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

PRESENT: Hon. Shlomo S. Hagler *Justice* **PART:** 17

KEITH LUEBKE,

Plaintiff,

- against -

MBI GROUP, PINNACLE CONTRACTORS OF NY, INC., DUNHAM PIPING & HEATING CORP., HUDSON STREET OWNERS CORP., and PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,

Defendants.

INDEX NO.: 114861/2008
MOTION DATE: _____
MOTION SEQ. NO.: 002
MOTION CAL. NO.: _____

Motion by defendants Pinnacle, Hudson Street, and Prudential for summary judgment dismissing plaintiff's complaint.

	Papers Numbered
Defendants' Notice of Motion with Supporting Affidavits/Affirmations & Exhibits A through H, and Memorandum of Law in Support of Motion	1
Plaintiff's Affidavits and Affirmations in Opposition with Exhibits A through O	2
Defendants' Reply Affirmation & Exhibits	3
Transcript of May 2, 2012 Oral Arguments	4

Cross-Motion: ☑ **No** ☐ **Yes** **Number of Cross-Motions:** _____

Upon the foregoing papers, it is hereby ordered that this Motion by defendants Pinnacle Contractors of Ny, Inc., Hudson Street Owners Corp., and Prudential Douglas Elliman Real Estate, granting them summary judgment and dismissing the complaint as against them is granted, along with as per the attached Decision and Order.

Dated: July 20, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ☑ **Final Disposition** ☐ **Non-Final Disposition**
Motion is: ☑ Granted ☐ Denied ☐ Granted in Part ☐ Other
Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

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KEITH LUEBKE,

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Defendants.

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Index No.: 114861/08

DECISION AND ORDER

Shlomo S. Hagler, J.S.C.:

Defendants Pinnacle Contractors of NY, Inc. ("Pinnacle"), Hudson Street Owners Corp. ("Hudson") and Prudential Douglas Elliman Real Estate ("Prudential") (collectively, "moving defendants") move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims as asserted against them.

BACKGROUND

According to the complaint, plaintiff was injured at a construction site located at 4 Leonard Street, New York, New York on April 3, 2007. Plaintiff alleges that, as he was leaving the job site, he was struck by a glass door that fell off its hinges as he was attempting to hold the door and reposition it.

Pinnacle was the general contractor for the project and Hudson owned and managed the property. Prudential was the commercial tenant that retained Pinnacle in connection with renovations at the premises. After commencement of the action, moving defendants' attorney affirms that, by agreement of all of the parties, the matter was

discontinued as against MBI Group. The complaint alleges three causes of action: (1) common-law negligence; (2) violation of Labor Law § 241(6); and (3) violation of Labor Law § 200. In support of his Labor Law § 241(6) cause of action, plaintiff identifies, in his bill of particulars, violations of the Industrial Code, sections 23-1.5(c)(1) and (3), and 23-3.3.

At his examination before trial ("EBT"), plaintiff testified that, at the time of the accident, he was employed as a second-year apprentice electrician by nonparty Commercial Contractors, Inc. ("Commercial"). Plaintiff EBT, at 33-35. Plaintiff's supervisor at the project was Mike Dinsmore ("Dinsmore"), Commercial's foreman, and he received his instructions from Dinsmore on a daily basis. Id. at 63-64, 77.

Plaintiff said that his particular job site was the ground floor of a commercial building in a space that was occupied by Prudential. Id. at 56, 65. At the time of the occurrence, Prudential was expanding its space, and Commercial was engaged to remove the old electrical fixtures from the premises and install new ones. Id. at 56-57, 59, 66. According to plaintiff, he had been working at the job site for approximately one month. However, the week immediately preceding the accident he was working at a different location, and the accident occurred on his first day back at this job site. Id. at 58-59.

Plaintiff described the job site as having an entrance with two adjacent glass doors with metal framing, each such door opening individually. Id. at 65-66. Plaintiff stated that these doors opened outwards, but that the right door generally remained stationary. *Id.* at 81. The left side door had a "closure arm," which is a triangular metal device at the top of the door which opened and closed the door. Id. at 81-82. In addition, plaintiff averred that there were two pins on the left-hand side door, one at the top and one at the bottom, that

secured the door. Id. at 82. Plaintiff said that these doors were the only method of ingress and egress to the job site. Id. at 73.

Plaintiff testified that, during the entire time that he was working at the job site, he never became aware of any problems with the doors (Id. at 73), and that he and the other workers used these doors several times each day. Id. at 74. Plaintiff also said that he never had any trouble opening the doors and that, prior to his accident, no one had ever advised him that there was anything wrong with the doors. Id. In addition, plaintiff stated that he was not aware of any complaints having been made about the doors. Id.

On the day of the accident, plaintiff arrived at the job site and used the doors to enter the premises without any problem. Id. at 84. After he started work, Dinsmore asked plaintiff to get coffee for both of them and, as plaintiff attempted to walk through the left-side door by pushing it open with his left hand, the door came down on him. As plaintiff used his left hand in an attempt to stop the door from hitting him, he allegedly injured his shoulders. Id. at 87.

