SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 109050/2006

VOVCHIK STEVE

VS.

METROPOLITAN DEVELOPMENT

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

...otion to/for _____

_____ No(s). _____

_____ No(s). _____

_____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: Jan 20, 2012

_____, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [redacted] ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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STEVEN VOVCHIK and MARIE VOVCHIK,

Plaintiffs,

-against-

METROPOLITAN DEVELOPMENT PARTNERS II, LLC and GOTHAM CONSTRUCTION COMPANY, LLC,

Defendants.

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Decision and Order
Index No. 109050/06
Seq No. 002

Present:
Hon. Judith J. Gische
JSC

METROPOLITAN DEVELOPMENT PARTNERS II, LLC and GOTHAM CONSTRUCTION COMPANY, LLC,

Third-Party Plaintiffs,

-against-

HIGH-RISE ELECTRIC, INC.,

Third-Party Defendant.

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Third-Party Index No. 590139/07

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
High-Rise n/m 3212 w/MEB affirm, exhs (sep backs)	1,2
Vovchik opp w/MJS affirm, exhs	3
Metropolitan and Gotham supporting affirm (DP) . .	4
Vovchik supp opp w/MJS affirm, exh	5
Metropolitan and Gotham reply to Vovchik w/DP affirm	6
High-Rise reply w/MEB affirm	7

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action in which plaintiff Steven Vovchik ("Vovchik") alleges defendants violated sections 240 [1],

241 [6] and 200 of the New York State Labor Laws and that such violations were a proximate cause of his injuries. Vovchik's wife has asserted a derivative claim.

Plaintiff's accident is alleged to have occurred on July 9, 2004 when, while moving a core drilling machine from a ramp on a construction site owned by Metropolitan, the planks shifted, causing plaintiff to lose his balance and fall into a ditch or trench directly below.

Metropolitan Development Partners II, LLC (Metropolitan) and Gotham previously moved for conditional partial summary judgment on their third party claims against High-Rise for contractual indemnification (2nd cause of action) and breach of contract (4th cause of action).

In the court's decision and order dated October 19, 2010 (prior order), Gotham and Metropolitan's motion for summary judgment on their 2nd cause of action (contractual indemnification) was granted only as to Metropolitan, but denied as to Gotham. Metropolitan and Gotham's motion, however, for summary judgment on their 4th cause of action (breach of contract/failure to procure insurance coverage) was granted as to both third party plaintiffs. The reader is presumed familiar with the court's prior order as well as the facts alleged and arguments previously asserted by the parties.

Third-party defendant High-Rise Electric, Inc. (High-Rise),

plaintiff's employer on the date of the accident, now moves, pursuant to CPLR 3212, for summary judgment dismissing: (1) plaintiffs' Labor Law § 200 and common-law negligence claims as against Metropolitan; (2) the parts of plaintiffs' Labor Law § 241 (6) claim against both Metropolitan and Gotham that are based on Industrial Code (12 NYCRR Part 23) §§ 23-1.7 (b), (d), (e), (f) and 23-1.16; and (3) defendants/third-party plaintiffs' third-party claims for common-law indemnification and contribution.

Plaintiffs expressly state that they do not oppose dismissal of their Labor Law § 200 and common-law negligence claims as against Metropolitan, since this court, in its Order dated October 19, 2010, has already determined that "Metropolitan (the owner) has ... shown that it did not exercise supervision or control over the work performed by Vovchik, it did not have actual or constructive notice of the dangerous condition alleged [nor] did it create the condition" (10/19/10 Order, at 8 of 10). Accordingly, that part of High-Rise's motion that seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against Metropolitan is granted.

In addition, plaintiffs withdraw that part of their Labor Law § 241 (6) claim as is based on Industrial Code § 23-1.16, and 23-1.7 (b) (1) (ii) and (iii) as they concede those subsections are inapplicable. Therefore, High-Rise's motion for summary

judgment for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim, to the extent it is based upon violations of Industrial Code § 23-1.16, and 23-1.7 (b) (1) (ii) and (iii) is granted as well.

The court notes that plaintiffs' Supplemental Affirmation in Opposition dated September 20, 2011 purports to present the sworn affidavit of one of Vovchik's co-workers in further opposition to High-Rise's motion. That same co-worker, Orlando Franco, previously provided an unsworn statement which plaintiffs annexed to their opposition papers dated August 26, 2011 as Exhibit C. Moving defendants argue that the unsworn statement must be rejected because it is not evidence in admissible form and also ask the court to reject the later submitted sworn statement on the basis that it is improper to do in reply.

