

Senande v City of New York

2010 NY Slip Op 32073(U)

August 4, 2010

Supreme Court, New York County

Docket Number: 108842/04

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

MANUEL SENANDE,

Plaintiff,

INDEX NO. 108842/04

-against-

MOTION DATE _____

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, THE NATIONAL
RAILROAD PASSENGER CORPORATION/AMTRAK,
and CONSOLIDATED EDISON COMPANY OF NEW
YORK,

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Defendants.

THE CITY OF NEW YORK,

Third-Party Plaintiff,

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

-against-

CONSOER TOWNSEND ENVIRODYNE ENGINEERS OF
NEW YORK, INC.,

Third-Party Defendant.

The following papers, numbered 1 to 2 were read on this Motion by plaintiff(s) for a an Order and Judgement Pursuant to Article & of the Civil Practice Law and Rules and defendants motion to add a necessary party per CPLR 1003 .

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

BACKGROUND

Defendants, the National Railroad Passenger Corporation/Amtrak (Amtrak) and the City of New York (City) move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims as against them. Plaintiff Manuel Senande (Senande) cross-moves, pursuant to CPLR § 3212, for partial summary judgment on his Labor Law § 241 (6) cause of action, and opposes Amtrak's and City's motion for summary judgment. Defendant Consolidated Edison Company of New York, Inc. (Con Ed) cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims as against them. Third-party defendant Consoer Townsend Envirodyne Engineers of New York, Inc. (CTE) cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against them.¹ The complaint was dismissed as against defendants New York City Transit Authority (Transit) and Metropolitan Transportation Authority (MTA) by order of the court dated November 26, 2006.

In his amended complaint, Senande asserts that he sustained personal injuries when his shovel contacted a live underground electrical line while performing construction work on the West 37th Overpass Bridge project. Motion, Ex. A. Senande alleges six causes of action: (1) as against City, for negligence causing injuries resulting from one or more exceptions to Article 16 of the CPLR; (2) as against Transit [no longer applicable]; (3) as against the MTA [no longer applicable]; (4) as against Amtrak, violations of Labor Law §§ 200, 240, 241 (a), and 241 (1-6); (5) as against Con Ed, violations of Labor Law §§ 200, 240, 241 (a) and 241 (1-6); and (6) as against CTE, for negligence causing injuries resulting from one or more exceptions to Article 16

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of the CPLR.

In his bill of particulars, Senande supplements his complaint as against the City and CTE by alleging that they violated Labor Law §§ 200, 240 (1), and 241 (6), violated 12 NYCRR 23-1.2 (c), 23-1.5 (a) and (b) and 23-1.13, and violated an OSHA provision.

At his examination before trial (EBT), Senande testified that he was employed by North Star Contracting (North Star) as a laborer at the time of the accident. Senande EBT, at 9. North Star was rehabilitating and renovating a portion of West 37th Street in Manhattan, including a portion that passed over the Amtrak train tracks. *Id.* at 24. Senande stated that he only received supervision and direction from supervisors at North Star, and that he never received any direction from Amtrak. *Id.* at 27, 54, 171. The accident occurred on West 37th Street, approximately 100 feet from the train tracks (*id.* at 32, 166), and Senande never performed any work on the Amtrak tracks. *Id.* at 153.

Senande stated that, on the day of the accident, his foreman directed him to prepare an excavated dirt road bed for a concrete pour, which is the work that he was performing when the accident occurred. *Id.* at 46, 50. According to Senande, he was provided with shovels, harnesses, drills, electrical drills and jackhammers by North Star, but was not provided with any other type of safety equipment. *Id.* at 18. Senande said that the type of work that he was doing is performed with square shovels, pointy shovels, and a plate temper and rake. *Id.* at 48-49. Senande stated that he was digging out a rock from the road bed when his shovel hit a live underground wire, which he did not see before his shovel made contact with it. *Id.* at 61-63. Senande testified that he was not told about electrical lines being in the area where he was working, and that there were no signs warning about electrical lines on the ground at that location. *Id.* at 55-57.

John Kemp (Kemp), a senior engineer for electric traction, testified on behalf of Amtrak. Kemp testified that Amtrak trains are powered by a third rail on the tracks, not an overhead

catenary line, as they pass under the West 37th Street overpass. Kemp EBT, at 41. Kemp stated that there is a catenary line running under the overpass, but that it is not connected to the overpass itself. *Id.* at 121. The third rail is powered by a cable from Penn Station, and there is no artificial illumination under the West 37th Street overpass. *Id.* at 50, 64. When he was shown a photograph of the wire that contacted Senande's shovel, Kemp averred that the type of wire so depicted was not a wire that would be used by Amtrak. *Id.* at 129.

Sat Kataria (Kataria), a project engineer, was produced for deposition by New York City Department of Transportation (DOT). Kataria testified that City hired CTE as the resident engineers for the project, and that he, Kataria, would make weekly visits to the project, primarily for meetings. Kataria EBT, at 6, 9. Kataria stated that CTE, as the resident engineers, supervised the day-to-day construction and safety issues related to the project, and that he was unaware of any City employees who had any duties or responsibilities with respect to the safety of the construction workers. *Id.* at 116-117. According to its contract with the City, CTE's responsibilities included checking the "layout of conduits, pipes, gas mains, water mains, electrical conduit and lighting equipment, and other miscellaneous structures," and to "check all electrical wiring, permanent or temporary, for compliance with plans and specifications." CTE Cross motion, Ex. D. Kataria also stated that Con Ed provided the temporary service line as part of its general responsibilities, and that, according to the accident report, the electrical line was ruptured by a backhoe. Kataria EBT, at 57-60.

Thomas Maher (Maher) testified on behalf of Con Ed. Maher is employed by Con Ed as a construction inspector. Maher EBT, at 4. Maher was assigned by Con Ed to the West 37th Street project, because Con Ed had underground facilities in the area, and, as part of the contract between City and North Star, North Star was required to work around the Con Ed facilities, and Con Ed was required to use North Star to perform that work. Con Ed and North Star entered into a contract to have North Star perform some upgrades of the Con Ed system

while the trestle was being rehabilitated. *Id.* at 221-223. Maher's responsibility was to inspect the installation of the facilities that North Star was performing for Con Ed. *Id.* at 44. To perform his duties, Maher would visit the site at least once a day, and remain at the site between half an hour and all day, depending on the nature of the work that was being done. *Id.* at 166-167.

Maher became aware of the accident when he was contacted by Rick Colabella (Colabella), a North Star superintendent, who called him after the incident. When Maher arrived at the location, he learned that a North Star excavating machine had ripped up a shunt with which Senande's shovel had come in contact. *Id.* at 49-50, 74-75. Maher stated that he visually observed that the shunt had been pulled up with a backhoe. *Id.* at 76-77. Maher said that Con Ed repaired the damaged equipment after the accident. *Id.* at 59.

According to Maher, a shunt is a temporary electrical connection which was installed at the site because, a year before the accident, North Star had allegedly damaged the electrical service cables that serviced the premises that were adjacent to the project. The shunt was installed to keep electrical power flowing to the adjacent businesses until the project was completed and new service cables were installed. *Id.* at 85-87, 92. Maher stated that the shunt was in a temporary trench specifically dug for that purpose by North Star, and that Con Ed made the necessary electrical connections, after which North Star covered the trench containing the shunt with approximately 18 inches of dirt. *Id.* at 116-118, 200, 228. Maher further averred that, after the project began, it was North Star's responsibility to maintain the markings of the locations of all electrical facilities on the project site. *Id.* at 192-193, 198, 235.

Maher opined that the incident happened because North Star failed to hand dig around the temporary electrical shunt that it had previously buried. *Id.* at 199-200. Maher further stated that he regularly instructed Colabella, as well as other North Star employees, to hand dig and not to use backhoes in the vicinity of live electrical wires. *Id.* at 70-73. According to Maher, it is common practice for workers to use shovels around live electrical equipment, and that

shunts are insulated so that if a shovel comes in contact with a shunt it should not pose a risk to a worker. *Id.* at 143-235. Maher also testified that State regulations require excavators to hand dig around electrical equipment (*id.* at 105), and that a backhoe should not be used because it has “no feel” and could pull up electrical facilities before the operator realizes that he has encountered them. *Id.* at 141.

In CTE’s cross motion, CTE asserts that, pursuant to the contract that CTE had with City, CTE was not responsible for, nor did it control, the means and methods of operation at the work site. CTE Cross Motion, Ex. D.

According to Thomas Iu (Iu) a resident engineer with CTE, responsibility for determining the means and methods of construction fell outside of the scope of CTE’s work on the project, and CTE did not have the authority to stop work at the job site. Iu EBT, at 26-27. Iu further stated that the responsibility for making sure that the temporary power lines were located safely was the responsibility of the contractor, North Star, and Con Ed. *Id.* at 21.

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 [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). 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 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. *See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 (2d Dept 2007).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident, and, under such theory, the defendant's supervision and control over the work being performed is irrelevant. *See Murphy v Columbia University*, 4 AD3d 200 (1st Dept 2004). Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009).

Section 240 (1) of the New York Labor Law states, in pertinent part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) only applies to elevation-related accidents, and is therefore

inapplicable to the case at bar as against all defendants. *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 (2009); *Narducci v Manhasset Bay Associates*, 96 NY2d 259 (2001).

The court notes that there is no Labor Law § 241 (a) as cited in the amended complaint.

Labor Law § 241 (6) states:

"Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct.

Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 (1998).

In the instant matter, plaintiff has alleged a violation of 12 NYCRR 23-1.13 (b) (4), which states:

"Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

Claims premised on a violation of 12 NYCRR 23-1.13 (b) (4) have been deemed to be sufficiently specific to support a cause of action based on Labor Law § 241 (6). *Hernandez v Ten Ten Company*, 31 AD3d 333 (1st Dept 2006); *Snowden v New York City Transit Authority*, 248 AD2d 235 (1st Dept 1998).

Senande has also claimed violations of 12 NYCRR 23-1.2 (c) and 12 NYCRR 23-1.5, which have been held to be too general to support a claim premised on a violation of Labor Law § 241 (6). *Hasty v Solvay Mill Limited Partnership*, 306 AD2d 892 (4th Dept 2003); *Gordineer v County of Orange*, 205 AD2d 584 (2d Dept 1994). Further, Senande's allegations of violations of OSHA regulations have also been held to be insufficient to support a cause of action based on a violation of Labor Law § 241 (6). *Irwin v St. Joseph's Intercommunity Hospital*, 236 AD2d 123 (4th Dept 1997).

Amtrak's motion to dismiss the complaint and all cross claims as against it is granted. According to the testimony of Kemp, Amtrak was neither the owner nor the general contractor nor an agent for the work being performed, and, therefore, can have no liability under the Labor Law. *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338 (1st Dept 2007). Further, since Amtrak had absolutely no control or supervision over the work being performed, had no notice of any allegedly unsafe condition, and Amtrak's power ran on tracks 100 feet away from where Senande's accident occurred, Amtrak cannot be found to have been negligent.

Senande's cross motion for partial summary judgment on his Labor Law § 241 (6) cause of action is denied.

The documents and testimony submitted fail to provide conclusive evidence as to whether the accident was caused by the existence of a dangerous condition or was caused by the means and methods employed to perform the work.

According to Senande, he was performing the work with a shovel, which, all parties

agree, would be the appropriate method for working around electrical circuits. However, according to the accident report, as well as the testimony of Kataria and Maher, the electrical line was ruptured by a backhoe, not a shovel. Moreover, Senande was not provided with any insulating equipment or protective gear. The resolution of this issue would determine whether the accident was caused, in whole or in part, by negligence in the means and methods of operation.

Further, it is not disputed that there were no warning signs in the area indicating the presence of live electrical circuits, nor is there any specific evidence as to whether the shunt was insulated, as it was supposed to be, by North Star, which had that responsibility. If this were to be determined to be the cause of the accident, then the accident would have been caused, in whole or in part, by the existence of a dangerous condition.

