Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PHYLLIS ORLIKOFF FLUG Justice — IA Part 9

CARLOS A. GOMES, et al. x

-against-

THE CITY OF NEW YORK, et al. x

Index Number 16260 2001

Motion Date May 11, 2004

Motion Cal. Number 10

The following papers numbered 1 to 17 were read on this motion by the plaintiffs, pursuant to CPLR 3212, for summary judgment on the issue of the liability of the defendants The City of New York and Massand Engineering L.S. P.C. based upon a violation of Labor Law § 241[6]; and, cross motion by the defendant City of New York, pursuant to CPLR 3212, for summary judgment on the issue of the liability of Massand Engineering L.S. P.C. for contractual indemnification, including all defense costs, and for breach of an insurance procurement provision.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits .	5-8
Answering Affidavits - Exhibits	9-14
Reply Affidavits	15-17

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

I. The Relevant Facts

The plaintiff Carlos A. Gomes, while employed by the third-party defendant Cofire Paving Corporation (Cofire) was injured on September 20, 2000, while working on a water main excavation in a roadway located on Sutphin Boulevard, in Jamaica, New York. The accident occurred when the sides of a 13-foot-deep trench in which he was working collapsed on him.

Gomes commenced this action against the City of New York (the City) and Massand Engineering L.S., P.C. (Massand), seeking damages

for negligence and violations of Labor Law §§ 200, 240[1] and 241[6], and his wife sued derivatively. The City cross-claimed against Massand seeking contribution, common-law and contractual indemnification and damages for breach of a contractual insurance procurement provision.[1]

A. The City/Massand Contract

Pursuant to the contract between the City and Massand, Massand was to provide resident engineering inspection services for the inspection, management and administration of the project, so that the required construction work was properly executed and completed in a timely fashion and in conformity with plans. Massand was to serve as the City's representative at the site.

In addition, Massand was to provide technical inspection, management and administration of the work of the contractors, and review and monitor the means and methods of construction proposed by the contractor until final acceptance of the project. Massand was also obligated to monitor the contractors' activities to ensure the maintenance of a clean and safe environment at the site, and perform daily inspections and issue directives to contractors to correct any identified deficiencies.

Although Massand had the ability to review and monitor safety programs initiated by the contractors, it was not responsible for prescribing, instituting or maintaining a safety program or for providing safety engineers. Massand was to promptly notify the City's Commissioner and the contractors if it observed any hazardous condition.

The City/Massand contract also obligated Massand to obtain a comprehensive general liability insurance policy naming the City as additional insured, in order to protect the City and Massand from bodily injury claims arising from operations under the contract, whether performed by Massand or anyone directly or indirectly employed by Massand.

Finally, the City/Massand contract obligated Massand to indemnify and hold harmless the City from any and all claims and judgments arising out of the negligence of Massand or its officers, agents or employees, or any other company, agent or person engaged by Massand.

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[1] Massand also commenced a third-party action against Cofire and other entities; however, by stipulation dated April 22, 2004, Massand's third-party action against Cofire and all other entities and persons, other than Cody Construction Corp., was discontinued.

On October 15, 2002, the City tendered its defense to and demanded indemnification from Massand, but received no response.

B. Examinations Before Trial

During his examination before trial (EBT) Gomes stated that on the date of the accident, he reported only to a Cofire foreman, and only Cofire supervised or controlled his work and provided him with tools and equipment. At the time, he was working in an 11-foot-deep and 12-foot-wide excavation hole, which was dug by Cofire. His foreman directed him to dig the hole two-and-one-half feet deeper, and to install an iron bar or steel beam to hold the 12-foot-long plywood planking which was shoring the sides of the hole. Other Cofire workers were at the same site, performing the same work.

Cofire provided him with an iron bar and a shovel to dig the hole, and also provided him with a helmet and a vest. After digging down for about 20 minutes, a dirt wall began to break loose from the top of the excavation. Although his foreman called for everyone to jump out to avoid being buried, he was unable to get out in time.

During his EBT, the City resident engineer stated that neither he nor anyone from the City was present at the work site on September 20, 2000. Massand ran the project and was responsible for supervising the daily activities of the contractors, and ensuring compliance with various safety and other specifications. The general contractor for the project was a joint venture, Cofire/JLJ Enterprise.

On the date of the accident, he acted as the City's engineer in charge. His duties included visiting the field office or the job site to ensure compliance with standard procedures. He did not recall anything unusual about his last visit to the site.

The inspector, engineer and resident engineer for the site worked for Massand, and Massand's resident engineer was in charge of the project on a daily basis. The City was unaware of any complaints and never made any complaints to Massand.

During his EBT, a Massand representative stated that Massand had no control over how the shoring was installed. After each section of sheeting was installed as shoring, he inspected to ensure that it complied with City regulations and details.

II. Motion and Cross Motion

In support of his motion for summary judgment against the City and Massand on the issue of liability under Labor Law § 241[6], Gomes relies on 12 NYCRR §§ 23-1.2, 23-1.3, 23-4.1, 23-

4.2[a] and 23-4.5, which are applicable to excavations and trench operations.

The City opposes Gomes' motion, asserting that the Industrial Code provisions are inapplicable and cross-moves for summary judgment on the issue of Massand's liability for contractual indemnification and for breach of the insurance procurement provision.

Massand opposes Gomes' motion, contending that it cannot be liable under Labor Law § 241[6] as, (1) it was a design professional which lacked any authority to direct or control the means and methods of the work of Cofire or Gomes; (2) there is no evidence that it exercised supervision and control over the job site so as to be liable under the statute; and, (3) in any event, a violation of an Industrial Code provision constitutes only some evidence of negligence, so there is an issue of fact as to whether it was negligent and proximately caused Gomes' injuries.

Massand further opposes the City's cross motion contending, inter alia, that: (1) the City hired Cofire as its contractor, Cofire was supposed to install and maintain the excavation shoring, the City was supervising Cofire, and the shoring was installed pursuant to City specifications; (2) there is an issue of fact as to whether the City was negligent, as its engineer was present on site and attended progress meetings which included safety issues; (3) it is not liable to indemnify the City for its own negligence; and, (4) it procured the requisite insurance naming the City as an additional insured, as evidenced by a certificate of insurance and an insurance policy.

The City replies that although Massand produced an appropriate policy, to date, Massand has neither assumed its defense nor provided coverage.

III. Decision

Labor Law § 241[6] imposes a nondelegable duty of reasonable care upon owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed, even in the absence of control or supervision of the work site (see Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 348-350 [1998], citing, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]; see also Musillo v Marist College, 306 AD2d 782, 783 [2004]).

Once it has been alleged that a concrete specification of the Industrial Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction caused a plaintiff's injury and, if proven, the owner

or general contractor is vicariously liable without regard to fault (see Rizzuto v L.A. Wenger Contr. Co., Inc., supra at 350).

The question of whether a contractor or subcontractor can be considered an agent of the owner or general contractor for Labor Law § 241[6] purposes depends on whether they were contractually delegated the duty or obligation to correct unsafe conditions or maintain work site safety (see Musillo v Marist College, supra at 784; Everitt v Nozkowski, 285 AD2d 442 [2001]; Kehoe v Segal, 272 AD2d 583 [2000]; see also Mennerich v Esposito, 4 AD3d 399 [2004]).

It is well settled that liability for an injury sustained by a worker may not be imposed upon an engineer who was 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., Inc., 306 AD2d 379 [2003]; Suriano v City of New York, 240 AD2d 486 [1997]; see also Becker v Tallamy, Van Kuren, Gertis & Assocs., 221 AD2d 1014 [1995]; Carter v Vollmer Assocs., 196 AD2d 754 [1993]).

Here, Gomes sufficiently alleged a violation of 12 NYCRR §§ 23-4.2, 23-4.4 and 23-4.5, which are concrete specifications relating to the shoring and stabilization of trenches and other excavation work (see Wells v British American Dev. Corp., 2 AD3d 1141, 1144 [2003]; Fernez v Kellogg, 2 AD3d 397 [2003]).

Nonetheless, in view of the evidence that shoring and bracing was provided, there is an issue of fact for jury determination as to whether the City complied with the relevant Industrial Code provisions (cf., Rodriguez v City of New York, 232 AD2d 621 [1996]; Mendoza v Cornwall Hill Estates, Inc., 199 AD2d 368 [1993]). Accordingly, Gomes motion for summary judgment on the issue of the City's liability under Labor Law § 241[6] is denied.

Massand, however, was not the City's agent for purposes of imposing liability under Labor Law § 241[6]. The City/Massand contract, while providing that Massand should inspect and report safety violations, did not contain a provision allowing Massand to actually exercise control over the site or over Cofire, and there is no evidence of any affirmative act of negligence by Massand. As a result, Massand had no duty to protect Gomes (see Hernandez v Yonkers Contracting Co., Inc., supra; Suriano v City of New York, supra; Becker v Tallamy, Van Kuren, Gertis & Assocs., supra; Carter v Vollmer Assocs., supra), and Gomes' motion for summary judgment on the issue of Massand's liability under Labor Law § 241[6] is denied.

In view of this determination and the insurance documents, the City's cross motion for summary judgment on the issue of Massand's liability for common-law and contractual indemnification, and on

the issue of Massand's liability for breach of the insurance procurement provision of the contract, lacks merit.

Accordingly, the motion and cross motion are denied.

Dated: July 9, 2004

J.S.C.