

[\*1]

Decided on April 17, 2008

**Supreme Court, Queens County**

**Maleek Aiken and Melody Aiken, Plaintiffs,**

**against**

**Central Parking System of New York, Inc., Kinney Parking System, Inc. d/b/a Central Parking System, Amedeo Hotels Limited Partnership and "John Doe" ("John Doe" purported to be the driver of the motor vehicle), Defendants. Amedeo Hotels Limited Partnership, Third-Party Plaintiff, H & L Electric, Inc., Third-Party Defendant.**

1105/06

Joseph P. Dorsa, J.

By notice of motion, defendant/third-party plaintiff, Amedeo Hotels Limited Partnership [\*2](Amedeo), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of plaintiffs' complaint and any and all cross-claims and counterclaims as against them; or in the alternative awarding defendant/third-party plaintiff, Amedeo, judgment as against Central Parking System of New York, Inc. and Kinney Parking System, Inc. d/b/a Central Parking System (Central Parking) and/or H & L Electric, Inc. on their claim for indemnity).

Plaintiffs file an affirmation in opposition to the motion and cross-motion noted below. Defendant Central Parking files an affirmation in opposition.

Third-party defendant, H & L Electric Inc., also opposes and cross-moves for summary judgment and dismissal of the third-party complaint and any and all cross-claims as against them.

Amedeo files an opposition to the cross-motion and reply to the oppositions to their motion. Third-party defendant, H & L Electric, Inc. files two replies.

The underlying cause of action is a claim by plaintiff, Maleek Aiken, for personal injuries alleged to have been sustained in a work place accident on May 11, 2005, in the parking garage of the New York Palace Hotel in New York, NY

The New York Palace Hotel is owned and operated by defendant Amedeo Hotels Limited Partnership (Amedeo). The defendant hotel entered into a licensing agreement which was ultimately assigned to defendant Central Parking to operate the parking garage. Meanwhile, plaintiff's employer, H & L Electric, Inc. (H & L), entered into a construction agreement with the defendant hotel to install an emergency generator system.

While the installation was on going, the garage continued to operate. Access to parking from street level required garage attendants to utilize two elevators from the street to where the cars were backed out, and parked.

On the day in question, plaintiff was installing pipe in an area approximately forty (40) feet away from the elevator doors. Plaintiff was standing on the fourth rung of a six (6) foot extended "A" frame ladder when one of Central Parking's employees backed a car out of the elevator, striking the opposite side of the ladder. Plaintiff was thrown five (5) to seven (7) feet.

Plaintiff alleges that defendant's employee was negligent in failing to check that the area was clear before backing into him.

Defendant responds that plaintiff, did not, but should have placed red or orange cones around the area where he was working. Said failure to do so, defendants maintain, is a factor to be considered in ascribing comparative negligence to plaintiff. Moreover, defendants maintain that there is only plaintiff's version of events, making the account of the accident suspect.

Plaintiff responds that such a claim is inaccurate; that there were at least two witnesses to [\*3]the accident. One of the witnesses, plaintiff's co-worker, Sal, yelled "stop" to defendant driver in an effort to stop him from crashing into the ladder. The other witness was plaintiff's manager/foreman, who was standing behind him. In any event, even if plaintiff was the sole witness, such a fact would not be a bar to his recovery.

Among those who testified at examinations before trial were the plaintiff, Maleek Aiken; Edwin Yactayo, the garage manager for Central; Charles Peter Grimm, the general foreman for H & L; Mark Dehnert, director of property operations for the NY Palace Hotel; and, Anderson Joseph, the person subsequently identified as the only "Central" parking attendant who could have driven the vehicle that backed into plaintiff's ladder.

Although Mr. Joseph denies that he was the driver who backed into the ladder, it is undisputed that he was working on the date in question and that he was the only attendant working who fit the description of the driver.

Plaintiff worked in the same general area for a few days prior to the accident, without incident. In fact he had worked there all morning on the same day without any problems. The accident occurred in the afternoon, after lunch. Plaintiff maintains that he did not use plastic cones or tape to set off his work area, and that, in fact, he had not seen any of the workers doing so.

In contrast, plaintiff's supervisor, Peter Grimm, maintains that he told his workers to use cones, caution tape and rolling dumpsters to block off areas where they were working, and that whoever was going up on a ladder was required to secure the area.

Mr. Grimm says he complained about the parking attendants driving too fast. He further maintained that he worked out a system for drivers to honk their horns and that his workers, in response, would get down and move the ladders as they went by.

On the date in question, the driver did not honk, or stop and get out of his car until after the ladder was struck.

Mark Dehnert maintains that the hotel took no role in direct work supervision or safety standards for the parking lot attendants for Central or the workers from H & L Electric, Corp.

Plaintiffs and co-defendant Central, however, argue that since defendant/third-party plaintiff Amedeo could shut down the garage or any portion thereof at any time, such authority constituted the requisite supervisory control to warrant imposing liability.

In particular plaintiff and Central note that defendant Amedeo shut down the whole operation on occasions when VIP guests were at the hotel, or when the work caused broken pieces of cement to fall on guest vehicles.

At the outset, the Court declines to disregard H & L Electric, Corp.'s cross-motion as [\*4]untimely as the Court notes ample good cause shown for the very brief lateness in filing.

Plaintiffs maintain cause(s) of action against defendant Amedeo based on Labor Law §§ 200, 240(1), and § 241(6). Defendant Amedeo maintains that this incident does not fall within the ambit of the so-called "Scaffold Law" § 240(1), as there is no claim that plaintiff's accident was caused by defendant having provided defective equipment, or failed to provide equipment for plaintiff's safety.

Defendant further maintains that the provision of the Industrial Code cited by plaintiffs is inapplicable under these circumstances as that regulation refers to public vehicular traffic, not the conditions herein.

In response, plaintiffs fail to rebut defendant's assertions regarding their claims based on Labor

Law § 240(1) and § 241(6), thereby conceding defendant's demand for dismissal of those claims.

Plaintiffs and co-defendant Central, however, continue to maintain that defendant owes a duty to plaintiff pursuant to Labor Law § 200 based on what they characterize as defendant Amedeo's "supervisory" control of the work project.

"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 NY*, 27 AD3d 711 , 713, 815 NYS2d 617 (2d Dep't 2006).

"Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe work place (*see Rizzuto v. LA. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993); *Molyneau v. City of New York*, 28 AD3d 438 (2006); *Paladino v. Society of NY Hosp.*, 307 AD2d 343, 344 (2003). If the allegedly dangerous condition arises from the contractor's methods and the owner or general contractor exercises no supervisory control over the operation, liability does not attach under the common law or under Labor Law § 200 (*see Comes v. New York State Elec. & Gas Corp.*, *supra* ; *Lombardi v. Stout*, 80 NY2d 290, 295 (1992); *Mas v. Kohen*, 283 AD2d 616 (2001); *Cuartas v. Kourkoumelis*, 265 AD2d 293 (1991))." *Peay v. NYC School Constr. Auth.*, 35 AD3d 566 , 567, 827 NYS2d 189 (2d Dep't 2006).

This applies even in circumstances, such as here where the owner has the authority to stop the work altogether. "Contrary to plaintiff's contention '[t]he construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees.' *Warntiz v. Liro Group*, 254 AD2d 411, 411-412 (1998), quoting *Buccini v. 1568 Broadway Assoc.*, 250 AD2d 466, 468-469 (1998)." [\*5] *Id.* at 567.

"...[I]n order to recover against an owner or general contractor for alleged defects or dangers arising from a subcontractor's methods or materials, it must be shown that the party charged with negligence exercised some supervisory control over the operation. Mere notice of unsafe methods of performance is not enough to hold the owner or general contractor vicariously liable under this section" (citations omitted) *Colon v. Lehrer, McGovern, Bovis*, 259 AD2d 417, 419, 687 NYS2d 130 (1 Dep't 1999). (*See also, Mercado v. TPT Broadway Assoc.*, 38 AD3d 732 , 832 NYS2d 93; *Bourne v. Utopia I, LLC*, 39 AD3d 445 , 833 NYS2d 226; *Gittlesone v. Coolwind Ventilation Corp.*, 46 AD3d 855, 848 NYS 709).

Thus, H & L Electric Corp.'s claims that they complained to Dehnert about the way the attendants drove the vehicles, and that on occasion Amedeo would shut down the operation or even block out areas where concrete might fall on guest's vehicles was insufficient to establish supervisory control within the meaning of Labor Law § 200. Having established a prima facie entitlement to summary judgment as a matter of law, plaintiff and co-defendant Central failed to raise any triable issues of fact in response. *Murray v. City of New York*, 43 AD3d 429 , 430-431,

841 NYS2d 341 (2d Dep't 2007).

Accordingly, upon all of the foregoing, defendant Amedeo's motion for summary judgment and dismissal of the plaintiffs' complaint and any and all cross and counterclaims as against them is granted. It follows, therefore, that third-party defendant H & L's cross-motion for summary judgment and dismissal of the third-party complaint and any and all cross-claims is likewise granted.

Therefore, it is hereby

ORDERED, that the complaint and any and all cross and counter-claims as against defendant Amedeo Hotels Limited Partnership are hereby severed and dismissed, and the Clerk is directed to enter judgment in favor of said defendant; and, it is further

ORDERED, that the third-party complaint and any and all cross and counterclaims as against third-party defendant, H & L Electric Corp. are severed and dismissed, and the Clerk is directed to enter judgment in favor of said third-party defendant, and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York

April 17, 2008

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**JOSEPH P. DORSA**

**J.S.C.**