

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

DILIA SERNA, x

Plaintiff,

- against -

WFP TOWER A CO., L.P. and DOW JONES
& COMPANY, INC.

DOW JONES & COMPANY, INC., x

Third-Party Plaintiff,

- against -

BLACKMON-MOORING STEAMATIC
CATASTROPHE, INC. a/k/a BMS CATASTROPHIC,
INC.,

Third-Party Defendant.

WFP TOWER A CO. L.P., x

Second Third-Party Plaintiff,

- against -

BLACKMON-MOORING STEAMATIC CATASTROPHE,
INC. a/k/a BMS CATASTROPHE, INC.,

Second Third-Party Defendant.

x

The following papers numbered 1 to 30 were read on this:
(1) motion by the defendant/third-party plaintiff Dow Jones &
Company, pursuant to CPLR 3212, for summary judgment dismissing the
complaint and all cross claims interposed against it; (2) cross
motion by the defendant/second third-party plaintiff WFP Tower A
Co., L.P., pursuant to CPLR 3212, for summary judgment dismissing

the complaint and all cross claims and counterclaims interposed against it, and for partial summary judgment on the issue of the liability of third-party defendant/second third-party defendant Blackmon-Mooring Steamatic Catastrophe, Inc. a/k/a BMS Catastrophe, Inc. for contractual and common-law indemnification; and, (3) cross motion by the plaintiff, pursuant to CPLR 3025 and 3043, for leave to serve a supplemental bill of particulars or, in the alternative, for leave to amend her bill of particulars.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Notice of Cross Motion - Affidavits - Exhibits ...	9-12
Answering Affidavits - Exhibits	13-21
Reply Affidavits	22-30

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

I. The Relevant Facts

A. Background

As a result of the World Trade Center disaster that occurred on September 11, 2001, the premises known as 1 World Financial Center, located at 200 Liberty Street in Manhattan (building) was damaged and required remediation work. That work included asbestos abatement, removal of debris and the replacement of windows.

The defendant/third-party plaintiff Down Jones Company (DJ) was a tenant of floors 9-16 of the building, pursuant to a lease with the building owner, Brookfield Financial Properties (BFP). The defendant WFP Tower A. Co., L.P. (WFP) is a subsidiary of BFP, and had an on-site presence at the building. BFP, the building owner, is not a party to this action.

Following the disaster, DJ and all other tenants were required to vacate the building. During this time, BFP entered into a service contract with Blackmon-Mooring-Steamatic Catastrophe, Inc., a/k/a BMS Catastrophe, Inc. (BMS), for the performance of asbestos

abatement and other remedial work.¹ BMS subcontracted with ETS Contracting, Inc. (ETS), for ETS to perform the asbestos abatement at the building.²

On May 26, 2002, the plaintiff Dilia Serna (Serna) was employed by ETS and, during the course of her work at DJ's rented premises, was injured when her right foot went into a hole that had been covered by plastic.

In this action commenced against WFP and DJ, Serna seeks damages based upon violations of Labor Law §§ 240[1], 241[6] and 200 and based on common-law negligence. In her bill of particulars she alleges a violation of, inter alia, Industrial Code provisions 12 NYCRR 23-1.5, 23-1.7, 23-1.16 and 23-1.21.

In response to the complaint DJ: (1) cross-claimed against WFP and others seeking contribution and common-law indemnification; and, (2) commenced a third-party action against BMS seeking the same relief. In response to the third-party complaint, BMS cross-claimed against WFP and DJ for contribution and contractual and common-law indemnification.³

In response to the complaint, WFP: (1) cross-claimed against DJ for contribution and contractual and common-law indemnification; (2) filed a second third-party summons and complaint against BMS seeking the same relief; and, (3) cross-claimed against BMS for the same relief. In response to the second/third-party complaint

1

The BFP/BMS contract contains an indemnification provision requiring each to indemnify the other and its agents for all claims and damages attributable to the negligence or other fault of the indemnifying party, and entitling the prevailing party in any litigation to reasonable attorney's fees and costs of suit from the non-prevailing party.

