SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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RICHARD ANDREANA and DENISE ANDREANA,

Plaintiffs,

DECISION AND ORDER

- against -

345 PARK AVENUE L.P., RUDIN MANAGEMENT CO., INC., and J.T. MAGEN & COMPANY INC.,

Index No. 157839/2014

MOT SEQ 005

Defendants.

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345 PARK AVENUE L.P., RUDIN MANAGEMENT CO., INC. and J.T. MAGEN & COMPANY INC.,

Third-Party Plaintiffs,

-against -

NEW ENGLAND CONSTRUCTION CO., INC.,

Third-Party Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiffs Richard Andreana (hereinafter Richard) and Denise Andreana commenced this action to recover damages for personal injuries allegedly sustained by Richard on September 1, 2011, when he slipped on construction debris while working at 345 Park Avenue in Manhattan (the Premises). The plaintiff assert causes of action to recover for common-law negligence and violation of Labor Law §§ 200, 240(1), and 241(6).

The defendants third-party plaintiffs 345 Park Avenue L.P. (345 Park), Rudin

Management Co., Inc. (Rudin) and J.T. Magen & Company, Inc. (Magen) (collectively the defendants) move pursuant to CPLR 3212 for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240 (1) claims against them. The motion is granted to the extent that summary judgment is awarded to the defendants dismissing the Labor Law § 240(1) cause of action against all of them and the common-law negligence and Labor Law § 200 causes of action against 345 Park and Rudin. The motion is otherwise denied, as the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the common-law negligence and Labor Law § 200 causes of action against Magen.

II. BACKGROUND

On the day of the accident, 345 Park owned, and Rudin managed, the Premises where the accident occurred. At the time of the accident, the fifth through seventh floors, one half of the eighth floor and parts of two basement levels of the subject 44-story commercial office building were being built out into new office space for a tenant, nonparty National Football League (NFL). The NFL retained Magen as its construction manager for the work. In turn, Magen hired nonparty Forest Electric Corp., Richard's employer, to serve as its electrical subcontractor on the project. Magen also hired the third-party defendant New England Construction Co., Inc. (NEC), to install new walls, partitions, and acoustical drop ceilings.

A. Richard's Deposition Testimony

Richard testified that, on the day of the accident, he was assigned to run wires from motorized window shades in several conference rooms on the seventh floor to electrical devices

mounted either in the ceiling or in a mechanical room. He explained that, after exiting the mechanical room, he "slipped on some debris" left on the hallway floor and stated that, after he slipped, "[he] looked back to see what [he] slipped on" and noticed a "pencil rod" on the floor. Richard explained that the term "pencil rods" refers to metal rods of varying lengths that are one-quarter inch in diameter, and are used to support drop ceilings. He testified that there were several "pencil rods and dust and dirt . . . on the floor," and that he slipped on a three- to four-inch long pencil rod. Richard averred that he did not see the pencil rod before he fell, nor did he see it on the floor when he traversed the area one hour before the accident.

Richard maintained that he did not see anyone working with pencil rods on the day of, or the day prior to, his accident, and that his work did not involve removing any of the pencil rods that had been installed. He further explained that laborers were responsible for removing construction debris, but that he did not see any laborers cleaning debris in the area after the accident. Richard testified that he never saw any pencil rods, or related black-iron attachments, scattered on the hallway floor in the days preceding the accident. He never complained, nor did he ever hear of anyone complaining, about the condition of the floor before the accident.

B. Deposition Testimony of Eugene Simmons

Eugene Simmons testified that he was employed by Rudin as the property manager overseeing the Premises on the day of the accident. Simmons averred that he supervised 25 employees, and that Magen was the NFL's general contractor on the Project. Simmons asserted that he and his employees were not involved in directing or supervising the renovation work, and that his involvement on the Project was limited to scheduling when Magen could use the

building's freight elevators and loading dock.

