

**Heleniak v City of New York**

2008 NY Slip Op 30101(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0102797/2005

Judge: Eileen A. Rakower

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

**EILEEN A. RAKOWER**

PRESENT:

**J.S.C.**  
*Justice*

PART Part 5

Index Number : 102797/2005

**HELENIAK, WLADYSLAW**

vs.

**CITY OF NEW YORK**

SEQUENCE NUMBER : # 004

SUMMARY JUDGMENT

INDEX NO. 102797-05

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

MOTION SEQ. NO. #004

MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

4, 5

6, 7, 8, 9

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**

JAN 15 2008

NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 1/11/08

  
**EILEEN A. RAKOWER**

**J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
WLADYSLAW HELENIAK and ANA HELENIAK,

Plaintiffs,

Index No.  
102797/05

- against -

**DECISION/ORDER**

THE CITY OF NEW YORK, NEW YORK CITY  
HOUSING AUTHORITY, UTB-UNITED  
TECHNOLOGY, INC., and LILLY CONSTRUCTION  
CO., INC.,

Seq. No.: 004, 005,  
006, 007 & 008

Defendants.

-----X  
NEW YORK CITY HOUSING AUTHORITY

Third-Party Plaintiff,

**FILED** Index No.  
90800/05  
JAN 15 2008

-against-

LILLY CONSTRUCTION CO, INC., UTB COUNTY NEW YORK  
TECHNOLOGIES, INC., and OLYMPIC FENCE & CLERKS OFFICE  
RAILING COMPANY, INC.,

Third-Party Defendants.

-----X  
HON. EILEEN A. RAKOWER

The question presented here is whether a worker who was injured while performing his work can sue pursuant to the Labor Law where the cause of his injury was a defect in the public roadway next to the work site. It is clear that the purpose of the applicable provisions of the Labor Law is to ensure workers of a safe work place, including ways and approaches to the work site.

Wladyslaw Heleniak ("plaintiff") worked for a company installing fences on December 29, 2003. That morning, he arrived at 1955 Second Avenue, New York, New York, along with other members of the work crew, all employees of Olympic Fence & Railing Company, Inc. ("Olympic"). Olympic was a sub contractor on a bigger project.

New York City Housing Authority ("NYCHA"), the owner of Washington Houses, located between 97<sup>th</sup> Street and 104<sup>th</sup> Street, between Second and Third Avenues, in the County and State of New York, was involved in a project replacing fuel oil tanks both below and above ground for the housing complex. It contracted with UTB-United Technology, Inc. ("UTB") to accomplish that task in 2003. Part of the project required UTB to install temporary chain link fences around work areas. One such area was an above ground tank located near to 100<sup>th</sup> and 101<sup>st</sup> Streets and Second Avenue, in the rear of 1955 Second Avenue. UTB hired a subcontractor, Olympic, to erect the fence. Nearby, there was a sidewalk shed, constructed by Lilly Construction Co., Inc. ("Lilly"). Lilly had a standing contract with NYCHA to erect needed sidewalk sheds throughout the City of New York, and erected this particular one pursuant to a job order in April 2002.

Olympic employees, at the time of plaintiff's accident, were the only contractors working at the project site. When they arrived, they parked their vehicle on Second Avenue, in the public street, alongside the curb. The four Olympic laborers, including plaintiff, shared the task of unhitching what plaintiff described as a 1200 pound compressor from the Olympic vehicle which towed it to that location. Their intention was to move the compressor from the street on Second Avenue to the area within Washington Houses, where they were to install a chain link fence around an above ground oil tank. The compressor had wheels, like a rickshaw, and was moved by three men pushing it, while plaintiff pulled it. While still in the street, on Second Avenue, one of the wheels under the compressor got stuck in a hole or depression in the street, causing the compressor to tilt. The unintended movement of the compressor pushed plaintiff, knocking him to the ground, where he suffered injuries.

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff was moving the compressor in the street abutting the curbcut to the driveway leading to the entrance to 1955 Second Avenue, part of the Washington Houses. Plaintiff brings this labor law claim for the failure of the City of New York (City), and NYCHA to provide a safe place for the plaintiff to work pursuant to the Labor Law.

He makes additional claims as against UTB, who was retained by NYCHA to install above ground and below ground oil tanks on the premises of the Washington Lenox Houses, and Lilly, who was responsible for constructing a sidewalk shed at the location. Plaintiff's wife, Anna Heleniak, brings a derivative action. NYCHA brings a third-party action against Lilly, UTB and Olympic, plaintiff's employer. Plaintiff elected to receive worker's compensation benefits, barring a direct suit against his employer, Olympic.