Senande has testified that only North Star exercised supervisory control over his work, and North Star is not a party to this action. As a consequence, if the accident was the result of the means and methods of operation, Senande would not be entitled to summary judgment on his Labor Law § 241 (6) claim against the named defendants. Therefore, the evidence is insufficient to grant Senande's cross motion for partial summary judgment.

Similarly, Con Edison's cross motion for summary judgment dismissing the complaint as against it must also be denied.

As stated in *Kane v Coundorous* (293 AD2d 309, 310-311 [1st Dept 2002]):

"The liability for injuries resulting from a violation of Labor Law § 241 (6) is 'absolute.' In addition, property owners and their agents are vicariously liable under section 241 (6) for injuries sustained by construction workers due to the negligence of a subcontractor in failing to maintain the worksite in reasonably safe condition, even when the owner exercises no direct supervisory control over the subcontractor [internal citation omitted]."

Therefore, since the electrical circuit is owned by Con Ed, even though it exercised no

direct supervision over Senande's work, it still may be liable, in whole or in part, for Senande's injuries if North Star is determined to have failed to maintain the worksite in a safe condition.

The City's motion for summary judgment dismissing the complaint as against it is granted.

The City "neither had the authority to supervise or control the activity bringing about the plaintiff's injury, nor [is there any evidence that it] had actual or constructive notice of the allegedly dangerous condition." See *Peay v New York City School Construction Authority*, 35 AD3d 566, 567 (2d Dept 2006). Therefore, it cannot be held liable under Labor Law § 200 or under common-law negligence, nor pursuant to a cause of action based on a violation of Labor Law § 241 (6).

CTE's cross motion for summary judgment dismissing the complaint as against it is granted.

"A construction manager whose duties [are] limited to observing the work and reporting to the contractor safety violations by the employees does not thereby become liable to the contractor's employee when the latter is injured by a dangerous condition arising from the contractor's negligent methods [internal quotation marks and citation omitted]."

Buccini v 1568 Broadway Associates, 250 AD2d 466, 468 (1st Dept 1998).

Moreover, there is no evidence that CTE had notice of any defective or unsafe condition.

Masciotta v Morse Diesel International, Inc., 303 AD2d 309, 312 (1st Dept 2003).

Hunter v Perez Interboro Asphalt Company (237 AD2d 214 [1st Dept 1997]), the case cited by Senande in support of his cross motion as against CTE, is distinguishable from the case at bar. In *Hunter*, the engineering inspector's contract called for it to inspect the worksite to protect both the workers and the general public, and the court found that the contract requirements indicated a broader duty than just to assure compliance with specifications. Such broad duties are absent from the City's contract with CTE, as indicated above.

Therefore, based on the foregoing, CTE's cross motion for summary judgment dismissing the complaint as against it is granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that The City of New York's and the National Railroad Passenger Authority/Amtrak's motion for summary judgment dismissing the complaint and all cross claims as against them is granted; and it is further

ORDERED that Consoer Townsend Envirodyne Engineers of New York, Inc.'s cross motion for summary judgment dismissing the complaint as against it is granted; and it is further

ORDERED that the portion of Consolidated Edison Company of New York, Inc.'s cross motion to dismiss plaintiff's cause of action pursuant to Labor Law §§ 240 (1) and 241 (a) is granted, but that the other portions of its cross motion seeking to dismiss the complaint and all cross claims as against it is denied; and it is further

ORDERED that Manuel Senande's cross motion for partial summary judgment on his cause of action based on Labor Law § 241 (6) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: 8/4/10

Enter:


PAUL WOOTEN 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 — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
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shunts are insulated so that if a shovel comes in contact with a shunt it should not pose a risk to a worker. *Id.* at 143-235. Maher also testified that State regulations require excavators to hand dig around electrical equipment (*id.* at 105), and that a backhoe should not be used because it has "no feel" and could pull up electrical facilities before the operator realizes that he has encountered them. *Id.* at 141.

In CTE's cross motion, CTE asserts that, pursuant to the contract that CTE had with City, CTE was not responsible for, nor did it control, the means and methods of operation at the work site. CTE Cross Motion, Ex. D.

According to Thomas Iu (Iu) a resident engineer with CTE, responsibility for determining the means and methods of construction fell outside of the scope of CTE's work on the project, and CTE did not have the authority to stop work at the job site. Iu EBT, at 26-27. Iu further stated that the responsibility for making sure that the temporary power lines were located safely was the responsibility of the contractor, North Star, and Con Ed. *Id.* at 21.

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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). 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 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. *See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 (2d Dept 2007).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident, and, under such theory, the defendant's supervision and control over the work being performed is irrelevant. *See Murphy v Columbia University*, 4 AD3d 200 (1st Dept 2004). Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009).

Section 240 (1) of the New York Labor Law states, in pertinent part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) only applies to elevation-related accidents, and is therefore

inapplicable to the case at bar as against all defendants. *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 (2009); *Narducci v Manhasset Bay Associates*, 96 NY2d 259 (2001).

The court notes that there is no Labor Law § 241 (a) as cited in the amended complaint.

Labor Law § 241 (6) states:

"Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct.

Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 (1998).

In the instant matter, plaintiff has alleged a violation of 12 NYCRR 23-1.13 (b) (4), which states:

"Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

Claims premised on a violation of 12 NYCRR 23-1.13 (b) (4) have been deemed to be sufficiently specific to support a cause of action based on Labor Law § 241 (6). *Hernandez v Ten Ten Company*, 31 AD3d 333 (1st Dept 2006); *Snowden v New York City Transit Authority*, 248 AD2d 235 (1st Dept 1998).

Senande has also claimed violations of 12 NYCRR 23-1.2 (c) and 12 NYCRR 23-1.5, which have been held to be too general to support a claim premised on a violation of Labor Law § 241 (6). *Hasty v Solvay Mill Limited Partnership*, 306 AD2d 892 (4th Dept 2003); *Gordineer v County of Orange*, 205 AD2d 584 (2d Dept 1994). Further, Senande's allegations of violations of OSHA regulations have also been held to be insufficient to support a cause of action based on a violation of Labor Law § 241 (6). *Irwin v St. Joseph's Intercommunity Hospital*, 236 AD2d 123 (4th Dept 1997).

Amtrak's motion to dismiss the complaint and all cross claims as against it is granted. According to the testimony of Kemp, Amtrak was neither the owner nor the general contractor nor an agent for the work being performed, and, therefore, can have no liability under the Labor Law. *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338 (1st Dept 2007). Further, since Amtrak had absolutely no control or supervision over the work being performed, had no notice of any allegedly unsafe condition, and Amtrak's power ran on tracks 100 feet away from where Senande's accident occurred, Amtrak cannot be found to have been negligent.

Senande's cross motion for partial summary judgment on his Labor Law § 241 (6) cause of action is denied.

The documents and testimony submitted fail to provide conclusive evidence as to whether the accident was caused by the existence of a dangerous condition or was caused by the means and methods employed to perform the work.

According to Senande, he was performing the work with a shovel, which, all parties

agree, would be the appropriate method for working around electrical circuits. However, according to the accident report, as well as the testimony of Kataria and Maher, the electrical line was ruptured by a backhoe, not a shovel. Moreover, Senande was not provided with any insulating equipment or protective gear. The resolution of this issue would determine whether the accident was caused, in whole or in part, by negligence in the means and methods of operation.

Further, it is not disputed that there were no warning signs in the area indicating the presence of live electrical circuits, nor is there any specific evidence as to whether the shunt was insulated, as it was supposed to be, by North Star, which had that responsibility. If this were to be determined to be the cause of the accident, then the accident would have been caused, in whole or in part, by the existence of a dangerous condition.

Senande has testified that only North Star exercised supervisory control over his work, and North Star is not a party to this action. As a consequence, if the accident was the result of the means and methods of operation, Senande would not be entitled to summary judgment on his Labor Law § 241 (6) claim against the named defendants. Therefore, the evidence is insufficient to grant Senande's cross motion for partial summary judgment.

Similarly, Con Edison's cross motion for summary judgment dismissing the complaint as against it must also be denied.

As stated in *Kane v Coundorous* (293 AD2d 309, 310-311 [1st Dept 2002]):

"The liability for injuries resulting from a violation of Labor Law § 241 (6) is 'absolute.' In addition, property owners and their agents are vicariously liable under section 241 (6) for injuries sustained by construction workers due to the negligence of a subcontractor in failing to maintain the worksite in reasonably safe condition, even when the owner exercises no direct supervisory control over the subcontractor [internal citation omitted]."

Therefore, since the electrical circuit is owned by Con Ed, even though it exercised no

direct supervision over Senande's work, it still may be liable, in whole or in part, for Senande's injuries if North Star is determined to have failed to maintain the worksite in a safe condition.

The City's motion for summary judgment dismissing the complaint as against it is granted.

The City "neither had the authority to supervise or control the activity bringing about the plaintiff's injury, nor [is there any evidence that it] had actual or constructive notice of the allegedly dangerous condition." See *Peay v New York City School Construction Authority*, 35 AD3d 566, 567 (2d Dept 2006). Therefore, it cannot be held liable under Labor Law § 200 or under common-law negligence, nor pursuant to a cause of action based on a violation of Labor Law § 241 (6).

CTE's cross motion for summary judgment dismissing the complaint as against it is granted.

"A construction manager whose duties [are] limited to observing the work and reporting to the contractor safety violations by the employees does not thereby become liable to the contractor's employee when the latter is injured by a dangerous condition arising from the contractor's negligent methods [internal quotation marks and citation omitted]."

Buccini v 1568 Broadway Associates, 250 AD2d 466, 468 (1st Dept 1998).

Moreover, there is no evidence that CTE had notice of any defective or unsafe condition. *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 312 (1st Dept 2003).

Hunter v Perez Interboro Asphalt Company (237 AD2d 214 [1st Dept 1997]), the case cited by Senande in support of his cross motion as against CTE, is distinguishable from the case at bar. In *Hunter*, the engineering inspector's contract called for it to inspect the worksite to protect both the workers and the general public, and the court found that the contract requirements indicated a broader duty than just to assure compliance with specifications. Such broad duties are absent from the City's contract with CTE, as indicated above.

Therefore, based on the foregoing, CTE's cross motion for summary judgment dismissing the complaint as against it is granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that The City of New York's and the National Railroad Passenger Authority/Amtrak's motion for summary judgment dismissing the complaint and all cross claims as against them is granted; and it is further

ORDERED that Consoer Townsend Envirodyne Engineers of New York, Inc.'s cross motion for summary judgment dismissing the complaint as against it is granted; and it is further

ORDERED that the portion of Consolidated Edison Company of New York, Inc.'s cross motion to dismiss plaintiff's cause of action pursuant to Labor Law §§ 240 (1) and 241 (a) is granted, but that the other portions of its cross motion seeking to dismiss the complaint and all cross claims as against it is denied; and it is further

ORDERED that Manuel Senande's cross motion for partial summary judgment on his cause of action based on Labor Law § 241 (6) is denied; and it is further

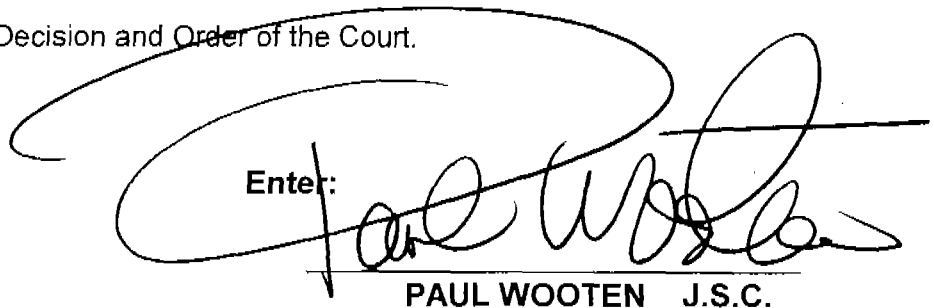
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: 8/4/10

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE

FILED

AUG 05 2010

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