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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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MICHAEL DAVIS,

Index No.: 153678/2014

Plaintiff,

-against-

COLUMBIA UNIVERSITY MEDICAL CENTER, F.J. SCIAME CONSTRUCTION CO., INC., THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and SCIAME CONSTRUCTION, LLC,

Defendants.

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THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and SCIAME CONSTRUCTION, LLC,

Third-Party Plaintiffs,

-against-

DFC STRUCTURES LLC,

Third-Party Defendant.

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THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and SCIAME CONSTRUCTION, LLC,

Second Third-Party Plaintiffs,

-against-

CORD CONTRACTING and URBAN FOUNDATION ENGINEERING, LLC,

Second Third-Party Defendants.

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David B. Cohen, J.:

This is an action to recover damages for personal injuries allegedly sustained by an iron worker on March 19, 2014, when, while working on the construction of a 15-story building (the Project) for the Columbia University Medical Center at 104 Haven Avenue, New York, New York (the Premises), he stepped down onto a piece of lumber, as he was traveling from an elevated portion of a deck to an adjoining lower portion.

Defendants the Trustees of Columbia University in the City of New York (Columbia) and Sciame Construction, LLC (Sciame) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

Plaintiff Michael Davis cross-moves, pursuant to CPLR 3212, for summary judgment in his favor on those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.7 (e) 2 and 23-1.7 (f).

BACKGROUND

On the day of the accident, Columbia owned the Premises where the accident occurred. Sciame served as the construction manager of the Project underway there. Sciame hired various subcontractors for the Project, including DiFama Concrete (DiFama), the subcontractor in charge of the super-structure concrete work. Plaintiff was employed by DiFama as an iron worker.

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that on the day of the accident, he was working for DiFama as an iron worker. On that day, the basement of the Premises had already been constructed, and he was working on the first floor. Plaintiff's job entailed "tying steel" with wire (plaintiff's tr at 23). The steel was previously laid down by other DiFama iron workers in preparation for a concrete pour that was part of the installation of the flooring.

Plaintiff testified that the first floor consisted of two levels, one of which was two to three feet above the other one. Plaintiff explained that as he was returning from getting some additional wire, he stepped down from the higher elevation to the lower one. As he did so, his foot landed on top of a 2' x 4' piece of wood, and the wood "roll[] towards [his] left" (*id.* at 58). This caused his ankle to turn over and him to fall down.

Specifically, when plaintiff was asked as to what caused the accident to happen, he replied, "Upon me coming back from getting some wire and using the bathroom, as I stepped down on a different elevation of the deck, I stepped on a 2 by 4, which I didn't see" (*id.* at 25). Plaintiff explained that he did not see the piece of wood "until it was too late because it was like tucked in, like curved, sideways" underneath an exterior wall (*id.* at 41).

Affidavit of Ken Moore (DiFama Lather)

In his affidavit, Ken Moore stated that he was working for DiFama as a lather on the day of the accident. That day, the DiFama crew was working on the ground floor of the Premises "laying out and tying up rebar steel for the floor deck and for reinforced concrete walls" (Moore aff). He asserted that "[o]ne section of the ground floor was 2-3 feet higher than the other section," and that "[t]here were no steps or ramps connecting the higher section to the lower section" (*id.*).

Moore further stated that after the accident, plaintiff told him that "while stepping down from the elevated portion of the deck, he stepped on a piece of lumber debris and rolled his ankle" (*id.*). Moore maintained that the piece of wood was "debris created by the carpenters when they built the form work for the deck" (*id.*).

Deposition Testimony of Alex Solnick (Sciame's Assistant Project Manager)

Alex Solnick testified that he served as Sciame's assistant project manager on the day of the accident. In addition, Sciame had 11 laborers and 23 carpenters working on the Project. Solnick testified that after the steel was laid and the concrete was poured, wood shoring was used to support the new floor. After 28 days, DiFama removed the wood shoring. DiFama also used 2 foot by 4 foot pieces of wood to create the forms for its concrete pours.

Solnick testified that each subcontractor was primarily in charge of cleaning up their own debris after completing their work in any one area. However, if a subcontractor did not adequately clean up after its work, Sciame's laborers were responsible for cleaning it up. Sciame was not responsible for removing said debris until the subcontractor's work on the floor was totally completed, and they had left the floor. In this regard, Solnick explained:

> "So [DiFama] would build off one floor onto the next floor, and they would put their shoring up to support the next floor. At that time, you know, DiFama was still in control of those floors because they had not yet finished stripping operations or - you know, they were the only contractor more or less on those floors. They were the controlling contractor. Once the shoring had been removed from the subsequent lower floor, whatever time frame that may be, then they would no longer be on the floor. Then they would turn the floor over to Sciame"

(Solnick tr at 25-26).

Solnick further testified that he was informed of plaintiff's accident by John Benedetto, Sciame's site safety manager, and that Benedetto told him that he was preparing an accident report.

The City Safety Compliance Corp Updated Accident Report

The City Safety Compliance Corp Updated Accident Report (the Report), which was prepared by Benedetto, describes plaintiff's accident, as follows:

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> "[Plaintiff states] that he was walking back from the bathroom on the 1st floor framing deck. He was traveling from a higher elevation to a lower elevation when the injury accord [sic]. [Plaintiff] states that he stepped on a piece of 2/4 for work which "rolled" under his body weight. This caused him to lose his balance and injure his left ankle"

(plaintiff's notice of cross motion, exhibit 8, the Report).

DISCUSSION

"'The proponent of 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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim Against Defendants

Defendants move for dismissal of the Labor Law § 240 (1) claim against it. As plaintiff does not oppose that part of defendants' motion which seeks to dismiss said claim, this unopposed claim is deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful

termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, defendants are entitled to dismissal of the Labor Law § 240 (1) claim against it.

The Labor Law § 241 (6) Claim Against Defendants

Defendants move for dismissal of the Labor Law § 241 (6) claim against it. Plaintiff cross-moves for summary judgment in his favor on those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.7 (e) 2 and 23-1.7 (f).

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Initially, while plaintiff asserts multiple alleged Industrial Code violations in his bill of particulars, with the exception of Industrial Code section 23-1.7 (e) (2) and 23-1.7 (f), plaintiff

does not oppose their dismissal. Therefore, these unopposed Industrial Code provisions are deemed abandoned (*see Kempisty*, 92 AD3d at 475; *Genovese*, 309 AD2d at 833).

Thus, defendants are entitled to dismissal of those parts of the Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 23-1.7 (e) (2)

Initially, Industrial Code section 23-1.7 (e) (2) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Appelbaum v 100 Church*, 6 AD3d 310, 310 [1st Dept 2004]).

Section 23-1.7 (e) (2) provides, in pertinent part:

"(e) Tripping and other hazards.

* * *

(2) Working Areas. 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."

As noted previously, plaintiff was injured when, while stepping down from an elevated portion of the floor to a lower portion, his foot stepped down onto an allegedly discarded piece of wood, causing his ankle to turn on the piece of wood and plaintiff to fall. Plaintiff argues that the lone piece of wood that caused the accident was just an errant scrap of debris, forgotten underneath the deck, rather than a material in the process of being installed.

Defendants argue that section 23-1.7 (e) (2) does not apply to the facts of this case because the piece of wood that plaintiff stepped on was integral to the super-structure work underway in the accident location at the time of the incident (*see Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607 [1st Dept 2015] [alleged section 23-1.7 (e) (2) violation dismissed,

where the plaintiff tripped over a screw, which was an integral part of the raised tile floor system being installed]; *O'Sullivan*, 7 NY3d at 806 [electrical pipe or conduit that plaintiff tripped over was an integral part of the construction]; *Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465, 466 [1st Dept 2013] [section 23-1.7 (e) (2) did not apply where the pipe and pipe fittings that plaintiff tripped over were consistent with the work being performed in the room]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [rebar steel that the plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, an integral part of the work being performed]).

A review of the record indicates that pieces of wood were used for shoring and for creating the forms for the concrete pours, and that these tasks were very much a part of the floor installation work on the Project. However, as it is unclear from the record as to whether those tasks were already fully completed by the time of the accident, a question of fact exists as to whether the piece of wood that plaintiff stepped on was integral to the work.

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code section 23-1.7 (e) (2), and defendants are not entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-1.7 (f)

Initially, section 23-1.7 (f) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]; *Atkins v Baker*, 247 AD2d 562, 562 [2d Dept 1998]).

Section 23-1.7 (f), which refers to vertical passages, states, in pertinent part:

"Stairways, ramps or runways shall be provided as the means of access to working

> levels above or below ground except where the nature or progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Here, plaintiff testified that his accident occurred because the piece of wood that he stepped on had not been properly cleared away from his work area, but also testified that he stepped down harder because of the height of the drop to the lower portion of the deck . Under these circumstances, wherein plaintiff had to step down a distance of two to three feet, it is possible that the lack of a proper means of access between the upper and lower portions of the deck may have also contributed to the happening of his accident. Thus, there is a question of fact as to whether the failure to provide a stairway, ramp, runway, ladder, or other safe means of accessing this vertical passage was a proximate cause of plaintiff's accident and injury. As such, since a question of fact exists as to whether section 23-1.7 (f) applies, neither plaintiff nor defendants are entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (f).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 (1) states, in pertinent part, as follows:

> "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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the

contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the

event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, the piece of wood that caused the accident "was not a defect inherent in the property," but, rather, its presence on the floor was a result of the means and methods of the work (*Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] ["the protruding bolt [that the plaintiff tripped over] was not a defect inherent in the property, but rather was created by the manner in which plaintiff's employer performed its work"]; *Maddox v Tishman Constr. Corp.*, 138 AD3d 646, 646 [1st Dept 2016] ["the double-stacking of the sand and cement bags at the work site was not an inherently dangerous condition of the work site but a result of the means and methods of the injury-producing work"]; *Ocampo*, 123 AD3d at 457 [where the plaintiff was injured as a result of slipping on ice, the common-law negligence and Labor Law § 200 claims were dismissed "because the record show[ed] that [the] defendant did not exercise supervisory control over the means and methods of the work, which required plaintiff's employer to use water to minimize the risks associated with asbestos"]).

As there is no evidence in the record establishing that Columbia supervised or directed any of the clean-up work on the Project, Columbia is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

As to Sciame, plaintiff offers no evidence to refute Solnick's testimony that Sciame was not responsible for removing any subcontractor's debris until that subcontractor's work on the

floor was totally completed and the subcontractor had moved on to a different floor. Moreover, at the time of the accident, DiFama's workers were still working on the first floor where the accident took place.

Thus, Sciame is also entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the parts of defendants the Trustees of Columbia University in the City of New York and Sciame Construction, LLC's (together, defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240 (1) claims, as well as those parts of the Labor Law § 241 (6) claim predicated on alleged violations of the abandoned provisions, is granted, and these claims are dismissed as against defendants, and the motion is otherwise denied; and it is further

ORDERED that defendants' motion and plaintiff Michael Davis's cross motion, pursuant to CPLR 3212, for summary judgment on those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.7 (e) 2 and 1.7 (f) are denied; and it is further

ORDERED that the action shall continue.

Dated: March 29, 2019

Hon. David B. Cohen

HON. DAVID B. COHEN
J.S.C.