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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 101009/2011
CORETTO, CARLO
vs
EXTELL WEST 57TH STREET, LLC.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. 101009/11
MOTION DATE 2/4/14
MOTION SEQ. NO. 004

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

FILED

JUL 07 2014

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: June 30, 2014

JOAN M. KENNEY, 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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CARLO and GUISEPPA CORETTO,
Plaintiffs,

-against-

EXTELL WEST 57TH STREET, LLC, EXTELL DEVELOPMENT COMPANY, BOVIS LEND LEASE LMB, INC., PAR PLUMBING CO., INC., PARKVIEW PLUMBING & HEATING, INC., AND FIVE STAR ELECTRIC CORP.,
Defendants.

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DECISION AND ORDER
Index №.: 101009/11
Motion Seq. No. 004

JOAN M. KENNEY, J.S.C.:

In this Labor Law action, defendant Parkview Plumbing & Heating, Inc. (Parkview) moves for an Order, pursuant to CPLR 3212, dismissing all claims and cross claims as against it.

Defendants, Extell West 57th Street (Extell West 57th), Extell Development Company (Extell Development) (together, Extell), Bovis Lend Lease LMB, Inc. (Bovis), and Par Plumbing Co., Inc. (Par Plumbing) (collectively, cross-moving defendants), cross-move for summary judgment dismissing plaintiff's Labor Law § 200 claims against them, as well as dismissing all claims as against Extell Development and Par Plumbing. Finally, defendant Five Star Electric Corp. cross-moves for summary judgment dismissing all Labor Law claims as against it.

FACTUAL BACKGROUND

On September 8, 2010, plaintiff Carlo Coretto (Coretto), a laborer, was injured while working for nonparty Pinnacle Contracting (Pinnacle) at a construction site located at 157 West 57th Street, in Manhattan, when he tripped over several unsecured pipes. Extell West 57th is the owner of the property, while Extell Development is the developer, and Bovis is the construction manager/general contractor, on a project to construct One57, a 75-story skyscraper housing a 92-unit condominium and a 210-unit hotel on the property. Parkview and Par Plumbing were each

plumbing contractors on the project, while Five Star was an electrical contractor and Pinnacle was a concrete contractor.

Plaintiff's injury occurred while he was walking along a corridor in the cellar between the elevator shaft and a wall, as a Pinnacle foreman had asked him to retrieve some scaffold parts that were in the area; as he passed by a coworker who was walking in the other direction, plaintiff stepped to his right, and he tripped as his right foot came down on several gray PVC pipes (Coretto tr at 92-96; 169-171; 183-184; 196-197; 216; 220-221).

Plaintiff filed a second amended summons and complaint on March 23, 2011 alleging that defendants are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6). Plaintiff Guiseppa Coretta brings a derivative claim for loss of consortium. By a stipulation filed on January 9, 2014, plaintiff discontinued his Labor Law § 240 (1) claims as against all defendants.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 200 and common-law negligence

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" (*Comes v New*

York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

a. Parkview

Parkview argues that it cannot be held liable under Labor Law § 200 as it did not control or direct plaintiff's work. In support, Parkview cites to plaintiff's testimony that he never received any instruction from anyone at Parkview (Coretto transcript at 166).

Parkview separately argues that plaintiff's common-law negligence claim against it should be dismissed because it had no connection to plaintiff's accident. Specifically, Parkview cites to a portion of the deposition transcript of John Lyons (Lyons), its president, in which Lyons states that Parkview only used white PVC pipes on the project, not the grey ones involved in plaintiff's accident (Lyons transcript at 41). Moreover, Parkview notes, Lyons testified that while Parkview did work on the sub-cellar, it did no work on the cellar where plaintiff's accident took place (*id.* at 99), and that it did not receive any complaints regarding pipe storage (*id.* at 60).

In opposition, plaintiff argues that summary judgment is inappropriate because there are questions of fact as to whether Parkview created the subject defect, and as to whether it had actual or constructive notice of the defect. Instead of referring to evidence relating to these issues, plaintiff simply argues that Parkview has failed to meet its prima facie burden with respect to these issues. In a brief opposition to Parkview's motion, Five Star endorses plaintiff's arguments in opposition.

