SHORT FORM ORDER

INDEX No. 16-620169
CAL. No. 19-00145OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 6-18-19
ADJ. DATE 8-6-19
Mot. Seq. # 001 - MG; CASEDISP

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JOSEPH QUEVEDO,

Plaintiff,

- against -

MACERICH PROPERTY MANAGEMENT COMPANY, LLC and AURORA CONTRACTORS OF NY, INC, a/k/a AURORA CONTRACTORS, INC.,

Defendants.

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Upon the following papers numbered read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated May 23, 2019; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by plaintiff, dated July 15, 2019; Replying Affidavits and supporting papers by defendants, dated August 2, 2019; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Macerich Property Management Company, LLC and Aurora Contractors of NY, Inc., a/k/a Aurora Contractors, Inc., for summary judgment dismissing the complaint is granted.

Plaintiff Joseph Quevedo commenced this action to recover for injuries he allegedly sustained during his employ for nonparty Island Diversified, Inc. (Island Diversified) on March 12, 2016, at the commercial premises known as Green Acres Mall, located at 2034 Green Acres Mall in Valley Stream, New York, which is owned by defendant Macerich Property Management Company, LLC (Macerich). Macerich allegedly hired defendant Aurora Contractors of NY, Inc., a/k/a Aurora Contractors, Inc. (Aurora) as the general contractor, who then allegedly hired a subcontractor, Island Diversified, to

perform certain fireproofing work at the work site. The accident allegedly occurred when plaintiff slipped and fell on plastic sheeting, which was covered in fireproofing material. Plaintiff alleges claims for common-law negligence and for violations of Labor Law §§ 200 and 241 (6).

Defendants now move for summary judgment dismissing the complaint. They argue, in part, that they cannot be held liable for common-law negligence or for violation of Labor Law § 200, because the accident arose from the means and methods of Island Diversified's work, and they did not direct, supervise, or control the injury-causing work. They also contend that they did not violate the provisions of the Industrial Code set forth in the bill of particulars, precluding liability under Labor Law § 241 (6). In support of their motion, defendants submits, among other things, the transcripts of the deposition testimony of plaintiff, Michael McGarth, and Dennis Danseglio, and the affidavit of Katherine Smith.

In opposition, plaintiff argues, in part, that defendants failed to eliminate triable issues of fact regarding whether they had constructive notice of the alleged dangerous condition, precluding dismissal of his common-law negligence and Labor Law § 200 claims. He also argues that defendants are not entitled to dismissal of their Labor Law § 241 (6) claim premised upon their alleged violation of 12 NYCRR 23-1.7 (d), because the plastic sheeting was not integral part of the work. Plaintiff submits, among other things, his affidavit.

Dennis Danseglio testified that he was employed by Aurora as the project manager for the work site. He also testified that Island Diversified was responsible for protecting the concrete floor from staining, and that it used plastic tarps to do so. He stated that the lights at the work site always remained turn on unless the circuit breaker malfunctioned. No one allegedly complained of the lighting conditions on the second floor to Danseglio.

Michael McGarth testified that has was employed by Island Diversified as a field super at the time of the accident. According to McGarth's testimony, Aurora's involvement in Island Diversified's work was limited to directing the sequence of such work. McGarth testified that nylon tarps, which were supplied by Island Diversified, were used to protect the floor. McGarth allegedly did not receive any complaints from Island Diversified's employees regarding the lighting conditions on the second floor prior to March of 2016.

Plaintiff testified that he was working as a laborer, which entailed assisting sprayers and handling fireproofing material, at the work site. According to his testimony, plaintiff received instruction and direction regarding his work from Island Diversified's foreman. He further testified that he was walking towards a co-worker, who was preparing to spray fireproofing material, at the time of the accident.

In her affidavit, Katherine Smart states that she is the vice president of risk management for Macerich. She avers that Macerich had no involvement in Island Diversified's fireproofing work.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant

has the initial burden of proving entitlement to summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see ***Winegrad v New York Univ. Med. Ctr.***, supra). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***New York City Asbestos Litig. v Chevron Corp.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

Labor Law § 200 codifies the common-law duty of owners and general contractors to provide workers with a safe place to work (*see* ***Boody v El Sol Contr. & Constr. Corp.***, 180 AD3d 863, 116 NYS3d 586 [2d Dept 2020]; ***Campanello v Cinquemani***, 179 AD3d 763, 117 NYS3d 262 [2d Dept 2020]; ***Pchelka v Southcroft, LLC***, 178 AD3d 836, 115 NYS3d 382 [2d Dept 2019]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Boody v El Sol Contr. & Constr. Corp.***, *supra* at 864, quoting ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Pchelka v Southcroft, LLC***, *supra*; ***Sanders v Sanders-Morrow***, 177 AD3d 920, 114 NYS3d 114 [2d Dept 2019]). Where a defect is not inherent in the premises, but results from the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises (*see* ***Villanueva v 114 Fifth Ave. Assoc. LLC***, 162 AD3d 404, 78 NYS3d 87 [1st Dept 2018]; ***Dalanna v City of New York***, 308 AD2d 400, 764 NYS2d 429 [1st Dept 2003]). Where a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, an owner or general contractor only can be held liable where the party to be charged exercised some supervisory control over the operation (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Boody v El Sol Contr. & Constr. Corp.***, *supra*; ***Pchelka v Southcroft, LLC***, *supra*). A defendant exercises sufficient authority to supervise or to control the work to be held liable under Labor Law § 200 "when that defendant bears the responsibility for the manner in which the work is performed" (***Boody v El Sol Contr. & Constr. Corp.***, *supra* at 865, quoting ***Ortega v Puccia***, *supra* at 62; *see* ***Pchelka v Southcroft, LLC***, *supra*; ***Lombardi v City of New York***, 175 AD3d 1521, 109 NYS3d 373 [2d Dept 2019]). However, the mere retention of general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (*see* ***Boody v El Sol Contr. & Constr. Corp.***, *supra*; ***Pchelka v Southcroft, LLC***, *supra*; ***Lazo v Ricci***, 178 AD3d 811, 115 NYS3d 424 [2d Dept 2019]).

Contrary to plaintiff's contention, defendants established, prima facie, that the accident did not arise from a dangerous or defective premises condition, but rather from the method and manner of the work (*see* ***Boody v El Sol Contr. & Constr. Corp.***, *supra*; ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Cooper v State of New York***, 72 AD3d 633, 899 NYS2d 275 [2d Dept 2010]). Defendants further established, prima facie, that they lacked the authority to supervise or to control the injury-producing work (*see* ***Boody v El Sol Contr. & Constr. Corp.***, *supra*; ***Lopez v Edge***

11211, LLC, 150 AD3d 1214, 56 NYS3d 187 [2d Dept 2017]; ***Austin v Consolidated Edison, Inc.***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]). Defendants' submissions indicated that plaintiff worked solely under the direction of Island Diversified's foreman, and that Island Diversified supplied the plastic sheeting to protect the floor. In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Boody v El Sol Contr. & Constr. Corp.***, *supra*; ***Lopez v Edge 11211, LLC***, *supra*; ***Austin v Consolidated Edison, Inc.***, *supra*).

Labor Law § 241 (6) imposes a nondelegable duty upon "owners and contractors 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" (***Misicki v Caradonna***, 12 NY3d 511, 515, 882 NYS2d 375 [2009], quoting ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501-502; *see* ***Ortega v Roman Catholic Diocese of Brooklyn, N.Y.***, 178 AD3d 940, 112 NYS3d 583 [2d Dept 2019]; ***Mendez v Vardaris Tech, Inc.***, 173 AD3d 1004, 103 NYS3d 523 [2d Dept 2019]). To prove a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards, and that his or her injuries were proximately caused by that violation (*see* ***Moscati v Consolidated Edison Co. of N.Y., Inc.***, 168 AD3d 717, 91 NYS3d 209 [2d Dept 2019]; ***Rodriguez v 250 Park Ave., LLC***, 161 AD3d 906, 76 NYS3d 107 [2d Dept 2018]; ***Zaino v Rogers***, 153 AD3d 763, 59 NYS3d 770 [2d Dept 2017]). Here, plaintiff's Labor Law § 241 (6) claim is premised upon alleged violations of 12 NYCRR 23-1.7 (d) and 23-1.30.

Defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) claim premised upon a violation of 12 NYCRR 23-1.7 (d), by establishing that the fireproofing material and the plastic sheeting upon which plaintiff slipped was an integral part of his work (*see* ***Lopez v Edge 11211, LLC***, *supra*; ***Galazka v WFP One Liberty Plaza Co., LLC***, 55 AD3d 789, 865 NYS2d 689 [2d Dept 2005]; ***Gist v Central School Dist. No. 1***, 234 AD2d 976, 651 NYS2d 818 [4th Dept 1996]). 12 NYCRR 23-1.7 (d) sets forth that "foreign substance[s] which may cause slippery footing shall be removed, sanded or covered to provide safe footing." The fireproofing material and the plastic sheeting do not constitute a "foreign substance" within the meaning of that provision of the Industrial Code (*see* ***Lopez v Edge 11211, LLC***, *supra*; ***Galazka v WFP One Liberty Plaza Co., LLC***, *supra*; ***Salinas v Barney Skanska Constr. Co.***, 2 AD3d 619, 769 NYS2d 559 [2d Dept 2003]; ***Gist v Central School Dist. No. 1***, *supra*). In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Lopez v Edge 11211, LLC***, *supra*; ***Galazka v WFP One Liberty Plaza Co., LLC***, *supra*).

Defendants also established their prima facie entitlement to summary judgment dismissing the Labor Law § 241 (6) claim premised upon a violation of 12 NYCRR 23-1.30 (*see* ***Kochman v City of New York***, 110 AD3d 477, 973 NYS2d 114 [1st Dept 2013]; ***Tucker v Tishman Constr. Corp. of N.Y.***, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007]; ***Carty v Port Auth. of N.Y. & N.J.***, 32 A.D.3d 732, 821 NYS2d 178 [1st Dept 2006]). 12 NYCRR 23-1.30 sets forth, in pertinent part, that "[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction . . . but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work." Plaintiff's allegation that defendants violated 12 NYCRR 23-1.30, standing alone, is too vague to support an inference that the lighting fell below the specific statutory requirements (*see* ***Kochman v City of New York***, *supra*; ***Tucker v Tishman Constr. Corp. of N.Y.***, *supra*; ***Carty v Port Auth. of N.Y. & N.J.***, *supra*). In any event, plaintiff has abandoned his reliance on

12 NYCRR 23-1.30, by failing to address that provision in opposition (*see* ***Pita v Roosevelt Union Free Sch. Dist.***, 156 AD3d 833, 68 NYS3d 84 [2d Dept 2017]; ***Palomeque v Capital Improvement Servs., LLC***, 145 AD3d 912, 43 NYS3d 483 [2d Dept 2016]; ***Harsch v City of New York***, 78 AD3d 781, 910 NYS2d 540 [2d Dept 2010]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: 4/24/2020

Linda J. Kevins J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION