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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

KWANG-SUP KIM,

Plaintiff,

-against-

VORNADO REALTY TRUST, SOUTH HILLS MALL, LLC, SOUTH HILLS EAT II, LLC, CDECRE, INC., and SORDONI CONSTRUCTION CO.,

Defendants.

Index No: 19134/10

Motion Date: 10/24/12

Motion Cal. No.: 7

Motion Seq. No.: 1

The following papers numbered 1 to 15 read on this motion by defendant, VORNADO SOUTH HILLS, LLC i/s/h/as SOUTH HILLS EAT II, LLC (hereinafter Vornado) and separate cross-motion by defendant, SORDONI CONSTRUCTION CO.(hereinafter Sordoni) for leave to make a late summary judgment motion and upon granting leave for summary judgment dismissing the plaintiff's Labor Law and common law claims

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Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows.

Defendant, Vornado's Order to Show Cause was originally submitted on June 27, 2012. The plaintiff initially opposed only that portion of Vornado's Order to Show Cause which sought leave to make a late summary judgment motion and for a stay of the trial claiming that the Order to Show Cause signed by the court did not provide notice that Vornado also sought summary judgment, and thus, plaintiff would not address the summary judgment motion on the merits. Sordoni did not submit any papers.

Plaintiff had clearly misinterpreted the provisions of the Order to Show Cause and the relief requested. Thus, the court contacted the attorneys for all parties to advised them that the motion was restored to the motion calendar, that the Court would determine Vornado's motion for summary judgment on the merits and that plaintiff and co-defendant, Sordoni, could submit further papers in opposition and/or cross-move for relief, if they so desired.

The branch of the motion and cross-motion for leave to make a late summary judgment motion is granted. The defendants have established good cause for failing to timely move for summary judgment.

As good cause for the delay counsel for Vornado and Sordoni assert that a Stipulation to be so Ordered dated December 1, 2011 staying the action and directing post note of issue discovery was e-mailed to Judge Ritholtz' the CSC Part, on December 2, 2011 by plaintiff's counsel. It is undisputed that the attorneys did not receive any further communication from the court or from plaintiff's counsel, they all assumed that the stipulation had been so Ordered and the action was stayed. On May 17, 2012 the attorneys received notice of a pre-trial conference scheduled for May 18, 2012 and learned, for the first time, that the stipulation was not so Ordered and the action had not been stayed. At the pre-trial conference, Referee Florio, rejected defenants' request to refer the case back to the Compliance Settlement Conference Part. In addition, Vornado asserts that the it promptly moved on June 1, 2012 after the last deposition was held on April 16, 2012.

Plaintiff's counsel does not dispute defendants' account. Instead, he argues that the delay was due to defense counsels' failure to confirm that the stipulation was so Ordered which does not constitute good cause.

Under the circumstances, the court finds that good cause exists for the delay in moving for summary judgment (see (see Brill v. City of New York, 2 NY3d 648, 652 [2004]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]). Moreover, significant relevant discovery outstanding at the time plaintiff was compelled to file his note of issue (see Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124 [2000]) and the fact that defendant moved promptly after discovering that the action was not stayed in and of itself constitutes good cause for the delay in moving for summary judgment.

This is an action to recover for personal injuries plaintiff allegedly sustained on June 18, 2008 when he slipped and fell due to the presence of water on the roof of the premises known as South Hills Mall located at 1895 South Road, Poughkeepsie, N.Y. owned by Vornado incorrectly i/s/h/a South Hills Eat II, LLC.

Plaintiff commenced this action against the defendants SOUTH HILLS MALL, LLC, VORNADO REALTY TRUST and Vornado i/s/h/a SOUTH HILLS EAT II, LLC and SORDONI CONSTRUCTION CO., alleging violations of Labor Law §241(6) and §200 and common law negligence. Subsequently, the plaintiff discontinued the action as against South Hills Mall, LLC, Vornado Realty Trust and South Hills Eat II, LLC leaving only Vornado (Vornado South Hills, LLC) and Sordoni as defendants in this action.

Defendants now move to dismiss the plaintiff's all claims asserted in the complaint relying upon the deposition testimonies of the plaintiff, Sordoni's Project Superintendent Richard K. Vastola, and Vornado's Director of Construction Brian Thompson and Vastola's September 15, 2012 affidavit.

Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury" (Russin v. Picciano & Son, 54 NY2d 311, 317 [1981]). However, general supervisory authority, including the authority to review safety programs, does not rise to the level of directing or controlling the method of work required for a claim under Labor Law § 200 (see Martin v. Paisner, 253 AD2d 796 [1998]). Also, where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (Comes v. New York State Electric and Gas Corporation, 82 NY2d 876 [1993]; Lombardi v. Stout, 80 NY2d 290 [1992]). Nor can an owner or general contractor be held liable under Labor Law § 200 absent proof that the owner or general contractor had either actual or constructive notice of the allegedly dangerous condition that caused plaintiff's injuries and failed to remedy it after a sufficient period of time (see Piaquadio v. Recine Realty Corp., 84 NY2d 967 [1994]).

The defendants established, prima facie, their entitlement to summary judgment dismissing the plaintiff's claims based upon violation of Labor Law § 200 and common law negligence. by demonstrating that Vornado did not supervise or control the means

and manner of plaintiff's work nor have the authority to do so, and that it did not have actual or constructive notice of any unsafe manner in which the work was performed or of any unsafe condition on the roof.

The plaintiff, testified that he was a certified asbestos handler, employed by Dong Soo Kim's Asbestos Company, as a laborer to perform asbestos removal work on the roof of the subject premises. He also testified that materials containing asbestos had to be kept constantly wet to prevent asbestos fibers from becoming airborne during the removal process. His bosses Dong Soo Kim or Sang Lee alternated spraying water onto the roofing material being removed. Plaintiff also testified that his employer provided the required asbestos overalls and mask and that he was also wearing work boots with rubber soles. The plaintiff further testified that the water made the roof slippery, and although did not fall of the roof, he slipped and fell down sustaining injury. He also testified that he complained to his bosses of the slippery condition, but did not complaint to anyone else.

Vornado's Director of Construction, Thompson, testified that Vornado contracted with Sordoni Construction Co. to perform all the construction activities for the redevelopment construction project of South Hills Mall except the asbestos abatement work. Vornado separately contracted with Environmental Remedial Services, Inc.(ERSI) to perform asbestos abatement before commencement of the construction and demolition work. Thompson testified that he was present at the site weekly to generally review the work being performed and he dealt directly with the representative of ERSI. Thompson did not know whether ERSI hired any subcontractors to actually perform the asbestos work. Thompson also testified that Vornado did not supply any equipment or protective gear for the asbestos abatement work and never received any complaints from anyone, including the workers, with respect to the abatement work. Although he admitted that he had the authority to stop any unsafe practices, he did not have the authority to instruct ERSI as to the means and methods of performing their work. He also testified that he was on the roof only one or two times and does not remember seeing any unsafe practices.

In opposition, plaintiff failed to raise a triable issue of fact.

Labor Law § 241(6) imposes a non-delegable duty upon owners and general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in

construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (Ross v. Curtis Palmer Hydro-Electric Co., 81 NY2d 491, 501 [1993]; Rizzuto v. L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]). To prevail on a Labor Law § 241(6) claim, a plaintiff must establish a violation of a New York State Industrial Code which contains a specific, positive command applicable to the circumstances of the accident, that such violation was a proximate cause of his injuries (see St. Louis v. Town of North Elba, 16 NY3d 411 (2011); Gasques v. State, 15 NY3d 869 (2010); Fusca v. A & S Const., LLC, 84 AD3d 1155 [2011]; Forschner v. Jucca Co., 63 AD3d 996 [2009]) and plaintiff's lack of comparative negligence (see Roman v. A1 Limousine, Inc., 76 AD3d 552, 553 [2010]).

In support of his Labor Law §241(6) claim, the plaintiff's bill of particulars alleges violations of Industrial Code §§ 23-1.5, 23-1.7(d) and (e), 23-1.8, 23-1.16 and 23-1.24.

The defendants established, prima facie, their entitlement to summary judgment dismissing the plaintiff's claim for violation of Labor Law § 241(6), predicated upon violations of §§ 23-1.5, 23-1.7(d),(e), 23-1.16 and 23-1.24 by demonstrating that § 23-1.5 sets forth a general standard of care and cannot serve as a predicate for a violation of Labor Law §241(6)(see Gasques v. State of New York, 15 NY3d 869 [2010]) and §§ 23-1.16 and 23-1.24 are inapplicable to the facts of this case (see Smith v. Cari, LLC, 50 AD3d 879, 881 [2008]; Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616 [2008] D'Acunti v New York City School Const. Auth., 300 AD2d 107 [2002]).