Here, plaintiff is incorrect that Parkview has failed to make a prima facie showing as to the issue of creation of the subject defect. Lyons testified that Parkview did not use gray pipes on the project. As plaintiff's accident was caused by gray pipes, Parkview has made an unrefuted showing that it did not create the condition that caused plaintiff's accident. As to notice, Parkview makes a prima facie showing that it did not have actual notice by submitting Lyons's testimony that Parkview did not receive any complaints about pipe storage, and

Parkview makes a prima facie showing as to constructive notice through Lyons's testimony that Parkview did not do any work on the cellar level where plaintiff's accident occurred. As with the issue of defect creation, plaintiff fails to rebut Parkview's prima facie showing.

Thus, as it did not create or have notice of the condition that caused plaintiff's accident, Parkview is entitled to dismissal of the Labor Law § 200 and common-law negligence claims as against it.

b. Cross-moving defendants

Cross-moving defendants argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed against cross-moving defendants as they had neither supervisory control over plaintiff's work, nor notice of the condition that caused his accident.

As to supervisory control, cross-moving defendants refer to plaintiff's testimony that no one from Extell, Bovis, or Par Plumbing ever gave him any instruction on his work (Coretto tr at 31).

Regarding actual notice, cross-moving defendants refer to the testimony of Matthew Ross (Ross), Bovis's site safety manager, who testified that he did not recall any complaints regarding tripping hazards caused by pipes or other construction debris, and that there were no prior pipe-related tripping incidents on the project (Ross tr at 46-47; 50-52).

As to constructive notice, cross-moving defendants refer to plaintiff's testimony that he did not recall when he first saw pipes on the day of his accident (Coretto tr at 41). Cross-moving defendants also refer to the deposition transcript of Hugh Boyle, Five Star's foreman, who testified that he was not aware of any complaints about pipes or other construction debris on the floor before plaintiff's accident (Boyle tr at 57-58), as well as Parkview's Lyons, who

testified that he was not aware of any construction debris on the floors before plaintiff's accident (Lyons tr at 60-61).

Cross-moving defendants argue that the negligence claim as against Par Plumbing should be dismissed as there is no evidence in the record that PVC pipes involved in plaintiff's accident belonged to Par Plumbing. In support, cross-moving defendants submit the deposition transcript of Robert Demartino (Demartino), a foreman for nonparty Liberty Mechanical Contractors, LLC, who testified that Par Plumbing and Liberty were involved in a joint venture to conduct plumbing work on the job (Demartino tr at 12-13), and that Par Plumbing did not involve any pipes on the job until three months after plaintiff's accident (*id.* at 39-41). Additionally, moving defendants rely on Ross, Bovis's site safety manager, who testified that Par Plumbing did not use any PVC pipe on the project before plaintiff's accident on September 8, 2010 (Ross tr at 43).

In opposition, plaintiff argues that Par Plumbing, Extell West 57th, and Bovis fail to make a prima facie showing of entitlement to judgment on his Labor Law § 200 and common-law negligence claims. As to Par Plumbing, plaintiff argues that there is a question as to whether Par Plumbing created the condition that caused his injuries. Specifically, plaintiff refers to Ross's testimony that Par Plumbing did work on the cellar floor the week before plaintiff's accident (Ross tr at 127-128).

However, plaintiff does not offer any evidence to rebut Ross's testimony that Par Plumbing did not use any pipes prior to plaintiff's accident. As to Par Plumbing's work on the cellar floor prior to plaintiff's accident, Ross testified that the work, installation of "plumbing sleeves" or "drain bodies," did not involve pipes (Ross tr at 128). Thus, plaintiff has not submitted any evidence raising a question of fact as to whether Par Plumbing created the subject

condition. As a result, Par Plumbing is entitled to dismissal of plaintiff's Labor Law § 200 and common-law negligence claims as against it.

Five Star also opposes the cross motion of cross-moving defendants. Specifically, Five Star argues that there is a question of fact as to whether Par Plumbing created the condition because plaintiff's testimony does not establish conclusively that the subject pipes were grey. Five Star refers to the following portion of plaintiff's deposition testimony:

> Q: What color were the pipes?
> A: Gray.
> Q: Were they all the same color or different colors? Same color gray?
> A: I don't recall.

(Coretto tr at 170-171).

However, Par Plumbing has made its prima facie showing through testimony that it did not use any pipes at all before plaintiff's accident. Moreover, while Par Plumbing argues that it should be entitled to dismissal of plaintiff's common-law negligence claim as against it, it has not moved for such relief.

Turning to Bovis, plaintiff argues that there is a question of fact as to whether it had notice of the condition that caused plaintiff's accident. Bovis notes that Ross, its site safety manager, did not affirmatively state that he had not seen loose pipes around the worksite, only that he did not recall (Ross tr at 46-47). Moreover, plaintiff argues that Bovis had notice of the subject condition because there had been another accident on the project involving an engineer who fell off a ladder in the elevator pits (*id.* at 52).

Here, a previous fall from a ladder in an elevator pit does not establish that Bovis had notice of the loose pipes that caused plaintiff's accident. Ross's testimony that he did not recall any complaints and that there were no previous tripping incidents caused by loose materials is

sufficient to make a prima facie showing as to actual notice. Plaintiff has failed to rebut this showing.

As to constructive notice, it "is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Here, Bovis has made a prima facie showing of lack of constructive notice by submitting plaintiff's testimony that he did not recall seeing the pipes before tripping on them. This is enough, along with the other testimony that there were no complaints regarding pipes, or other debris left out on the worksite, to be a basis on which a factfinder could reasonably conclude that the condition did not exist for a sufficient period to afford Bovis an opportunity to discover it. Plaintiff, on the other hand, fails to submit any evidence that would form a basis for the opposite conclusion, i.e., that the condition existed for a sufficient duration. As plaintiff's accident was caused by a condition on the worksite, rather than the method, manner, or materials of his work, the absence of notice, where there is no evidence that Bovis created the condition, is a fatal flaw to his Labor Law § 200 and common-law negligence claims as against Bovis. As such, Bovis is entitled to dismissal of these claims as against it.

Plaintiff makes no arguments in opposition to dismissal of the Labor Law Law § 200 and common-law negligence claims as against Extell Development, the developer on the project. As such, plaintiff has abandoned these claims as against Extell Development, and Extell Development is entitled to dismissal of plaintiff's Labor Law Law § 200 and common-law negligence claims as against it. As to Extell West 57th, the owner, plaintiff makes the same arguments against it that he made against Bovis. As with Bovis, the lack of notice is fatal to

plaintiff's Labor Law § 200 and common-law negligence claims as against Extell West 57th, and Extell West 57th is entitled to the dismissal of these claims.

c. Five Star

Five Star argues that it is not a proper defendant under the Labor Law as it is not a general contractor, an owner, or a statutory agent. While Five Star moves to have all Labor Law claims as against it dismissed, it does not move for dismissal of plaintiff's general negligence claims as against it. Five Star relies on plaintiff's testimony that he took instruction only from other Pinnacle worker, that, as a consequence, he did receive any instruction from Five Star (Coretto tr at 29-30, 189). Five Star cites to *Thomas v Benton* (112 AD3d 812, 812 [2d Dept 2013]), which held that the defendant contractor "was entitled to summary judgment dismissing the Labor Law § 200 cause of action," as it "established, prima facie, that it did not have authority to supervise or control the area of the worksite where plaintiff was injured."

Plaintiff does not oppose Five Star's motion. As such, plaintiff has abandoned its Labor Law § 200 claim as against Five Star, and Five Star is entitled to dismissal of this claim (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] [holding that "plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"]).

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides that general contractors, owners, and their agents on qualifying construction, excavation and demolition work must comply with the following:

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

a. Parkview

Parkview argues that it is not subject to liability under Labor Law § 241 (6), as it is not an owner or general contractor. Nor, Parkview contends, was it a statutory agent of the owner or general contractor. As to the issue of agency, Parkview argues that the duties giving rise to liability under Labor Law § 241 (6) were not delegated to Parkview. In support, Parkview refers to the plaintiff's testimony that no one from Parkview ever directed him to do his work (Coretto tr at 166).

In opposition, plaintiff argues that Parkview was Bovis's statutory agent. That is, plaintiff argues that because some work involving the installation and storage of pipes was delegated to Parkview, Parkview somehow had the authority to control plaintiff's work.

Here, there is no question that Parkview is not an owner or general contractor. Just as clearly, Parkview is not a statutory agent of either the owner or the general contractor. The Appellate Division, Second Department, has recently reiterated the standard for statutory agency under Labor Law §§ 240 (1) and 241 (6):

> "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition"

(*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 945-946 [2d Dept 2013] [internal quotation marks and citations omitted]).

Plaintiff himself testified that Parkview never exercised control over his work, and nothing in the record suggests that Parkview had such an authority. Plaintiff's argument that Parkview was a statutory agent of Bovis, the general contractor, because Parkview used PVC pipes in the subcellar is unavailing. Parkview has established both it did not work on the cellar floor where plaintiff was injured, and that it used PVC pipes that were a different color than the ones on which plaintiff slipped. Even if this were not the case, plaintiff would still not have established supervisory control and authority. As it is, plaintiff fails to raise an issue of fact as to whether Parkview was a statutory agent.

Thus, as Parkview has established that it is neither an owner, a general contractor, nor a statutory agent, it is entitled to dismissal of plaintiff's Labor Law § 241 (6) cause of action. As this is the last remaining claim against Parkview, it is also entitled to dismissal of plaintiff's complaint as against it in its entirety.

b. Extell Development and Par Plumbing

Cross-moving defendants argue that Extell Development and Par Plumbing are not proper Labor Law defendants, as neither is the general contractor on the project, or the subject property owner. Cross-moving defendants submit the deposition testimony of Charles Loskant (Loskant), Extell Development's senior vice president of construction management, who testified that Extell West 57th Street was the owner of the property, that Extell Development was the developer, and that in this role, Extell Development worked, alongside with Bovis, to budget and schedule work on the project (Loskant tr 8-10). Loskant also testified that Extell Development did not give the contractors or subcontractors at the project any directions regarding their work.

As to Par Plumbing, cross-moving defendants refer to the testimony of Demartino, nonparty Liberty Mechanical Contractors, LLC's foreman, who testified that Par Plumbing and Liberty were involved in a joint venture to conduct plumbing work on the job (Demartino tr 12-13). Moreover, cross-moving defendants refer to plaintiff's own testimony that no one from Par Plumbing ever gave him any instruction regarding his work (Coretto tr at 31).

Plaintiff does not oppose the portion of the motion that seeks dismissal of all claims as against Extell Development. As to Par Plumbing, plaintiff argues that it was a statutory agent of Bovis and is, as a result, liable under Labor Law § 241 (6). Here, there is no evidence that Par Plumbing had supervisory control of plaintiff's work. Indeed, plaintiff testified that no one from Par Plumbing ever instructed him as to his work. As such, Par Plumbing is not a statutory agent of Bovis. Accordingly, as Extell Development and Par Plumbing are not owners, general contractors or statutory agents, plaintiff's Labor Law § 241 (6) claims as against them must be denied.

c. Five Star

Five Star is entitled to dismissal for the reasons discussed above, in regard to Labor Law § 200. That is, Five Star is not an owner, general contractor, and did not have the authority to control plaintiff's work, and is thus not a statutory agent of either. Moreover, plaintiff has not opposed Five Star's cross motion. As such, Five Star is entitled to dismissal of plaintiff's Labor Law § 241 (6) claim as against it.

III. Parkview's Application for Attorney's Fees

Parkview is not entitled to attorney's fees under 22 NYCRR 130-1.1, which grants the court discretion to award "reasonable attorney's fees" to parties forced to defend against frivolous litigation conduct. 22 NYCRR 130-1.1 (c) defines "frivolous" conduct as having three categories, that is, conduct that is completely meritless, conduct that is undertaken primarily to delay, and assertions of material falsities. Plaintiff's refusal to withdraw his claims does not fall under any of these categories, as he made reasonable arguments against Parkview's successful application for summary judgment. Accordingly, it is

ORDERED that defendant Parkview Plumbing & Heating, Inc.'s motion for summary judgment dismissing all claims and cross claims as against it is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Parkview Plumbing & Heating, Inc., and against plaintiff, dismissing the complaint and any cross claims against defendant Parkview Plumbing & Heating, Inc.; and it is further

ORDERED that defendants Extell West 57th Street, Extell Development Company, Bovis Lend Lease LMB, Inc., and Par Plumbing Co., Inc.'s cross motion for summary judgment dismissing plaintiff's Labor Law § 200 claims as against all of them, as well as

dismissing all claims as against Extell Development Company and Par Plumbing Co. Inc., is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Extell Development Company and Par Plumbing Co., dismissing all claims against them; and it is further

ORDERED that defendant Five Star Electric Corp.'s cross motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241 (6) claims as against it, is also granted; and it is further

ORDERED that the remaining parties proceed to mediation/trial forthwith.

Dated: June 30, 2014

ENTER:

Hon. JOAN M. KENNEY