

Kent v Skanska USA Bldg., Inc.

2009 NY Slip Op 30476(U)

February 24, 2009

Supreme Court, Suffolk County

Docket Number: 06-8692

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 9-17-08
ADJ. DATE 11-19-08
Mot. Seq. # 004 - MotD
005 - XMotD

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THOMAS KENT, :
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 Plaintiff, :
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 - against - :
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 :
 SKANSKA USA BUILDING, INC., UNITED :
 AIR CONDITIONING CORP., and DANCO :
 ELECTRICAL CONTRACTOR, INC., :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 52 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30 ; Notice of Cross Motion and supporting papers 31 - 36 ; Answering Affidavits and supporting papers 37 - 41; 42 - 45 ; Replying Affidavits and supporting papers 46 - 47 ; 48 - 49 ; 50 - 52 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by the defendant Skanska USA Building, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and the cross claims asserted against them by United Air Conditioning Corp. and Danco Electrical Contractor, Inc., and summary judgment on its cross claims for contractual and common-law indemnification, and for breach of contract, is granted to the extent that the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed as against it, and is otherwise denied; and it is further

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ORDERED that the cross motion (#005) by the defendant Danco Electrical Contractor, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, is granted to the extent that the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed as against it, and is otherwise denied

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered when he was hit by an electrical conduit at a construction site. Skanska USA Building, Inc. (Skanska) was the general contractor hired to construct a dormitory at the State University of New York Maritime College. Skanska hired the prime contractors, including United Air Conditioning Group (United), the HVAC contractor, and Danco Electrical Contractor, Inc. (Danco), the electrical contractor.

The plaintiff testified at his deposition that he was a journeyman steam fitter for nonparty Bradshaw Mechanical, a subcontractor for United. Bradshaw had been working at the dormitory project for more than a year but the plaintiff had just recently returned to the site. The plaintiff testified that his foreman, John Klueg, was the only person who directed or controlled his work. On the day of the accident the plaintiff and his coworker were installing copper pipes for the heating and air conditioning system. The room where he was to work was large (approximately 20 x 40 feet), it was cluttered, and contained dumpsters, insulation, door bucks, and sheetrock, although the sheet rock was not yet installed on the walls. A door buck is the metal frame surrounding a door. The plaintiff testified that there were three or four door bucks stacked and leaning against the aluminum studs. To fabricate the correct length of pipe, the plaintiff had set up a tripod, or metal bench, to use while cutting the bundle of pipes. He was about to measure the pipes for cutting when an electrician employed by United, whom he new casually, entered the room and they exchanged a few comments. The plaintiff stated that the electrician leaned against the door bucks, which caused a dumpster to move slightly. When the dumpster moved, it released an electrical conduit which was "caught" on the dumpster handle. The conduit was subjected to tension and, when it was released from the dumpster handle, it acted like a spring. The plaintiff was hit in the face by the conduit, sustaining the injuries alleged herein. The plaintiff testified that he learned after the accident that the conduit was suspended from the ceiling and, because there were no walls for the conduit to which it could be attached, it had been placed at the dumpster handle. The plaintiff did not see the conduit before his accident.

Initially, the Court notes that the cross motion made by Danco is procedurally defective because it was not interposed within the time limitation prescribed by CPLR 3212 (a) (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). To the extent that the cross motion seeks the "nearly identical" relief sought by Skanska in its motion-in-chief, those issues shall be considered (*Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]; *see also, Boehme v A.P.P.L.E.*, 298 AD2d 540, 749 NYS2d 49 [2002]), but the remainder of the cross motion is denied as untimely.

The Court notes that there is no view of the uncontested evidence which would bring the accident under the absolute liability imposed by Labor Law § 240 (1) (*Toefer v Long Is. R.R.*, 4 NY3d 399, 795

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NYS2d 511 [2005]) and the plaintiff has conceded that it is inapplicable. Accordingly, the plaintiff's Labor Law § 240 (1) claim is dismissed against all defendants (CPLR 3212 [b]; *Rogers v C/S Assoc. Ltd. Partnership*, 273 AD2d 523, 708 NYS2d 524, *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000]).

Labor Law § 241 (6) requires owners and general contractors to “provide reasonable and adequate protection and safety” for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. The duty to comply with the Commissioner's regulations imposed by § 241 (6) is nondelegable (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502, 601 NYS2d 49 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]; *Allen v Cloutier Constr.*, 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241 (6) wherein the rule or regulation alleged to have been breached is a “specific positive command” and not merely “general safety standards” need not show that a defendant exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see, Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998] *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*). Further, the regulation must be applicable to the facts and its violation must be the proximate cause of the plaintiff's injury.

The plaintiff has confined his opposition argument to the defendants' alleged violation of the Industrial Code at 12 NYCRR §§ 23-1.7 (a) , (e) (1) and (2), and 23-2.1 (a) (1) and (2).¹ Section 23-1.7 is entitled “Protection from general hazards” and provides, in relevant part:

- (a) Overhead hazards. (1) 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.
- (2) 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, however, the cause of the plaintiff's accident was not an overhead hazard contemplated by the regulation, he was not “normally exposed to falling material or objects,” nor was he subjected to an overhead hazard such that a barricade or fence would have prevented his inadvertent entry to such area. Therefore, the Court finds subsection (a) inapplicable to the plaintiff's accident (*see, Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 [2007]).

¹ Although the plaintiff's bill of particulars does not list any Code violations, the complaint does include the violations asserted in his opposition. The other violations alleged in the complaint are either too general or not applicable to the plaintiff's accident.

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Subsection (e) is entitled “Tripping and other hazards” and provides:

(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.

Here, the plaintiff did not trip or stumble in a passageway, nor was his accident caused by dirt, debris, scattered tools or sharp projection in a working area. Therefore, a violation of section 23-1.7 (e) (1) or (2) was not the proximate cause of the plaintiff’s accident, and these claims are dismissed (*see, Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 854 NYS2d 388 [2008]; *Tucker v Tishman Constr. Corp.*, 36 AD3d 417, 828 NYS2d 311 [2007]).

Section 23-2.1 is entitled “Maintenance and housekeeping” and provides, in relevant part:

(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Here, too, the plaintiff’s accident was not caused by material which was improperly stored, rather, the plaintiff alleges that the conduit was suspended from the ceiling because it was prematurely installed, i.e. before the walls were in place to receive the conduit. Therefore, the conduit was already in use (*Tucker v Tishman Constr. Corp., supra; Mahoney v Madeira Assoc.*, 32 AD3d 1303 [2006]; *Castillo v Starrett City*, 4 AD3d 320, 772 NYS2d 74 [2004]), there was no obstruction of a passageway, and the conduit did not fall from the edge of a floor or platform. Accordingly, in the absence of a specific code violation which was the proximate cause of the accident, summary judgment dismissing the plaintiff’s Labor Law 241 (6) claim is granted to Skanska.² Since there is no code violation to form the predicate for the

² To the extent that the plaintiff argues that it was the door bucks, resting against the studs, which violated section 23-2.1 (a) and caused his accident, the Court does not concur. According to the plaintiff’s testimony, the proximate cause of the accident was the suspended conduit which was caught on the dumpster handle.

plaintiff's Labor Law 241 (6) claim, his § 240(1) claim is also dismissed against Danco,³ as well as the non-moving defendant United (CPLR 3212[b]; *Rogers v C/S Assoc. Ltd. Partnership, supra*).

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercise control or supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). "Where, as here, a worker's injuries result from an unsafe or dangerous condition existing at a work site, rather than from the manner in which the plaintiff's work is being performed, the liability of a general contractor, and of an allegedly negligent subcontractor, depends upon whether they had notice of the dangerous condition and control of the place where the injury occurred" (*Wolfe v KLR Mech.*, 35 AD3d 916, 918, 826 NYS2d 458 [2006]; *Jurgens v Whiteface Resort on Lake Placid*, 293 AD2d 924, 926-927, 742 NYS2d 142 [2002]; *Johnson v Packaging Corp. of Am.*, 274 AD2d 627, 629, 710 NYS2d 699 [2000]). Further, a defendant moving for summary judgment dismissing a Labor Law § 200 claim based upon a defect or dangerous condition on the property has the initial burden to establish, *prima facie*, that it did not create nor have actual or constructive notice of the dangerous condition alleged (*Gadani v Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 841 NYS2d 709, 712 [2007]; *Wolfe v KLR Mech.*, *supra* at 919; *Bonse v Katrine Apt. Assoc.*, 28 AD3d 990, 991, 813 NYS2d 578 [2006]).

Among the arguments made by United in opposition to Skanska's motion is that the deposition transcripts offered in support of Skanska's motion are unsworn and are, therefore, inadmissible. It is well settled that the deposition transcript of a witness submitted in support of a motion for summary judgment is not in admissible form unless it is either signed by the witness or was previously forwarded to the witness for his review (CPLR 3116 [a]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2006]; *Santos v Intown Assoc.*, 17 AD3d 564, 793 NYS2d 477 [2005]), and evidence submitted in inadmissible form on a motion for summary judgment cannot be cured by submitting new evidence in a reply paper (*GJF Constr. Corp. v Cosmopolitan Decorating Co.*, 35 AD3d 535, 828 NYS2d 409 [2006]; *Osborne v Zornberg*, 16 AD3d 643, 792 NYS2d 183 [2005]). Here, none of the transcripts submitted by Skanska are signed by the party deposed and the only deposition which is accompanied by the requisite CPLR 3116 (a) notice is that of the plaintiff.⁴ Accordingly, the Court finds that Skanska

³ The Court notes that, while Danco would not be subject to the vicarious liability imposed by Labor Law § 241 (6) because it is not an owner or a general contractor (*Nasuro v PI Assoc.*, 49 AD3d 829, 830, 858 NYS2d 175 [2008]), for the purposes of Danco's untimely cross motions, the court is unable to consider this argument in that it is not an argument "nearly identical" to that made by Skanska in the motion-in-chief (*Grande v Peteroy, supra*).

⁴ Since the transcript of the plaintiff's deposition was accompanied by a copy of the letter sent to the plaintiff's attorney with the transcript, which contained the CPLR 3116 (a) notice, it was considered by the Court in support of that portion of Skanska's motion which is dependent upon the plaintiff's testimony as to how the accident happened.

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failed to meet its initial burden of demonstrating by admissible evidence that it did not create nor have actual or constructive notice of the dangerous condition alleged, and summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims is denied (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2008]; *GJF Constr. Corp. v Cosmopolitan Decorating Co.*, *supra*).

Skanska's cross claims

Skanska also seeks, *inter alia*, summary judgment on its cross claims for common-law and contractual indemnification over and against United and Danco. It is well settled that "the right to contractual indemnification depends upon the specific language of the contract" (*Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461, 791 NYS2d 634 [2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588 [1995]). Here, the contract with United and the contract with Danco are identical and provide, in pertinent part, that these subcontractors would, "to the fullest extent permitted by law," indemnify, defend and hold Skanska harmless for claims "arising out of or in connection with" the work performed by them or by their own subcontractor. Therefore, Skanska's right to indemnification is not dependent upon a finding that some act or omission on the part of United or Danco caused the plaintiff's injury (*Sullivan v G & L Bldg. Corp.*, 43 AD3d 401, 839 NYS2d 918 [2007]; *Lesisz v Salvation Army*, 40 AD3d 1050, 837 NYS2d 238 [2007]). The agreements further provide for (i) full indemnification in the event that the liability imposed upon Skanska is without any fault on the part of Skansk ; or (ii) partial indemnification in the event that Skanska is found to be partially at fault. If Skanska is found to be partially at fault, the costs and attorneys' fees to which it is entitled are to be computed on a pro rata basis. Therefore, full indemnification may be appropriate in the event that Skanska is found to be free of negligence and partial indemnification may be appropriate in the event that the jury finds that some negligence on the part of Skanska contributed to the plaintiff's accident. However, at this juncture, since the issue of the defendants' comparative negligence, if any, remains unresolved, summary judgment is inappropriate (*see, Brooks v Judlau Contr.*, 11 NY3d 204, 869 NYS2d 366 [2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 773 NYS2d 10 [2004]).

Further, since a claim for common-law indemnification is dependent upon a showing that the party seeking indemnity was not guilty of any negligence and also a showing that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 822 NYS2d 542 [2006] *Perri v Gilbert Johnson Enters.*, 14 AD3d 681, 685, 790 NYS2d 25 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [2004]), this claim is also premature. Skanska has not established that it was free of negligence nor has it been established that Danco or United were guilty of some negligence. Accordingly, summary judgment on its cross claims for common-law and contractual indemnification over and against United and Danco is denied to Skanska.

Lastly, Skanska seeks summary judgment on its claims that United and Danco breached their respective contracts by failing to procure the insurance mandated therein naming Skanska as an

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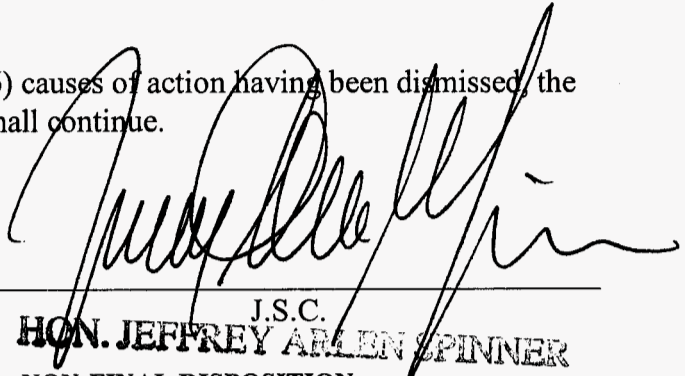
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additional insured. The gravamen of Skanska's argument is that the carriers for both United and Danco have declined to assume their defense, although duly demanded, based upon policy coverage and notice requirements. Therefore, Skanska's assertion that United and Danco failed to procure insurance adding them as additional insured is uncorroborated by any documentary evidence (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]), rather, the submissions suggest that the carriers have declined coverage under existing policies.⁵

The plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action having been dismissed, the plaintiff's remaining causes of action are severed and shall continue.

Dated: FEB 24 2009



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⁵ Moreover, the Court notes that the appropriate action as to carriers' refusal to defend would be a plenary declaratory judgment cause of action against the carriers (*Mortillaro v Public Serv. Mut. Ins. Co.*, 285 AD2d 586, 728 NYS2d 185 [2001]).