Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES Justice — IA Part 17

JOHN STAFFORD

Plaintiff,

-against-

VIACOM, INC., 1515 BROADWAY ASSOCIATES L.P. f/k/a TISHMAN SPEYER-EQUITABLE ASTOR LIMITED PARTNERSHIP and GEL ENTERPRISES,

Defendants.

Index Number 4691 1996

Motion Date October 22, 2003

Motion Cal. Numbers 38, 39, 40

VIACOM, INC.,

Third-Party Plaintiff,

-against-

JACKSON VOICE DATA, INC., WILTEL COMMUNICATIONS SYSTEMS and SCS SYSTEMS, LTD.,

Third-Party Defendants.

1515 BROADWAY ASSOCIATES,

Second Third-Party Plaintiff,

-against-

LEHR CONSTRUCTION CORP.,

Second Third-Party Defendant.

x

SCS SYSTEMS, INC.,

Third Third-Party Plaintiff,

-against-

LJB SERVICES, INC.,

Third Third-Party Defendant.

x

LEHR CONSTRUCTION CORP.,

Fourth Third-Party Plaintiff,

-against-

LJB SERVICES, INC.,

Fourth Third-Party Defendant.

x

LJB SERVICES, INC.,

Second Fourth-Party Plaintiff,

-against-

JOVIAN FLOORING, INC.,BRITTANY DESIGN INC., and CUSTOM FLOOR CRAFTERS, INC.,

Second Fourth-Party Defendants.

x

Motion calendar numbers 38, 39 and 40 are combined herein for disposition.

The following papers numbered 1 to 65 read on the motion by second-fourth-party defendant Jovian Flooring, Inc. (Jovian) for leave to renew and reargue its previous cross motion for summary judgment; and on the motion by second-third-party defendant/fourth-third-party plaintiff Lehr Construction Corp. (Lehr) for leave to renew and reargue its previous motion for summary judgment; and on the motion by plaintiff for leave to reargue his previous motion to amend the complaint; and on the

cross motion by defendant Viacom, Inc. for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it and against defendant 1515 Broadway Associates L.P. (1515 Broadway), and for summary judgment on the first cause of action in its cross complaint against Lehr for contractual indemnification; and on the cross motion by 1515 Broadway for summary judgment dismissing plaintiff's complaint and all cross claims; and on the cross motion by second-fourth-party defendant Brittany Design Inc. (Brittany Design) for summary judgment dismissing the second-fourth-party complaint as asserted against it; and on the cross motion by Jovian for summary judgment dismissing the second-fourth-party complaint and all cross claims asserted against it; and on the cross motion by third-third-party defendant/fourth-party defendant LJB Services, Inc. (LJB) for summary judgment dismissing the impleader actions asserted against it.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1-12
Notices of Cross Motions - Affidavits - Exhibits ..	13-31
Answering Affidavits - Exhibits	32-50, 62-65
Reply Affidavits	51-61

Upon the foregoing papers it is ordered that the motions and cross motions are decided as follows.

The facts were previously set forth and, thus, will not be restated herein.

The motion by Jovian and the motion by Lehr for leave to reargue is granted and upon reargument the court adheres to its original decision but on different grounds.

Labor Law § 200 is the same as liability premised upon common-law negligence, as said statute merely codifies a landowner's duty to provide laborers with a reasonably safe place to work (see Lombardi v Stout, 80 NY2d 290 [1992]; Jock v Fien, 80 NY2d 965 [1992]; Allen v Cloutier Constr. Corp., 44 NY2d 290 [1978]; Yong Ju Kim v Herbert Constr. Co., Inc., 275 AD2d 709 [2000]). Liability based on theories of common-law negligence and breach of the general statutory duty to protect health and safety will attach to a landowner, contractor or an agent thereof who either created, or had actual or constructive notice of the unsafe condition which caused the accident, or exercised supervision and control over the injury-producing work (see, Lombardi v Stout, supra; Shipkoski v Watch Case Factory Assocs., 292 AD2d 589 [2002];

Akins v Baker, 247 AD2d 562 [1998]; Yong Ju Kim v Herbert Constr. Co., Inc., supra).

