SCANNED ON 6/10/2005

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

PRESENT: Richter Justice PART 24

Index Number : 119149/2001
CANZANI, RUDOLFO
VS
OLYMPIC PLUMBING & HEATING
Sequence Number : 6
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

See Annexed decision

FILED
JUN 10 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/7/05

ROSALYN RICHTER J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

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RUDOLFO CANZANI,

Plaintiff,

-against-

OLYMPIC PLUMBING & HEATING, J.A. JONES GMO/LLC, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK UNIVERSITY MEDICAL CENTER, KEVIN ROCHE, JOHN DINKELOO AND ASSOCIATES, NEW YORK UNIVERSITY, and PREMIER-NEW YORK, INC.,

Defendants.

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NEW YORK UNIVERSITY s/h/a NEW YORK UNIVERSITY SCHOOL OF LAW,

Third-Party Plaintiff,

-against-

PREMIER-NEW YORK, INC.,

Third-Party Defendant.

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Index No. 119149/01

Decision & Order
Motion Sequence Nos.
006, 007, & 008

ROSALYN RICHTER, J.:

In this action to recover monetary damages for plaintiff's alleged workplace injuries, motion sequence numbers 006, 007, and 008 are consolidated for disposition.

In motion sequence no. 006, defendants J.A. Jones GMO/LLC (Jones) and New York

University School of Law, New York University Medical Center, and New York University (together, NYU) seek summary judgment (CPLR 3212) dismissing plaintiff's complaint and all cross claims and counterclaims as against them, as well as summary judgment on their third-party complaint against third-party defendant Premier-New York, Inc. (Premier).

In motion sequence no. 007, defendant/third-party defendant Premier moves for summary judgment (CPLR 3212) dismissing both plaintiff's complaint as against it, as well as the third-party complaint.

In motion sequence no. 008, defendant Olympic Plumbing & Heating (Olympic) moves for summary judgment (CPLR 3212) dismissing plaintiff's complaint and all cross claims as against it. Additionally, plaintiff cross-moves for partial summary judgment as against Jones and NYU, based upon his claims under Labor Law § 240 (1).

For the reasons stated below, Jones and NYU's motion for summary judgment is granted only to the extent of dismissing plaintiff's complaint as against them, and is otherwise denied. Premier's motion for summary judgment is granted only to the extent of dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against it, as well as the third-party complaint, and is otherwise denied. Olympic's motion for summary judgment is granted only to the extent of dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against it, and is otherwise denied. Plaintiff's cross motion is denied.

Plaintiff alleges that, on October 16, 2000, he was injured while working at a construction site at 123 East 13th Street, New York, New York. According to plaintiff, an employee of non-party Consolidated Edison (Con Ed), immediately prior to his accident, he was working in a below-

ground-level vault, that was situated in the street outside the construction area. Plaintiff maintains that he was in the vault, passing electrical cable through holes in the vault into the partially completed building, when a fellow Con Ed worker warned him of impending danger. Plaintiff contends that he immediately started to climb the ladder to get out of the vault, and was almost at street level, when he was knocked off the ladder by a flood of water. According to plaintiff, although he did not see where the water originated prior to being hit, when plaintiff reclimbed the ladder, he saw water coming down from a pipe high up on the building being constructed. See Plaintiff EBT, at 50-52. Plaintiff alleges that, as the result of this accident, he sustained injuries to his left elbow and hand, as well as to his back.

Plaintiff seeks recovery under common-law negligence, as well as Labor Law §§ 200, 240 (1), and 241 (6) theories of liability. To support his Labor Law § 241 (6) claims, plaintiff alleges violations of sections 12 NYCRR 23-1.5, 23-1.7, 23-1.16, and 23-1.21 of the Industrial Code.

Jones, the general contractor of the construction project; NYU, the owner of the building and the land on which the new building was being constructed; Premier, the roofing subcontractor; and Olympic, the plumbing subcontractor, all seek summary judgment dismissing plaintiff's complaint.