C. Deposition Testimony of Charles Russo

Magen's senior project manager, Charles Russo, testified that the NFL hired Magen as its construction manager on the Project. He stated that Magen's work called for the installation of new walls, ceilings, partitions, floors, and HVAC and electrical units.

Russo explained that, in order to install the dropped ceiling, lathe operators shot anchors into concrete ceiling slabs, and then secured a one-quarter inch thick pencil rod to each anchor. Russo believed that there was a four-foot space between each anchor, and that the pencil rods were suspended vertically from the ceiling slab. According to Russo, the lathe operators then clipped black iron onto the bottom of each pencil rod and, once the black iron was in place, carpenters mounted the ceiling grid and acoustical tiles to the black iron. Russo testified that, although most of the pencil rods used on the Project were pre-cut, workers at times used bolt cutters to trim the pencil rods to the correct length. Russo asserted that the electricians began working almost immediately after the drop ceilings were completed, and, in some instances, the electrical work was performed concurrently with the ceiling work. Russo could not recall when NEC last worked with pencil rods before plaintiff's accident. He stated that he never received any complaints about NEC leaving debris in its work area.

Russo further testified that Magen employed 6 superintendents to oversee the work, and between 15 and 20 laborers to perform general housekeeping duties on the Project. As Russo described it, the laborers cleaned and swept the site each day and removed debris generated by the construction work. Russo explained that all debris was placed in containers, and that there

were between 10 and 15 debris containers placed on each floor. Russo averred that, if a container were unavailable, Magen directed each trade to isolate and "center pile" the debris for later collection. Russo explained that if a laborer conducting a walkthrough saw debris that had not been gathered in a center pile, the laborer was expected to clean the area. According to Russo, the laborers brought the filled containers to the loading dock where the debris would be removed from the site.

Russo further testified that Magen's corporate safety manual provided that walkways, aisles, and entrances should be kept clear of debris at all times. When asked if he agreed with a statement in the manual that read "[p]oor housekeeping on construction projects creates unsafe walking and working conditions," Russo responded, "yes, I do." Russo asserted that, at one weekly "toolbox" meeting in May, workers were advised to watch out for construction debris, such as pencil rods. Russo acknowledged that a pencil rod that had not been either center piled or removed could become a slipping hazard "[l]ike any other debris on the floor." In addition, Russo stated that Magen's superintendents were responsible for conducting daily safety inspections, but Russo was not sure if these inspections, which should have been noted in the daily reports, had been performed.

Russo also testified that Magen expected its subcontractors to timely notify it of any on-site incident, so that Magen could prepare an incident report. Russo was unable to locate an incident report for plaintiff's accident.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the movant on 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 Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." Vega v Restani Constr. Corp., supra, at 503.

B. Labor Law § 240(1)

The defendants move for summary judgment dismissing the Labor Law § 240 (1) cause of action, arguing that the accident, as described by plaintiff, did not involve an elevation-related risk. The defendants established, prima facie, that the accident did not involve an elevation-related risk, since Richard concededly slipped or tripped on debris left on the surface of a floor, and there was thus virtually no height differential between the debris and the floor. See Torkel v NYU Hosps. Ctr., 63 AD3d 587 (1st Dept. 2009). In opposition, the plaintiffs concede that Labor

Law § 240(1) is inapplicable to the facts of this case, and agree to withdraw the claim. Thus, the Labor Law § 240 (1) cause of action is dismissed as against all of the defendants.

C. Common-Law Negligence and Labor Law § 200

The defendants also move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

> Labor Law § 200 (1) provides, in relevant part:
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> "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."

