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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 400831/2010
KOLECI, SHPEND
vs
BROADWAY 522 FIFTH
Sequence Number : 001
DISMISS

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.



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

Dated: 10/9/12

_____ J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ 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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 15
*Justice*

In the Matter of the Application of

SHPEND KOLECI,

Plaintiff,

- v -

BROADWAY 522 FIFTH INVESTORS, LLC, TURNER CONSTRUCTION COMPANY, MORGAN STANLEY & CO. INCORPORATED AND 522 FIFTH ACQUISITION OWNERS, LLC.,

Defendants,

INDEX NO. 400831-2010

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____



The following papers, numbered 1 to _____ were read on this motion for/to

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answer — Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

Shpend Koleci ("Plaintiff") brings this action to recover for personal injuries which he allegedly sustained on the second floor of 522 Fifth Avenue, New York, New York around 2:45 a.m. on May 21, 2007. The second floor of 522 Fifth Avenue is owned by Broadway 522 Fifth Investors, LLC and 522 Fifth Acquisition Owners, LLC. Morgan Stanley & Co. Incorporated ("Morgan Stanley") is the net lessee of the premises. Turner Construction Company ("Turner") was a general contractor doing construction in the building at the time of the incident. Additionally, Cushman & Wakefield was the property manager for Morgan Stanley. Cushman & Wakefield contracted with ABM, Plaintiff's employer, to do cleaning on the premises.

Plaintiff, an employee of ABM, claims that he was assigned to clean the second floor kitchen and adjoining café area. He went with his crew in the late evening into morning hours of May 20 to 21, 2007, and he supervised the cleaning. He arrived to find workers replacing wet ceiling tiles in the kitchen area, and interacted with them briefly, before they left with their ladders. Plaintiff claims that cabinets were piled and stored in the hallway adjoining rooms that he and his crew were assigned to clean, and stacked in such a way that when the door opened, it hit a shelving unit, and the equipment fell like dominoes, causing his injury. Plaintiff contends that he saw the cabinets placed in the corridor by four individuals who were working in the kitchen, although he did not know who they were employed by.

Plaintiff claims that Defendants were in violation of Labor Law §200 and Labor Law §241(6). Defendants now move to dismiss this action pursuant to CPLR §3212. Plaintiff opposes.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

To succeed on a cause of action based on a violation of Labor Law §241(6), a Plaintiff must plead and prove that an owner or contractor failed to comply with specific provisions, and that such failures were the proximate cause of Plaintiff's accident. (*Ross v. Curtis-Palmer Hydro Electric*, 81 NY2d 494, 601 NYS2d 49 [1993]). "In order to establish a violation of Labor Law §241(6), the underlying statute or rule that the violation of Labor Law §241(6) is premised upon, must be one that mandates concrete specifications rather than a general safety standard." *(DiPalma v. Metropolitan Transportation Authority*, 872 NYS2d 690 [1st Dept 2008]). A Defendant is thus entitled to summary judgment, dismissing a §241(6)

cause of action where the cited regulation is not applicable to Plaintiff's accident, or where Defendant's violation was a proximate cause of Plaintiff's injury. *Id.*

In Plaintiff's supplemental amended verified bill of particulars, he broadly alleges that the Industrial Code provision 12 NYCRR §23-1.7 was violated. While this section of the Industrial Code has multiple subsections, Plaintiff has failed to identify any specific sub-sections which were allegedly violated by defendants.

Plaintiff, in his opposition to the instant motion, now contends that Defendants violated 12 NYCRR§23-1.7(e)(1) and (e)(2) because there was debris on the floor which prevented him from being able to move from the path of the falling cabinets.

NYCRR §23-1.7(e)(1) and (e)(2) provide,

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstruction 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.

Specifically, 12 NYCRR §23-1.7(e)(1) and (e)(2) relate to "tripping and other hazards." 12 NYCRR §23-1.7(e)(1) specifically relates to passageways and 12 NYCRR §23-1.7(e)(2) relates to working areas. Both sections require that Plaintiff trip and the accident have been caused by the type of condition that "could cause tripping".

Plaintiff states that he was unable to extricate himself from the falling cabinets due to debris on the floor. However, Plaintiffs complaint merely alleges, "while in the course of his duties, multiple cabinets that had been piled in the corridor outside of the kitchen fell on him."Although the complaint does mention that there was debris in the kitchen area, it does not mention that he tripped upon

it, or that it extended to the hallway where plaintiff was injured. His bill of particulars merely states that "defendants caused/and or created the condition by piling cabinets in the corridor." Additionally, in an "Injured Employee Report" written by Neil Capri, the Area Manager, he describes Plaintiff's incident as follows: "Mr. Koleci claims while he was supervising a kitchen clean-up on May 22 at 522 5th Ave, as he was passing by a stove a door from stove hit him on his left calf."

Plaintiff specifically states in his deposition,

> A: Then the cabinets, I saw the cabinets fell in my face, one cabinet, and I try to hold it. Then the other cabinet started hitting one by one like a domino, bam, bam, bam to the first cabinet. That was too heavy, I couldn't hold it anymore....
>
> A: I couldn't hold it anymore and I got stuck from the debris and I just jump, because I couldn't hold it. And I tried to protect myself, because they were going to hit me in my face, my head.
>
> Q: Did you throw the cabinet to the ground or did you throw it in some general direction?
>
> A: No, I didn't throw it, I just throw myself in the right side. And the cabinets hit me in my left ankle. Then, in that time, I hit my right knee on the floor.

Here, Plaintiff clearly alleges that he was injured when a cabinet hit his left ankle. The cabinet fell onto him, rather than him tripping and falling. Even if there was debris, plaintiff does not state that debris caused him to trip. Indeed, he does not describe debris, and use of that term alone does not implicate this section. As such, 12 NYCRR §23-1.7(e)(1) and (e)(2) are not applicable.

New York courts have not found violations of Industrial Code §23-1.7(e) in cases where Plaintiff did not trip, or was not struck by an object which could puncture plaintiff, even in cases where the Plaintiff was struck by falling objects. (*See, Urbano v. Rockefeller Center North, Inc.*, 91 AD3d 549 [1st Dept 2012]; *McParland v. Travelers Insurance Co. 302 AD2d 328* [1st Dept 2003]). Since

Plaintiff did not trip on the cabinets, and the placement of the cabinets was not the type of condition which could cause tripping, 12 NYCRR §23-1.7(e) is not applicable. There are no other subsections of 12 NYCRR §23-1.7 which are applicable to Plaintiff's incident. As such, this section cannot serve as a basis for a Labor Law §241(6) claim.

Plaintiff also brings a Labor Law §200 cause of action against Defendants. Labor Law §200 codifies the common law duty of the owner or employer to provide employees with a safe place to work. In cases arising from the manner in which the work was performed, the owner or general contractor may only be held liable if it exercised supervision or control of the work that led to the injury. *(O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745 [2006]). In addition to a showing of "supervision or control" over the injury-producing work, a Plaintiff must also prove that Defendants had notice, either actual or constructive, of the defective condition which caused the accident, to prove a case under either Labor Law §200 or the common law. (*Ross v. Curtis Palmer Hydro Electric Co., Inc.*, 81 NY2d 494, 601 NYS2d 49 [1993]).

It is undisputed that the owners of the property, Broadway 522 Investors, LLC and 522 Fifth Acquisition Owner, LLC had no employees. As such, they could not have exercised "supervision and control" over any work being performed on the premises on or before May 2007, and they are entitled to summary judgment on Labor Law §200.

Turner was the general contractor doing construction work in the building. It claims that it turned the second floor over to Morgan Stanley prior to the accident. Turner claims it could not have supervised or controlled the work that led to the injury because it had not worked on the second floor for several weeks before the accident. Additionally, Turner's Superintendent, Larry Costello, states in his deposition that Turner's workers and sub-contractors never worked after midnight. He states that Turner's standard day was 7 a.m. to 3 p.m.. Turner annexes a copy of its daily reports for the month prior to the accident which indicates that no work took place on the second floor at any time prior to the alleged accident, or on May 21, 2007.

Plaintiff argues that Turner was engaged in construction work on the second floor where the incident occurred, which included opening the walls for the installation of structural blocking, electrical outlets, and light fixtures as well as

the replacement of damaged ceiling tiles and the relocation of sprinkler heads. Plaintiff specifically alleges in his deposition:

> In the kitchen I saw four construction people with ladder. They replacing the ceiling tiles. And I saw the floor was full of piece of the ceiling tiles, of plywood, of wires, of dust, those things like that. . . . They told me, what are you guys doing here, okay? And we tell them, we have request to clean. Oh, okay, no problem. But I say, these things, what you put it down, you going to clean it? They say, no, we have no time to clean it, that is for you guys. When they finish, they left.

While Turner claims it turned over the floor to Morgan Stanley, they conceded they did so upon "substantial" completion, which does not demonstrate their work was actually complete. Indeed, Costello testifies that work was ongoing "[f]rom March, April, early May," and there were weekly safety meetings. Costello testifies that the punch list on the second floor was done after the Morgan Stanley move-in.

Defendants assert that Morgan Stanley could not be liable under Labor Law §200, because Morgan Stanley did not retain Plaintiff's employer ABM. Morgan Stanley also contends that it could not have supervised or controlled the work. Saeid Garebaglow, a project manager for Morgan Stanley, states in his deposition that Morgan Stanley occupied only the ground floor at 522 Fifth Avenue at the time of the incident. Garebaglow says that the trade hours for work at the project were 7 a.m. to 3 p.m. and no work was done after 6 p.m. He also testified that Morgan Stanley did not hire ABM, but instead, it was Cushman & Wakefield who hired them.

Plaintiff first points to Defendant's own exhibit, a purchase order dated May 1, 2007, that specifically lists Cushman & Wakefield as an agent of Morgan Stanley. "Where the work is delegated to a third party, the third party has concomitant authority to supervise and control the work delegated and becomes an "agent" of the owner or general contractor for the purposes of Labor Law." *(Walls v. Turner Const. Co.*, 4 NY3d 861, 798 NYS2d 351 [2005]). Further, Plaintiff states that although Morgan Stanley only occupied the ground floor at 522 Fifth Avenue on May 21, 2007, it was in the process of moving onto the second floor at

the time. Prior to the move, the premises had to be built out, and was in fact being built out at the time. According to Turner, the second floor, designated as a café area, was being "retrofitted" for new paint, carpeting and lighting at the time of the incident.

Costello testifies that Turner did have "minis" or "dumpsters" to hold construction debris on the second floor. He also testified that "[t]he building used part of the second floor for storage of furniture that was in the building." He stated that Morgan Stanley was also supervising the work done on the second floor, Sayid, who was not there every day, but at least once a week. Regarding the kitchen materials, Costello states "We didn't move kitchen material. . . . It would be Morgan Stanley would have their maintenance people do it."

A question of fact exists as to who the four individuals were that were working at the premises on the evening of the accident, and whether Turner or Morgan Stanley are liable under Labor Law §200. Neither party conclusively demonstrates that its employees were not working at the accident site at the date and time of the incident, or that Turner or Morgan Stanley's employees did not supervise and/or control the activity that led to Mr. Koleci's injury, or did not know of the dangerous condition in the hallway.

Wherefore, it is hereby,

ORDERED that Broadway 522 Investors, LLC and 522 Fifth Acquisition Owners motion for summary judgment dismissing plaintiff's claim is granted in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further,

ORDERED that this action is severed and continued against the remaining defendants; and it is further,

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that Turner Construction Company, and Morgan Stanley's motion for summary judgment dismissing plaintiff's claim under Labor Law

§241(6) is granted; and it is further,

ORDERED that Turner Construction Company and Morgan Stanley's motion for summary judgment dismissing plaintiff's claim under Labor Law §200 is denied; and it is further,

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158) who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court. All other relief requested is denied.

**Dated:** October 9, 2012

J.S.C.

**Check one:** FINAL DISPOSITION X NON-FINAL DISPOSITION
**Check if appropriate:** ☐ DO NOT POST ☐ REFERENCE