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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

JOHN THILMAN and KATHY THILMAN,

Plaintiff(s),

- against -

YONKERS CONTRACTING COMPANY INC.,
FIVE STAR ELECTRIC CORP.,

Defendant(s).

TRIAL/IAS PART 7

INDEX NO. 2290/07

MOTION SEQUENCE
NO. 3 & 4

MOTION SUBMISSION
DATE: November 13, 2009

YONKERS CONTRACTING COMPANY, INC.,

Third Party Plaintiff,

- against -

FIVE STAR ELECTRIC COP., and EATON ELECTRIC INC.,

Third Party Defendants.

The following papers read on this motion:

Notice of Motion	XX
Affirmation in Opposition	XX
Reply Affirmation	X
Memorandum of Law	X

Upon the foregoing papers, the Defendant/Third party plaintiff, Yonkers Contracting Company, Inc. ("Yonkers"), moves, *inter alia*, pursuant to CPLR 3212, for an Order of this Court, granting it summary judgment dismissal of plaintiffs' Labor Law §241(6), §200 and common law negligence claims.

Defendant/Third party defendant, Five Star Electric Corp. ("Five Star") together with third party defendant, Eaton Electric, Inc. ("Eaton"), also move, pursuant to CPLR 3212, for an Order of this Court, granting them summary judgment and dismissing the plaintiffs' complaint in its entirety as well as dismissing the third party complaint of the defendant/third party plaintiff, Yonkers, including it's common law

indemnification and contribution claims as against Five Star and Eaton.

The motions are determined as herein set forth below.

On September 6, 2006, plaintiff, John Thilman, a "journeyman electrician," while in the employ of third party defendant, Eaton Electric, Inc., was allegedly injured when he stepped off the lift gate of a delivery truck while unloading reels of wire at the Hunts Point Wastewater Treatment Plant ("Hunts Point") in Bronx, New York.

The Hunts Point Wastewater Treatment Plant is situated on a 62-acre site in Bronx, New York. The site is owned and operated by the New York City Department of Environmental Protection ("DEP"). In 2002, the DEP commenced refurbishment of the plant which included some new construction as well as an upgrading of existing structures and equipment. Toward that end, the DEP hired a construction manager, namely URS Corporation, to oversee the project. The project was to be performed in multiple phases, with prime contractors for each phase. The DEP hired four separate prime contractors (by trade) for the project; to wit: electrical, HVAC, plumbing and general construction.

Specifically, the DEP, pursuant to a written agreement, hired the defendant Five Star Electric Corp.,to serve as the electrical prime contractor for Phase II of the project. Five Star, in turn, subcontracted with and hired plaintiff's employer, third party defendant herein, Eaton Electric, Inc., pursuant to a written subcontract.

Like Five Star, defendant Yonkers Contracting Company, Inc. was hired by the DEP pursuant to a written agreement to serve as the prime contractor for general construction for Phase II of the project. The contract with DEP required Yonkers to construct three buildings and retrofit a fourth with new equipment, such as sluice gates, slide gates, inlet fumes and blowers. It also included some concrete work and steel work. It is undisputed that there was no contractual relationship among and between the various prime contractors.

On September 6, 2006, Eaton was accepting the delivery of a large spool of steel wire. Several Eaton employees rolled the spool off of the bed of the delivery truck and onto the dirt ground of Eaton's staging area, located at the perimeter of the site. At the time of his accident, plaintiff was assisting his fellow Eaton employees in unloading the wire. According to the plaintiff, he stepped from the truck's tailgate about six inches from the ground onto a small piece of concrete and twisted his knee in the process. He claims that defendants Yonkers and Five Star are liable for the injuries he sustained as a result of the allegedly dangerous condition at the construction site, to wit: a piece of cement, approximately six inches by eight inches and four to six inches thick. Plaintiff advances allegations of violations of Labor Law §§ 200, 241(6), and upon a theory of common law negligence.

Upon the instant motion, Yonkers, seeks, *inter alia*, summary judgment dismissal of plaintiffs' complaint. Defendant asserts six bases for summary judgment. First, that plaintiff has not alleged the violation of any New York State Industrial Code provision, which is required to support a claim based upon the alleged violation of Labor Law §241(6). Second, that Yonkers was not an owner or contractor within the meaning of Labor Law §241(6). Third, URS Corporation (not Yonkers) was responsible for the overall supervision of all trades at the project. Fourth, Yonkers was not directing or controlling the plaintiff's work. It only supervised and exercised control over the work of its own employees and the employees of the subcontractors it hired. Plaintiff's employer, Eaton, was not a subcontractor of Yonkers, rather, it was a subcontractor of Five Star. Fifth, Yonkers neither created the alleged hazard, nor did it have any notice of the hazard or a duty to the plaintiff to remedy it. Lastly, Yonkers did not contribute to, nor was it otherwise responsible for, the plaintiff's accident.

Upon the instant motion, defendant/third party defendant, Five Star Electric Corp. together with third party defendant, Eaton Electric, Inc., also seek, *inter alia*, summary judgment dismissal of plaintiff's complaint as well as dismissal of the third party complaint. Five Star and Eaton assert four bases for summary judgment. First, that plaintiff has failed to enumerate the violation of any New York State Industrial Code provision that proximately caused plaintiff's accident. Second, that Five Star did not direct, control or supervise the plaintiff's work. Third, that there is no evidence that Five Star created the debris upon which plaintiff allegedly stepped and was injured or that Five Star had actual or constructive notice the debris. Lastly, with respect to Five Star and Eaton's common law indemnification and contribution claims, there is no evidence that they were negligent and as a result, caused or contributed to plaintiff's accident.

Labor Law §241(6)

By failing to allege the violation of a single provision of the Industrial Code, this Court herewith dismisses plaintiff's Labor Law §241(6) claims. To state a claim pursuant to Labor Law §241(6), plaintiff must allege the violation of a specific rule or regulation promulgated by the Commissioner of the Department of Labor in the Industrial Code and as set forth in Article 12 of New York's Codes, Rules and Regulations (*Ross v. Curtis-Palmer*, 81 NY2d 494, 501-02 [1993]). In order to prevail on a claim under this section, plaintiff must also prove that the violation was the proximate cause of his injuries (*Id*). The rule or regulation relied upon to state a claim pursuant to Section 241(6) must be a "specific, positive command" that rises to the level of a duty imposed without regard to supervision or control (*Ross v. Curtis-Palmer*, supra at 504). Where a plaintiff can point to such a provision, failure to comply with that provision constitutes evidence of negligence sufficient to defeat summary judgment and present a claim to a jury (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]). Where a plaintiff cannot point to a "specific, positive" command but, instead, relies only on general safety standards set forth in rules or regulations, no Section 241(6) claim is stated (*Rizzuto v. L.A. Wenger Contr. Co.*, supra at 349; *Ross v. Curtis-Palmer*, supra at 504). Under such circumstances, while plaintiff may have a common law negligence claim or a claim pursuant to Section 200 of the Labor Law, any claim pursuant to Section 241(6) is dismissed (*see e.g., Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 878 [1993]). Such is the case at hand.

In this case, plaintiff has failed to allege the violation of a single provision of the Industrial Code. Indeed, in his opposition to the defendants' respective motions, counsel for plaintiff, does not dispute the notion that they have failed to enumerate the violation of a specific Industrial Code provision. Therefore as a matter of law, plaintiffs' Labor Law §241(6) claim is dismissed.

Labor Law §200 and Common Law Negligence

Plaintiff's claim pursuant to Labor Law §200 of New York's Labor Law is for all intents and purposes, identical to a common law claim for negligence (Labor Law § 200; *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, supra at 352). Said section of the Labor Law is a codification of the common law duty of an owner or general contractor to provide and maintain a safe construction site (*Id*; *Comes v. New York State Electric and Gas Corp.*, supra at 877). As such, the defendant cannot be held liable unless it knew or should have known of the condition or work practice in issue and had the ability/authority to correct the unsafe condition (*Rizzuto v. L.A. Wenger Contracting Co.*, Inc., supra at 352; *Pilch v. Board of Education of City of New York*, 27 AD3d 711 [2nd Dept. 2006]; *DeBlase v. Herbert Construction Company, Inc.*, 5 AD3d 624 [2nd Dept. 2004]). Thus, Labor Law §200 imposes liability only if the defendant exercised control or supervision over the work and had actual or constructive notice of the allegedly unsafe condition (*Jehle v. Adams Hotel Associates*, 264 AD2d 354, 355 [1st Dept. 1999]). Where a jury could rationally find that the named defendant possessed supervisory control over the work being performed sufficient to prevent the unsafe condition, summary judgment for the defendant is properly denied (*Rizzuto v. L.A. Wenger Contracting, Inc.*, supra at 352).

According to plaintiff's testimony, as well as his responses to discovery, it is clear that the claim of negligence is based upon the presence of a piece of cement upon the dirt ground, which the plaintiff admittedly did not see prior to the accident and could not at any point identify its source. Further, at his sworn examination before trial, plaintiff testified that while working at Hunts Point, his employer, Eaton directed and controlled his work. Indeed, Eaton's foreman, Francis Selback, testified that Eaton was responsible for overseeing the Eaton electricians (including the plaintiff) and providing them with their daily duties. Based upon the papers presented, this Court finds that defendants Yonkers and Five Star have met their prima facie burden of establishing that they neither directed nor controlled the method or manner in which the plaintiff conducted his work (*Amaxes v. Newmark & Co. Real Estate*, 15 AD3d 321 [2nd Dept. 2005]), and neither created nor had actual or constructive notice of the defective condition (*Beltrone v. City of New York*, 299 AD2d 306 [2nd Dept. 2002]).

In opposition, while plaintiffs have failed to raise a triable issue of fact with respect to Yonkers motion for summary judgment, they have presented questions of fact on Five Star's motion for summary judgment.

In opposing defendants' motion for summary judgment, plaintiff submits that the decision as to where it's employer, Eaton, would have their storage area as well as where they could receive deliveries was made jointly by Yonkers and Five Star and this, plaintiff argues demonstrates an exercise of control and direction such that the moving defendants can be held liable under Labor Law §200 and common law negligence. Plaintiff also argues that based upon the testimony of Five Star's general foreman, Chris Cilenti, who stated at his deposition that he was aware of and in or about September 2006, in fact saw debris in the form of broken concrete in the vicinity of the staging area where deliveries were made and in the area of the aeration tanks which were located in the vicinity of where the plaintiff's accident took place, there remain issues of fact as to control over the work site, whether the work site was reasonable and safe, and whether Five Star had knowledge of a dangerous condition and failed to remedy same.

Plaintiffs' second argument in opposition to defendants' motion for summary judgment is that as the prime contractor for general construction, Yonkers was responsible for a variety of tasks including pouring and setting of concrete in or about the Fall of 2006. Plaintiff submits that in addition to doing work on the aeration tanks which were in the vicinity of where plaintiff's accident took place, Francis Selback (on behalf of Eaton) testified that as part of Yonkers' duties on the site was to dig up roads so that the other trades could install conduit or "run steam pipe conduit in the road" (*Selback tr.*, p. 28). Selback explained that after the roads were dug and the appropriate conduit or material was laid in the roadway, Yonkers would fill it back in. Plaintiff submits that these sworn statements of fact confirm that Yonkers was working on the job, and prior to September 2006, was working in the vicinity of where Eaton received deliveries and plaintiff was injured. Plaintiff also argues that the evidence is clear that Yonkers was not only doing work around the aeration tanks in the form of both demolition and pouring cement, they were also involved in digging up the roadway in that vicinity and filling it back in. Plaintiff argues that these facts demonstrate an exercise of control in the area where plaintiff's accident took place and as such, Yonkers was also responsible as a prime contractor for general construction to maintain the area where it's work had been done. Plaintiff submits that the fact that Yonkers is responsible for the cleanup of that particular area during the time they exercised control over the same is germane to the issue of exercising control particularly because it is clear, that there was significant debris in the area in question.

Finally, with respect to notice, plaintiff submits that Chris Cilenti's testimony that he saw debris in the form of broken concrete in the vicinity of the staging area where deliveries were made as well as in the vicinity of the staging area where deliveries were made as well as in the vicinity of the aeration tanks, rebuts the notion that neither Yonkers nor Five Star lacked any notice.

Plaintiffs arguments in opposition to defendants' motion fall short of raising issues of fact with respect to Yonkers motion. As such, Yonkers motion for summary judgment is granted and plaintiffs' complaint as against Yonkers is dismissed in its entirety. With respect to Five Star however, affording the non-movant plaintiff the benefit of every favorable inference (*Szczerbiak v. Pilat*, 90 NY2d 553 [1997]; *Robinson v. Strong Memorial Hosp.*, 98 AD2d 976 [4th Dept. 1983]), this Court finds that the plaintiff has successfully presented questions of fact requiring a trial (*Id; see also Napolitano v. Dhingra*, 249 AD2d 523 [2nd Dept. 1998]).

<u>Yonkers' Motion</u>

With respect to Yonkers, plaintiffs arguments are conclusory, speculative and entirely unsubstantiated (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Aghabi v. Sebro*, 256 AD2d 287 [2nd Dept. 1998]). It is undisputed that Yonkers was a separate prime contractor hired by the DEP for the general construction during Phase II of the refurbishment project. Yonkers was thus in an analogous position to Five Star who was retained for the Electrical portion of Phase II of the project. While liability under Labor Law §200 is predicated upon the defendant's status as either an owner or general contractor who had the authority to "control the activity bringing about the injury to enable to it to avoid or correct an unsafe condition", here, plaintiff has failed to demonstrate that Yonkers, a separate prime contractor who did not hire the plaintiff or plaintiff's employer had the authority to control the delivery of the steel wire in Eaton's staging area - i.e., the activity bringing about the injury (*Comes v. New York State Electric and Gas Corp.*, supra at 877). This Court cannot overlook the fact that this accident took place in an open area of a 62-acre plot of which consisted of dirt and rocks. Further, it remains undisputed by the plaintiff that it was Eaton (his employer and Five Star's subcontractor), that chose to unload the wire roll exactly where they did and plaintiff admits that it was Eaton that decided how they would unload it. Eaton obviously could have moved the delivery a few feet one way or another to avoid the "debris" which plaintiff claims to have been the dangerous condition. More importantly, plaintiff does not dispute that Yonkers, even if it wanted to, could have controlled or otherwise directed the change in delivery of the wire. Based upon the evidence presented, it is clear to this Court that Yonkers had nothing to do with Eaton's work.

Plaintiff's argument that by virtue of its position as a prime contractor for "general construction," Yonkers assumed the responsibility to correct all defects on the premises owned by DEP is entirely unavailing. Plaintiff has failed to present any admissible evidence that defendant Yonkers was a "general contractor" for the project or that it had the responsibility for the oversight of the entire project. Rather, counsel for plaintiffs does not dispute that the construction manager for the project at hand was URS Corporation and that URS was responsible for the oversight of the entire project. Further, counsel for plaintiff does not argue that like Five Star, defendant Yonkers hired by the DEP as a prime contractor for it's own special trade. Moreover, the distinction between prime contractor and general contractor is irrelevant in the context of Labor Law §200 liability. As stated above, liability can be imposed under Labor Law §200 only if the party charged with violating it was negligent. This requirement means that the defendant cannot be held liable unless the plaintiff can demonstrate that the defendant knew or should have known of the condition or work practice in issue and had the ability/authority to correct it. Plaintiff has failed to raise any issue of fact with respect to Yonkers' knowledge or responsibility to have had the knowledge of the broken cement piece (*Murray v. City of New York*, 43 AD3d 429, 430-431 [2nd Dept. 2007]; *Eddy v. Tops Friendly Markets*, 91 AD2d 1203 [4th Dept. 1983]; *Carricato v. Jefferson Valley Mall Ltd. Partnership*, 299 AD2d 444 [2nd Dept. 2002]). In fact the evidence points to testimony which confirms that there were no complaints made to Yonkers about pieces of cement in the Eaton staging area. Additionally, there is no proper evidence to support plaintiff's conclusion that Yonkers created the small piece of concrete that the plaintiff stepped on or that Yonkers placed the concrete into Eaton's staging area. Reliance upon some testimony that Yonkers did some work with concrete in the "vicinity" of Eaton staging area at some point is entirely misplaced and unavailing. The conclusions based upon these statements are obviously nothing more than mere guesswork

or speculation and certainly do not create a proper issue of fact sufficient to defeat Yonkers' motion for summary judgment (*Febot v. New York Times Co.*, 32 NY2d 486 [1973]). Rather, it is clear to the Court that the plaintiff admitted that he does not know where the concrete came from and that he could not recall any demolition work being done within 50 feet of the accident site. Plaintiff does not know if Yonkers created the alleged concrete debris and testified that he only knows that Yonkers was working with some cranes and that Yonkers had trucks. In fact, even Five Star's general foreman, Chris Cilenti, does not offer any testimony that Yonkers created the subject hazard; Cilenti simply states that Yonkers had performed some chipping of concrete at the closest aeration tank about a 100 feet away from Eaton's staging area (*Cilenti Tr.*, p. 21). Frances Selback, Eaton's foreman, also testified that he could not recall what Yonkers was doing at the site in September 2006; just that the area where the accident occurred was open dirt terrain (*Selback Tr.*, pp. 23-24). Selback specifically denied knowing where the alleged piece of concrete came from (*Id.* at p. 57).

In light of plaintiff's failure to raise a triable issue of fact for his Labor Law §200 and common law negligence claim, defendant, Yonkers motion for summary judgment is granted and the complaint is dismissed as against it.

Insofar as there is no claim for contractual indemnification by Yonkers, Yonkers third party action against Five Star and Eaton is also dismissed.

<u>Five Star's Motion</u>

With respect to plaintiffs' common law negligence and Labor Law §200 claims as against Five Star, plaintiff again points to the fact that Five Star certainly designated where Eaton would have it's staging area and where it would be required to accept deliveries. Plaintiff argues that this is clearly an exercise of control and direction of how Eaton would be required to perform some of it's responsibilities at the job site. Plaintiff also argues that Cilenti's testimony wherein he clearly indicated a knowledge and an awareness of the condition of the staging area and specifically that he saw debris in the form of broken concrete in the vicinity of the staging area where deliveries were made as well as the vicinity of the area aeration tanks adds to the fact that this area was designated by Five Star to be used by Eaton employees and creates questions of fact as to control over the work site, whether the work site was reasonable and safe and whether Five Star had knowledge of such a dangerous condition and failed to remedy same. Further, plaintiff notes that the fact that tool box meetings were conducted weekly with Eaton employees and were run by a "safety representative from Five Star" which generally involved safety issues also presents issues of fact as to whether Five Star had the requisite control so as to be held liable under Labor law §200. Plaintiff argues that the discussion of safety methods and work place safety is inextricably intertwined with exercising control over the means and methods of how work is performed and thus questions of fact appear to exist as to the control over Eaton by Five Star on this specific project.

Further, plaintiff argues that taken together with Francis Selback's testimony (on behalf of Eaton) that when Eaton needed materials he would fax his request directly to Five Star who in turn would place the order for the materials to be delivered to the work site, the totality of the evidence demonstrates (or at the very least presents triable issues of fact) that Five Star not only exercised control or supervision over plaintiff's work, but also had actual or constructive notice of the dangerous condition.

While plaintiff's proof in support of his Section 200 and common law negligence claims cannot be characterized as anything other than weak, this court holds that the claims are sufficient to withstand summary judgment with respect to Five Star. Accordingly, Five Star's motion for summary judgment dismissal of plaintiff's Labor Law §200 and common law negligence claims as against it is denied.

This shall constitute the decision and Order of the Court.

SO ORDERED.

DATED: 1/4/2010

Roy S. Mahon
J.S.C.

ENTERED

JAN 06 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE