Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALAN LeVINE IA Part TSP
Justice

FRANK NATOLI

- against -

THE CITY OF NEW YORK, et al.

Index Number 6535 1997

Motion Date March 2, 2004

Motion Cal. Number 35

The following papers numbered 1 to 36 were read on this: (1) motion by the third-party defendant Baker Engineering NY, Inc., pursuant to CPLR 2201, for an order staying the trial on the ground that discovery is not complete; (2) cross motion by the third-party defendant Li-ro Engineering & Construction Management, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims interposed against it; (3) cross motion by the third-party defendant Baker Engineering NY, Inc., pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims interposed against it; and, (4) cross motion by the defendant City of New York, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims interposed against it.

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I. The Relevant Facts

The plaintiff Frank Natoli ("Natoli") commenced this action seeking damages for injuries he sustained on March 26, 1996, while working at a premises owned by the defendant City of New York ("City"). At the time, Natoli was employed by Perini Corp., which was also the general contractor performing construction and/or alterations at the premises (Perini Corp. shall hereinafter be

referred to as the "employer/general contractor"). The City contracted with the defendant Malcolm Pirnie, Inc. ("Pirnie"), to act as construction manager for the project.

Natoli commenced this action against the City and Pirnie alleging that he was injured when a support rope for a jackhammer broke while he was on a scaffold, causing his fall and injuries. He seeks damages based upon negligence and violations of Labor Law §§ 200, 240[1] and 241[6].[1]

A. The Contract and Subcontracts

The City/Pirnie contract obligated Pirnie to provide construction management and professional engineering services. Pirnie subcontracted with the third-party defendant Li-ro Engineering and Construction Management, P.C. ("Li-ro"), and with the third-party defendant Baker Engineering NY, Inc. ("Baker"), for project administration and resident inspection services.

The City/Pirnie contract defined the services to be provided by Li-ro and Baker. Project Administration included various tasks to ensure timely managerial actions and a controlled flow of information of decision makers, such as progress meetings, progress reports, scheduling, interfacing with utility companies and other city agencies, conferencing and reporting. Resident Engineering Inspection Services involved the inspection of the work to safeguard against defects and deficiencies. Pursuant to the Resident Engineering Inspection Services section, Pirnie was the City's representative at the site and had the power, in the first instance, to inspect the performance of the work. The same section imposed on the employer/general contractor, not Pirnie, the responsibility to determine the means and methods of construction; however, Pirnie had the authority to report to the City where such means and methods were a hazard to the work or to persons or property.

The Pirnie/Baker and Pirnie/Li-ro subcontracts provided, inter alia, that the City/Pirnie contract was incorporated into the subcontracts to the extent that the City/Pirnie contract terms affected the services to be provided under the subcontracts. Baker and Li-ro agreed to hold Pirnie harmless from and against all losses and damages of every kind arising out of the acts, errors

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[1] Originally, Natoli commenced two separate actions against the City and Pirnie (Index No. 6535/97 and Index No. 5866/99). By order dated February 1, 2000, the two actions were consolidated for all purposes under Index No. 6535/97.

omissions and/or negligence of Baker or Li-ro, or their employees, agents or others for whose acts Baker and Li-ro were responsible under the subcontracts. Each subcontract required Baker and Li-ro to procure insurance naming Pirnie and the City as additional insureds.

B. Procedural Background

On or about December 17, 2001, Natoli filed a note of issue.

On or about February 2, 2002, Pirnie commenced its third-party action against Li-ro, Baker and other third-party defendants, seeking contribution, common-law and contractual indemnification, and damages for breach of the insurance procurement provisions of the subcontracts.

By Stipulation Regarding Further Discovery dated April 23, 2002, the parties agreed that the action would remain on the trial calendar and the note of issue would not be vacated while certain discovery was thereafter exchanged. All parties were to file dispositive motions within 60 days of the completion of discovery.

Pirnie, Baker, Li-ro and the third-party defendant Mueser Rutledge Consulting Engineers ("Mueser") then moved and cross-moved for an order dismissing the third-party complaint. By memorandum decision and order dated September 24, 2003, this court (Schulman, J.), granted Mueser's cross motion for summary judgment and dismissed the third-party complaint and all cross claims interposed against it. The same court denied the motion and cross motions by Pirnie, Baker and Li-ro based upon the finding, inter alia, that: (1) there were issues of fact as to whether Pirnie exercised supervisory control over the project and/or was an agent of the owner; (2) Pirnie's delay in bringing the third-party action until more than two months after the filing of the note of issue and three years after the commencement of the action did not warrant dismissal or severance of the third-party action; and, (3) instead, Baker and Li-ro could conduct discovery while the action remained on the trial calendar and, if necessary, could seek a short stay of the trial to complete disclosure.

C. Examinations Before Trial

During his examination before trial ("EBT"), Natoli stated that he had prior experience in mining, drilling, blasting and operating pneumatic equipment, including a high pressure jackhammer/drill for concrete demolition. While working for his employer/general contractor on the job at issue, he used a

pneumatic drill to make abutment holes in a two-block long concrete sewage tank.

The pneumatic drill weighed about 115 pounds with the drill bit and was about three feet high. The jackhammer was lowered to where he stood on an iron scaffold and was suspended by a rope. He stood on the iron scaffold about 30 feet below street level, and about six to eight feet above the ground level. The concrete tank was about two and one-half feet away from the scaffold.

The rope suspending the jackhammer was about one to one and one-half inches thick. It was tied around the center of the jackhammer to keep the jackhammer balanced, and was looped over an overhead beam. Using a slip knot, he pulled the jackhammer to the necessary level. The jackhammer had to swing like a pendulum to enable him to perform his work. The jackhammer had to be at least waist or shoulder high so he could push it into the side of the concrete tank.

As he was performing this task, the rope holding the jackhammer broke, causing him to drop to his knees on the scaffold. As he dropped to his knees, he released the jackhammer which had become dead weight in his hands, and the jackhammer fell between the wall and the scaffold.

The foreman for his employer/general contractor instructed him on his job, job safety and the use of safety equipment. Safety meetings were held once or twice a week, but he did not know the name of the company that held those meetings. There were no discussions at those meetings concerning the use of jackhammers or ropes.

Reza Marandi, employed by the City Department of Environmental Protection ("DEP"), was a licensed civil engineer and a site project manager at the time of the accident. While on the site he monitored the construction manager, Pirnie. Other on-site City employees performed inspections under Pirnie's supervision. The City had two on-site safety inspectors who checked for safety violations. Natoli's employer/general contractor, not Pirnie, held daily safety meetings. Pirnie had the authority to monitor Natoli's employer/general contractor, and could bring violations or unsafe practices or conditions to that entity's attention.

Robert Vargo, Pirnie's operations specialist, stated that at the time of the accident he was a resident engineer who oversaw Baker's only employee at the project, the on-site assistant resident engineer. The duties of the Baker employee were to act as office engineer, perform correspondence, and file and coordinate

the inspectors' duties. In coordinating the inspectors' duties, the Baker employee determined which inspector would oversee and observe the work at a particular location.

Li-ro provided two inspectors, and he and the Baker assistant resident engineer supervised them. The Li-ro inspectors completed daily reports which were filed with Pirnie. They observed the work and the manpower and equipment used, but they did not determine the adequacy or proper functioning of the equipment. Only Pirnie could instruct the employer/general contractor to correct or stop work or hazardous conditions.

III. Motion and Cross Motion

Baker moves to stay the trial upon the ground that discovery is not complete. It asserts that it was not present at the prior EBTs, it has not had the opportunity to depose Natoli, the defendants or the third-party defendants, and it has not conducted independent physical examinations of Natoli. Pirnie supports Baker's motion, asserting that although it exchanged all records in its possession, the third-party defendants would not consent to the scheduling of EBTs. Natoli opposes the motion, contending that the third-party defendants never sought discovery from him.

Baker cross-moves for summary judgment dismissing the third-party complaint, contending that: (1) it had only one employee on site acting as office engineer for Pirnie; (2) there is no evidence that its employee supervised or controlled Natoli or the employer/general contractor; and, (3) as a result, it cannot be held liable for negligence or Labor Law violations.

Li-ro cross-moves for summary judgment contending that it performed only resident engineering inspection services, and there is no evidence that it was negligent or controlled or supervised the construction site.[2]

The City cross-moves for summary judgment, contending that: (1) as the jackhammer was suspended between Natoli's waist and shoulders, Natoli failed to demonstrate any elevation-related risk necessary for a Labor Law § 240[1] cause of action; (2) Natoli failed to demonstrate any Industrial Code violation sufficient to support liability under Labor Law § 241[6]; and, (3) as it did not supervise or control Natoli's employer/general contractor and was

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[2] In support, Li-ro annexes, inter alia, the affidavit and inspection reports of an inspector who worked at the site at the time of the accident.

unaware of any hazardous condition, it cannot be liable for negligence or a Labor Law § 200 violation.

