

**Passanisi v Horizon at Forest Hills, LLC**

2010 NY Slip Op 33510(U)

December 21, 2010

Sup Ct, NY County

Docket Number: 113244/07

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C.

PART 2

Index Number : 113244/2007  
**PASSANISI, TIMOTHY**  
vs.  
**HORIZON AT FOREST HILLS**  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

**MOTION IS GRANTED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

DEC 23 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/21/10

Luy  
LOUIS B. YORK  
J.S.C.

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 2

-----x

TIMOTHY PASSANISI,

Plaintiff,

Index No.: 113244/07

-against-

**FILED**

HORIZON AT FOREST HILLS, LLC and BRITT  
REALTY DEVELOPMENT CORP.,

DEC 23 2010

Defendants.

-----x

HORIZON AT FOREST HILLS, LLC and BRITT  
REALTY DEVELOPMENT CORP.,

NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party Plaintiffs,

Index No. 590368/08

-against-

MID ISLAND STEEL CORP.,

Third-Party Defendant.

DECISION

-----x

HORIZON AT FOREST HILLS, LLC and BRITT  
REALTY DEVELOPMENT CORP.,

Second Third-Party Plaintiffs,

-against-

RANGER STEEL CORP.,

Second Third-Party Defendant.

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**LOUIS B. YORK, J.S.C.:**

**BACKGROUND**

Motion sequence numbers 005 and 006 are consolidated for  
disposition.

In motion sequence number 005, defendants Horizon at Forest Hills, LLC (Horizon) and Britt Realty Development Corp. (Britt) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, and for summary judgment against third-party defendant Mid Island Steel Corp. (Mid Island) and against second third-party defendant Ranger Steel Corp. (Ranger) for contractual and common-law indemnification.

In motion sequence number 006, Mid Island moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint asserted against it.

Previously, by order dated October 20, 2010, this court denied plaintiff's motion seeking summary judgment on his cause of action based on a violation of Labor Law § 240 (1), stating that "there are too many disputed facts to defeat summary judgment ... ."

This action involves an accident that took place at a construction site. Horizon states that it was the owner and general contractor for the construction project where plaintiff was allegedly injured. According to the complaint, Britt was also a general contractor or construction manager for the project.

Prior to the date of the accident, Horizon allegedly entered into a subcontract with Ranger to erect structural steel at a condominium that was going to be built at 64-05 Yellowstone

Boulevard in Queens, New York. Horizon also contracted with Mid Island to fabricate the structural steel that was to be erected by Ranger at the construction site.

Plaintiff, a journeyman ironworker employed by Ranger, was injured at the construction site on April 5, 2007, when he was walking on a wall to access a column in order to plumb that column. Plaintiff alleges that he tripped over a rebar that was on the wall, causing him to fall four feet to the ground, thereby sustaining injuries.

At plaintiff's examination before trial (EBT), he testified that the foreman at Ranger would tell him what work he was to perform at the beginning of each day. Plaintiff's EBT, at 67. Plaintiff also stated that he only met with employees of Ranger while at the job site, and that Ranger provided him with whatever equipment he needed to use. *Id.* at 88-89.

Plaintiff stated that his work, plumbing, involved his making sure that the columns were standing straight and that they were not leaning in any direction. *Id.* at 91. According to plaintiff, on the day of the accident, his foreman, Peter Foss (Foss), told him that there was a problem with a particular column, and that the base of the column needed to be moved. *Id.* at 100. Plaintiff avers that he was injured while he was making his way to plumb the column, while he was on the concrete wall, which was approximately four feet high, where the column was

situated. *Id.* at 113. To get to the top of the wall, plaintiff said that he decided just to step onto the wall, and initially said that he does not recall whether there were ladders available for him to use in the Ranger equipment truck, but then indicated that he had seen a six-foot ladder in the truck. *Id.* at 114, 116-117.

Plaintiff testified that, at the top of the wall where he was standing, there were approximately five rebar between him and the column that he was to plumb, each rebar about four-to-five feet high. *Id.* at 117-118. Plaintiff contends that, as he was walking to the column on the top of the wall, he got "hung up" on a rebar that knocked him off balance, causing him to fall off the wall. Plaintiff also said that he had never walked on a foundation wall like the one in question in order to plumb a column. *Id.* at 118-119. According to plaintiff, the rebar was the only reason why he got knocked off balance and fell off the wall. *Id.* at 124.

When questioned, plaintiff said that he did not know why he did not use a ladder to access the column where it was situated rather than walking along the wall to reach the column. *Id.* at 126.

Scott Patterson (Patterson), the project supervisor for Horizon and Britt, submitted an affidavit in which he stated that he was present at the site every day, including the day of the

accident and that, in his opinion, plaintiff's decision to walk the wall to access a column for plumbing and leveling was reckless and unnecessary. Motion, Ex. I. Patterson also said that plaintiff's decision to walk on top of the wall was extremely hazardous because the width of the wall is insufficient to allow someone to walk. *Id.* Further, Patterson states that ladders were available for plaintiff to use so that he did not need to climb onto the top of and walk along the wall to access the column. *Id.*

Carter Manz (Manz), the president of Mid Island and the person who signed the contract with Horizon on behalf of Ranger, was also deposed. At his examination before trial, Manz testified that Ranger kept tools and ladders in its trucks, which were located on or near the job site, that he was sure that there were ladders available at the job site, and that Ranger controlled and supervised plaintiff at the job site. Manz EBT, at 73-77. Manz also said that he did not see any reason why plaintiff needed to go on the top of the wall to plumb the column. *Id.* at 84.

Brian Hamburger (Hamburger), Horizon's safety inspector and OSHA advisor for the project, provided an affidavit that is included with the instant motion. Motion, Ex. V. Hamburger opined that plaintiff's decision to walk along the wall to reach the column was reckless and dangerous. Hamburger also said that

plaintiff should have used a ladder for the job, and that ladders were provided at the job site by Ranger, said ladders being portable, moveable and easily maneuverable. *Id.* Hamburger also said that the ground by the wall where the column was located was level, and a ladder could easily have been set up there. *Id.*

Dr. William Marletta, a certified safety expert, provided an affidavit in which he concluded, with a reasonable degree of construction safety certainty, that adequate safety devices were present, of which plaintiff was aware, and that his decision not to use them was the cause of his accident, thereby making plaintiff the sole proximate cause of his injuries. Motion, Ex. K.

In his complaint and bill of particulars, plaintiff alleges causes of action based on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), as well as violations of sections 23-1.7 (b), (d) (e) and (f), 23-1.15, 23-1.16, 23-1.21 (a), (b), (c) and (d), and 23-2.1 of the Industrial Code.

The contract submitted into evidence allegedly entered into between Horizon and Ranger contains the following indemnification provision:

"To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Design-Builder, the Design-Builder consultants, the Owner and the Owner's consultants, and the agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work provided that such claim, damage, loss or expense is attributable

to bodily injury, sickness, disease or death or to injury to or destruction of tangible property (other than the work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such a claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation which would otherwise exist as to a party or person described in this Section A.3.19."

Motion, Ex. G.

In opposition to this motion, Mid Island contends that it performed no work at the project and that its only contractual obligation was to fabricate the steel which was to be erected at the site. Mid Island did not control, direct or supervise plaintiff's activities, and there are no allegations that the fabrication of the steel was in any way negligent. Therefore, Mid Island contends, it is not responsible for any of plaintiff's injuries.

Further, Mid Island states that, whereas Manz is its president, and that Mid Island and Ranger share office space and often work together, Manz only signed one contract on behalf of Ranger, which he did in his representative capacity for Ranger, not on behalf of Mid Island. Moreover, the contract in question was never signed by Horizon, a fact that is undisputed by any party.

In opposition to the motion for summary judgment made by Horizon and Britt, Ranger asserts two arguments: (1) that, because no liability has yet to be found as against Horizon and

[\* 9]

Britt, any claim for indemnification from Ranger is premature; and (2) that the alleged contract between Horizon and Ranger is invalid because Manz is not an employee, officer or agent of Ranger and, therefore had no authority to sign a contract on Ranger's behalf. Further, David Marom (Marom) the president of Horizon, never executed the contract, and could not explain why he never signed it. Marom EBT, at 50-51.

William Coyne (Coyne), the president of Ranger at the time of the occurrence, testified that Manz had no relationship with Ranger at the time he signed the contract with Horizon. Coyne EBT, at 13. Further, at his deposition, Manz stated that he was not an employee or principal of Ranger, and that he never received any compensation or salary from Ranger. Manz EBT, at 7-8. In addition, Manz testified that the contract with Horizon bearing his signature was the only one that he ever signed on behalf of Ranger. *Id.* at 48. At a second deposition, Manz stated that he only represented Ranger with respect to scheduling, and that the reason for his signing the contract that is the subject of this litigation is that, when he went to Horizon to pick up a check for Mid Island, Horizon refused to give him the Mid Island check unless he signed the contract. Manz Second EBT, at 10.

In reply, Horizon and Britt point out that, in his first deposition, Manz stated that he has been the president of Mid

Island since 1980 (Manz EBT, at 7), and that the contract states that Manz is Ranger's designated representative and that "the Contractor's designated representative, identified above, shall be authorized to act on the Contractor's behalf with respect to the project". