masonite also covered the steel area between the elevator doorjamb. The Masonite outside the elevator protected the vinyl laminate floor from foot and wheel traffic during the construction process. As plaintiff exited the elevator with a pipe hoisted over his shoulder, he stepped on an unsecured piece of Masonite between the doorjamb. This piece of Masonite was smaller than the pieces located outside of the elevator.<sup>1</sup> When the loose piece of Masonite gave way beneath him, plaintiff fell to one knee and twisted his back, sustaining personal injuries. Plaintiff commenced this action against defendants on February 27, 2009, alleging common-law negligence and violation of Labor Law §§ 200 and 241(6).

#### SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the movant must submit enough evidence to eliminate all factual issues; then the burden shifts to the nonmoving party to present evidence of a triable factual issue. *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228, 812 N.Y.S.2d 12, 14 (1st Dep't 2006). However, if the movant does not meet "the initial burden of setting forth

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<sup>1</sup> The piece of Masonite that allegedly caused plaintiff's accident was approximately three to four feet long and one foot wide, while the pieces outside the elevator were four feet long and eight feet wide.

evidentiary facts sufficient to establish entitlement to judgment as a matter of law, the motion must be denied” and the nonmoving party does not need to present evidence. *Roman v. Hudson Tel. Assoc.*, 15 A.D.3d 227, 228, 791 N.Y.S.2d 6, 7 (1st Dep’t 2005). “[A]ll of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party’s favor.” *Udoh v. Inwood Gardens, Inc.*, 70 A.D.3d 563, 565, 897 N.Y.S.2d 12, 14 (1st Dep’t 2010). Summary judgment should be denied if “there is any doubt as to the existence of triable issues” of fact. *Id.*

#### LABOR LAW § 200

Plaintiff claims that defendants are liable under Labor Law § 200. The statute, titled “General duty to protect health and safety of employees; enforcement,” provides, in pertinent part,

All places to which this chapter applies shall be so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection to the lives, health, and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

N.Y. Labor Law § 200. Section 200 “is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe” workplace. *Cody v. State of N.Y.*, 82 A.D.3d 925, 926, 919 N.Y.S.2d 55, 57 (2d Dep’t 2011); *see also Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 55 (1993). There are two types of § 200 cases: “those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those” where workers are injured as a result of “the manner in which the work is performed.” *Cody*, 82 A.D.3d at 925, 919 N.Y.S.2d at 57.

In cases where the injury stems from a dangerous or defective premises condition at a work site, a general contractor or “property owner can be held liable for either creating the condition or having actual or constructive notice [of the condition] and not remedying [it] within a reasonable time.” *Scott v. 122 E. 42 St. LLC*, No. 50358(U), slip op. at 6 (Sup. Ct. Queens Cnty. 2012). Whether the general contractor or owner supervised the plaintiff’s work is irrelevant. *Minorczyk v. Dormitory Auth. of the State of N.Y.*, 74 A.D.3d 675, 675, 904 N.Y.S.2d 383, 384 (1st Dep’t 2010); *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626, 790 N.Y.S.2d 697, 700 (2d Dep’t 2005).

In the present case, however, the manner in which the work was performed allegedly caused plaintiff’s injuries. See *Schwind v. Mel Lany Constr. Mgmt. Corp.*, 95 A.D.3d 1196, 1198, 945 N.Y.S.2d 151, 153 (2d Dep’t 2012) (holding that “plaintiff’s alleged injuries arose from the manner in which the work was performed” when plaintiff slipped on unsecured piece of Masonite). “[W]here a claim under Labor Law § 200 is based upon alleged defects or dangers arising from” the way the work is performed, “liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work.” *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 306, 836 N.Y.S.2d 86, 88 (1st Dep’t 2007). Specifically, the owner or general contractor must control “the manner in which the plaintiff performed his or her work.” *Hughes*, 40 A.D.3d at 306, 836 N.Y.S.2d at 89. “General supervisory authority” does not constitute supervisory control under the statute. *Id.* Therefore, the issue is whether defendants exercised sufficient supervisory control over plaintiff’s work to trigger liability under § 200. Contrary to plaintiff’s apparent belief, it is irrelevant whether defendants created the condition or had actual or constructive notice of it. Indeed, “[l]iability pursuant to Labor Law § 200 may be based *either* upon the manner in which the work is

performed *or* actual or constructive notice of a dangerous condition inherent in the premises.”

