

**Burgalassi v Mandell Mechanical Corporation**

2006 NY Slip Op 30479(U)

October 17, 2006

Supreme Court, New York County

Docket Number: 120117/03

Judge: Rosalyn H. Richter

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

DECEMENT.

*Rosalyn Richter*

PART 24

Index Number : 120117/2003

BURGALASSI, ALEXANDER

vs

MANDELL MECHANICAL

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION 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

**FILED**  
OCT 24 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

*All annexed decision + order*

*The case is scheduled for mediation  
2 for Nov 1 at 9:30 am*

Dated: 10/17/06

*Rosalyn Richter*  
ROSALYN RICHTER S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 24

-----X

ALEXANDER BURGALASSI,

Plaintiff,

Index No.:120117/03  
DECISION/ORDER

-against-

MANDELL MECHANICAL CORPORATION,  
BOVIS LEND LEASE LMB INC., and 455  
CENTRAL PARK WEST, LLC,

Defendants,

-----X

BOVIS LEND LEASE LMB INC., and 455  
CENTRAL PARK WEST, LLC,

Third-Party Plaintiffs,

Index No.:590122/05

-against-

PINNACLE INDUSTRIES, II LLC, and PRINCE  
CARPENTRY, INC.,

Third-Party Defendants,

-----X

MANDELL MECHANICAL CORPORATION,

Second Third-Party Plaintiff,

Index No.:05590738/05

-against-

TRIPLE S AIR SYSTEMS, INC.,

Second Third-Party Defendant.

-----X

**ROSALYN RICHTER, J.S.C.:**

In this personal injury/negligence action, the motions with sequence numbers 005, 006 and 008 are consolidated for disposition. These sequences consists of competing motions and cross motions for summary judgment by the plaintiff (motion sequence number 005), the three named defendants (motion sequence numbers 006 and 008), and one of the third-party defendants (motion sequence number 005). For the following reasons, the plaintiff's motion is denied; the defendants' motions are both granted in part and denied in part; and the third-party defendant's

cross motion is denied.

On February 20, 2003, plaintiff Alexander Burgalassi (Burgalassi), a construction worker employed by third-party defendant Pinnacle Industries, II LLC (Pinnacle), suffered injuries to his right arm and elbow when he stepped into a hole in the floor at a construction site in a building located at 455 Central Park West in the County, City and State of New York (the building). Defendant 455 Central Park West, LLC (455) owns the building. Defendant Bovis Lend Lease LMB Inc. (Bovis) was the general contractor for the construction work that was being performed at the building. Defendant Mandell Mechanical Corporation (Mandell) was the subcontractor hired to perform the steamfitting work on that construction. Burgalassi's employer, Pinnacle, was another subcontractor that had been hired to perform the concrete work on the construction.

At the time of the accident, Burgalassi was walking on the permanent 13<sup>th</sup> floor of the building removing temporary wooden framing that had been installed to support the concrete slab of the 14<sup>th</sup> floor that had been poured the previous week. Burgalassi was carrying wooden planks across the floor when his right foot went through a concealed hole in the floor. Burgalassi described the hole as approximately two feet in diameter, and indicated that his right leg fell into the hole up to his crotch level, which caused him to suffer a broken elbow and other injuries.

Mandell was deposed via Edward Wissenbach (Wissenbach), the project manager in charge of Mandell's steamfitting work at the building. Wissenbach stated that the hole into which Burgalassi fell had been cut by Mandell's steamfitters to pass "risers" (i.e., heating pipes) through the building. Wissenbach estimated that the subject hole was either 14" or 16" in diameter, since that was the diameter of the riser pipes that the steamfitters were installing. Wissenbach also stated that such holes were usually covered by "sleeve covers" made of "light

gauge tin” that were only capable of supporting “a couple of pounds” of weight, but that they were usually raised a couple of inches above floor level and spray painted bright orange as safety precautions. Wissenbach stated at one point in his deposition that the particular sleeve cover that Burgalassi fell through was flush with the floor and had not been spray painted a bright color; instead it appeared to be gray, the same color as the concrete floor.

Patrick O’Doherty (O’Doherty), the time keeper for all of Pinnacle’s employees at the building, stated that before the date of Burgalassi’s injury, he had received complaints from other Pinnacle employees that Mandell’s steamfitters had improperly covered other riser holes in the building with duct tape. Russell Gilroy (Gilroy), the construction superintendent at the building who worked for Bovis, stated that he held weekly meetings with the foremen of all of the subcontractors, and that the foremen had complained to him several times about uncovered or improperly covered riser and duct holes in the areas where their crews were working. Gilroy also stated that he conducted walk-through inspections of the work at the building himself, and that he had observed uncovered or improperly covered holes in the floor on several occasions. Gilroy stated that whenever he learned of or personally found an uncovered or improperly covered hole, he directed third-party defendant Prince Carpentry, Inc. (Prince), the protection subcontractor, to cover it. Finally, Gilroy admitted that Bovis had the ability to stop the work of any contractors on the site if they observed a safety violation.

The moving party on a summary judgment motion bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64 (1st Dept. 2002). Once this showing has been made, the burden

shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See Zuckerman v City of New York*, 49 N.Y.2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 A.D.2d 340 (1st Dept. 2003).

Burgalassi's motion seeks summary judgment on the issue of liability on his two Labor Law causes of action against 455, Bovis and Mandell arguing that his injuries were "elevation related" because the hole that he stepped into on the thirteenth floor was sufficiently large for him to have fallen completely through it to the twelfth floor below. Burgalassi cites *Carpio v. Tishman Const. Corp. of New York*, 240 A.D.2d 234 (1st Dept. 1997) to support his arguments. In *Carpio*, the Appellate Division held that a plaintiff who inadvertently stepped into a 10-14" inch wide riser hole in the floor of a worksite while he was engaged in painting the ceiling above him with a paint roller had suffered an "elevation related" injury for purposes of Labor Law 240(1) analysis. Bovis argues that this case is controlled by *Piccuillo v Bank of New York Co., Inc.*, 277 A.D.2d 93 (1st Dept. 2000), and that, under that decision, dismissal of both the Labor Law 240(1) and 241(6) claims are warranted. In *Piccuillo*, the Appellate Division held that the plaintiff electrician, who had inadvertently stepped into an uncovered 12" wide hole used to pass electrical wires from one floor of a building to another during its construction had not suffered an "elevation related" injury for purposes of Labor Law 240(1) analysis.

This Court concurs with defendants' arguments. Indeed, *Piccuillo* and several other Appellate Division cases hold that a fall through a small hole is not a Labor Law 240(1) event. *See Rice v Bd. of Educ. of City of New York*, 302 A.D.2d 578 (2d Dept. 2003) (a one-foot by one-foot hole in the platform of a flatbed truck "does not present an elevation-related hazard to

which the protective devices enumerated in [Labor Law § 240(1)] are designed to apply”); *Alvia v. Teman Elec. Contracting, Inc.*, 287 A.D.2d 421 (2d Dept. 2001) (12-inch by 16-inch wide hole is not covered by § 240(1)); *D’Egidio v Frontier Ins. Co.*, 270 A.D.2d 763 (3d Dept. 2000). Indeed, as the Court stated in *D’Egidio*, “We are not persuaded ... that Labor Law § 240(1) applied to a plaintiff who, while painting a ceiling, was injured when he backed into a 10 to 15-inch wide and 3-foot deep hole in a concrete floor. In our view, ruling that an elevation differential exists on such facts would render owners and contractors liable for virtually any fall by a construction worker into a hole of any measurable elevation, regardless of its location at the work site, a holding which we believe is plainly at odds with the decision in *Rocovich v Consolidated Edison Co.*”, 270 A.D.2d at 766. See also, *Johnson v City of Corning*, 269 A.D.2d 865 (4th Dept. 2000) (“A worker’s fall into an opening from ground level while the worker is traversing a worksite is not within the purview of [Labor Law § 240(1)]”).

At his deposition, Wissenbach stated that the hole in which Buralassi was injured was either 14” or 16” in diameter because that was the diameter of the riser pipes that Mandell’s steamfitters were installing. Even if the Court accepts plaintiff’s estimate that the hole was wider than that, there still is no reason to conclude that it was wide enough for a person to fall through and, in fact, only plaintiff’s leg went into the hole.<sup>1</sup> *O’Connor v. Lincoln Metrocenter Partners, L.P.*, 266 A.D.2d 60 (1st Dept. 1999), can be distinguished because the hole there was three feet by four feet, significantly wider than the sleeve into which Buralassi’s foot fell. Thus, this Court finds, based on the holding in *Piccuillo*, the Labor Law 240(1) claim must be

---

<sup>1</sup> Plaintiff did not measure the hole and admitted in his testimony that the two-foot diameter was an approximation.

dismissed.