Vincent Manciameli ("Manciameli"), the project manager for Pinnacle at the job site, was deposed in this matter and testified that he was not involved in any of the work being performed, but that he visited the job site once each week to coordinate the work and to make sure that the work was progressing according to schedule. Manciameli EBT, at 29, 46. Manciameli stated that he did not have any safety responsibilities with regard to the project and that each subcontractor was responsible for the safety of its own workers. Id. at 56-57. Manciameli also said that his only contact with Commercial was with the foreman, with whom he would discuss the status and progress of the work being performed. Id. at 50-51. In addition, Manciameli averred that, prior to the date of the

accident, he was never advised by anyone that the double doors of the entrance or the door-closing mechanism were defective in any way. Id. at 71. Moreover, Manciameli testified that, prior to the date of the accident, no one ever reported to him that the doors needed to be repaired, nor were any complaints about the doors ever made to him. Id. at 72, 83. According to Manciameli, the first time that he learned of a problem with the doors was when plaintiff had his accident. Id. at 105.

Denise Cannavina ("Cannavina"), Prudential's facilities director, was also deposed in this matter and testified that her duties involve monitoring the renovation and construction of new or existing Prudential offices in Manhattan. Cannavina EBT, at 7. As part of her duties, Cannavina would visit the job site weekly to attend project meetings and to monitor the general progress of the work. Id. at 57. Cannavina said that Prudential neither inspected the quality of the work nor directed the method and manner of plaintiff's work. Id. at 74.

Both Manciameli and Cannavino affirmed that, as soon as they learned about a problem with the doors, due to plaintiff's accident, the doors were immediately repaired.

Noel Gomez ("Gomez"), the building superintendent who was employed by Hudson, also testified in this matter and averred that his responsibilities did not include the ground floor commercial portion of the premises. Gomez EBT, at 8-10. Gomez stated that, during the renovation project, he would visit the site approximately twice each week, out of curiosity, but that no one ever told him that the glass doors needed repairs. Id. at 38.

Moving defendants argue that plaintiff cannot establish a prima facie case of common-law negligence or a violation of Labor Law § 200, since they did not exercise control or supervision over plaintiff's work nor did they create or have actual or constructive

knowledge of the allegedly defective glass door. Furthermore, moving defendants state that the Industrial Code provisions cited by plaintiff are insufficient to support his cause of action based on an alleged violation of Labor Law § 241(6).

In opposition to the instant motion, plaintiff contends that Pinnacle and Prudential had notice of the defective condition of the door, based on the affidavit of Dinsmore, attached to the opposition, who avers that he had observed that one of the doors had been damaged a week or so before the accident, and that it was his "understanding" that Pinnacle's project manager was aware of the damaged condition of the door. Dinsmore affidavit submitted in opposition to the Motion, at ¶ 18. Therefore, according to plaintiff, Pinnacle and Prudential should be held liable for violations of common-law negligence and Labor Law § 200.

In addition, plaintiff maintains that the work in which he was involved consisted of demolition, thereby rendering Pinnacle and Prudential liable under the provisions of Labor Law § 241(6) and Industrial Code § 23-3.3. Plaintiff concludes with a request that the court search the record and grant him partial summary judgment on his Labor Law § 200 and § 241(6) causes of action.

In reply, moving defendants note that plaintiff has proffered no argument against dismissal of the complaint as asserted against Hudson. Further, moving defendants say that plaintiff's request for partial summary judgment should not be considered by the court because it was improperly introduced in papers styled as "Plaintiff's Affirmation in Opposition." Moreover, moving defendants contend that such prayer for relief is untimely, since all dispositive motions were to be made on or before September 26, 2011, by

so-ordered stipulation (Reply, Exhibit A), and the opposition containing the dispositive request was filed on December 5, 2011.

Substantively, moving defendants argue that, according to plaintiff' deposition, the work that he was performing was renovation, consisting of removing and replacing electrical fixtures, but that the demolition of the wall was performed first by the carpenters. Plaintiff's EBT, at 56-59. As a consequence, moving defendants maintain that plaintiff was not involved in any demolition work to bring him under the purview of Labor Law § 241(6).

Lastly, moving defendants assert that Dinsmore's conclusory statement that it was his "understanding" that Manciameli knew about a defective condition with respect to the door is insufficient to defeat their motion for summary judgment.

DISCUSSION

Summary Judgment Standard

"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 [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). 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); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

Plaintiff's Labor Law § 200 Cause of Action

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, general contractors, and their agents. Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796 (2d Dept 2007).

To sustain a cause of action for violation of Labor Law § 200 when the accident arises from a dangerous condition, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident and, under such theory, the defendant's supervision and control over the work being performed is irrelevant. Murphy v Columbia Univ., 4 AD3d 200 (1st Dept 2004). Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. Comes v New York State Elec. & Gas Corp., 82 NY2d 876 (1993); McFadden v Lee, 62 AD3d 966 (2d Dept 2009). General supervision over the job site is insufficient to render an owner or general contractor liable under Labor Law § 200. Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347 (1st Dept 2006).