2

The contract between BMS and ETS does not contain an indemnification provision.

3

By so-ordered stipulation dated January 20, 2006 (Weiss, J.), the parties agreed to amend the caption to reflect that the only defendants in this action were WFP and DJ, that the fourth party action was a second/third-party action, and that BMW was the only third-party defendant and second/third-party defendant.

interposed by WFP, BMS cross claimed against WFP and DJ for the same relief.

B. Examinations Before Trial

During her examination before trial (EBT), Serna stated that a supervisor from ETS and/or BMS directed her on the job. At the time of her accident, she was on the 10th floor performing asbestos abatement on ventilation ducts in the building.

Areas of the floor were covered with plastic, which she had seen used on other floors where she worked. ETS workers regularly used the plastic.

After she cleaned several ventilation ducts, a BMS employee told her that they were going to another floor. She descended the ladder, unplugged her equipment and, as she walked or moved on the floor, plastic covering the floor area broke, and her right foot went into a hole that had been covered by the plastic. She had seen other, similar holes in the floor, and believed that they were for computer hook-ups, because they were like outlets.

During his EBT, a BMS representative stated that BMS entered into a contract with DJ dated November 27, 2001 for the removal and disposal of DJ's furniture, and that work was completed by December, 2001.

In March or April, 2002, BMS entered into a contract with BFP to clean all heating, ventilation and air conditioning (HVAC) equipment in the building on all floors, and that contract was in effect on May 26, 2002. BMS decided how the work for BFP was to be performed.

BMS entered into a separate contract with DJ for remediation work on a smaller area in the building. On the date of the accident, BMS was performing work at the building pursuant to its contract with BFP, and not pursuant to its contact with DJ. At that time, DJ was not occupying the building. An environmental company hired by DJ went to DJ's floors daily to take samples of the interior of the HVAC ducts, and to approve the work being performed by BMS pursuant to BMS' contract with BFP.

ETS workers performed work under BMS' direction, supervision and control. ETS supervisors were on site to direct ETS personnel, but BMS directed the ETS supervisors. BMS did not have the right to hire or fire ETS workers. BMS directed and supervised Serna's work on the day of the accident.

During his EBT, a former employee of WFP stated that at the time of the accident, he was WFP's assistant building manager and oversaw the maintenance and operation of the building. After the World Trade Center disaster, the entire building was empty except for his staff, and a DJ contact person. DJ and other tenants used BMS to perform cleanup work for them after the "gross" cleanup by BMS.

The premises rented by DJ had raised metallic computer floors which sat on pedestals six inches above a concrete slab floor, which made it easier to run communication and electrical cables. The raised floors could be unscrewed and lifted to expose the floor underneath, and they were removed for the asbestos remediation work. WFP did not have any oversight over the remediation.

During his EBT, a DJ general services manager in charge of maintenance, cleaning, construction and purchasing stated that BMS and ETS worked directly for BFP on the date of the accident, performing the "gross" cleanup.

DJ entered into a separate contract with BMS to clean a self-sustaining "building within the building" that DJ constructed when it initially moved to the premises. The structure was built to ensure that DJ never missed a day of publication, and it had its own air conditioning system, ducts and emergency generators. Because the structure was owned by DJ, DJ hired BMS to clean the ducts in that structure only, and that work occurred after BMS performed its work for BFP. DJ did not have contractors in the building while BMS and ETS were performing the gross remediation pursuant to the contract with BFP.

The floors of DJ's rented premises were raised to allow ease of moving and installation of cables and other items beneath them. The raised floors had hatches about one foot by 10 inches in size, with a depth to the concrete floor below of about eight inches. Each floor had hundreds of the hatches with hinged covers to enable cables to be plugged into them. Many of the hinges were damaged or removed as a result of the disaster, and they were repaired or replaced after the cleanup. As a result, during the time of remediation, there may have been openings in the raised floors.

During his EBT, an ETS project supervisor stated that he ensured compliance with environmental rules and regulations, communicated with BFP, coordinated work and materials, and ensured the use of safety equipment and the timeliness of the work. At the time of the accident ETS performed HVAC cleanup for BMS, and supplied people to BMS, which oversaw the operation.

