

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

PAUL KIRCHNER,

Plaintiff,

Index No.: 20884/06

- against -

Motion Date: 3/14/07

OCCASIONS INCORPORATED,

Motion No.: 14

Defendant.

- - - - - x

The following papers numbered 1 to 9 on this motion:

	<u>Papers Numbered</u>
Defendant's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	5-7
Defendant's Reply Affirmation-Exhibit(s)	8-9

By notice of motion, defendant seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissing the complaint.

Plaintiff opposes and defendant replies.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a fall on April 7, 2005, at premises located at 127-08 Merrick Boulevard, Springfield Gardens, N.Y. 11434.

Plaintiff is alleged to have been injured when the wheels on a baker's rack on which he was standing, failed to lock, causing him to fall. At the time of his accident, plaintiff was applying spackling on the banquet hall entrance way, part of the premises leased by defendant, Occasions.

Plaintiff was employed by Aspro Mechanical Contracting, who was engaged in a construction job at the same site. The owner of the building, MVA Enterprises, Inc., was having an additional floor added to the building by Aspro Mechanical Contracting. During the construction, some water damage was done to the floor occupied by defendant Occasion, a tenant of the building. On that day, plaintiff was instructed by his supervisor, Vincent Aspermonte, a principal and owner of Aspro Mechanical/MVA Enterprises to repair the damage.

Defendant Occasion maintains that they did not instruct, supervise, direct, or otherwise provide any working materials to plaintiff. Plaintiff does not refute this claim.

Plaintiff's complaint herein, alleges that defendant, Occasions, Inc., should be held liable for plaintiff's injuries pursuant to Labor Law §§§ 200, 240, 241(6).

"To establish liability for a violation of Labor Law § 200 and for common law negligence, the plaintiff must demonstrate that the defendants exercised supervision and control over the work performed, or had actual or constructive notice of the allegedly unsafe condition. (See, Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317 (1981); Dennis v. City of New York, 304 AD2d 611, 512 (2003))." Pilch v. Bd. of Educ. of City of N.Y., 27 AD3d 711, 713, 815 NYS2d 617 (2d Dep't 2006).

Labor Law §240(1) provides in pertinent part:

All contractors and owners and their agents...
who contract for but do not direct or control
work...

Thus, it is apparent that the statute applies to contractors, owners and their agents in the first instance. Defendant Occasion, in spite of plaintiff's allegations to the contrary, does not fit into any of the named categories. Occasion merely leases the basement floor of the premises where the accident occurred. Such assertion is not contradicted by plaintiff.

"Absolute liability under the Scaffold Act (Labor Law §240(1)) applies to contractors and owners at a work site. A lessee is liable under the statute where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor." Guzman v. LMP Realty Corp., 262 AD2d 99 (2d Dep't. 1999); Santos v. American Museum of Natural History, 187 AD2d 420, 421 (2d Dep't.

1992).

Here, plaintiff has failed to dispute defendant's assertion that it "...was neither contractor, owner, or agent...engaged in the...cleaning...[or] painting...of a building or structure. Nor did it have the authority to control the activity which brought about the injury." Id.

"To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards." See, Plass v. Solotoff, 5 AD3d 365, 357 (2d Dep't. 2004); Ross v. Curtis Palmer Hydro Elec. Co., 81 NY2d 94 (1993); Ferrero v. Best Modular Homes, Inc., 33 AD3d 847, 851, 823 NYS2d 477 (2nd Dep't. 2006). "In addition, the provision must be applicable to the facts of the case." See, Singleton v. Citnalta Constr. Corp., 291 AD2d 393, 394 (2d Dep't. 2002). Id. 851.

Plaintiff has similarly failed to sustain it's burden pursuant to Labor Law § 241(6).

Accordingly, defendant has made a prima facie case for summary judgment and dismissal and plaintiff has failed to refute the same.

It is therefore,

ORDERED, that the motion is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court, upon the submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: Jamaica, New York
April 19, 2007

JOSEPH P. DORSA
J.S.C.