SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32
Justice

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JOSEPH CHARLES,

Plaintiff,

- v -

SUMMIT GLORY LLC,SUMMIT GLORY PROPERTY LLC,FOSUN PROPERTY HOLDINGS

Defendant.

INDEX NO. 161044/2017

MOTION DATE 12/13/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 34, 36, 37, 38, 39
were read on this motion to/for DISMISS

The branch of defendants' pre-answer motion to dismiss the Labor Law § 200 claim is denied. The branch of the motion to dismiss the Labor Law § 241(6) claim is granted. The remaining claim based on Labor Law § 240 was withdrawn by plaintiff.

Background

This case arises out of injuries suffered by plaintiff while he was working on a construction project at 28 Liberty Street New York, New York. The premises is owned by defendant Fosun Property Holdings ("Fosun") and defendant Summit Glory LLC ("Summit Glory").[1] Plaintiff worked for a subcontractor, non-party Stonebridge Steel Erectors ("Stonebridge"), as a journeyman ironworker for the project.

[1] The action against defendant Summit Glory Property LLC has been discontinued pursuant to a stipulation between all parties (NYSCEF Doc. No. 25).

On the day of the accident, as plaintiff was descending a ladder, his right forearm was struck by a piece of metal. That metal broke from the head of a drift pin that his Stonebridge co-worker was hammering into position with a sledgehammer. A drift pin is a metal hand tool, tapered on one end, and is used to align holes in steel beams; once the beams are aligned, the drift pin is removed and a bolt is put through the holes to secure the beams.

Plaintiff alleges that the injury was caused by defendants' negligence in failing to prevent the striking end/head of the drift pin from becoming mushroomed. Accordingly, plaintiff asserts liability against defendants pursuant to Labor Law §§ 200 and 241(6).

Defendants seek an order granting their pre-answer motion to dismiss the plaintiff's complaint pursuant to CPLR 3211[a][1] and 3211[a][7] or alternatively to treat this motion as one for summary judgment pursuant to CPLR 3211[c].

Defendants move to dismiss plaintiff's Labor Law § 200 claim and common law negligence claim on the grounds that defendants had no supervisory control over plaintiff's work because plaintiff worked for non-party Stonebridge. Defendants emphasize that they did not provide tools or equipment to workers at the construction site, including to plaintiff, nor did they have constructive notice of any alleged dangerous conditions. Defendants also move to dismiss plaintiff's Labor Law § 241(6) claim, alleging that plaintiff did not provide any applicable Industrial Code section that applies to the facts at hand.

Discussion

"When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Labor Law § 200 Claim

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises

and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). "Where 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" (*id.* at 144).

"Where an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

Defendants claim that plaintiff is unable to state a claim under Labor Law § 200 because defendants did not supervise plaintiff's work. In supporting their claims, defendants point to the affidavit of James Connors, the Managing Director of Asset Management for Summit Glory, who states that defendants never supervised or controlled the work of the trade subcontractors, including Stonebridge employees. He further states that defendants did not provide tools or equipment to Stonebridge employees (NYSCEF Doc. No. 11 at 2). Additionally, defendants point to the affidavit of Erik Hoermann, an employee of non-party Hunter Roberts, who claims that Summit Glory contracted with Hunter Roberts to serve as construction manager for the project, who in turn subcontracted with Stonebridge. Hoermann states, "To the best of my knowledge, the incident involving Mr. Charles arose out of the means and methods of how Stonebridge did its work at the 28 Liberty Project" (NYSCEF Doc. No. 13 at 3).

Plaintiff, on the other hand, claims that defendants are liable under Labor Law § 200 because they did supervise and control the construction project. Plaintiff's complaint states that defendants "[S]upervised, managed, controlled, inspected and directed the work being performed at the aforementioned construction site and employed superintendents, officers, agents, servants, and/or employees and generally supervised and directed the construction work at the aforementioned location" (NYSCEF Doc. No. 1 at 4). Furthermore, plaintiff states in his affidavit that he had been working on the job site for two weeks and had seen several drift pins with mushroomed heads. Plaintiff alleges that because this condition existed for two weeks prior to the accident, it likely demonstrates that defendants had constructive notice of the condition.

Plaintiff's complaint and testimony compels the Court to deny the branch of defendants' motion to dismiss the Labor Law § 200 claim. Plaintiff's complaint states that defendants supervised and controlled the job site. Because there are sufficient factual allegations in plaintiff's complaint and affidavit, defendants' motion to dismiss this claim is denied.

Labor Law 241(6) Claim

"Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Lopez v New York City Dep't of Envtl. Prot.*, 999 NYS2d 848, 851 [2d Dept. 2014] "As a predicate to a section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code" (*Perez v 286 Scholes St. Corp.*, 22 NYS3d 545, 546 [2d Dept. 2015].

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff alleges a violation of Industrial Code Section 23-1.10(a), which provides that "edged tools shall be kept sharp and shall be maintained free from burrs and mushroomed heads. Split or loose tool handles shall not be used." Plaintiff claims that his injury resulted because of defendants' negligence in failing to keep the drift pin free from burrs and mushroomed heads. Defendants allege that this provision of the Industrial Code is not applicable because drift pins have rounded edges and Section 23-1.10(a) only applies to tools with sharp edges.

The Court finds that this section is inapplicable to the facts at hand. "It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other" (*People v Mobil Oil Corp.*, 48 NY2d 192, 199, 397 NE2d 724, 728 [1979]). Plaintiff fails to allege that a drift pin is a tool that has a sharp edge. Without a sharp edge to a drift pin, this industrial code section does not apply. The section does not require that the head/striking end of *any* tool be free of mushrooming or burrs; this particular section only applies to tools in which the non-striking end is sharp. While plaintiff does allege that there was a mushroomed head on the drift pin, he fails to show that the drift pin is covered by the Industrial Code provision because he never states that the

non-striking end was or should have been sharp. Therefore, defendants' motion to dismiss the Labor Law §241(6) claim is granted.

Accordingly, it is hereby

ORDERED that the branch of defendant's motion to dismiss the Labor Law § 200 claim is denied.

ORDERED that the branch of defendant's motion to dismiss the Labor Law § 241(6) claim is granted and that claim is severed and dismissed.

ORDERED that the branch of defendant's Labor Law § 240 claim, having been withdrawn, is severed and dismissed.

1.23.19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE