[* 1] SCANNED on 8/2/2012

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

WALTER PANTOVIC,

Plaintiff,

INDEX NO. 117471/08

-against-

MOTION SEQ. NO. 011

YL REALTY, INC., and SPRINT COMMUNICATIONS COMPANY L.P.,

Defendants.

SPRINT COMMUNICATIONS COMPANY L.P.,

Third-Party Plaintiff,

INDEX NO. 590807/09

-against-

PENMARK REALTY CORPORATION,

Third-Party Defendant.

FILED
AUG 02 2012
NEW YORK
COUNTY CLERK'S OFFICE

The following papers were read on this motion by third-party defendant for summary judgment dismissing the third-party complaint.

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

Cross-Motion: ☐ Yes ■ No

Motions sequence numbers 011 and 012 are hereby consolidated for disposition.

In this action arising out of personal injuries, third-party defendant Penmark Realty Corporation (Penmark Realty) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint (motion sequence number 011). In motion sequence number 012, defendant/third-party plaintiff Sprint Communications Company L.P. (Sprint) moves, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), and 241(6) causes of action.

BACKGROUND

On August 9, 2007, plaintiff was working as a building superintendent at the residential

condominium building located at 71 Nassau Street in Manhattan. His office was located in the basement, in a room that had been divided into two. Plaintiff's office was on one side of a door, and a small room which Sprint had leased for a cell tower site was on the other. Only a wall separated the two rooms, and in order to gain entry into the Sprint site, one had to go through plaintiff's office. Apparently, the heat generated by the cell tower was excessive and permeated plaintiff's office. Plaintiff repeatedly complained about the heat to the building's sponsor, defendant YL Realty, Inc. (YL Realty), the managing agent (Penmark Realty), and Sprint, but no relief was forthcoming. Finally, Penmark Realty told plaintiff to find a way to vent the room and then to install an industrial grade air conditioning unit. While plaintiff was on a ladder, trying to open a trap door in an air conditioning duct within Sprint's cell site, he fell from the ladder and was injured. There is no evidence as to what caused plaintiff to fall. His own recollection is just that he was on the ladder and then woke up in an emergency room (Plaintiff's December 10, 2009 EBT at 40, 117). Subsequently, plaintiff brought the herein action asserting five causes of action, for negligence and violations of Labor Law §§ 200, 240(1), 241(6), and two purported causes of action for violations of OSHA and New York's Industrial Code.

Nonparty Croft Building Condominium (Croft) is the overall owner of the 50 or so residential units in the building. Penmark Realty is Croft's managing agent; and YL Realty is the sponsor. The first floor and basement were retained by YL Realty as eight commercial units. By means of a PCS Site Agreement, Sprint leased the basement cell site from the sponsor. Sprint in its third-party complaint alleges claims for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

STANDARDS

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of

fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Rotunda Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1)

> Labor Law § 240 (1) provides, in relevant part:
> All contractors and owners and their agents, ... in the ... repairing ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, ... ladders ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

It is well established that:

> "Labor Law § 240 (1) provides exceptional protection for workers against the "special hazards" that arise when either the work site

> itself is elevated or is positioned below the level where materials or load are being hoisted or secured. The failure of an owner ... to furnish or erect suitable devices to protect workers when work is being performed results in absolute liability against that owner under Labor Law § 240(1)" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011] [internal quotation marks and citations omitted]; *see also Harrison v State of New York*, 88 AD3d 951, 951-952 [2d Dept 2011]).

"The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). In order "[t]o establish liability on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mech. of NY Corp.*, 80 AD3d 564, 564-565 [2d Dept 2011]).

DISCUSSION

Sprint's Motion (Motion Sequence 012)

Sprint contends that plaintiff was not performing an activity protected by Labor Law §§ 240(1) and 241(6) when he was injured. Plaintiff maintains that he was repairing Sprint's nonfunctional air conditioning unit at the time.

"While 'repair' of a broken or malfunctioning item is among [Labor Law § 240 (1)]'s enumerated activities, 'routine maintenance' to prevent malfunction is not covered activity" (*Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 555 [1st Dept 2009]; *see also Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011] ["(i)t is well settled that (Labor Law § 240 [1]) does not apply to routine maintenance in a non-construction, non-renovation context"]; *Anderson v Olympia & York Tower B Co.*, 14 AD3d 520, 521 [2d Dept 2005] [one who is involved in "the replacement of worn-out parts in a nonconstruction and nonrenovation context" is engaged in routine maintenance]). "The question of whether a particular activity constitutes a

'repair' or 'routine maintenance' must be determined on a case-by-case basis" (*Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008]), and "'[d]elineating between routine maintenance and repairs is frequently a close, fact-driven issue.' That distinction depends upon 'whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work,' and whether the work involved the replacement of components damaged by normal wear and tear" (*Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728 [4th Dept 2010] [internal citations omitted]; *see also Alexander v Hart*, 64 AD3d 940 [3d Dept 2009]).

At the time of the accident plaintiff was not engaged in "repairing," or any other protected activity. In this nonconstruction and nonrenovation context, plaintiff was not repairing Sprint's air conditioning unit as it was not broken. Daniel Kwarteng, Sprint's field technician, assigned to the cell site at the time of the incident attested that twice, when an alarm summoned him to the cell site, the air conditioner was merely turned off, not in need of repair (*see* Kwarteng EBT, at 63; *see also id.* at 59, 60, 61, 62 ["the reason is that the air conditioner was turned off. Not that the air conditioner has broken down, it has been turned off"]). There is no evidence that plaintiff even touched Sprint's air conditioner itself in an attempt to correct some defect. Rather, the "repair" plaintiff was attempting to achieve was to reduce the heat in his office by the installation of a new air conditioning unit in his own office, not to make some modification to Sprint's existing unit (Plaintiff's December 10, 2009 EBT, at 109). Thus, the portion of Sprint's motion which seeks summary judgment dismissing plaintiff's section 240(1) claim is granted.

With respect to Labor Law § 241(6), that statute applies only to "[a]ll areas in which construction, excavation or demolition work is being performed." As none of this activity was being performed at the time of plaintiff's accident, summary judgment dismissing this claim is also granted (*see Montalvo v New York & Presbyt. Hospital*, 82 AD3d 580, 581 [1st Dept 2011] ["As plaintiff was not engaged in construction, demolition or excavation when he was injured, he

is not eligible for the protection of Labor Law § 241(6)"]).

Plaintiff's complaint contains "causes of action" for violations of OSHA and New York's Industrial Code (12 NYCRR Part 23). Alleged violations of OSHA regulations do not provide a basis for liability under Labor Law § 241(6) (*see e.g. Shaw v RPA Assoc., LLC*, 75 AD3d 634, 637 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2d Dept 2005]).

The Industrial Code forms the basis for claims of violations of Labor Law § 241(6), but alleged violations of Industrial Code provisions do not constitute a cause of action in and of themselves. Moreover, plaintiff fails to allege violation of a specific, applicable section of the Industrial Code in either his complaint or in his bills of particulars (*see e.g. Ventimiglia v Thatch, Ripley & Co., LLC*, ___ AD3d ___, 2012 NY Slip Op 05163, at *3 ["To recover under Labor Law § 241 (6), a plaintiff must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific, applicable safety standards"]). Plaintiff's bare allegation that Sprint violated "Section 23 of the Industrial Code of the State of New York" (Complant, ¶ 70) provides no basis for recovery under Labor Law § 241(6).