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented," *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441 (1968), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980).

To establish a prima facie case of common-law negligence, a plaintiff is required to establish that: (1) a defendant either created or had notice of the alleged dangerous or defective condition, and (2) that the alleged dangerous condition was the proximate cause of the injury. *See Pouso v. City of New York*, 177 A.D.2d 560 (2nd Dept. 1991).

To make out a valid common-law negligence claim against an owner or general contractor in the context of a Labor Law case, there must be evidence that the owner or general contractor either caused the dangerous condition, or had actual or constructive notice of it. *See also Higgins v. 1790 Broadway Assocs.*, 261 A.D.2d 223 (1st Dept. 1999); *Balaj v. Equitable Life Assur. Soc. of U.S.*, 211 A.D.2d 487 (1st Dept. 1995), *lv denied* 85 N.Y.2d 811 (1995).[1]

Plaintiff offers no evidence that either NYU or Jones, the owner and general contractor, respectively, either caused the water to stream down from the pipe or had prior actual notice of the alleged defective condition. Indeed, plaintiff's opposition papers to the various motions submitted by the defendants here makes no mention of the common law negligence claims against NYU or Jones or offers any specific theory of liability on which these claims could proceed. Rather, plaintiff focuses on the Labor Law claims involving them, and then, in a boilerplate closing paragraph asks the Court to deny all the defendants motions.

"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 N.Y.2d 836, 837 (1986). Additionally, constructive notice "must be of the specific condition and of its specific location."

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[1] Supervision and control is not required to make out such a claim. *See Murphy v. Columbia University*, 4 A.D.3d 200 (1st Dept. 2004).

Canning v. Barney's New York, 289 A.D.2d 32, 33 (1st Dept. 2001). Because plaintiff has not proffered any evidence to show that the stream of water existed for a sufficient period of time prior to plaintiff's alleged accident such that the owner or general contractor knew or should have known of the problem, the common law negligence claims against them are dismissed.

However, those portions of Olympic and Premier's motions that seek dismissal of plaintiff's common-law negligence cause of actions against them are denied. Olympic, the plumbing contractor, admits that, from time to time, it tested piping below the roof drain by filling the system up with water and draining it down to street level below. *See* EBT of Edward Whelan (Whelan), at 19. Additionally, Whelan states that as of the date of plaintiff's alleged accident, "[w]e were about sixty percent complete with the roofing and piping. There were still some areas that required the installation of roofing and connections to the main drain that was further connected to the sewer. There were about four or five drains on the roof. Some were connected to the main drain and some were not." *See* Whelan Affidavit, ¶3.

No question exists that Olympic had an obligation to perform its work carefully and to do so in a manner that ensured that there was no flooding or significant water gushing into the street or the vault where plaintiff was working. From the proffered evidence, there is a material question of fact as to whether Olympic caused water to flow down an exterior drainpipe, which then flowed into the vault in which plaintiff was working.

Premier, the roofing contractor, contends that, because there is no admissible evidence that, on the date of the alleged accident, Premier was testing the waterproofing of the roof by flooding, it should be granted summary judgment dismissing plaintiff's claims as against it. However, to the extent that such evidence is not available to the parties opposing Premier's motion, it is at least partly

Premier's own doing. Premier did not present anyone for deposition during discovery. In any event, the contract with Premier indicates that its work included all the roofing and waterproofing work, flood testing on the roof and the supervision of this work.

The deposition testimony of Olympic's witness also raises questions, which warrant denial of summary judgment, regarding Premier's involvement. Olympic was required to coordinate its work directly with Premier, the roofing subcontractor, and thus, if there was a problem with the connection between the roof and the drains which may have led to the flooding in the vault, factual questions exists whether such a problem was caused by Olympic, Premier or both. Finally, the record contains evidence that water may have flowed from the roof into the building about a week before this accident. Although it is not clear whether that problem is connected to the drain problem and the water that allegedly caused plaintiff's accident, all of this evidence raises sufficient questions of fact as to Premier's involvement in the roof operations, and the water testing, as to preclude summary judgment for either Olympic or Premier.

An owner or general contractor's common-law duty to maintain a safe workplace under the common-law is codified in Labor Law § 200. *See Gasper v. Ford Motor Co.*, 13 N.Y.2d 104 (1963). However, supervision and control of the injured worker's methods by an owner or general contractor are prerequisites to liability under Labor Law § 200. *See Candela v. City of New York*, 8 A.D.3d 45 (1st Dept. 2004); *see also Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876, 877 (1993); *Mitchell v. New York University*, 12 A.D.3d 200 (1st Dept .2004). To be charged with such liability under that statute, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981).

An owner, general contractor, or construction manager must perform more than a "general duty to supervise the work and ensure compliance with safety regulations." *De La Rosa v. Philip Morris Management Corp.*, 303 A.D.2d 190, 192 (1st Dept. 2003); *see also Vasiliades v. Lehrer McGovern & Bovis, Inc.*, 3 A.D.3d 400 (1st Dept. 2004); *Reilly v. Newireen Associates*, 303 A.D.2d 214 (1st Dept. 2003). "[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200[, n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." *Dalanna v. City of New York*, 308 A.D.2d 400 (1st Dept. 2003). Plaintiff does not contend that he was supervised by anyone other than his own bosses or that anyone had the ability to control his work. Plaintiff does not even argue that the general contractor here had any responsibility for overseeing the installation of the Con Ed cables or any authority, for safety or anything else, over the Con Ed vault where the work was underway. According, that portion of plaintiff's complaint that seeks to impose liability on any of the defendants under Labor Law § 200 is dismissed.

Under Labor Law § 240 (1), owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. *See Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991); *see also Rizzo v. Hellman Elec. Corp*, 281 A.D.2d 258 (1st Dept. 2001).

Additionally,

> [t]o come within the special class for whose benefit absolute liability is imposed upon contractors, owners and their agents to furnish safe equipment for employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered

> to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent.

Whelen v. Warwick Valley Civic and Social Club, 47 N.Y.2d 970, (1979); *see also Brown v. Christopher Street Owners Corp.*, 211 A.D.2d 441, 442 (1st Dept. 1995), *aff'd* 87 N.Y.2d 938 (1996).

In this action, none of the defendant owners, general contractor, or subcontractor had any contract with Con Ed to perform the work for the project or to install the electrical cable. It is undisputed that no contract existed between the owner of the property or the general contractor which gave Con Ed access to the premises to install cables. It is also undisputed that Con Ed was not hired or paid any funds to perform any work for the project. *See* EBT of John Rutigliano (Rutigliano), at 42-43. Furthermore, and of the greatest significance, plaintiff was not working in the building or in any part of the construction site controlled by the owner, general contractor or any other named defendants when the accident occurred.

"By statute, Con Ed is required to supply electricity to a new building." *Id.* The deposition testimony establishes that Con Ed was notified by letter of the need to install additional cables, and then they sent the plaintiff to work in the vault located in the street. No payments were made to ensure that Con Ed arrived to perform this task nor was the owner or general contractor required to be on the site to provide Con Ed access. Indeed, plaintiff does not contend otherwise, but argues that because the cables were being run from the street adjacent to the building, and the cables were going to be placed into the building, this is sufficient to impose liability on the building owner. Such an argument has no support in the case law and is not persuasive. Plaintiff's argument, if accepted, would impose liability on every building owner for any action taken by a utility or other worker doing work in a public street or on utility property simply because the adjacent buildings ultimately

will benefit from the electrical or telephone service.

