

**IDI Construction Company, Inc. v Teman Electrical  
Construction Company, Inc.**

2005 NY Slip Op 30042(U)

February 7, 2005

Supreme Court, New York County

Docket Number: 0108584/8584

Judge: Sherry Klein Heitler

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sherry Klein Heitler  
0108584/2002

PART 30

O'SULLIVAN, SEAN  
VS  
IDI CONSTRUCTION COMPANY  
SEQ 3  
SUMMARY JUDGMENT

O. 108584/02  
DATE (003)  
SEQ. NO. \_\_\_\_\_  
N CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied  
as per the memo decision  
of 2-7-05

**FILED**  
FEB - 9 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2-7-05 \_\_\_\_\_  
Sherry Klein Heitler  
2-7-05  
SHERRY KLEIN HEITLER  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30**

-----X  
SEAN O’SULLIVAN,

Plaintiff,

-against-

IDI CONSTRUCTION COMPANY, INC. and  
251 EAST 51<sup>ST</sup> STREET CORP.,

Defendants.

-----X  
IDI CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

TEMAN ELECTRICAL CONSTRUCTION, INC.  
and COSNER CONSTRUCTION,

Third-Party Defendants.

-----X  
**SHERRY KLEIN HEITLER, J.:**

Plaintiff Sean O’Sullivan (O’Sullivan) commenced this action against IDI Construction Company Inc. (IDI) and 251 East 51<sup>st</sup> Street Corp. (251 East) to recover for personal injuries he sustained on October 14, 2000, while working as a concrete laborer at a high-rise construction site located at, and owned by, 251 East, in New York City. IDI was the general contractor, and third-party defendant Cosner Construction (Cosner) was a concrete subcontractor and plaintiff’s employer. IDI and 251 East move for an order, pursuant to CPLR 3212, granting a summary dismissal of the complaint, and, adopting the arguments set forth in movants’ papers, Cosner joins in the motion. Third-party defendant Teman Electrical Contracting, Inc., s/h/a Teman Electrical Construction, Inc. (Teman) cross-moves for an order dismissing the third-party complaint and all cross claims against

INDEX NO. 108584/02

**DECISION AND ORDER**

it.

It is undisputed that O'Sullivan began working at the 251 East 51<sup>st</sup> Street site in or about late August 2000, and worked five or six days a week, eight or nine hours a day, until the time of his accident. According to plaintiff, on the morning of October 14, 2000, he arrived at work, as usual, at about 7:00 a.m., and started his work on the ground floor. For his first task, he lifted two three-by-four feet long ribs of lumber onto his shoulder and started walking with them when he suddenly tripped over an object protruding from the cement floor. Plaintiff sustained serious injuries to his knee and as a result, he commenced this law suit, charging IDI and 251 East with statutory and common-law theories of negligence, including violations of Labor Law §§ 200, 240 (1) and 241 (6), Industrial Code sections 12 NYCRR 23-1.5 (a); 12 NYCRR 1.7(e) (1) and (2); 12 NYCRR 23 - 2.1 (b), and 29 CFR § 1926.25. On October 1, 2002, IDI commenced a third-party action, sounding in indemnification, against Cosner, who was hired to erect the superstructure at the high-rise, including steel installation, form work, and concrete pouring, and against Teman, an electrical contractor at the site. Discovery ensued, a note of issue was filed and defendants now seeks summary judgment dismissing plaintiff's claims.

Labor Law § 241 (6) provides, in pertinent part:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

This section of the Labor Law was enacted to provide protection and safety for workers at construction sites, such as the one at 251 East 51<sup>st</sup> Street, and it places a non-delagable duty on owners and contractors to comply with specific safety rules set forth in the New York State Industrial

Code (see Ross v Curtis-Palmer Hydro-Elect. Co., 81 NY2d 494, 501 - 502 [1993]).

To this end, O'Sullivan alleges a violation of Industrial Code 12 NYCRR 23-1.7 (e) (2)<sup>1</sup>.

Industrial Code 12 NYCRR 23-1.7 (e) (2) provides:

[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Defendants argue that this section does not apply because, at the time of his accident, O'Sullivan was employed as a concrete laborer, whose job responsibilities included laying the cement floors through which projections, including electrical pipes which are an integral part of the superstructure of a high-rise, are routinely, and necessarily secured into place prior to the cement pouring stage.

Plaintiff contends, however, that defendants have failed to establish that the pipe upon which he tripped was an electrical conduit or other essential component of the project. Plaintiff asserts that the failure of the protrusion to be spray painted or enclosed is evidence that the object was not an electrical pipe, and, relying on Rizzo v HRH Constr. Corp. (301 AD2d 426 [1<sup>st</sup> Dept 2003]), plaintiff also contends that subject pipe was a sharp object and not an integral part of the concrete floor under construction, within the meaning of the regulation.

Plaintiff's reliance on Rizzo is mistaken, as the gist of the Appellate Court's holding was that "the record [was] too sparse to permit findings that the drainpipe was a 'sharp object' within the meaning of that rule, and, if so, whether it was an integral part of a floor under construction" (Rizzo, 301 AD2d at 427 [citations omitted]). In the instant matter, the record is not only ample, but it was

---

<sup>1</sup> Plaintiff's opposition papers only argue the applicability of 12 NYCRR 23 - 1.7 (e) [2] to the facts of this case. Plaintiff has apparently abandoned his remaining regulatory violation claims.

the plaintiff himself who described the protrusion as an electrical pipe. Specifically, when asked if he knew what the pipe was used for, O'Sullivan stated "it was the electrical pipe" and had been installed into the floor, although he could not say whether electrical wires had been installed in the pipe yet (O'Sullivan Deposition, at 25 - 26).

At the Cosner deposition, site construction supervisor Jim Costigan (Costigan) testified about the procedure for laying a cement floor. According to Costigan, the floor area is initially framed with wood, steel reinforcement is put down, and any of the penetrations, including electrical conduit pipe, which are to be installed by other trades, are put in prior to Cosner's men pouring the "concrete over the whole mess of it and you have a floor" (Costigan Deposition, at 11).

It is well settled that 12 NYCRR 23-1.7 (e) (2) "does not apply where the object on which plaintiff tripped was an integral part of the work he was performing" (Alvia v Teman Elec. Contr. Inc., 287 AD2d 421, 423 [2<sup>nd</sup> Dept 2001] [citations and quotations omitted]). According to O'Sullivan, his job entailed the construction of the concrete flooring. The permanent installation of the electrical pipe was intended, necessary, and as routine in the creation of a high-rise superstructure, as was the pouring of the cement floor. The electrical pipe's protrusion from the concrete floor was consistent with the work being performed, therefore, it cannot be considered a "sharp object," nor can it be considered debris, a scattered tool or material, within the meaning of the regulation. Plaintiff has, therefore, failed to present an issue of fact as to whether 12 NYCRR 23 - 1.7 (3) (2) was violated (Isola v JWP Forest Elec. Corp., 262 AD2d 95, 96 [1<sup>st</sup> Dept 1999]; Vieira v Tishman Constr. Corp., 255 AD2d 235 [1<sup>st</sup> Dept 1998]).

O'Sullivan also fails to raise a question of fact with respect to his common-law negligence and Labor Law § 200 claims against IDI or 251 East. Labor Law § 200 codifies a property owner's

and general contractor's common-law duty to maintain a safe workplace (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d at 505). Liability under the common-law and/or Labor Law § 200, requires a showing that such property owner or general contractor, 251 East or IDI, exercised the requisite degree of supervision and control over the portion of the work that led to plaintiff's injury, and liability also requires a showing that the workplace was unreasonably dangerous (id.).

At his deposition, O'Sullivan stated that the first time he saw the electrical pipe was when he first started working at the site about a month to a month and a half prior to his accident, and that the pipe had been in place prior to his assignment at the site (O'Sullivan Deposition, at 26, 30). O'Sullivan testified that he worked almost daily in the area where he fell, passing by the subject electrical pipe at some point each day (O'Sullivan Deposition, at 30 - 32, 84).

IDI had a site safety manager, Shawn McBride (McBride), present at the high-rise, who testified at IDI's deposition, that he regularly checked for safety violations and would notify the foreman of the responsible trade of a need to correct any safety violation. In response to further questioning, McBride testified that "stubs," or objects protruding from the floor, were color-coded, meaning spray-painted orange, and that wood or styrofoam was usually placed around them. Referring to his supervisory accident investigation report for October 14, 2000, McBride stated that the subject pipe was color-coded.

Plaintiff, however, testified that the electrical pipe was metal-colored, and that he did not recall it being either color-coded, or encased in wood or styrofoam. Plaintiff argues that, even if the pipe was to be considered an integral part of the work, a point he does not concede, the fact that it was neither color-coded nor encased in protective wrapping evidences IDI's failure to provide a safe work environment.

While the evidence is inconclusive as to whether the subject electrical pipe was color-coded, this issue, in and of itself, does not preclude summary judgment. Plaintiff fails to offer evidence that such color-coding is required by statute or otherwise, or that this type of precaution is anything more than an accommodation. Moreover, and more to the point, the purpose of color-coding, as stated by the parties, is to make protruding objects more visible, and based on plaintiff's own testimony, it cannot be said that the electrical pipe was not open and obvious, as he himself acknowledged passing by and seeing it, since his first day on the job, permanently embedded in the cement floor, sticking up approximately two feet, and in the same position.

Plaintiff's argument, with respect to the lighting provided at the site on October 14, 2000, is meritless. The evidence fails to show that the temporary lighting strung up during the early, superstructure phase of construction, was in any way, substandard or defective. Plaintiff's conjecture, that a bulb may have been burnt out, does not present a triable issue of fact, sufficient to defeat a motion for summary judgment (Ellis v New York Racing Assn., 300 AD2d 621 [2<sup>nd</sup> Dept 2002]).

Defendants seek a dismissal of plaintiff's Labor Law 240 (1) claim. Plaintiff stated that he tripped while walking on the ground floor of the construction site while carrying lumber. These facts do no support a Labor Law 240 (1) claim. O'Sullivan was "exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1)" (Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc., 84 NY2d 841, 843 [1994]; see also Wendell v Sylvan Lawrence Co., 279 AD2d 383 [1<sup>st</sup> Dept 2001]).

It is noted that plaintiff does not oppose defendants' motion to dismiss his claims pursuant to Industrial Code sections 12 NYCRR 23 - 1.5; 23 -2.1 (b) and 12 NYCRR 23 - 1.7 (e) (1). These

apparently abandoned claims are dismissed as they are either too general (§ 23 - 1.5) to support a Labor Law 241 (1) claim, or are inapplicable (§§ 23 -2.1 [b]; 23 - 1.7 [e] [1]; 29 CFR 1926.25) to the facts of this case.

Defendants have made a prima facie showing of entitlement to summary judgment as a matter of law and plaintiff has failed to raise a material question of fact sufficient to defeat defendants' motion (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Plaintiff fails to offer probative evidence that the worksite was rendered unreasonably dangerous by the necessary and routine placement of an electrical pipe in the superstructure of a high-rise, and speculation and conclusory statements alone cannot adequately rebut defendants' prima facie showing of entitlement to summary judgment (Alvarez v Prospect Hosp., 68 NY2d 320, 325 [1986]).

Accordingly, it is

ORDERED that defendants IDI Construction Company, Inc., 251 East 51<sup>st</sup> Street Corp., and third-party defendant Cosner Construction's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of these defendants; and it is further

ORDERED that the motion to dismiss the third-party complaint is granted and the complaint and all cross claims against the third-party defendants are dismissed.

This shall constitute the decision and order of the court.

DATED: FEBRUARY 7, 2005

**FILED**

FEB - 9 2005

NEW YORK  
COUNTY CLERK'S OFFICE

  
SHERRY KLEIN HEITLER  
J.S.C.