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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 108048/2010
EDWARDS, DIONNE
vs.
PLAZA CONSTRUCTION
SEQUENCE NUMBER : 002
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). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/9/13

HON. EILEEN A. RAKOWER 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

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

DIONNE EDWARDS,

Plaintiff,

- v -

PLAZA CONSTRUCTION CORP., BATTERY PARK CITY AUTHORITY, MP LIBERTY LLC AND MP FREEDOM, LLC,

Defendants.

INDEX NO. 108048/2010

MOTION DATE _____

MOTION SEQ. NO. 2

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: Yes

Dionne Edwards ("Plaintiff") bring this action to recover for injuries allegedly sustained on January 27, 2010, while working for DelSavio Masonry Corp. ("DelSavio"). Plaintiff was allegedly injured when a container filled with debris shifted against her shoulder as she was moving it up a ramp. She brings causes of action pursuant to Labor Laws §200, §240, and §241. Defendants Plaza Construction Corp. ("Plaza"), Battery Park City Authority ("Battery Park"), MP Liberty, LLC ("MP Liberty") and MP Freedom, LLC ("MP Freedom") (collectively, "Defendants") now move for summary judgment pursuant to CPLR §3212. Plaintiff opposes.

Plaintiff was a 33-year old construction laborer who was working as a mason tender for DelSavio on the date of the accident. She had been working for DelSavio at the premises since September 2009. Plaintiff's supervisor at the premises was Rocco Regina, a DelSavio foreman.

DelSavio was retained by Plaza, pursuant to a subcontract, to perform masonry work on the sites where two high rise condominiums were being built adjacent to one another. The two buildings are referred to as "Site 23" located at 300 North End Avenue, New York, New York and "Site 24" located at 200 North End Avenue, New York, New York. Site 23 is located on the northern part of the lot and Site 24 is on the southern end. The two sites share a common foundation, and have a common cellar and sub cellar. Site 24 also contains a depressed or recessed area in the cellar, on its southeast end.

Plaza is the construction manager for the projects located at 200 North End Avenue, "Site 24" and 300 North End Avenue, "Site 23". Battery Park is the owner and ground lessor of 200 and 300 North End Avenue. MP Liberty is the lessee of 200 North End Avenue, Site 24, and MP Freedom is the lessee of 300 North End Avenue, Site 23.

On the date of the accident, Plaintiff arrived at Site 24 at 6:40 a.m. She was tasked with moving containers full of heavy debris out of Site 24 and onto the shared hoist, which was located on the southern wall of Site 23. Plaintiff needed to utilize ramps to move the containers out of the depressed area on Site 24. Plaintiff states that a pump jack was needed to lift the container and move it over the ramps due to the weight of the debris. She describes that a jack was used "[b]ecause sometimes the wheels [on the container] were damaged or sometimes the container would be much too heavy to be moved by physical strength." "Pump jacks are uniquely designed scaffolds consisting of a platform supported by moveable brackets on vertical poles. The brackets are designed to be raised and lowered in a manner similar to an automobile jack." (*See, http://www.osha/gov*). In this instance, Plaintiff describes the pump jack as having "three wheels. One in front, two in the back and it's manual. It is a manual jack."

Plaintiff's bill of particulars alleges that she was "pushing a debris container on a plywood ramp, the ramp broke and collapsed causing plaintiff to be forcibly struck by the debris container." At her deposition, she states "we got like halfway up the ramp and right before we got to the second level the front wheel of the pump jack like got stuck in the plywood. The ramp gave way and the front wheel got stuck and I was like going up full force and the container jerked forward and then back and that's when I felt my shoulder, the injury."

In support of its motion, Defendants provide: Plaintiff's bill of particulars; Plaintiff's summons and verified complaint; Defendants' verified answer with cross-claims; this Court's compliance conference orders; the deposition testimony of Plaintiff; the deposition testimony of Joseph Lacertosa, a construction superintendent for Plaza; and the note of issue filed on December 10, 2012.

In opposition, Plaintiff attaches: the deposition testimony of Wildred Augustus Stoll, a DelSavio employee who worked with Plaintiff on the date of the accident; Maria Rosenfeld the VP of Development for Roseland Properties, the developer of the building; John Matajy, a Site Safety Manager for Total Safety, a subcontractor on the project; Plaintiff's accident report taken by Total Safety on January 27, 2010; and the written testimony of John Matajy dated September 13, 2010 regarding Plaintiff's accident.

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.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970], *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

MP Freedom moves for summary judgment dismissing this action as to it, on the grounds that the accident happened entirely within 200 North End Avenue, and it has no ownership, leasehold, control or supervision over 200 North End Avenue. Plaintiff asserts that Sites 23 and Site 24 are one site.

Movant provides the cover sheet to the ground lease dated October 31, 2006 as amended and restated on November 15, 2007, between Battery Park City Authority, d/b/a Hugh L. Carey Battery Park City Authority as Landlord and MP Liberty LLC as Tenant of premises, "Site 24, Battery Park City, New York, New

York." No party provides a similar document listing Site 23 or listing MP Freedom. Mr. Lacertosa testified at his deposition that the projects consisted of "two buildings" at "two sites," proceeding on different timetables, and that there were separate ground leases. Mr. Lacertosa describes a wall that was in the process of being built to separate the two sites. John Matajy from Total Safety was specifically assigned to Site 24 on the date of the accident, and indicated as much in his incident report prepared to reflect this accident.

