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

PRESENT: JAFFE Justice

PART 12

Index Number : 108989/2008
MALCHIODI, LOUIS
vs
R. P. BRENNAN GENERAL
Sequence Number : 002
DISMISS ACTION

INDEX NO. 108989/08

MOTION DATE

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 30-38

Answering Affidavits — Exhibits ____ No(s). 43

Replying Affidavits ____ No(s). 44

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 12/23/13

BJ J.S.C.
BARBARA JAFFE
J.S.C.

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
COUNTY OF NEW YORK : IAS PART 12

----------x

LOUIS MALCHIODI,

Plaintiff,

- against -

R.P. BRENNAN GENERAL CONTRACTORS & BUILDERS, CPS 1 REALTY, L.P., and PLAZA RESIDENTIAL OWNER, L.P.,

Defendants.

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Index No. 108989/08

Mot. seq. no. 002

**DECISION AND ORDER**

BARBARA JAFFE, J.:

**For plaintiff:**
Devon Reiff, Esq.
Devon Reiff, P.C.
55 Broad St., 29th fl.
New York, NY 10004
212-988-9000

**For R.P. Brennan:**
Michael J. Pearsall, Esq.
The Law Offices of Edward Garfinkel
12 Metrotech Ctr., 28th fl.
Brooklyn, NY 11201
718-250-1100

By notice of motion, defendants R.P. Brennan General Contractors & Builders (Brennan), CPS 1 Realty, L.P. (Realty), and Plaza Residential Owner, L.P. (Owner) move pursuant to CPLR 3212 for an order summarily dismissing the complaint in this action. Plaintiff opposes.

## I. BACKGROUND

On June 28, 2007, at approximately 8 pm, plaintiff, a laborer working at the Plaza Hotel in Manhattan, fell after he tripped on debris on the C-level of the hotel's basement at or about the base of stairwell seven. Carrying a box of heavy equipment, plaintiff descended the stairs into the basement, stepped off the stairs, walked two feet down a pathway, and fell on metal studs that resembled those ordinarily used to hold up sheetrock. He did not see the studs before he fell.

That day, the pathway was lined with construction debris, but every day there were

different kinds of debris there. Plaintiff had never before seen any studs on the floor, and did not know where they came from or what contractor at the site used them. Plaintiff had seen workers cleaning up debris around the accident area before his accident but did not know who employed them. (NYSCEF 32, 35).

At the time of his accident, plaintiff was employed by Tishman Construction (Tishman), the general contractor in charge of building the condominium portion of the hotel. He had worked for Tishman at the hotel for approximately six months to one year; his duties as a laborer included chopping concrete and moving equipment. He received instructions only from Tishman employees. Plaintiff was also responsible for sweeping as directed solely by Tishman foremen, and he swept debris such as dust and paper, and he was not to clean up debris that was not generated by Tishman workers. (*Id.*).

Pursuant to a written contract between defendants Realty and Brennan, Brennan agreed to construct the hotel portion of the hotel. The hotel was being renovated and it was divided into four components: a hotel, a condominium, a retail section, and a club. It is undisputed that Brennan had no responsibility for the condominium portion of the project. According to Brennan's contract drawing for sub-level C of the basement, which delineated its scope of work in that area, staircase seven was not within Brennan's work area, but was within Tishman's. (NYSCEF 36-38). The contract also authorized Brennan to stop work on the project if it deemed it unsafe, and required that it ensure that its subcontractors comply with its general safety plan. (NYSCEF 36).

## II. PERTINENT PROCEDURAL BACKGROUND

In his summons and complaint, plaintiff alleges that defendants violated, *inter alia*, Labor

Law §§ 200 and 240, Industrial Code §§ 1.7(d) and 1.7(e)(1), (2), and unidentified Occupational Safety and Health Association (OSHA) regulations. (NYSCEF 32).

At an examination before trial (EBT) held on September 22, 2010, Lenny Wersan testified that in June 2007 he was employed by Brennan as a senior project manager, responsible for overseeing the hotel portion of the construction. According to Wersan, Brennan employees were responsible for cleaning and removing debris generated by Brennan or its subcontractors, and Tishman was responsible for cleaning and removing its debris and that of its subcontractors. He confirmed that staircase seven was not within Brennan's work area. (NYSCEF 36).

