

Higgins v Consolidated Edison Co. of N.Y., Inc.

2009 NY Slip Op 31935(U)

August 26, 2009

Supreme Court, New York County

Docket Number: 109560/04

Judge: Judith J. Gische

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.

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 109560/2004
HIGGINS, CHRISTOPHER
VS.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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

FILED
AUG 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and status conf scheduled 9/24/09
@ 9:30am APO*

AUG 26 2009

Dated: AUG 26 2009

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
Christopher Higgins,

Plaintiff (s),

-against-

Consolidated Edison Company of
New York, Inc. and Case Contracting, Ltd.,

Defendant (s).

-----X
Consolidated Edison Company of
New York, Inc.,

Third-Party Plaintiff (s),

-against-

Case Contracting, Ltd. and Proven
Electrical Contracting, Inc.,

Third-Party Defendant (s)

-----X
Case Contracting, Ltd.,

2nd Third-Party Plaintiff (s)

-against-

Proven Electrical Contracting, Inc.,

2nd Third-Party Defendant (s)

-----X
*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these)
motion(s):*

Papers	Numbered
Con Ed n/m (§3212) w/RES affirm, exhs	1
Case n/m (§3212) w/SRL affirm, exhs	2
Higgins opp (both motions) w/GJC affirm, KH affid, exh	3
Con Ed reply w/RES affirm, exh	4
Case reply, partial opp w/SRL affirm	5

DECISION AND ORDER

Index No.: 109560/04

Seq. No.: 003, 004

Present:

Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
590301/05

FILED

AUG 27 2009

COUNTY CLERK'S OFFICE
NEW YORK

T.P. Index No.:
591278/05

Gische J.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries allegedly sustained by plaintiff Christopher Higgins ("Higgins" or "plaintiff") on August 20, 2002 ("date of the accident"). Higgins alleges that his injuries were due to defendants' violation of sections 240 (1), 241 (6) and 200 of the Labor Laws of the State of New York ("Labor Law § ____").

Consolidated Edison Company of New York, Inc. ("Con Ed") and Case Contracting, Ltd. ("Case") have each moved for summary judgment dismissing plaintiff's claims against them. Con Ed also seeks summary judgment on its indemnification claims against Case, if Higgin's claims against it are not dismissed. Plaintiff opposes both motions, whereas Proven Electrical Contracting, Inc. ("Proven"), Higgin's employer, has not taken a position on either one of them.

Issue was joined by the moving defendants and plaintiff filed his note of issue on October 27, 2008. Since both motions are timely, they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision and order is as follows:

Overview

Although Con Ed and Case have separately moved, they adopt and support each other's arguments as to why they are entitled to summary judgment dismissing plaintiff's complaint. Both defendants argue that plaintiff cannot establish that the accident happened due to a violation of Labor Law § 240 (1) or "scaffold law" because plaintiff, who was in the process of coaxing or pulling cable off a large reel, was on the

same level as the reel he was pushing. Thus, while he may have hurt his back, nothing was being "hoisted" within the meaning of the Labor Laws, nothing fell on him, and he did not fall. They also argue that the forces of gravity were not involved, and the accident was the unfortunate result of the usual and ordinary dangers of a work site.

Defendants also seek the dismissal of plaintiff's Labor Law § 241 (6) claims. They contend the regulatory predicates that Higgins' relies upon are either inapplicable to how his accident happened or not specific enough to support his claim, as a matter of law. They deny the equipment being used - a "Greenlee Ultra Tugger" - is a hoist, within the meaning of the Labor Laws, and argue it is simply an electric winch¹. They allege that none of the special requirements found in the Industrial Code, like special bells signals, or cut off devices, have any applicability to this accident.

The defendants deny owing plaintiff any duty of care or that they were negligent. Thus, they also seek the dismissal of plaintiff's common law negligence and Labor Law § 200 claims as well. Defendants deny having any direction or control over how plaintiff did his job on the day of the accident, but argue that plaintiff was instructed and directed by his foreman or other Proven employees who were working with him that day on the cable pull.

