

Dowd v City of New York

2005 NY Slip Op 30290(U)

February 3, 2005

Supreme Court, Kings County

Docket Number: 15462/96

Judge: Martin M. Solomon

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At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of February, 2005

P R E S E N T:

HON. MARTIN SOLOMON,
Justice.

-----X
SCOTT DOWD AND MARIE DOWD,
Plaintiffs,

- against -

Index No. 15462/96

THE CITY OF NEW YORK AND BROOKLYN UNION
GAS COMPANY,
Defendants.

-----X
THE CITY OF NEW YORK,
Third-Party Plaintiff,

- against -

PCM CONSTRUCTION, INC.
Third-Party Defendant.

----- X

The following papers numbered 1 to 22 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-6 _____
Opposing Affidavits (Affirmations) _____	7-16 _____
Reply Affidavits (Affirmations) _____	17-24 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memorandum of Law</u> _____	22 _____

Upon the foregoing papers, defendant Brooklyn Union Gas Company (Brooklyn Union) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of

plaintiffs Scott Dowd and Marie Dowd, and all cross claims asserted against it. Defendant/third-party plaintiff The City of New York (The City) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims asserted against it and for common law indemnification against Brooklyn Union. Plaintiffs cross-move, pursuant to CPLR 3126, to strike the answer of Brooklyn Union for its failure to provide a copy of its contract with third-party defendant PCM Construction, Inc. (PCM) or with an affidavit of good faith indicating that it could not locate the contract or, in the alternative, for an order denying Brooklyn Union's motion for summary judgment or, in the alternative, for an order declaring that Brooklyn Union was a general contractor on the subject site who exercised the requisite supervision and control over the work of PCM and its employees pursuant to Labor Law § 200; for leave to supplement their bill of particulars, pursuant to CPLR 3043 (b), as to Brooklyn Union and The City, to add violations of 12 NYCRR § 23-1.7 (d) and New York City Department of Transportation (DOT) regulations §§ 1.06.23 (O) and 6.02.2 (L) or, to the extent such leave is denied, for leave to amend their bill of particulars pursuant to CPLR 3025 (b); for leave to amend their notice of claim pursuant to General Municipal Law (GML) §50-e (6), for leave to amend their bill of particulars as to the City to add a cause of action in negligence based upon a dangerous water condition, and for an order granting their motion for summary judgment on the issues of Labor Law §§ 200 and 241 (6). PCM cross-moves, pursuant to CPLR 1010, to sever the third-party action.

The instant action arises out of an August 29, 1995 accident that occurred when plaintiff Scott Dowd, a foreman of a small mains gas crew for PCM, was attempting to lay pipes in an eight-foot deep excavation trench on 9th Street, south of its intersection with 2nd Avenue, in Brooklyn, New York. On the day of the accident, plaintiff attempted to remove a piece of wood embedded in the mud at the bottom of the trench. As plaintiff pulled the wood out of the mud, he lost his footing, fell backwards and a nail which was lodged in the wood pierced his right wrist. Plaintiff testified that each day, as a result of a broken water main nearby, at least six feet of water had to be pumped from the trench before PCM could begin its work. PCM was working at the job site as a subcontractor of Brooklyn Union, pursuant to a written contract. The City is the owner of the location where the accident occurred.

Plaintiff served a notice of claim on the City on or about October 19, 1995, and testified at a 50-h hearing on or about April 12, 1996. Thereafter, by summons and verified complaint dated May 6, 1996, plaintiff commenced the instant against the City and Brooklyn Union, alleging violations of Labor Law §§ 200 and 241 (6) and a cause of action sounding in common law negligence. The City and Brooklyn Union joined issued in June and July, 1996, respectively. Plaintiffs filed their note of issue on January 30, 2004. The City thereafter commenced the third-party action against PCM on or about May 19, 2004, seeking common law indemnification and contribution.

CPLR 3212(a) Timeliness Issue

As an initial matter, Brooklyn Union argues that the court should not consider the untimely cross motions of plaintiffs and the City on the merits inasmuch as these parties have failed to seek leave to make the instant motions and have failed to demonstrate “good cause” for moving for summary judgment in an untimely manner. The court concurs.

