

**Antretter v 660 Twelfth Unit One, LLC**

2008 NY Slip Op 30448(U)

February 5, 2008

Supreme Court, New York County

Docket Number: 0104913/2004

Judge: Walter Tolub

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

PRE Index Number : 104913/2004

PART \_\_\_\_\_

ANTRETT, JAMES

vs  
660 TWELFTH UNIT ONE

Sequence Number : 004

SUMMARY JUDGMENT

K NO. \_\_\_\_\_

ON DATE \_\_\_\_\_

ON SEQ. NO. \_\_\_\_\_

ON CAL. NO. \_\_\_\_\_

NEW YORK COUNTY CLERK'S OFFICE  
PAPERS NUMBERED

**FILED**

FEB 19 2008

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2/1/08

4  
WALTER B. TOLUB J.S.C.

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: PART 15**

-----X  
JAMES ANTRETTER and DENISE ANTRETTER,

Index No.: 104913/2004

Plaintiffs,

-against-

660 TWELFTH UNIT ONE, LLC, ROCKROSE  
DEVELOPMENT CORP., ALMAR PLUMBING &  
HEATING CORP., HIGH-RISE ELECTRIC, INC.,  
INTERSTATE IRON WORKS OF NEW JERSEY,  
INTERSTATE IRON WORKS CORP., and  
ROCKROSE CONSTRUCTION (621 W48-GC) LLC,

Defendants.

-----X  
**Tolub, J.:**

This is an action to recover damages sustained by a worker when he tripped and fell on a roof while working at a construction site located at 660 Twelfth Avenue, New York, New York on January 3, 2002. Defendant High-Rise Electric, Inc. (High-Rise) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs James Antretter and Denise Antretter's (plaintiff) complaint and all cross claims as against it.

Defendant Interstate Iron Works Corporation (Interstate) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims as against it.

Defendant Almar Plumbing & Heating Corporation (Almar) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims as against it. Defendants Twelfth Unit One, LLC (Twelfth Unit One), Rockrose Development Corporation (Rockrose Development) and Rockrose Construction (621 W48-GC) LLC (Rockrose Construction) (collectively, Twelfth Unit) cross-move, pursuant to CPLR 3212, for

summary judgment dismissing plaintiff's complaint as against them; or in the alternative, granting them full contractual and common-law indemnity as against co-defendants, as well as granting them summary judgment in their favor as against co-defendants for failing to procure insurance coverage for the benefit of Twelfth Unit in accordance with their contractual obligation to do so.

### **BACKGROUND**

Twelfth Unit One was the owner of the premises where plaintiff's accident occurred. Rockrose Development was the managing agent for the property, and Rockrose Construction was the general contractor for the project, which entailed building a Fed Ex facility consisting of a cellar, two floors and a third-floor roof. Defendant Rockrose Construction coordinated the various trades at the site. Rockrose Construction contracted with defendant Interstate to provide the structural steel for the building. Rockrose Construction also hired defendant High-Rise to perform electrical work at the building, and defendant Almar to install various piping and plumbing fixtures. Plaintiff was employed by non-party Battery River Construction as a laborer. Plaintiff's job duties included cleaning up after the other trades at the job site and moving materials. Each morning, plaintiff was instructed as to what work he was to perform at the worksite by his foreman, Vinny Conagario (Conagario). Plaintiff only took orders from Conagario.

Plaintiff testified that, on the date of his accident, he was directed by Conagario to go up to the third-floor roof of the building and move some heavy cement stops that were in a subcontractor's way. Plaintiff stated that, as it was early in the morning, it was still dark outside when he reached the roof. In addition, plaintiff noted that, although lighting had been provided

in the basement and on the first floor of the building, there was no lighting on the third-floor roof on the morning of his accident.

