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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

KYUNG HWAN KANG,

Plaintiff,

-against-

K&B, LLC., et al.,

Defendant.

K&B, LLC., et al.,
Third-Party Plaintiffs,

-against-

GOLDEN MANGO NY, INC.,
Third-Party Defendants.

K&B, LLC., et al.,
Second Third-Party Plaintiffs,

-against-

GOLDEN MANGO AMERICA, INC.,
Second Third-Party Defendant.

Index No. 5837/08

Motion
Date June 29, 2010

Motion
Cal. No. 34

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion and

cross motion are determined as follows:

Third-party defendant, Golden Mango, NY, Inc. and second third-party defendant, Golden Mango America, Inc.'s amended motion for an order pursuant to CPLR 3212 granting to the third-party defendant, Golden Mango NY, Inc. and the second third party defendant Golden Mango America, Inc.'s summary judgment dismissing the complaint of the plaintiff and any cross claims and/or counterclaims against Golden Mango, NY, Inc. and Golden Mango America, Inc. and the third party complaint and the second third party complaint as against the moving defendants, Golden Mango NY, Inc. and Golden Mango America, Inc. or in the alternative, for an order striking this action from the Court's trial calendar as discovery in this matter is incomplete is hereby denied.

Pursuant to a Stipulation submitted by the plaintiff dated March 17, 2010, "(1) The amended motion made by third-party defendant, GOLDEN MANGO, NY, INC. and second third-party defendant GOLDEN MANGO AMERICA, INC. returnable on May 11, 2010 be and the same is amended and limited to dismissing the third-party Complaint;" and "(2) The motion is amended and withdrawn as to any relief pursuant to CPLR 3212 seeking summary judgment dismissing the Complaint of the plaintiff or striking the action from the trial calendar."

As the motion by Golden Mango, NY, Inc. and Golden Mango America, Inc.' solely seeks summary judgment against the plaintiff and since the Stipulation dated March 17, 2010 withdraws any relief pursuant to CPLR 3212 seeking summary judgment dismissing the Complaint of the plaintiff, there is no remaining affirmative relief sought before the Court by third-party defendant, Golden Mango, NY, Inc. and second third-party defendant, Golden Mango America, Inc.

Defendants/third-party plaintiffs, Degree Operations Corporation, Barnyard, Inc. and K&B, LLC's cross motion for an order pursuant to CPLR 3212 dismissing the plaintiff, Kyung Hwan Kang's Complaint is hereby granted.

Plaintiff, Kyung Hwan Kang, maintains that on July 19, 2006, plaintiff was lawfully employed by defendant, Golden Mango America, Inc. ("Golden Mango"), and actually engaged in the course of his duties. Plaintiff further maintains that on the aforesaid day and while plaintiff was working within the scope of his employment, he was required to obtain produce in the annex building of said employer, which annex building was compartmentalized and contained refrigerated spaces for produce, meat, etc.; and while plaintiff was on a ladder in the process of getting a box of produce (pears) from a shelf in the annex, and

solely and wholly because of the defective condition of the flooring, which was broken and in disrepair and other unsafe conditions in the annex, plaintiff fell, sustaining serious and severe personal injuries. Plaintiff commenced this action to recover for serious injuries. Plaintiff argues liability against defendants pursuant to Labor Law §§ 200, 240(1), and 241(6) and under common-law negligence theories.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Defendants/third-party plaintiffs established a prima facie case that the claim under Labor Law § 200 must be dismissed. Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment(*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." (*Damiani v. Federated Department Stores, Inc.*, 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (Id.). In support of the motion, plaintiff submits the examination before trial transcript testimony of plaintiff himself, the examination before trial transcript testimony of Magdalena Koziarczyk who testified on behalf of co-defendant, Degree Operations Corp. and who testified that she is the Operations manager for Degree Operations Corp. in their Brooklyn, New York Office, and the examination before trial transcript testimony of Jeongmo Shin, who testified that he has been employed as the Grocery Manager at the subject Golden Mango store from the time of the plaintiff's accident to the present. Cross-moving defendants established a prima facie case that the plaintiff in the instant case, was not a construction site worker and therefore, the protections of the Labor Law do not apply to him.

In opposition, plaintiff failed to raise a triable issue of fact and submits an affidavit of plaintiff himself, wherein he avers that at the time of the accident he was a stock clerk at the supermarket.

Accordingly, plaintiff's claims under Labor Law § 200 must be dismissed.

Defendants/third-party plaintiffs established a prima facie case that the claim under Labor Law § 240(1) must be dismissed. Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see, Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v. State of New York*, 59 AD3d 666 [2009]; *Rau v. Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see, Gordon v. Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v. Puccia*, 57 AD3d 54 [2008]; *Riccio v. NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see, Chlebowski v. Esber*, 58 AD3d 662 [2009]; *Rakowicz v. Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v. Brogor Realty Corp.*, 45 AD3d 828 [2007]). Defendants/third-party plaintiffs proved a prima facie case that plaintiff was not engaged in a construction activity involving heights, but merely that he was attempting to secure a box of fruit from the refrigerator room of his employer's supermarket. Labor Law § 240(1) imposes liability upon owners for failing to provide safety devices necessary to protect workers involved in construction, repair, alteration, demolition, maintenance, or cleaning at elevated worksites, and who sustain injuries proximately caused by such omissions (*see, Ross v. Curtis-Palmer Hydro-Electric Co., supra*; *Guzman v. Gumley Haft, Inc.*, 274 AD2d 555 [2d Dept 2000]). Plaintiff was not involved in the "erection, demolition repairing, altering, painting, cleaning or pointing of a building or structure." (*See,* Labor Law § 240[1)].

In opposition, plaintiff failed to raise a triable issue of fact and submits an affidavit of plaintiff himself, wherein he avers that at the time of the accident he was a stock clerk at the supermarket.

Accordingly, plaintiff's claims under Labor Law § 240(1) must be dismissed.

Defendants/third-party plaintiffs established a prima facie case that the claim under labor Law 241 (6) must be dismissed. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (*see, Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." *(Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards," but rather must establish "concrete specifications." (*See, Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996]). Defendants/third-party plaintiffs established a prima facie case by establishing that plaintiff was not in an area of "construction, excavation, or demolition work" on the date of his alleged accident (*see,* Labor Law § 241[6]).

In opposition, plaintiff failed to raise a triable issue of fact and submits an affidavit of plaintiff himself, wherein he avers that at the time of the accident he was a stock clerk at the supermarket, who went in the stores refrigerator room to get a box of pears down from a shelf.

Accordingly, plaintiff's claims under Labor Law § 241(6) must be dismissed.

This constitutes the decision and order of the Court.

Dated: January 10, 2011

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Howard G. Lane, J.S.C.