

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

SUNDAY EDUWU and CYNTHIA EDUWU,

Plaintiffs,

-against-

FRENCH QUARTER V, LLC, AVALA
CONTRACTING COMPANY, INC. and
AVAYA INC.,

Defendants.

Index No: 14424/03

Motion Date: 5/11/05

Motion Cal. No: 9

The following papers numbered 1 to 15 read on this motion by defendant, FRENCH QUARTER V, LLC, for summary judgment dismissing the complaint.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits	5 - 7
Answering Affidavits-Exhibits.....	8 - 10
Replying Affidavit-Exhibit.....	11 - 13
Replying Affidavits.....	14 - 15

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows.

The defendant's motion is granted to the extent that the causes of action based upon violation of Labor Law §§ 241(6) and 200 and common-law negligence are dismissed and the remainder of the motion is denied. The plaintiff's cross-motion is denied.

This is an action to recover for injuries the plaintiff allegedly sustained on March 4, 2003 when he fell off a ladder while installing cable wire at the JFK Radisson Hotel (hereinafter the Hotel.) The Hotel is owned by the defendant, FRENCH QUARTER V, LLC, and managed and operated by INNOVATIVE HOTEL MANAGEMENT, INC.(hereinafter IHM) pursuant to a contract with the owner.

On the day of the accident, the plaintiff was a maintenance engineer employed by IHM. His general duties included the repair, maintenance and service all of the equipment at the Hotel, including the heating system, boiler, TV and telephone. On the day of his accident and after completing his routine check of the hotel's equipment, he was summoned to his supervisors office where he was met by the hotel manager, ZB Mohammed, and his supervisor, the chief engineer, Espinal. Plaintiff testified at his deposition that he was instructed to run a computer cable from the penthouse on the 12th floor to the computer room in the basement. To accomplish the task, plaintiff had to pass the cable from floor to floor through existing conduit pipes accessed via a prefabricated hole with a cover which he flipped off with a screw driver. The cable was passed through the hole into the metal conduit and pulled through another hole in the conduit in the ceiling of the floor below. The plaintiff claims that while he was standing on a ladder pulling the cable down from the ceiling of the business center, the ladder shifted and he fell to the floor and rendered unconscious.

Plaintiff commenced this action against the defendants alleging violations of Labor Law (LL) §§ 240(1), 241(6) and 200, as well as common-law negligence. More specifically the plaintiff claims that he was caused to fall because the ladder was defective because it did not have rubber grips on the bottom and the ladder was not secured so as to prevent slipping or tipping.

The owner, defendant, FRENCH QUARTER V, LLC moves for summary judgment dismissing the complaint on the grounds that that plaintiff's activity is not a covered activity within the meaning of Labor Law §§ 240(1) or 241(6) and that the Industrial Codes cited in the plaintiff's bill of particulars do not set forth a specific standard of conduct to form the basis of a violation of Labor Law § 241(6); that it cannot be held liable under Labor Law § 200 or common law negligence because it did not control, direct or supervise the plaintiff's activity or have the authority to do so; and it did not create or have actual or constructive notice of any defective or dangerous condition. The plaintiff cross-moved for leave to serve an amended bill of particulars to assert the violation of additional Industrial Codes not previously plead.

The branch of defendant's motion to dismiss the plaintiff's causes of action for violation of Labor Law § 200 and common law negligence is granted.

Labor Law § 200 is a codification of the common-law duty of an owner or an employer to provide an employee with a safe place

to work. (See, Jock v. Fien, 80 NY2d 965, 967 [1992]; Yong Ju Kim v. Herbert Const. Co., 275 AD2d 709 [2000]). "It applies to owners, contractors or their agents (Russin v. Picciano & Son, 54 NY2d 311,317 [1981]; also see Ross v. Curtis-Palmer, 81 NY2d 494, 505-506 [1993]), who exercise control or supervision over the work, or who either created the allegedly dangerous condition or had actual or constructive notice of it. (Houde v. Barton, 202 AD2d 890,891- 892, lv. dismissed 84 NY2d 977; see, Lombardi v. Stout, 80 NY2d 290, 294-295 [1992]; Jehle v. Adams Hotel Assoc., 264 AD2d 354 [1999]; Raposo v. WAM Great Neck Assoc., 251 AD2d 392 [1998]; Haghighi v. Bailer, 240 AD2d 368 [1997])" (Yong Ju Kim v. Herbert Const. Co., 275 AD2d at 712 [2000]). Where the alleged dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches. (see, Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Lombardi v. Stout, supra). The defendant established its prima facie entitlement to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action by submitting, inter alia, the deposition testimony of the plaintiff and evidence that it did not have any actual nor constructive notice of any defective condition in the ladder, nor did it control or supervise the plaintiff's work or have the authority to do so. The plaintiff testified at his deposition that he used a ladder that was in the workshop and which he had used previously, that he set the ladder "where [he] knew it would stand properly" and that he did not see anything wrong with the ladder before his accident. He did not observe anything wrong with the ladder before his accident. He further testified that his only supervisor was Esposito, the chief engineer, also an employee of IHM. In opposition, the plaintiff failed to present any evidence to raise a triable issue of fact as to whether the defendant had the authority to control the plaintiff's activities or whether the defendant had notice of any defective condition of the ladder.

