[* 1]

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

PRESENT: _____ PART _____

Justice

_____

INDEX NO. _____

Index Number : 110223/2010
PIAZZA, JOSEPH
VS.
CRP/RAR III PARCEL J
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

RECEIVED
MAR 29 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
MAR 29 2012
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with the annexed decision.

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

Dated: 3/28/12

_____
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

JOSEPH PIAZZA,

Plaintiff,

Index No. 110223/10

-against-

DECISION/ORDER

CRP/RAR III PARCEL J, LP and
BOVIS LEND LEASE, INC.,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff commenced this action to recover for injuries he allegedly sustained when he tripped and fell in the course of his employment. He now brings this motion for partial summary judgment pursuant to Labor Law §240(1). Defendants cross-move for summary judgment dismissing plaintiff's Labor Law §240(1) claim, his Labor Law §241(6) claim, his Labor Law §200 claim and his negligence claim. For the reasons set forth more fully below, plaintiff's partial summary judgment motion is denied and defendants' cross-motion for summary judgment is granted in part and denied in part.

The relevant facts are as follows. Defendant CRP/RAR III PARCEL J, LP ("CRP") owned the building being constructed at 60 Riverside Boulevard. Defendant Bovis Lend Lease,

Inc. ("Bovis") was the construction manager of the project. It is undisputed, however, that Bovis was acting as the general contractor and retained and supervised other contractors.

At the time of the accident, plaintiff Joseph Piazza was employed as a mechanic journeyman by Pinnacle Industries ("Pinnacle"), a subcontractor hired by Bovis, to work on the building being erected at 60 Riverside Boulevard. Pinnacle had been hired to put in the concrete superstructure of that building. On March 9, 2009, plaintiff was injured as he was leaving his worksite. He was working on either the fourth or ninth floor at the time of the accident. The floor he was working on was accessible only via ladders positioned in a central elevator shaft. There was one ladder positioned to reach the floor below and one to reach the floor above. There were guardrails positioned near the ladders but their exact position has been disputed. There was an opening in and around the elevator shaft, although there is a dispute over how large that opening was and whether the space in the elevator shaft was boarded over except to leave an opening for the necessary ladders.

In front of the elevator shaft, tarps were hung like a curtain. Plaintiff testified that Pinnacle laborers installed the tarps. The tarps were used to insulate the floors to speed up the drying of the concrete. The tarp in this instance was longer than the height of the ceiling on this particular floor and thus was bunched up on the floor where plaintiff was working. As plaintiff approached the elevator shaft to leave the work site, his foot caught on the bunched-up tarp and he tripped. He caught himself and did not fall into the shaft itself. However, it is unclear how close plaintiff was to the elevator shaft when he tripped and whether his foot was at any point dangling in the airspace above the shaft. It is also unclear whether plaintiff's fall was caused or exacerbated because he was attempting to avoid falling into the elevator shaft and thus pushed

against the wall. It is undisputed, however, that he fell on his knee, breaking his patella (kneecap).

As an initial matter, this court will address defendants' argument that all of plaintiff's Labor Law claims should be dismissed because plaintiff was not working at the time of his injury but was leaving work. This argument is without merit. As defendants admit, the ladders in the elevator shaft were the only means of exiting the building. Plaintiff had no choice but to walk towards the elevator shaft, past or near where the tarp lay bunched on the floor, in order to descend the ladder and leave the job site. Because plaintiff had no choice but to take the route he took in order to leave work, the mere fact that he was leaving for the day does not mean that there can be no liability for his injury. *Cordeiro v Shalco Invs.*, 297 A.D.2d 486 (1st Dept 2002), cited by defendants, is distinguishable because there, the court found that plaintiff was taking a "voluntary detour" at the time of the accident. That is not the case here.

The court now turns to plaintiff's motion for summary judgment on his Labor Law §240(1) claim and defendants' cross-motion seeking to dismiss that same claim. Labor Law §240(1) requires that:

> All contractors and owners and their agents . . . who contract for but do not 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, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law §240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the

worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. *See Bland v Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v East Medical Center, LP*, 6 N.Y.3d 550 (2006). A workplace accident can have more than one proximate cause. *See Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 A.D.2d 384, 385 (1st Dept 2003).

In the instant case, neither plaintiff nor defendants are entitled to summary judgment as there are questions of fact as to exactly how plaintiff's accident occurred and whether it involved an elevation-related hazard. Plaintiff makes out a prima facie case that he faced an elevation-related risk, which was the danger of falling into the elevator shaft opening. He testified that he stepped into the gap between the elevator shaft opening and the platform covering it, that his foot started to go down into the gap, and that he then put his hands on the wall to push himself away from the gap, landing on his knee. *See* Plaintiff's Deposition at 177. Therefore, but for the elevator shaft opening, plaintiff would not have had to push off the concrete wall to avoid a fall and would not have landed on his knee. This is sufficient to establish a prima facie case. Moreover, an accident may have more than one proximate cause. *See Pardo*, 308 A.D.2d at 385. The fact that the bunched-up tarp was also a proximate cause of plaintiff's fall does not mean that the existence of the opening was not another proximate cause.

However, defendants raise an issue of fact as to whether plaintiff's accident involved an elevation-related hazard. Defendants cite plaintiff's deposition testimony that he tripped and fell about two feet away from the elevator shaft gap and argue that the existence of the gap was unrelated to the accident. *See* Plaintiff's Deposition at 167. If a jury found this testimony credible, the jury could find that there was no elevation-related hazard and that instead plaintiff's accident was caused by tripping over material on a flat floor.

There are also questions of fact as to whether the elevator shaft was appropriately protected by guardrails. Plaintiff cites Vincent Piazza's deposition testimony that the guardrails were perpendicular to the elevator shaft opening and thus did not protect against a fall from the side where the opening was. Defendants, on the other hand, cite Mr. Cattarini's testimony that the opening was just big enough for someone to access the ladder and was otherwise blocked by a guardrail. Therefore, even if plaintiff faced an elevation-related risk, there is a question of fact as to whether defendants used appropriate safety devices to guard against that risk. Accordingly, plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim must be denied and, conversely, defendants' cross-motion for summary judgment dismissing this claim must also be denied.

The court now turns to defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim. Section 241(6) of the Labor Law requires owners and contractors, or their agents, to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 at 502 (1993). A plaintiff must plead and prove that a specific Industrial Code safety regulation was

violated. Plaintiff has pled that 12 NYCRR §23-1.7(b)(1), 12 NYCRR §23-1.7(d) and 12 NYCRR §23-1.7(e) were violated.

Plaintiff raises issues of fact as to whether 12 NYCRR §23-1.7(b)(1) was violated but does not raise any issues of fact as to whether 12 NYCRR §23-1.7(d) and 12 NYCRR §23-1.7(e) were violated. Therefore, defendants' cross-motion is granted in part and denied in part. 12 NYCRR §23-1.7(b)(1) requires that "hazardous openings" be covered, that where free access is required by the work in progress, a safety railing be installed with a safety gate and where employees are required to work close to the edge of such an opening, protections should be put in place including a life net beneath the opening. There are questions of fact as to whether the hazardous opening in question, the elevator shaft opening, was adequately guarded as required by this provision of the code.

However, defendants are entitled to have plaintiff's claim based on 12 NYCRR §23-1.7(e) dismissed as plaintiff does not raise issues of fact as to whether this rule was violated. This provision states:

> Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (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.

Plaintiff does not contend that the area in question was a working area but argues that it was a

passageway. However, a "common, open area", even if "regularly traversed" does not constitute a passageway. *Dalanna v City of New York*, 308 A.D.2d 400, 401 (1st Dept 2003). Therefore, this provision does not apply to the instant case.

Defendants are also correct that 12-NYCRR §23-1.7(d), which applies to slipping hazards, does not apply here. This provision states:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

This provision is geared toward preventing falls due to inherently slippery materials. A bunched-up tarp is not slippery and is not a slipping hazard but a "tripping" hazard as described in 12 NYCRR 23-1.7(e). Plaintiff's cause of action based on this Industrial Code provision is therefore dismissed.

Defendants claim plaintiff cannot base his Labor law §241(6) claim on OSHA and ANSI violations. As plaintiff does not allege any such violations in his Bill of Particulars, the point is moot.

This court now turns to defendants' cross-motion seeking to dismiss plaintiff's Labor Law §200 and common-law negligence claims. Labor Law §200 codifies the common law duty of an owner and general contractor to maintain a safe workplace. Where plaintiff's injury is caused by a dangerous condition, liability for either of these causes of action will only attach if the defendant "had the authority to control the activity bringing about the injury." *Russin*, 54 N.Y.2d at 317. The First Department has held that to be held liable under Labor Law §200 or common-law negligence where the alleged defect or dangerous condition arises from the

contractor's methods, an owner or construction manager must be found to have exercised supervision or control over the injury-producing work. *See Conforti v Bovis Lend Lease LMB, Inc.*, 37 A.D.3d 235, 236 (1st Dept 2007) (*citing Buccini v 1568 Broadway Assocs.*, 250 A.D.2d 466, 469 (1st Dept 1998); *Dalanna*, 308 A.D.2d 400. However, "[t]he general duty to supervise the work and ensure compliance with safety regulations does not constitute such control of the work site as would render the supervisory entity liable for the negligence for the contractor who performs the day-to-day operations." *Id. See also Curtis v 37th Street Assocs.*, 198 A.D.2d 62 (1st Dept 1993) (construction superintendent's coordination of subcontractors' work insufficient to establish liability for common law negligence). Even the "authority to stop work for safety reasons" is insufficient to establish liability pursuant to these theories. *Dalanna*, 308 A.D.2d 400 (1st Dept 2003).

In the instant case, defendants are entitled to summary judgment dismissing plaintiff's Labor Law §200 and common-law negligence claims. Defendants make out a prima facie case that they did not supervise the injury-producing work. Pinnacle, not defendants, hung the tarps and there is no testimony that defendants supervised or controlled how they did so. In response, plaintiff cites the testimony of Leon Cattarini, the general superintendent vice president of what was then called Bovis Lend Lease, who stated that he and a Mr. Reuter walked the floors on a daily basis and if he saw an unsafe condition he would "go to the appropriate party and have it corrected." However, that testimony is insufficient to raise a question of fact as to whether defendants are subject to liability pursuant to Labor Law §200 or for common-law negligence. *See Dalanna*, 308 A.D.2d 400. Therefore, defendants are entitled to summary judgment dismissing those claims.

Finally, the court need not address defendants' request that the court not consider the affidavit of Michael Mignone as the court did not rely on that affidavit for any of the above determinations.

Accordingly, plaintiff's motion for partial summary judgment on his Labor Law §240 claim is denied. Defendants' cross-motion for summary judgment dismissing that claim is denied as well. Defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law §200 claim and common-law negligence claim is granted. Their cross-motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted except to the extent that it is based on Industrial Code provision 12 NYCRR §23-1.7(b)(1). This constitutes the decision and order of the court.

Dated: 3/28/12

Enter: _____
J.S.C.