Previously, by motion sequence 5 and 6, City moved to dismiss plaintiff's claims as against it, asserting it had no prior notice of holes in the street and did not cause or create the offending defect. Limited to the submissions within those motions, this Court, by decision dated November 2, 2007, found the City did not sustain its burden regarding the Labor Law claims within the complaint, despite the motion being unopposed. Currently, this Court has Lilly's motion to dismiss and Olympic's cross motion to dismiss, motion sequence 4, NYCHA's motion to dismiss, motion sequence 7, and UTB's motion to dismiss, motion sequence 8, all made at or about the same time as City's motion, but not fully submitted until after the November 2, 2007 decision was rendered. The totality of those submissions with exhibits have shed additional light on the case, and this Court, *sua sponte*, vacates its prior decision regarding motion sequence 5 and 6, and will consider City's motion *ab initio*.

Plaintiffs originally filed a summons and complaint sounding in negligence. NYCHA followed with a third party action seeking indemnification. Plaintiffs filed and served a supplemental pleading asserting, in addition to negligence claims, that defendants failed to provide plaintiff with a safe place to work, violating provisions of the Labor Law.

The submissions before the court include the following:

Lilly, in support of its motion, submits: (1) the summons and complaint dated February 14, 2005; (2) NYCHA's verified answer with cross claims; (3) a third party summons and complaint dated July 28, 2005 with exhibits; (4) a supplemental summons and amended complaint dated September 8, 2005; (5) UTB's verified answer; (6) Lilly's verified answer to the third party complaint; (7) NYCHA's verified answer to amended complaint with cross claims; (8) Olympic's answer to the third party complaint; (9) Plaintiff's bill of particulars in response to Lilly; (10) the July 28, 2006 deposition of plaintiff Wladyslaw Heleniak taken

with the use of a Polish Interpreter; (11) a marked photograph; (12) the March 30, 2007 deposition of Angel Harry, Supervisor of Grounds for NYCHA; and (13) the March 30, 2007 deposition of Jasvinder Saini, Controller of Lilly.

Olympic, in support of its cross motion, submits (1) a purchase order for work by Olympic, signed by the office manager of UTB, for a fence to be erected around a UTB placed tank at 1955 Second Avenue, and (2) a portion of the deposition of Mohan Sharma, President of UTB.

NYCHA, in opposition to Lilly's motion (and in support of its separate motion for summary judgment, discussed later), provides (1) the affidavit of James Gleba, the Program Administrator for the Major Renovation and Site Improvement Unit of NYCHA; (2) the affidavit of Virgil Fincher, Superintendent for NYCHA's Washington Houses during the period in question; (3) the Answer of the City of New York to the Amended Complaint; (4) the Indemnification Provision form the NYCHA-Lilly contract; (5) Plaintiff's Bill of Particulars in response to NYCHA's demands; (6) Plaintiff's response to City's Notice of Discovery and Inspection; (7) the contract between NYCHA and UTB; (8) the deposition of Mohan Sharma; (9) the deposition of Michael Costanza, owner of Olympic; (10) plaintiff's Notice of Claim to NYCHA; and (11) the deposition of Jasvinder Saini. Additionally, it relies on the exhibits already submitted by Lilly.

UTB, in support of its motion, provides (1) the pleadings; (2) plaintiff's bill of particulars in response to UTB's request; (3) the deposition of plaintiff; (4) the photograph of the offending pothole in the City street; (5) the deposition of Angel Harry; (6) the deposition of Mohan Sharma; (7) additional photographs of the driveway and roadway within Washington Houses; (8) Olympic's work order; (9) and the deposition of Michael Costanza.

City, in support of its motion for summary judgment dismissing claims as against it, provides: (1) the pleadings; (2) the deposition testimony of Cynthia Howard, record searcher for the City Department of Transportation ("DOT") Litigation Support Unit; (2) a response sheet for a search done of Second Avenue between East 100<sup>th</sup> and East 101<sup>st</sup>

Streets; (3) A "Street Opening Permit" issued to Consolidate Edison issued on February 19, 2002; (4) A defect report or complaint dated May 8, 2003; (5) a "history of defect" report which states "referred to maintenance" and "close defect"; and (6) a "Big Apple Map."

