

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

PRESENT: EDWARD H. LEHNER
Justice

PART 19

ANTHONY BURULCICH and ROSALIND BURULCICH,

Plaintiffs,

- against -

TURNER CONSTRUCTION COMPANY, BOSTON PROPERTIES, INC., 90 CHURCH STREET LIMITED PARTNERSHIP and BOSTON PROPERTIES, LP, YORK, INC. and ATLANTIC WATER & SEWER, INC.,

Defendants.

INDEX NO. 114347/04

MOTION SEQ. NO. 002 3 & 4

MOTION DATE 10/17/08

MOTION CAL. NO. _____

TURNER CONSTRUCTION COMPANY, BOSTON PROPERTIES, INC., 90 CHURCH STREET LIMITED PARTNERSHIP and BOSTON PROPERTIES, LP,

Third-Party Plaintiffs,

- against -

NELSON AIR DEVICE CORPORATION, CW SHEETMETAL, INC., and SIRINA FIRE PROTECTION,

Third-Party Defendants.

INDEX NO. 591022/06

MOTION SEQ. NO. _____

MOTION DATE _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motions by defendants and by third-party defendants for summary judgment are decided as follows:

The claim under Labor Law § 240(1) was withdrawn by plaintiff.

The branch of defendants' motion to dismiss the claim under Labor Law 241(6) is denied as triable issues are raised as to whether the elevated lifts were, as alleged

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

by plaintiffs, operated in violation of §§ 23-9.6(c)(3) and 23-9.6(e)(3) of the Industrial Code. The alleged improper operation purportedly caused plaintiff to jump onto a pile of stored pipes to avoid being struck by the lifts that were being operated in the corridor. The only other section of the Industrial Code which plaintiffs stated at oral argument was being relied upon was § 23-1.7(e). While there was much dispute as to whether the accident occurred in a "passageway" or a "working area," the court finds that a large, stored pile of pipes could not be deemed a "tripping hazard," and plaintiff's injuries cannot be said to be caused by a violation of either paragraph of said section. The pipes were not "dirt" or "debris" nor "scattered tools (or) materials."

The claims under Labor Law § 200 and for common-law negligence are dismissed as liability "requires not only supervision or control over the injury producing work, but also actual or constructive notice of the dangerous condition that caused plaintiff's injury ... (and) liability under section 200 may not be based solely on an owner's notice of the allegedly unsafe manner in which a contractor's work is being performed" [Cahill v. Triborough Bridge and Tunnel Authority, 31 AD3d 347, 350-351 (1st Dept. 2006)]. See also, Burkowski v. Structure Tone, Inc., 40 AD3d 378 (1st Dept. 2007); Singh v. Black Diamonds LLC, 24 AD3d 138 (1st Dept. 2005). Plaintiffs have demonstrated no such control or notice.

In light of the foregoing and the absence of any proof that any of the third-party defendants were involved in the alleged improper operation of the lifts on the day of the accident, the motion of the third-party defendants to dismiss the third-party complaint is granted and the Clerk shall enter judgment accordingly, severing the remaining action.

Plaintiffs and defendants shall appear in this part on Wednesday, January 14, 2009 to resolve any outstanding discovery issues.

Dated: December 2, 2008



J.S.C.