

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D24166
T/prt

_____AD3d_____

Argued - May 22, 2009

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-08656

DECISION & ORDER

Patrick J. Hirsch, plaintiff, v Blake Housing, LLC,
et al., defendants, Empire Developers Corp.,
defendant third-party plaintiff-appellant; Absolute
Electrical Contracting, Inc., et al., third-party
defendants; Bass Plumbing & Heating Corp.,
third-party defendant-respondent.

(Index No. 5208/04)

Mound Cotton Wollan & Greengrass, New York, N.Y. (Michael Rubin of counsel),
for defendant third-party plaintiff-appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville, N.Y. (Michael T. Reagan of
counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, the defendant third-party plaintiff Empire Developers Corp. appeals from so much of an order of the Supreme Court, Kings County (Hinds-Radix, J.), dated July 24, 2008, as, in effect, denied that branch of its motion which was for summary judgment on its third-party cause of action for contractual indemnification insofar as asserted against the third-party defendant Bass Plumbing & Heating Corp.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff, an employee of the third-party defendant Bass Plumbing & Heating Corp. (hereinafter Bass), was injured while working at a construction site. Bass was a subcontractor of the defendant third-party plaintiff Empire Developers Corp. (hereinafter Empire), the general contractor. The contract between Empire and Bass required Bass to indemnify Empire “from and

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against claims, damages, losses and expenses . . . arising out of or resulting from performance of [Bass]’s Work under this [contract] . . . but only to the extent caused by the negligent acts or omissions of [Bass].” Empire moved, inter alia, for summary judgment on its third-party cause of action for contractual indemnification insofar as asserted against Bass. The Supreme Court, in effect, denied that branch of Empire’s motion.

“[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc. v Gealtex Remodeling Corp.*, 58 AD3d 660, 662; see General Obligations Law § 5-322.1). “Where, [as here], a plaintiff’s injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition” (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708-709; see *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576; *Nasuro v PI Assocs. LLC*, 49 AD3d 829, 830).

Empire failed to establish, prima facie, that it lacked control over the work site or notice of the allegedly dangerous condition, thus precluding a finding, as a matter of law, that it was not negligent (see *Keating v Nanuet Bd. of Educ.*, 40 AD3d at 708). Moreover, Empire was required to establish that Bass was negligent as a matter of law in order to demonstrate its entitlement to summary judgment (see *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738), an issue which cannot be determined on this record (see *id.*; *Vyadro v City of New York*, 2 AD3d 519, 521). Since the alleged negligence of Empire and Bass, if any, cannot be determined as a matter of law, that branch of Empire’s motion which was for summary judgment on its third-party cause of action for contractual indemnification insofar as asserted against Bass was properly, in effect, denied (see *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d at 739; *Vyadro v City of New York*, 2 AD3d at 521; *Keating v Nanuet Bd. of Educ.*, 40 AD3d at 708).

Empire’s remaining contentions are without merit.

SKELOS, J.P., SANTUCCI, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court