Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JAMES A. MANTHOS,

Plaintiff,

-against-

OMNI HOUSING DEVELOPMENT LLC, OMNI DEVELOPMENT COMPANY, INC., LIPSKY ENTERPRISES, INC., ROCKVILLE CENTRE HOUSING AUTHORITY, ROCKVILLE CENTRE HOUSING ASSOCIATES, L.P., ROCKVILLE CENTRE HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendants.

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LIPSKY ENTERPRISES, INC.,

Third-Party Plaintiff,

-against-

DESIGN DEVELOPMENT,

Third-Party Defendant.

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INDEX NO.: 38956/2008
CALENDAR NO.: 201101364OT
MOTION DATE: 6/6/2012
MOTION SEQ. NO.: 002 MOT D;
003 MOT D; 004 MOTD

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 78 read on this motion and cross-motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers 17-39; 40-62 ; Answering Affidavits and supporting papers 63-64; 65-66 ; Replying Affidavits and supporting papers 67-68; 69-70; 71-72; 73-74; 75-76; 77-78 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by third party defendant Design Development, LLC s/h/a Design Development (Design Development) seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint is granted solely to the extent that plaintiff's causes of action claiming violations of Labor Law Sections 240(1) & 241(6) are hereby dismissed; and it is further

ORDERED that the third party defendant Design Development's unopposed application seeking judgment dismissing claims for common law indemnity and contribution in the third party complaint on the basis that plaintiff James A. Manthos (Manthos) has not sustained a grave injury as defined pursuant to Worker's Compensation Law Section 11 is granted; and it is further

ORDERED that the motion by plaintiff Manthos seeking an order pursuant to CPLR Sections 3025(b) & 3212: 1) granting leave to permit plaintiff to serve a supplemental bill of

particulars; and 2) granting partial summary judgment against the defendants with respect to the issue of liability as to causes of action based upon defendants' violation of Labor Law Sections 240(1) & 241(6) is denied; and it is further

ORDERED that the motion by defendants Omni Housing Development LLC, Omni Development Company, Inc. (Omni), Rockville Centre Housing Authority (RCHA), Rockville Centre Housing Associates, L.P., Rockville Centre I Housing Develoment Fund Company, Inc. seeking an order pursuant to CPLR Sections 3025(b) granting leave to permit the defendants to file an amended answer to include a cross-claim against third party defendant Design Development for contractual indemnification and failure to procure insurance is granted. The proposed pleading shall be deemed filed nunc pro tunc to the date of service of the defendants' motion. Responsive pleadings, if any, shall be served within twenty days of service of a copy of this order with notice of entry; and it is further

ORDERED that the defendants' (including defendant Lipsky Enterprises, Inc. (Lipsky)) application for an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint against the defendants is granted to the extent that plaintiff's causes of action sounding in violations of Labor Law Section 240(1) & 241(6) are hereby dismissed.; and it is further

ORDERED that the defendants' application seeking an order pursuant to CPLR Section 3212 granting summary judgment against the third party defendant Design Development with respect to defendants' third party claims for contractual indemnification and failure to procure insurance is denied.

On December 7, 2007 plaintiff Manthos sustained injuries while working at a construction site at premises owned by defendant Rockville Centre Housing Authority (RCHA). The premises consisted of nine apartment buildings containing 154 units which provide public housing for local residents. A reconstruction/renovation/rehabilitation project was ongoing at the site in which each building's frame structure was totally demolished so that each unit could be completely reconstructed.

Defendant RCHA hired defendant Omni LLC to act as the owner's agent and construction manager for the project. Defendant Omni LLC hired defendant Lipsky as the project's general contractor. Third party defendant Design Development was a carpentry subcontractor hired by Lipsky. Plaintiff Manthos, an employee of Design Development, was performing interior framing on the second floor of an apartment in a 20 foot by 30 foot open area. Manthos testified that after nailing a sole plate (described as a 2 x 4) into the floor, he stepped back with his left heel into a hole measuring approximately 3 inches by 14 inches. His foot descended between 6-12 inches into the hole. The vent hole into which he stepped had been created after removal of heating ducts. Plaintiff claims to have suffered serious injuries to his left knee and back as a result of the fall.