On March 24, 2011, Mordechai Feibish, director of construction for El Ad Properties NY, LLC (Properties) testified at an EBT that in 2007 he was the project manager in charge of the hotel's construction, acted as Owner's representative for the project, and was authorized to stop any unsafe work practices during the project. Each general contractor was responsible for removing construction debris for its portion of the project. Feibish had never received complaints about construction debris before plaintiff's accident. Properties, Realty, and Brennan did not employ a site safety officer for the project, although Tishman did. Tishman was responsible for the area in which staircase seven was located, and the owner of that area was Owner. (NYSCEF 38).

## III. CONTENTIONS

Defendants contend that the area where plaintiff fell was under the control of Tishman, not Brennan, that plaintiff has no cognizable claim under Labor Law § 240(1) as his fall did not result from an elevation-related risk, and that they cannot be held liable under Labor Law § 200 or for common law negligence as they neither directed nor supervised plaintiff's work and did

not create the debris or have actual or constructive notice of it before his accident. They argue that the Industrial Code sections cited in plaintiff's bill of particulars do not apply as plaintiff did not fall in a passageway or working area, as he tripped rather than slipped, and as he was not working on an elevated surface. (NYSCEF 31).

Plaintiff maintains that he fell within a passageway as the area consisted of a partition wall on one side and a trail of debris on the other, that the area was also a working area as he was required to pass through it in order to get to his assigned work location, and that defendants failed to establish that they cannot be held liable for common law negligence and under Labor Law § 200 absent proof that they had no actual or constructive notice of the debris or that the metal studs did not belong to Brennan or its subcontractors or were not generated by their activities. (NYSCEF 43).

In reply, Brennan argues that plaintiff offers no evidence showing that the metal studs were owned or used by Brennan or its subcontractors, or that it was responsible for removing them from the accident area, or that defendants created or had notice of the debris. They reiterate that a passageway is not created by debris and that the sub-basement area does not constitute a work area. (NYSCEF 44).

## III. ANALYSIS

### A. Labor Law § 240(1)

As plaintiff submits no opposition to this portion of defendants' motion, the cause of action based on Labor Law § 240(1) is dismissed.

### B. Labor Law § 241(6) claim

A claim advanced pursuant to Labor Law § 241(6) may be premised on a specific

violation of the Industrial Code. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 495 [1993]).

Pursuant to section 23-1.7(e)(1) ("Tripping and Other Hazards"):

> 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.

And pursuant to section 23-1.7(e)(2) of the Industrial Code:

> 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.

Here, given plaintiff's testimony that he fell while walking along a path leading from the stairs created by a wall on one side and a pile of debris on the other, and that he was required to pass through that area to arrive at his work location that day, his description of the accident area raises a triable issue as to whether he was injured in a passageway and/or working area. (*See Harasim v Eljin Constr. of New York, Inc.*, 106 AD3d 642 [1st Dept 2013] [permanent staircase where plaintiff fell constituted passageway as it was sole means of access to work site and was not open area accessible to general public]; *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246 [4th Dept 2013] [although industrial code regulations do not define "passageway," term has been interpreted to mean defined walkway or pathway used to traverse between discrete areas rather than open area]; *Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669 [1st Dept 2012] ["passageway" may encompass permanent staircase when staircase is sole access to work site]; *Torres v Forest City Ratner Cos., LLC*, 89 AD3d 928 [2d Dept 2011] [as plaintiff fell in building on floor where he had been working, and to his left was row of trash containers and to right was hoist or lift which was only way to exit building, defendants failed to show absence of triable issues as to whether plaintiff was injured in passageway or working area]; *Aragona v State*, 74

AD3d 1260 [2d Dept 2010] [plaintiff fell while carrying materials along corridor created by lumber and construction material; triable issue as to whether he fell in passageway]).

As plaintiff does not address defendants' arguments related to Industrial Code 23-1.7(d), that claim is dismissed.

C. Labor Law § 200 and common law negligence

Pursuant to Labor Law § 200 and under common law negligence, where it is alleged that a dangerous condition caused an employee's injury, an owner may be held liable if it created the condition or had actual or constructive notice of it. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). A defendant is charged with constructive notice of a dangerous condition when the dangerous condition is visible, apparent, and exists for a sufficient length of time before an accident to permit the defendant to discover and remedy it. (*Lopez v Dagan*, 98 AD3d 436 [1st Dept 2012]).

