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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

JOHN STAFFORD

- against -

VIACOM, INC., et al.

Index Number 4691 1996

Motion Date October 9, 2002

Motion Cal. Numbers 37 & 38

Motion calendar numbers 37 and 38 are consolidated herein for disposition. The following papers numbered 1 to 44 read on the motion by plaintiff to restore the case to the calendar, to amend the complaint to add a cause of action under Labor Law § 241(6) and to add SCS Systems, Inc ("SCS") as a direct defendant; and on the cross motion by Lehr Construction Corp. ("Lehr") to dismiss the action pursuant to CPLR 3404 or for summary judgment pursuant to CPLR 3212 dismissing plaintiff's Labor Law § 200 and common-law negligence claims; and on the cross motion by Jovian Flooring, Inc. ("Jovian") to dismiss the action pursuant to CPLR 3404 or for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross claims asserted against it; and on the motion by SCS to dismiss the action pursuant to CPLR 3404.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1-4 36-41
Notices of Cross Motions - Affidavits - Exhibits ..	5-12
Answering Affidavits - Exhibits	13-26 42-44
Reply Affidavits	27-35

Upon the foregoing papers it is ordered that the motion by plaintiff is granted to the extent of restoring the matter to the trial calendar; the motion is otherwise denied. The motion by SCS and all of the cross motions are denied.

This is an action for personal injuries sustained by plaintiff on November 7, 1994 while working at a renovation site at 1515 Broadway in New York City (the "building"). Plaintiff alleges that at the time of his accident he was walking to his work area on the 38th floor, turned a corner and slipped on glue. After he fell, plaintiff saw a carpet installer several feet in front of him applying carpet tiles.

Plaintiff commenced this action for common-law negligence against the defendants.[1] Defendant 1515 Broadway Associates, L.P. f/k/a Tishman Speyer-Equitable Astor Limited Partnership ("1515 Broadway") is the owner of the building, and defendant Viacom, Inc. is the tenant that was renovating the 37th through 39th floors. Impleader actions were commenced against the various contractors and subcontractors. In their respective responses, the contractors and subcontractors have asserted cross claims or counterclaims against each other.

Lehr is the construction manager for the renovation project. Jackson Voice Data, Inc. ("Jackson Voice") was the contractor hired to provide and install communications cables, which, in turn, subcontracted the installation to Wiltel Communications Systems, plaintiff's employer. SCS was hired to furnish and install floor tile and carpeting and retained LJB Services, Inc. ("LJB") to perform the work.

SCS alleges that LJB was negligent in failing to erect proper barriers or warning signs while performing its work. In addition, SCS claims that it is entitled to contractual indemnification and common-law contribution from LJB. LJB alleges that it entered into an agreement with Jovian, Brittany Design, Inc. ("Brittany") and Custom Floor Crafters, Inc. ("Custom Floor") to install and supervise the installation of the subject carpet. LJB alleges that the negligence of Jovian, Brittany and Custom Floor caused plaintiff's accident and resulting injuries. The case has been summarily dismissed against Custom Floor. SCS and Brittany each have been precluded from testifying at trial for failure to produce a deposition witness. The note of issue was filed on March 13, 2000.

There is some dispute as to what happened on May 11, 2001, the day the case was called for trial. However, it is not disputed that plaintiff made an application to amend his complaint to add a cause of action for a violation of Labor Law § 241(6). Although, neither the plaintiff nor any of the parties have submitted an order or any evidence that the case was marked off the trial calendar, it is also not disputed that the case was marked off to allow plaintiff to file his motion to amend.

Plaintiff now moves to have the case restored to the trial calendar and to amend the complaint to allege a Labor Law § 241(6) claim. Plaintiff contends that he served the instant notice of motion, affirmation and exhibits on May 9, 2002, less than one year after the case was marked off. Therefore, plaintiff maintains, he is entitled to have the case restored without any further explanation or demonstration of merit.

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[1] The action has been discontinued against defendant Gel Enterprises, Inc.

Jovian and Lehr, separately, cross-move to dismiss the action for neglect to prosecute and to have it deemed abandoned since there has been no discovery or activity in the case for more than a year. Jovian and Lehr also argue that the action should not be restored as plaintiff has not provided an excuse for the delay, demonstrated an intent not to abandon the case, established the merits of the case, or that the defendants will not be prejudiced.

The attorney for SCS affirms that he has not received a motion to restore the matter to the calendar, a proposed amended summons and complaint or a note of issue. Therefore, SCS made a separate motion to have the case dismissed and deemed abandoned for lack of activity for more than a year after being marked off the trial calendar.

The papers before the court establish that plaintiff's motion to restore was made within one year of being marked off the calendar, therefore the action cannot be deemed abandoned and can be restored without the need for further explanation or demonstration of merit (Basetti v Nour, 287 AD2d 126; Jones v Strachan, 287 AD2d 438; Mosesson v 288/98 West End Tenants Corp., 272 AD2d 152). Moreover, it is well settled that CPLR 3404 dismissals are accomplished automatically and by operation of law upon the passage of one year after being stricken from the trial calendar. Therefore, had plaintiff failed to timely move to restore, the motion by SCS and the cross motions by Lehr and Jovian would not have been necessary (see, Nunez v County of Nassau, 265 AD2d 312; Lee v Chion, 213 AD2d 602; see also, Threatt v Seton Health Sys., Inc., 277 AD2d 796; Meade v L.A. Lama Agency, Inc., 260 AD2d 979).