The statute codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site. See Comes v New York State Elec. & Gas Corp., 82 NY2d 876 (1993). Claims brought under this section "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed." Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143-144 (1st Dept. 2012). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant had control over or responsibility for the premises, and either created the condition or failed to remedy a condition of which it had actual or constructive notice. See Licata v AB Green Gansevoort, LLC, 158 AD3d 487 (1st Dept. 2018); Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1 (1st Dept. 2011); Mitchell v New York Univ., 12 AD3d 200 (1st Dept 2004). If the accident results from the means and methods of the

work, liability may be imposed only if defendant supervised or controlled the injury-producing work. See Cappabianca v Skanska USA Bldg. Inc, supra.

Inasmuch as Richard was injured when he slipped on debris that was not properly cleared or removed from the accident location, his accident arose from a dangerous premises condition. See Licata v AB Green Gansevoort, LLC,, supra; Mendoza v Highpoint Assoc., IX, LLC, supra; cf. Dalanna v City of New York, 308 AD2d 400 (1st Dept. 2003) (installation of protruding bolt implicates means and methods of work, not dangerous premises condition).

The plaintiffs expressly withdraw their common-law negligence and Labor Law § 200 causes of action against 345 Park and Rudin. As to Magen, however, summary judgment must be denied in connection with these causes of action. The parties' testimony shows that Magen and its employees were responsible for providing site safety and for performing debris removal and cleanup of the Premises. See Maza v University Ave. Dev. Corp., 13 AD3d 65 (1st Dept. 2004); Paradise v Lehrer, McGovern & Bovis, 267 AD2d 132, 134 (1st Dept. 1999). Crucially, Magen did not establish, prima facie, that it lacked constructive notice of the debris condition.

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 838 (1986) (citations omitted). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 421 (1st Dept. 2011) (citations omitted). "[W]here the hazardous condition is transitory, a defendant may establish its

entitlement to summary judgment by demonstrating that the condition could have arisen shortly before the accident." Betances v 185-189 Audubon Realty, LLC, 139 AD3d 404, 405 (1st Dept. 2016) (citations omitted).

Although Magen presented evidence that it did not create the condition (see Schulman v City of New York, 157 AD3d 548 [1st Dept. 2018]), it failed to demonstrate its lack of notice. See Simpson v City of New York, 126 AD3d 640 (1st Dept. 2015); Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp., 110 AD3d 637 (1st Dept. 2013). Generally, a defendant moving for summary judgment on the ground that it did not have constructive notice of a dangerous condition must show that it recently inspected the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident. See Guzman v Broadway 922 Enters., LLC, 130 AD3d 431 (1st Dept. 2015); Rivera v Tops Mkts., LLC, 125 AD3d 1504 (4th Dept. 2015); Mike v 91 Payson Owners Corp., 114 AD3d 420 (1st Dept. 2014). Proof of recent inspections is not required only where it is demonstrated that such inspections would not have disclosed the dangerous condition or defect. See Branham v Loews Orpheum Cinemas, Inc., 31 AD3d 319 (1st Dept. 2006), citing Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc., 15 AD3d 857 (4th Dept 2005).

Here, Magen's senior project manager was not sure if the required daily inspections had been performed, and could not identify the last time, prior to the subject accident, any such inspection had been conducted. Nor did he show that any such inspection would not have disclosed the dangerous accumulation of debris. Hence, Magen did not demonstrate its prima facie entitlement to judgment as a matter of law dismissing the common-law negligence and Labor Law § 200 causes of action against it. Those branches of the motion which were for

summary judgment dismissing those causes of action against it must thus be denied, regardless of the sufficiency of the plaintiffs' opposition papers.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the defendants' motion is granted to the extent that they are awarded summary judgment dismissing the Labor Law § 240(1) cause of action against all of the defendants and the common-law negligence and Labor Law § 200 causes of action against the defendants 345 Park Avenue, L.P., and Rudin Management Co., Inc., those causes of action are dismissed as indicated, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: June 6, 2016

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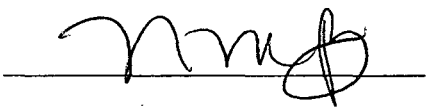

J.S.C.
HON. NANCY M. BANNON