As plaintiff testified that he had not seen the metal studs on which he tripped before his fall, had never before seen metal studs on the floor, and did not know where they came from or which contractor used them, and as Feibish testified that he had not seen any debris or received complaints about debris before plaintiff's accident, defendants Realty and Owner have demonstrated, *prima facie*, that they neither created the dangerous condition, nor had actual or constructive notice of it. (*See Gordon v Am. Museum of Nat. History*, 67 NY2d 836 [1986] [no constructive notice shown absent evidence that anyone, including plaintiff, observed paper before accident and thus paper could have been deposited only minutes or seconds before accident and any other conclusion would be pure speculation]; *Rodriguez v Dormitory Auth. of State*, 104 AD3d 529 [1st Dept 2013] [plaintiff testified that he had seen similar scaffold clamps on floor on

day of accident and preceding day, but there was no testimony indicating how long clamp that caused plaintiff's fall had been in location of accident]; *Steiger*, 104 AD3d at 1249 [defendants met burden of establishing lack of actual notice as matter of law by showing that it received no complaints about area before plaintiff's fall]; *Kobiashvilli v Hill*, 34 AD3d 747 [2d Dept 2006] [as defendant submitted proof that length of time for which defect existed was unknown, court held that finding that debris was present for sufficient length of time to be discovered would constitute pure speculation]).

That these defendants may have had general supervisory authority and control over the entire construction project and the authority to stop unsafe work practices does not impose liability on them under Labor Law § 200 or under common law negligence. (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [duty to supervise work generally, stop contractor's work if safety violation is observed, or ensure compliance with safety regulations and contract specifications insufficient to impose liability under section 200 or common law negligence]).

Moreover, a contractor may also be held liable for a dangerous condition at a work site under Labor Law § 200 or common law negligence if it had control over the work site and actual or constructive notice of the dangerous condition. (*Mikelatos v Thelfilaktidis*, 105 AD3d 822 [2d Dept 2013]).

Wersan's testimony and Brennan's evidence that the accident occurred in an area where Brennan performed no work and had no duty or responsibility to clean up debris established that Brennan had no control over the area of plaintiff's accident, and thus any notice or lack of notice of the debris is irrelevant. (*See White v Vill. of Port Chester*, 92 AD3d 872 [2d Dept 2012]

[contractor responsible for interior spaces at construction site and not sidewalk demonstrated that it lacked control over sidewalk where plaintiff fell and thus not held liable]; *Ortiz v I.B.K. Enter., Inc.*, 85 AD3d 1139 [2d Dept 2011] [Labor Law § 200 claim properly dismissed as defendant established that it had no authority to supervise or control area of work site where plaintiff was injured]; *Barto v NS Partners, LLC*, 74 AD3d 1717 [4th Dept 2010] [contractor submitted evidence that it had no employees working in accident area before accident and that another contractor's employees performed all relevant work in area; plaintiff did not raise triable issue absent evidence that contractor's employees entered area before accident; constructive notice thus not imputed to contractor]; *Wolfe v KLR Mech., Inc.*, 35 AD3d 916 [3d Dept 2006] [no evidence that contractors had obligation or authority to maintain or control stairway in building where plaintiff fell; thus, whether contractors met burden of proving that they did not create or have actual or constructive notice of condition irrelevant]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981] [as primary contractors had no contract with plaintiff's employer, they had no ability to control either plaintiff or activity which resulted in injury and thus could not be held liable to plaintiff under section 200 for failure to provide safe workplace]).

Plaintiff cites no authority for his argument that Brennan was required, as part of its *prima facie* burden, to identify the contractor to which the metal studs belonged.

## IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted to the extent of dismissing plaintiff's: (1) Labor Law § 240(1) claim; (2) Labor Law § 241(6) claim premised on a violation of Industrial Code 23 -1.7(d); and (3) Labor Law § 200 and common law negligence

claims, and is otherwise denied.

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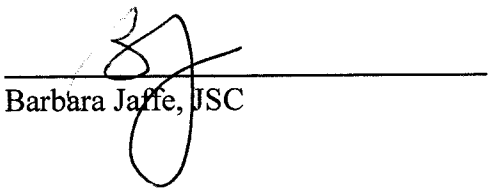

Barbara Jaffe, JSC

DATED: December 23, 2013
New York, New York