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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Justice

Index Number : 114853/2010
O'BRIEN, THOMAS J.
vs.
PORT AUTHORITY OF NEW YORK
SEQUENCE NUMBER : 006
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

FILED
JUL 16 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/11/13

Ely, J.S.C.

LOUIS B. YORK

1. CHECK ONE: ..... ☐ 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
COUNTY OF NEW YORK: PART 2

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THOMAS J. O'BRIEN, JR.,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, SILVERSTEIN PROPERTIES, INC., LOWER MANHATTAN DEVELOPMENT CORPORATION, DURST 1 WTC CONSULTANT LLC, THE DURST ORGANIZATION L.P., THE DURST ORGANIZATION, INC., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TISHMAN REALTY & CONSTRUCTION CO., INC., REGIONAL SCAFFOLDING & HOISTING CO., INC. and ATLANTIC HOISTING & SCAFFOLDING, INC.,

Defendants.

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Index No.: 114853/10

YORK, J.:

Motion sequence numbers 005 and 006 have been consolidated for disposition. In this action, plaintiff, Thomas J. O'Brien, Jr., alleges personal injuries as a result of an accident which took place on July 13, 2010, while he was working at a construction site in Manhattan, New York.

In motion sequence number 005, plaintiff moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to the issue of liability under Labor Law § 240 (1), against defendants The Port Authority of New York and New Jersey (PANYNJ) and Tishman Construction Corporation of New York (Tishman). Plaintiff also moves against the same defendants, pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment on the issue of liability as to Labor Law § 241 (6).

In motion sequence number 006, defendants, PANYNJ, Tishman, and Atlantic Hoisting & Scaffolding, LLC (Atlantic), move, pursuant to CPLR 3212, for an order granting summary

judgment, and dismissing plaintiff's causes of action for the alleged violations of Labor Law §§ 200, 240 (1), and 241 (6).

FACTUAL ALLEGATIONS

Plaintiff was employed by DCM Erectors (DCM), and was working at 1 World Trade Center in Manhattan, New York, for approximately seven months before the date of the accident. PANYNJ owned and operated the premises at 1 World Trade Center, Tishman was the general contractor of the construction project, and Atlantic provided scaffolding and related supplies at the construction site.

Plaintiff was responsible for the maintenance of two welding machines located at the ground level on the east and west sides of the building which was being constructed. A DCM supply shanty was located on the ground level of the site, next to the staircase where plaintiff allegedly fell. Plaintiff testified that on July 13, 2010, the day of his accident, it had been periodically raining, and that it was raining before he took his afternoon break at 3:00 p.m. Upon his return from his break, plaintiff checked the welding machines and then visited the DCM supply shanty to retrieve his backpack. Plaintiff then decided to go to another DCM shanty located below ground at the B3 level in order to retrieve his rain jacket because it was raining outside and it looked like it was going to continue raining through his evening work schedule.

Plaintiff left the DCM supply shanty located on the ground level, and approached the temporary staircase located outside the shanty, which descended to the lower B3 level. Plaintiff testified that the steps were "metal, steep, slippery, and smooth on the edges." O'Brien tr., at 59. Before he walked down the steps, plaintiff noticed that the steps were wet. Plaintiff testified that while holding onto the railing with his right hand, he slipped and fell on the first step of the subject staircase, and continued to fall down to the next platform landing. He maintains that when he placed his foot on the step, "[m]y foot slipped right off the tread." *Id.* at 70. Plaintiff testified that the railing was also wet and that he could not hold onto it due to its wetness.

Plaintiff contends that the steps were exposed to the elements, and that there were no signs which warned users that the steps were wet.

Following the accident, plaintiff walked back up the staircase and sat in the supply shanty located at ground level for approximately five minutes before walking to the onsite nurse. Plaintiff reported the accident on July 14, 2010, to Mr. Richard Schula, DCM's safety coordinator. The accident report, which plaintiff submits as an exhibit, states that he was "descending tower during rain when foot skidded off stair tread causing Mr. O'Brien to fall injuring right foot/ankle." Rigelhaupt Affirmation, exhibit 6.

On November 15, 2010, plaintiff filed a summons and complaint against several defendants, including PANYNJ, Tishman, and Atlantic, alleging causes of action under New York's Labor Law §§ 200, 240 (1), 241 (6).

DISCUSSION

Summary judgment is a "drastic remedy" which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Defendants maintain that is improper for this court to grant summary judgment as to Atlantic and Tishman, pursuant to New York's Labor Law, because plaintiff has failed to establish that either of these defendants is an owner, general contractor, or an agent who has been delegated authority to supervise and control the plaintiff's work. *See Blake v Neighborhood Hous. Servs. of N.Y.City, Inc.*, 1 NY3d 280, 293 (2003) (holding that Labor Law § 240 [1] imposes liability on contractors, owners or their agents); *Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450, 451 (2d Dept 2006) (holding that "[o]nly upon obtaining the authority to supervise and control the plaintiff's work does a third party fall within the class of those having

nondelegable liability as an agent under Labor Law § 240").

