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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 31620/2008
CALENDAR NO.: 200902773OT
MOTION DATE: 7/1/2010
MOTION NO.: 001 MOTD

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ROBERT PARRONE and DEBRA PARRONE, his wife,

Plaintiffs,

-against-

BANCKER CONSTRUCTION CORP.,

Defendant.

----------X

PLAINTIFFS' ATTORNEY:
RAPPAPORT, GLASS, GREENE & LEVINE, LLP
1355 Motor Parkway
Hauppauge, New York 11749

DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 53 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-21 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 22-39 ; Replying Affidavits and supporting papers 40-48; 49-50; 51 -53 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Bancker Construction Corp., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint, is denied as to those causes of action premised upon the alleged violation of Labor Law §200, and common law negligence and §241(6) premised upon Title 12 NYCRR sections 23-4.1, 23-4.2 and 23-4.4; and is granted as to the cause of action premised upon the alleged violation of Labor Law §240and Title 12 NYCRR section 1.5 and is dismissed with prejudice.

Plaintiffs sue, personally and derivatively, to recover damages for injuries claimed to have been sustained by the plaintiff, Robert Parrone, on December 8, 2007, at the premises known as Elmwood Street, West Babylon, New York, in the course of his employment with the Suffolk County Department of Public Works relative to repair and removal of a sewer pipe by the defendant Bancker Construction Corp. (Bancker), when he was caused to fall into a portion of an excavation ditch when the ground underneath him collapsed. It is claimed the defendants were negligent and violated common law, New York State Labor Law Sections 200, 240(1), and 241-(6) and Title 12 NYCRR sections 23-1.5(a); 23-4.1(b); 23-4.2(a) ,(e) and (h); and 23-4.4 and that the defendant had actual and constructive notice of the conditions giving rise to the occurrence.

In motion (001), the defendant seeks summary judgment dismissing the complaint on the basis that Labor Law §200 and common law negligence are inapplicable in that the defendant did not direct, supervise or control the plaintiff who was not their employee; on the basis that Labor Law §240 is inapplicable to the facts of this action; on the basis that any violations of Labor Law §240 and 241(6) has not been plead with specificity and are not applicable to the facts and circumstances of the case and the defendant did not violate any section of the Industrial Code, and any violation by the defendant of said code was not the proximate cause of the accident and plaintiff's claimed injuries.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of its motion, the defendant Bancker has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, bill of particulars and supplemental bill of particulars; and copies of the transcripts of the examinations before trial of Robert Parrone dated April 23, 2009, Raymond Rudden for Bancker dated June 17, 2009, John Brower dated July 17, 2009, Filipe Gonzales dated July 17, 2009 Matthew Roberts dated November 19, 2009, and Alfred Blechner dated November 19, 2009.

COMMON LAW NEGLIGENCE AND LABOR LAW §200

Labor Law §200 provides in pertinent part that "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...." (*Trbaci v AJS Construction Project Management, Inc, et al,* 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Supreme Court of New York, Kings County 2009). "New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work" (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]).

Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Markey et al v C.F.M.M. Owners Corp. et al,* 51 AD3d 734, 858 NYS2d 293 [2nd Dept 2008]; *Aranda v Park East Constr.*, 4 AD3d 315, 772 NYS2d 70 [2004]; *Akins v Baker,* 247 AD2d 562, 669 NYS2d 63 [1998])" (*Marin v The City of New York, et al,* 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the

activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (*Ramos v HSBC Bank et al,* 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail on a claim under Labor Law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (*Mendoza v Cornwall Hill Estates, Inc.,* 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]).

In considering the common law negligence and Labor Law §200 claim, it is evident that Bancker has not demonstrated a *prima facie* entitlement to summary judgment. It has not been demonstrated that Bancker did not exercise direction and control over the safety of the work site and there are factual issues concerning whether he directed the plaintiff where to stand at the site. During the testimony of Raymond Rudden, a foreman for the defendant Banker, he claimed he did tell Suffolk County employees to stay away from the machinery and shoring on several occasions. However, there are factual issues raised in that several of the County employees testified they were not told where to stand, and when they were at the site of the accident they were not asked to move, while others testified that at some point they were directed not to stand by the machinery being operated. Further, it has not been demonstrated that Bancker did not have knowledge of the potentially dangerous condition being created at the time of the accident. Testimony supports that the shoring was put in place to prevent cave-ins. When the shoring boards had to be removed to cut the broken pipe, the cave-in occurred. There are factual issues to preclude summary judgment concerning whether the Bancker caused or created the condition, whether Banker knew or should have known that this cave-in could occur, and whether any steps were taken prior to removal of the shoring board before cutting the pipe to make sure the area was cleared and safe and that the sheathing or remaining boards were otherwised braced to prevent a cave-in.

Accordingly, that part of motion (001) by Bancker for an order dismissing the causes of action premised upon common law negligence and Labor Law §200 is denied.

LABOR LAW §240

New York State Labor Law §240. Scaffolding and other devices for use of employees (1) provides "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

"New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation" (*see, Plotnick et al v Wok's Kitchen Incorporated, et al,* 21 AD3d 358, 800 NYS2d 37 [2nd Dept 2005]; *Handlovic v Bedford Park Development, Inc.,* 25 AD3d 653, 811 NYS2d 677 [2nd Dept 2006]). Labor Law §240 (1) was enacted 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" (*Cruz v The Seven Park Avenue Corporation et al,* 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]). In *Ortega et al v Puccia et al,* 2008 NY Slip Op 8350, 2008 NY App Div Lexis 8140 [2nd Dept October 28, 2008], the court set forth that Labor Law §240 is intended to protect

workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

"Labor Law §240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured (*citations omitted*). These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.... Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured ...." (*Natale v City of New York et al,* 33 AD3d 772, 822 NYS2d 771 [2nd Dept 2006]). It is well settled that not every hazard or danger encountered in a construction zone falls within the scope of N.Y. Labor Law §240(1) as to render the owner or contractor liable for an injured worker's damages. Rather Labor Law §240(1) is aimed at only elevation-related hazards, and accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of a required safety devices (see, *Conway et al v Beth Israel Medical Center,* supra.).

It is clear that the occurrence complained of herein was "a general hazard of the workplace, not one contemplated to be subject to Labor Law §240(1)" (*O'Keefe v Tishman Westside Construction of New York,* 2007 NY Misc Lexis 4783; 237 NYLJ 125 [Supreme Court of New York, New York County 2007]). The plaintiff was working at the site only to receive the damaged section of the asbestos pipe after it was removed from the excavated site and was to then take the pipe from the worksite. It was not a part of the plaintiff's work to be working at an elevated height. The plaintiff, by counsel, concedes that Labor Law §240(1) is inapplicable to the facts of this action.

Accordingly, that part of motion (001) by Bancker for dismissal of the cause of action premised upon violation of N.Y. Labor Law §240(1) is granted and that cause of action is dismissed with prejudice.

LABOR LAW §241-a and 241(6)

New York State Labor Law §241(6) provides in pertinent part that "All 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 persons employed therein or lawfully frequenting such places." "Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (citing *Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49). Liability may be imposed under §241(6) even where the owner or contractor did not supervise or control the worksite (*Navin et al v SJP TS, LLC et al,* 2010 NY Slip Op 30988U, 2010 NY Misc Lexis 1904 [Supreme Court of New York, New York County]). Unlike Labor Law §200, Labor Law §241(6) does not require the plaintiff to show that the defendant exercised supervision or control over the worksite (*Mendoza v Cornwall Hill Estates,* 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]). The absolute liability imposed upon owners and general

contractors pursuant to Labor Law §241(6) does not apply to prime contractors having no authority to supervise or control the work being performed at the time of the injury (*Hornicek et al v Lane, Inc.*, 265 AD2d 631, 696 NYS2d 557 [3rd Dept 1999]), but liability can be imposed upon a subcontractor only when it is in supervision or control of the area involved or the work that gives rise to the injury (*DaSilva v Jantron Industries, Inc.*, 155 AD2d 510, 547 NYS2d 370 [2nd Dept 1989]). Here it is demonstrated that Bancker was in charge supervising and controlling the area and work being conducted at the time of the accident.

New York Labor Law §241(6) merely restates the common-law duty to provide a safe working environment and thus is not sufficiently specific to support a claim (*Craemer v Amsterdam High School et al*, 241 AD2d 589, 659 NYS2d 560 [3rd Dept 1997]). As the Court of Appeals explained in *Rizzuto v L.A. Wegner Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998], "Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault" (*McDevitt et al v Cappelli Enterprises, Inc. et al*, 16 Misc3d 1133A, 847 NYS2d 903 [Supreme Court, New York County 2007]). Accordingly, in order to support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State*, 80 NY2d 959, 590 NYS2d 874 [1992]; *see also, Adams v Glass Fab.*, 212 AD2d 972, 624 NYS2d 705 [1995])" (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]; *see, Mahoney v Madeira Associates et al*, 32 AD3d 1303, 822 NYS2d 190 [Supreme Court of New York 4th Dept 2006]).

A claim asserted under Labor Law §241(6) must refer to a violation of a specific standard established by the New York Commissioner of Labor and there must be proof that the violation of such provision was the proximate cause of any claimed injury. In this regard, rules in the New York Industrial Code that mandate compliance with concrete specifications will sustain a claim under Labor Law §241(6) , while those establishing general safety standards will not (*Shields v GE*, 3AD3d 715, 771 NYS2d 249 [3rd Dept 2003]). Here, the plaintiff has pleaded that Title 12 NYCRR 23 of the State of New York, sections 23-1.5(a); 23-4.1(b); 23-4.2(a) ,(e) and (h); and 23-4.4 have been violated. An allegation of violation of at least one provision of Industrial Code 12 NYCRR §23 which requires compliance with concrete specifications supports a claim under of Labor Law §241(6) (*Ciraolo v Melville Court Assocs.*, 221 AD2d 582, 634 NYS2d 205 [2nd Dept 1955]).

12 NYCRR §23-1.5 has been deemed a general provision that cannot sustain a Labor Law §241(6) cause of action (*Krause et al v Central New York Oil and Gas Comany, LLC*, 16 Misc3d 1106A, 841 NYS2d 826 [Supreme Court of New York, Broome County 2007] citing *McGrath v Lake Tree Vil. Assocs.*, 216 AD2d 877, 629 NYS2d 358 [1955]). Therefore, it has been demonstrated that 12 NYCRR §23-1.5 does not support the plaintiff's claim with respect to Labor Law §241(6).

Accordingly, that part of the complaint (001) premised upon the alleged violation of 12 NYCRR §23-1.5 in support of the alleged violation of Labor Law §241(6) is dismissed.

12 NYCRR § 23-4.1(b)provides that no person shall be suffered or permitted to enter any trench or similar excavation where he may be exposed to slide or bank failure or cave-in unless proper safeguards for his protection have been provided.

12 NYCRR § 23-4.2(a) provides, *inter alia*, for sheeting and shoring in compliance with the rule as provided, inspection, and additional protection against slides and cave-ins shall be provided whenever necessary. Section (e) provides for, inter alia, sheeting and shoring where there is a vertical load pursuant to the specifications determined by a professional engineer licensed to practice in the State of New York, designed to support the vertical load imposed by the overhanging material as well as the load imposed by the adjacent ground. Section (h) applies to, inter alia, open excavations adjacent to a sidewalk, street, highway or other area lawfully frequented by any person, require effective guarding.

12 NYCRR § 23-4.4 provides, *inter alia*, for shoring, sheeting and bracing in compliance with the rule for any excavation; the use of shores, struts and braces of adequate size, anchored and fastened to fully resist all imposed forces, and to prevent shifting or slipping; bracing of each individual stringer; cross bracing; excavations which are generally parallel to existing underground pipe lines, utilities or structures of any kind shall be tightly sheeted or shored alongside such pipelines,, etc when they are exposed; and further provides for the dimensions of timber sheeting consistent with the depth of the excavation.

Based upon the foregoing, Bancker has failed to demonstrate entitlement to summary judgment premised upon Labor Law §241(6) which places a nondelegable duty upon owners, general contractors and their agents to comply with the specific safety rules set forth in the Industrial Code (citing *Ross v Curtis Palmer Hydro-Elec. Co.,* 81 NY2d 494, 601 NYS2d 49), and the particular rules as set forth above. Here it is asserted that Bancker violated Labor Law §241(6) and specific sections of the Industrial Code. Therefore, this factual issue must go to the jury for determination as to whether any negligence of some party to, or participant in, the construction project caused plaintiff's injury, and if proven, whether the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault (*McDevitt et al v Cappelli Enterprises, Inc. et al*, supra).

Accordingly Title 12 NYCRR 23 of the State of New York, Sections Title 12 NYCRR sections 23-4.1(b); 23-4.2(a) ,(e) and (h); and 23-4.4. serve as a basis for jury determination as to whether liability may be imposed premised upon Labor Law §241(6), and that part of the defendants' application for dismissal of the cause of action premised upon the alleged violation of Labor Law §241(6)and the alleged violation of the aforementioned rules is denied.

Dated: January 5, 2011

PAUL J. BAISLEY, JR.
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**