Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

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MARIO GIANFRANCESCO,	
	Motion
Plaintiff,	Date October 15, 2013
-against-	Motion
	Cal. No. 76
MUSS DEVELOPMENT, LLC, et al.,	
	Motion
Defendants.	Sequence No. 1

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Notice of Motion-Affidavits-Exhibits...	1-4
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Upon the foregoing papers it is ordered that this motion by defendants Muss Development, LLC also formerly known as Muss Development Company ("Muss LLC"), Flushing Town Center III (FTC III), and Flushing Town Center, L.P.'s (FTC III LP) for an order for summary judgment pursuant to CPLR 3212 dismissing the plaintiff's Complaint and any and all cross claims pursuant to CPLR 3211(a)(7) as against them is hereby decided as follows:

Plaintiff, Mario Gianfrancesco, maintains that on April 24, 2009, he was lawfully working as a mason laborer in the course and scope of his employment with Crimson Construction Corp. ("Crimson") on a construction site, which job entailed pouring concrete. Plaintiff further maintains that on said date he was caused to be injured when he slipped on debris as he attempted to lift a 500 pound cement-filled hose with a makeshift tool, causing him to sustain severe and disabling personal injuries as a result of defendants' negligence. Plaintiff commenced this action to recover for serious injuries, alleging liability against all defendants pursuant to Labor Law §§ 200, 240(1), and 241(6) and under common-law negligence theories. Defendants, Muss Development, LLC also formerly known as Muss Development Company ("Muss LLC"), Flushing Town Center III (FTC III), and Flushing Town Center, L.P. (FTC III LP) move for an order pursuant to CPLR 3212 granting summary judgment to said defendants and dismissing the plaintiff's complaint as against them.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]).

It is well settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see, Pirotta v. EklecCo., 292 AD2d 362 [2002]; Kobeszko v. Lyden Realty Investors, 289 AD2d 535 [2001]; Giambalvo v. Chemical Bank, 260 AD2d 432 [1999]). Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (Damiani v. Federated Department Stores, Inc., 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (Id.).

Moving defendants established a prima facie case that the plaintiff's claims under Labor Law § 200 and common law negligence must be dismissed. In support of this branch of the motion, moving defendants submitted, inter alia, the examination before trial transcript testimony of plaintiff himself; the affidavit of Joseph J. McKillop, General Counsel of Muss Development LLC and FTC III LP on the date of the accident; and a copy of the Construction Management Agreement between FTC III LP and Muss Brooklyn Development Corp., which evidence establishes that: plaintiff's immediate supervisor on the date of the accident was his foreman, Mike Tattoo, plaintiff got his instructions and supervision from Mike Tattoo, from the Crimson owner's son, and from his co-worker he referred to as "the Italian guy" and from no one else; Crimson provided all the material used at the jobsite, Muss LLC and FTC LP were not the

owners of the property, had no involvement with the project, had no authority to and did not direct the means and methods of the work of Crimson or anyone at the project site; and FTC III LP although being the owner premises at the time of the accident, did not have authority for the means, methods, procedures, or safety precautions regarding the project, nor did they provide direction, supervision, or control over the work of Crimson at the job site, nor did they provide any tools, materials, or equipment thereto. Accordingly, defendants established that the accident arose out of the means and methods of the work being performed by plaintiff and his co-employees/employer and there is no evidence that they gave plaintiff any safety directives or directed, supervised, or controlled the injury producing work.

In opposition, plaintiff raised a triable issue of fact against defendant, FTC III only. FTC III is admittedly the owner of the property. Via, inter alia, the examination before trial transcript testimony of plaintiff himself, plaintiff raises issues of fact as to whether defendant FTC III, the property owner, created the condition or had actual or constructive notice of the condition. Plaintiff raises issues of fact as to whether defendant FTC III created or had notice of a condition which caused plaintiff's foot to slip and kick out while trying to lift the subject hose.

Accordingly, defendants, Muss and FTC III LP only are granted summary judgment on the Labor Law § 200 and common-law negligence claims.

Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]; see, Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Gasques v. State of New York, 59 AD3d 666 [2009]; Rau v. Bagels N Brunch, Inc., 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see, Gordon v. Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Ortega v. Puccia, 57 AD3d 54 [2008]; Riccio v. NHT Owners, LLC, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (see, Chlebowski v. Esber, 58 AD3d 662 [2009]; Rakowicz v. Fashion Inst. of Tech., 56 AD3d 747 [2008]; Rudnik v. Brogor Realty Corp., 45 AD3d 828 [2007]).

"Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured" (Orner v. Port Authority, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (Salinas v. Barney Skansa Construction Co., 2 AD3d 619 [2d Dept 2003]).

Moving defendants established a prima facie case that Labor Law § 240(1) does not apply in this case since plaintiff did not fall from a height nor was he struck by a falling object. In support of this branch of the motion, moving defendants presented inter alia: the examination before trial transcript testimony of plaintiff himself, wherein plaintiff testified that he was on ground level and the hose did not fall onto or strike him, nor did he fall to the ground but rather he remained in a standing position; and that he has not seen any workers in his line of work use any other device in connection with pouring cement as the carrying of the hose is done manually by either holding on to the hose or using the hook device. Moving defendants established that the accident occurred as a result of plaintiff's co-worker failing to lift the concrete-containing hose at the count of three, thereby causing plaintiff to carry a heavier section of the hose. Moving defendants also established that none of the devices mentioned under the statute were required in order for plaintiff and his co-workers to perform the task of pouring cement.

In opposition, plaintiff fails to raise a triable issue of fact. In opposition, plaintiff submits, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testifies inter alia, that: he was injured while attempting to lift a hose with a makeshift tool, which hose was used to pour concrete, the hose carrying the concrete weighed about 500 pounds, and so it required three men, including plaintiff, to lift it, to assist in lifting the hose, plaintiff would make a makeshift "J" hook to hook the hose and pull it upwards, and other than that tool, he was not provided with any other tool by any other entity to assist him in lifting the hose. Plaintiff failed to present facts establishing that his injury was gravity-related.

As there is no triable issue of fact, moving defendants' motion for summary judgment on the Labor Law § 240(1) claim is granted.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe

working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., 4 NY3d 399 [NY 2005]; Bland v. Manocherian, 66 NY2d 452 [1985]; Kollmer v. Slater Electric, Inc., 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care" (Rizzuto v. LA Wenger Contracting, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards" but rather must establish "concrete specifications" (see, Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]; Williams v. Whitehaven Memorial Park, 227 AD2d 923 [4th Dept 1996]).

Defendants established a prima facie case that there are no triable issues of fact regarding a violation of Labor Law § 241(6). Plaintiff asserts violations of Industrial Code Sections, 12 NYCRR 23-1.5(a), (b), and (c), 23-1.33(a) and (b), 23-6.1, 23-1.7(d) and 23-1.7(e).

Defendants established a prima facie case that Section 23-1.5(a), (b) and (c) and its subdivisions are not sufficiently specific to support a cause of action under Labor Law 241(6) since they merely establish a general safety standard (Spencer v. Island Estates at Mt. Sinai II, LLC, 79 AD3d 936, 914 NYS3d [2d Dept 2010]; Ulrich v. Motor Parkway Properties, LLC, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; Erickson v. Cross Ready Mix, Inc., 75 AD3d 524, 906 NYS2d 54 [2d Dept 2010]; and Vernieri v. Empire Realty Co., 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]).

Defendants established a prima facie case that Section 23-1.33(a) and (b) do not apply since the accident occurred in the County of Queens in the City of New York and the provision specifically states that it is not applicable "to any city in New York having a population of one million or more persons". Additionally, said provision applies to protection of pedestrians passing by areas, buildings or other structures where construction, demolition or excavation is being performed. Defendants established that plaintiff was not a pedestrian passing by a building or structure.

Defendants established a prima facie case that Section 23-6.1 does not apply since such section applies to maintenance, operation and safety features of certain material hoisting equipment and there was no material hoisting equipment involved in this case (Georgakopoulos v. Shifrin, 83 AD3d 659 [2d Dept 2011]).

Defendants established a prima facie case that Section 23-1.7(d), which section deals with slipping hazards, does not apply in this case since plaintiff maintains that he felt a popping sensation to the back of his neck as he was lifting the hose on account of his co-worker not lifting the hose at the count of three and he alleges injuries to his neck and right shoulder/elbow/arm/hands, as well as headaches, anxiety and sleep disturbance but makes no claim for injury/pain to his lower back and right foot as a result of the accident. Defendants established a prima facie case that plaintiff's claimed injuries resulted from the lifting of the hose and not from slipping (right foot kicking out) as his right foot kicked out when he felt the pop in his neck.

Moving defendants established a prima facie case that Section 23-1.7(e)(1) does not apply since the 19th floor was a work area and not a passageway and said section applies to passageways.

Plaintiff established a prima facie case that there are triable issues of fact only with regards to Section 23-1.7(d) and 23-1.7(e) regarding FTC III only. With regards to these sections, plaintiff submitted, inter alia, his own examination before trial transcript testimony which indicates that debris in his work area contributed to his accident and as such, plaintiff has raised a triable issue of fact with regard to these sections. (see, Lopez v. City of New York Transit Auth., 21 AD3d 259 [1st Dept 2005]).

Accordingly, plaintiff's claims regarding Labor Law sections 23-1.7(d) and 23-1.7(e) shall not be dismissed as to defendant FTC III only.

This constitutes the decision and order of the Court.

Dated: December 20, 2013

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Howard G. Lane, J.S.C.