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

PRESENT: JANE S. SOLOMON Justice

PART 55

Ingarito

-v-

City of New York

INDEX NO. 106525/08

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	6
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed Memorandum Decision and Order.

FILED

DEC 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/13/11

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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JOSEPH INGENITO and DEBBIE INGENITO, Index No. 106525/2008

Plaintiffs,

DECISION & ORDER

-against-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants.

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SOLOMON, J.:

This is a personal injury action brought under the New York Labor Law. Plaintiff Joseph Ingenito (Ingenito), a construction worker, and his Wife Debbie Ingenito (Debbie) sue the City of New York (City) and the New York City Department of Transportation (DOT; together Defendants) for damages from an injury at a construction site in Manhattan. He alleges claims under Labor Law §§ 200, 240(1) and 241(6), as well as common law negligence, and Debbie alleges a loss of consortium claim.

PROCEDURAL HISTORY

In Motion Sequence 002, Defendants moved for summary judgment dismissing the complaint on the ground that they have no liability to Ingenito. It was submitted without opposition, and granted on default by decision and order dated July 28, 2011. Plaintiffs, represented by new counsel, now move to vacate the decision on the ground that their default was due to their change of counsel. They seek to argue the prior motion on the merits. Plaintiffs submitted adequate proof that their failure to respond

was due to the delay that occurred whilst changing attorneys, and by Interim Order, dated September 26, 2011, the decision and order in Motion Sequence 002 was vacated. Plaintiffs now oppose the motion, which is now fully submitted.

FACTS

Ingenito was employed by Schiavone Construction Co. (Schiavone). Schiavone was hired by the Transit Authority (not a party to this action) for the South Ferry subway project in Manhattan. On April 3, 2007, Ingenito was removing debris when he tripped and fell, suffering injuries. He signed an Employee Report of Injury (attached to Greenblatt Aff., Ex. 7) which stated: "Shoveling debris. Tripped on H beam flange/vert section backwards fell/sat on H beam flange/vert section" (Ingenito EBT, attached to Greenblatt Aff., Ex. 4, p. 68). His Workers' Compensation C2 injury report stated "Tripped on flange of perimeter I-Beam/wale" (*Id.*).[1] Both reports (the Reports) were filled out and signed by Michael Voudouris (Voudouris), a safety supervisor subcontractor hired by Schiavone (Voudouris Affidavit, attached to Greenblatt Aff., Ex. 6).

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[1] A flange is the horizontal portion of an I-Beam, or the vertical portion of an H-Beam. An H-Beam is an I-Beam turned sideways.

A wale, or waler, is a component of the bracing structure placed around the perimeter of an excavation site. It is made of I-Beams laid on their sides. It is used to hold up the site's walls until the structure is complete and the ground is back-filled.

Notwithstanding his signed Employee Report, Ingenito testified at his 50-H hearing, and at a deposition here, that he tripped over debris, including wood, lumber, steel, concrete pieces, bricks, bottles, and wires (50-H hearing, attached to Chakmakian Aff., Ex. A, p. 16; Ingenito deposition, attached to Chakmakian Aff., Ex. B, p. 69).

Defendants move for summary judgment dismissing the complaint. They first argue that the City and the DOT are not the owners of the property; rather the Transit Authority is. In support, they refer to the deposition testimony of Frank Hrubes, DOT's director of construction (Greenblatt Aff., Ex. 5).

Hrubes stated that the South Ferry project was a Transit Authority project, and to his knowledge, the City and DOT did not own the property and had not leased it to the Transit Authority. Defendants argue that this is proof that the Defendants are not the owners of the property, did not contract for the work, and cannot be liable under the Labor Law (see, *Morton v. State of New York*, 15 NY3d 50, 56 [2010][there must be some nexus between the owner and the worker, such as a lease agreement or other property agreement]).

However, the Defendants do not submit any actual proof of ownership (lease, deed, construction contract). That Hrubes, the construction manager, was unaware of who owned the property, or the existence of a lease, is insufficient to conclusively

establish a lack of nexus. Accordingly, lack of ownership is not established.

A. Section 240(1) Liability

Labor Law § 240(1) is known as the scaffold law. It protects against hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

In a footnote, the Defendants argue that there is no evidence that this accident involved an elevation differential or a falling object. The Reports (attached to Greenblatt Aff., Ex. 7) explicitly note a "fall to same level." Ingenito does not oppose dismissal of this claim, and it is dismissed.

B. Section 241(6) Liability

Labor Law Section 241(6) provides, as relevant:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

It places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross* v. *Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502

[1993]).

In order to support a cause of action under this section, a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that sets forth a concrete standard of conduct (*Id.*, at 502). In seeking to establish his claim, Ingenito relies upon 12 NYCRR 23-1.7(e)(2), which sets forth such a standard.[2]

Section 23-1.7 is entitled "protection from general hazards." Subsection (e) states, as relevant:

> (e) Tripping and other hazards.
> * * *
> (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.

Defendants argue that this section does not apply where a worker trips over something integral to his work (see, *O'Sullivan v. IDI Construction Co., Inc.*, 7 NY3d 805 [2006][section 23-1.7(e) did not apply to worker who tripped over electrical conduit he was installing]). They claim that Ingenito's job, specifically, was to clean up debris on the wale, and that the wale itself, and any debris on it, were integral parts of his work. In support, they cite to *Cabrera v. Sea Cliff*

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[2] In his complaint and bill of particulars, Ingenito lists several other industrial code sections. The only one he discusses in opposition to the motion is 23-1.7(e). All others are deemed abandoned.

Water Co., 6 AD3d 315 (1st Dept., 2004), which held "[w]here plaintiff was in the very process of sweeping up the dust he and his fellow workers had just created, there is no basis for imposing liability against defendants for his slip and fall."

In opposition, Ingenito attempts to create a question of fact that there is no evidence that the flange that the Reports say he tripped over was part of the structure of the wale, rather than just a random piece of I-Beam debris unconnected to the wale. In support he states that only I-Beams that are filled with concrete can be considered part of the structure, and anything else is debris. He argues that Hrubes testified that "certain beams had been made part of the structure as they were embedded into the structure with concrete" (Opposition memorandum of law, p. 7), but cites no such statement, nor any other evidence to support this argument. There is no question that he slipped on the beam or debris in the wale he was charged with cleaning.

C. Section 200 liability

Section 200 of the Labor Law is a codification of the common-law duty to provide workers with a reasonably safe work place. To be liable under this section, the parties sued must have exercised control over the work that brought about the injury *(see, Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 352 [1998]). The exercise of general supervisory

authority is insufficient to establish supervision and control for the purpose of Section 200 (*Buckley v. Columbia Grammar and Preparatory*, 44 AD3d 263, 272, [2007]).

Hrubes testified that the Defendants did not control the means or methods of the contractor or its employees (Greenblatt Aff., Ex. 5, p. 34). In response, Ingenito argues that Voudouris, through his presence at the work site, gave the Defendants notice of the hazards. This argument is insufficient to raise a question of fact. Voudouris was the safety supervisor subcontractor, hired and employeed by Schiavone. There is no evidence that the Defendants exercised control over the worksite through Voudouris.

In light of the foregoing, it hereby is

ORDERED that the motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements as taxed.

FILED

DEC 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/13/11, 2011

Enter:

J.S.C

JANE S. SOLOMON