Third party defendant Design Development's summary judgment motion seeks an order dismissing the claims set forth in plaintiff's complaint and the third party plaintiff Lipsky's claims seeking common law indemnity and contribution claiming that no viable causes of action are stated in the complaint and that plaintiff has not sustained a "grave injury" as defined pursuant to Worker's Compensation Law Section 11. Design Development claims that no valid negligence claims have

been asserted since the undisputed evidence shows that the hole where Manthos fell was readily observable by any individual working in the area and therefore constitutes an open and obvious condition for which none of the defendants can be found liable. Design Development also claims that no valid Labor Law claims for violations of Labor Law 240(1)&241(6) remain viable based upon the deposition testimony which reveals that Manthos was not injured as a result of an elevated-related risk or as a result of defendants' violation of any relevant section of the Industrial Code. Finally Design Development argues that Manthos has not sustained a "grave injury" as defined pursuant to Workers Compensation Law Section 11 and therefore plaintiff's employer cannot be found liable for contribution or common law indemnification to third parties including third party plaintiff Lipsky.

Plaintiff's cross motion seeks an order permitting Manthos to supplement his bill of particulars to include a recitation of the specific New York Industrial Code Sections violated by the defendants, and upon permitting such amendment, granting summary judgment against all defendant with respect to violations of Labor Law Sections 240(1) & 241(6). Plaintiff claims that defendants failed to provide adequate safety devices to correct the dangerous condition which existed in the form of a hole in the floor in the area where heating ducts had been removed. Plaintiff claims that the injury occurred as a result of an elevation/gravity related risk and defendants are therefore strictly liable based upon their failure to provide adequate safety devices. Plaintiff also argues that the owners and contractors are strictly liable based upon the defendants' violation of Industrial Code Section 023-1.7(b)(1), claiming that defendants' violations in failing to provide a cover or railing to prevent a worker's exposure to an open hole contributed to cause Manthos' injuries.

Defendants cross motion seeks an order granting all defendants (with the exception of Lipsky) leave to file an amended answer which would include a cross-claim against third party defendant Design Development for contractual indemnification and failure to procure insurance, and that upon such permitting such amendment, granting summary judgment against the Design Development for those claims. Defendants application also seeks an order granting summary judgment dismissing plaintiff's complaint. Defendants claim that no prejudice will result from the amendment of their answer to include cross claims against Design Development and that summary judgment is warranted on the cross claims based upon the third party defendant's failure to comply with the Lipsky/Design Development subcontract provisions requiring contractor/owner indemnification and insurance coverage which the subcontractor failed to furnish. Defendants also claim that no viable Labor Law 240(1) & 241(6) violations are stated since the hole Manthos stepped in measured only 3 inches by 14 inches and plaintiff's resultant injuries are therefore neither elevated nor gravity related risk injuries and are not applicable to "hazardous opening" injuries sustained as a result of a violation of the New York State Industrial Code section 23-17(b) and its subsections which are intended to protect workers from falling through an opening to a floor below. Defendants also argue that plaintiff's common law negligence claims must be dismissed since the record proves that none of the defendants supervised, directed or controlled plaintiff's work and there is no evidence to show that the defendants had actual or constructive notice of the hole prior to plaintiff's fall.

Leave to amend a pleading may be granted at any time, including prior to or during trial, absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see Galarraga v. City of New York*, 54 AD3d 308, 863

NYS2d 47 (2nd Dept., 2008). Leave to amend is entrusted to the sound discretion of the court (*Arcuri v. Ramos*, 7 AD3d 741, 776 NYS2d 895 (2nd Dept., 2004)). Where the application is made long after the action is certified for trial, "judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious"(*Morris v. Queens Long Island Medical Group, P.C.*, 49 AD3d 827, 854 NYS2d 222 (2nd Dept., 2008)). Leave to amend a bill of particulars to include allegations that the defendants violated specific industrial code provisions may be properly granted after the note of issue has been filed provided that the plaintiff makes a showing of merit and the amendment involves no new factual allegations, raises no new theories of liability and causes no prejudice to the defendants (*see Dowd v. City of New York*, 40 AD3d 908, 837 NYS2d 668 (2nd Dept., 2007)).

