

JT Magen & Co., Inc. v Adco Elec. Corp.

2008 NY Slip Op 30418(U)

February 5, 2008

Supreme Court, New York County

Docket Number: 0113698/2005

Judge: Shirley W. Kornreich

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

JUDGE SHIRLEY WERNER KORNREICH

PRESENT.

PART 54

Justice

Index Number : 113698/2005
MILANO, STEVEN
 vs.
JT MAGEN & CO.
 SEQUENCE NUMBER : # 003
~~DISMISS COMPLAINT~~

INDEX NO. 113698-05
 MOTION DATE 11/1/07
 MOTION SEQ. NO. #003
 MOTION CAL. NO. _____

are read on this motion to/for Summary judgment

PAPERS NUMBERED
1-2A
3-7
8-11

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

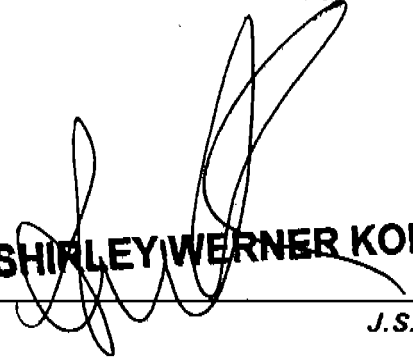
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

FEB 14 2008

NEW YORK COUNTY CLERK'S OFFICE


 HON. SHIRLEY WERNER KORNREICH
 J.S.C.

Dated: 2/5/08

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DEFERENCE

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

-----X
STEVEN MILANO,

Plaintiff,

-against-

JT MAGEN & CO., INC., 875 THIRD AVENUE LLC
and EXIS CAPITAL MANAGEMENT, INC.,

Defendants.

-----X
JT MAGEN & CO., INC.,

Third-Party Plaintiff,

-against-

MARTIN THOMAS CONTRACTING CORP. and
MILLWRIGHT WOODWORK & INSTALLERS, INC.,

Third-Party Defendants.

-----X
875 THIRD AVENUE LLC,

Second Third-Party Plaintiff,

-against-

EXIS CAPITAL MANAGEMENT, INC.,

Second Third-Party Defendant.

-----X

Index No. 113698/05

DECISION & ORDER

Third-Party
Index No. 590122/06

Third-Party
Index No. 590510/06

FILED

FEB 14 2008

NEW YORK
COUNTY CLERKS OFFICE

-----X
JT MAGEN & CO., INC.,

Third-Party
Index No. 590644/06

Third Third-Party Plaintiff,

-against-

ADCO ELECTRICAL CORP. and PREFERRED
MECHANICAL, INC.,

Third Third-Party Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

In this action for personal injuries, third third-party defendant Adco Electrical Corp. (Adco) moves for summary judgment dismissing the complaint and all other claims against it. Defendant/second third-party plaintiff 875 Third Avenue LLC (875) cross-moves for summary judgment dismissing the complaint and all other claims against it and for summary judgment on the third cause of action for contractual indemnification in its second third-party complaint against Exis Capital Management, Inc. (Exis). Exis cross-moves for summary judgment dismissing the complaint and all other claims against it and for summary judgment on its contractual indemnification cross-claim against JT Magen & Co., Inc. (JT). Exis and 875 request the court to order a hearing on the issue of attorneys' fees owed by their respective indemnitors.

The amended complaint contains a single cause of action against 875, JT and Exis that improperly combines claims pursuant to Labor Law §§200 and 241(6). CPLR §3014. In his bill of particulars, plaintiff alleges a violation of "Industrial Regulations Section 23-1.7e2."

Factual and Procedural Background

Plaintiff, an employee of third-party defendant Millwright Woodwork and Installers, Inc. (Millwright), was injured on December 17, 2003, when he fell into a two foot deep hole in a raised computer floor. The accident took place at 875 Third Avenue, New York, New York (Building) on the 29th floor (Premises). The Building was owned by 875 and the Premises were leased to Exis. JT was the general contractor hired by Exis to renovate the Premises. JT hired Martin Thomas Contracting Corp. (Martin) as a subcontractor for woodwork and millwork on the Premises. JT also entered into subcontracts with Adco to perform electrical work.

At his deposition, plaintiff described the accident as follows. On December 17, 2003, he had been working for Millwright at the Premises for about seven days. He took instructions only from Millwright's foreman, Joe. On the day of the accident, Joe told plaintiff to install a hydraulic device to close a door in the entranceway of an office. At 8:00 a.m., plaintiff entered the office and after two or three steps, he fell into a hole in a raised computer floor. The hole was two feet by two feet square and approximately 18 inches deep. The computer floor was made of two by two tiles with carpeting on top. It sat on supports above the concrete slab subfloor and, therefore, there was space between the computer floor and the slab. Plaintiff's EBT, pp. 105-106. As plaintiff crawled out of the office after his fall, he observed that a tile was missing from the computer floor. *Id.* at 107. With respect to lighting in the office, plaintiff testified that there was no illumination, but there were windows five to six feet in height. *Id.* at 27. Plaintiff described the office as lit by daylight just before he fell:

A: The windows outside, it was daylight. So even though there was not light, I could see straight ahead the windows.

Q: Was it sunny out?

A: It was 8:00 in the morning. It was just normal day. [sic] I don't remember if the sun was out.

Q: You don't recall anything about the weather?

A: It was normal, it wasn't snowing or anything that I remember.

Id. at 107-108. Plaintiff was alone when the accident happened and did not know whether any other trades were working in the area where he fell. Plaintiff did not know who removed the tile. He denied that he had seen or had been told about missing tiles prior to the accident, or that there was a sign on the office door warning of danger prior to the accident.

Plaintiff's foreman, Joe Cicero, the witness produced by Millwright, testified that the day before the accident, he and plaintiff were installing the door to the room where plaintiff fell. EBT Cicero, pp. 16-17. Cicero said the room had an electrical panel box in it. *Id.* at 17. Cicero testified that he noticed two or three missing floor tiles and told plaintiff that they should be careful. *Id.* at 18-19. Plaintiff responded, "we should make a note of it, obviously." *Id.* Cicero also testified that he told plaintiff that he would tell the super to replace the tiles or put a sign on the door for everyone's protection. *Id.* at 19. Later that evening, Cicero said he suggested to Rich Johnston, the project superintendent for JT that a warning sign about the missing floor tiles should be placed on the door and Mr. Johnston said he would take care of it. *Id.* at 20-21. Mr. Cicero had no idea who removed the floor tiles. *Id.* at 66. Later in the day, after the accident, Mr. Cicero noticed a sign on the door that said "danger." *Id.* at 26-27 and 41.

The project superintendent for JT, Robert Johnston, testified that the accident took place in the conference room of the Premises. Johnston EBT, pp. 21-22. Mr. Johnston saw plaintiff

working on the conference room door the night before the accident. *Id.* at 57-58. At the time, he noticed that the conference room floor was missing tiles, so he posted a sign on the door that said, "Danger, open floor, keep out." *Id.* at 24-26. Mr. Johnston testified that Martin Thomas Contracting Corp. was also known as Millwright. *Id.* at 51. That statement is unrebutted and must be deemed admitted on this motion. *Costello Associates, Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 229 (1st Dept. 1984), *appeal dismissed*, 62 N.Y.2d 942 (1984).

Labor Law §241(6)

A plaintiff asserting a cause of action under Labor Law §241(6) must allege a violation of a concrete specification of the Industrial Code. *Adams v. Santa Fe Constr. Corp.*, 288 A.D.2d 11, 12 (1st Dept. 2001). The "failure to identify a qualifying section in the complaint or bill of particulars may serve as a basis for summary dismissal of a section 241(6) claim."

Walker v. Metro-North Commuter R.R., 11 A.D.3d 339, 340 (1st Dept. 2004).

Summary judgment must be granted in favor Exis and 875 dismissing plaintiff's cause of action pursuant to §241(6), as he failed to indentify an applicable concrete specification of the Industrial Code that was violated . Plaintiff's opposition papers do not counter defendants' argument that 12 NYCRR §23-1.7(e)(2), the only specific regulation plaintiff relies upon, is inapposite to the facts of this case. Subsection 2 of §23-1.7(e) relating to "tripping and other hazards," provides as follows:

(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.

As plaintiff fell when he stepped into an uncovered hole, the section relied upon is inapplicable

and the §241(6) cause of action in the amended complaint must be dismissed as against Exis and 876. In searching the record, plaintiff's §241(6) cause of action against JT is dismissed as well.

However, in the exercise of discretion and in the interest of justice, the court grants plaintiff leave to serve a second amended complaint to assert a claim under §241(6) based on a different subsection of §23-1.7, which provides as follows:

(b) Falling hazards. (1) Hazardous openings. (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

12 NYCRR §23-1.7(b). Summary judgment cannot be denied based upon a theory not pleaded, *MBL Life Assur. Corp. v. Shorenstein Co.*, 237 A.D.2d 160, 161-162 (1st Dept. 1997); *Raymond Babtkis Assocs. v. Tarazi Realty Corp.*, 34 A.D.2d 754, 755 (1st Dept. 1970). However, where it appears on a summary judgment motion that a plaintiff may have an unpleaded cause of action, the court has discretion to grant leave to amend, in the absence of a motion for that relief. CPLR §3025(b); *Raymond Babtkis Assocs. v. Tarazi Realty Corp.*, *supra*; *Lefft v. Canada Life Assurance Co.*, 40 A.D.2d 641, 642 (1st Dept. 1972); *Dampskibsselskabet Torm A/S v. P. L. Thomas Paper Co.*, 26 A.D.2d 347, 352 (1st Dept. 1966)(amendment on appeal *sua sponte* where plaintiff's theory was apparent in record and opposing party not misled to its prejudice). Moreover, motions to amend to specify Industrial Code sections relied upon may be granted in the absence of prejudice. *Walker v. Metro-North Commuter R.R.*, 11 A.D.3d 339, 341 (1st Dept. 2004)(no prejudice where underlying facts same); *Baten v. Wehuda*, 281 A.D.2d 366 (1st Dept. 2001); *Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp.*, 271 A.D.2d 231, 232 (1st Dept. 2000)(facts and theories unchanged); *Snowden v. New York City Transit Auth.*, 248 A.D.2d 235 (1st Dept.

1998). In this case, there is no prejudice or lack of notice because the amended complaint and plaintiff's deposition testimony put defendants on notice that plaintiff was injured when he stepped into an uncovered hole in the floor. The error of identifying subsection (e) rather than subsection (b) of the very same Industrial Code regulation did not mislead defendants to their prejudice because they cannot avoid the applicability of the correct subsection based on the facts in the record. An amendment will enable resolution on the merits rather than on a technical deficiency.

Labor Law §200

Labor Law §200¹, codifies the common law duty of an owner or general contractor to maintain a safe workplace. *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317 (1981). A prerequisite to a finding of liability under §200 is that the defendant either created or had notice of a dangerous condition or had "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Id.*

Defendants Exis and 875 are entitled to summary judgment dismissing plaintiff's claim under Labor Law §200 against them. There is no evidence in the record that they created or had notice of the missing floor tiles in the room where plaintiff fell, or that they supervised or controlled plaintiff's work at the time of the accident.

¹ Labor §200 provides that: "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Adco's Motion for Summary Judgment in the Third Third-Party Action

Adco is entitled to dismissal of JT's third-third party complaint and all cross-claims against it. There is no evidence in the record that Adco removed the missing tiles or that lighting played a role in causing the accident. Plaintiff's accident in this case was brought about by the missing tiles in the floor. Adco's witness, Ralph Occhipinti, testified that the floor tiles were removed before Adco came onto the project. Occhipinti EBT, pp. 13-14, 23. Mr. Johnston, JT's witness testified that "probably" the electricians would have removed the tiles based upon the nature of the work going on in the room. Johnston EBT, p. 65. Mr. Johnston's statement is mere speculation insufficient to defeat Adco's motion for summary judgment. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980); *Jeffcoat v. Andrade*, 205 AD2d 374 (1st Dept. 1994). The lack of artificial temporary lighting in the room did not play a part in bringing about the accident because plaintiff testified that daylight from the windows enabled him to see. Hence, the third third-party complaint and all other claims against Adco must be dismissed.

Indemnification

The motion by 875 for summary judgment on liability on its third-party claim for contractual indemnification is granted. Exis entered into a lease, dated July 15, 2003 with 875, as landlord, for the Premises, for a term commencing September 1, 2003 and ending June 30, 2014 (Lease). Paragraph 33.1(b) of the Lease provides that Exis agreed to indemnify "Indemnitees"² for all claims against them arising from "any accident, injury or damage whatsoever caused to any person ... and occurring in or about the Premises during the Term, unless and to the extent caused

² The term "Indemnitees" is not defined in the Lease.

by the act, omission or negligence of Landlord, its principals, officer and employees.” The indemnity provision includes indemnification for “attorneys’ fees and disbursements incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof.” Exis does not dispute that it is obligated to indemnify 875 for the defense of this action, but it argues that JT should pay 875’s attorneys’ fees because JT must indemnify Exis. As Exis does not deny 875’s entitlement to indemnification, its motion is granted.

Exis is entitled to summary judgment on its cross-claim against JT for contractual indemnification. Exis’ cross-motion against JT for indemnification is based upon a contract between them, dated August 25, 2003 (JT Contract). Exis argues that the JT Contract by reference incorporated the General Conditions contained in AIA Document A201-1997. Article 15.1.2 does indeed provide that the A201-1997 General Conditions are part of the Contract Documents. Paragraph 3.18.1 of the AIA General Conditions provides, in pertinent part, as follows:

To the fullest extent permitted by law...the Contractor shall indemnify and hold harmless the Owner...from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, ... but only to the extent caused by negligent acts or omissions of the Contractor, a Subcontractor, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.³

Pursuant to the language just quoted, JT agreed to indemnify Exis for accidents caused by JT, its subcontractor, or anyone for whose acts they might be liable. A general contractor who has notice

³ The indemnification clause is enforceable, despite the fact that it could be construed to indemnify Exis for its own negligence because there can be no finding on this record that Exis was negligent. *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 795, fn. 5 (1997).

of a dangerous condition and control over the work site can be held liable under §200. *Keating v. Nanuet Bd. of Educ.*, 40 A.D.3d 706 (2nd Dept. 2007); *Roosa v. Cornell Real Prop. Servicing, Inc.*, 38 A.D.3d 1352 (4th Dept. 2007); *cf. Lally v. JGN Constr. Corp.*, 295 A.D.2d 148 (1st Dept. 2002); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 295 A.D.2d 723, 724-725 (3rd Dept. 2002). Here, JT's witness admitted he had notice of the missing tiles. Accordingly, as plaintiff's accident arose out of either the negligence of JT, its subcontractor, Millwright, or its employee, plaintiff, Exis is entitled to indemnification by JT. Accordingly, it is

ORDERED that Adco's motion for summary judgment is granted and the third third-party complaint and all other claims against it are dismissed with prejudice; and it is further

ORDERED the Labor Law §241(6) claim in the amended complaint against JT, Exis and 875 is dismissed, but plaintiff is given leave to serve a second amended complaint to assert a Labor Law §241(6) claim based upon 12 NYCRR §23-1.7(b) within twenty (20) days of service upon plaintiff of a copy of this order with notice of entry; and it is further

ORDERED that the motion of 875 for summary judgment on the third cause of action for contractual indemnification in its second third-party complaint against Exis is granted; and it is further

ORDERED that the motion of Exis for summary judgment on its cross-claim against JT for contractual indemnification is granted; and it is further

ORDERED that the issue of the amount of attorneys' fees and costs incurred in this action to be awarded to 875 and Exis on their contractual indemnification claims is referred to a Special Referee to hear and determine and said amount shall be computed through the date of the hearing before the Special Referee; and it is further

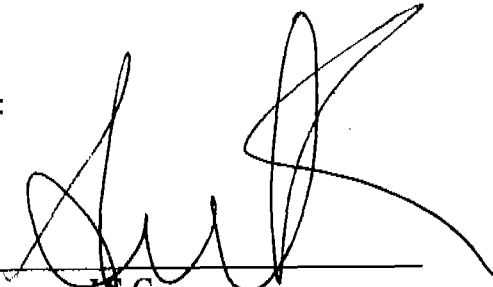
ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk of the Reference Part shall notify all parties of the date of the hearing on the issue of attorney's fees and costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: February 5, 2008

ENTER:



J.S.C.

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