SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

DANIEL MACK and STACEY MANGINO

INDEX NO. 151913/16

MOT. DATE

- v -

MOT. SEQ. NO. 005-007

330 HUDSON STREET, LLC et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

This is a labor law action in which plaintiff seeks to recover for injuries sustained when a refrigerator allegedly almost fell onto him. There are three pending motions which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 005, plaintiffs move for partial summary judgment against defendants 330 Hudson Street, LLC ("330 Hudson") and Structure-Tone Realty, Inc. d/b/a Structure-Tone Inc. ("Structure-Tone") on his Labor Law § 241[6] claim based on a violation of Industrial Code § 23-2.1[a][1]. 330 Hudson and Structure-Tone oppose that motion.

In motion sequence 006, third-party defendants Consolidated Carpet Workroom, LLC, Consolidated Specialy Surfaces, LLC and Consolidated Carpet Associates, LLC move for summary judgment dismissing plaintiff's complaint. Plaintiffs oppose that motion.

Finally, in motion sequence 007, defendants/third-party plaintiffs 330 Hudson, Structure-Tone, Callahan Capital Properties ("Callahan"), Beacon Capital Partners, LLC ("Beacon"), BCSP VI Property Management, LLC ("BCSP"), and CBRE, Inc. ("CBRE") move for summary judgment dismissing plaintiff's complaint as well as on their cross-claims and counter-claims and on their third-party claims for contractual defense, indemnification and the failure to procure insurance. Plaintiff and the third-party defendants oppose this motion insofar as the movants seek relief against them.

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court will first consider the motions with respect to plaintiffs' complaint.

The following facts are not in dispute. Plaintiff Daniel Mack was injured while working at a construction project located at 330 Hudson Street (the "jobsite" or "premises"). 330 Hudson owned the premises and CBRE was the property manager for the premises. In turn, CBRE hired Structure-Tone as general

Dated: 12/12/19

HON. LYNN R. KOTLER, 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

contractor to perform construction services on the third floor of the premises.

Daniel Mack testified at a deposition about his accident as follows. On June 30, 2015, plaintiff was working at the jobsite for Consolidated Carpet as a mechanic installing flooring. Plaintiff had worked for Consolidated Carpet for ten years prior to the date of the accident. On the date in question, plaintiff was working on the third floor of the jobsite.

Plaintiff had begun working at the jobsite approximately two to three weeks prior. During that time, including the incident date, plaintiff was the only person from Consolidated Carpet at the jobsite. Plaintiff explained that two employees of Structure-Tone, Rupert Heron, a superintendent and a laborer named Danny, would tell him where to work.

Plaintiff was on the jobsite for approximately 45 minutes to an hour before the accident occurred. Prior to his accident, plaintiff was hanging vinyl base in the pantry. Plaintiff used his own personal tools which he purchased himself. Plaintiff testified that there was "[a] lot of construction debris" and "garbage, pallets of light fixtures" as well as the refrigerator in the pantry. Plaintiff claimed that he asked Danny to "get everything cleared out the best you can" prior to beginning his work.

Immediately prior to his accident, plaintiff was working on his hands and knees, installing base around a column. Plaintiff was injured while "squeez[ing]" through a one-and-a-half-foot gap between the column and the refrigerator. Instead of moving the refrigerator, which was on its own set of wheels, plaintiff testified that he "believed [he] could get through without moving it." Specifically, plaintiff testified that the accident occurred as follows:

> Q. So tell me if I'm wrong here, but you are on your knees, the column is to your right, the piece of the refrigerator is to your left –
>
> A. Uh-huh.
>
> Q. -- you are snaking the base to get around, and you are facing towards the center of the room?
>
> A. Yes.
> ...
>
> Q. All right. Then your left shoulder comes into contact with the piece of the refrigerator?
>
> A. Yes.
> ...
>
> Q. ... What happens next?
>
> A. As I felt it move, it startled me. I came up, started falling towards me. I caught it with my right arm and shoved it forward, and that's when I felt the pop and it kind of half stabilized itself, and then that's when I was down on my knees and banged.
> ...
>
> Q. When you pushed the refrigerator back up with your right hand, what, if anything, did you do with your left hand?
>
> A. My left hand -- I felt a bump. I turned up. I came forward. And my left hand was here. And I just lunged this way. It was coming at me from that side.

...My left hand fell to my side and I pushed up forward to counterbalance.

Q. So your left hand falls to your side. Did you still have the roll of base in the left hand?

A. No.

Q. You dropped it?

A. Yes. It was already on the floor.

Q. Right, but I guess what I'm asking is: You let go of it?

A. I let go of it, yes.

Q. When you pushed the refrigerator back, were you -- with your right hand, were you still on your knees?

A. Yes.

...

Q. As you sit here right now, is it your understanding that the fridge shifted because your left shoulder came in contact with it?

A. I have no idea.

...

Q. Okay. So when you are on your knees before you raise yourself up, how high off the ground would you estimate your left shoulder was?

A. About two-and-a-half feet.

Q. And it was at that level that your left shoulder came into contact with the refrigerator?

A. Yes.

No witnesses have testified that they saw the accident occur. Defendants have submitted a copy of an C-3 Workers' Compensation Board Employee Claim form prepared by plaintiff dated July 16, 2015. In that document, plaintiff wrote in response to the question of how he was injured: "[w]ent to move frig. It was top heavy frig went to fall I lunged to catch it and injured right shoulder."

According to Structure-Tone's witness, Heron, the refrigerator that nearly fell on plaintiff was supposed to be installed in the pantry. The refrigerator did not yet have a door. Plaintiff claims that the refrigerator was top-heavy because it almost fell on him. He admitted that this belief was based solely on "the low amount of impact [plaintiff] had" with the refrigerator and "it coming down on [plaintiff]." However, Heron disputes that the refrigerator was top heavy and maintained that it did not pose a tripping hazard.

In support of their motion, plaintiffs have provided the affidavit of Andrew Yarmus, an engineer, wherein Yarmus maintains that the manufacturers guide for the refrigerator indicates that it is top heavy. That guide, however, states under a section entitled Installaion:

> This appliance is top-heavy and must be secured to prevent the possibility of tipping forward. Keep the door closed until the appliance is completely installed and secured per the installation instructions.

Plaintiffs have further provided the affidavit of Kathleen Hopkins, a Certified Safety Manager, who opines that the defendants violated Labor Law § 241[6] vis-à-vis 12 NYCRR § 23-2.1[a][1] which requires that "[a]ll building materials shall be stored in a safe and orderly manner."

330 Hudson and Structure-Tone oppose plaintiffs' motion on the grounds that the Industrial Code provision they rely on does not apply here since plaintiff "was not working in a 'passageway, walkway, stairway or other thoroughfare'" (emphasis removed). Rather, 330 Hudson and Structure-Tone point to plaintiffs' own deposition testimony as well as floor plans for the jobsite which indicate that plaintiff was injured in a large open area. 330 Hudson and Structure-Tone further argue that the refrigerator was not a "building material" because it was an appliance that had been staged for installation. They also point to the manufacturer's instructions for the refrigerator which indicate that the door should be kept closed to avoid tipping. On this point, 330 Hudson and Structure-Tone argue that plaintiffs' and Yarmus' reliance on the manufacturer's instructions is misplaced.

Meanwhile, in support of their motion, the third-party defendants contend that "[t]he description of plaintiff's alleged accident defies the laws of physics and seeks to violate common sense and every day experience all in an attempt to recover on this claim." They have provided the affidavit of Dr. Ali M. Sadegh, who has a PhD in mechanical engineering, is a licensed engineer and is a Professor at the City College of the City University of New York. Sadegh inspected the refrigerator and maintains that it would not have tipped over onto plaintiff when his shoulder came into contact with it two to two-and-a-half-feet above the floor. Rather, Sadegh states that since the refrigerator was on wheels, it would have rolled away from him. Alternatively, if the refrigerator was unable to roll, it would have slid away from him and if it had been prevented from moving away from plaintiff it would have tipped over away from him. Sadegh further maintains that the refrigerator was not "top heavy".

Further, Sadegh estimates that to cause the refrigerator to move, plaintiff would have had to apply a force of between 20-60 pounds, given the weight of the refrigerator without a door and the co-efficient of friction between he wheels and the floor. Sadegh claims that if the accident occurred the way plaintiff described, he would have had to exert a force of 160 pounds with his shoulder at a point two-and-a-half-feet above the floor.

In opposition to the third-party defendants' motion, plaintiffs' counsel maintains that plaintiff's testimony is not incredible as a matter of law and that plaintiffs' experts' affidavits have raised a triable issue of fact.

With respect to the complaint, defendants also argue that the accident could not have occurred in the manner plaintiff. Defendants have provided the affidavit of Jeffrey Schwalje, an engineer, which is generally consistent with Sadegh's opinions.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue

(*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff Daniel Mack has asserted causes of action under Labor Law §§ 200, 240[1] and 241[6] as well as for common law negligence. Plaintiff Stacey Mangino has asserted a cause of action for loss of consortium.

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.21(3) and (4) was violated as a matter of law.

Industrial Code § 23-2.1[a][1] states in pertinent part as follows:

> All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

There can be no dispute on this record that plaintiff's accident did not occur in a passageway, walkway, stairway or other thoroughfare. Therefore, Section 23-2.1[a][1] does not apply and plaintiffs' motion must be denied. Since plaintiffs have otherwise failed to oppose the motions for summary judgment on all other claims Industrial Code violations, plaintiffs are deemed to have concede them.

Further, both defendants' motions for summary judgment dismissing plaintiffs' complaint must be granted. Labor Law § 240[1] is wholly inapplicable to the facts in this case. Labor Law § 200, which codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]), is also unavailing.

There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Here, the Labor Law § 200 claim fails against both 330 Hudson and Structure-Tone because there is no evidence on this record that they exercised supervisory control over plaintiff's work or that they had notice or created the allegedly dangerous condition. Further, plaintiff Daniel Mack's account of his accident, as Sadegh and Schwalje demonstrate, is incredible as a matter of law. Plaintiff would have had to exert a force much greater than would be consistent with his testimony of the underlying incident. On this record, defendants have established, as a matter of law, that plaintiff's account of the accident is incredible.

Plaintiffs' counsel's reliance on the manufacturer instructions regarding the appliance being top heavy is unavailing because the refrigerator was not in the condition referenced by said document when plaintiff was injured. The refrigerator did not have a door on; there is no proof on this record that the refrigerator without a door was top heavy. Rather, defendants have demonstrated though admissible evidence that it was not and therefore did not need to be secured.

Otherwise, plaintiff has failed to demonstrate that the accident occur as he testified sufficient to survive summary judgment. Indeed, Daniel Mack's account of the accident at his deposition substantially differed from the version he gave in the accident report. No reasonable factfinder could credit plaintiff's testimony on this record. Accordingly, defendants and third-party defendants' motions are granted to the extent that plaintiff's claims against them are severed and dismissed.

The court must now address the parties' requests for relief with respect to the third-party complaint. Defendants/third-party plaintiffs state that "[i]n the alternative, if the court denies Structure Tone, CBRE and 330 Hudson's motion for summary judgment then they are entitled to summary judgment on their claims against [the third-party defendants] for contractual defense, indemnification and insurance procurement." Since the court has granted defendants' motion dismissing plaintiff's complaint, the balance of their motion is denied as moot.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that defendants' and the third-party defendants' motions for summary judgment are granted to the extent that plaintiff's complaint, any crossclaims and the third-party claims are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the defendants' and the third-party defendants' motions are otherwise denied as moot.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/12/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.