Pursuant to CPLR 3212 (a), the court may set a date after which no summary judgment motion may be made, and if no such date is set by the court the motion “shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” “[G]ood cause’ in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion -- a satisfactory explanation for the untimeliness -- rather than simply permitting meritorious, non-prejudicial filings, however tardy” (*Brill v City of New York*, 2 NY2d 648, 652 [2004], citing CPLR 3212 [a]). “No excuse at all, or a perfunctory excuse, cannot be ‘good cause’” (*id.*; see also *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725 [2004]).

Here, plaintiffs and the City concede that their cross motions are untimely. Specifically, the record indicates that plaintiffs filed the note of issue on January 30, 2004. However, the City and the plaintiffs moved, respectively, for summary judgment on June 1, 2004 and June 9, 2004, 122 days and 131 days after the note of issue was filed.¹

¹In fact, the City indicates in its reply that due to a clerical error, the June 1, 2004 cross motion was not placed on the court’s calendar for the June 11, 2004 return date. Thus, counsel for the city re-dated and re-served a copy of the City’s original cross motion, per this court’s direction, on July 6, 2004.

Thus, plaintiffs and the City failed to make their motions within the 120-day period as set forth in CPLR 3212 (a). The only explanation offered by either party for their delay is the perfunctory excuse of “law office failure,” which, according to *Brill*, does not constitute good cause. “In the absence of such a ‘good cause’ showing, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment” (*Thompson v N.Y. City Bd. of Educ.*, 10 AD3d 650, 651 [2004]).

The City contends, among other things, that since *Brill* was decided before it made its motion, and because *Brill* “created a new procedural guideline,” *Brill* should not be applied retroactively to preclude the court from entertaining its cross motion. This argument is rejected. *Brill* merely enforced an existing statutory requirement. Moreover, *Brill* itself reversed an order of the Appellate Division, Second Department, which granted the untimely summary judgment motion of the City, without any concerns of retroactivity. In addition, a court is generally constrained to decide cases on the law as it exists at the time of the decision (*Kilkenny v City of New York*, Index No. 39978/00, Partnow, J., citing *Lawrence School Corp. v Morris*, 167 AD2d 467 [1990]). In view of the foregoing, that branch of plaintiffs’ cross motion for summary judgment on its Labor Law §§ 200 and 241 (6) and common law negligence claims is denied and the cross motion of the City is denied.

Cross Motion of Plaintiff to Strike

Plaintiffs cross-move to strike the answer of Brooklyn Union based upon its failure to provide a copy of Brooklyn Union’s contract with PCM, or an affidavit of good faith

regarding its failure to locate the contract or, in the alternative, to deny Brooklyn Union's motion for summary judgment or, in the alternative, to declare that Brooklyn Union was the general contractor on the work site who exercised the requisite supervision and control over PCM's work and employees within the meaning of Labor Law § 200. Plaintiffs argue that the contract would shed light on Brooklyn Union's status on the work site and its authority to supervise and control the work of PCM and its employees; that Brooklyn Union has disregarded four court orders, annexed to plaintiffs' papers, directing Brooklyn Union to provide the contract, and that its failure to do so is willful and contumacious.

Counsel for Brooklyn Union argues in opposition that its investigator, Mr. Mikol, whose affidavit is annexed, searched for and provided part of the contract to plaintiffs' counsel several years ago, that throughout this litigation, he (counsel) has repeatedly advised plaintiffs' counsel that he was unable to provide a complete copy, and that on or about October, 2004, he found and provided a copy of the complete contract to plaintiffs after he again searched his office records. Counsel argues that Brooklyn Union's efforts to provide the contract refute any allegation that it acted willfully or contumaciously.

In a "further affirmation in opposition," plaintiffs concede that they have received a complete copy of the contract, but assert prejudice because of its untimely production. They also note that they received a "Disclosure of Information" notice from Brooklyn Union, which identifies a witness, Lenny Scotto, now deceased, his log book, and the name of a possible unnamed witness, which Brooklyn Union only provided after it moved for summary

judgment; information which plaintiffs claim they should have had to oppose Brooklyn Union's motion

Brooklyn Union replies and the record indicates that it disclosed Mr. Scotto's identity and last known address to plaintiffs in 1999, and that while plaintiffs' counsel served Brooklyn Union with a notice to take Mr. Scotto's nonparty deposition, it never took place. Further, Brooklyn Union annexes a second affidavit of its investigator, Mr. Mikol, who states that he only recently obtained Mr. Scotto's log book from Mrs. Scotto, from whom he learned that Mr. Scotto was deceased, after which the log was made available to all parties. As for the possible eye-witness to the accident, Brooklyn Union notes that the individual it disclosed was Al Vittioso, a PCM employee and part of plaintiff's work crew, whom Brooklyn Union, based upon investigation, asserts is the same individual plaintiff identified as "Al Victorio" at his 50-h hearing. Brooklyn Union asserts that since Mr. Vittioso was part of plaintiff's work crew, plaintiff should be able to determine whether the two men are one in the same. With respect to plaintiffs' claim that they are prejudiced by the late receipt of work records, Brooklyn Union argues that these records were provided informally to plaintiffs' counsel at Brooklyn Union's deposition, and that in any event, the late disclosure does not prejudice plaintiffs because they have not used it as part of their opposition to Brooklyn Union's motion. Finally, Brooklyn Union notes that while the court's August 5th, 2003 compliance order directed Brooklyn Union to provide the portion of the contract not already produced or an affidavit of good faith that the contract could not be

located, it also provided that Brooklyn Union would not be precluded from producing the contract if located at a later date. Brooklyn Union states that it chose to continue to search for the contract, rather than submitting an affidavit stating that the contract could not be located.

“Actions should be resolved on their merits wherever possible . . . and the drastic remedy of striking a pleading should not be employed absent a clear showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith” (*Simpson v City of New York*, 10 AD3d 601, 602 [2004]). Here, the record does not reveal that Brooklyn Union willfully and contumaciously failed to provide discovery. Plaintiffs’ counsel does not refute Brooklyn Union’s counsel’s contention that he repeatedly advised plaintiffs’ counsel that he was unable to provide a copy of the complete contract. While Brooklyn Union was remiss in failing to conduct a more thorough search sooner, the August 5th order permitted Brooklyn Union to provide a copy of the contract if it could be located. In addition, plaintiffs have received the contract and other material in time to use it to oppose Brooklyn Union’s motion. As for discovery regarding two witnesses, plaintiffs were in possession of the information regarding the two witnesses and had sufficient information, some provided by Brooklyn Union, to engage in further investigation. Further, plaintiffs’ argument that their expert was not able to review the recently disclosed material is specious as plaintiffs failed to disclose their expert during pretrial discovery. Under the circumstances, that branch of the motion to strike Brooklyn Union’s answer or, in the alternative, to deny Brooklyn

Union's motion or, in the alternative, to declare Brooklyn Union as the general contractor is denied.

In the alternative, plaintiffs seek leave to supplement their bill of particulars pursuant to CPLR 3043 (b) as to Brooklyn Union and the City to add violations of 12 NYCRR 23-1.7 (d) and DOT regulations §§ 1.06.23 (O) and 6.02.2 (L) or, to the extent such leave is denied, for leave to amend their bill of particulars pursuant to CPLR 3025 (b).

Insofar as relevant here, the record reveals that Brooklyn Union joined issue on or about July 18, 1996. Thereafter, in response to Brooklyn Union's demand, plaintiffs served a bill of particulars on or about July 30, 1996, without identifying any sections of the Industrial Code which had allegedly been violated. Subsequently, a preliminary conference order was issued on October 11, 1996, which directed plaintiffs to serve a supplemental bill of particulars setting forth the Code provisions upon which they predicated their Labor Law § 241 (6) claim. On June 12, 1997, plaintiff served a supplemental bill of particulars alleging violations of 12 NYCRR 23-1.7 (e) (2), 23-1.8 (c), 23-2.1 (b) and of 29 CFR 1926.20 (b) (1) and (2) (OSHA).² Thereafter, plaintiffs moved to strike defendants' answers or, in the alternative, to supplement and/or amend their bill of particulars to add a violation of 12 NYCRR 23-1.7 (d), entitled "Slipping hazards," which states that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and

²Occupational Health and Safety Act.

any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing. Plaintiff also seeks to add violations of certain DOT regulations.