"Labor Law § 200 codifies the common-law duty to maintain a safe work site" (*Ventimiglia v Thatch, Ripley & Co., LLC*, ___ AD3d ___, 2012 NY Slip Op 05163, *3 [2d Dept 2012]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: whether the injuries resulted from a dangerous condition, or from the means and methods by which the work was done. "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1195 [2d Dept 2012] [interior quotation marks and citations omitted]). In this matter, plaintiff

alleges that the excessive heat in his office was a dangerous condition. He asserts that he was on the ladder in Sprint's cell site because of the heat, but there is no evidence that plaintiff suffered any deleterious effects from the heat, and there is no evidence that excessive heat was a proximate cause of his injuries. Since there were no witnesses and plaintiff does not remember his fall or what caused it, there can be no question of fact to go to the jury. Given the dearth of facts, a jury could only speculate about the cause of the accident, and therefore, speculate as to whether Sprint had any liability under Labor Law § 200 or common-law negligence.

This same reasoning disposes of plaintiff's allegation that Sprint owed plaintiff a duty because it was contractually obligated, but failed, to maintain the cell site in a reasonably safe condition. There is simply no evidence that the heat proximately caused plaintiff's accident.

Supervision and control are preconditions to liability under Labor Law § 200 when the accident arises from the contractor's means and methods of performing the work. "In other words, the party against whom liability is sought must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [interior quotation marks and citation omitted]" (*Griffin v Clinton Green South, LLC*, ___ AD3d ___, 2012 NY Slip Op 04841, *5 [1st Dept 2012]). "'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed'" (*Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012] [citation omitted]).

Plaintiff alleges that Sprint had the authority to supervise and control his attempt to vent the cell site in preparation for the installation of a new air conditioner because Sprint should have done the job, but failed to do so, leaving plaintiff in the position to do the installation (*see* Roth 2/21/11 Affirm. in Opp., ¶ 38 ["The work of PANTOVIC should have been performed by SPRINT. However, it was SPRINT'S refusal to take control and responsibility for the worksite

that necessitated PANTOVIC'S intervention"]). Plaintiff admits that Sprint did not supervise him (Roth 2/21/11 Affirm. in Opp., ¶ 42), and there is no evidence that Sprint authorized plaintiff to even enter the cell site area, let alone to touch any machinery he found within it. Moreover, there is no evidence that Sprint had anything to do with plaintiff installing a new air conditioner in his own office, which was separate and distinct from Sprint's cell site.

Thus, the portion of Sprint's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 claim is granted. Because section 200 is the codification of an owner or general contractor's duty to provide workers with a safe work place (*Griffin v Clinton Green South, LLC*, ___ AD3d ___, 2012 NY Slip Op 04841, *supra*), plaintiff's cause of action for common-law negligence against Sprint is also dismissed, and as a result the entire complaint is dismissed as against Sprint.

Penmark Realty's Motion (motion sequence number 011)

When a complaint against a party is dismissed, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety" (*Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]). Therefore, Penmark Realty's motion for summary judgment dismissing the third-party complaint is granted.

YL Realty

YL Realty has not appeared in this action. However, in deciding this motion the Court may, in its discretion, search the record and grant summary judgment to non-moving parties (*see* CPLR 3212(b); *see also Atiencia v MBBCO II, Inc.*, 75 AD3d 424 [1st Dept 2010] ["A court, in the course of deciding a motion, is empowered to search the record and award summary judgment to a nonmoving party"]; *Mini Mint Inc.v Citigroup Inc.*, 83 AD3d 596 [1st Dept 2011]; *Brooks v City of New York*, 212 AD2d 435, 435 [1st Dept 1995]). After searching the record, it is clear that plaintiff has no viable claim against YL Realty. Accordingly, the Court grants YL

Realty summary judgment, pursuant to CPLR 3212(b), dismissing the complaint as against it.

CONCLUSION

Accordingly, it is

ORDERED that Sprint Communications Company L.P.'s motion (motion sequence number 012) is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further;

ORDERED that the Court searches the record and grants summary judgment to YL Realty, Inc. and dismisses the action as against YL Realty, Inc.; and it is further

ORDERED that Penmark Realty Corporation's motion (motion sequence number 011) is granted; and it is further

ORDERED that Sprint Communications Company L.P. is directed to serve a copy of this order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

FILED

AUG 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/11/2012

PAUL WOOTEN *J.S.C.*

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**