Joblon v. Solow, 91 N.Y.2d 457 (1998), cited by plaintiff, can be distinguished on several grounds. First, the worker in *Joblon* was an electrician employed by a subcontractor who had a contract with one of the named defendants, and not a public utility worker who was there because the utility, by statute, was required to provide the electrical lines. Of greater significance, the worker in *Joblon*, unlike the plaintiff here, was in the building and not working in a public street when he was injured. Finally, the Court in *Joblon* focuses on whether the worker was engaged in the type of work covered by the Labor Law, but does not address whether the building owner could be held liable if the work was performed outside the structure. *Cf. Zaher v. Shopwell, Inc.*, 2005 WL 1215956 (1st Dept. 2005)(Labor Law claim viable where cable installer working in the basement of the store).

Furthermore, although Con Ed informed building owners what equipment would be in the vaults (*See* Rutigliano EBT, at 44), none of defendants had any ability to direct the manner or method by which Con Ed personnel performed their work and plaintiff does not argue otherwise. Finally, plaintiff testified that the ladder and his tools were supplied by Con Ed. *See* Plaintiff EBT, at 37-39.

Therefore, plaintiff's Labor Law § 240 (1) claims are dismissed.

Labor Law § 241 (6) provides that "[a]ll 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." The section requires owners and contractors at a construction site 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-Electric Co., supra*, 81 N.Y.2d 494, 502 (1993).

Jones, NYU, Premier, and Olympic all seek to dismiss plaintiff's Labor Law § 241 (6) claims, which according to plaintiffs' complaint, are predicated upon violations of Industrial Code sections 12 NYCRR 23-1.5, 23-1.7, 23-1.16, and 23-1.21. For the reasons stated in the above discussion, all of plaintiff's Labor Law § 241 (6) claims are dismissed.

In motion sequence no. 008, Olympic seeks dismissal of Premier's cross claims against it. However, because it is unclear at this time whether either or both of Olympic and Premier was liable in plaintiff's alleged accident, that portion of Olympic's motion that seeks to dismiss Premier's cross-claims is denied.

Jones and NYU seek indemnification from Premier for their legal fees and costs, pursuant to a February 23, 2000 contract between Jones and Premier. Article 9 of the General Conditions of that contract provides that Premier will "indemnify, defend, save and hold the Owner, Contractor ... harmless from and against liability, ... actions ... (including attorney's fees and disbursements) which arise out of or are connected with, or are claimed to arise out of or be connected with: 1. [t]he performance of the Work by [Premier], or any act or omission of [Premier]." Premier incorrectly argues that any determination on indemnification must await a liability determination since there is no evidence that the accident arose out of their work. However, the clause here is very broad and covers even those accidents which are claimed to arise out of or be connected to any act or omission of Premier. Such a broad clause expressly contemplates the absence of fault on Premier's part and provides for indemnification even if Premier is not liable for the accident. *See Di Perna v. American*

Broadcasting Companies, Inc. v. Anthony Concrete Corp., 200 A.D.2d 267 (1st Dept. 1994). Therefore, Jones and NYU are entitled to indemnification as against Premier.

Accordingly, it is hereby

ORDERED that J.A. Jones GMO/LLC, New York University School of Law, New York University Medical Center, and New York University's motion for summary judgment is granted only to the extent of dismissing plaintiff's complaint in its entirety as to those defendants, and is otherwise denied; and it is further

ORDERED that costs and disbursements are granted to J.A. Jones GMO/LLC, New York University School of Law, New York University Medical Center, and New York University as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that Premier-New York, Inc.'s motion for summary judgment is granted only to the extent of dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against it, as well as the third-party complaint, and is otherwise denied; and it is further

ORDERED that Olympic Plumbing & Heating's motion for summary judgment is granted only to the extent of dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against it, and is otherwise denied; and it is further

ORDERED that plaintiff's cross motion is denied. This constitutes the decision and order of the Court.

June 8, 2005

Justice Rosalyn Richter