Previously, Jovian and Lehr each sought summary dismissal of the complaint as asserted against 1515 Broadway and Viacom on the ground that plaintiff testified that only his employer, third-party defendant Wiltel Communications Systems (Wiltel) directed, controlled or supervised the work he was performing. While the court was correct, in denying summary judgment for failure to submit the portion of plaintiff's deposition transcript which supported this argument, the court overlooked the fact that plaintiff's Labor Law § 200 and common-law negligence claims are predicated upon a hazardous condition in the hallway, not upon the work plaintiff was assigned to perform. Therefore, the arguments regarding direction, supervision and control over the plaintiff's work is superfluous.

Furthermore, it has not been established that neither 1515 Broadway nor Viacom created the allegedly hazardous condition or had actual or constructive notice of it. Therefore, summary judgment dismissing these claims is not warranted (see, Rizzuto v Wenger Contr. Co., Inc., 91 NY2d 343 [1998]; Giovengo v P&L Mechanical, 286 AD2d 306 [2001]; Steven v Alfredo, 277 AD2d 218 [2000]; Yong Ju Kim v Herbert Constr. Co., Inc., supra; Goettelman v Indeck Energy Svcs. of Olean, Inc., 262 AD2d 958 [1999]; see also, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). A fortiori, the branch of Viacom's cross motion which seeks contractual indemnification against Lehr must be denied as it cannot be determined at this juncture that Viacom's role was passive (cf. Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990]); Montour v City of New York, 270 AD2d 236 [2000]).

Plaintiff's motion for leave to reargue is granted and upon reargument the court adheres to its original decision. Unavailing is plaintiff's contention that 12 NYCRR 23-1.7(d) is applicable because he was at the site to install communication cable and, thus, not an integral part of the flooring installation and glue application which resulted in the slippery condition that caused his accident (see e.g. Moses v Pinazo, 265 AD2d 391 [1999]; Isola v JWP Forest Elec. Corp., 262 AD2d 95, lv dismissed 94 NY2d 797, resettled 267 AD2d 157 [1999]). Moreover, although plaintiff argues that Labor Law § 241(6) was violated because the subject passageway should have been barricaded or signs erected warning of the hazardous condition, he does not cite an applicable Industrial Code provision to support this argument.

The cross motion by Viacom and the cross motion by 1515 Broadway for summary judgment dismissing the complaint are

denied. Denial of the original motion by Jovian and motion by Lehr for summary judgment in favor of 1515 Broadway and Viacom established the law of the case (see Levitz v Robbins Music Corp., 17 AD2d 801 [1962]; see also City of Long Beach v Saril Corp., 56 AD2d 574, lv dismissed 42 NY2d 974 [1977]) thereby prohibiting 1515 Broadway and Viacom from bringing a successive motion for summary judgment based upon different evidence (see Lapadula v Kwok, 304 AD2d 798 [2003]). In any event, although Viacom's and 1515 Broadway's respective papers are denominated cross motions for summary judgment, they are in effect for reargument of the original motions made by Jovian and Lehr (see id.) as the evidence relied upon does not constitute new information (see, Foley v Roche, 68 AD2d 558 [1979], lv denied 56 NY2d 507 [1982]; Haussmann v Wolf, 187 AD2d 371 [1992]). As the cross motions fail to seek leave of the court and fail to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law" (Foley v Roche, supra, at 567), reargument is denied.

The remaining cross motions for dismissal of the impleader actions seeking contribution and indemnification are denied. Summary dismissal of any contribution and common-law indemnification claims is premature as the party or parties responsible for plaintiff's accident and alleged injuries has yet to be determined (see, Freeman v National Audubon Socy., Inc., 243 AD2d 608 [1997]; La Lima v Epstein, 143 AD2d 887 [1988]). Moreover, based upon the papers submitted, it cannot be determined, as a matter of law, that LJB, Jovian or Brittany were not responsible for the subject accident.

Accordingly, the motions to reargue are granted and upon reargument, the court adheres to its original decision, and the cross motions for summary judgment are denied.

Dated: September 30, 2004

J.S.C.