SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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PAOLO T. BENNICI, ANNALISA BENNICI,

Plaintiff,

- v -

ROSELAND DEVELOPMENT ASSOCIATES, LLC,ALGIN MANAGEMENT CO., LLC,DIFAMA CONCRETE, INC.,

Defendant.

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INDEX NO. 160530/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

ROSELAND DEVELOPMENT ASSOCIATES, LLC, ALGIN MANAGEMENT CO., LLC

Plaintiff,

-against-

DFC STRUCTURES LLC

Defendant.

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Third-Party
Index No. 595166/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 80, 81, 82, 83, 84, 98, 114, 115, 116, 117, 118

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 002 and 003 are consolidated for disposition. Plaintiffs' motion (MS002) for summary judgment on his Labor Law §§ 240(1), 241(6) and 200 claims is granted in part and denied in part. Defendants Roseland Development Associates LLC ("Roseland") and Algin Management Co. LLC's motion ("Algin") (MS003) for summary

judgment against third-party defendant DFC Structures LLC ("DFC") is denied and the cross-motion by DiFama Concrete Inc. ("DiFama") for summary judgment against plaintiff is granted in part and denied in part.

Background

In this Labor Law action, plaintiff Paolo Bennici (hereinafter "plaintiff") seeks damages arising out of two separate falls, which took place on consecutive days. The first fall took place on July 5, 2016 and plaintiff claims he slipped and fell on a slippery and wet condition. He insists he fell on a smooth piece of plastic HDO plywood that had petroleum residue on it and which had been exposed to rain the previous night.

Plaintiff maintains that he returned to work the next day despite experiencing severe pain and he was told to walk over a rebar grid that was improperly secured. He claims his foot fell between the layers of the rebar grid 14 inches to the deck below and the rest of his body fell onto the rebar.

He insists that defendant Roseland owned the property, defendant Algin was the management company while defendant Pavarini was the general contractor. Plaintiff worked for Pavarini. The project entailed constructing a new 62-story building. Plaintiff contends there was also a site-safety manager hired by Pavarini.

Plaintiff alleges that Pavarini subcontracted the concrete work to DFC, although he acknowledges that DiFama is the entity that actually did the work. Plaintiff argues that DFC and DiFama are used interchangeably in the industry and these two entities have shared owners and executives. He asks the Court to consider them as the same entity or, if not, to permit him to amend the complaint to add DFC as a direct defendant. He claims that DiFama installed the

slippery plywood at issue in the first accident and installed the rebar that caused plaintiff to fall concerning the second accident.

DiFama and DFC

As an initial matter, the Court must address the identities of the defendant DiFama and third-party defendant DFC. Plaintiff appears to argue that these entities are one and the same. DFC contends it had no role on site and subcontracted the work to DiFama. DFC includes the contract for the concrete work with Pavarini (NYSCEF Doc. No. 77). DiFama is not included in this contract.

DiFama and DFC argue that they are two separate entities. The Court agrees that plaintiff has not met his burden to establish that this Court should treat these entities as a single company and ignore the corporate form. Nothing on this record compels the Court to pierce the corporate veil of either entity.

Plaintiff asks, in his moving papers, for leave to amend the complaint to add DFC as a direct defendant. The Court denies that request as plaintiff did not upload a proposed amended complaint as required by CPLR 3025(b).

The Court also denies DiFama's claim that it is not a proper Labor Law defendant. The Court is unable to determine as a matter of law that DiFama was not acting as agent of the general contractor by supervising and controlling the specific work areas where plaintiff was injured (*Nascimento v Bridgehampton Const. Corp*., 86 AD3d 189, 193, 924 NYS2d 353 [1st Dept 2011]). As will be discussed in greater detail below, there are issues of fact surrounding DiFama's role in the two accidents. For the first accident, plaintiff contends that DiFama put down the plastic plywood and, with respect to the second accident, plaintiff argues that DiFama should have tied down the rebar that moved and allegedly caused plaintiff to fall. Certainly, if a

fact finder believes plaintiff's version of events, then it might also find that DiFama controlled the work areas where plaintiff suffered his accidents.

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Plaintiff brings a Labor Law § 240(1) claim only with respect to his second accident—where he slipped and fell on plywood sitting on top of unsecured rebar. The Court denies this branch of plaintiff's motion and grants DiFama's cross-motion to dismiss this claim. The fact is that the second accident was not the type of elevation-related hazard contemplated by this section of the Labor Law (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 98, 7 NYS3d 263 [2015]).

Here, plaintiff testified that he "was going to take my left foot, and my right foot just went away. The plank moved" (NYSCEF Doc. No. 88 at 83). The plank "went forward and

sideways" (*id*. at 84). He added that "My foot went with it and went in between the rebar, and my body twisted and I went down and hit my arm … and my head whiplashed" (*id*.).

In this Court's view, this second accident was more akin to a trip (or slip) and fall and not the type of accident covered by the scaffold law provision of the Labor Law. The Court adds that this was not a gravity-related accident where plaintiff fell down some amount. Rather, plaintiff says he "went down" while his foot went in between the rebar. While there is no minimum elevation required in order to seek relief under this provision of the Labor Law, the Court finds that these circumstances do not sustain this cause of action.

Labor Law § 241(6)

"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]).

For the first accident, plaintiff relies upon 22 NYCRR § 23-1.7(d). This section provides that "that no employee shall be permitted 'to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition' and requires the removal of any '[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing'" (*Potenzo v City of New York*, 189 AD3d 705, 139 NYS3d 156 [1st Dept 2020]).

Roseland and Algin claim that there is no evidence the plywood was wet. Plaintiff contends that there is no dispute that this smooth plastic plywood was not appropriate for flooring and that an expert is not needed to prove the slippery condition of the floor.

The Court grants this branch of plaintiff's motion for summary judgment as against Roseland and Algin only with respect to the first accident as the site safety manager testified that when he went to look at the plywood right after the accident, the wood was wet and it was slippery (NYSCEF Doc. No. 64 at 51-52). Nothing presented from Roseland and Algin raises an issue of fact about the wet condition of the plywood. Both plaintiff and the site safety manager saw a slippery and wet condition and plaintiff claims this caused his accident.

However, the Court denies this branch of plaintiff's motion as against DiFama (as well as DiFama's cross-motion to dismiss this claim) because it is unclear whether DiFama laid down this plywood. At the deposition of DiFama's witness, he claimed he did not know who put it down (NYSCEF Doc. No. 68 at 35-36) and plaintiff did not produce any conclusive evidence that DiFama put it down. That creates an issue of fact about whether DiFama's scope of work involved putting down plywood that was inherently slippery and unfit for use as flooring for a walkway at the construction site and who put down the plywood.

For the second incident, plaintiff relies upon section 23-2.2(a). This section provides that "General requirements. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." Plaintiff insists that the rebar used in the concrete forms was not properly tied and that when it moved, it caused plaintiff to fall.

Defendant DiFama argues that the plywood (which was on top of the rebar) was laid down so that workers could get across the work surface and that this plywood was not a "form" used for concrete work under this Industrial Code section.

The Court severs and dismisses the Industrial Code § 23-2.2(a) claim with respect to the second accident as plaintiff's accident was not caused by a form. Rather, it was caused by plywood placed on top of layers of rebar that, apparently, DiFama was going to fill with concrete. There is no dispute that plaintiff claims he was on the plywood, not the portion of the form itself. The distinction is critical— in order to raise an issue of fact, plaintiff had to show that the rebar was a proximate cause of his accident. But plaintiff testified that he fell because of the plywood on top of the rebar, not the rebar itself.

Labor Law § 200

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]).

Plaintiff claims that defendants are liable under Labor Law § 200. Roseland and Algin contend that it did not create the purportedly dangerous conditions or have actual or constructive notice of these conditions.

DiFama claims with respect to the first incident that plaintiff cannot establish that DiFama laid down the plywood that caused plaintiff to allegedly slip and fall. DiFama argues with respect to the second condition that it submitted an expert report which claims that because the rebar was the process of being installed that it did not have to tie down every piece of rebar mat. DiFama also points out that the plywood for this accident (which was on top of the rebar) was laid down by Pavarini to walk across the platform (NYSCEF Doc. No. 66 at 44 [deposition of Pavarini employee]). This raises an issue about the exact nature of the dangerous condition for the second cause of action.

The Court denies the branches of plaintiff's motion for summary judgment on the Labor Law § 200 claim related to both incidents. For the first incident, it is unclear who put down the plywood and so the Court is unable to assess whether or not anyone had the requisite notice (constructive or actual) concerning the allegedly dangerous condition. Similarly, for the second accident, there is testimony that plaintiff's employer (Pavarini) put down the plywood upon

which he fell. Therefore, the Court cannot find, as a matter of law, that any defendant is liable under principles of common law negligence.

The Court observes that notice of cross-motion by DiFama does not seek summary judgment on the Labor Law § 200 claim.

Remaining Issues

Roseland and Algin move[1] for summary judgment on their claims for contractual defense, indemnification and for failure to procure insurance. They claim that they have not yet received defense coverage from DFC despite the fact that DFC signed a contract with Pavarini that required DFC to procure insurance naming them as additional insureds.

DFC claims that Roseland and Algin must show that plaintiff's injuries arise out of DFC's work or the work of DiFama (DFC's subcontractor). DFC argues that for the first accident, there are questions about who laid down the board and, for the second accident, non-party Pavarini controlled the work site. DFC emphasizes that it did, in fact, procure commercial general liability insurance as required under the contract with Pavarini.

Roseland and Algin did not reply.

The Court denies this motion in its entirety. As DFC points out, it acquired insurance and there are outstanding issues about which parties, if any, are responsible (under a theory of negligence) for plaintiff's accidents.

Accordingly, it is hereby

[1] Although Roseland and Algin move for summary judgment dismissing the complaint in their affirmation in support, they did not make substantive arguments in support of this requested relief nor was this request included in the notice of motion.

ORDERED that plaintiffs' motion for summary judgment is granted only to the extent that the Court grants their Labor Law § 241(6) claim related to the first incident, based upon Industrial Code 23-1.7(d), against defendants Roseland Development Associates LLC and Algin Management Co. LLC and denied with respect to the remaining branches of the motion; and it is further

ORDERED that defendant Roseland Development Associates LLC and Algin Management Co. LLC's motion for summary judgment is denied; and it is further

ORDERED that DFC Structures LLC's and DiFama Concrete, Inc.'s cross-motion is granted only to the extent that plaintiff's Labor Law § 240(1) claim as well as his Labor Law § 241(6) claim with respect to the second accident (based upon Industrial Code 23-2.2(a)) are severed and dismissed and denied with respect to the remaining relief requested.

4/25/2023
DATE

ARLENE P. BLUTH, J.S.C.

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