While plaintiff alleges in his complaint that Atlantic violated Labor Law §§ 200, 240 (1), and 241 (6), the reply affirmation of David H. Perecman, Esq., counsel for plaintiff, which is dated January 23, 2013, clarifies that plaintiff is not arguing that the Labor Law would apply as to this defendant. Therefore, because plaintiff does not contend that the causes of action for Labor Law would apply to Atlantic, any claims made against this defendant, pursuant to the Labor Law, must be dismissed.

With regards to Tishman, defendants maintain that plaintiff fails to demonstrate that Tishman, a company which defendants allege was the construction manger at the site of plaintiff's accident, is subject to liability under Labor Law §§ 240 (1) and 241 (6). Plaintiff submits documentary evidence which demonstrates that Tishman is a proper defendant under the Labor Law. Defendants submit a copy of the "General Contractor Agreement" which Tishman entered into on September 10, 2003, for its work at the site. The agreement discusses the duties of the general contractor, including that it shall supervise the work of the subcontractors, that it is required to comply with safety regulations, that it will secure the required approval from the PANYNJ, and that it will coordinate the site's safety program with the subcontractors.

Defendants submit a copy of the "Tishman Construction Safety Guide" which discusses, among other things, site safety as well as the construction manager's responsibilities. Defendants also submit the testimony of Tishman's site safety manager, Mr. Dion Rivera, who testified that Tishman was responsible for site safety, that it ensured that the work was performed at the site in a safe manner, and that it had the authority to have the work stopped at the site.

Therefore, because plaintiff has met his burden and submits documentary evidence which demonstrates that Tishman had a supervisory role over the work of plaintiff as to prevent or correct unsafe conditions, defendants' argument that the Labor Law is inapplicable as to Tishman fails.

Labor Law § 200

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Cruz v Toscano*, 269 AD2d 122, 122 (1st Dept 2000). Labor Law § 200 provides in part:

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Depending on the factual scenario involved, there are two different standards applicable to cases involving Labor Law § 200. The applicable standards include, whether the accident was a result of the manner in which the work was being performed, or whether the accident was the result of a dangerous condition. *See McLeod v Corporation of Presiding Bishop Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 (2d Dept 2007). Defendants argue that plaintiff fails to demonstrate that either standard applies to his accident. Plaintiff maintains that the exposed stairway and railing became wet during inclement weather and created a dangerous condition, of which defendants had actual and constructive notice. Plaintiff argues that because defendants had notice of the problems with the stairwell, they are liable under Labor Law § 200 and common-law negligence.

The Appellate Division, First Department, has held that "[w]here an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012) (citation omitted). Plaintiff's bill of particulars alleges that "[a]ctual notice is claimed in that defendants, and their agents, servants and/or employees created, caused and/or contributed to the dangerous and defective condition complained of herein." Rigelhaupt Affirm., exhibit 3. With regards to constructive notice, the bill of particulars states that the subject condition "existed for a considerable length of time prior this alleged occurrence. The defendants knew or with the exercise of prudent and reasonable

care should have known of the existence of the said condition." *Id.* While plaintiff does not submit any evidence which demonstrates that defendants had actual notice of the condition, defendants fail to demonstrate that they did not have constructive notice of the alleged dangerous condition.

The Court of Appeals has held that in order to find that a defendant had constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) (citations omitted). Here, although defendants move for summary judgment, it remains unclear as to how long before the accident the alleged slippery conditions of the stairs and railing existed, and whether the conditions were apparent to defendants. Plaintiff testified that the only protection above the stairs was a piece of plywood and that the steps were exposed to inclement weather. Plaintiff further testified that before his accident took place, he had heard other construction workers at the site discuss the slippery propensities of the subject steps.

Plaintiff submits an affidavit from Jakub Erenc (Erenc), an employee of DCM, that worked at the construction site with plaintiff since January of 2010. Erenc maintains that he was familiar with the staircase where the accident took place, that other workers at the site knew of the slippery condition of the subject staircase, and that the stairs were slippery when wet. Erenc states that the workers would talk about the slippery nature of the stairs, that there were different stairs on other scaffolds which were less slippery, and that following plaintiff's accident, black gritty tape was placed on the end of the subject stairs.

Along with the testimony of plaintiff and Erenc regarding whether defendants had constructive notice of the conditions, the expert affidavits, which plaintiff and defendants submit, raise a question of fact as to whether the temporary staircase was constructed and equipped, as to provide plaintiff with reasonable protection. Walter Konon (Konon), an engineer and building inspector with an expertise in construction engineering and safety, submits an

affidavit on behalf of plaintiff. He reviewed the employer's C-2 report, plaintiff's bill of particulars, plaintiff's deposition transcript, Tishman's deposition transcript, Atlantic's deposition transcript, and various photographs of the accident location. Konon concludes that the stairs on which plaintiff fell, "were not in compliance with various industry and governmental standards including OSHA, and more specifically 29 CFR 1926.1052 (a) (7) which requires that 'slippery conditions on stairways should be eliminated before the stairways are used to reach other levels.'" Konon Affidavit.

Konon states that the temporary staircase demonstrated:

> "obvious signs of longstanding use, wear, tear, and therefore a decrease in the anti-slip properties, if any, of the stairs. Additionally, the primary friction/anti-slip measure that these stairs were equipped with are small round protruding nubs which provide limited anti-slip protection, at best, and even less as they became worn down, as they were here. All of these conditions coupled with the fact that the stairs were wet due to rain and that the workers were allowed to work and use the stairs despite the rain and the wet stair treads, created a dangerous condition that was not in compliance with good and accepted standards of construction site safety and created a significant risk of slipping on the stairs and of thus falling down the stairs."

Id.

Defendants submit an affidavit which conflicts with the conclusions of Konon. Defendants submit an affidavit from David H. Glabe, P.E. (Glabe), a certified instructor, regarding the use of scaffolding, fall protection, stairways, and staircases for use at construction sites, including the subject staircase. Glabe maintains that the subject staircase is designed for use in both indoor and outdoor settings, and that the staircase is designed and manufactured to provide traction within industry standards during inclement weather. Glabe concludes that the perforated holes in the stairs allow water, rain, and snow to pass through; that the raised metal nubs are designed for traction and grip; and that industry standards do not require additional anti-skid protection for the steps.

Generally, conflicting expert opinions present credibility issues which cannot be resolved

by a motion for summary judgment. *See Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 (4th Dept 2011); *Hall v New York City Bd. of Educ.*, 82 AD3d 512, 512 (1st Dept 2011). Here, it remains unclear from the testimony of plaintiff, as well as the conflicting expert reports of Konon and Glabe, whether defendants had notice of the slippery steps, whether the stairway was safe for use at the site, and whether reasonable and adequate protections were provided to plaintiff.

Therefore, because factual issues remain as to whether the statute was violated and whether the defendants' were negligent in utilizing and maintaining the temporary stairway at the site, the part of defendants' motion for summary judgment dismissing plaintiff's cause of action for negligence and Labor Law § 200, must be denied.

Plaintiffs Labor Law § 240 (1)

Plaintiff and defendants move for summary judgment as to plaintiff's cause of action for Labor Law § 240 (1). Labor Law § 240 (1) provides:

> "[a]ll 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 as to give proper protection to a person so employed."

Labor Law § 240 (1) was designed "to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility.'" *John v Baharestani*, 281 AD2d 114, 117 (1st Dept 2001), quoting *Ross v Curtis-Palmer Hydro-Elec. Co*, 81 NY2d 494, 500 (1993). In order to prevail on a Labor Law § 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. *See Blake v Neighborhood Hous. Servs. of N.Y.City*, 1 NY3d at 287; *Torres v Monroe Coll.*, 12 AD3d 261, 262 (1st Dept 2004).

The Appellate Division, First Department, has held that Labor Law § 240 (1) may apply in cases involving falls from temporary stairwells and ramps at a construction site. *See Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 (1st Dept 2011) (holding that plaintiff established a prima facie case that Labor Law § 240 [1] would apply and that whether a plank was "a functional substitute for a staircase or passageway, as opposed to a safety device, is irrelevant since the defendants had a statutory duty to provide a safety device adequate to protect the plaintiff from an elevation-related hazard ..."); *Morris v City of New York*, 87 AD3d 918, 919 (1st Dept 2011) (holding that an issue of fact exists as to whether a temporary step placed at the bottom of the stairway constitutes a device under Labor Law § 240 [1]); *McGarry v CVP 1 LLC*, 55 AD3d 441, 441 (1st Dept 2008) (holding that the court was correct to grant summary judgment on plaintiff's Labor Law § 240 [1] claim as "[t]he makeshift staircase was being used as access to different levels of the work site, including the floor where the injured plaintiff's safety equipment was stored in a Bovis shanty"); *Paul v Ryan Homes*, 5 AD3d 58, 60 (4th Dept 2004) (holding that when a plank has been utilized as the functional equivalent of a scaffold, ladder or other device enumerated in the statute, Labor Law § 240 [1] may apply); *Wescott v Shear*, 161 AD2d 925, 926 (3rd Dept 1990) (holding that the temporary stairway was the functional equivalent of a ladder and that Labor Law § 240 [1] would apply).

Here, plaintiff was descending the temporary stairwell so that he could obtain a coat in order to protect himself from the rain and continue with his work. The stairwell was utilized by plaintiff as the equivalent of a ladder so that he could reach a lower level of the construction site. Also, the harm to which plaintiff was exposed, flowed from the application of the force of gravity to the plaintiff, as the force of gravity caused him to fall several stairs to the lower platform.

Furthermore, there is no explanation from defendants as to why the handrail, which was to act as a safety measure for those workers utilizing the steps, was wet and unable to assist plaintiff when he reached for it. Plaintiff testified:

"Q. Before you started to descend these ladders, did you grab a hold of either of the railings?
A. I had my hand on the handrail, it was wet and I couldn't hold on.
Q. What was wet?
A. The railing."

O'Brien tr., at 70-71.

Based upon the above case law, Labor Law § 240 (1) may apply to plaintiff's factual allegations. However, it remains unclear as to whether the temporary stairwell, as well as the railing, provided proper protection for plaintiff. Furthermore, as previously discussed, the affidavits of both Konon and Glabe conflict as to the adequacy and safety of the temporary stairwell. Therefore, as there remains a question of fact as to whether proper protection was provided to plaintiff and whether Labor Law § 240 (1) was violated, plaintiff's and defendants' motions for summary judgment must be denied.

Plaintiff's Labor Law § 241 (6)

Plaintiff and defendants also move for summary judgment regarding the allegations of violations under Labor Law § 241 (6). Labor Law § 241 (6) provides, in pertinent part:

"[a]ll 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(6) 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. ..."

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar*

& Preparatory, 44 AD3d 263, 271 (1st Dept 2007).

In his complaint, plaintiff alleges that defendants violated Industrial Code Rules 23-1.5, 23-1.7(d) and (f), and 23-1.16 (a-d). Additionally, plaintiff's expert disclosure alleges that defendants violated Industrial Code Rule 23-5.1 (f). Although plaintiff alleges several violations of the Industrial Code, plaintiff fails to address Industrial Code §§ 23-1.5, 23-1.7 (f), 23-1.16 (a-d) and 23-5.1 (f). Therefore, these sections are deemed abandoned. *See Kronick v L.P. Thebault Co., Inc.,* 70 AD3d 648, 649 (2d Dept 2010).

Plaintiff argues that Industrial Code 12 NYCRR 23-1.7 (d) is applicable to this case. Industrial Code 12 NYCRR 23-1.7 (d) provides;

> "[e]mployers 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."

Here, plaintiff's testimony, as well as the testimony of Erenc, demonstrates that this section of the Industrial Code was violated. Although defendants argue that plaintiff testified that the ground was wet before he reached the staircase and that plaintiff's shoes may have been wet from the ground, plaintiff testified that before he walked down the steps, he noticed that the steps were wet. Furthermore, plaintiff testified that the railing was also wet when he grabbed it. Erenc's affidavit also discusses how the stairs were slippery when wet. Defendants fail to present any evidence that the staircase or the railing were not in a slippery condition or that they took any steps to remove the water.

Therefore, because plaintiff meets his burden and demonstrates that 12 NYCRR 23-1.7 (d) was violated, the part of plaintiff's motion for partial summary judgment regarding Industrial Code section 12 NYCRR 23-1.7 (d), is granted.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the causes of action for Labor Law §§ 200, 240 (1), and 241(6), are

dismissed as to defendant Atlantic Hoisting & Scaffolding, LLC; and it is further

ORDERED that defendants The Port Authority of New York and New Jersey and Tishman Construction Corporation's motion for partial summary judgment, pursuant to Labor Law §§ 200 and 240 (1), is denied; and it is further

ORDERED that plaintiff Thomas J. O'Brien's motion for partial summary judgment, pursuant to Labor Law § 240 (1), is denied; and it is further

ORDERED that plaintiff's motion for partial summary judgment, pursuant to Labor Law § 241 (6), predicated on the alleged violation of Industrial Code 12 NYCRR 23-1.7 (d), is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of defendants The Port Authority of New York and New Jersey and Tishman Construction Corporation's motion for summary judgment, made pursuant to Labor Law § 241 (6), which it seeks to dismiss the alleged violations of the Industrial Code 23-1.5, 23-1.7 (f), 23-1.16 (a-d) and 23-5.1 (f) is granted, and these claims are severed and dismissed as to these defendants; and it is further

ORDERED that the reminder of the action shall continue.

Dated: 7/11/13

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.