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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice

PART 44

George Englert

-v-

Tishman Construction

INDEX NO. 106636/10

MOTION DATE

MOTION SEQ. NO. 001

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 decided in accordance with the annexed decision.

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

Dated: 7/16/13

MGT, J.S.C.

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

[* 2]

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

----------X

GEORGE ENGLERT

Plaintiff,

-against-

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, ONE BRYANT PARK LLC and THE DURST ORGANIZATION INC.,

Defendants.

----------X

106636/10

FILED

JUL 29 2013

COUNTY CLERK'S OFFICE
NEW YORK

Defendants Tishman Construction Corporation of New York, One Bryant Park LLC and The Durst Organization Inc. move for summary judgment dismissing plaintiff's Labor Law §200, §240(1) and §241(6) claims.

George Englert (Plaintiff) alleges he sustained a shoulder injury on May 21, 2007, while working in a switchgear room at One Bryant Park. On the date of the incident in question, Plaintiff testified he was in the process of relocating switchgear cabinets into a switchgear room located in the basement. *Id* at 13; 22. Plaintiff estimated each switchgear weighs approximately one thousand pounds and measured about thirty inches wide and eight feet tall. *Id* at 22-23; 54. The cabinet had to be lifted using a chain fall and moved into its intended position on a four inch high concrete pad. *Id* at 41; 72.

Plaintiff admitted in his testimony: (1) he was provided with all the equipment necessary for the job; and (2) Plaintiff's partner operated the chain fall. Id at 38; 63; 123. Plaintiff also testified, being concerned that the switchgear might bump the wall while being raised, decided to grab the bottom and "give it a nudge". *Id* at 48. Plaintiff first testified at the time of the accident he was lifting

the switchgear and then modified his answer to indicate he was applying pressure up and forward, which was a method he used on numerous occasions in the past. *Id* at 70-71.

According to Plaintiff's testimony, when he first attempted to maneuver the switchgear, it slid. *Id* at 72. On the second attempt to move the switchgear it slid faster and slipped off the concrete pad, at the same time Plaintiff alleges he slid off the pad and felt his left bicep "pop". *Id* at 72-72. Thereafter, Plaintiff allegedly noticed an oily substance on part of the pad but was unaware of how long the substance had been there. *Id* at 78-79.

The movant on a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law. *Winegrad v. New York Medical Center*, 64 N.Y.2d 851, 853 (1985). "The party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action." C.P.L.R. Section 3213; *Zuckerman v. City of New York*, 49 N.Y.2d 577 (1980). The movant of a summary judgment motion has the initial burden to show evidentiary proof in an admissible form establishing entitlement to summary judgment. *Id.*

The owner must provide a safe work environment and keep all machinery, equipment and devices safe protecting lives and health of the employees. Labor Law §200. To impose liability on a party, Plaintiff is required to show the owner or general contractor had both notice and control of the activity bringing about the injury. *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993). "Duty to provide safe place to work is not breached when injury arises out of defect in subcontractor's own plant, tools and methods, or through negligent acts of subcontractor occurring as detail of work". Labor Law, § 200; *Persichilli v. Triborough Bridge and Tunnel Authority*, 16 N.Y.2d 136 (1965). The New York State Court of Appeals has not adopted the reasoning cited in *Nagel v. Metzger*, imposing liability solely on the basis of notice to the owner of the alleged unsafe manner in

which the work was performed. *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993).

Defendants allege, they were not in control of Plaintiff's performance and had no notice of the dangerous condition. Defendants assert Plaintiff's only reported to his foreman Rob Rechten and hadno other interaction with anyone else. Thus, Defendants allege they were not in control over Plaintiff's performance of moving the switchgear. Defendants assert Plaintiff was also provided with adequate equipment for use of the chain fall, and did not breach their duty to provide a safe work place. Lastly, Defendant claims they were unaware of the dangerous condition and had no notice to remedy the condition.

Once the movant has established a *prima facie* case that it is entitled to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49 N.Y.2d 577 (1980).

Plaintiff asserts the defendants had both control and notice and were negligent in failing to keep the premises safe. Plaintiff alleges by Defendants being the general contractors of the project, they had control of the workers' activities. Plaintiff also testified there was a substance upon which he slipped; however he was unaware of how long the substance had been there. Plaintiff's method of moving of the switchgear was a method of his own and does not impose liability on Defendants. Plaintiff has not established sufficient evidence to show Defendants had both notice and control of the activity causing the injury. Therefore, the motion for summary judgment as to Labor Law §200 is granted.

Any areas in which construction, excavation or demolition work is being performed must be constructed to provide reasonable and adequate protection and safety for persons lawfully employed therein. Labor Law § 241(6). "To constitute 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 the defendant's employees to discover and remedy it."

Dean Essen, an employee of defendant Tishman Construction Corporation , testified he was responsible for conducting daily walk-throughs of the job site and making sure the job site was safe. If there was a spill or cleaning issue, Essen would have an employee clean it immediately. The date of the incident in question, Essen was unaware of the details of Plaintiff's accident and no reports were made of any spill in the basement. Defendants assert, therefore, there was not sufficient time to discover and remedy the spill.

Plaintiff testified he noticed the oily substance after he slipped, however he was unaware of how long the oily substance had been there. No other evidence has been presented that defendants had actual or constructive notice of the dangerous condition. There is an issue as to whether there was an existence of oily substance at the time of the alleged incident. Therefore, the motion for summary judgment as to Labor Law §241(6) is denied.

Where an employee's labor requires the use of scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices the owner is required to have the area constructed to give proper protection to employees. Labor Law § 240(1). A plaintiff is entitled to recovery under Labor Law § 240(1) where there is a determination of the injury sustained and the injury is the type of elevation-related hazard to which the statute applies. *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1 (2011); see *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, (1991). The New York Court of Appeals held Labor Law § 240(1) did not apply where the height was minuscule, approximately four feet, and concluded the height is not the type of elevation which calls for the use of a device like those listed in section 241(6) to prevent a worker from falling. *Toefer v. Long Island R.R.*, 4 N.Y.3d 399 (2005).

The switchgear and Plaintiff were on a four inch high concrete pad from which they fell. Defendants assert Labor Law §240(1) was not violated because the height upon which the Plaintiff fell, was not height in which the statute covers.

Plaintiff asserts Labor Law §240(1) does apply because he was elevated four inches off the ground before he fell. The miniscule height in the instant case, as ruled in *Toefar v Long Island R.R.* does not apply to Labor Law §240(1). Therefore, the motion for summary judgment as to Labor Law § 240(1) is granted.

The court finds no genuine issues of material disputed facts as to Labor Law § 240(1) and §200. However, the court does find an issue of disputed material fact as to Labor Law § 241(6), as to the existence of the slippery substance. The motion for summary judgment as to Labor Law §200 is granted, therefore dismissing Plaintiff's Labor Law §200 claim. The motion for summary judgment as to Labor Law §240(1) is granted, therefore dismissing Plaintiff's Labor Law §240(1) claim. The motion for summary judgment as to Labor Law §241(6) is denied.

Dated: New York
July 15, 2013

Honorable Milton A. Tingling J.S.C.