Higgins contends that he suffered a gravity related injury because the cable reel reversed itself and the backwards turn was caused by the forces of gravity. He argues that the Greenlee Ultra Tugger is a hoisting device, within the meaning of the Labor

¹A winch is a machine or instrument for hauling or pulling; especially: a powerful machine with one or more drums on which to coil a rope, cable or chain for hauling or hoisting. www.Merriam-Webster.com.

Laws, and that this is consistent with a 1984 decision by Hon. Ira Gammerman involving the same kind of equipment (Novell v. Carney Electric Construction, 123 Misc.2d 1089 [Sup Ct, N.Y. Co. 1984]). Although he has cited a number of Industrial Code Regulations in his bill of particulars, plaintiff's opposition focuses on the applicability of those regulations related to hoisting (12 NYCRR 23-6.1 et seq) and power operated equipment (12 NYCRR 23-9.2 et seq). Plaintiff contends these are specific and applicable requirements, providing a predicate basis for his Labor Law § 241 (6) claim.

Arguments Presented

Defendant Con Ed is the owner of the East River electrical station on 14th street in Manhattan where the accident took place. Case Contracting, Ltd. ("Case") was Con Ed's contractor on the project pursuant to Purchase Order Number 223877, dated April 15, 2002. Pursuant to that purchase order, Case agreed to provide Con Ed with "all necessary supervision, labor, equipment, tools and material to install Duraline load centers at the East River Station." Defendant Proven Electrical Contracting, Inc. (f/k/a Basic Electric) was plaintiff's employer when he was injured ("employer"). Proven was Case's electrical subcontractor.

Plaintiff, an electrician, contends that on the date of the accident he began working on a cable pull. He was briefed about this assignment the day before. The prior briefing was informal and was given by persons also employed by Proven. Higgins could not remember exactly who was present, however, or whether any one from Con Ed or Case came to the briefing.

Plaintiff was deposed (references will be to "CH EBT p__"). He described the

cable reel as being approximately 7 to 8 feet tall and weighing approximately 10,000 pounds. According to plaintiff he expected the cable reel would be loaded onto the elevator, as he had seen done with other smaller reels. This reel, however, was too big and would not fit into the elevator. Plaintiff testified that someone decided that instead of pulling the cable down from a higher level, it would be pulled up to the conduit. He did not know exactly who made this decision, but he was "working with and assisting Zurlo who was giving him directions ("I was under his direction"). CH EBT pp35, 36. He was also working with Kern, his foreman.

The cable pull first required that the cable reel be elevated so it could spin and the cable unwound from it. According to plaintiff, someone from Proven decided that this would be accomplished by inserting a steel bar through the center of the reel. The bar was then rested and stabilized by a jack on either side of the reel. Once completed, the cable reel was a few inches off the ground. The loose end of the cable was then attached to the "cable tugger" using a rope. The cable tugger then pulled the rope and cable up 15 feet to the opening of a conduit on the ceiling. The ceiling conduit ran parallel or vertical to the floor where the cable reel was.

Plaintiff was initially on the ground floor and in the process of "soaping" the cable to make it move smoothly off the reel. This required the use of a rag and soap; it made the cable easier to unroll because it did not stick to itself.

This process had only been underway for about 10 minutes, and the cable was already going through the conduit, when plaintiff was instructed to stop soaping the cable and turn the cable reel instead. Only one worker had been turning the reel before that. Plaintiff does not know who gave the instruction to turn the reel, but Zurlo, who

had been supervising the wire going into the conduit, took over soaping the cable.

The process of turning the cable reel or "coaxing" was described by plaintiff as requiring him to "coax the reel [to] give the reel momentum to free up some weight for the pulling machine . . ." CH EBT p46. Plaintiff testified at his EBT that he coaxed the reel by "manually [turning] the reel, by standing behind the reel and putting my hands on the sides of the reel and keeping my hands to my chest and pushing upwards using more my back and my knees." CH EBT pp46-47. Fellow worker, "Louie" was the person in front of the reel whereas plaintiff was behind it. Zurlo was watching the cable go into the conduit and everyone had a two way radio. There was radio contact between the ground floor where the reel of cable was and upstairs where the cable tugger was. Plaintiff was wearing protective gear which his employer required. This included protective ear gear, gloves, long pants, a hard hat, long sleeve shirt, goggles and steel toe boots. CH EBT p48.

According to plaintiff, his body was fully extended in the upward direction when the cable reel stopped moving forward and jerking to a stop and reversed itself. He testified at his EBT that it "came back towards me" when "the machine, the wire pull, had stopped for some reason." He felt a "pop" in his back, a crunching sensation, and then pain. He left the reel and went to lie down. He later sought medical attention. Higgins allegedly suffered bulging discs in his lower back, and he continues to experience pain in his legs and when seated.

Defendants argue that the cable tugger is not a "hoist," as plaintiff now contends, but a "winch." They argue that this is exactly what plaintiff testified during his EBT and consistent with how the tugger works. CH EBT p25. At his EBT, plaintiff described the

cable tugger as follows:

"It works kind of like a winch, I guess. When they would pull the rope, they would pull the rope through the conduit and what they do is they wrap it around the machine and it actually turns and with that turning process, it would then pull the wire through the conduit."

Defendants deny that any load was being hoisted by the cable tugger or that the tugger was being used as a "hoist." They contend the work being done was cable "pulling" which entailed only a very brief vertical pull to the ceiling where the opening of the conduit was, so then the cable could be pulled through the conduit which was horizontal. To support their motions, defendants upon plaintiff's EBT, as well as the deposition testimony by Joseph Arbano ("Arbano"), Con Ed's Construction Manager, Rich Kern (Kern), plaintiff's foreman, employed by Proven, and Joseph Zurlo ("Zurlo"), a journeyman also employed by Proven.

These witnesses have each testified that the cable reel was very large and extremely heavy. They have also testified that the cable pull was part of the larger project to install the Duraline load.

Kern testified at his EBT ("RK EBT p__") that his crew rolled the reel into the building and set it up on jacks so it could be fed into the conduit. The conduit was "approximately 300 feet [long]," and "above your head about 15 feet." RK EBT pp23-24. The cable pull was assisted by a "Greenlee Ultra Tugger" that Proven owned, and had been inspected by John Ehler, also a Proven employee.

Zurlo also described the ceiling conduit as being "300 feet [long]." He testified that the cable was pulled up into the opening of the conduit without any problems, like bunching up. He testified the tugger was firmly anchored to the floor.

To support their claim, that plaintiff received all instructions from his foreman, or other Proven employees, defendants rely upon the testimony that Arbano gave at his deposition ("JA EBT p__"). Arbano, Con Ed's chief construction inspector, testified that *Con Ed supplied the cable for the project and delivered it to the power station, but it was entirely up to the subcontractor to decide what to do with it when it got there, how to get the reel into the building and how many feet of cable were needed to install each load center at the power plant.*

Arbano testified that he did not monitor, nor was it his job to decide, how much cable the contractor needed to use or how to do the pull. According to Arbano, it was the responsibility of the subcontractor's foreman (here Kern) to make all these decisions and give the workers all necessary instructions. JA EBT pp29-30, 45. Arbano did not suggest or instruct anyone how the cable should be pulled (up or down), or have any involvement in the cable pulling project that day.

Although Arbano testified that a reel is typically rolled up onto ramps so it is suspended, much like a car at an auto shop, the way that Proven suspended the reel (using a steel bar and jacks) was acceptable and something he had seen done before. Arbano testified he knew Case had subcontracted the entire electrical project to Proven, its subcontractor, and that Case was not involved in doing any of the work itself but left it to its subcontractor. JA EBT p47. This is also what Russell Randazza, Proven's principal, testified at his EBT.

Arbano had daily meetings with the contractors' supervisors, but these meetings were pro forma. Arbano was briefed about the activities of any given day, and Arbano made general suggestions like "make sure your guys take breaks . . . it's hot outside. . .

make sure your guys don't get dehydrated. . ."

Plaintiff contends he suffered a gravity related injury because the defendants failed to provide him with the right equipment to safely do his job. He argues that the cable reel was too big to on the elevator, and the alternative plan, of using a cable tugger to pull the cable to the areas it was needed, was dangerous because the cable was too heavy. In addition to his own testimony, and the testimony of the persons he deposed, plaintiff relies on the sworn affidavit of his proposed trial expert, Kathleen Hopkins, a Certified Site Safety Manager ("Hopkins"). He also offers an information sheet found on Greenlee's website. The sheet set forth the specifications of the Ultra Tugger.

Although Hopkins did not physically examine the cable tugger used on the cable pull project or the power plant where the work took place, she reviewed documents and transcripts of the persons who were deposed.

Hopkins opines that the tugger was a hoisting device because of the vertical distance from the cable reel on the floor to the end of the conduit. She also opines that plaintiff's injury was due to the sudden change in rotation of the reel. Although she states that "it is unknown at this time what caused the cable to stop and to slip backward within the conduit which in turn caused the cable reel to reverse," she contends there are "several scenarios that could have caused this accident." They include that the "Tugger malfunctioned in some manner, the Tugger was not provided with a brake to hold the cable when the cable stopped moving, the cable became caught within the conduit, the cable was not adequately soaped, an improper rope was used . . . or the person holding and pulling on the rope at the Tugger location failed to

control the rope or let go of [it].”

Hopkins opines there were violations of the Industrial Code because the person operating the tugger was not competent or qualified to do so. The basis for this opinion is that the accident could have been prevented had the operator known what he was doing. She also opines that Con Ed personnel had a duty to make sure that “safe equipment was provided” because this is required under the law.

Applicable Law

“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.” Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64. 562 (1980). Only if this burden is met, will it then shift to the opposing party who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003). The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and

whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

Discussion

Labor Law § 240 (1)

Labor Law § 240 (1), commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site. Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 (1st Dept 2007) (*citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 (1995)). The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed. Panek v. County of Albany, 99 N.Y.2d 452 (2003).

For this reason, the statute's protections "extend only to a narrow class of special hazards." Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999). Not every hazard or danger encountered at a construction site falls within scope of Labor Law § 240 (1), nor does it encompass every peril that may be connected in some tangential way with the effects of gravity. Hill v. Stall, 49 AD3d 438, 442 (1st Dept 2008) (*internal citations omitted*).

Defendants have presented a strong case for why plaintiff's accident does not come within the protections afforded by Labor Law § 240 (1). Although part of the cable pulling operation required the cable to first be pulled 15 feet above ground to the

ceiling conduit, the conduit itself, through which the cable was pulled, was horizontal to the ground for some 300 feet. The plaintiff was not operating the cable tugger or anywhere near it. He was downstairs manually turning or spinning the cable reel to give the cable on it some slack. The cable tugger was guiding and tugging the cable along inside the conduit.

While doing this job, Higgins himself was not elevated in any way; he was on the same level as the reel. The reel was not suspended over him; it was directly in front of him.

At the time of his accident, Higgins was working much like an inchworm or spring: he would extend himself fully when he pushed up on the reel, then reach back down to push up again. As he did this, the cable on the reel was slackened. Higgins was injured when, while extended, he was pushed or "scrunched" back down by the heavy reel. This caused him to go from a completely extended position into to a compressed position, much like a spring or coil. Plaintiff never fell, he was not knocked down. Nothing fell on plaintiff, nor did the cable ricochet out of the conduit and strike him. The cable reel remained on the jacks; it did not fall down.

The parties disagree about whether the Greenlee Ultra Cable Tugger was being used as a hoist on this cable project. Although defendants contend it is a "winch" and therefore not a "hoist," the activity of lifting cable from a lower to a higher elevation qualifies as a "hoist," within the meaning of the statute. see, Novell v. Carney Electric Construction, 123 Misc.2d 1089 (Sup Ct, N.Y. Co. 1984). Unless, however, the accident results from an elevation differential, the fact that a hoist was involved is not enough to create liability. Melo v. Con Edison, 246 AD2d 459 (1st Dept 1998); Brogan

v. City of New York, 4 Misc3d 1017 (A) (Sup Ct, N.Y. Co, 2004).