“In general, a party may amend pleadings ‘at any time by leave of court’ and such ‘[l]eave shall be freely given upon such terms as may be just’” (*Borowicz and International Paper Co.*, 245 AD2d 682, 683-684 [1997], quoting CPLR 3025[b]). Further, “[t]he decision to allow or disallow an amendment is committed to the court’s sound discretion” (*Leonardi v City of New York*, 294 AD2d 408, 409 [2002]). With respect to Labor Law § 241(6), a plaintiff’s belated allegation of a violation of an Industrial Code to support this cause of action is permissible if it involves no new factual allegations, raises no new theories of liability, and causes no prejudice (*Kelleir v Supreme Indus. Park*, 293 AD2d 513, 514 [2002]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [2002]). On the other hand, “leave to amend should be denied where . . . there is no merit to the proposed amendment” (*Russo v Clinton Disposal Serv.*, 295 AD2d 1006 [2002]).

Here, in their July 30, 1996 bill of particulars, plaintiffs alleged that Brooklyn Union was negligent “in failing to timely and/or properly stop and/or control water coming into the subject excavation [and] in failing to properly remove water from [the] subject excavation,” and that Brooklyn Union was “given actual prior notice of the dangerous water conditions existing in the excavation at the work site.” In addition, Brooklyn Union was aware of plaintiff’s deposition testimony, part of which was taken on February 10, 1999, regarding the

daily accumulation of water in the trench and plaintiff's loss of footing in the water and mud while picking up the piece of wood. Finally, although plaintiffs have failed to provide an excuse for their delay, such failure is not fatal to this branch of their motion since this amendment as to Brooklyn Union does not involve new factual allegations, raises no new theories of liability, and causes no prejudice (*Kelleir*, 293 AD2d at 514; *Noetzell*, 271 AD2d at 231).

Nevertheless, "Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to all persons employed in areas in which construction, excavation, or demolition work is being performed" (*Miranda v City of New York*, 281 AD2d 403, 404 [2001], quoting Labor Law § 241(6)). "[T]o prevail upon a Labor Law § 241 (6) claim, a plaintiff must establish that a defendant violated a regulation that sets forth a specific standard of conduct" (*id.*).

Here, Brooklyn Union argues that section 23-1.7 (d) (1) is inapplicable because its "position is that plaintiff's injuries were caused by the piece of wood, which may not be characterized as a foreign substance that may cause slippery footing. Brooklyn Union also contends that even were the court to find that the accident was caused by a slipping hazard, this provision does not apply because mud at the bottom of an open-air trench cannot be considered a foreign substance. In addition, Brooklyn Union asserts that the bottom of a trench is not a floor, as contemplated by this section and, that in any event, liability cannot be imposed pursuant to this section because plaintiff testified that the piece of wood was part

of the sheeting installed to support the walls of the trench, which was an integral part of the work at the subject premises.³

While this provision is sufficiently specific to support a Labor Law § 241 (6) claim (see *Whalen v City of New York*, 270 AD2d 340, 342 [2000]), review of the record and relevant case law reveal that it is inapplicable to the facts of this case. The evidence here indicates that PCM had to pump out six feet of water from the eight-foot deep trench every day before working in it, and that approximately one foot of water remained at the bottom of the trench while PCM worked there. Under the circumstances, the water and mud at the bottom of the trench were not foreign substances as contemplated under this provision (*Miranda*, 281 AD2d as 404 [23-1.7 (d) does not apply to natural sand surface of the excavation trench in which plaintiff was standing; sandy ground did not constitute a “slippery condition” under provision]; *Gielow v Rosa Coplon Home*, 251 AD2d 970, 971-972 [1998] [23-1.7 (d) not applicable because plaintiff did not fall on foreign substance, but on muddy ground (sloped embankment in 14-foot excavation) exposed to the elements]). Moreover, given that plaintiff and other PCM employees were required to pump out the trench each day and regularly worked in one foot of water at the bottom of the trench, the wet and muddy condition of the trench floor was a normal and integral part of the pipe laying operation (*Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2003]). Under the circumstances,

³The City also opposes this branch of plaintiffs’ motion, but argues that, with respect to the City, plaintiff must seek leave to amend their notice of claim, not their bill of particulars, and that such leave should not be granted, for reasons set forth below.

12 NYCRR 23-1.7 (d) may not serve to support plaintiffs' Labor Law § 241 (6) claim. As such, the motion to supplement and/or amend the bill of particulars to add this violation as to Brooklyn Union and the City is denied.

That branch of the motion to supplement and/or amend the bill of particulars to allege DOT violations is also denied as to both defendants. First, “[o]nly a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under [Labor Law § 241 (6)]” (*Heller v 83rd St. Investors Ltd. Pshp.*, 228 AD2d 371 [1996], *lv denied* 88 NY2d 815 [1996]). Second, notwithstanding the conclusory assertions of plaintiff's expert that these regulations have been violated, plaintiffs have failed to demonstrate whether a violation of these regulations support their Labor Law § 200 and common law negligence claims, and thus whether this part of their motion to amend has merit.

Plaintiffs also seek leave to amend their notice of claim pursuant to GML §50-e(6) and to supplement and/or amend their bill of particulars as to the City to allege that the City was negligent in failing to timely and properly stop and/or control water from coming into the subject trench, and in failing to properly remove water from the trench.

The City opposes, arguing, in substance, that having asserted in the notice of claim that plaintiff was “injured by a post which had a nail protruding from it,” plaintiffs may not amend their notice of claim, nine years after the date of the accident and over eight years after the commencement of this action, to allege a new theory of negligence, namely that the

water condition at the bottom of the trench was a substantial factor in causing plaintiff's accident. The City asserts that if the amendment is granted, it will be substantially prejudiced because it would be deprived of the opportunity to investigate the facts and circumstances surrounding the alleged water condition as it existed nearly nine years ago, and of the opportunity to locate and examine potential witnesses while memories are still fresh. In addition, the City notes that when there has been an inordinate delay in seeking leave to amend, plaintiffs must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (*Rosse-Glickman v Beth Isr. Med. Ctr.*, 309 AD2d 846 [2003]).

Plaintiffs reply that the City's own moving papers demonstrate that it was aware of their "dangerous water condition" claim, and that the claim is readily discernable from plaintiffs' original bill of particulars and plaintiff's testimony at the 50-h hearing. In particular, on April 12, 1996, plaintiff testified at his 50-h hearing that each day before PCM began their work at the subject accident site, six feet of water, originating from a nearby broken water main, had to be pumped from the eight-foot deep trench before he and other PCM employees could commence their work, that the procedure took approximately two hours, that after the procedure was complete, approximately one foot of water remained in the trench, that while working on the day of the accident, there was one foot of water in the trench, and that when he attempted to pull the piece of wood embedded at the bottom of the trench, he lost his footing in the mud and fell backward. Further, in their original bill of

particulars provided to the City on or about July 19, 1996, plaintiffs alleged that the City was “given actual prior notice of the dangerous water conditions existing at the work site.” Finally, in its cross motion, plaintiffs note that the City’s affirmation makes clear that it was aware of a dangerous water condition because, in an attempt to demonstrate that Brooklyn Union was aware of the “alleged defect,” it cites plaintiff’s February, 1997 deposition testimony that he told a Brooklyn Union supervisor that he was backfilling the sheeting (or wood braces) on the walls of the trench to prevent the sheeting from breaking apart due to the pressure of the water main leak.

