

<b>Gray v Bovis Lend Lease Corp.</b>
2010 NY Slip Op 33092(U)
October 25, 2010
Supreme Court, New York County
Docket Number: 102050/2007
Judge: Emily Jane Goodman
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**EMILY JANE GOODMAN**

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

F Index Number : 102050/2007

PART 17

**GRAY, CHARLES**

vs.

**BOVIS LEND LEASE**

SEQUENCE NUMBER : 005

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_, are filed in support of the motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*to be granted as requested*

**FILED**

OCT 29 2010

NEW YORK  
CLERK'S OFFICE

Dated: 10/25/10

**EMILY JANE GOODMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 17

-----X

Charles Gray and Virginia Gray,  
Plaintiffs,

Index  
Number  
102050/2007

-against-

Bovis Lend Lease Corp., American  
Museum of Natural History, the  
Museum of Natural History and  
Planetarium Authority, the City of  
New York, and Liberty Contracting  
Corp.,

Defendants.

-----X

Bovis Lend Lease LMB, Inc.,  
American Museum of Natural  
History and the City of New York,  
Third-Party Plaintiffs,

-against-

Fresh Meadow Mechanical Corp. and  
Liberty Contracting Corp.,  
Third-Party Defendants.

-----X

Emily Jane Goodman, J.:

Under motion sequence 005, Liberty Contracting Corp.  
(Liberty) and under motion sequence 006, Fresh Meadow Mechanical  
Corp. (Fresh Meadow), move to reargue this Court's Decision and  
Order, dated June 21, 2010 (which motions are joined by  
Plaintiffs) to the extent that the Court granted summary judgment  
to the general contractor Bovis Lend Lease Corp. (Bovis), and the  
owners, American Museum of Natural History (Museum), the Museum  
of Natural History and Planetarium Authority (Planetarium) and

**FILED**  
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COUNTY OF NEW YORK  
JUDICIAL OFFICE

the City of New York (the City), dismissing Plaintiffs' claims against them under Labor Law § 200 and common-law negligence, and, Liberty's and Fresh Meadow's cross claims against Bovis for common law negligence, and to the extent that the Court awarded Bovis conditional contractual indemnity against Fresh Meadow and Liberty. Reargument is granted and upon reargument, the Court reinstates Plaintiffs' claim against Bovis under Labor Law § 200 and common-law negligence, and, Liberty's and Fresh Meadow's cross claims against Bovis for common law negligence, and reverses and denies, as premature, the award to Bovis against Liberty and Fresh Meadow based on contractual indemnity. The motions are consolidated for disposition.

Plaintiff Charles Gray, a Fresh Meadow's employee, was allegedly injured when he stepped through a bathroom window down onto an enclosed radiator and slid on cinder blocks and/or other debris and/or water. With the knowledge and approval of Bovis, the bathroom window was being used as an access point by Plaintiff and other trades to access work at the cooling towers outside. Evidence submitted also indicates that Bovis provided or constructed a wooden box at the bathroom window, which served as a step. Fresh Meadow maintains that it was not informed of the demolition work being conducted by Liberty in the bathroom, and Bovis does not contend that it so informed Fresh Meadow of

such work, which was done at very the same time that workers were using the bathroom window as an access point.

Although the Court correctly found there was no evidentiary proof that Bovis or the Owners exercised supervisory control over Liberty's work, such that the Labor Law § 200 and common-law negligence claims could be asserted (Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]; Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 272 [1st Dept 2007]), the Court overlooked Bovis' potential negligence based on a failure to coordinate the trades (Rizzuto v LA Wenger Contracting Co., 91 NY2d 343 [1998] [triable issue of fact existed as to whether the general contractor had the ability to coordinate the work of the subcontractors and the capacity to exclude them from the area, or direct them not to engage in activity, when another potentially hazardous activity was underway]; Hurley v Best Buy Stores, L.P., 57 AD3d 239 [1st Dept 2008] [grant of summary judgment on indemnification was premature where plaintiff might be able to prevail on a theory of negligent coordination of demolition and electrical projects, that resulted in a dangerous condition, which allowed a light fixture to swing and hit plaintiff]); see also Paljevic c 998 Fifth Avenue Corp., 65 AD3d 896 [1st Dept] [as the evidence indicated that the general or prime contractor, LICO Constructing Co., contracted to coordinate the trades, it

could be liable under Labor Law §240(1), even though it did not supervise or control plaintiff's work, because it agreed to maintain and supervise all safety programs]).

The contract between the American Museum of Natural History and Bovis, subdivisions 3.5.1 and 3.6.1, provide that Bovis shall "monitor the work of each Contractor" and "coordinate the safety programs of each Contractor and precautions which should be taken to minimize risk of injury to persons" and "schedule and coordinate (and be responsible for the coordination of) the Work of the Contractors." Because there is an issue of fact as to whether Bovis was negligent regarding such coordination, the Court reinstates the Labor Law §200 and common law negligence claims against Bovis and reverses its grant of conditional summary judgment on contractual indemnity, which is now premature. Whether the bathroom was wide enough for both trades to work, without danger, is an issue for the jury. Further, Bovis's claim that it had no actual notice of the debris, is contradicted by the evidence that its superintendent testified that he observed debris in the bathroom, and Bovis's knowledge that Liberty was doing demolition work in the bathroom, when the bathroom was being used by other trades as a access point. While it is true that Liberty was responsible to clean up its own debris, an issue of fact is raised as to Bovis's independent

responsibility.


IT IS HEREBY

ORDERED that the motions for reargument are granted and upon reargument, the Court reinstates Plaintiffs' claim against Bovis under Labor Law § 200 and common-law negligence, and, Liberty's and Fresh Meadow's cross claims against Bovis for common law negligence, and reverses and denies, as premature, the award to Bovis against Liberty and Fresh Meadow based on contractual indemnity.

This Constitutes the Decision and Order of the Court

Dated: October 25, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

EMILY JANE GOODMAN

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