ETS supplied and used polyurethane sheeting to cover openings in the walls and broken windows, and to cover floors in order to catch any debris that fell during the cleaning of the ceilings.

ETS workers performed both gross cleanup and fine cleanup when the gross cleanup was completed. She supervised ETS employees when they worked for ETS but, when they worked for BMS, those personnel were supervised by BMS.

II. Motion and Cross Motions

DJ moves for summary judgment dismissing the complaint and all cross claims interposed against it asserting, inter alia, that: (1) Labor Law §§ 240[1] and 241[6] are inapplicable, as Serna stepped into an opening in a floor; (2) the Industrial Code provisions relied on by Serna are inapplicable; and, (3) the Labor Law § 200 and common-law negligence claims must be dismissed, as it did not supervise or control Serna's work and, at the time of the accident, it was an out-of-possession tenant without actual or constructive notice of any defect.

WFP cross-moves for the same relief and for partial summary judgment on its second/third-party complaint seeking contractual and common-law indemnification from BMS asserting, inter alia, that: (1) the Labor Law § 240[1] claim must be dismissed as Serna was not subject to an elevation-related hazard and, instead, was exposed to the usual and ordinary dangers of the work site; (2) the Labor Law § 241[1] cause of action must be dismissed as none of the Industrial Code provisions relied on by Serna are applicable; (3) the Labor Law § 200 and common-law negligence claims must be dismissed, as it did not exercise control over the work or have actual or constructive notice of the dangerous condition; and, (4) it is entitled to contractual and common-law indemnification from BMS.⁴

Serna opposes only so much of DJ's motion and WFP's cross motion as seek to dismiss the Labor Law § 241[6] cause of action, and cross-moves for leave to serve a supplemental bill of particulars, asserting that: (1) BMS worked for both DJ and WFP's affiliate BFP, and DJ and WFP directed, supervised and controlled the work being performed; and, (2) Labor Law § 241[6] applies based upon a violation of 12 NYCRR 23-1.7[b][1].

4

WFP withdrew that portion of its cross motion seeking summary judgment on the issue of the liability of ETS for common-law indemnification.

BMS opposes so much of WFP's cross motion as seeks summary judgment against it asserting, inter alia, that: (1) there is a question of fact as to whether Serna was its special employee at the time of the accident, which would entitle it to the protections of the workers' compensation law with respect to any common-law claims of contribution and indemnification; (2) WFP has no claim for contractual indemnification, as its contract was with BFP; and, (3) there is no evidence that it was negligent and, instead, ETS placed plastic on the floors.

WFP and DJ oppose Serna's cross motion seeking leave to amend the bill of particulars asserting, inter alia, that 12 NYCRR 23-1.7[b][1][i] is inapplicable to the hole in the floor at issue.

III. Decision

Liability for violations of Labor Law §§ 240[1] and 241[6] may be imposed against contractors and owners, as well as parties who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors (see Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]; Nienajadlo v Infomart NY, LLC, 19 AD3d 384 [2005]).

A defendant may be vicariously liable as an agent of the property owner for injuries sustained under the Labor Law only where the defendant had supervisory control and authority over the work being done when the plaintiff was injured (see Walls v Turner Constr. Co., 4 NY3d 861 [2005]; Blake v Neighborhood Hous. Servs. of NY City, Inc., 1 NY3d 280, 293 [2003]).

Here, it was BFP, not WFP, that contracted with BMS for the remedial work, and it was BFP that owned the building. Although WFP was on site and managed the building itself, there is no evidence that it had supervisory control or authority over the remediation work being performed by BMS and ETS. As a result, WFP is not liable as BFP's statutory agent under Labor Law §§ 240[1] or 241[6] (see Adair v BBL Constr. Serv., LLC, 25 AD3d 971 [2006]).

