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

Index No. 302851/2008
Motion Calendar No. 6
Motion Date: 1/30/17

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NORMA DOUGLAS,

Plaintiff,

-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

SHERWOOD 48 ASSOCIATES, a limited partnership, SHERWOOD 48 OPERATING COMPANY, L.P., individually and as general partner of SHERWOOD 48 ASSOCIATES, JK 48, LLC, individually and as general partner of SHERWOOD 48 ASSOCIATES, SHERWOOD EQUITIES, INC., RENAISSANCE HOTEL MANAGEMENT COMPANY, LLC a/k/a RENAISSANCE HOTEL OPERATING COMPANY, and BELCOR BUILDERS, INC.,

Defendants.

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BELCOR BUILDERS, INC.,

Third-Party Plaintiff,

-against-

Third Party
Index No.: 84047/2008

RITE-WAY INTERNAL REMOVAL, INC., and C.M.K. CONTRACTING, INC.,

Third-Party Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, Exhibits Thereto	**1**
Notice of Cross- Motion, Affirmation in Support, Exhibits Thereto	**2**
Affirmation in Opposition	**3**
Reply Affirmation in Support and in Opposition	**4**
Reply Affirmation	**5**

Motions decided as follows: Upon deliberation of the application duly made by defendants SHERWOOD 48 ASSOCIATES, a limited partnership, SHERWOOD 48 OPERATING COMPANY, L.P., individually and as general partner of SHERWOOD 48 ASSOCIATES, JK 48, LLC, individually and as general partner of SHERWOOD 48 ASSOCIATES, SHERWOOD EQUITIES, INC., (hereinafter collectively referred to as "SHERWOOD defendants"), RENAISSANCE HOTEL MANAGEMENT COMPANY, LLC a/k/a RENAISSANCE HOTEL OPERATING COMPANY (hereinafter "RENAISSANCE"), and BELCOR BUILDERS, INC., (hereinafter "BELCOR") (hereinafter collectively referred to as "defendants"), by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, for summary judgement and dismissal of plaintiff's Verified Complaint and all cross-claims, counterclaims and claims of any nature asserted against defendants on the grounds that the defendants bear no liability as a matter of law under principles of common-law negligence or Labor Law §§ 200, 240(1) or 241(3), (4), (5) or (6); or alternatively, for an Order granting BELCOR conditional indemnification as against the third-party defendants, RITE-WAY INTERNAL REMOVAL, INC., (hereinafter "RITE-WAY"), is heretofore granted in part and denied in part. Upon deliberation of the application duly made by RITE-WAY, by **NOTICE OF CROSS-MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, dismissing all the claims against RIGHT-WAY, is heretofore denied in part.

This action involves injuries allegedly sustained by the plaintiff as a result of a July 18, 2007 accident that occurred during the course of her employment as a carpenter with the non-appearing third-party defendant, CMK CONTRACTING, INC. (hereinafter "CMK"). The accident allegedly occurred on the job site of the gut renovation of the Renaissance Hotel Times Square, located at 714 Seventh Avenue, New York, NY (hereinafter "subject premises"). The SHERWOOD defendants were the owners of the subject premises. RENAISSANCE occupied the third floor of the subject premises. BELCOR is a construction company who was the "general contractor" hired for the gut renovation project. The gut renovation included removing all existing finishes, installation of new finishes, and re-configuring part of the space in terms of the new partitions. This included ripping down walls and removing the finished floors. It appears that BELCOR subcontracted with RITE-WAY for demolition services, and their duties included removal of the stone and marble floor. The only "contract" submitted to the Court was a single page purchase agreement for services. It appears that the stone tile flooring removal from the third floor of the subject premises took approximately two (2) consecutive days and was completed by May 25, 2007.

