

**Demartino v Consolidated Edison Co. of N.Y., Inc.**

2009 NY Slip Op 31764(U)

July 20, 2009

Supreme Court, New York County

Docket Number: 110464/04

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ANTHONY DEMARTINO,  
Plaintiff,

Index No.: 110464/04

Motion Date: 03/10/09

- v -

Motion Seq. No.: 03

CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC., T. MORIARTY & SONS, INC., and  
UNIVERSAL ELECTRIC CORP.,

Motion Cal. No.: 36

Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

PAPERS NUMBERED

1

2 - 6

7 - 9

**FILED**  
AUG 06 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall grant summary judgment to defendants on plaintiff's Labor Law 240 (1) claim, to Universal only on plaintiff's 241 (6) claim and otherwise deny summary judgment in this action where plaintiff sues for knee and spine injuries suffered as a result of an accident on a construction project. Plaintiff was employed as a laborer by third-party defendant Ruttura & Sons Construction, Inc. (the third-party action has been discontinued). The project involved building a substation for defendant Con Ed, and Moriarty was the general contractor for

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

the subsurface portion of the building. Moriarty retained Ruttura as a subcontractor for various jobs including demolition, backfilling, and excavation, while Universal was hired as the electrical subcontractor.

Universal moves for summary judgment against the complaint and cross-claims and Moriarity moves for summary judgment on the complaint and on its cross-claims for indemnification.

Plaintiff does not oppose the dismissal of the Labor Law 240 (1) claim and therefore the court shall grant summary judgment dismissing that claim against Universal and Moriarty and upon a search of the record shall grant summary judgment dismissing that claim against Con Ed.

The court shall grant Universal's motion to dismiss plaintiff's Labor Law 241 (6) claim and deny Moriarty's cross-motion to dismiss the same claim. There is no dispute that at the time of the accident plaintiff was performing work for Ruttura and that Universal was not working in the area or supervising plaintiff's work. As stated by the Court, under the Labor Law "the statutory 'agent' language appropriately limits the liability of a [sub]contractor as agent for a general contractor or owner for job site injuries to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created." Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 (1981). "A subcontractor . . .

however, can be liable under the statute only when it is in supervision or control of the area involved or the work which gives rise to the injury." DaSilva v Jantron Industries, Inc., 155 AD2d 510, 511 (2d Dept 1989). In determining whether a subcontractor may be held liable as an agent under the Labor Law the court must focus not on the cause of the injury but instead on the nature of the subcontractor's relationship to the work in which plaintiff was engaged at the time of the injury. Wong v New York Times Co., 297 AD2d 544, 549 (1<sup>st</sup> Dept 2002).

In this case, there is no record evidence that Universal had any involvement in or control over the work plaintiff was performing at the time of the accident and therefore Universal has no liability to plaintiff under Labor Law 241 (6). Plaintiff misrelies upon Locicero v Princeton Restoration, Inc. (25 AD3d 664, 666 [2d Dept 2006]) and Rizzuto v L.A. Wenger Contracting Co., Inc. (91 NY2d 343 [1998]) because in those cases the issue was not the liability of a subcontractor as agent for the owner or general contractor but instead the issue the Courts confronted was the liability of an owner or general contractor where neither party initiated the acts that caused the harm. Thus the Labor Law 241 (6) claim shall be dismissed as against Universal.

Plaintiff's testimony was that he tripped in a "passageway" due to an electrical grounding cable that protruded above the surface of the non-conducting sand it was laid in. However,

plaintiff's testimony and pictures of the accident site establish that the accident happened outdoors on top of the flat foundation even assuming as true plaintiff's testimony that he was walking along a "path" that the workers used to get from one point to another. As stated by the Court, "12 NYCRR 23-1.7 (e) (1) is limited in its application to passageways and 12 NYCRR 23-1.7 (e) (2) relates to 'the parts of floors, platforms and similar areas where persons work or pass.' Patently, an out-of-doors worn dirt pathway is not a floor, platform, passageway or similar working surface within the purview of the cited regulations." Gavigan v Bunkoff General Contractors Inc., 247 AD2d 750, 751 (3d Dept 1998); Porazzo v City of New York, 39 AD3d 731 (2d Dept 2007) ("Contrary to the plaintiffs' contention, the open, ground level of the work site where the injured plaintiff fell did not constitute a passageway, walkway,").