Plaintiff described the roof as littered with debris on top of steel decking, also known as Q-decking. Cement is poured on top of Q-decking to form a floor of a building. In addition, pins, which were placed four to five inches apart, and which were elevated higher than the highest part of the Q-decking, were welded to the steel of the Q-decking in order to hold the concrete in place once it was poured. Plaintiff noted that the uneven surface created by the Q-decking is “the nature of the job” (Defendant High-Rise’s Notice of Motion, Exhibit D, Plaintiff’s Deposition, at 42).

Plaintiff testified that, at approximately 7:05 A.M., he placed one of the 100-pound cement stops up onto his right shoulder to move it. As he was in the process of moving the cement stop and looking straight ahead, he felt his foot grab something, and he fell down on his left knee. Plaintiff noted that, at the time of his accident, there was no debris in his path. He further testified that he did not know exactly what had caused him to trip, but noted the unevenness of the Q-decking, as well as his observation of a pin in the area of his accident. Plaintiff also surmised that he “could have very well misstepped and got [his] foot caught on one of the valleys in the Q-Deck, too” (*id.* at 44-45). Plaintiff stated that he did not know if anyone else had made any complaints about the conditions in the area, and he did not complain or express concern about the level of light.

In his affidavit, dated August 3, 2007, plaintiff stated that, before the morning of his accident, he had never been on the roof itself. In addition, before the date of his accident, plaintiff had never performed work on the roof or at any other location in the building before

sunrise or during dark hours. Plaintiff also noted that he was aware that an electrical contractor had been hired to provide temporary lighting during the construction of the building that would allow him to work during dark hours, and that, as he proceeded to the roof level on the morning of his accident, he was depending on the fact that the same electrical contractor, which had provided temporary lighting to the lower floors, had also provided lighting to the third-floor roof. Plaintiff maintained that the lack of temporary lighting contributed to his accident, as he could not see the uneven features of the Q-decking in the dark.

### DISCUSSION

“The 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 eliminate any material issues of fact from the case” (Santiago v Filstein, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

Initially, it should be noted that, in his opposition papers, plaintiff did not contest defendant Almar’s cross motion for summary judgment dismissing plaintiff’s complaint as against it. Thus, Almar is entitled to summary judgment dismissing plaintiff’s complaint as

against it.

It should also be noted that, in his opposition papers, plaintiff withdrew his Labor Law §§ 200, 240 (1) and 241 (6) claims as against defendants High-Rise and Interstate. To this effect, plaintiff acknowledged that neither of these defendants was the owner, general contractor or an agent thereof on the project, so as to be held liable under Labor Law §§ 240 (1) and 241 (6). In addition, plaintiff acknowledged that his accident was not the result of a fall from an elevated worksite, so as to fall within the purview of Labor Law § 240 (1). Further, plaintiff also conceded that these defendants did not direct or control the manner in which plaintiff performed his work, so as to be held liable under Labor Law § 200. Thus, defendants High-Rise and Interstate are entitled to summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) claims as against them.

However, plaintiff asserts that defendant High-Rise is liable for his injuries in common-law negligence, as High-Rise was obligated to install temporary lighting throughout the building in order to enable the laborers to work during dark hours. In addition, plaintiff attests that he relied upon High-Rise to install this temporary lighting, and that High-Rise's failure to fulfill this obligation resulted in the creation of the dangerous condition that caused plaintiff's accident.

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (Kenny v City of New York, 30 AD3d 261, 262 [1<sup>st</sup> Dept 2006]).

Because a finding of negligence must be based upon a breach of duty, a threshold and dispositive question in this case is whether High-Rise, as an electrical subcontractor, owed a duty of care to plaintiff, a non-contracting party to the contractual arrangement between Rockrose

\* 7 ]

Construction and High-Rise (Church v Callanan Industries, Inc., 99 NY2d 104, 110 [2002]; Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]; Timmins v Tishman Construction Corporation, 9 AD3d 62, 65 [1<sup>st</sup> Dept 2004]).

“[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party” (Espinal v Melville Snow Contractors, Inc., 98 NY2d at 138). In the case of Espinal v Melville Snow Contractors, Inc. (*supra*), the Court identified three sets of circumstances as exceptions to this general rule, in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof (*id.* at 140; *see Church v Callanan Industries, Inc.*, 99 NY2d at 111; Timmins v Tishman Construction Corporation, 9 AD3d at 66). Based upon the circumstances of this case, plaintiff fails to qualify under any of the exceptions.

The first set of circumstances arises where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk (*id.* at 139). This conduct has also been described as “‘launch[ing] a force or instrument of harm’” (Church v Callanan Industries, Inc., 99 NY2d at 111, quoting H.R. Moch Company v Rensselaer Water Company, 247 NY 160, 168 [1928]). Here, there is no evidence in the record that High-Rise’s incomplete performance of its work to install temporary lights on the subject roof created or increased the risk for plaintiff’s accident beyond the risk which existed before High-Rise entered into any contractual undertaking (*see Church v Callanan Industries, Inc.*, 99 NY2d at 112 [no evidence that defendant’s incomplete performance of its contractual duty to install guide-railing created or increased the risk of plaintiff’s divergence from roadway beyond the risk which existed before the contractual duty arose]).

The second set of circumstances giving rise to a promisor's tort liability arises where the plaintiff has suffered injury as a result of a reasonable reliance upon the defendant's continuing performance of a contractual obligation (Espinal v Melville Snow Contractors, Inc., 98 NY2d at 140; see also Eaves Brooks Costume Company v Y.B.H. Realty Corporation, 76 NY2d 220, 226 [1990]). Here, as evidence in the record indicates that plaintiff had never been to the roof or been assigned to work during dark hours, it cannot be said that plaintiff detrimentally relied on High-Rise's continued performance of its contractual obligation to install temporary lighting. In fact, plaintiff testified that he was aware of the inadequate lighting on the roof at the time that he arrived on the third-floor roof level, but chose to continue his work anyway because he did not feel he was in a position to refuse his supervisor's instructions.

The third set of circumstances wherein tort liability will be imposed upon a promisor is "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Church v Callanan Industries, Inc. 99 NY2d at 112, quoting Espinal v Melville Snow Contractors, Inc., 98 NY2d at 140; Palka v Servicemaster Management Services Corporation, 83 NY2d 579, 589 [1994]). Here, High-Rise's contractual duty to install lighting at the premises was not of the type of "comprehensive and exclusive" property maintenance obligation that would entirely displace the landowner's duty to maintain the premises safely (Timmins v Tishman Construction Corporation, 9 AD3d at 66, quoting Espinal v Melville Snow Contractors, Inc., 98 NY2d at 141). Based upon these considerations, this court concludes that the alleged negligence of High-Rise in performing its contractual obligations did not breach any duty to plaintiff.

In any event, High-Rise did not owe a duty of care to the plaintiff in this case, so as to be

liable for plaintiff's injuries under a theory of common-law negligence, as evidence in the record indicates that, at the time of plaintiff's accident, High-Rise was in the process of installing the temporary lighting on the roof in a timely fashion, and that it was not made aware that plaintiff would be working on the roof of the subject building before the temporary lighting was in place.

In his affidavit, dated October 8, 2007, Vito Guido (Guido), a foreman for High-Rise on the date of plaintiff's accident, stated that High-Rise installed temporary metal halide lights on the bulkheads of the roof after another trade installed the Q-decking. After the concrete was poured on the Q-decking to create a floor, High Rise installed permanent lights on the roof. Guido noted that High Rise installed both the temporary and permanent lights on the roof of the subject building in accordance with the directions given by Rockrose Construction. To this effect, Guido stated that High-Rise "installed both the temporary and permanent lights on the roof on schedule with the directions and coordination provided by Rockrose Construction, LLC," and that High-Rise "did not fail to install either the permanent and/or temporary lights when Rockrose Construction, LLC told it to" (High-Rise's Reply Affirmation, Exhibit A, Guido Affidavit dated October 8, 2007, at 2).

