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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 104628/2008
DAPIAS, SOKRATIS
vs
PRESBYTERIAN HOSPITAL
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 2/13/13

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

SOKRATIS DAPIAS AND PANAGIOTA DAPIAS,

Plaintiff,

- v -

NEW YORK PRESBYTERIAN HOSPITAL, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK AND COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS,

Defendant.

INDEX NO. 104628/2008

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answer — Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: X Yes No

Sokratis Dapias and Panagiota Dapias (collectively "Plaintiffs") bring this action for personal injuries allegedly sustained by Sokratis Dapias ("Mr. Dapias") at 622 West 168th Street, New York, New York, on January 9, 2008. Plaintiffs allege that Mr. Dapias was working on a boiler system when he was severely burned by scalding hot water. Defendants, The Trustees of Columbia University in the City of New York, sued herein as The Trustees of Columbia University in the City of New York, and Columbia University and Columbia University College of Physicians and Surgeons ("Columbia"), bring this motion for summary judgment pursuant to CPLR §3212. Plaintiffs oppose the motion and cross-move to amend their Bill of Particulars to allege specific provisions of the Industrial Code of the State of New York allegedly violated by Defendants. No other party submits papers.

Plaintiffs filed a Summons and Complaint on February 9, 2008. On August 17, 2009, Plaintiff filed an amended complaint. On September 1, 2009, Plaintiff

filed a second summons and amended verified complaint adding Columbia as Defendants. In this second amended complaint, Plaintiffs add that Columbia "entered into an agreement and contract with Neptune Machine Inc. ("Neptune") by which Neptune was to provide certain work, labor, services and material to the former as the General Contractor with respect to certain work, repairs, construction, and/or renovations to be conducted within a certain structure located at the subject premises." By order dated January 10, 2011, this Court dismissed Plaintiffs' Complaint as to Defendant New York Presbyterian Hospital.

On the date of the incident, Neptune was Mr. Dapias' employer. According to the complaint, on January 9, 2008, Mr. Dapias was dispatched by a Neptune foreman with a co-worker, Bob Cousins, to 100 Haven Avenue, New York, New York, a steam house on the Columbia campus, to install a motor on the recirculating pump component of a condensation tank which was part of a heating system. Mr. Dapias alleges that after performing the task they were dispatched to do, replacing a back up pump motor, he noticed that there was a leak coming from the main pump. He phoned his boss, Nick, and alerted him that the pump that had been replaced a week before was leaking. Thinking it was a stuck check valve, Nick, by phone, directed plaintiff to address it.

> He said, I want you to close off such and such valve and such and such valve and turn off the power and unscrew the cap of the check valve to see if there is any water pressure in there. . . He said careful, don't take it off all the way because there might be pressure in there, just release the pressure a little bit. If you see water spewing out, let it release all the pressure. Okay, so I did that, and eventually there was no water coming out after maybe five or ten minutes, and then I said, Nick, there is no pressure now. . . So I hung up, then I proceeded to take the cap off the valve and I took it off and there was no water there or anything. I checked the flap like he said; it wasn't stuck. . . . I never had a chance to put it back. All water started spewing up three or four feet in the air and I was, like, standing right above it like a lobster and that was it. (Deposition of Sokratis Dapias, November 9, 2011, beginning at page 69, line 5)

Plaintiff's Amended Verified Complaint advances claims under Labor Law §§§ 200, 240, 241 and common law negligence.

Plaintiffs' cross motion, seeks to amend its bill of particulars to add specific violations of the Industrial Code. In order to amend a bill of particulars after Plaintiff files their note of issue and makes a summary judgment motion, a Plaintiff must provide an explanation for the delay. (*Reilly v. Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003]) [Leave to amend bill of particulars after note of issue and summary judgment motion filed denied because Plaintiff failed to provide an explanation for her lengthy delay]; [*see also, Del Rosario v. 114 Fifth Ave Assoc*, 266 AD3d 162 [1st Dept 1999] [Plaintiff's request to amend bill of particulars three years after commencement and five months after filing of note of issue properly rejected as untimely and prejudicial.]).

Here, Plaintiff filed its note of issue on May 16, 2012. Plaintiff states, "during the course of pre-trial discovery it became apparent that violations of a specific provision of the Industrial Code requiring protective material were a cause of the injuries sustained by plaintiff when boiling hot water gushed into legs while he was working in the steam room owned and controlled by [Columbia]." Plaintiffs have waited over five months from filing its note of issue, over a year from depositions, and over four and a half years from filing the Complaint to amend their bill of particulars in support of their Labor Law §241(6) claim. Plaintiffs do not provide an explanation as to why they did not bring a motion to amend their bill of particulars while discovery was being conducted or depositions were being taken. As such, Plaintiff fails to provide a proper explanation for the length of delay, and the cross-motion to amend the bill of particulars is denied.

With regard to Columbia's motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y. 557 [1980]). In addition, bald, conclusory allegations are not enough. (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249 [1st Dept 1989]).

Columbia, in support of its motion for summary judgment submits: the pleadings, the verified bill of particulars, this court's Order dated January 11, 2011

granting summary judgment to New York Presbyterian Hospital, deposition testimony of Mr. Dapias, affidavit testimony of Nick Karkas, the President of Neptune Machine, the "Task Order Agreement" dated May 7, 2007, and deposition testimony of Marco Camacho, an employee of Columbia.