Although supplemental submissions should not be used to present new theories to the court, the court may, in its discretion, allow such submissions to, for example, address procedural oversights (*Ostrov v. Rozbruch*, -- N.Y.S.2d ---, 2012 WL 5780 [1st Dept. 2012]). Plaintiffs' supplemental affirmation with Franco's sworn affidavit is illustrative of this principle and will, therefore, be permitted. Plaintiffs has simply recast the unsworn statement into a sworn affidavit and the affidavit supports the arguments plaintiffs have asserted in other ways, including Vovchik's own sworn deposition testimony.

Since issue was joined by the moving defendants and this motion is timely, having been brought within 120 days of the note of issue being filed, the motion will be decided on the merits (CPLR § 3212; *Brill v. City of New York*, 2 NY3d 648 [2004]; *Ostrov v. Rozbruch*, -- AD3d ---, 2012 WL 5780 [1st Dept.,2012]).

Law Applicable to Motions for Summary Judgment

A movant seeking summary judgment in its favor 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 (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]). The evidentiary proof tendered, however, must be in admissible form (*Friends of Animals v. Assoc. Fur Manufacturers*, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Discussion

Labor Law § 241 (6) imposes a *nondelegable* duty ... upon owners and contractors to provide reasonable and adequate protection and safety to [workers involved in "constructing or demolishing buildings or doing any excavating in connection therewith"]. To recover on a cause of action alleging a

violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards. The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case [internal quotation marks and citations omitted](*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]). When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003). The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

The Industrial Code § 23-1.7 subsections relied upon by plaintiffs have all been found to be specific enough to support a section 241 (6) claim: section 23-1.7 (b) (*Bell v Bengomo Realty*, 36 AD3d 479 [1st Dept 2007]); section 23-1.7 (d) (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343 [1998]; *Lopez v City of New York Transit Authority*, 21 AD3d 259 [1st Dept 2005]); section 23-1.7 (e) (*Smith v McClier Corp.*, 22 AD3d 369 [1st Dept 2005]); and section 23-1.7 (f) (*Mugavero v Windows By Hart, Inc.*, 69 AD3d 694

[2d Dept 2010]). Thus the issue is whether, liberally construing the evidence in the light most favorable to plaintiff (Kesselman v. Lever House Restaurant, 29 AD3d 302 [1st Dept. 2006]), these sections apply to the facts of this case, as alleged.

Plaintiff testified at his EBT that the accident occurred as he was wheeling a core drill machine down some planks he described as being "warped" which wobbled when he walked on them. According to plaintiff, beneath the ramp was a 6-8 feet long ditch or trench. Although there is conflicting evidence as to whether there was a ditch or trench, section 23-1.7 (b) does not apply to a ditch or trench and, therefore, cannot be used to support plaintiff's section 241 (6) claim in this matter (*see Kaleta v New York State Electric & Gas Corp.*, 41 AD3d 1257, 1259 [4th Dept 2007] [drainage ditch was not "a hazardous opening within the meaning of the regulation"]).

Section 23-1.7 (d) pertains to slipping hazards caused by a "foreign substance" that makes a surface slippery. Plaintiffs contend that the boards of the ramp themselves, in that they were warped and wobbly, were what caused him to slip. No foreign substance was involved. Therefore, section 23-1.7 (d) is inapplicable to the facts of this case as well.

Section 23-1.7 (e) covers tripping hazards caused by dirt and debris. There is no allegation by plaintiffs that dirt and

debris contributed to the cause of this accident. Consequently, Section 23-1.7 (e) does not apply to the facts of this case either.

However, section 23-1.7 (f), which governs vertical passages, applies to the facts of this case, as alleged by plaintiffs, because plaintiff claims the ramp "provided a means of access to different working levels" (*Conklin v Triborough Bridge & Tunnel Authority*, 49 AD3d 320, 321 [1st Dept 2008]).

Therefore, the part of High-Rise's motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is granted with respect to Industrial Code §§ 23-1.7 (b), (d) and (e), but is denied with respect to section 23-1.7 (f).

Metropolitan and Gotham have asserted claims for common law and contractual indemnification, as well as for contribution. High-Rise seeks summary judgment dismissing those claims on the basis that, as plaintiff's employer, it cannot be held liable for common law indemnification where plaintiff did not sustain a "grave injury." High-Rise points out that plaintiff does not allege he sustained a grave injury nor did he testify to any injuries that would qualify under the applicable statute as being "grave."

Metropolitan and Gotham do not oppose dismissal of their common-law indemnification and contribution claims as long as

such dismissal is "without prejudice," leaving open the option of reasserting these claims in the event that plaintiff's condition may change to one which meets the criteria of Workers' Compensation Law § 11.

"Workers' Compensation Law § 11 prohibits a third-party action for common-law indemnification or contribution against an employer except in the case where, inter alia, the employee has sustained a grave injury" (*Cocom-Tambriz v Surita Demolition Contracting, Inc.*, 84 AD3d 1300, 1301 [2d Dept 2011]). The definition of "grave injury" is set by statute (Workers' Compensation Law § 11), and those conditions listed, and only those conditions listed, constitute a "grave injury":

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability

"The categories of grave injuries listed in section 11, providing the sole bases for a third-party action, 'are deliberately both *narrowly and completely described*'; the list, both 'exhaustive' and 'not illustrative,' is 'not intended to be extended absent further legislative action' (Governor's Approval

Mem at 55 [emphasis added])" (*Fleming v Graham*, 10 NY3d 296, 300 [2008]).

High-Rise's motion to dismiss the third-party claims for common-law indemnification and contribution was made on the basis that plaintiff has not suffered a grave injury and, therefore, such claims fail against High-Rise (the employer), as a matter of law. Plaintiff makes no claim that he suffered a grave injury within the meaning of he Workers' Compensation Law, section 11 and, although plaintiffs have opposed High-Rise's motion on other grounds, they reiterate that the "plaintiffs do not claim [Vovchik's] injuries constitute a 'grave injury' within the meaning of Workers' Compensation Law § 11."

Although Metropolitan and Gotham seek to discontinue their claims against High-Rise without prejudice, that is not agreed to and there is no stipulation that their claims be so marked. Were the court to mark these claims in that manner, this decision would not have a res judicata effect (*see A. Colish, Inc. v. Abramson*, 178 A.D.2d 252 [1 Dept. 1991]). The purpose of a motion for summary judgment is to grant judgment where the movant has established as a matter of law their claims (or defenses) or where there are no triable issues of fact. What Metropolitan and Gotham propose is antithetical to what CPLR 3212 is intended to achieve: finality, without a trial.

There is no basis to permit Metropolitan and Gotham to voluntarily withdraw without prejudice their common law indemnification and contribution claims. Metropolitan and Gotham cannot reserve rights they do not presently have or could not have obtained by litigating this matter (see e.g., *O'Brien v. City of Syracuse*, 54 NY2d 253 [1981]). Therefore, the court grants High-Rise's motion for summary judgment dismissing the third-party claims against it for common-law indemnification and contribution on the merits. Thus, it is now the law of the case that plaintiff has no grave injury, since no such claim is made, either directly by the plaintiff of by way of affirmative defense asserted. High-rise's motion for summary judgment dismissing Metropolitan and Gotham's claim against it (the employer) for common law indemnification or contribution is granted, on the merits (see *Singh v. Friedson*, 10 AD3d 721 [2nd Dept 2004]).

CONCLUSION

Accordingly,

It is hereby

ORDERED that the part of High-Rise Electric, Inc.'s motion that seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against Metropolitan Development Partners II, LLC is granted; and it is further

ORDERED that the part of High-Rise Electric, Inc.'s motion

which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is granted with respect to Industrial Code §§ 23-1.7 (b), (d) and (e), but is denied with respect to section 23-1.7 (f); and it is further

ORDERED that the part of High-Rise Electric, Inc.'s motion which seeks summary judgment dismissing the third-party claims for common-law indemnification and contribution is granted; and it is further

ORDERED that this case is ready to be tried since the note of issue has been filed; plaintiff Vovchik shall serve a copy of this decision/order on the Office of Trial Support so that the case may be scheduled for Trial; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
January 20, 2012

So Ordered:

Hon. Judith J. Gische J.S.C.