

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

D31079  
H/kmb

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Argued - March 22, 2011

WILLIAM F. MASTRO, J.P.  
ANITA R. FLORIO  
ARIEL E. BELEN  
CHERYL E. CHAMBERS, JJ.

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2010-02249

DECISION & ORDER

Garry M. White, et al., appellants, v Village  
of Port Chester, respondents, et al., defendants  
(and a third-party action).

(Index No. 10669/05)

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Rutberg & Associates, P.C. (Pollack, Pollack, Isaac & DeCicco, New York, N.Y.  
[Brian J. Isaac and Michael H. Zhu], of counsel), for appellants.

The McDonough Law Firm, LLP, New Rochelle, N.Y. (Jeffrey S. Peske of counsel),  
for respondents Village of Port Chester, Port Chester IDA, G&S Investors, G&S Port  
Chester, LLC, G&S Investors/Jersey City, L.P., G&S Investors/Jersey City II, L.P.,  
G&S Investors/Willow Park, L.P., Willow Park Enterprises, Inc., HR Construction  
and Renovations, Inc., and Farmingdale Maintenance Services, Inc.

LeClair Ryan, New York, N.Y. (Timothy E. Shanley of counsel), for respondents Etre  
Associates, Ltd., ELQ Industries, and B.M.B. Leasing Corporation.

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne, N.Y. (Jeffrey Briem of  
counsel), for respondent March Associates, Inc.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as  
limited by their brief, from so much of an order of the Supreme Court, Westchester County (Loehr,  
J.), entered January 28, 2010, as granted those branches of the separate motions of the defendants  
Village of Port Chester, Port Chester IDA, G&S Investors, G&S Port Chester, LLC, G&S  
Investors/Jersey City, L.P., G&S Investors/Jersey City II, L.P., G&S Investors/Willow Park, L.P.,

May 10, 2011

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Willow Park Enterprises, Inc., HR Construction and Renovations, Inc., and Farmingdale Maintenance Services, Inc., the defendant March Associates, Inc., and the defendants Etre Associates, Ltd., ELQ Industries, and B.M.B. Leasing Corporation which were for summary judgment dismissing the complaint insofar as asserted against each of them.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion of the defendants Village of Port Chester, Port Chester IDA, G&S Investors, G&S Port Chester, LLC, G&S Investors/Jersey City, L.P., G&S Investors/Jersey City II, L.P., G&S Investors/Willow Park, L.P., Willow Park Enterprises, Inc., HR Construction and Renovations, Inc., and Farmingdale Maintenance Services, Inc., which was for summary judgment dismissing the complaint insofar as asserted against them and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof granting that branch of the motion of the defendants Etre Associates, Ltd., ELQ Industries, and B.M.B. Leasing Corporation which was for summary judgment dismissing the complaint insofar as asserted against them and substituting therefor a provision denying that branch of their motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the defendant March Associates, Inc., payable by the plaintiffs, and one bill of costs to the plaintiffs payable by the defendants Village of Port Chester, Port Chester IDA, G&S Investors, G&S Port Chester, LLC, G&S Investors/Jersey City, L.P., G&S Investors/Jersey City II, L.P., G&S Investors/Willow Park, L.P., Willow Park Enterprises, Inc., HR Construction and Renovations, Inc., and Farmingdale Maintenance Services, Inc., and the defendants Etre Associates, Ltd., ELQ Industries, and B.M.B. Leasing Corporation appearing separately and filing separate briefs.

As part of an urban renewal project, the defendant Village of Port Chester leased certain real property to a corporate entity known as G&S Port Chester, LLC (hereinafter G&S). G&S entered into agreements with several construction contractors, including the defendant March Associates, Inc. (hereinafter March Associates), as general contractor in the construction of the interior portions of a building known as “retail G,” and the defendant Etre Associates, Ltd. (hereinafter Etre), as contractor of the roadway and sidewalk areas outside retail G. Etre hired the defendant A.G. Construction Corp. to assist in the installation of the sidewalk by pouring the concrete.