BELCOR also subcontracted with non-appearing third-party defendant, CMK, for carpentry work to be performed at the subject premises. On the date of the accident, plaintiff and her co-workers from CMK were putting up sheetrock and plywood on the wall of the subject premises for the purposes of redoing the walls on the third floor. Plaintiff was directed to cut sheetrock and move the mobile scaffold that her co-workers were perched on top of. Plaintiff never ascended, descended or climbed the scaffold and her duties were limited to cutting the sheetrock , handing the sheetrock to her co-workers who were on the mobile scaffold and then moving the scaffold while her co-workers were on the scaffold to another location of the wall for the purposes of putting up sheetrock and plywood. At the time of the accident, plaintiff was in the process of moving the mobile scaffold, by walking backwards and pulling it towards her with both hands. Plaintiff alleges that as she was

pulling the scaffold towards herself, she stepped back with her left foot, and the heel of her left foot went into a hole or trench, so that her left heel and the back part of her left foot from the heel to the mid arch were wedged at the bottom of the trench and the rest of her foot and the toe of her work boot were "sticking out" of the trench. Moreover, plaintiff claims that the wheel of the scaffold also went into the trench and it pinned her foot into the hole, although she was able to successfully remove her foot from the hole or trench after pushing the scaffold.

A party seeking summary judgement must demonstrate, *prima facie*, entitlement to judgement as a matter of law by presenting sufficient evidence to negate any issue of material fact. *See* Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1983). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. *See* Zuckerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

The application by defendants for summary judgement, dismissing plaintiff's Labor Law§ 240(1) claim is heretofore granted. Labor Law §240 reads, in pertinent part:

> "All contractors and owners and their agents, except owners of one and two family dwelling who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays ladders, slings, hangers, blocks, pullys braces, irons, ropes, and other devices which shall so be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240(1) applies in all cases in which the work involves risks related to differences in elevation and gravity related risks. *See* Becerra v. City of New York, 261 A.D.2d 188 (1st Dept. 1999). Furthermore, Labor Law §240(1) mandates that defendants be held strictly liable to workers who sustain injuries proximately caused by failures on the part of owners and general contractors to provide or erect proper ladders, scaffolds and other safety devices necessary to give proper protection to a worker. *See* Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513 (1985). Moreover, the implications of strict liability provide that any fault, negligence or carelessness on the part of the plaintiff, which may have contributed to his injuries, are not to be considered. *See* Bland v. Manocherian, 66 N.Y.2d 452 (1985).

It cannot be said that the act of pulling a mobile scaffold and stepping into a trench is a gravity related risk contemplated by Labor Law § 240(1). *See* Runner v. New York Stock Exchange, 13. N.Y.3d 599, 895 N.Y.S.2d 279 (2009). It has not been demonstrated that plaintiff ascended, descended or climbed the scaffold at any point during the performance of her duties on the day in question. It appears her duties were limited to cutting the sheetrock, handing the sheetrock to her co-workers who were on the mobile scaffold and then moving the mobile scaffold. It does not appear that plaintiff's feet ever left the ground of the third floor of the subject premises and her exclusive interaction with the scaffold was pulling it towards her person while her co-workers were perched on the scaffold and pushing it off of her foot. As plaintiff's injuries did not involve a gravity related

risk, plaintiff's Labor Law § 240(1) claim must be dismissed.

Moreover, the application by defendants for summary judgement, dismissing plaintiff's Labor Law §§ 241(3), (4), (5) causes of action is heretofore granted, without opposition.

The application by defendants for summary judgement, dismissing plaintiff's Labor Law § 241(6) cause of action, is heretofore denied. It should be noted that plaintiff does not dispute this application with respect to 12 NYCRR §§ 23-1.5; 23-1.7(b); 23-1.7(d); 23-1.7(e)(1) and (2); 23-2.1(a) and (b); 23-1.30; 23-5.1(b); 23-5.3(g). However, plaintiff does dispute defendants' application with respect to 12 NYCRR 23-5.18(g) and (h).

12 NYCRR §23-5.18(g) provides, in pertinent part:

> Scaffold footing. Whenever any such scaffold is in use and is occupied by any person, such scaffold shall rest upon a stable footing, the platform shall be level and the scaffold shall stand plum.

The plain language of this section indicates that his Section applies to work being done while the party is on the scaffold and not pulling the scaffold. Defendants' application to as to 12 NYCRR §23-5.18(g) must therefore be granted.

However, defendants' application to dismiss plaintiff's Labor Law §241(6) claim is denied due to an issue of fact as to their violation of 12 NYCRR §23-5.18(h).

12 NYCRR §23-5.18(h) provides in pertinent part:

> Moving the scaffold. Provisions shall be made to prevent such scaffolds from tipping or falling during their movement from one location to another. Scaffolds shall be moved only on level floors or equivalent surfaces free from obstructions and opening.

It appears that EBT testimony exists from RITE-WAY demonstrating that demolition work was done on the third floor of the subject premises. It also appears that plaintiff was injured while moving the scaffold before the floor was finishes. Furthermore, EBT testimony from RENAISSANCE witness, James Goebel, and plaintiff, exist which demonstrates that trenches may have been dug into the concrete subfloor of the third floor during the gut renovation and could have been done for "relocation of electrical services." It also appears that EBT testimony exists that these same trenches were observed to be uncovered and testimony from RITE-WAY exists that indicates that RITE WAY was not retained to dig trenches and, in any event, they were not responsible for covering the floors after their work as that responsibility would be the general contractor or BELCOR's. As such it appears that issues of fact exist as to whether defendants violated 12 NYCRR §23-5.18(h) and as such, defendants application to dismiss plaintiff's Labor Law § 241(6) claim must be denied.

Defendants application for summary judgement with respect to plaintiff's Labor Law §200 claim is heretofore denied. Labor Law §200 is a codification of common law negligence. *See* Lombardi v.

Stout, 80 N.Y.2d 290, 590 N.Y.S.2d 55 (1992). It codifies the common law duty of an owner and a general contractor to provide a safe place to work for workers at a construction site. *See* Allen v. Cloutier Construction Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630 (1978). In order to establish entitlement to summary judgement, defendants must establish that it either did not have a right to control or supervise the plaintiff's work or that it did not have any notice of a defective condition which caused the injures. *See* Higgins v. 1790 Broadway Assoc., 261 A.D.2d 223, 225 (1st Dept 1999).

Here, triable issues of fact exists with respect to whether the general contractor, retained the right to control and supervise the job site. More specifically, EBT testimony from Mr. Goebel and BELCOR president, Michael Bellion, appear to create an issue of fact as to whether defendants' supervisory employees had authority to "stop work" of the subcontractors when if and when they observed any unsafe conditions, thereby retaining the right to control and supervise the job site on the third floor of the subject premises. Moreover, as previously indicated, there appears to be an issue of fact as to who controlled the safety and maintenance of the work site and who was responsible to cover the trenches that had been created in the floor.

Furthermore, issues of fact as to actual notice of the alleged hazardous conditions exist. Plaintiff testified that she overheard defendants' representatives being notified by CMK employees of the existence of open trenches on he floor. Even assuming, *arguendo*, that this Court not consider this fact due to issues of hearsay, plaintiff has sufficiently established issues of fact with respect to constructive notice. Plaintiff testified that trenches existed from early June, 2007 and she personally witnessed them laying uncovered to varying degrees up until the time of the accident. Moreover, Mr. Goebel testified that the trenches may have been made fore the purposes of electrical wiring, and that he may have witnessed them uncovered while worker was being performed. Even further, Mr. Bellion, testified that he was present at the subject job site "twelve hours" per day, approximately six days per week, during the course of the gut renovation project. Lastly, again, there appears to be issues of fact as to who was responsible for covering the trenches to begin with. Therefore issues of fact exist as to whether defendants should have had, at the very least, constructive notice of the existence of uncovered trenches exists. *See* Mitchell v. City of New York, 29 A.D.3d 372, 815 N.Y.S2d 55 (1st Dept. 2006). As such, defendants' application for summary judgement with respect to plaintiff's Labor Law §200 claim is heretofore denied.

BELCOR's application for conditional indemnification against RITE-WAY is heretofore denied. BELCOR has not attached a contract to their application that sets forth any duty on the part of RITE WAY to indemnify BELCOR in any way shape or form. All that BELCOR has attached to their application is what appears to be a purchase order from RITE WAY to remove stone flooring on the third floor of the subject premises. Moreover, that purchase order specifically EXCLUDES "protection." As a matter of law, BELCOR has not produced sufficient evidence for this Court to grant conditional indemnification.