In this case, Higgins was not struck by an object falling from a hoist. He was not struck by cable. The cable tugger was being used to first raise the loose end of the cable from a large cable reel to the ceiling where it would then be pulled or guided through the conduit. The conduit was an open channel in which the cable would lay and remain once pulled through. Since the cable was cumbersome because it consisted of three twisted wires, the tugger expedited the process of getting it to the opening of the conduit which was several feet above ground. Once in the conduit, the cable was pulled through some 300 feet to the other end. The tugger was never used to hoist materials or suspend any load over the plaintiff.

The protective devices enumerated within Labor Law § 240 (1) are intended to prevent injuries to workers due to the differences in elevation between the level of the required work and a lower level, or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 (1991); Ross v. Curtis-Palmer Hydro Electric Co., 81 NY2d 494, 501 (1993); Melo v. Consolidated Edison Co. of N.Y., 92 NY2d 909 (1998). Under the facts of this case, as plaintiff presents them, the plaintiff did not sustain harm due to an elevation related risk. see, Misseritti v. Mark IV Constr. Co., *supra*; Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001).

The court has also considered plaintiff's arguments about the force of gravity. Plaintiff's description of the accident is that the cable reel - which was enormous - reversed itself or recoiled once the tension was released. The reel did not fall on

plaintiff, it opposed his forward, pushing, motions. Assuming the release of tension is gravity at work, the effects of gravity and the role it played in plaintiff's accident, were only tangential. Therefore, the special protections of Labor Law § 240 (1) do not apply to the facts of this case. *see, Ross v. Curtis-Palmer Hydro-Elec. Co., supra.*

Plaintiff's expert's opinion fails to raise triable issues of fact. Leaving aside the issue that she was not disclosed to defendants until they made these motions, she has not provided any cogent explanation or theory about how the accident happened. All she has done is present a number of possibilities, none of which require any special expertise. Her opinion, that the Labor Laws were violated are conclusions.

Labor Law § 241 (6)

Labor Law § 241 (6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers. Comes v. New York State Electric & Gas Co., 82 NY2d 876 (1993); Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (1993). To properly state a claim under Labor Law § 241(6), the plaintiff must identify a specific and applicable Industrial Code provision that has been violated. Ross v. Curtis-Palmer Hydro-Elec. Co., supra. The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

All the sections plaintiffs relies upon pertain to "hoists" or power equipment. As has already been discussed, there was no load or materials being "hoisted" or

suspended in air by the tugger. *compare, Lopez v. Boston Properties Inc.*, 41 A.D.3d 259 (1st Dept 2007). Nothing was being loaded or unloaded using the tugger. Rather, plaintiff was spinning or turning a cable reel that was considerably taller and heavier than he was. His injury happened when the reel opposed him and pushed him back.

Even were the court persuaded that the cable tugger is a hoist, within the meaning of the Industrial Code. The sections plaintiff relies upon are either not specific or do not apply, and therefore, insufficient as a matter of law to support this claim.

12 NYCRR 23-6.1 (c) (1) provides that "[o]nly trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times." This a general, not specific or concrete regulation, and therefore, legally insufficient to support a claim under Labor Law § 241 (6). *Cardenas v. American Ref-Fuel Co. of Hempstead*, 244 A.D.2d 377 (2nd Dept 1997); *Sharrow v. Dick Corp.*, 233 AD2d 858 (4th Dept 1996).

12 NYCRR 23-6.1 (e) (1) - (4) sets forth signal requirements when material hoists are being used. The requirements include the use of a "signal system," like bells or lights, and the posting of a signal code. It also requires that material hoists only be operated in response to those signals. Plaintiff contends that the operator of the cable tugger stopped the upward motion of the cable without warning and let it slip back. The operator of the cable tugger was never deposed, however, and this is complete speculation. Moreover, no load was being "hoisted" by the tugger, or suspended in, plaintiff was not trying to prevent some object from falling on him. *compare, Lopez v. Boston Properties Inc.*, 41 A.D.3d 259 (1st Dept 2007). This section is, therefore, completely inapplicable to the facts of this case.

12 NYCRR 23-6.1 (j) requires that a hoist machine have brakes "capable of stopping and holding 150 percent of the rated capacity of the hoist" it also requires that a "manually-operated material hoist shall be equipped with an effective pawl and ratchet capable of holding the rated load capacity when such a load is suspended." Once again, this section is inapplicable to the facts of this case, though a concrete provision

12 NYCRR 23-9.2 (b) applies to power operated equipment. This regulation is simply a codification of common-law requirements and is insufficient to establish a nondelegable duty under Labor Law § 241 (6). Weber v. Dunkirk, 226 AD2d 1050 (3rd Dept 2007) aff'd 10 NY3d 902 (2008).

Although defendants have presented detailed arguments and legal authority for why the other Industrial Code regulations relied upon by plaintiff are inapplicable or an insufficient predicate for his Labor Law § 241 (6) claim, Higgins has not addressed them at all. It appears he has abandoned his claim that those sections support a Labor Law § 241 (6) cause of action under the facts of this case. In any event, defendants have proved they do not apply or that they are general requirements. There being no predicate basis for plaintiff's Labor Law § 241 (6) claim, it must be dismissed.

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., 91 NY2d 343 (1998). Where such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had, unless it is shown that the party

to be charged exercised some supervisory control over the operation. Ross v. Curtis-Palmer Hydro-Electric Co., supra. Since defendants have moved for summary judgment on this cause of action, this must prove they did not exercise supervision and control over injury producing work, or have actual or constructive notice of the dangerous condition alleged, or create the condition. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1st Dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 *aff'd* 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., supra; Gonzalez v. United Parcel Serv., 249 AD2d 210 (1st Dept. 1998).

Both defendants have proved that Proven was Case's subcontractor for the Duraload project, and Kern, Proven's employee, instructed plaintiff what to do and how to do it. Kern also determined how the cable pull would be done, and who would work on that particular assignment. Con Ed supplied and delivered the cable, but was not involved in the cable pull after that. Abarno did not discuss with Kern how the cable would be pulled from location to another. Case has also established that it had a contract with Proven to do the electrical work and Case did not do any of that work itself.

In opposition, plaintiff argues that Con Ed created a dangerous condition because it provided a cable reel with three wires twisted together and had the reel been smaller, the cable pulling job could have been done by pulling the cable down, not up. All this is conjecture, and insufficient to defeat either defendant's motion for summary judgment.

Plaintiff also contends that Arbano had the right to stop any work at the plant, if

he thought it was dangerous. Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., 40 AD3d 305 (1st Dept 2007); Brown v. New York City Economic Dev. Corp., 234 AD2d 33 (1st dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

Since defendants have proved plaintiff was instructed by his foreman how to do his work, and the decisions about the cable pull were not made by either Con Ed or Case, nor did they have notice of or create a dangerous condition, Con Ed and Case are entitled to summary judgment dismissing plaintiff's Labor Law §200 and common law negligence claims against them as well.

Indemnification

Having dismissed plaintiff's claims against Con Ed and Case, that branch of Con Ed's motion for contractual indemnification by Case is rendered academic and denied for that reason.

Conclusion

Con Ed and Case have each proved that it is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240, 241 (6) and 200 (common law negligence) claims. Plaintiff has failed to raise triable issues of fact. The clerk shall enter judgment in favor of Con Ed and Case dismissing plaintiff's claims against them.

It is unclear what, if anything, remains of the third party and 2nd third party actions, since they are for indemnification, etc., with respect to plaintiff's now dismissed

claims. Neither of the moving parties have asked for any relief in that regard and Proven has taken no position on these motions.

Rather than dismiss the third party action, they are scheduled for a status conference on **September 24, 2009 at 9:30 a.m. in Part 10.**

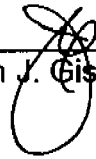
If the parties to the third party actions file a stipulation of discontinuance by that date, they do not have to appear. If there is no appearance on that date, both third party actions will be marked as "disposed."

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 26, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
AUG 27 2009
COUNTY CLERK'S OFFICE
NEW YORK