*Markey v. C.F.M.M. Owners Corp.*, 51 A.D.3d 734, 736, 858 N.Y.S.2d 293, 297 (2d Dep’t 2008)

(emphasis added).

#### OBPLLC, OBP Development, and Durst

Defendants claim that OBPLLC, OBP Development, and Durst did not control the manner in which plaintiff performed his work. To this end, when deposed, Durst employees testified that OBPLLC, OBP Development, and Durst did not supervise plaintiff’s work. Indeed, Thomas Duff, Durst’s Vice President of Construction, stated that Bank of America took possession of the C-2 level in June 2008, months before plaintiff’s accident. As plaintiff offers no evidence to the contrary, the court grants defendants’ motion for summary judgment dismissing the Labor Law § 200 claims against OBPLLC, OBP Development, and Durst. *See Tighe v. Hennegan Constr. Co.*, 48 A.D.3d 201, 202, 850 N.Y.S.2d 417, 419 (1st Dep’t 2008) (“Plaintiff’s claims of . . . violations of Labor Law § 200 should have been dismissed . . . because [defendant] did not exercise any control or supervision over the demolition work out of which the injury arose.”).

#### Tishman

Defendants also assert that Tishman did not control the manner in which plaintiff performed his work. In support, they rely on deposition testimony from Durst and Tishman employees. Specifically, Durst’s vice president of construction provided uncontroverted testimony that Bank of America took possession of the C-2 level in June 2008, thus assuming responsibility for the placement and maintenance of the Masonite. In addition, Tishman’s

general superintendent on the day of the accident testified that Tishman did not supervise, direct, or control plaintiff's work or the work of any of the subcontractors on the C-2 level. Rather, Tishman's duties included managing the construction schedule and costs, performing daily walk-throughs, and hiring subcontractors. On this basis, defendants claim that Tishman's duties did not rise to the level to trigger liability under Labor Law § 200. See *McByrne v. Ambassador Constr. Co.*, 290 A.D.2d 243, 243, 736 N.Y.S.2d 17, 18 (1st Dep't 2002) (dismissing Labor Law § 200 claim when defendant "had no direct supervision or control over the manner of the work's performance").

In opposition, plaintiff points out that Tishman created and maintained a site safety program, that Tishman superintendents had the authority to stop a subcontractor's work if they observed an unsafe work practice, and that Tishman was still performing "punch-list" work on the C-2 level on the date of plaintiff's accident. However, the above duties and authority are not sufficient to trigger liability under Labor Law § 200. See *Geonie v. OD & P NY Ltd.*, 50 A.D.3d 444, 445, 855 N.Y.S.2d 495, 496 (1st Dep't 2008) ("[T]he evidence that [defendant]'s project superintendent coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition is insufficient to raise a triable issue whether [defendant] exercised the requisite degree of supervision and control over the work to sustain [§ 200] claims."). To trigger liability under Labor Law § 200, Tishman would have had to directly tell plaintiff or his employer how to perform the work. *Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 381, 836 N.Y.S.2d 130, 134 (1st Dep't 2008); *Singh v. Black Diamonds LLC*, 24 A.D.3d 138, 140, 805 N.Y.S.2d 58, 59 (1st Dep't 2005). Plaintiff offers no evidence that Tishman exercised this

degree of supervisory control over plaintiff's work or gave plaintiff direct instructions of any kind. Therefore, plaintiff's argument fails.

Plaintiff's reliance on *Ross v. Curtis-Palmer Hydro-Electric Co.* also is unavailing. In *Ross*, there was a contract between the owner and manager of the site in which the manager "undertook to supervise the construction work and . . . to comply with the legal standards governing the safety of all employees on the site, including those of its subcontractors." 81 N.Y.2d at 506, 601 N.Y.S.2d at 56. The court refused to dismiss the Labor Law § 200 claim because the contract "furnish[ed] cause to believe that further discovery [would] lead to evidence that [defendant]'s employees did exercise actual supervision or control over plaintiff's worksite." *Id.* Indeed, "plaintiff had not yet deposed defendants' representatives when the motion for summary judgment suspended discovery." *Id.* The present case is clearly distinguishable from *Ross*. Although Tishman entered into a similar contract, discovery is complete and plaintiff has had ample opportunity to depose all relevant parties. As noted above, discovery has not revealed that Tishman exercised the requisite degree of control or supervision over the manner in which plaintiff performed his work. Accordingly, plaintiff's argument fails because the contract is not "in [itself] sufficient to justify holding [defendant] liable" under Labor Law § 200. *Id.*

Finally, plaintiff contends that Tishman's contract with nonparty Total Safety creates an issue of fact as to whether Tishman controlled the manner in which plaintiff performed his work. The First Department cases upon which plaintiff relies, however, do not apply to the facts of this case. For example, in *Bush v. Gregory/Madison Ave.*, the safety coordinator in question was defendant's employee. 308 A.D.2d 360, 361, 764 N.Y.S.2d 262, 264 (1st Dep't 2003). Similarly, in *Brennan v. 42nd St. Dev. Project, Inc.*, defendant "had a representative of its own safety department on site whose duty was to observe the contractors and make sure they complied with

all safety regulations.” 10 A.D.3d 302, 302, 781 N.Y.S.2d 335, 336 (1st Dep’t 2004) (emphasis added). In contrast, in the present case, Total Safety—not a Tishman employee—was the site safety coordinator. Thus Tishman’s contract with Total safety has no bearing on whether Tishman exercised control over plaintiff’s work.

For all of the above reasons, the court grants the prong defendants’ motion for summary judgment that seeks dismissal of the Labor Law § 200 claim against Tishman.

#### COMMON LAW NEGLIGENCE

As noted above, Labor Law § 200 codifies the “common-law duty imposed upon an owner or general contractor to maintain a safe” workplace. *Cody*, 82 A.D.3d at 926, 919 N.Y.S.2d at 57. It follows that, as in this case, “[w]here the alleged defect or dangerous condition arises from” the manner in which the work was performed, “and the [defendant] exercises no supervisory control over the operation, no liability attaches to the [defendant] under the common law or under Labor Law § 200.” *Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 169 (1993). Accordingly, the court grants the prong defendants’ motion for summary judgment that seeks dismissal of the common law negligence claims for the same reasons it dismissed the Labor Law § 200 claims.

#### LABOR LAW § 241(6)

Defendants’ motion also seeks to dismiss plaintiff’s claim that defendants are liable under Labor Law § 241(6). The statute imposes the following duty on “[a]ll contractors and owners and their agents”:

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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith.

N.Y. Labor Law § 241(6). Because the “duty to comply with the Commissioner[] [of the Department of Labor’s] regulations is nondelegable,” a plaintiff need not show that a defendant exercised supervision or control over the work site in order to recover. *Ross*, 81 N.Y.2d at 502, 601 N.Y.S.2d at 53. However, to recover under § 241(6), “a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor.” *Lenard v. 1251 Ams. Assoc.*, 241 A.D.2d 391, 392, 660 N.Y.S.2d 416, 417 (1st Dep’t 1997); *see also Ross*, 81 N.Y.2d at 503, 601 N.Y.S.2d at 54 (noting that terms of Labor Law § 241(6) “require reference to [Department of Labor regulations] to determine the standard by which a defendant’s conduct must be measured.”). In support of his Labor Law § 241(6) claim, plaintiff relies on 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(1) and (2).

12 NYCRR 23-1.7(d)

12 NYCRR 23-1.7(d), titled “Slipping hazards,” provides,

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.

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(d) (2012) (emphasis added). Defendants argue that Masonite is not a foreign, slippery substance covered by the provision. In opposition,

plaintiff contends that the unsecured Masonite constituted an “other foreign substance” and therefore falls within the purview of 12 NYCRR 23-1.7(d).