Plaintiffs, in opposition, submit: the pleadings, a proposed supplemental verified bill of particulars, and a notice of cross motion.

Columbia moves to dismiss Plaintiff's cause of action based on Labor Law §241(6). To succeed on Labor Law §241(6) claim, a Plaintiff must plead and prove that an owner or contractor failed to comply with specific provisions, and that such failures were the proximate cause of Plaintiff's accident. (*Ross v. Curtis-Palmer Hydro Electric*, 81 NY2d 494, 601 NYS2d 49 [1993]). "In order to establish a violation of Labor Law §241(6), the underlying statute or rule that the violation of Labor Law §241(6) is premised upon, must be one that mandates concrete specifications rather than a general safety standard." *(DiPalma v. Metropolitan Transportation Authority*, 872 NYS2d 690 [1st Dept 2008]). A Defendant is thus entitled to summary judgment, dismissing a §241(6) cause of action where the cited regulation is not applicable to Plaintiff's accident, or where Defendant's violation was a proximate cause of Plaintiff's injury. *Id.*

As Plaintiff's request to amend the bill of particulars is denied, there is no allegation of a violation of any specific Industrial Code Regulation. Accordingly the Labor Law §241(6) claim is dismissed.

Columbia also moves for dismissal of Plaintiffs' Labor Law§ 240(1) claim. Labor Law §240(1) protects employees engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." However, it is only applicable to work performed at heights or where the work itself involves risks related to differentials in elevation. (*Masullo v. City of New York*, 253 AD3d 541 [2nd Dept 1998]). Columbia asserts that Mr. Dapias performed all work while standing on the ground. Plaintiff's do not oppose Columbia's assertion. Nowhere in his deposition testimony or in the pleadings is Mr. Dapias described as working at a height when the incident occurred, or as exposed to a gravity-related risk. In fact, Mr. Dapias clearly states in his testimony that the pump and pipes were all about two or three feet off the ground. A pipe at that height would not involve an elevation-related risk. Plaintiff contends it is a covered activity in that it is a "repair" but fails to address the absence of an

elevation-related risk. Thus Labor Law §240(1) is not applicable and all claims pursuant to this section are dismissed.

Furthermore, Columbia moves to dismiss the Labor Law §200 cause of action alleged by Plaintiffs. Labor Law §200 codifies the common law duty of the owner or employer to provide employees with a safe place to work. In cases arising from the manner in which the work was performed, the owner or general contractor may only be held liable if it exercised supervision or control of the work that led to the injury. *(O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745 [2006]). In addition to a showing of "supervision or control" over the injury-producing work, a Plaintiff must also show that Defendants had notice, either actual or constructive, of the defective condition which caused the accident. (*Ross v. Curtis Palmer Hydro Electric Co., Inc.*, 81 NY2d 494, 601 NYS2d 49 [1993]).

There can be no liability under Labor Law§ 200 if the defendant "exercised no actual supervision or control over the Plaintiff or control over the methods and means of his work." (*Russin v. Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Here, Mr. Dapias admits that he was exclusively supervised and directed by his employer, Neptune. The only involvement defendants had with the work being performed was to give plaintiff access.

> Well, he escorted us there to that outhouse. There was a lock with a chain on the door and he unlocked the padlock and he didn't take it with him, he just unlocked the padlock, released the chain and relocked it back on the chain and just left it there. That was it. It was, like, see you guys later. (Dapias deposition, page 50, line 12)

The fact that a Columbia employee provided access to the work area where Mr. Dapias was assigned to work by his boss at Neptune, does not raise an issue of fact regarding Columbia's assertion it had no supervision and control over Mr. Dapias' work. Mr. Dapias testimony indicates that he was not instructed by any Columbia employees, and he did not discuss the work to be performed with anyone from Columbia; rather, he worked exclusively with his co-worker at Neptune, Bob Cousins and his Neptune boss.

In addition, there is no evidence that Columbia had actual or constructive notice of the defective condition which caused the accident. Upon discovering the

leak, plaintiff did not alert Columbia. Instead, he alerted his boss, Nick.

> Bob suggested that we just leave it as is and just go, and if the engineers have a problem with it, the Columbia engineers, that they would just call back and complain and say, hey, one of the new pumps you installed is leaking. Come fix it. (Dapias deposition, page 66, line 16)

Moreover, the deposition of Marco Camacho of Columbia University, attests that there was never any type of work order generated in connection with the steam house prior to January 9, 2008, that Columbia employees never conducted any type of work in the steam house prior to January 9, 2008, and no one ever complained of a condition in the steam house.

Plaintiff raises no issue of fact regarding Columbia's assertion that it had no notice of the dangerous condition, and plaintiff raises no issue of fact regarding Columbia's assertion that it did not have supervision or control over Plaintiff. (*See, Leon v. J&M Peppe Realty Corp.*, 190 AD3d 400, 596 NYS2d 380 [1st Dept. 1993]). Accordingly, Columbia's motion for summary judgment is granted.

Wherefore, it is hereby,

ORDERED that Defendants The Trustees of Columbia University in the City of New York, and Columbia University and Columbia University College of Physicians and Surgeons motion for summary judgment is granted and the complaint is dismissed.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: ~~January 30~~ Feb 1, 2013

HON. EILEEN A. RAKOWER J.S.C.

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Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE