

Jannicelli v Penny Lane Owners Corp.

2007 NY Slip Op 30735(U)

April 10, 2007

Supreme Court, New York County

Docket Number: 0109046/2004

Judge: Carol R. Edmead

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

CAROL EDMEAD

DEFENDANT. J.S.C.

PART 35

Index Number : 109046/2004

JANNICELLI, MIKE

vs

PENNY LANE OWNERS CORP.

Sequence Number : 004

DISMISS

INDEX NO. 109046/04

MOTION DATE 1/25/07

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 16 2007
COUNTY CLERK'S OFFICE
NEW YORK COUNTY

The motion is decided in accordance with the accompanying Memorandum Decision.

Accordingly, it is

ORDERED that the motion by defendant Robo-Breaking Co., Inc. for summary judgment dismissing the complaint and all cross claims as against it is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the cross motion by defendants GGMC Parking LLC, Maxwell Kates, Inc., Penny Lane Owners Corp., and Penny Lane Car Park, LLC for summary judgment

Dated: _____

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):

is missing the complaint and all cross claims as against them is granted to the following extent:

- (1) the complaint is hereby severed and dismissed as against GGMC Parking LLC, and Maxwell Kates, Inc. with costs and disbursements upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendants;
- (2) the complaint as against Penny Lane Owners Corp. and Penny Lane Car Park, LLC is dismissed to the extent of dismissing the Labor Law §§ 200 and negligence, 240, and 241 (6) causes of action except as to 12 NYCRR 23-1.7 (e) (2);

And it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the cross motion by plaintiffs Michael Jannicelli and Jo-Ann Jannicelli for leave to amend the bill of particulars to allege additional Industrial Code violations is denied as moot.

FILED
 APR 16 2007
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated 4/16/07

ENTER:

[Signature]
 _____, J.S.C.
 CAROL EDWARDS
 CLERK

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
MICHAEL JANNICELLI and JO-ANN JANNICELLI,

Plaintiffs,

-against-

Index No. 109046/04

PENNY LANE OWNERS CORP., PENNY LANE
CAR PARK, LLC, GGMC PARKING LLC, DACAR
GARAGE CORP., JACOB I. SOPHER REALTY OF
NEW JERSEY, INC., J. I. SOPHER REALTY, INC.,
SOPHER GROUP, LLC, SOPHER FAMILY, LLC,
SOPHER FAMILY PARTNERSHIP, L.P., CONTHUR
DEVELOPMENT COMPANY, MAXWELL KATES,
INC., ROBO-BREAKING CO., INC., QUIK PARK
GARAGE, INC. and JOHN DOES NO. "2" through
"10,"

DECISION/ORDER

Defendants.

-----X

CAROL R. EDMEAD, J.:

FILED
APR 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

On June 21, 2001, plaintiff Michael Jannicelli was allegedly injured in a construction site accident at the Penny Lane Parking Garage, located at 215 East 24th Street in Manhattan.

Plaintiff claims in this action to have lost the sight in his left eye as a result of the accident.

Defendant Robo-Breaking Co., Inc. (Robo) moves (seq. no. 004), pursuant to CPLR 3212, for summary judgment: (1) dismissing the complaint as against it; and (2) dismissing the cross claims asserted against it.

Defendants Maxwell-Kates, Inc., Penny Lane Owners Corp., Penny Lane Car Park, LLC, and GGMC Parking LLC cross-move for summary judgment: (1) dismissing the complaint as against them; and (2) dismissing any cross claims against them.

Plaintiffs cross-move, pursuant to CPLR 3025, 3042 and 3043, for leave to amend their bill of particulars to allege additional violations of the New York State Industrial Code.

BACKGROUND

The injured plaintiff was a demolition worker employed by non-party Structural Preservation Systems, Inc. (SPS), which was hired by Penny Lane Car Park LLC c/o GGMC Parking LLC to renovate the parking garage. SPS retained Robo to demolish the concrete floor of the upper level of the garage and the entrance/exit ramp to the garage. Penny Lane Owners Corp. (Penny Lane Owners) owned the parking garage, as well as the cooperative building above the garage. Maxwell-Kates, Inc. (Maxwell Kates) was Penny Lane Owners' managing agent. Pursuant to a lease dated March 29, 2001, and commencing on April 1, 2001, Penny Lane Owners leased the parking garage of the building to Penny Lane Car Park LLC (Penny Lane). GGMC Parking LLC (GGMC) was Penny Lane's managing agent for the garage.

Notably, pursuant to the agreement between Penny Lane and SPS, SPS was required to "keep the premises and surrounding area free from accumulations of waste materials or rubbish caused by operations under the Contract. At completion of the Work, . . . [SPS] shall remove from and about the Project waste materials, rubbish, [SPS's] tools, construction equipment, machinery and surplus materials" (Malino Affirm., Exh. C, ¶ 3.15 of General Conditions).

During the days prior to plaintiff's accident, an employee of defendant Robo used a Brokk machine, which is a heavy-duty robotic jackhammer mounted on a chassis, to demolish a substantial portion of the concrete floor of the upper level of the two-level parking garage. As work proceeded, the debris was permitted to fall to the lower level.

On the date of the accident, plaintiff was performing demolition work on the lower level

of the garage. Plaintiff was ordered to clean beams to prepare them for sandblasting. He was wearing a hard hat with an attached plastic face shield. Although plaintiff was provided with safety glasses, he did not use them because they fogged up due to the heat and humidity in the garage. While standing on a pile of heavy-duty debris, plaintiff used a lopper hand tool to cut a “bowling ball” sized chunk of concrete (weighing approximately 40 pounds) that was attached to a steel beam above him. Plaintiff cut the rebar from which the concrete ball was hanging, causing it to fall onto his head. The concrete knocked plaintiff’s hard hat and face shield askew. After hitting plaintiff’s head, the concrete continued to fall, striking a rebar fragment on the floor. The fragment then flew up under his face shield and struck plaintiff in the left eye.

Plaintiff and his wife, Jo-Ann Jannicelli, suing derivatively for loss of services¹, commenced this action against these defendants, alleging violations of Labor Law §§ 200, 240, 241, the New York State Industrial Code, and OSHA regulations, in addition to common-law negligence. Defendant Robo cross-claimed against, *inter alia*, the Penny Lane Owners, Penny Lane, GGMC, and Maxwell Kates for common-law and contractual indemnification and contribution. Defendants Penny Lane Owners, Penny Lane, GGMC, and Maxwell Kates also cross-claimed against their co-defendants for contribution and indemnification. By stipulation dated September 18, 2006, the action was discontinued as against the Sopher defendants and defendant Quik Park Garage, Inc.

Plaintiffs claim that defendants and their agents caused, created, and permitted deplorable working conditions to exist at the work site. They further claim that defendants failed to provide plaintiff with proper eye protection, such as safety goggles, and to clean up the debris at the site.

¹ Plaintiffs represent that the claim for loss of services has been discontinued.

DISCUSSION

It is well settled that “[t]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion (*id.*). If the movant makes a *prima facie* showing, then the burden shifts to the opposing party to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Statutory Agency, Labor Law § 200, and Common-Law Negligence

Robo argues that, as a subcontractor, it cannot be liable under the Labor Law, given that it is not an owner, general contractor, or statutory agent. With respect to agency, Robo contends that it undisputedly did not direct or control plaintiff’s work. Similarly, Penny Lane, the tenant, Maxwell Kates, the cooperative’s managing agent, and GGMC, the garage’s managing agent, all contend that they are not statutory agents, since they did not have the authority to control the activities that lead to plaintiff’s accident. All of these defendants also maintain that, in light of this evidence, they cannot be liable under Labor Law § 200 or in negligence.

Labor Law §§ 200, 240, and 241 apply to owners, general contractors or their “agents” (Labor Law §§ 200 [1], 240 [1], 241). A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Fox v Brosman-*

Archer Realty Servs., Inc., 266 AD2d 97, 99 [1st Dept 1999]). The Court of Appeals in *Russin, supra*, clearly stated that “[o]nly upon obtaining the authority to supervise and control does the third party fall within the class of those having a nondelegable liability as an ‘agent’” (*Russin*, 54 NY2d at 318; *see also Morales v Spring Scaffolding, Inc.*, 24 AD3d 42 [1st Dept 2005]).

Likewise, an implicit precondition to the duty under Labor Law § 200 is that the party charged with that responsibility have the “authority to control the activity bringing about the injury,” to enable it to prevent or remedy an unsafe condition (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 219 [1st Dept], *lv denied* 100 NY2d 508 [2003]).

Robo has made a *prima facie* showing that it is not a statutory agent. At plaintiff’s examination before trial, he testified that Robo did not have the authority to direct or control plaintiff’s work (Jannicelli EBT, at 327). Rather, all direction plaintiff received regarding how to perform his work came from James Maklan, SPS’s foreman on the job (*id.* at 327-328, 390). Mr. Maklan decided when the demolition debris on the lower level of the garage would be removed, once the entire upper level had been demolished (*id.* at 92-93). Plaintiff received no direction or instruction from Robo regarding how to perform his work (*id.* at 354). Plaintiffs have failed to raise an issue of fact as to Robo’s agency, and thus, Robo cannot be liable under the Labor Law (*see Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348, 351 [2d Dept 2005] [electrical subcontractor that did not have supervisory control over work was not statutory agent]).

Based on the foregoing evidence, Maxwell Kates and GGMC have also made a *prima facie* showing that they did not have the authority to control plaintiff’s work (*see also Newman Aff.*, ¶ 5). Plaintiffs have failed to raise an issue of fact by pointing to the management services

agreement between GGMC and Penny Lane, requiring GGMC to perform management services, secure licenses for the operation of the garage, enter into contracts, and to further the best interests of the owner with respect to the garage (Malino Affirm., Exh. A), or the testimony of GGMC's Vice President of Operations, Nathan Jakub, confirming that Maxwell Kates was indeed the managing agent for Penny Lane Owners (Jakub EBT, at 106-107). None of this evidence shows that either defendant had the authority to supervise the work (*cf. Fox*, 266 AD2d at 98 [acting managing agent was building owner's statutory agent, where management contract vested agent to supervise the injury-producing work]). Nor is there any evidence that Maxwell Kates or GGMC had anything to do with plaintiff's accident.

However, a lessee may be liable where the lessee actually hires the general contractor (*Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007]; *Pest v Beeper Connection Paging, Inc.*, 302 AD2d 249 [1st Dept 2003]; *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1st Dept 1999]). In the instant case, Penny Lane hired SPS to perform the demolition work (Malino Affirm., Exh. C). Thus, it cannot be concluded that Penny Lane was not an "owner" within the meaning of the Labor Law (*see Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept], *lv dismissed* 3 NY3d 737 [2004] [tenant was owner when it hired contractors]).

With respect to Penny Lane Owners and Penny Lane, plaintiffs have failed to raise an issue of fact as to these defendants' supervision and control over the worksite. Therefore, the section 200 and negligence claims are dismissed as against Penny Lane Owners and Penny Lane.

As for Robo's alleged negligence, it is well settled that a subcontractor performing work for a general contractor owes no duty to non-contracting third parties such as plaintiff, except, *inter alia*, when the subcontractor, while affirmatively discharging a contractual obligation,

creates an unreasonable risk of harm to others, or increases that risk (*Church v Callanan Indus., Inc.*, 99 NY2d 104, 111 [2002]). Here, SPS contracted Robo to “[b]reak concrete deck 6,000 sqft & open up pocket in steel beam to facilitate Structural Preservation Systems removal of concrete from beams” (Bronk Affirm., Exh. I). Pursuant to the agreement, SPS was responsible for removal of all debris, including reinforcing (*id.*). In fact, plaintiff testified at his examination before trial that SPS would remove debris after all demolition was complete (Jannicelli EBT, at 92-94). Given that there is no evidence that Robo created an unreasonably dangerous condition, or otherwise assumed a duty to plaintiff, the common-law negligence claim against Robo is also dismissed.

In sum, Robo, Maxwell Kates, and GGMC have established that they are not statutory agents under the Labor Law. The section 200 and common-law negligence claims are dismissed.

Labor Law § 240

Penny Lane Owners and Penny Lane argue that section 240 of the Labor Law, also known as the Scaffold Law, does not apply because plaintiff was not subject to an elevation-related hazard. These defendants also claim that, even if the statute did apply, they cannot be liable because plaintiff was the sole proximate cause of his accident, since plaintiff failed to use the safety glasses that were provided to him by SPS.

Labor Law § 240 (1) provides, in relevant part:

All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The statute applies to both falling workers and falling objects (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). With respect to falling objects, “for section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of the absence or inadequacy of a safety device of the kind enumerated in the statute*” (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001] [emphasis in original]).

It is clear that plaintiff was not subject to an elevation-related risk. Because the ball of concrete was not being hoisted or secured at the time of the accident, the statute does not apply (*Doucoure v Atlantic Dev. Group, LLC*, 18 AD3d 337, 339 [1st Dept 2005]). Moreover, the ball of concrete did not fall because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*see Boyle v 42nd St. Dev. Project, Inc.*, – AD3d –, 2007 WL 896253, *2 [1st Dept, Mar 27, 2007]; *Natale v City of New York*, 33 AD3d 772, 774 [2d Dept 2006]).

Nor does the rebar fragment qualify as a falling object. The Court of Appeals decision in *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]) is instructive. In the companion case to *Toefer*, the plaintiff Casey, while unloading a flatbed truck, was struck by a wooden lever. The Court of Appeals determined that plaintiff “Casey was not injured by a beam, or by any falling object; the object that struck him inexplicably flew at him either upwards or horizontally. His injury, horrendous as it is, is not attributable to the sort of elevation-related risk that Labor Law 240 (1) was meant to address” (*id.* at 408; *see also Mosher v County of Rensselaer*, 232 AD2d 952, 953-954 [3d Dept 1996]). Plaintiff herein was also injured by an upwardly moving rebar fragment. In light of this determination, the court need not consider the parties’ remaining contentions concerning Labor Law § 240 (1).

Accordingly, plaintiffs' section 240 (1) claim is dismissed.

Labor Law § 241 (6)

Penny Lane Owners and Penny Lane further argue that plaintiffs' Labor Law 241 (6) cause of action is insufficient as a matter of law, because they have failed to identify any specific provision of the New York State Industrial Code that applies to these facts. Plaintiffs contend that the Code provision relating to overhead hazards and working areas – 12 NYCRR 23-1.7 – is sufficiently concrete and is applicable. Additionally, plaintiffs seek to amend the bill of particulars to allege 14 additional Code violations, to wit, 12 NYCRR 23-1.2 (a), 23-1.4, 23-1.5, 23-1.7, 23-1.8, 23-1.30, 23-2.1, 23-3.3 (b), (c), (g), (l), 23-3.4 (c) (3), (c) (4), and (c) (5).

Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide “reasonable and adequate” protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross*, 81 NY2d at 501-502). In order to recover, a plaintiff need not prove that the owner or contractor exercised supervision or control over the work being performed (*see id.*; *Long v Forest-Fehlhaber*, 55 NY2d 154, 159, *rearg denied* 56 NY2d 805 [1982]). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 NY2d at 502-504). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long*, 55 NY2d at 160).

There is no dispute that plaintiff was engaged in demolition work at the time of his accident. The bill of particulars alleges that defendants violated the following Code provisions:

sections 23-1.5, 23-1.7 (2), (3), 23-1.16 (a), (b), and 23-1.24, and OSHA regulations codified in 29 CFR §§ 1926/1910, 1926/251 (u), (v), and 1926.20. As detailed below, with the exception of 23-1.7 (e) (2), these sections are insufficient to impose any liability on defendants.

Subdivision (e) (2) of section 23-1.7 provides that “[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.” Given that this subdivision has been held to be sufficiently specific (*Singh v Young Manor, Inc.*, 23 AD3d 249 [1st Dept 2005]), the court finds that this section arguably applies.

Section 23-1.5, entitled “General responsibility of employers,” has been held to be insufficiently specific to result in liability under section 241 (6) (*Carty v Port Auth. of New York and New Jersey*, 32 AD3d 732 [1st Dept 2006]; *Meslin v New York Post*, 30 AD3d 309 [1st Dept 2006]; *Sajid v Tribeca N. Assocs., L.P.*, 20 AD3d 301, 302 [1st Dept 2005]).

The remaining provisions are inapplicable to the facts at hand. First, the Code provision concerning “Protection from general hazards” (section 23-1.7) requires protection from overhead hazards in subdivision (a). It states as follows:

Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

Here, inasmuch as there is no evidence that the area where plaintiff was working was “normally exposed to falling material or objects,” or that overhead planking would have been consistent with plaintiff’s task, this subdivision does not apply (*see Mercado v TPT Brooklyn Assocs., LLC*, – AD3d –, 2007 WL 853022, *1 [2d Dept, Mar 20, 2007]; *Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]). None of the other subdivisions of this regulation apply.

Second, 12 NYCRR 23-1.16 sets forth rules for the use of safety belts, harnesses, tail lines, and lifelines. There is no evidence that any such devices were furnished to plaintiff, and there is nothing in this regulation that requires that they be furnished in the performance of this project (*see Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 870-871 [3d Dept 1998]). Third, 12 NYCRR 23-1.24 does not apply because it governs work on roofs, and plaintiff was not engaged in any such work (*Rudolph v Hofstra Univ.*, 225 AD2d 680 [2d Dept 1996]).

Finally, OSHA regulations do not support a claim under this statute (*Khan v Bangla Motor and Body Shop, Inc.*, 27 AD3d 526, 528-529 [2d Dept], *lv dismissed* 7 NY3d 864 [2006]; *Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]).

Plaintiffs claim that they are entitled to amend the bill of particulars as of right, because their cross motion to amend was served prior to service of the note of issue. Because plaintiffs are seeking to amend the bill of particulars and not the complaint, CPLR 3042 governs amendment. A party may amend the bill of particulars once as of right prior to the filing of the note of issue (CPLR 3042 [b]; *see also Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 391 [1st Dept 2006]). The note of issue was filed on December 14, 2006. Plaintiffs’ cross motion was served on November 16, 2006. Plaintiff served four bills of particulars in response to defendants’ requests on March 8, 2005, and, thereafter, served a supplemental bill of particulars

on December 1, 2005. Thus, leave of court is unnecessary.

Indemnification, Contribution, and Failure to Procure Insurance

The indemnification provision in the agreement between SPS and Robo provides that “[t]he Subcontractor shall indemnify and save harmless the Contractor and Owner from any and all claims and liabilities for . . . personal injury, including death, *arising out of or resulting from or in connection with execution of work hereunder*” (Bronk Affirm., Exh. I, ¶ 4 [emphasis supplied]).

An indemnification provision that authorizes indemnification for a party’s own negligence is void as against public policy and is unenforceable (General Obligations Law § 5-322.1; *see also Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008 [1997]). However, provisions that provide for partial indemnification, i.e., “to the fullest extent permitted by law,” are enforceable (*see e.g. Landgraff v 1579 Bronx River Ave., LLC*, 18 AD3d 385, 387 [1st Dept 2005]; *Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236-237 [1st Dept 2005]; *McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]). Thus, the indemnification provision violates the General Obligations Law as a matter of law and is unenforceable.

With regard to common-law indemnification, it is well settled that, the one seeking indemnification, in addition to proving its one freedom from negligence, must also prove some negligence on the part of the indemnifying party that contributed to the accident (*Robinson v City of New York*, 22 AD3d 293, 294 [1st Dept 2005]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Because Robo could not have been negligent, the cross claims seeking common-law indemnification and contribution are dismissed.

The insurance procurement provision of the contract states as follows:

Said indemnity shall be insured by comprehensive general liability insurance from an acceptable insurance carrier naming the Contractor as an additional insured for limits of \$500,000/\$1,000,000; vehicular insurance for all vehicles used by Subcontractor, its servants, agents and subcontractors and suppliers on jobsite, in limits of \$250,000/\$500,000; statutory Workmen's Compensation and Employers Liability Insurance. Policies may not be canceled without adequate substitution before cancellation or any change in coverage. STRUCTURAL PRESERVATION SYSTEMS, INC. must be named as an additional insured and be given 30 days notice for cancellation or any change in coverage (Bronk Affirm., Exh. I, ¶ 4).

As noted above, the provision requires that SPS, the general contractor, be named as an additional insured. There is no requirement that insurance be procured naming any defendant as an insured. Therefore, these cross claims are dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant Robo-Breaking Co., Inc. for summary judgment dismissing the complaint and all cross claims as against it is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the cross motion by defendants GGMC Parking LLC, Maxwell Kates, Inc., Penny Lane Owners Corp., and Penny Lane Car Park, LLC for summary judgment dismissing the complaint and all cross claims as against them is granted to the following extent:

- (1) the complaint is hereby severed and dismissed as against GGMC Parking LLC, and Maxwell Kates, Inc. with costs and disbursements upon the submission of an

appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendants;

- (2) the complaint as against Penny Lane Owners Corp. and Penny Lane Car Park, LLC is dismissed to the extent of dismissing the Labor Law §§ 200 and negligence, 240, and 241 (6) causes of action except as to 12 NYCRR 23-1.7 (e) (2);

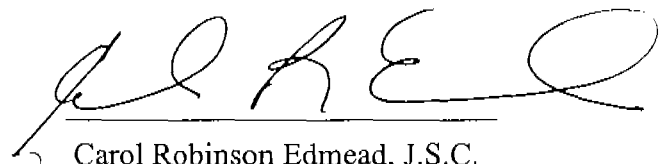
And it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the cross motion by plaintiffs Michael Jannicelli and Jo-Ann Jannicelli for leave to amend the bill of particulars to allege additional Industrial Code violations is denied as moot.

Dated: April 10, 2007

ENTER:



Carol Robinson Edmead, J.S.C.

CAROL EDMED
J.S.C.

FILED
APR 15 2007
COUNTY CLERK'S OFFICE
NEW YORK