However, to the extent plaintiff's claim is based upon 12 NYCRR 23-1.7 (e) (2), "Working areas," it is not subject to summary adjudication. In this case, the finder of fact could conclude based upon plaintiff's testimony that the protruding cable constitutes a "sharp projection" from which the plaintiff should have been protected. Moriarty argues that this section of the Industrial Code is inapplicable because the cable alleged to have caused the accident was part of the work being performed citing Hageman v Home Depot U.S.A., Inc. (45 AD3d 730, 732 [2d

Dept 2007] ["liability is precluded where, as here, the alleged tripping hazard was an integral part of the work being performed"]. However, as argued by plaintiff, the principle cited in Hageman only applies where the tripping hazard is part of the work being performed by the injured worker. See Salinas v Barney Skanska Const. Co., 2 AD3d 619, 622 (2d Dept 2003)

("plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed"); Tucker v Tishman Const. Corp. of New York, 36 AD3d 417 (1<sup>st</sup> Dept 2007) ("no liability under the latter section because the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris, scattered tools and materials, or a sharp projection"). Where the tripping hazard is not created by the work plaintiff is performing, facts supporting a violation of 12 NYCRR 23-1.7 (e) (2) are sufficient to establish liability and support a denial of summary judgment. See Canning v Barney's New York, 289 AD2d 32, 34 (1<sup>st</sup> Dept 2001) (summary judgment denied where worker injured while pushing cart over completed concrete floor when wire became entangled in the wheel of the dumpster); Maza v University Ave. Development Corp., 13 AD3d 65, 66 (1<sup>st</sup> Dept 2004) ("pieces of wood, sheet rock . . . were . . . within the meaning of the latter regulation . . . and were not integral to plaintiff's work"). In this case, there is no dispute that the

cables were not integral to plaintiff's work at the time of the accident. This case is distinguishable from O'Sullivan v IDI Const. Co., Inc. (28 AD3d 225, 226 [1<sup>st</sup> Dept 2006]) because in that case the plaintiff conceded that the electrical conduit he tripped over appeared to be permanent whereas in this case the evidence is that the cables in their "permanent" form would be buried and not protrude above the finished floor. Therefore the plaintiff's claim under Labor Law 241 (6) against Moriarty is properly sustained.

The court shall deny summary judgment with respect to plaintiff's Labor Law 200 and common law negligence claims. The evidence establishes that Universal was responsible for placing the cables in the non-conducting sand and the Moriarty and Con Ed closely performed certain aspects of the work and supervised others. There is sufficient record evidence that if accepted as true by the factfinder could lead to the conclusion that the defendants created a hazardous condition. Universal was the only party that had a contractual duty to lay the cable in the sand. Moriarty had the contractual duty to dig the trenches into which the cables were placed and neither party denies that they executed their contractual responsibilities. There was testimony that Con Ed was on the site regularly monitoring the progress of the construction and directing its execution. Liability here is predicated not on plaintiff's work but on the creation of a

dangerous condition. The factual issues as to the creation of the condition preclude summary determination.

With respect to Universal's and Moriarty's applications for summary determination of the indemnification and contribution claims, those applications shall be denied as the parties' relative fault, if any, and the basis for such liability in either negligence or statute, must be resolved before any legal determinations can be made.

Accordingly, it is

ORDERED that plaintiff's cause of action under Labor Law 240 (1) is hereby dismissed as against all defendants; and it is further

ORDERED that the motion for summary judgment by defendant Universal Electric Corp. is GRANTED only to the extent of dismissing plaintiff's claim under Labor Law 241 (6) against it; and it is further

ORDERED that the remainder of the motion and cross-motion is DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference in Part Mediation-2 on October 6, 2009 at 10:00 A.M., and if the case is not settled thereat, the parties are to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on October 27, 2009 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: July 20, 2009

ENTER:

~~Debra A. James~~  
J.S.C.

**HON. DEBRA A. JAMES**

**FILED**  
AUG 06 2009  
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