The branch of the defendant's motion to dismiss the cause of action based upon violation of Labor Law § 241 (6) is granted. Accordingly, the plaintiff's cross-motion is denied as moot.

Labor Law § 241 (6) requires that all areas where construction, demolition of a building and excavation is being performed shall be arranged and operated so as to provide reasonable and adequate protection and safety to persons employed in or frequenting such areas. (See, Rizzuto v. Wenger Contracting Co., 91 NY2d 343, 348 [1998]; Allen v. Cloutier Constr. Corp., 44 NY2d 290 [1978].) The defendant has established through, inter alia, the deposition testimony of the plaintiff that there was no construction, demolition or excavation taking place at the Hotel

at the time of the plaintiff's accident. Here, the plaintiff's accident did not occur in the context of construction, demolition or excavation and, thus, Labor Law § 241 (6) does not apply to this case. (Nagel v. D & R Realty Corp., 99 NY2d 98, 103 [2002]; see also Sarigul v. New York Telephone Company, 4 AD3d 168 [2004], lv denied 3 NY3d 606 [2004]; Esposito v. New York City Industrial Development Agency, 305 AD2d 108 [2003], aff'd 1 NY3d 526 [2003].) The plaintiff failed to submit any evidence to rebut the defendant's proof or to raise a triable issue of fact in this regard. The plaintiff's claim that the plaintiff was performing construction work as defined in the Industrial Code is without merit and was rejected by the Court of Appeals in Nagel v. D & R Realty Corp., supra.

The branch of defendant's motion to dismiss the plaintiff's cause of action for violation of Labor Law § 240(1) is denied. Labor Law § 240(1) requires that in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, owners, general contractors and their agents provide proper protective equipment or devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. (See, Ross v. Curtis-Palmer Hydro-Elec. Co., supra; Rocovich v. Consolidated Edison Co., 78 NY2d 509 [1991]). Thus, for an owner or general contractor to be held absolutely liable under this statute, at the time of the accident, a plaintiff must be engaged in construction or one of the other activities covered by section 240(1) (see, Joblon v. Solow, 91 NY2d 457 [1998]; Smith v. Shell Oil Co., 85 NY2d 1000 [1995]).

The defendant asserts that the plaintiff was engaged in routine maintenance by replacing a non-functioning computer wire. The plaintiff, relying upon Weininger v. Hagedorn & Company, 91 NY2d 958 [1998], contends that plaintiff's activity constitutes the "alteration" of the building thus bringing this action within the purview of Labor Law § 240(1). Plaintiff maintains that the defendant contracted with Guest-Tek to provide high speed internet access from the guest rooms at the hotel. On the day of his accident, the plaintiff was installing computer cable through which the previously non-existent high speed internet access would be provided to the guest rooms in the hotel.

Both plaintiff and defendant submitted the Guest-Tek contract to support its own claim. The contract reflects that Guest-Tek was to provide soft ware and a "server" to upgrade the existing computer system so that it would provide high speed internet access. The contract provided that Guest-Tek would test the existing network at the Hotel, determine whether it could

support the system to be installed, and if not, then it would identify the problem and make suggestions as to possible resolutions. The Hotel was to resolve the problems at its own cost. If the existing network system was approved by Guest-Tek, then they were responsible for installing necessary networking equipment, server computer and the various software.

The defendant did not submit any evidence to establish that the work under the contract was complete; what work was required; or who would perform such work. The expected dates of commencement and completion of the work were not included in the contract. However, the date of the contract was December 31, 2002, and on April 11, 2003 the defendant signed and acknowledged completion. The plaintiff's accident occurred on March 4, 2003.

The deposition testimony of Ben-Zur, the president of defendant, and Mr. Leffman, the general manager of the Hotel, and employee of IHM was less than candid or clear regarding when the work was done; on what dates Guest-Tek was at the Hotel; whether the existing network was approved or whether modifications or additions had to be made. Accordingly, the defendant has failed to establish its entitlement to summary judgment by demonstrating that Labor Law § 240(1) is inapplicable because the plaintiff was involved in "routine maintenance" work as opposed to being involved in the installation of a new system, similar to the activity in Weininger v. Hagedorn & Company, supra.

Dated: June 22, 2005
D# 21

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J.S.C.