“A notice of claim must state ‘the time when, the place where and the manner in which the claim arose’” (*Ruiz v City of New York*, 237 AD2d 422, 423 [1997], quoting General Municipal Law § 50-e [2]). “Moreover, the notice of claim must provide a sufficient basis for a municipality to conduct an investigation while the facts surrounding the incident are fresh” (*id.*, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]). GML § 50-e(6) permits correction of a notice of claim “[a]t any time after its service of “a mistake, omission, irregularity or defect made in good faith” (*Matter of Halperin v City of New York*, 127 AD2d 461, 462-463 [1987]; *White v N.Y. City Hous. Auth.*, 288 AD2d 150 [2001]; *Harrington v City of New York*, 6 AD3d 662, 663 [2004]; *Olivera v City of New York*, 270 AD2d 5, 6 [2002]). “First, the mistake, omission, irregularity, or defect must be made in good faith, and second, it must appear that the public corporation was not prejudiced thereby” (*Jngle v N.Y. City Transit Auth.*, 7 AD3d 574 [2004]). Moreover, an amendment

that alters the substantive nature of the claim or that sets forth a new theory of liability is not within the statute's purview (*White*, 288 AD2d 150; *Harrington*, 6 AD3d at 663; *Olivera*, 270 AD2d at 6).

In this case, over eight years have passed between the commencement of this action and plaintiffs' motion to amend the notice of claim. Further, while plaintiff testified in detail about the flooding in the trench five months after the notice of claim was filed and eight months after the accident occurred, it is well settled "that what satisfies the statute is not knowledge of the alleged wrong, but rather, knowledge of the nature of the claim" (*Pico v City of New York*, 8 AD3d 287, 288 [2004]). Here, inasmuch as the notice of claim did not set forth a theory of liability premised upon a dangerous water condition, the City "did not acquire knowledge of a specific claim, but only, [at best] a general knowledge that a wrong may have been committed" (*Perre v Town of Poughkeepsie*, 300 AD2d 379, 380 [2002]). In addition, granting leave would result in prejudice to the City since it has been denied the opportunity to conduct a prompt and accurate investigation while the facts surrounding the incident, and memories of witnesses, are still fresh (*id.*; *Ruiz*, 237 AD2d at 423). Notably, the prejudice is compounded in light of the transitory nature of the water condition (*Cavanagh v Monticello Cent. Sch. Dist.*, 241 A.D.2d 654, 655 [1997]; *cf. Ruiz*, 237 AD2d at 423[snow and ice]; *Zapata v City of New York*, 225 AD2d 543, 544 [1996] [sidewalk defect]). In addition, the notice of claim, which alleged, *inter alia*, that the City was negligent in their control and operation of the work site, in failing to provide plaintiff

a safe place to work and a defect-free area, and in allowing the work site to remain in a dangerous condition, does not fairly imply the claim of a dangerous water condition (*Compare Melendez v N.Y. City Hous. Auth.*, 294 AD2d 243 [2002]). Further, the one sentence reference to the water condition in the bill of particulars, served on the City almost eleven months after the accident, and the complaint, which alleges that plaintiff was caused to lose his footing while removing debris, were too vague to give the City notice of the essential facts constituting the current claim of a dangerous water condition (*see White*, 288 AD2d at 150). Finally, plaintiffs have been aware of the nature of the accident since it occurred, yet have failed to explain the delay in seeking the amendment. Thus, they have failed to demonstrate that the omission of this theory in their original notice of claim was made in good faith. Accordingly, that branch of the motion to amend the notice of claim is denied. Since the notice of claim may not be amended, any proposed amendment to the bill of particulars incorporating the same barred claims would be without merit and must be denied (*Chipurnoi v MBSTOA*, 216 AD2d 171, 172 [1995]).

Motion of Brooklyn Union

In support of its motion for summary judgment, Brooklyn Union first argues that plaintiffs' Labor Law § 200 and common law negligence claims should be dismissed because it did not have actual or constructive notice of the wood or water condition and did not supervise or control the work plaintiff performed.