The unsecured piece of Masonite clearly constituted a slippery condition. However, the cases upon which plaintiff relies do not support plaintiff’s contention that the Masonite constitutes an “other foreign substance” under the Industrial Code provision. In each of these cases, the plaintiff slipped on a foreign substance that was not supposed to be there. *See, e.g., Colucci v. Equitable Life Assur. Socy. of U.S.*, 218 A.D.2d 513, 514, 630 N.Y.S.2d 515, 516 (1st Dep’t 1995) (Plaintiff slipped on food when “safety guidelines for work in kitchen areas prohibited the bringing of food and dirty dishes into the work area while renovations were in progress.”); *Scott*, No. 50358(U), slip op. at 7 (“The hose . . . was not part of the steam fitters’ work at the time of the accident, but was a mere consequence of it after their work had been completed.”). In the present case, the unsecured Masonite was not a foreign substance because it was intentionally placed on the floor and there is no indication that it was not supposed to be there. As 12 NYCRR 23-1.7(d) does not apply to the facts of this case, the court dismisses plaintiff’s Labor Law § 241(6) claim to the extent that it is based on 12 NYCRR 23-1.7(d).

#### 12 NYCRR 23-1.7(e)(1)

12 NYCRR 23-1.7(e), titled “Tripping and other hazards,” has two subsections. 12 NYCRR 23-1.7(e)(1), titled “Passageways,” provides, in pertinent part, “All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.” N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(e)(1) (2012). As defendant correctly asserts, 12 NYCRR 23-1.7(e)(1) only applies to tripping hazards in passageways. *See Aguilera v. Pistilli Constr. & Devel. Corp.*, 63 A.D.3d 763, 765, 882 N.Y.S.2d

148, 150 (2<sup>nd</sup> Dept. 2009)(plaintiff who slipped on debris could not assert claim under NYCRR 23-1.7(e)(1) or (2), which relate to tripping hazards); *Ventura v. Lancet Arch, Inc.*, 5 A.D.3d 1053, 1054, 773 N.Y.S.2d 683, 683 (4<sup>th</sup> Dept. 2004)(plaintiff who alleged he slipped on wet mortar could not claim a tripping hazard under this provision). Here, plaintiff testified that he slipped on the unsecured piece of Masonite, which was clearly not a tripping hazard.

Further, the cases plaintiff cites in opposition are inapposite; for example, in *Collins v. Switzer Constr. Grp., Inc.*, 69 A.D.3d 407, 408, 892 N.Y.S.2d 94, 95 (1st Dep't 2010), the court addressed a claim based on 12 NYCRR 23-1.7(e)(2), not 12 NYCRR 23-1.7(e)(1). Also significant, the issue of slipping versus tripping hazards does not appear to have been raised in *Collins*; at any rate, unlike the courts in *Aguilera* and *Ventura*, the First Department did not address the issue. *See also Cooper v. State*, 72 A.D.3d 633, 635, 899 N.Y.S.2d 275, 277 (2<sup>nd</sup> Dept. 2010)(claimant's deposition testimony that he "slipped" precluded assertion of claim under 12 NYCRR 23-1.7(e)(2) based on a tripping hazard). Therefore, the court dismisses plaintiff's Labor Law § 241(6) claim to the extent that it is based on 12 NYCRR 23-1.7(e)(1).

#### 12 NYCRR 23-1.7(e)(2)

12 NYCRR 23-1.7(e)(2) is also inapplicable to the present case. Titled "Working areas," it provides, "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 and from sharp projections insofar as may be consistent with the work being performed." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(e)(2) (2012). As noted above, the record indicates that the unsecured piece of Masonite on which plaintiff slipped was a protective device purposefully placed outside the elevators on the C-2 level. *See Lenard*, 241 A.D.2d at 393, 660 N.Y.S.2d at

417-18 (“[L]iability will not be imposed where the item causing the injury was . . . an integral part of the work being performed, or itself constituted a protective device.”). As plaintiff offers no evidence to the contrary, any argument that the Masonite constituted dirt or debris is borderline frivolous. Further, Industrial Code § 23-1.7(e)(2) does not apply where, as here, there is no evidence that tools or materials (the Masonite) were scattered, or that plaintiff was injured by a sharp projection. *Waitkus v. Metro. Hous. Partners*, 50 A.D.3d 260, 260, 854 N.Y.S.2d 388, 390 (1st Dep’t 2008). Accordingly, the court dismisses plaintiff’s Labor Law § 241(6) claim to the extent that it is premised on 12 NYCRR 23-1.7(e)(2).

CONCLUSION

For the reasons set forth above, the court grants defendants’ motion.

Therefore, it is

ORDERED that the motion for summary judgment is granted and this action is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: 9/28/12

**FILED**  
OCT 04 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

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LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
J.S.C.