Plaintiffs provide the affidavit of plaintiff, dated November 15, 2007, both in Polish and with a translation, a photograph of the street and curbcut leading to the Washington Houses and the parking lot, within which is a visible oil tank, a photograph of the offending pot holes, and portions of the deposition of Angel Harry, grounds supervisor for NYCHA.

Lilly brings this motion for summary judgment, identified as motion sequence 4, seeking to dismiss all claims as against it. Olympic cross moves, also seeking to dismiss all claims as against it. Plaintiff has no objection to an Order dismissing the claims as against Lilly; however, NYCHA opposes, stating Lilly's use of heavy equipment could have caused or created the offending hole in the street.

NYCHA brings its motion for summary judgment, identified as motion sequence 7, seeking to dismiss all claims as against it. Plaintiff opposes.

UTB brings its motion for summary judgment, identified as motion sequence 8, seeking to dismiss all claims and third party claims as against it. NYCHA opposes.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Plaintiff alleges that he was injured due to defendants' failure to provide a safe work site within the meaning of Labor Law 200 and 241. Specifically, plaintiff, in his

bill of particulars in response to NYCHA's demand states that "defendant was in violation of sections of the Labor Law including but not limited to 200 and 241 in failing to and/or improperly providing plaintiff with a safe place to work as required under the provisions of the Labor Law, and applicable provisions of the Industrial Code of the State of New York including but no limited to Sections 12 NYCRR 23-1.7(e)(1) and 12 NYCRR 23-1.7(e)(2)."

Labor Law § 200 directs that the owner and general contractor owe a duty to assure that all workplaces be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to those working there. This includes the ways and approaches to the work area. (*Caspersen v. La Sala Bros.*, 253 NY 491 [1930]). However, "liability will be imposed only upon a showing of both notice of the dangerous condition and control of the site of the injury" (*Blysm v. County of Saratoga*, 296 AD2d 637 [3<sup>rd</sup> Dept., 2002]). Thus, plaintiff must demonstrate that defendants supervised or controlled plaintiff's work and had actual or constructive notice of the alleged dangerous condition.

Labor Law §241(6) states, in relevant 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work. . .shall comply therewith.

In order to prevail under a §241(6) claim, plaintiff must first establish that there has been a violation of a specific Industrial Code section which calls for a particular standard of conduct. Here, plaintiff alleges that defendants violated 12 NYCRR §§23-1.7(e)(1), 23-1.7(e)(2). These provisions regard tripping and other hazards, and state in relevant part:

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. 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.

The work area for this project was contained in the rear of 1955 Second Avenue. The oil tank around which Olympic was to erect a fence, was approximately ten feet wide and thirty four feet long. It was placed on asphalt in a tenant parking area within the housing project. Mr. Sharma described in his deposition that the oil tank was brought to the location prior to the day of the accident on a flatbed truck, that the truck entered the location at the Second Avenue Driveway to the parking lot, unloaded the oil tank and left through the same driveway. Photographs provided reveal that the work site was contained entirely within the Washington Houses, beyond the sidewalk, within iron fencing, on a parking lot.

Plaintiff, in his deposition, stated that his employer, Michael, directed he and his crew to move the compressor up the driveway. Additionally, in his deposition, plaintiff answered that when he got to the work site on the day that the accident occurred, there were no workers there employed by anybody else other than Olympic. Finally, at his deposition, plaintiff stated that he knew of no other witnesses to the accident other than the Olympic employees with him.

Michael Costanza, in his deposition, concurs that he saw no other contractors working at the site at the time of the accident. Further, he saw no one from NYCHA or anyone else direct Olympic to move the compressor. When asked directly if Olympic's truck could have gone up the apron into the driveway and the parking area, Costanza did not remember. When asked "when the truck was stopped, did it block the apron," he answered, "no, it's a large apron." Finally, when asked again why Olympic did not pull the truck and the compressor up closer to where the tank was, he answered "I don't think it could have fit, my truck, the big truck, where they are talking about going in, so it had to be pushed by hand."

Present at the time of plaintiff's accident were the Olympic employees mentioned above, and some 60 feet away, UTB's Mr. Sharma was discussing where the fence was to go with Olympic's owner, Mr. Costanza. Neither Sharma nor Costanza witnessed plaintiff's actual fall. Plaintiff, in a 2007 affidavit, for the first time, explained that when Olympic arrived at the location, the vehicle towing the compressor could not drive up to the work area, and instead, parked in the street on

Second Avenue. Plaintiff states that "vehicle and construction equipment and machinery were parked on the sidewalk and in the gate opening, leaving only a narrow passageway from the road across the sidewalk and into the project." Plaintiff states that Costanza motioned for them to bring the compressor into the work area. There is no evidence that any other party controlled or directed Olympic.

Costanza states that the entry into the area was too narrow for Olympic's vehicle to tow the compressor up to the site. No one identifies who was responsible for the equipment blocking the way. Again, Olympic states it was the only contractor working at the site at that time. Sharma explained that UTB could do no other work connecting the tank until the fence was erected.

The testimony of Angel Harry, NYCHA's supervisor of grounds, explained that this was not the only entrance to the area. He explained that pedestrian walkways were wide enough for vehicles.

The offending pothole is clearly identified in both photographs and by deposition testimony as being contained entirely within the street on Second Avenue. Costanza explained that the street was broken near the apron to the driveway. The holes were in the street next to the curb cut. There is no defect alleged on the driveway, apron, or sidewalk between the interior parking lot and Second Avenue. The defect was in an open area, not the work site, not on a walkway or passageway into the work site, and there were no accumulations of dirt and debris or sharp projections or scattered tools and materials alleged to be present. Finally, there is no evidence that Second Avenue was being used by any of the trades in the construction project as a staging area or otherwise. Indeed, there is no contention that it was closed to public use.

Lilly argues that it had a contract with NYCHA to erect sidewalk sheds at various locations. Pursuant to a job order, it erected a shed at the Washington Lexington Housing Development in April of 2002. It did not cause or create the defect in the street which plaintiff alleges caused his accident. Its maintenance of the shed did not extend to the street or sidewalk area, and it was not responsible for plaintiff's accident.

Olympic explains that, pursuant to a purchase order, which post dates the work performed, it was to install a chain link fence, coordinate with UTB, provide a certificate of insurance and worker's comp certificate. The accident happened to its

own employee during the course of the employee's employment, and that the resulting injuries were not grave injuries as defined in section 11 or the Worker's Compensation Law. Thus, Olympic claims it owes no common law indemnification to NYCHA. Further, inasmuch as there was no written agreement between it and NYCHA, there can be no claim for contractual indemnification.

NYCHA asserts that Lilly could have created or exacerbated the alleged defect in the street when it's own heavy vehicle drove over the area. However, this is unsupported by evidence in admissible form that Lilly did cause or create the hole in question. Indeed, plaintiff concedes it can offer no evidence in opposition to Lilly's motion. NYCHA's contentions are supported only by speculation, "[i]t cannot be denied that a truck weighing well over 20,000 lbs. *could* have caused a road defect or enlarged an already existing pothole"[emphasis added]. "A motion for summary judgment may not be defeated by charges based upon surmise conjecture and suspicion." *Shapiro v. Health Ins. Plan of Greater New York*, 7 NY2d 56 (1959). It is not claimed that Lilly's was the only truck which traveled the area in question. Indeed, after April 2002, UTB concedes that the oil tank was delivered by flatbed truck traversing the driveway leading into the Washington Houses.

NYCHA concedes that Olympic was a sub contractor of UTB without a written subcontract. NYCHA's claim for contractual indemnification goes only to UTB.

NYCHA moves to dismiss all claims as against it, stating that it did not own, control or maintain the public roadway where the alleged defect existed. Further, it is not responsible for maintaining the safety of an area outside the construction area, as contemplated by the Labor Law.

Defendants have met their burdens of demonstrating that they are not responsible for the pothole in the public roadway Second Avenue, and City has shown it had not prior written notice of the condition of the roadway. It is incumbent upon plaintiff to demonstrate that there is a material issue of fact sufficient to deny summary judgment. Plaintiff fails to do so.

Wherefore, it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is hereby dismissed as against all defendants, The City of New York, New York City Housing Authority, Lilly Construction Co., Inc., and UTB-United Technologies, Inc.,

and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that as a result of the foregoing, the third party action as against Lilly Construction Co., Inc., UTB-United Technologies, Inc. and Olympic Fence & Railing Company, Inc. is dismissed; and the cross motion of Olympic Fence & Railing Company, Inc. is rendered moot; it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: January 11, 2008



\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
JAN 15 2008  
NEW YORK  
COUNTY CLERK'S OFFICE