The court reaches the same conclusion with respect to Buralassi's Labor Law 241(6) claim. "To assert a sustainable cause of action under section 241(6), a plaintiff 'must allege a violation of a concrete specification of the [Commissioner's regulations in the] Industrial Code'." *Messina v. City of New York*, 300 A.D.2d 121, 122 (1<sup>st</sup> Dept. 2002), quoting *Noetzell v. Park Avenue Hall Housing Development Fund Corp.*, 271 A.D.2d 231, 232 (1<sup>st</sup> Dept. 2000). Here, Buralassi cites to 12 NYCRR 23.1.7 (b). However, as Bovis correctly points out, the Appellate Division has held that that provision of the Industrial Code only requires "protections against falls from an elevated area to a lower area through openings large enough for a person to fit." *Messina*, 300 A.D.2d at 122. Here, as previously mentioned, Buralassi has presented no evidence that the riser hole in which he was injured was large enough for him to have fallen completely through. Buralassi's reliance on 23-1.15 to support his 241(6) claim also is defective because that section cannot apply since no safety railings or harnesses were in use. See *Maldonado v. Townsend Ave. Enter.*, 294 A.D.2d 207 (1<sup>st</sup> Dept. 2002). Accordingly, the court rejects Buralassi's request for summary judgment on his Labor Law 241(6) cause of action and dismisses this claim.

Third-party defendant Pinnacle cross moves for summary judgment to dismiss Buralassi's Labor Law §§ 240(1) and 241(6) causes of action. In light of the fact that the Court is dismissing these claims based on Bovis' motion, this motion is academic. Pinnacle's cross motion also requests summary judgment dismissing the "Labor Law § 200 claim and common-law negligence claim and all cross-claims and counterclaims asserted against it." With respect to the "Labor Law § 200 claim and common-law negligence claim and all cross-claims and

counterclaims,” Pinnacle’s motion is also denied. As Bovis correctly points out, the only remaining claim asserted against Pinnacle herein is Bovis’s cause of action, sounding in contractual indemnification, which is set forth in Bovis’s third-party complaint. Pinnacle’s cross motion simply contains no argument as to why this cause of action should be dismissed.

With respect to Buralassi’s Labor Law § 200/common-law negligence cause of action, defendants argue only that they did not supervise or control the subcontractor that performed the work that caused Buralassi’s injury. In its’ motion, Mandell points out that in the general contracting agreement between Bovis and 455, Bovis specifically retained the authority to supervise all subcontractors with respect to work site safety precautions, and to enforce the subcontractors’ compliance therewith. Mr. Gilroy, Bovis’ witness at the deposition, also described in detail how he would respond when he saw uncovered holes on the site and explained that he would have them covered by Prince. This testimony suggests that Bovis did, in fact, have the authority to correct safety problems. More significantly, Gilroy admitted at his deposition that Bovis could stop work if he observed a safety violation, which precludes dismissal of these claims.

Bovis’s and 455’s motion sets forth no argument as to why any of the cross-claims asserted against them herein should be dismissed. Accordingly, the court denies the portion of their motion that requests such relief.

Finally, Mandell moves to dismiss Buralassi’s complaint in its entirety, as well as all cross claims asserted against it. The court grants this motion with respect to Buralassi’s Labor Law §§ 240(1) and 241(6) causes of action for the same reasons discussed earlier in this decision.

Mandell’s motion also seeks summary judgment dismissing Buralassi’s Labor Law §

200/common-law negligence cause of action. Mandell argues that it did not supervise or control the performance of Burgalassi's work. However, at his deposition, Pinnacle foreman O'Doherty stated that prior to Burgalassi's injury, he had received complaints from other Pinnacle employees that Mandell's steamfitters had improperly covered other riser holes in the building with duct tape. A witness for Pinnacle also testified at his deposition that he advised Bovis' safety manager that someone was placing duct tape over the HVAC sleeves. Wissenbach also acknowledged that it was Mandell's sleeve cover that was over the hole and that he usually painted the sleeve cover with bright colored paint, but the cover here was the color of cement. Thus, no question exists that Mandell had responsibility for ensuring that the sleeves were adequately highlighted to prevent the type of fall at issue here. Mandell's argument that it was Pinnacle's skimming of the concrete over the sleeve that prevented Burgalassi from seeing the sleeve is an issue for the jury, and not one to be resolved on summary judgment. Therefore, the court also denies the portion of Mandell's motion that seeks dismissal of Burgalassi's Labor Law 200/common-law negligence cause of action.

Finally, as Prince correctly points out, Mandell's motion sets forth no argument as to why any of the cross-claims asserted against it herein should be dismissed. Accordingly, the court denies the portion of Mandell's motion that requests such relief.

This constitutes the decision and order of the Court.

October 17, 2006

**FILED**  
OCT 24 2006  
NEW YORK  
COUNTY CLERKS OFFICE  
*Rosalyn Richter*  
Justice Rosalyn Richter