Plaintiff provides the testimony of Maria Rosenfeld, the VP of Development for Roseland Properties, the development advisor on the project, who indicated that MP Liberty and MP Freedom are "jointly and severally" referred to as the owners of 200 and 300 North End Avenue in their contract with Plaza. However, no party provides the Plaza contract.

While Plaza indicated that the debris was carted from a central location and that location was accessed through a shared construction hoist located on the South side of Site 23, the Sites themselves remained distinct in all references throughout the papers. It is irrelevant that Plaintiff was headed to the shared hoist with the debris, since the ramp on which she was injured was located entirely within Site 24.

Labor Law §200

Defendants move for summary judgment on the Labor Law §200 cause of action. Labor Law §200 codifies the common law duty of an owner or contractor to provide employees with a safe place to work. (*Jock v. Fien*, 80 N.Y.2d 965 [1992]). Where the dangerous condition arises out of a contractor's unsafe work practices, a defendant owner or contractor is liable if the defendant supervised or controlled the work activities. (*Lombardi v. Stout*, 80 NY2d 290 [1992]).

Plaza Superintendent Joseph Lacertosa testified that Plaza hired a safety manager, Total Safety, who visited the sites, observed any safety issues, and attended safety meetings. He indicates that each subcontractor was required to prepare a safety plan that was submitted to Plaza on a daily basis. Furthermore, he

confirms that each of the Plaza superintendents had the authority to stop the work performed by DelSavio at any time, even if there was not imminent danger. If a Total Safety employee observed a dangerous condition where there was not imminent danger, they were instructed to contact a Plaza employee before stopping work. Mr. Lacertosa states that to his knowledge, no representative from Battery Park attended the job site throughout the course of construction.

In opposition, Plaintiff does not provide any evidence that Defendants Battery Park and MP Liberty supervised or controlled work on the site of the accident. While Mr. Stolle states in his deposition that he saw Plaza employees on site every day, he could not recall seeing any employees for Battery Park on site. Ms. Rosenfeld confirmed that Battery Park "did not have regular people [sic] on the site" and that "Battery Park did not have an office on site." Plaintiff herself stated that "we have safety guys walking around all the time," but never identified who the safety people worked for, if for anyone other than DelSavio.

Labor Law §241(6)

Defendants also move for summary judgment on 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 specific provisions were not complied with, 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 does not mandate concrete specifications, or where it is not applicable to Plaintiff's accident.

Plaintiff's bill of particulars lay out violations of Industrial Code Sections 23-1.7(e)(1), 23-1.7(e)(2), 23-1.11(a), 23-1.22(a), 23-1.22(b)(1)-(b)(4) and 23-1.22(c)(1).

Sections §23-1.7(e)(1) provides:

> All passageway shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp protections which could cut or puncture any person shall be removed or covered.

Additionally, Section §23-1.7(e)(2) states:

> 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.

Both Sections 23-1.7(e)(1) and (e)(2) require all passageways and working areas to be kept free from accumulation of dirt and debris and any other obstructions or conditions which could cause tripping. As Plaintiff never alleged that her injuries were caused as a result of tripping over anything, but instead asserts that she was injured when the pump jack wheel became lodged in a plywood ramp and the debris container "jerked forward and then back" hitting her shoulder, such provisions are inapplicable.

Plaintiff alleges a violation of Section 23-1.22(a). This section applies to ramps constructed of earth, gravel, stone or similar embankment material. As the ramp at issue was made of plywood, this section is not relevant.

Section 23-1.22(b)(4) relates to ramps constructed for the use of persons at a height of more than four feet above the ground. Inasmuch as the ramp is never alleged to be a height of more than four feet, this section is inapplicable.

Section 23-1.22(b)(1) applies to ramps used by "motor trucks or heavier vehicles". It states:

> All runways and ramps shall be substantially constructed and securely braced and supported. Runways and ramps constructed for use by motor trucks or heavier vehicles shall be not less than 12 feet wide for single lane traffic or 24 feet wide for two lane traffic. Such runways and ramps shall be provided with timber curbs not less than 10 inches by 10 inches, full size timber, placed parallel to, and secured to the sides of such runways and ramps. The floorings of such runways and ramps shall be positively secured against movement and constructed of planking at least three inches thick full size or metal of equivalent strength.

Section 23-1.22(b)(1) applies only to those ramps or runways which were meant for use by heavy vehicles, rather than the dollies, hand trucks, hand carts, power buggies, or other smaller equipment, which are instead covered by the provisions under §23-1.22(b)(3). "Although the first sentence of this regulation refers to "all runways and ramps," reading §23–1.22(b)(1) in its entirety, and viewing the regulation in the context of the succeeding subdivisions of §23–1.22, it is clear that this provision is intended to apply to runways and ramps used by trucks and other heavy vehicles." (*Huether v. New York Times Bldg., LLC*, 24 Misc.3d 634 [Sup. Ct. Kings County 2009][A dock plate serving as a ramp for the transportation of drywall by a four-wheeled A-frame dolly, weighing approximately 100 pounds, between a height differential clearly did not constitute a runway or ramp for use by trucks and heavier vehicles under §23-1.22(b)(1). Instead, §23-1.22(b)(3), which contemplates the use of a ramp or runway by wheelbarrows, hand carts and hand trucks, is applicable, as it is clear that those are the types of ramps and runways used for the type of loading and unloading operations involved in such a case]).

Here, the ramp involved in Plaintiff's accident was for the transportation of construction debris in containers, weighing approximately 100 pounds when empty, by a non-mechanical pump jack. Clearly, the plate involved in Plaintiff's accident did not constitute such a runway or ramp contemplated for use by trucks or heavier vehicles under §23-1.22(b)(1). Instead, the type of runway or ramp that was constructed in the instant case is specifically covered by §23-1.22(b)(3).

Section 23-1.22(b)(2) requires that ramps constructed for the "use of persons" shall be at least eighteen inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Plaintiff testified that the plywood was approximately four feet wide, which is well within this regulation. While Mr. Lacertosa testified that the planking was approximately two inches thick, Mr. Stolle asserted at his deposition that the planking was only one and a half inches in thickness. Accordingly, the evidence provided by Plaintiff raises an issue of fact as to whether the planking complied with Section 23-1.22(b)(2), and the motion is denied as to this section.

Section 23-1.22(b)(3) which pertains to "structural runways, ramps and platforms" requires that ramps be constructed to utilize with "wheelbarrows, power buggies, hand carts or hand trucks". It also requires such ramps to be forty-eight inches wide, with planking two inches thick. Inasmuch as Mr. Stolle has stated that the planking was only one and a half inches thick, the motion for dismiss this section is also denied.

Plaintiff also alleges a violation of Section 23-1.22(c)(1), which requires any platforms used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks to be provided with a floor planking at least two inches thick and plywood at least three-quarter inches thick. Mr. Lacertosa testified that the plywood was three-quarter inches thick and that the planks utilized were two inches thick. Inasmuch as Mr. Stolle attests that the planks were only one and a half inches thick, the motion to dismiss this section is denied.

Plaintiff also alleges a violation of Section §23-1.11(a). This section, entitled "lumber and nail fastenings" provides:

> The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.

Plaintiff's deposition testimony indicates that 2x4 pieces of wood were used to support the plywood ramp where Plaintiff's accident occurred. She says that as she and her coworkers pushed the container on the pump jack up the ramp, she heard the plywood start to make a cracking noise. After shoring up the ramp, Plaintiff indicates that they pushed the next container on the pump jack up the ramp. They got about halfway up before the pump jack got stuck in the plywood, due to a crack, causing the container to jerk back onto her shoulder. As Plaintiff described the front wheel as going through the plywood at the time of her accident, Defendants are not entitled to dismissal of this Section.

Section §240(1)

Labor Law §240(1) provides:

> All contractors and owners and their agents... 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.

The statute imposes absolute liability on building owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker. *(Wilinski v. 334 E 92nd Hous. Dev. Fund. Corp.*, 19 NY 3d 1 [2011]). Whether a plaintiff is entitled to recover under Labor Law §240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies. (*Wilinski*, 18 NY 3d at 3). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Wilinski,* at 6).

There is no "bright-line minimum height differential that determines whether an elevation hazard exists... Rather, the relevant inquiry is whether the

hazard is one 'directly flowing from the application of the force or gravity to an object or person." (*Auriemma v. Biltmore Theatre*, LLC, 82 A.D.3d 1 [1st Dept 2001]).

Plaintiff alleges that Mr. Nardone told her her, "We're going to go up [the ramp] fast because we need the momentum." She further asserts:

> we got like halfway up the ramp and right before we got to the second level the front wheel of the pump jack like got stuck in the plywood... [t]he ramp gave way and the front wheel got stuck and I was like going up full force and the container jerked forward and then back and that's when I felt my shoulder, the injury.

As such, Plaintiff has raised issues of fact regarding whether her injury is one that flowed from the force of gravity on the container.

Wherefore, it is hereby,

ORDERED that Defendants' motion for summary judgment is granted in its entirety as to MP Freedom, LLC, and to the extent that all Labor Law §200 claims are dismissed as to Battery Park and MP Liberty, and all §241(6) claims brought under Section 23-1.7(e)(1), 23-1.7 (e)(2), 23-1.22(a), 23-1.22(b)(1), and 23-1.22(b)(4) are dismissed in their entirety; and it is further,

ORDERED that all causes of action brought under Labor Law §240(1) and Labor Law §241(6) under Sections 23-1.11(a), 23-1.22(b)(2), 23-1.22(b)(3), and 23-1.22(c)(1) remain as to Plaza, Battery Park and MP Liberty, and all Labor Law §200 claims remain as to Plaza.

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

Dated: October 9, 2013

J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE