Mianti v Structure Tone, LLC
2020 NY Slip Op 30196(U)
January 24, 2020
Supreme Court, New York County
Docket Number: 160122/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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INDEX NO. 160122/2017

JASON MIANTI,

MOTION DATE 11/16/2018, 07/25/2019

Plaintiff,

MOTION SEQ. NO. (MS) 001; 003

- v -

STRUCTURE TONE, LLC,STRUCTURE TONE, INC.,TURNER CONSTRUCTION COMPANY, PJ MECHANICAL SERVICE & MAINTENANCE CORP., PENGUIN AIR CONDITIONER CORP., PENAVA MECHANICAL CORP., PACOLET MILLIKEN ENTERPRISES, INC.,HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,7BP OWNER, LLC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169

were read on this motion to/for DISMISS (SUMMARY JUDGMENT).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 148, 150, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 198, 199, 206, 207, 208, 209, 210

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this Labor Law matter, plaintiff sustained injuries when he fell from a ladder while working at a construction site located at 7 Bryant Park in the city, state, and county of New York on March 28, 2016. Plaintiff alleges four causes of action: (1) common law negligence; (2) violation of Labor Law § 200; (3) violation of Labor Law § 240(1); and (4) violation of Labor Law § 241(6). Defendant Structure Tone, LLC f/k/a Structure Tone, Inc. ("Structure Tone") moves for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's complaint (MS 001)). Defendant Penguin Air Conditioning Corp. ("Penguin") moves for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's claims and all cross-claims asserted against it (MS 003). Plaintiff opposes only MS 001; defendant Turner Construction Company ("Turner") opposes MS3; and defendant PJ Mechanical Service & Maintenance Corp. ("PJ Mechanical") opposes both motions. The motions are pre-note of issue.

FACTS

Plaintiff worked an assistant chief engineer for non-party Hines Interests, L.P. ("Hines")[1] at the time of the incident (NYSCEF #22 – Mianti EBT at 37). According to plaintiff, his employer, Hines, was the construction manager for the premises (*id.* at 51). However, Structure Tone's project manager, Douglas Kruser, disagrees and asserts that Hines was merely the property manager of the premises (NYSCEF #108 – Kruser EBT at 15-16).

Structure Tone claims that it signed a construction contract with Bank of China New York on July 13, 2016, to operate as the general contractor on a "build out" of Bank of China's space at 7 Bryant Park (NYSCEF #27 – Construction Contract). Prior to that date, the only document signed between Bank of China and Structure Tone was a "December 15, 2015 Letter of Intent" that governed pre-construction services such as reviewing documents, consulting/advising the architect, preparing budgets, estimating costs, facilitating the bidding process, preparing schedules, and assisting with surveying (NYSCEF #28 – Letter of Intent). However, plaintiff testified that Structure Tone employees, agents, and subcontractors were present at the premises performing a "build out" of the floor for Bank of China on March 28, 2016 (NYSCEF #22 at 48).

In any event, Structure Tone hired Penguin to perform heating, ventilation, and air conditioning work, and Structure Tone also hired PJ Mechanical to perform duct work. Penguin, in turn, hired Penava Mechanical Corp. ("Penava") to install piping at the premises; that the contract was signed on April 12, 2016, after plaintiff's incident (NYSCEF #114 - Pegola Aff, ¶¶4-14). There was no contract between Penguin or PJ Mechanical and Hines. There is no indication that PJ Mechanical, Penava, or Penguin had any control or supervision over plaintiff.

Plaintiff testified that Hines did not perform any construction work in connection with the project (*id.* at 53). Kruser confirmed this (NYSCEF #108 at 40). Kruser testified that Hines, as the property manager, would open doors for Structure Tone, do drain-downs of the hot water system, turn on the air conditioning units when needed, and took care of regular maintenance (*id*). There is also no evidence that Hines had a contract with Structure Tone.

Plaintiff testified that Structure Tone's build-out work included "installing generators, life safety equipment, electrical systems, fuel oil risers, building out floors, putting A/C units in, tapping into base building systems" (NSYCEF #22 at 48). Plaintiff further testified that Structure Tone and its subcontractors were installing an air conditioning unit for Bank of China on the date of the accident and needed to connect the air conditioning unit to the secondary condenser water system (*id.* at 54-55).

[1] Hines Interest is a separate entity from defendant Hines 1045 Avenue of the Americas Investors LLC.

Plaintiff testified that Hines was requested to perform a drain-down/fill-up of the building's secondary condenser (cold-water) system (*id.* at 54-55). According to plaintiff, the building had several water systems, among which are the hot water and cold-water systems (*id.* at 71). Plaintiff testified specifically that he was requested to perform a drain-down of the cold-water system, that he never performed a full-building secondary condenser drain-down, but had performed four to five drain-downs of the hot water system (*id.* at 70-74).

Plaintiff's testimony of the work request to drain down or fill up the cold-water system is belied by Structure Tone's written work request to Hines on March 25, 2016. The work requested was to "[p]lease drain down the hot water supply so we can facilitate the cut and cap program" (NYSCEF #26 – Hines Construction Work Notification).

As to plaintiff's accident, plaintiff testified that he set up and climbed a ladder to complete the drain-down project by closing a valve (NYSCEF #22 at 56). Plaintiff testified that he closed the valve, and at the point, he felt the leg on the A-frame ladder move (*id.* at 57). The procedure to close the valve consisted of turning a yellow handle, which plaintiff testified he had done thousands of times (*id.* at 57 and 107). Plaintiff testified that when he did this "[the ladder] walked, it kicked out, and then it started rocking the ladder, and then when I closed the valve... the ladder went to the right, so when I was falling, I turned and I saw that nipple and I grabbed that, and then once I grabbed that, like almost like monkey bars... and I was hanging down and I felt something. . . ."I didn't know if I pulled a muscle or something. I dropped down. I landed on my feet, and then I went down and I told the head of security that I had just fell" (*id.* at 57).

Plaintiff testified that neither Structure Tone or Penguin provided him with safety equipment and that he did not communicate with them regarding the assignment or report to Structure Tone or Penguin (NYSCEF #22 at 65-66, 76, 95, 99, 115-117).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba*

Extruders v Ceppos, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Labor Law § 240[1] and 241[6] Claims

One of plaintiff's claims falls under Labor Law § 240[1], which states that "[a]ll contractors and owners and their agents... in the erection... repairing, [or] altering... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding... [and] ladders... which shall be so constructed, placed and operated as to give proper protection to a person so employed." (Labor Law § 240[1]).

Plaintiff also brings a claim under Labor Law § 241[6], which states 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work... shall comply therewith.
> (Labor Law § 241 [6]).

Labor Law §§ 240 and 241[6] only apply to workers engaged in the construction or significant structural alteration of a building or structure (*see Joblon v Solow*, 91 NY2d 457, 464-467 [1998]). Here, defendant Penguin contends that plaintiff's activity did not constitute alteration work, and therefore plaintiff is not entitled to Labor Law §§ 240 and 241[6] protection.

Structure Tone's and Penguin's motions are granted and plaintiff's §§ 240 and 241[6] claims are dismissed. Plaintiff's act of turning a valve to facilitate the drain-down of the cold-water system is not construction or alteration work but merely routine maintenance. Acts of routine maintenance are not protected by Labor Law §§ 240[1] and 241[6] (*see Esposito v New York City Indus. Development Agency*, 1 NY3d 526, 528 [2003]). Additionally, Labor Law §§ 240 and 241[6] protections do not extend to non-covered activities that constitute an "integral and necessary part" of an activity covered by the Labor Law (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]).

The case of *Peterman v Ampal Realty Corp.*, 288 AD2d 54, 54-55 (1st Dept 2001) is directly on point for the factual circumstances here. The plaintiff in *Peterman* was the managing agent's chief engineer and was asked by the general contractor to close a water valve in the ceiling so that the contractor could proceed with plumbing work (*id.*). The *Peterman* plaintiff fell off a ladder in the course of closing the valve (*id.*). The *Peterman* court concluded that

> "[s]ince plaintiff acknowledges that only engineers such as himself are authorized to close valves, that he had closed valves in the past to facilitate plumbing work, and that after closing the valve his continued presence was not necessary to the contractor's work, plaintiff cannot be regarded as a person 'employed', within the meaning of section 240(1), to perform the plumbing work that was about to begin on the lower floor, even though the task of closing the valve might be regarded as necessary thereto"

(*id.*).

The *Peterman* court continued that "plaintiff was neither hired by the owner or general contractor to perform the renovation work nor permitted or suffered to work thereon at the time of his accident, but rather was performing a task that was part of his regular duties as the managing agent's chief engineer, plaintiff has no cause of action under Labor Law § 241(6)" (*id.*).

The facts here are nearly identical to *Peterman*. Plaintiff was employed by Hines, the property manager, as a building engineer. Plaintiff was instructed by his employer, not by any of the other defendants, to close the cold-water valve as an incidental component of the alleged air conditioner installation project. Plaintiff fell from a ladder while closing the valve. Plaintiff had closed the valves many times and had performed multiple hot water system drain-downs, indicating that it was routine procedure. There is no indication that plaintiff altered or repaired the premises. As such, plaintiff's activity must be construed as routine maintenance incidental to the plumbing work. Accordingly, plaintiff's activity is not entitled to Labor Law §§ 240[1] and 241[6] protection and his claims must be dismissed.

In any event, the movants did not hire Hines or plaintiff to perform construction work on the building, a necessary precondition to Labor Law § 241[6] protection (*see Paradise v Lehrer, McGovern & Bovis, Inc.*, 267 AD2d 132, 134 [1st Dept 1999] [finding that for a plaintiff to support a Labor Law § 241(6) claim, he must demonstrate that he or his employer were (1) hired by the owner or general contractor to perform construction work on the building; and (2) that he was permitted or suffered to work on the building]). Finally, plaintiff's assertion that Hines was a construction manager does not resonate with his testimony, along with other evidence, that Hines did no construction work.

Labor Law § 200 and Common Law Negligence Claims

Labor Law § 200 "codified landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer-Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). Labor Law § 20[1] states, in pertinent part, as follows:

> "All 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."

(Labor Law § 200[1]). There are two distinct standards applicable to Labor Law § 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]; *see also Jaycox v VNO Bruckner Plazza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]).

This is a means and methods case as plaintiff's claims implicate the ladder used to perform the valve shut-off procedure.

Here, neither Structure Tone nor Penguin exercised supervisory control over plaintiff. "An implicit precondition to [the] duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano and Son*, 54 NY2d 311, 317 [1981]). Neither Structure Tone nor Penguin directed, supervised, or controlled plaintiff's work. Plaintiff was exclusively under the control of Hines. Hines exercised exclusive control over the cold-water system valves, and Hines provided the ladder that plaintiff used. Additionally, it does not appear from the evidence that Structure Tone or Penguin requested plaintiff to perform a drain-down of the cold-water system, as the work request was to drain down the hot water system. Further, neither Structure Tone nor Penguin had a contract with Hines (*see Russin*, 54 NY2d 311 at 317). As such, there is no basis to hold Structure Tone or Penguin liable under Labor Law § 200 or for common law negligence.

Cross-Claims Against Penguin

Since Penguin is not liable for plaintiff's injuries, it cannot be held liable for any of the cross-claims for common law indemnity and contribution asserted against it by co-defendants Penava, Turner Construction and PJ Mechanical (NYSCEF #99, 101-102 – Co-Defendant Complaints with Cross-Claims) (*see Stone v Williams*, 64 NY2d 639, 642 [1984] ["Our conclusion that [defendant] is not liable to [plaintiff] for the injuries sustained by him necessarily defeats the cross claims for indemnification and contribution asserted against [defendants] by [co-defendants]"]). The cross-claims for common law indemnity and contribution are dismissed.

As for the cross-claims for contractual indemnification and breach of contract asserted by Penava, Turner, and PJ Mechanical, they are also dismissed. There is no evidence of any contracts between Penguin and co-defendants. As such, the contractual cross-claims against Penguin must be dismissed.

The court notes that the cross-claims asserted against Structure Tone remain as Structure Tone did not address them in its moving papers.

Prematurity Argument

PJ Mechanical contends that both Structure Tone's and Penguin's motions for summary judgment are premature. Turner Construction makes the same objection to Penguin's motion. Both PJ Mechanical and Turner Construction's arguments are similar in that they assert that the motions are premature because they have not yet deposed plaintiff and discovery is outstanding.

As a matter of procedural background, the instant action was consolidated with two other actions on July 3, 2019, by an order of this court (NYSCEF #64 – July 3, 2019 Decision and Order). PJ Mechanical and Turner claim that subsequent to the consolidation, they have not received the previous discovery conducted in this matter and have not had the benefit of conducting new depositions.

However, it does not appear that additional discovery is necessary to resolve Structure Tone and Penguin's motions (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008] [finding that since additional discovery was unlikely to be productive in the matter, summary judgment was not premature]). Neither PJ Mechanical nor Turner Construction shows how additional discovery would alter this court's determination on the Labor Law §§ 240(1) and 241(6) claims as plaintiff's alleged activity is not protected by the Labor Law. No additional discovery is needed to resolve those claims.

As for the Labor Law § 200, common law negligence claims and cross-claims, neither PJ Mechanical nor Turner Construction show that additional discovery is needed to resolve whether Structure Tone or Penguin exercised control over plaintiff's activity. Plaintiff's own deposition reveals that he had no contact with Structure Tone or Penguin and that he did not receive instructions from them. There is also no indication that Structure Tone or Penguin had a contractual relationship with plaintiff's employer, Hines.

Turner Construction argues that a purchase order relating to the air conditioner project between Penguin and Structure Tone issued ten days prior to plaintiff's accident creates an issue of fact as to Structure Tone's and Penguin's control over plaintiff. This is a red herring. Critically, the supposed purchase order is not attached to Turner's opposition and cannot be found in the record. As such, the supposed purchase order does nothing to change this court's finding that there was no relationship between Structure Tone and Hines/plaintiff or Penguin and Hines/plaintiff. Consequently, there is no basis to deny the movants' respective motions for prematurity.

Accordingly, it is ORDERED that defendant Structure Tone's motion for summary judgment (MS 001) is granted and plaintiff's claims are dismissed as to it; it is further

ORDERED that defendant Penguin's motion for summary judgment is granted, plaintiff's claims against it are dismissed, and all cross-claims asserted against it are dismissed; it is further

ORDERED that plaintiff's claims under Labor Law §§ 240(1) and 241(6) are dismissed as to all defendants; it is further

ORDERED that the Clerk of the Court is directed to amend the caption of the action as follows:

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JASON MIANTI

Plaintiff,

-against-

STRUCTURE TONE, LLC, STRUCTURE TONE, INC.,
TURNER CONSTRUCTION COMPANY,
PJ MECHANICAL SERVICE & MAINTENANCE CORP.,
PENAVA MECHANICAL CORP.,
PACOLET MILLIKEN ENTERPRISES, INC.,
HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,
7BP OWNER, LLC.,

Defendants

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It is further ORDERED that the parties appear in Part 33 at 71 Thomas St., New York, NY 10013 for a status conference on February 19, 2020 at 9:30 a.m. to resolve further discovery issues; it is further

ORDERED that the Note of Issue date in this matter is extended to March 13, 2020; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

1/24/2020
DATE

MARGARET A. CHAN, J.S.C.

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