In addition, Guido stated that "[a]t no time was [High-Rise] informed that laborers would be working on the roof for any reason before the sun rose before the installation of either the temporary or permanent light" (*id.*).

At his deposition, upon reviewing a photograph taken of the subject area, Guido stated that the photograph did not show the temporary lighting that his company installed on the roof, a project that would take five days to complete. In fact, Guido explained that the photograph depicted the middle of the project and that installation of the lights had not yet been completed at

that time. Specifically, Guido stated, “We’re not completed. I see pipes that have not been – we’re still working here” (High-Rise Notice of Motion, Exhibit H, Guido Deposition, at 51).

In his deposition, Michael Loria (Loria), a foreman for High-Rise who would visit the job site once a week to check on progress, testified that, as there was nothing overhead on the top of the building as it existed at the time of plaintiff’s accident, he did not think that overhead lighting was in place yet. He also later stated that he did not remember if any lighting existed on the third floor of the building on the date of plaintiff’s accident.

As there is no evidence in the record that High-Rise was negligent in its installation of the temporary lighting, or in the timeliness of the same, High-Rise is entitled to summary judgment dismissing plaintiff’s common-law negligence claim as against it.

In addition, plaintiff asserts that defendant Interstate is also subject to liability for his injuries under a theory of common-law negligence. Plaintiff maintains that Interstate, which provided and installed the Q-decking and its protruding pins, which may have caused plaintiff to trip and fall, was negligent in not warning workers of the unsafe condition, or at least providing barricades or ropes to cordon off the dangerous area.

Initially, it should be noted that there is no indication in the record to the effect that the Q-decking was improperly installed or defective in any way. Q-decking, by its very nature, and as conceded by plaintiff, is corrugated and uneven. In addition, that Interstate was required to provide warning or barricade off the area around the Q-decking is not supported by the evidence in the record. Steven Abramson (Abramson), president and co-owner of Interstate, testified that Interstate installed the Q-decking for the project. He noted that, after the studs were installed, and before the concrete was poured, the Q-decking would have valleys and depressions, as it is

made of corrugated metal. As such, nothing could be done to prevent someone from tripping. As workers were aware of the nature of the Q-decking as uneven, workers watched where they walked when walking on Q-decking. Specifically, Abramson stated that “obviously, if you are there, then you see the situation, which is you got to be careful” (High-Rise’s Notice of Motion, Exhibit F, Abramson Deposition, at 45).

In addition, Abramson stated that Interstate usually worked out how to give warnings of the raised studs with the various contractors, though also stating that “[o]ne would think that the contractor would avoid having people go on that floor, unless it was absolutely necessary” (*id.* at 43). Further, the record establishes that the area where plaintiff tripped was an open floor which was in the process of being constructed. There is no liability when the plaintiff’s accident is caused by an integral part of the work being performed and not debris, tools or materials (Tucker v Tishman Construction Corporation of New York, 36 AD3d 417, 417 [1<sup>st</sup> Dept 2007]). Thus, defendant Interstate is entitled to summary judgment dismissing plaintiff’s common-law negligence claim as against it.

Twelfth Unit cross-moves for summary judgment dismissing plaintiff’s complaint as against them. Initially, it should be noted that, although plaintiff asserts that Twelfth Unit is liable to plaintiff under Labor Law § 241 (1) and common-law negligence, plaintiff has discontinued its Labor Law §§ 200 and 240 (1) claims as against Twelfth Unit.

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id. at 504-505; Padilla v Frances Schervier Housing Development Fund Corporation, 303 AD2d 194, 196 [1<sup>st</sup> Dept 2003]).

Initially, it should be noted that, although plaintiff claimed violations of Industrial Code 12 NYCRR 23-1.7 (d) and (e) in his bill of particulars, he did not address those violations in his opposition papers. Thus, the court deems these claims as abandoned, and Twelfth Unit is entitled to summary judgment on those alleged Industrial Code violations (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003]).

Plaintiff maintains that Twelfth Unit is not entitled to summary judgment dismissing his Labor Law § 241 (6) claim, as a question of fact exists as to whether Twelfth Unit violated Industrial Code 12 NYCRR 23-1.30 by failing to provide adequate lighting in the area of plaintiff’s accident. Specifically, Industrial Code 12 NYCRR 23-1.30 states:

Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in

any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

Industrial Code 12 NYCRR 23-1.30 states a specific standard of conduct as opposed to a general common-law standard of care (Cahill v Triborough Bridge & Tunnel Authority, 31 AD3d 347, 349 [1<sup>st</sup> Dept 2006]; Murphy v Columbia University, 4 AD3d 200, 202 [1<sup>st</sup> Dept 2004]).

Industrial Code 12 NYCRR 23-1.30 requires that proper illumination be provided in areas where persons are required to pass. Here, testimony and other evidence in the record indicates that at least a question of fact exists as to whether the area where plaintiff was directed to perform his work was properly illuminated at the time of his accident. Thus, Twelfth Unit is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.30.

However, as there is no evidence in the record demonstrating that Twelfth Unit had actual or constructive notice that plaintiff would be working on the third-floor roof of the building before daylight or before the temporary lighting was installed, Twelfth Unit is entitled to summary judgment dismissing plaintiff's claim of common-law negligence as against them. To this effect, plaintiff, who only took his work orders from his supervisor, testified that he had never before been to the roof or been assigned to work during dark hours.

Twelfth Unit also cross-moves for summary judgment in their favor on their cross claims for contractual and common-law indemnification as against co-defendants High-Rise, Interstate and Almar, as well as summary judgment in their favor as against these co-defendants for their failure to procure insurance coverage for the benefit of Twelfth Unit. However, it is not

necessary for the court to address these claims, as they are moot, as High-Rise, Interstate and Almar have not been shown to be liable for plaintiff's injuries. Thus, Twelfth Unit is not entitled to summary judgment in their favor on their cross claims for common-law and contractual indemnification, as well as breach of contract for failure to procure insurance, as against co-defendants High-Rise, Interstate and Almar.

### CONCLUSION AND ORDER

For the foregoing reasons, it hereby

**ORDERED** that defendant High-Rise Electric, Inc.'s (High-Rise) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs James Antretter and Denise Antretter's (plaintiff) complaint and all cross claims as against it is granted; and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that defendant Interstate Iron Works Corporation's (Interstate) cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims as against it is granted; and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that defendant Almar Plumbing & Heating Corporation's (Almar) cross motion, pursuant to CPLR, for summary judgment dismissing plaintiff's complaint and all cross claims as against it is granted; and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that the part of defendants Twelfth Unit One, LLC (Twelfth Unit One), Rockrose Development Corporation (Rockrose Development) and Rockrose Construction (621 W48-GC) LLC (Rockrose Construction) (collectively, Twelfth Unit)'s cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims as against them, as well as plaintiff's Labor Law § 241 (1) claims predicated on violations of Industrial Code 12 NYCRR 23-1.7 (d) and (e) as against them, is granted; and it is further

**ORDERED** that the part of Twelfth Unit's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.30 as against them is denied; and it is further

**ORDERED** that those parts of Twelfth Unit's cross motion, pursuant to CPLR 3212, for summary judgment in their favor granting them full common-law and contractual indemnity as against co-defendants High-Rise, Interstate and Almar, and granting summary judgment in their favor as against co-defendants for their failures to procure insurance coverage for the benefit of Twelfth Unit in accordance with their contractual obligations to do so, is denied; and it is further

**ORDERED** that the remainder of the action shall continue.

Counsel for the remaining parties are to appear for a pre-trial conference on February 29, 2008 at 11am in room 335 at 60 Centre St.

DATED: 2/15/08

ENTER:

W  
Hon. Walter B. Tolub J.S.C.

**FILED**  
FEB 19 2008  
NEW YORK  
COUNTY CLERK'S OFFICE