SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** 33
Justice

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BRIAN MOONEY,

Plaintiff,

- v -

BP/CG CENTER II, LLC, CITIGROUP INC., STRUCTURE TONE, INC., FURNITURE CONSULTING, INC, STEELCASE, INC,

Defendants.

INDEX NO. 153483/2013

MOTION DATE

MOTION SEQ. NO. 007

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 179, 180, 181, 183, 186, 187, 188, 189, 190, 191, 192, 193, 194, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 244, 245, 246, 247, 248

were read on this application to/for SUMMARY JUDGMENT

Plaintiff Brian Mooney, a journeyman carpenter, seeks damages from defendants BP/CG Center II, LLC (BP), Citigroup, Inc. (Citi), Structure Tone, Inc.[1] (Structure Tone), Furniture Consulting Inc. (FCI), and Steelcase Inc. (Steelcase) for personal injuries he sustained on June 18, 2012, when he knelt on top of a screw while installing file cabinets at 601 Lexington Avenue in the City, State, and County of New York. Plaintiff alleges violations of Labor Law §§ 200 and 241(6), and common law negligence. In the first and second third-party actions, Structure Tone seeks, among other claims, contractual indemnity against FCI and Steelcase, respectively. Before this court are four motion sequences (MS). Steelcase in MS 4; Structure Tone, BP, and Citi, together, in MS 5; and FCI in MS 6 move for summary judgment motion against plaintiff, which plaintiff opposed. Plaintiff, in MS 7, cross-moves for summary judgment against BP, Citi and Structure Tone on

[1] Defendants and third-party plaintiffs, Structure Tone, Inc., BP/CG Center II, LLC, and Citigroup, Inc. are represented by the same counsel.

liability and for an immediate trial on damages, which defendants/third-party plaintiffs opposed.

FACTS

The premises known as 601 Lexington Avenue is owned by BP and managed by Boston Properties. Citi leased the premises from Boston Properties and hired Structure Tone to perform renovation work at the premises as a general contractor. Steelcase manufactured file cabinets for the premises, and Empire Furniture, Inc. was hired to install them. FCI provided file cabinets for the project and hired subcontractor Bryan-Does-It, Inc. (BDI) to install them at the premises. Plaintiff was employed by BDI.

Plaintiff testified that his assignment on the date of the incident was to install the file cabinets (MS4: Mot, Pappas aff, exh A- Ptf's Tr. at 31:9-10, 34:18-25). Plaintiff claimed that while installing a cabinet, he knelt with his right knee on top of the flat head of a screw and fell over twisting his right leg (*id.* at 62, 178:1-16). Plaintiff testified that he could not see the screw before the accident and did not know where the screw came from (*id.* at 61 and 64:18-25). According to plaintiff, there were several different trades and contractors on the same floor where he worked.

DISCUSSION

As a preliminary matter, plaintiff's motion for summary judgment is denied as untimely. Pursuant to this court's rules, the parties had 60 days after filing the note of issue to make any dispositive motion. Under CPLR 3212 (a), a movant must show good cause for a "delay in making a motion — a satisfactory explanation for the untimeliness" (*Brill v City of New York,* 2 NY3d 648, 652 [2004]).

Here, the note of issue was filed on November 14, 2016, and the time to file a dispositive motion expired 60 days thereafter. Plaintiff filed his motion on April 10, 2017, without providing a reason for the delay. Thus, plaintiff's motion summary judgment in MS 7 is denied.

Summary Judgment

As all parties move for summary judgment, they, as movants, must make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065, 1067 [1979]). Once met, this burden shifts to the opposing party to demonstrate the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 200

Labor Law § 200 codifies "common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). To prevail on a Labor Law § 200 claim, plaintiff must demonstrate that defendant "supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition" (*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 591 [1st Dept 2009] citing *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [2008]). To have supervisory control, a contractor must have controlled "how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp*, 40 AD3d 305 [1st Dept 2007]). A defendant is not required to prove lack of notice "where the plaintiff failed to claim the existence of notice of the condition" (*Frank v Time Equities*, 292 AD2d 186, 186 [1st Dept 2002]).

Here, defendants presented evidence that they neither supervised nor controlled the work. Defendants submitted plaintiff's testimony that at the time of the incident plaintiff worked for BDI, and was overseen by BDI's supervisor, Brendan Mackan (MS4: Mot, Pappas aff, exh A- Ptf's Tr. at 32:16-21; MS4 Greenfield Aff. in Opp at 2, ¶ 6). Defendants also showed that they did not create or have actual or constructive notice of the unsafe condition. Plaintiff testified that he did not see where the screw came from, and did not know how long the unsafe condition existed or who created the unsafe condition (MS5: Wilensky aff in opp, exh B- Ptf's Tr at 61:9-25 & 64:17-25). In fact, none of the defendants were made aware of the presence of the screw or the accident until plaintiff filed suit. Plaintiff's argument that defendants should have known of the defect is unsupported, especially when he stated that there were other unidentified contractors and tradesmen working around him on the same floor. Plaintiff's imputation of constructive notice on defendants does not raise an issue of fact to defeat defendants' prima facie entitlement to summary judgment on plaintiff's Labor Law § 200 claim.

Labor Law § 241(6)

Claims arising under Labor Law § 241 apply only to "general contractors, owners and their agents" (*Russin v Louis N Piccano & Son*, 54 NY2d 311, 317-318 [1981] [finding that "only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241."]) To support a claim under § 241(6), plaintiff must point to a specific violation of the Industrial Code (*Comes v New York State Elec. And Gas Corp.*, 82 NY2d 876, 878 [1993] [finding that a plaintiff cannot prevail on a 241(6) cause of action if it alleges only violations of general safety standards. Plaintiff must show violations of "concrete specifications imposing a duty on defendant"]).

Plaintiff asserts violations of Federal OSHA regulations and Industrial Code §§ 23-1.7(e), 1.30, 2.1 and subpart 25-5, as predicate for his Labor Law § 241(6) claim. However, as defendants argue, these sections do not support plaintiff's cause of action under Labor Law § 241 (6).

Violation of OSHA regulations by a subcontractor do not form the basis of liability under § 241[6] because the nondelegable duty under OSHA lies with employers (*id.*). It has been held that attempts by a plaintiff "to use Federal OSHA regulations as predicate for his Labor Law § 241[6] claim against a non-supervising owner or general contractor must fail" (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 351[1998]). None of the defendants were plaintiff's employer, and there is no evidence that any of the defendants had authority to supervise or control plaintiff's work. It was at the direction of plaintiff's employer, BDI, that plaintiff performed the work which led to his injury. Thus, defendants do not owe plaintiff a nondelegable duty under OSHA.

As for the alleged Industrial Code violations, § 23.17(e) "Tripping and other hazards" applies to tripping in passageways due to accumulations and sharp projections. The screw plaintiff allegedly knelt on was a single screw, and the part he knelt on was the flat head of the screw. Thus, the screw is not a part of an accumulation and is not a sharp projection contemplated under § 23.17(e). Section 23-1.30 relates to "illumination." Plaintiff has no support for this claim as he had testified that the lighting in the area he was working was "sufficient" at the time of the accident (MS5: Wilensky aff in opp, exh B- Ptf's Tr at 52:24-25 and 53:1-3). Section 23-2.1 concerning "storage of material or equipment and disposed debris" is inapplicable in this single screw condition that did not involve storage of material and equipment. As defendants argue, contrary to plaintiffs contention, § 23-2.1 does not provide 'a specific standard of conduct as opposed to a general reiteration of common-law principles' for its violation to qualify as predicate for a Labor Law § 241(6) cause of action" (*Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]). Finally, subpart 25-5 does not appear in the Industrial Code under § 23 and plaintiff has no explanation in its papers as to what is. Thus, this claim is deemed abandoned.

Common Law Negligence

To recover under a theory of negligence, plaintiff must show that defendant created a hazardous condition or had notice of the condition and had the duty to remedy it (*see Madrid v City of New York*, 42 NY2d 1039, 1040 [1977]). For the reasons stated above, defendants prima facie demonstrated that they neither created, had notice of, nor were under a duty to remedy a hazardous condition. Plaintiff has not presented arguments or evidence to raise an issue of fact. Thus, plaintiff's negligence claim is dismissed.

Contractual Common Law Indemnity

As defendants have made a prima facie showing of entitlement to judgment as a matter of law to dismiss plaintiff's labor law and negligence claims, we need not determine, at this juncture, whether Steelcase or FCI owe common law and contractual indemnity to BPI, Citi and Structure Tone. The various motions for indemnification, and other related claims are moot.

Conclusion

Accordingly, it is

ORDERED that the branch of defendant Steelcase, Inc.'s motion seeking summary judgment (MS4) dismissing the complaint is granted; consequently, the branch of its motion to dismiss third-party plaintiff Structure Tone, Inc.'s claims is denied as moot; and it is further

ORDERED that defendant BP/CG Center II, LLC, Citigroup, Inc., and Structure Tone Inc.'s motion for summary judgment (MS5) dismissing the complaint is granted; and it is further

ORDERED that defendant Furniture Consulting, Inc.'s motion for summary judgment (MS6) is granted; and it is further

ORDERED that plaintiff Brian Mooney's motion (MS7) for partial summary judgment is denied as untimely; and it is further

ORDERED that the complaint is dismissed; the Clerk of the Court is directed to enter judgment as written,

This constitutes the decision and order of the court.

8/14/2017
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION			
	[ ]	GRANTED	[ ]	DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER	[ ]	SUBMIT ORDER			
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