SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 108818/2007

ROSENTHAL, DAVID

INDEX NO.

VS

STRUCTURE TONE

MOTION DATE 6/22/09

Sequence Number : 003

MOTION SEQ. NO.

SUMMARY JUDGMENT

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the ANNEXED Memorandum Decision and order.

NB Nov. 16, 2009 @ 2 PM Pre Trial Conf at end of Duration

FILED
OCT. 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated:

JANE S. SOLOMON J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----------X

DAVID ROSENTHAL AND ERICA ROSENTHAL,

Plaintiffs,

-against-

STRUCTURE TONE, INC,
TRIZEC HOLDINGS, LLC and
BROOKFIELD PROPERTIES, LLC

Defendants.

----------X

Index No. 108818/07

DECISION AND ORDER

STRUCTURE TONE, INC,
TRIZEC HOLDINGS, LLC and
BROOKFIELD PROPERTIES, LLC

Third-Party Plaintiffs,

-against-

HATZEL BUEHLER, INC.,

Third-Party Defendant.

----------X

SOLOMON, J.:

Plaintiff David Rosenthal ("Rosenthal") was injured while working as an electrician on a construction project in a building located at One New York Plaza ("the premises"). Rosenthal sued the general contractor, Structure Tone, Inc. ("Structure Tone"), and the building owners, Trizec Holdings, LLC ("Trizec") and Brookfield Properties, LLC ("Brookfield") (collectively "Defendants"), who, in turn, filed a third-party action against Rosenthal's employer, Hatzel Buehler, Inc.

("Hatzel"), an electrical subcontractor.

Now before the court is Defendants' motion for summary judgment, seeking to dismiss Rosenthal's complaint in its entirety on the ground that there are no issues of fact regarding any duties which would require trial. The motion is granted in part and denied in part for the reasons set forth below.

FACTS

In his complaint, Rosenthal alleges that he was injured on June 19, 2006 while working on the premises when he stepped into a pre-cut opening in a computer floor. A computer floor has space underneath to accommodate cables, wires and pipes. The opening Rosenthal stepped into was created to access electrical wiring under the floor. He contends that the opening was concealed by a loose piece of "carpet remnant," possibly left by a contractor that was installing carpet at the time of the accident. The complaint alleges common law negligence, and violations of Labor Law §§ 200, 240(1) and 241(6). Co-plaintiff Erica Rosenthal asserts a derivative claim for loss of consortium.

In his deposition, Rosenthal described the area in which he fell as follows: "There was a carpet remnant. It wasn't actually on the tile itself. It was just a piece covering that area . . . It wasn't a fuel [sic] sized carpet piece. There were . . . things thrown all over the place" *(Plaintiff's*

Examination Before Trial, annexed to Notice of Motion at Ex. D, pg 39-40).

DISCUSSION

Rosenthal withdraws his claims pursuant to Labor Law §§ 200 and 240, and the common law negligence claim is deemed withdrawn as well because it duplicates the Labor Law § 200 claim. Accordingly, the only remaining claim regards violations of Labor Law § 241(6).

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 contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross* v. *Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Accordingly, it is well settled that 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 provision that is applicable given the

circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross*, 81 NY2d at 502).

In seeking to establish that there has been a violation of §241(6), plaintiff points to Industrial Code Sections 12 NYCRR 23-1.7(b)(1)(i) and 23-1.7(e)(2).

HAZARDOUS OPENINGS

Code Section 12 NYCRR 23-1.7(b)(1)(i), entitled "Hazardous Openings," requires that every "hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing . . . ."

In *Romeo v. Property Owner (USA), LLC,* the court determined that a 2 feet x 2 feet hole, 18 inches deep, in a computer floor "did not present significant depth and size to warrant the protection of [23-1.7(B)(1)(i)]" (61 AD3d 491, 492 [1st Dept. 2009]); see also, (*Messina v. City of New York*, 300 AD2d 121, 123-24 [1st Dept. 2002] [stepping into an unguarded seven inch deep drain pipe insufficient to trigger § 23-1.7(b)(1)]); (*Peccuillo v. Bank of N.Y. Co.*, 277 AD2d 93, 94 [1st Dept., 2000] [stepping into an eight inch deep "hand-hold" insufficient to trigger § 23-1.7(b)(1)]). The opening which Rosenthal stepped into was smaller and shallower than the openings in *Romeo, Messina or Peccuillo.* Accordingly, the present opening cannot be considered a "hazardous opening" within

the scope of the code.

