

**Conkling v 42/9 Residential, LLC**

2009 NY Slip Op 30962(U)

April 14, 2009

Supreme Court, Suffolk County

Docket Number: 05-3999

Judge: Melvyn Tanenbaum

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.



Conkling v 42/9 Residential  
Index No. 05-3999  
Page No. 2

Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 21; 22 - 27; Answering Affidavits and supporting papers 28 - 31; 32 - 33; 34 - 35; 36 - 38; 39 - 40; 41 - 42; Replying Affidavits and supporting papers 43 - 44; 45 - 46; 47 - 48; 49 - 51; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (#007) by the defendants/third-party plaintiffs 42/9 Residential, LLC (42/9 Residential) and Bovis Lend Lease, Inc. (Bovis) for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint and any cross claims asserted against them, and summary judgment on their claim for contractual indemnification over and against L. Martone & Sons Inc., is granted to the extent that the plaintiff's Labor Law § 240 (1) and 200, and common-law negligence, claims are dismissed as against 42/9 Residential, LLC, and they are granted summary judgment on their claim for contractual indemnification over and against is L. Martone & Sons Inc, and is otherwise denied; and it is further

**ORDERED** that the cross motion (#008) by the defendant R & J Construction for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint, is granted to the extent that the plaintiff's Labor Law § 240 (1) and 200, and common-law negligence claims are dismissed as against it, and is otherwise denied; and it is further

**ORDERED** that the cross motion (#009) by the defendant New Town Masonry for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint as well as any cross claims asserted it, is granted to the extent that the plaintiff's Labor Law § 240 (1) claim is dismissed as against it, and is otherwise denied.

42/9 Residential, LLC was the owner of real property. It hired Bovis to act as the general contractor for a two building construction project. Defendants subcontractors on the project included L. Martone & Sons, Inc. (Martone), the roofing and waterproofing contractor; New Town Masonry (New Town), the mason contractor; and R & J Construction (R & J), the carpentry and drywall contractor.

Plaintiff, Kevin Conkling (Conklin) commenced this action to recover damages (alleging Labor Law §§ 200, 240 (1), and 241 (6) violations and for common-law negligence) for injuries allegedly caused when he tripped and fell on a ramp at the construction site. (Plaintiff, Dorcas Conkling, alleged a derivative cause of action).

Conkling's deposition testimony was that for eight months he was Martone's project foreman. He described the lobby area which led to a ground level courtyard containing large enclosed planters. It was claimed that New Town workers constructed temporary sloped ramps to permit access to such planters and to the lobby site. (New Town disputes that it constructed the ramps, notwithstanding its contractual obligation with Bovis to construct and maintain ramps.). The ramps were described as consisting of stacked empty wooden pallets and a layer of planks covered with plywood sheets. Plaintiff stated that the plywood on the ramps would sometimes break due to heavy loads of stones and/or mortar carried by the bricklayer's dollies and that he saw bricklayers replace broken plywood sheets.

On the day of his accident, while making an inspection, the plaintiff used a ramp. He testified that

Conkling v 42/9 Residential  
Index No. 05-3999  
Page No. 3

he went up the ramp without incident; but when he started to return, his foot caught on the lip of the plywood sheet at the top of the ramp causing him to trip and fall.

The Court notes that the cross motion made by R & J, and the cross motion made by New Town, are not timely 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]). However, those claims in the cross motions are being considered where they seek the “nearly identical” relief sought in the main motion by 42/9 Residential and Bovis (*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]).

Labor Law § 240 (1), commonly known as the “scaffold law,” creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either actually exercised supervision or control over the work (*see, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The “exceptional protection” provided for workers by § 240 (1) is aimed at “special hazards” and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*id.* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). [1991]). However, the § 240 (1) “special hazards” “do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity” (*see, Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]). In order to prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]).

Here, the defendants established that Labor Law § 240 (1) is inapplicable to this plaintiff’s trip and fall. Although he allegedly fell down the ramp after tripping and such ramp was at an incline this case is not within the ambit of the elevation-related hazards contemplated by Labor Law § 240 (1) (*Cummings v I. & O. A. Slutsky, Inc.*, 304 AD2d 860, 757 NYS2d 625 [2003]; *see also, Scharff v Sachem Cent. School Dist.*, 53 AD3d 538, 861 NYS2d 406 [2008]). Section 240 (1) is inapplicable when a ramp or a plank is not a “tool” used in the performance of the plaintiff’s work but, rather, is used as a passageway or stairway (*see, Donahue v CJAM Assoc.*, 22 AD3d 710, 803 NYS2d 132 [2005]; *Paul v Ryan Homes*, 5 AD3d 58, 774 NYS2d 225 [2004]; *DeStefano v Amtad N.Y.*, 269 AD2d 229, 703 NYS2d 34 [2000]; *DePuy v Sibley, Lindsay & Curr Co.*, 225 AD2d 1069, 639 NYS2d 207 [1996]; *Straight v McCarthy Bros. Co.*, 222 AD2d 775, 634 NYS2d 272 [1995]). Here plaintiff testified that he used the ramp to access the planter in order to make sure that his materials were covered establishing that he was using the ramp as a passageway or stairway. Accordingly, summary judgment dismissing the plaintiff’s Labor Law § 240 (1) claims is granted to the defendants.

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 imposed by § 241 (6) is nondelegable (*Ross v Curtis-Palmer Hydro-Elec. Co., supra; Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982];

Conkling v 42/9 Residential  
Index No. 05-3999  
Page No. 4

*Allen v Cloutier Constr.*, 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241 (6) where the rule or regulation alleged to have been breached is a “specific positive command” and not merely “general safety standards” need not show that defendants 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*).

In support of his position plaintiff has cited the defendants’ alleged violation of the Industrial Code; 12 NYCRR §§ 23-1.5 [c] (2), 23-1.7(e) and (f), 23-1.11(a) and (c), and 23-1.22 (a) (2) and (3).

Section 23-1.5 sets forth an employer’s general responsibility for health and safety in the workplace and is insufficiently specific to support a Labor Law § 241 (6) claim (*Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 821 NYS2d 178 [2006]; *Sajid v Tribeca N. Assoc.*, 20 AD3d 301, 799 NYS2d 33 [2005]). Section 23-1.7 (e) entitled, “Tripping and other hazards,” 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.

Plaintiff argues that the courtyard was both a working area and a passageway. The defendants did not meet their initial burden to establish that the lip of the plywood was not a condition which created a tripping hazard affecting the integrity of the “ramps” or in violation of § 241 (6) (*see, Conklin v Triborough Bridge and Tunnel Auth.*, 49 AD3d 320, 855 NYS2d 54 [2008]; *Miano v Skyline New Homes Corp.*, 37 AD3d 563, 656, 830 NYS2d 257 [2007]).

Section 23-1.7 (f), entitled “Vertical passage,” provides:

Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Section 23-1.11, entitled “Lumber and nail fastenings,” provides:

(a) The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.

\* \* \*

(c) All nails shall be driven full length and shall be of the proper size, type, length and number to provide the required strength at all joints. Only double-headed or screw-type nails shall be used in the construction of scaffolds.

Section 23-1.22, entitled “Structural runways, ramps and platforms,” provides, in relevant part:

(2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, **butt jointed and securely nailed**. (emphasis added).

(3) Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be **substantially supported** and braced to prevent excessive spring or deflection. Where planking is used on such runways and ramps, it shall be laid close, **butt jointed and securely nailed**. Such runways and ramps shall be provided with timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of such runways and ramps. **Bracing for such runways and ramps shall be installed at a maximum of four foot intervals**. (emphasis added)

The essence of plaintiffs claim was that the surface was not nailed securely and the plywood joints did not have required butt joints which would have eliminated the tripping hazard caused by an elevated edge. Accordingly, summary judgment dismissing the plaintiff’s Labor Law § 241 (6) claim is denied.

A violation of the Industrial Code is only evidence of negligence subject to a fact finders determination that the operation or conduct at the work site was reasonable and adequate under the particular circumstances (see, *Rizzuto v L. A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Herman v St. John’s Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 [1997]).

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (see, *Russin v Picciano & Son*, 54 NY2d 311, 318, 445 NYS2d 127 [1981]) who exercised control or supervision over the work and either had actual or constructive notice or created an allegedly dangerous condition (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where,

Conkling v 42/9 Residential  
Index No. 05-3999  
Page No. 6

as here, the alleged dangerous condition arises from the method or material controlled by the subcontractors and the owner and general contractor exercised no supervision or control over the work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed against 42/9 Residential and denied as to Bovis which as general contractor had supervision and control of the construction site. There was no evidence submitted that R & J had control or supervision over the work or that it created or had any actual or constructive notice of the alleged ramp defect. Accordingly, R & J is also granted summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Conversely, New Town did not establish its entitlement to summary judgment as a matter of law on these claims.

42/9 Residential and Bovis also seek summary judgment on their claim for contractual indemnification against Martone. While a party which is held vicariously liable, in the absence of its own negligence, may be entitled to contractual indemnification, such right to contractual indemnification arises from specific language of the contract (*Moss v McDonald's Corp.*, 34 AD3d 656, 825 NYS2d 497 [2006]; *Kader v City of N. Y. Hous. Preserv. & Dev.*, 16 AD3d 461, 463, 791 NYS2d 634 [2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588 [1995]). Here, the contract between Bovis and Martone establishes, in pertinent part at Article 12, that Martone would defend, indemnify and save harmless the Contractor and Owner from and against any claim, cost, expense or liability (including attorneys' fees) attributable to any bodily injury caused or "arising out of, resulting from, or occurring in connection with the performance of the Work by subcontractor . . .". Accordingly, 42/9 Residential and Bovis are entitled to summary judgment on this claim (*Sullivan v G & L Bldg. Corp.*, 43 AD3d 401, 839 NYS2d 918 [2007]; *Lesisz v Salvation Army*, 40 AD3d 1050, 837 NYS2d 238 [2007]).

Dated: April 14, 2009

**MELVYN TANENBAUM**

---

J.S.C.