In the course of delivering steel to retail G, the injured plaintiff, the employee of a nonparty trucking company, parked his truck alongside a sidewalk area where newly-poured concrete was covered with a plastic sheet that extended into the roadway. In order to reach the chains that secured the steel to the truck, the injured plaintiff stepped onto the edge of the plastic that extended into the road, tripped on a brick that was under the plastic, and allegedly sustained injuries. The injured plaintiff and his wife, suing derivatively (hereinafter together the plaintiffs), commenced this action against the Village of Port Chester, G&S, and related entities (hereinafter collectively the Port Chester defendants), along with March Associates, Etre, and related entities (hereinafter collectively the Etre defendants), alleging violations of Labor Law § 241(6), § 200, and common-law negligence.

Where, as here, the injured plaintiff's accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 and common-law negligence will be imposed if the property owner

created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time (*see Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 147; *Aragona v State of New York*, 74 AD3d 1260, 1260-1261; *Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940).

Here, the Port Chester defendants failed to satisfy their prima facie burden of establishing their entitlement to judgment as a matter of law. The Port Chester defendants failed to offer sufficient proof as to the last time they inspected the sidewalk or that the brick underneath the plastic sheet could not have been discovered upon a reasonable inspection (*see Colon v Bet Torah, Inc.*, 66 AD3d 731, 732; *cf. Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 799-800).

A general contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition (*see Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d at 940; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 707).

Here, the Etre defendants, as the contractor hired to install the sidewalk, failed to establish, prima facie, that they lacked control over the sidewalk and, further, failed to establish, prima facie, that they neither created nor had actual or constructive notice of the alleged dangerous condition (*see Harsch v City of New York*, 78 AD3d 781, 783).

However, March Associates, as the contractor for six interior spaces at the subject construction site demonstrated, prima facie, that it lacked control over the sidewalk (*see Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695). In opposition, the plaintiffs failed to raise a triable issue of fact.

Labor Law § 241(6) imposes a nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502; *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737). In order to hold a subcontractor or statutory agent of the owner or general contractor absolutely liable under Labor Law § 241, there must be a showing that the subcontractor or agent had the authority to supervise and control the work giving rise to these duties (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318; *Soltes v Brentwood Union Free School Dist.*, 47 AD3d 804, 805; *Everitt v Nozkowski*, 285 AD2d 442, 443). Here, the Etre defendants failed to establish, prima facie, that they lacked the authority to supervise and control the work giving rise to the injured plaintiff's accident (*see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 520-521; *Kelly v LeMoyne Coll.*, 199 AD2d 942, 943). However, March Associates met its prima facie burden of establishing its entitlement to judgment as a matter of law and, in opposition, the plaintiffs failed to raise a triable issue of fact.

Since the injured plaintiff was in the course of delivering materials for use at the construction site, and Labor Law § 241(6) applies to workers and all those lawfully frequenting the construction site, the Port Chester and Etre defendants failed to eliminate all triable issues of fact as to whether the injured plaintiff was engaged in construction work and, thus, entitled to the protection

of Labor Law § 241(6) (*see Simms v Elm Ridge Assoc.*, 259 AD2d 538, 539; *Williams v G.H. Dev. & Constr. Co.*, 250 AD2d 959, 961; *cf. Vernieri v Empire Realty Co.*, 219 AD2d 593, 595).

The plaintiffs' cause of action to recover damages pursuant to Labor Law § 241(6) is premised on a violation of 12 NYCRR 23-1.7(e)(2), which is a sufficiently specific, positive command (*see Lane v Fratello Constr. Co.*, 52 AD3d 575, 576). This provision of the Industrial Code was adequately pleaded in the plaintiffs' bill of particulars. Moreover, the Port Chester and Etre defendants failed to establish, *prima facie*, that 12 NYCRR 23-1.7(e)(2) is inapplicable to this case (*see Treu v Cappelletti*, 71 AD3d 994, 998). The injured plaintiff testified at his deposition that the brick in question was underneath the plastic sheet, and not on top of the sheet holding it down. Thus, the Port Chester and Etre defendants failed to eliminate all triable issues of fact as to whether the brick was integral to the work being performed or was debris (*see Riley v J.A. Jones Contr., Inc.*, 54 AD3d 744, 745).

The parties' remaining contentions either are academic in light of our determination or without merit.

Accordingly, the Supreme Court properly awarded summary judgment dismissing the complaint insofar as asserted against March Associates, but should not have awarded summary judgment dismissing the complaint insofar as asserted against the Port Chester defendants and the Etre defendants.

MASTRO, J.P., FLORIO, BELEN and CHAMBERS, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court