TRIPPING & OTHER HAZARDS

Code Section 23-1.7(e)(2), entitled "Tripping and Other Hazards" requires that working areas "shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." It is sufficiently specific to support a Labor Law § 241(6) claim (*Boss* v. *Integral Constr. Corp.*, 249 AD2d 214 [1st Dept. 1998]).

Defendants make three arguments. First, they argue that there is no evidence that Rosenthal fell due to an accumulation of dirt, debris or scattered tools and materials. Second, they argue that the opening in which Rosenthal stepped was not a hazard as it was "an integral part of the floor being constructed" consistent with the work being performed. Third, defendants argue that Rosenthal did not "trip" but merely stepped into the opening, and, therefore, 23-1.7(b)(e)(2) does not apply. Rosenthal counters that the carpet remnant was debris within the meaning of the Code.

Defendants first argument goes to the nature of the carpet remnant. Defendants cite to *Romeo v. Property Owner (USA), LLC, supra*, for the principle that Rosenthal did not trip or slip on debris. In *Romeo*, the Appellate Division held that an electrician who stepped on a flooring tile, which then dislodged

causing him to fall into a hole, did not "trip" or "slip" on any debris as required by the code section (61 AD3d at 492). This situation is not analogous to the present matter. The plaintiff in *Romeo* did not slip or trip on debris. Rather, an entire portion of floor tiling shifted unexpectedly, causing plaintiff to fall. In the present case, Rosenthal alleges that he fell due to a loose piece of carpet, which he characterizes as debris, masking a hazard. Defendants have not establish as a matter of law that the carpet remnant was not debris within the meaning of the Code.

Defendants also argue that the carpet could not be debris because, at the time of the incident, the carpeting contractor was actively laying carpet on the floor. Section 23-1.7(e)(2) is not implicated when the debris or tripping instrumentality alleged is caused by the work being performed and is an integral part of the work being performed by the plaintiff at the time of his accident (*see, Tighe* v. *Hennegan Construction Co., Inc.*, 48 AD3d 201 (1st Dept., 2008); *Salinas* v. *Barney Skanska Construction Co.*, 2 AD3d 619 (2nd Dept., 2003) [debris created directly by plaintiff or his coworkers insufficient to establish violation of 23-1.7]; and *Maza* v. *University Ave. Development Corp.*, 13 AD3d 65 [1st dept. 2004] [snow, ice, wood and sheetrock that caused fall were debris because they were not integral to Plaintiff's work as a bricklayer]). Similarly, in

Boss v. *Integral Construction Corp.* (249 AD2d 214 [1st Dept. 1998]), plaintiff, an employee of a window installation contractor, tripped on sheetrock left on the work site by the defendant, a separate contractor. The court held that "[s]ince plaintiff alleged that Integral workers placed the sheetrock in a location where it caused him to trip, and there is no evidence in the record to the contrary, the motion court properly denied Integral's motion for summary judgment . . ." (249 AD2d at 215).

In the present case, there is no evidence that plaintiff or his coworkers placed the carpet remnant over the opening, rather, the remnant was from a separate contractor's work. It remains unclear from the submissions whether those contractors had people working there at the same time, in which event, the carpet remnant may have been integral to the work being performed.

Finally, defendants' argument that 23-1.7(b)(e)(2) requires the plaintiff to allege that he tripped is unpersuasive. The very title of the section states "Tripping and *Other* hazards" (Emphasis added). If tripping were the only manner in which the section could be triggered, the term "other" would not be included in its title, and to conclude otherwise would be to ignore the plain meaning of the section's text.

Defendants have established a prima facie entitlement to summary judgment with regard to Rosenthal's claim pursuant to

12 NYCRR 23-1.7(b)(1)(i). However, defendants have not established a prima facie entitlement to summary judgment with regard to the claim pursuant to 12 NYCRR 23-1.7(e)(2). As this claim remains, the derivative claim by Erica Rosenthal also remains a viable cause of action. Accordingly, it hereby is

ORDERED that the defendants' motion for summary judgment is granted in part and denied in part in accordance with the above stated reasons; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on November 16, 2009 at 2 PM.

Dated: October 15, 2009

Enter:

J.S.C.

JANE S. SOLOMON

FILED
OCT 19 2009
COUNTY CLERK'S OFFICE
NEW YORK