Defendants' cross motion seeking an order granting defendants (except defendant Lipsky) leave to serve and file an amended answer to include cross claims for contractual indemnification and failure to procure insurance against third party defendant Design Development must be granted since movants have submitted arguably meritorious claims and since there has been no showing of prejudice to the third party defendant's ability to prepare a defense to those claims. However significant issues of fact exist concerning the merits of the defendants' third party cross claims sufficient to deny the defendants' application for an order granting summary judgment against the third party defendant Design Development.

With respect to plaintiff's application seeking leave to file an amended bill of particulars, a review of the code provisions recited by the plaintiff as having been violated by the defendants reveals that none of the regulations cited apply to the incident and plaintiff's resultant injuries. The undisputed facts reveal that plaintiff stepped into a hole described as measuring 3 inches by 14 inches. The hazardous openings code regulation cited by plaintiff as applicable, is intended "to protect workers from falling through an opening to the floor below and is inapplicable where the hole is too small for a worker to fall through" (*Heather v. NY Times Building, LLC*, 24 Misc.3d 634, 641, 877 NYS2d 644, 650 (NY Sup.Ct., 2009) citing *Alvia v. Teman Electrical Contracting*, 287 Ad2d 421, 424, 731 NYS2d 462 (2nd Dept., 2001). Under these circumstances plaintiff's motion seeking leave to amend the bill of particulars must be denied since the proposed Industrial Code violations do not apply to the undisputed facts in this case (*see Rice v. City of New York Board of Education*, 302 AD2d 578, 755 NYS2d 419 (2nd Dept., 2003)).

The proponent of a summary judgment motion 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 action. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. 20th Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 (1957)). The moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 (1985)). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. NYU Medical Center, supra.; Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065, 416 NYS2d 790 (1979)). Once such proof has been offered the burden shifts to the opposing party, who, in order to defeat the motion for summary judgment must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980)). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v. Aeroxon Products*,

148 AD2d 499, 538 NYS2d 843 (2nd Dept., 1979)) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v. Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 (2nd Dept., 1981)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (*Palka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR, 248 NY 339* (1928); Prosser, *"Torts"*, 4th Edition Sections 30, 41-42 & 53)). He must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (*Basso v. Miller*, 40 NY2d 233, 241, 386 NYS2d 564 (1976); *Smith v. Taylor*, 279 AD2d 566, 719 NYS2d 686 (2nd Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (*Martinez v. Santoro*, 273 AD2d 448, 710 NYS2d 374 (2nd Dept., 2000); *Sadler v. Town of Hurley*, 288 AD2d 805, 720 NYS2d 613 (3rd Dept., 2001)).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present a party cannot be held liable for injury caused by the defective or dangerous condition on the property (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 296-297, 532 NYS2d 105 (1st Dept., 1988); leave to appeal denied 78 NY2d 783 (1989); *Pappalardo v. NY Health & Racket Club*, 279 AD2d 134, 718 NYS2d 287 (1st Dept., 2000)).

In a slip and fall case a plaintiff may only recover when he is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (*Anderson v. Klein Foods*, 139 AD2d 904, 527 NYS2d 897 (4th Dept., 1988); affirmed 73 NY2d 835 (1989); *Moss v. JNK Capital*, 211 AD2d 769, 621 NYS2d 679 (2nd Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (*Fasolino v. Fashion Bug*, 77 NY2d 847, 567 NYS2d 640 (1991)).

The protection provided by Labor Law Section 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (*Jock v. Fien*, 80 NY2d 965, 590 NYS2d 878 (1992)). It applies to owners, contractors or their agents (*Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 (1981) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v. Stout*, 80 NY2d 290, 590 NYS2d 55 (1992); *Young Ju Kim v. Herbert Construction*, 275 AD2d 709, 713 NYS2d 190 (2000)). If the injury allegedly arises not from a dangerous condition at the property, but from the method or material used by the subcontractor, an implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity which brought about the injury (*Haider v. Davis*, 35 AD3d 363, 827 NYS2d 179 (2nd Dept., 2006)).