Clearly, plaintiff should have served, but according to the affidavit of service, did not serve the motion papers to restore on the attorney for SCS (see, CPLR 2103[b], [e]; Forte v Cities Serv. Oil Co., 195 AD2d 805). Nevertheless, plaintiff's failure to do so may be overlooked as a mere irregularity in the absence of any evidence of prejudice to SCS (see, Forte v Cities Serv. Oil Co., supra; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2103:6).

Here, there is no evidence that SCS will be prejudiced. The argument by SCS that the delay in moving to restore the case is prejudicial is of no moment. SCS, as well as the parties to the action did not have to wait for the year to elapse, but could have demanded that the plaintiff resume prosecution of the case by filing a 90-day demand pursuant to CPLR 3216 (see, Cascio v O'Daly, 221 AD2d 494; see also, Hansel v Lamb, 166 Misc 2d 593, affd 277 AD2d 838). Besides, SCS admits that it was made aware of plaintiff's motion when it received copies of papers in opposition thereto from the co-defendants. In any event, SCS received a copy of plaintiff's motion papers as same were attached to plaintiff's opposition to SCS's motion to dismiss. Consequently, SCS had sufficient opportunity to be heard, therefore, the court will

overlook plaintiff's failure to serve SCS and deem the motion to restore served.

Accordingly, that branch of plaintiff's motion which seeks to restore the case to the active trial calendar is granted. The branch of the cross motion by Jovian and by Lehr, and the motion by SCS pursuant to CPLR 3404 is denied.

The branch of plaintiff's motion which seeks to amend the complaint must be denied. Although leave to amend a pleading is freely granted (CPLR 3025[b]), where no cause of action is stated, the proposed amendment is palpably insufficient as a matter of law, or totally devoid of merit, leave to amend must be denied (see, Crimmins Contr. Co., Inc. v City of N.Y., 74 NY2d 166; Morgan v Prospect Park Assocs. Holdings, L.P., 251 AD2d 306; Konrad v 136 E. 64th St. Corp., 246 AD2d 324).

Here, the proposed amended complaint does not state a cause of action against SCS. Indeed, SCS is not even named, or otherwise identified as a defendant in the proposed amendment. Consequently, no cause of action has been stated against SCS. Accordingly, plaintiff is not entitled to amend the complaint to assert a direct cause of action against SCS.

Additionally, plaintiff's proposed Labor Law § 241(6) claim based upon a violation of the Industrial Code, 12 NYCRR § 23-1.7(d)[2] and 12 NYCRR 23-1.7(e)[3], is insufficient. To

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[2] 12 NYCRR 23-1.7(d) provides:

(d) Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

[3] 12 NYCRR 23-1.7 provides, in pertinent part:

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

(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.

maintain a cause of action under Labor Law § 241(6), plaintiff must plead a violation of an implementing regulation, which sets forth a specific standard of conduct (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494; Herman v St. John's Episcopal Hosp., 242 AD2d 316; McCole v City of N.Y., 221 AD2d 605). Further, there must be some factual basis from which a court can conclude that the regulation was in fact violated (see, Herman v St. John's Episcopal Hosp., supra; Creamer v Amsterdam H.S., 241 AD2d 589).

While the regulations relied upon by plaintiff are sufficiently specific (see, e.g., Rizzuto v Wenger Contr. Co., Inc., 91 NY2d 343; Fox v Westchester Resco, 229 AD2d 466; Corbi v Avenue Woodward Corp., 260 AD2d 255; Herman v St. John's Episcopal Hosp., supra), the regulations are not applicable to the facts of this case. Here, plaintiff's accident occurred not because of a failure to remove or cover a foreign substance, or because of dirt, debris or other scattered materials in the passageway. Rather, the glue being used to install the carpet was slippery and an integral part of the work being performed. Therefore, the glue does not constitute a foreign substance within the meaning of section 23-1.7(d) or a tripping hazard within the meaning of section 23-1.7(e) (see, e.g., Ryder v Mount Loretto Nursing Home, Inc., 290 AD2d 892; Isola v JWP Forest Elec. Corp., 262 AD2d 95, lv dismissed 94 NY2d 797; Gist v Central School Dist. No. 1, 234 AD2d 976; Basile v ICF Kaiser Engrs. Corp., 227 AD2d 959; Adams v Glass Fab, Inc., 212 AD2d 972; Dugandzic v New York City School Constr. Auth., 174 Misc 2d 702; cf., Cottone v Dormitory Auth. of State of N.Y., 225 AD2d 1032). As these provisions are inapplicable to the facts of the case, they are inadequate to support a cause of action under Labor Law § 241(6) (see, McCole v City of N.Y., 221 AD2d 605). Accordingly, that branch of plaintiff's motion which seeks to amend must be denied.

The branch of Lehr's cross motion and Jovian's cross motion which seeks summary judgment dismissing plaintiff's complaint against 1515 Broadway and Viacom is denied. In support of their respective cross motions, Lehr and Jovian rely on plaintiff's deposition testimony wherein he purportedly testified that he only received instructions from his employer. However, the pages of the transcript of such testimony are not before the court. Therefore, Lehr and Jovian have failed to tender sufficient evidence to warrant the court, as a matter of law, to grant judgment in their favor (see, CPLR 3212[b]; see, generally, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065).

Jovian is also not entitled to summary dismissal of the cross claims asserted against it. The cross claims against Jovian seek, inter alia, indemnification. The entity which caused plaintiff's accident has not yet been determined, hence, it is premature at this juncture to reach the issue of indemnification (see, Freeman v National Audubon Socy., Inc., 243 AD2d 608; La Lima v Epstein, 143 AD2d 886). Accordingly, that branch of Jovian's

cross motion which seeks summary judgment dismissing the cross claims must also be denied.

Dated: January 21, 2003

J.S.C.