For the same reasons, and because DJ was an out-of-possession tenant which neither contracted for nor supervised the work, DJ is not liable under Labor Law §§ 240[1] or 241[6] (see Adair, 25 AD3d at 971; Sumner v FCE Indus., Ltd., 308 AD2d 440 [2003]; Crespo v Triad, Inc., 294 AD2d 145 [2002]; cf. Bush v Goodyear Tire & Rubber Co., 9 AD3d 252 [2004], appeal dismissed 3 NY3d 737 [2004]). Contrary to Serna's claims, the evidence demonstrates that BMS performed separate work for DJ only after BMS completed its work on the building for BFP.

In addition, the holes in DJ's flooring did not present an elevation-related hazard to which the protective devices enumerated in Labor Law § 240[1] were designed to apply (see Rice v Board of Educ., 302 AD2d 578 [2003], lv denied 100 NY2d 516 [2003]; Alvia v Teman Elec. Contr., Inc., 287 AD2d 421 [2001], lv denied 97 NY2d 749 [2002]; D'Egidio v Frontier Ins. Co., 270 AD2d 763 [2000], lv denied 95 NY2d 765 [2000]).

Moreover, respect to Labor Law § 241[6], Serna's reliance on 12 NYCRR 23-1.7[b][1] is misplaced, as that regulation is not intended to apply to the type of hole at issue in this case, which is too small for a worker to fall through (see O'Sullivan v IDI Constr. Co., Inc., ___ AD3d ___, 2006 NY App Div LEXIS 4138 [1st Dept., Apr. 26, 2006]; Rice, 302 AD2d at 578; Messina v City of NY, 300 AD2d 121 [2002]; Alvia, 287 AD2d at 421; D'Egidio, 270 AD2d at 763; Piccuillo v Bank of N.Y. Co., 277 AD2d 93 [2000]).

Serna's assertion that Industrial Code sections 12 NYCRR 23-1.5, 23-1.16 and 23-1.21 apply lacks merit, as those provisions are either inapplicable (see 12 NYCRR 23-1.16; 12 NYCRR 23-1.21) or are insufficiently specific to support a Labor Law § 241[6] cause of action (see Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]; 12 NYCRR 23-1.5).

As neither DJ nor WFP had supervisory control over Serna, and they neither created the dangerous condition that injured Serna nor had actual or constructive notice of it, they are not liable for a violation of Labor Law § 200 or based on common-law negligence (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Lombardi v Stout, 80 NY2d 290, 294-295 [1992]; Russin, 54 NY2d at 316-317).

As a result, DJ and WFP are entitled to summary judgment dismissing the complaint and all cross claims and counterclaims interposed against them. In view of this determination, the branch of WFP's motion seeking summary judgment on the issue of the liability of BMS on the second/third-party complaint seeking contribution and contractual or common-law indemnification is denied, as academic.

Serna's cross motion for leave to amend and/or supplement the bill of particulars is denied as lacking in merit (see Perrini v City of NY, 262 AD2d 541 [1999]) and, as academic.

Conclusion

Based upon the papers submitted to this court and the determinations set forth above, it is

ORDERED that motion by the defendant/third-party plaintiff Dow Jones & Company for summary judgment dismissing the complaint and all cross claims interposed against it is granted, and the complaint and all cross claims interposed against that defendant/third-party plaintiff are dismissed; and it is further

ORDERED that the branch of the cross motion by the defendant/second third-party plaintiff WFP Tower A Co., L.P. for summary judgment dismissing the complaint and all cross claims and counterclaims interposed against it is granted, and the complaint and all cross claims and counterclaims interposed against that defendant/second third-party plaintiff are dismissed; and it is further

ORDERED that the branch of the cross motion by the defendant/second third-party plaintiff WFP Tower A Co., L.P. for partial summary judgment on the issue of the liability of third-party defendant/second third-party defendant Blackmon-Mooring Steamatic Catastrophe, Inc. a/k/a BMS Catastrophe, Inc. for contractual and common-law indemnification is denied; and it is further

ORDERED that the cross motion by the plaintiff for leave to serve a supplemental bill of particulars or, in the alternative, for leave to amend her bill of particulars, is denied.

Dated:

J.S.C.