Natoli opposes the motion and cross motions for summary judgment noting that he did not interpose any claims against Baker or Li-ro and: (1) the City's motion for summary judgment is untimely as it is made more than two years after the note of issue was filed; (2) the prior order of this court permitted only the third-party defendants to file subsequent motions for summary judgment; (3) in any event, the City was the contractor and owner, exercised supervisory control over the site, and the prior order determined there were issues of fact for trial on all causes of action; and, (4) in any event, the affidavit of his expert demonstrates that the hoist or sling in use at the time of the accident was defective, a synthetic web sling should have been used as a hoist, and there was a violation 12 NYCRR §§ 23-6.1 and 23-6.2.[3]

Pirnie opposes the motion and cross motion of Li-ro and Baker, contending that they are liable for contractual indemnification and breach of the insurance procurement provisions of the subcontracts. Baker and Li-ro respond, inter alia, that they have no duty to contractually indemnify Pirnie absent some evidence that they were negligent.

The City replies that: (1) its cross motion for summary judgment is timely as third-party discovery remains incomplete and, in any event, this court has the discretion to hear the motion and all cross motions; (2) the prior order did not address any issue concerning the applicability of Labor Law § 240[1] and, in any event, the City did not join in the prior motion and cross motions; (3) the evidence demonstrates that the City monitored only Pirnie, not the employer/general contractor; and, (4) the affidavit of Natoli's expert is insufficient to demonstrate any Industrial Code violation.

III. Decision

Considering the procedural history of this action, and the fact that discovery was not complete at the time of the filing of the note of issue, the City is granted leave to move for summary judgment dismissing the complaint upon good cause shown (see, Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124; CPLR 3212[a]).

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[3] In support, Natoli annexes the unsigned and unsworn affidavit of an expert in construction site safety.

A. Labor Law § 240[1]

Labor Law § 240[1] seeks to protect workers from elevation-related hazards resulting in injuries sustained by a worker falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see, Narducci v Manhasset Bay Assocs., 96 NY2d 259; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501; Aloi v Structure-Tone, Inc., 2 AD3d 375; Cummings v I. & O.A. Slutsky, Inc., 304 AD2d 860). Breach of the statutory duty must be the proximate cause of the injury (see, Striegel v Hillcrest Heights Dev. Corp., 100 NY2d 974, 977).

The mere fact that gravity causes something to fall while being moved does not implicate Labor Law § 240[1] if the object, though falling, had not been substantially elevated above the site (see, Rocovich v Consolidated Edison Co., 78 NY2d 509, 514; Daley v City of New York, 277 AD2d 88). While many workplace accidents can be classified as gravity-related occurrences stemming from improperly hoisted or inadequately secured objects, courts may nonetheless distinguish those occurrences that do not fit within the Legislature's intended application of Labor Law § 240[1] (see, Narducci v Manhasset Bay Assocs., supra at 270; Nobre v Nynex Corp., 2 AD3d 602).

Here Natoli claims that the jackhammer constituted equipment which was improperly hoisted and secured. Although the City contends that the jackhammer was at the same level as Natoli, the jackhammer was clearly suspended and free-swinging above the scaffold upon which Natoli was standing, and the jackhammer was required to remain in that suspended state to enable Natoli to perform his work. As a result, Natoli was exposed to an elevation-related risk (cf., Jordan v Blue Circle Atlantic, Inc., 306 AD2d 741; Monir v 393 Jericho Tpk., LLC, 293 AD2d 585).

Moreover, the jackhammer was a piece of equipment that required securing for the purposes of the undertaking at the time that it fell, and the evidence demonstrates that it fell as a result of the inadequacy of a safety device of the kind enumerated in the statute (see, Ortlieb v Town of Malone, 307 AD2d 679; Murphy v American Airlines, Inc., 277 AD2d 25; Jiron v China Buddhist Ass'n, 266 AD2d 347; Moore v Shulman, 259 AD2d 975, appeal dismissed 93 NY2d 998; Labor Law § 240[1]; cf., Bailey v Young Men's Christian Ass'n, 267 AD2d 642).

Accordingly, that branch of the City's motion seeking summary judgment on the Labor Law § 240[1] cause of action is denied.

B. Labor Law § 241[6]

To succeed on a claim arising under Labor Law § 241[6], a plaintiff must demonstrate a violation of a sufficiently specific section of the Industrial Code (see, Ross v Curtis-Palmer Hydro-Elec. Co., supra). Here, Natoli relies on 12 NYCRR §§ 23-6.1, 23-6.1.2, and 23-1.5, as well as violations of regulations promulgated under the Occupational Safety & Health Act ("OSHA"). He contends that the rope should have been inspected regularly for defects, and was an inappropriate hoisting device in view of the weight of the jackhammer.

The City correctly contends that certain Industrial Code provisions relied upon by Natoli are not sufficiently concrete to impose liability under Labor Law § 241[6] (see, Morrison v City of New York, ____ AD2d ____, 2004 NY App Div LEXIS 3428 [2d Dept., 3/22/04]; Danchick v Contegra Services, Ltd., 299 AD2d 923; Hawkins v City of New York, 275 AD2d 634; Cardensas v American Ref-Fuel Co., 244 AD2d 377; Smith v Homart Dev. Co., 237 AD2d 77; 12 NYCRR §§ 23-1.5, 23-6.1[a], [h]). In addition, Natoli's reliance on OSHA violations is misplaced (see, Millard v City of Ogdensburg, 274 AD2d 953; Schiulaz v Arnell Constr. Corp., 261 AD2d 247; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311).

Nonetheless, certain Industrial Code provisions relied upon by Natoli in support of his Labor Law § 241[6] cause of action mandate compliance with concrete specifications which are applicable to the accident at issue (see, Hayden v 845 UN Ltd. P'ship, 304 AD2d 499; 12 NYCRR §§ 23-6.1[b], [d], 23-6.2[a]).

Accordingly, that branch of the City's motion seeking summary judgment dismissing the Labor Law § 241[6] cause of action is denied.

C. Common-Law Negligence and Labor Law § 200

Liability for common-law negligence and for a violation of Labor Law § 200 requires evidence that the owner or contractor had supervisory control over the injured plaintiff's work or actual or constructive notice of a dangerous condition (see, Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877; Lombardi v Stout, 80 NY2d 290, 294; Applebaum v 100 Church LLC., ____ AD2d ____, 2004 NY App Div LEXIS 4768 [2d Dept., 4/22/04]). General supervisory power over the underlying project is insufficient to impose liability (see, Aloi v Structure-Tone, Inc., supra; Toefer v Long Island R.R., 308 AD2d 579).

Here, in view of the evidence that the City had safety inspectors at the site, there are issues of fact as to whether the City had actual or constructive notice of a dangerous condition sufficient to support liability based upon common-law negligence and Labor Law § 200. Accordingly, that branch of the City's motion seeking summary judgment on the common-law negligence and Labor Law § 200 causes of action is denied.

D. Liability of Baker and Li-ro

With respect to the third-party liability of Baker and Li-ro, liability for an injury sustained by a worker may not be imposed upon an engineer who is hired to assure compliance with construction plans and specifications, unless the engineer commits an affirmative act of negligence or such liability is imposed by a clear contractual provision (see, Hernandez v Yonkers Contr. Co., 306 AD2d 379).

Here, there is no evidence that Baker or Li-ro committed any affirmative act of negligence. Moreover, the subcontracts did not impose any duty on Baker or Li-ro to control or supervise the work at the construction site or ensure the safety of workers at the site (see, Hernandez v Yonkers Contracting Co., supra; Domenech v Associated Eng's, 257 AD2d 403, 404; Fecht v City of New York, 244 AD2d 315).

Instead, the evidence indicates that the Baker employee performed office duties subject to Pirnie's control and supervision, and the Li-ro employees inspected the progress of the work and compliance with drawings, plans and specifications, subject to Pirnie's control and supervision. Contrary to Pirnie's claims, the contractual indemnification provisions in the subcontracts may not be enforced absent some evidence of negligence by Baker and Li-ro.

As a result, the cross motions of Baker and Li-ro for summary judgment dismissing the third-party complaint and all cross claims interposed against them are granted. In view of this determination, Baker's motion seeking a stay of the trial pending further discovery is denied, as academic.

Conclusion

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

ORDERED that the motion by the third-party defendant Baker Engineering NY, Inc. for an order staying the trial on the ground

that discovery is not complete is denied as academic; and it is further

ORDERED that the cross motion by the third-party defendant Li-ro Engineering & Construction Management for summary judgment dismissing the third-party complaint and all cross claims interposed against it is granted, and the third-party complaint and all cross claims interposed against that third-party defendant are dismissed; and it is further

ORDERED that the cross motion by the third-party defendant Baker Engineering NY, Inc. for summary judgment dismissing the third-party complaint and all cross claims interposed against it is granted, and the third-party complaint and all cross claims interposed against that third-party defendant are dismissed; and it is further

ORDERED that the cross motion by the defendant City of New York for summary judgment dismissing the complaint and all cross claims interposed against it is denied.

Dated: April 23, 2004

J.S.C.