RITE-WAY's application for summary judgement is heretofore granted. BELCOR's Third-Party Complaint against RITE-WAY asserts four causes of action. The first cause of action asserts general allegations of negligence against RITE-WAY. The second, third, and fourth causes of action set forth allegations sounding in breach of contract. More specifically, the second cause of action sets

forth a breach of contract claim, the third cause of action alleges that RITE-WAY was contractually obligated to indemnify, hold harmless and had a duty to defend BELCOR and the fourth cause of action alleges that RITE-WAY failed to procure insurance.

RITE-WAY has made a *prima facie* showing of entitlement to summary judgement with respect to dismissing the Third-Party Complaint in it's entirety. More specifically, RITE WAY has set forth that is was retained by BELCOR to demolish the existing floor on the third floor of the subject premises and not to dig trenches. They have demonstrated that the agreement was pursuant to a March 17, 2007 one (1) page Purchase Order. Moreover, this purchase order specifically excludes "protection" and "secondary flooring/ceiling." Mr. Bellion testified at his EBT that no one from BELCOR or the ownership entities received any complaints concerning the condition of the concrete floor following the work that was performed by RITE-WAY. Morever, Mr. John Tramutolo and Mr. Saul Vergara testified on behalf of RITE-WAY. Mr. Vergara testified that the stone floor was removed using a chisel gun to crack and lift the marble tiles which composed the floor. Mr. Tramutolo testified that it was not RITE-WAYs practice or duty to provide floor covering, and that duty was the responsibility of the general contractor. Mr. Vergaras testified that after the floor was demolished, it was not RITE WAY's job to provide temporary flooring or floor covering. Lastly, it appears that RITE WAY was absent from the work site for approximately (5) weeks until the time of the accident due to the completion of their duties.

As RITE WAY has set forth a *prima facie* showing of entitlement to summary judgement, BELCOR must come forth with an issue of fact that would prevent this Court from granting summary judgement at this time.

It appears that BELCOR has failed to set forth any evidence demonstrating an issue of fact that would preclude this Court from granting summary judgement. This Court will not proactively ascribe a duty to RITE-WAY with respect to BELCOR's second, third or fourth cause of action as the purchase order is specifically silent as to indemnification, duty to defend, hold harmless and acquiring insurance. Moreover, there has been no evidence presented that RITE WAY breached any duty set forth in the purchase order which specifically excluded "protection" and "secondary flooring/ceiling." Lastly, there has been no evidence set forth by BELCOR that RITE WAY was negligent in any way in the performance of their duties, especially as their own witness testified to never receiving any complaints and that RITE WAY was absent from the work site for the five (5) weeks before the accident due to job completion, that the purchase order specifically excluded "protection" and "secondary flooring/ceiling."

As such, BELCOR's Third-Party Complaint against RITE WAY is heretofore dismissed.

Accordingly, it is:

ORDERED that the motion by defendants for dismissal of plaintiff's Labor Law§ 240(1) claim, is heretofore granted. It is further

ORDERED that the motion by defendants for dismissal of plaintiff's Labor Law §§ 241(3), (4), (5) claims, is heretofore granted without opposition. It is further

ORDERED that the motion by defendants for dismissal of plaintiff's Labor Law § 241(6) claim, is heretofore denied. It is further

ORDERED that the motion by defendants for dismissal of plaintiff's plaintiff's Labor Law § 200 claim and common law negligence claim, is heretofore denied. It is further

ORDERED that the motion by BELCOR, for an Order, granting BELCOR conditional indemnification as against RITE-WAY, is heretofore denied. It is further

ORDERED that the application by RITE-WAY, for an Order, pursuant to CPLR §3212, dismissing the Third-Party Complaint as against RITE WAY, is heretofore granted. It is further

ORDERED that the Clerk of the Court mark the file accordingly. It is further

ORDERED that defendants shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 7/7/17

HON. WILMA GUZMAN
J.S.C.