Based upon the submission of evidence by the parties, substantial issues of fact exist concerning issues surrounding all the named defendants control and supervision of the work performed on the project by the plaintiff and all the named defendants possible negligence in failing to provide a safe workplace sufficient to require a plenary trial. Moreover significant factual questions are presented concerning whether the 3 inch by 14 inch hole was open and obvious as a matter of law sufficient to defeat the third party defendant's application. Accordingly defendants' cross motion and third party defendant's motion each seeking an order granting summary judgment dismissing plaintiffs common law negligence and Labor Law Section 200 claims must be denied.

Labor Law Section 240(1) provides:

> 1. All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated to give proper protection to a person so employed.

An owner and a contractor have a non-delegable duty to provide required safety devices to a workman at a building site and will be held absolutely liable for a worker's injuries resulting from the breach of that duty (*Ross v. Curtis-Palmer Hydro Electric Company*, 81 NY2d 494, 601 NYS2d 49 (1993)). The "exceptional protection provided for workers by Labor Law Section 240(1) is aimed at "special hazards" that arise when the work site either is itself elevated or is positioned below the level where "materials or load (are) hoisted or secured". "Special hazards" do not encompass any and all perils connected with gravity but are limited to 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 Electric Company, supra.; Rocovich v. Consolidated Edison Company*, 78 NY2d 509, 577 NYS2d 219 (1991); *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 (1985)). The legislative purpose behind Labor Law 240(1) is to protect workers by placing ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of workers who are "scarcely in a position to protect themselves from accidents" (*Rocovich v. Consolidated Edison Company, supra.; Koenig v. Patrick Construction Company*, 289 NY 313 (1948)). However, in order to prevail upon a claim pursuant to Labor Law 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*Bland v. Manchérian*, 66 NY2d 452, 497 NYS2d 880 (1985); *Sprague v. Peckman Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 (2nd Dept., 1997)).

The facts underlying how plaintiff was injured are not in dispute. Although the plaintiff was working on the second floor, the injury occurred not as the result of an elevation or gravity related risk, but rather was caused by a simple step back into a relatively small (3" by 14") hole left after the removal of heating ducts. There was no possibility that plaintiff could have fallen through the hole to the floor below. The statute clearly aims to protect workers from "special hazards" that arise where the work site is either elevated or perils exist from gravity related injuries resulting from falls from heights or falling objects. In this case, neither situation exists and no viable cause of action is stated against the defendants based upon a violation of Labor Law Section 240(1)(*see Miller v. Weeden*, 7 AD3d 684, 777 NYS2d 516 (2nd Dept., 2004); *Avila v. Plaza Construction Corp.*, 73 AD3d 670, 900 NYS2d 378 (2nd Dept., 2010)).

Labor Law Section 241(6) provides:

> 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law 241(6) requires owners and contractors, or their agents, to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. Unlike Labor Law 200, the duty to comply with the Commissioner's regulations imposed by Labor Law 241(6) is nondelegable (*see Ross v. Curtis-Palmer Hydro Electric Company, supra.; Long v. Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 (1982)). A plaintiff who asserts a viable claim under Labor Law 241(6) need not show that the defendants exercised supervision or control over the work site, but must demonstrate that the defendants' violation of a specific rule or regulation was a proximate cause of the accident (*Seaman v. Bellmore Fire District*, 59 AD3d 515, 873 NYS2d 181 (2nd Dept., 2009)).

No viable claim is stated against the defendants based upon a violation of Labor Law Section 241(6) since no there remains no New York State Industrial Code provision recited by the plaintiff which would provide a legal basis for establishing the defendants liability. Defendants motion seeking an order granting summary judgment dismissing this cause of action must therefore be granted.

Finally with respect to the third party defendant Design Development's unopposed application seeking an order dismissing all claims for common law indemnity and contribution set forth in the third party complaint, movant's application must be granted since there is no proof submitted that plaintiff has suffered a "grave injury" (Worker's Compensation Law Section 11). Accordingly these claims are hereby dismissed.

Dated: September 6, 2012

PAUL J. BAISLEY, JR.

J.S.C.