In the instant matter, plaintiff argues that his injuries were caused by the defective condition of the glass doors. However, he has failed to provide any evidence in admissible

form that moving defendants either created the dangerous condition or had actual or constructive notice of it **prior** to his accident.

Plaintiff testified that he was unaware of any problem with the doors and that he had used the doors on several occasions prior to the time of his accident. Further, he averred that he never complained about the condition of the doors or knew of any complaint about the doors made by anyone else. Manciameli, Cannavino and Gomez all testified that they had no notice of any problem with the doors until plaintiff's accident.

Plaintiff contends that a "Change Order Log" dated April 2007 and a "Change Order" dated May 1, 2007, both of which were admittedly submitted after the accident, to requisition the repair of the doors somehow raises a triable issue of fact. (See Exhibit "C" to the moving papers.) However, the dates of the Change Order and the Change Order Log are not dispositive because they all occurred subsequent to the accident.

The only evidence provided by plaintiff, for the first time in his opposition to these averments, is Dinsmore's affidavit, in which Dinsmore says that he was aware of a problem with the doors, but he never states that he told any of the moving defendants about such problems. Further, Dinsmore only makes a conclusory and speculative statement that he "understood" that Manciameli was aware of the defect.

Conclusory and speculative statements regarding someone's possible awareness of a dangerous condition are insufficient to defeat a motion for summary judgment. Martinez v Hunts Point Coop. Mkt., Inc., 79 AD3d 569 (1st Dept 2010); Lombardo v Island Grill Diner, 276 AD2d 532 (2d Dept 2000). Moreover, a general awareness that a dangerous condition may be present is insufficient to hold an owner or general contractor liable. Gordon v American Museum of Natural History, 67 NY2d 836 (1986).

Therefore, based on the foregoing, plaintiff's causes of action based on common-law negligence and a violation of Labor Law § 200 are dismissed as asserted against moving defendants.

Plaintiff's Labor Law § 241(6) Cause of Action

Labor Law § 241(6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> • * *
>
> All 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241(6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 (1998). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241(6), such proof does not establish liability, and is merely evidence of negligence. Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, supra.

In the case at bar, the Industrial Code provisions cited by plaintiff to support this cause of action are insufficient to sustain this claim.

Sections 23-1.5(c)(1) and (3) of the Industrial Code have been found to be general safety provisions which would not constitute a basis for a claim under Labor Law § 241(6). Gasques v State of New York, 15 NY3d 869 (2010); Sihly v New York City Transit Auth., 282 AD2d 337 (1st Dept 2001).

Section 23-3.3 of the Industrial Code concerns demolition by hand and is more specific than the above sections. Section 23-3.3(f) states, in relevant part, the following:

> Access to floors. There shall be provided at all times safe access to and egress from every building or structure in the course of demolition. Such safe means of access and egress shall consist of entrances, hallways, stairways or ladder runs so protected as to safeguard the persons using such means from hazards of falling debris or materials.

For Section 23-3.3(f) to be applicable, there must have been on-going demolition work consistent with the Industrial Code definition. Section 23-1.4(b)(16) defines "demolition work" as follows:

> The work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.

It has been held that a gut renovation which includes the removal of sheet rock or plaster on walls and ceiling, to move a stairway, and to clean debris, did not constitute demolition work under this section. Zuniga v Stam Realty, 169 Misc 2d 1004, 1010 (Supreme Court, Qns. Co, 1996) affd 245 AD2d 561 (2d Dept 1997), lv denied 91 NY2d 813 (1998); Baranello v Rudin Mgt. Co., 13 AD3d 245 (1st Dept 2004) lv denied 5 NY3d 706 (2005) (the removal of a portion of a wall does not constitute demolition work as

defined in the Industrial Code); Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389 (1st Dept 2007) (the project did not call for dismantling or razing of a building and, hence, was not demolition).

The overall scope of the project at bar to convert the former hair salon and combine it with an existing real estate office, including the removal of the entire contents of the hair salon and its partitions, is not consistent with the definition of demolition work which requires the partial dismantling or razing of a building. Simply stated, in this case, the construction work amounted to a "gut renovation" rather than demolition work.

Moreover, the specific work that plaintiff was performing in removing and replacing light fixtures was renovation, not demolition. Fuchs v Austin Mall Assoc., LLC, 62 AD3d 746 (2d Dept 2009) (disconnecting and installing lighting fixtures constitutes an alteration, not demolition); Gherardi v City of New York, 49 AD3d 280 (1st Dept 2008) (installation of wiring on four floors of a building is an alteration, not demolition). Therefore, section 23-3.3 of the Industrial Code is inapplicable to the case at bar.

As a consequence of the foregoing, plaintiff's cause of action based on a violation of Labor Law § 241(6) is dismissed as asserted against moving defendants.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by moving defendants Pinnacle Contractors of NY, Inc., Hudson Street Owners Corp. and Prudential Douglas Elliman Real Estate for summary judgment dismissing the complaint and all cross claims as asserted against them is granted and the complaint is dismissed as against said defendants; and it is further

ORDERED that the remainder of the action shall continue.

ENTER:

Shlomo Hagler
J.S.C.

Dated: July 20, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.