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712-713 [2000]). In order for liability to attach under Labor Law § 200 or under a theory of common-law negligence, there must be evidence that the owner or contractor controlled and supervised the manner in which the underlying work was performed, or that it created or had notice of the allegedly dangerous condition which caused the accident (*id.*, *Gambino v Mass. Mut. Life Ins. Co.*, 8 AD3d 337 [2004]; *Kanarvogel v Tops Appliance City, Inc.*, 271 AD2d 409, 411 [2000], *appeal dismissed* 95 NY2d 902 [2000]).

This branch of the motion is denied because there is evidence that Brooklyn Union was aware of the water condition and piece of wood and there is a question of fact as to whether these conditions were a substantial factor in causing plaintiff's injury. First, as noted above, plaintiff testified that as he slipped on mud and water at the bottom of the trench while attempting to pick up the wood, the nail pierced his wrist. Moreover, the record reveals that Brooklyn Union's field inspector was aware of the ongoing water condition in the trench. In this regard, plaintiff testified that Brooklyn Union provided an inspector and an engineer for each job assignment; that he met with them and his PCM supervisors before the project began; that Brooklyn Union's field inspector, "Lenny," was present at the work site each day, except the day of the accident, saw the water in the trench and saw it being pumped out; that plaintiff told Lenny about the water which filled the trench; that Lenny was aware that on occasion plaintiff and his fellow PCM workers had to work in other areas of the job site

because the trench was filled with water; and that plaintiff and Lenny told the City's Department of Environmental Protection representative about the water problems in the trench two to six days before the accident occurred, and also told the City's Department of Transportation representative about the water problem.

Brooklyn Union's contention that it did not have notice of the water condition because Lenny was not present on the day of the accident is rejected. In this regard, plaintiff testified that it took approximately one week to dig the trench, that he first saw the water when they began to dig it, that Lenny was at the job on the first day plaintiff's work began, and that plaintiff discussed the water problem with Lenny the first day he dug the trench and on a daily basis thereafter.

Second, with respect to the nail in the piece of wood, plaintiff testified that the piece of wood containing the nail pierced his wrist. In addition, he stated that the wood was part of the sheeting or wood braces which lined the trench to prevent it from caving in, and that he had told Lenny, before the accident, that the pressure from the water main leak was causing the wood sheeting to break off.

In view of the foregoing evidence, the motion to dismiss plaintiffs' Labor Law § 200 and common law negligence claims must be denied.

Brooklyn Union also moves to dismiss plaintiffs' Labor Law § 241 (6) cause of action, arguing that the provisions plaintiffs' claim were violated do not apply to the circumstances of this case. This branch of the motion is also denied. Section 23-1.7 (e) (2)

provides that “the 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.” This provision is sufficiently specific to support a Labor Law § 241 (6) cause of action (*Rosenberg v Ben Krupinski Gen. Contrs., Inc.*, 284 AD2d 523, 524 [2001]). In addition, the bottom of the trench constitutes a part of a floor or a similar area where persons work (*McAndrew v Tennessee Gas Pipeline Co.*, 216 AD2d 876 [1995]; *Laboda v VJV Dev. Corp.*, 296 AD2d 441 [2002]). However, while the evidence indicates that sheeting was placed on the sides of the trench to prevent the trench from caving in, a question of fact exists as to whether the pointed end of a nail which extended from the piece of wood sheeting was an integral part of the work being performed; circumstances under which liability would not attach (*see Castillo v Starrett City, Inc.*, 4 AD3d 320 [2004]; *Salinas*, 2 AD3d at 619[2003]; *Devine v 77 Water Street, Inc.*, 272 AD2d 220 [2000]). Thus, plaintiffs’ section 241 (6) claim based upon this provision is upheld.

Brooklyn Union also argues that 12 NYCRR 23-1.8 (c) (2) - which provides that “every person required to work or pass in water, mud, wet concrete, or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubber over safety shoes” - is inapplicable because, *inter alia*, the lack of proper boots was not a proximate cause of the accident. The court concurs. While this provision is sufficiently specific to support a Labor Law § 241 (6) cause of action, it is not applicable

under the facts of this case because saturation of plaintiff's feet with water and mud was not the cause of plaintiffs' accident. Thus, that branch of Brooklyn Union's motion to dismiss plaintiffs' Labor Law § 241 (6) based on this provision is granted.

Finally, Brooklyn Union correctly asserts that 12 NYCRR 23-2.1(b) is not sufficiently concrete to support a Labor Law § 241 (6) claim (*Fowler v CSS Queens Corp.*, 279 AD2d 505 [2001]) and that liability under Labor Law § 241 (6) may not be predicated upon an OSHA regulation (*Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311 [1997]). Thus, that branch of Brooklyn Union's motion to dismiss plaintiffs' Labor Law § 241(6) claim based on these provisions is granted.

PCM's Cross Motion to Sever

In support of its cross motion, PCM argues that while the main action was commenced in 1996, and an October 11, 1996 preliminary conference order directed any third-party actions to be commenced within 90 days of the completion of all depositions (April 10, 2001), the City, without explanation, commenced the third-party action on or about May 22, 2004, almost four months after the note of issue was filed. PCM also contends that it is prejudiced because it was unable to engage in discovery during the eight years the matter has been pending, it has received incomplete discovery from the other parties, and it should have the opportunity to conduct discovery and file a motion for summary judgment. In addition, PCM notes that while it tendered its defense to Brooklyn Union under an owner controlled

insurance program (OCIP) on June 22, 2004, as of the filing of its cross motion, it has not yet received a response to the tender.

CPLR 1010 provides that:

“The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.”

Here, although the City has failed to justify its delay in bringing the third-party action, only indicating that it was “unavoidable,” as the City and plaintiffs argue, “since the actions involve common factual and legal issues a single trial is appropriate in the interest of judicial economy, and to avoid the possibility of inconsistent jury verdicts” (*Villatoro v Talt*, 269 AD2d 390 [2000]; see also *Pescatore v American Export Lines, Inc.*, 131 AD2d 739 [1987]; *Leavitt v New York City Transit Auth.*, 111 AD2d 907 [1985]).

Moreover, “the plaintiff[s] in the main action [do] not claim that [they] will be unduly delayed by the [City’s] impleader of [PCM] . . . [n]or, if the trial of the main action is stayed pending completion of disclosure by [PCM], can [PCM] claim any prejudice by reason of the [City’s] delay in bringing their third-party action for indemnity” (*Annanquartey v Passeser*, 260 AD2d 517, 517-518 [1999]). Here, as noted, plaintiffs oppose severance and assert in their reply they have provided PCM with “voluminous documents and, along with the other parties, will assist PCM in seeking discovery.” In addition, a trial of the main action has not yet been scheduled and thus a stay of the main action is unnecessary. Further, as plaintiffs

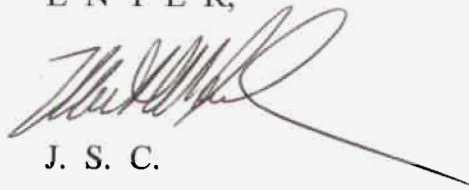
assert, inasmuch as the ongoing motion practice is delaying the trial, the “standard and goals” for conducting the trial, set for May 2, 2005, will likely be delayed. Finally, plaintiffs and the City have already provided PCM with a considerable amount of discovery.

Accordingly, while a discretionary severance is unwarranted under these circumstances, PCM is granted 90 days from the date this order is served with notice of entry to resolve the issue regarding its representation and to complete discovery in the third-party action.

In sum, the motion of Brooklyn Union is granted only to the extent of dismissing plaintiffs’ Labor Law § 241 (6) claim which is premised upon 12 NYCRR 23-1.8 (c) (2), 12 NYCRR 23-2.1 (b), and OSHA regulations. The City’s cross motion is denied. Plaintiffs’ cross motion is denied. PCM’s cross motion is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to read "Martin M. Solomon", written over the printed name "J. S. C.".

J. S. C.

Hon. Martin M. Solomon S.C.J.