Plaintiff did not submit any opposition to the branch of the defendants' motion and cross-motion seeking dismissal of plaintiff's Labor Law § 241(6) claim based upon the alleged violations of Industrial Code §§ 23-1.5, 23-1.16 and 23-1.24.

With respect to dismissal of plaintiff's Labor Law § 241(6) claim based upon the alleged violations of Industrial Code §§ 23-1.7(d) and (e) plaintiff has failed to raise a triable issue of fact.

The interpretation of an Industrial Code regulation and whether a regulation applies to a particular condition or circumstance is a question of law for the court (see Harrison v. State, 88 AD3d 951, 953 [2011]; Spence v. Island Estates at Mt. Sinai II, LLC, 79 AD3d 936, 938 [2010]). Contrary to plaintiff's claim § 23-1.7(e) regarding protection from tripping hazards does not apply because the plaintiff testified that he slipped due to the slippery condition on the roof caused by water being applied

and he did not trip on any dirt, debris, or other obstruction or condition which could cause tripping (see Eversfield v. Brush Hollow Realty, LLC, 91 AD3d 814, 817 [2012]; Spence v. Island Estates at Mt. Sinai II, LLC, 79 AD3d 936, 938 [2010]; Salinas v. Barney Skanska Const. Co., supra). Nor is § 23-1.7(d) regarding slipping hazards applicable to this case inasmuch as the water on which plaintiff slipped was an integral and necessary safety measure which was part of the asbestos removal work and not a "foreign substance", debris or defective condition within the meaning of § 23-1.7(d) (see Galazka v. WFP One Liberty Plaza Co., LLC, 55 AD3d 789 [2009], leave denied 12 NY3d 709 [2009]; Salinas v. Barney Skanska Const. Co., 2 AD3d 619, 622 [2003]; Harvey v. Morse Diesel Intl., 299 AD2d 451 [2002]).

The defendants, however, failed to demonstrate, prima facie, facie, that § 23-1.8 was not violated or that any alleged violation was not a proximate cause of plaintiff's accident.

Industrial Code § 23-1.8(c)(2) governing foot protective apparel provides that "Every person required to work or pass in water, mud, wet concrete or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubbers over safety shoes."

In support of their motions defendants rely in part on the plaintiff's deposition testimony that he was wearing regular work boots with rubber soles. Defendants also assert that the water was an integral part of the work being performed and cannot be the basis for liability under this provision. Defendants also maintains that the plaintiff's testimony at the Workers' Compensation hearing that he fell because his boss pushed him and, is sufficient to demonstrate that any alleged violation of this provision was not a proximate cause of the accident. Defendants' arguments are unpersuasive.

Section 23-1.8(c)(2) is intended to protect workers exposed to the very risk posed by the condition which plaintiff claims existed on the roof, namely "work[ing] *** in water, *** or in any other wet footing". Although plaintiff testified that he was wearing work boots with rubber soles, he also testified that the roof was very slippery and that he complained to his boss about the condition on more than one occasion.

A violation of an Industrial Code provision constitutes some evidence of negligence, however, "it is for a jury to determine whether the equipment, operation or conduct at the work site was reasonable and adequate under the particular circumstances." (Belcastro v. Hewlett-Woodmere Union Free School District Number

14, 286 AD2d 744, 746 [2001]; see also, Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513 [1985], rearg. denied, 65 NY2d 105).

The plaintiff's deposition testimony together with his testimony at the Workers' Compensation hearing is sufficient to raise issues of fact as to whether § 23-1.8(c)(2) was violated, whether the plaintiff was provided "proper" foot protection and whether such alleged violation was a proximate cause of the plaintiff's injury.

Accordingly, the defendant, Vornado's motion and Sordoni's cross motion to dismiss the plaintiff's claims based upon the alleged violation of Labor Law § 200 and Labor Law § 241(6) predicated upon the alleged violations of Industrial Code §§ 23-1.5, 23-1.16 and 23-1.24 and common law negligence are granted.

The defendants' motion and cross-motion to dismiss the plaintiff's Labor Law § 241(6) claim predicated upon the alleged violation of Industrial Code § 23-1.8 is denied.

The stay imposed in the Order to Show Cause is vacated. This action is set down for a pretrial conference to be held in the Trial Scheduling Part on December 18, 2012.

A copy of this Order is being mailed to the attorneys for the parties.

Dated: November 26, 2012
D# 47

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J.S.C.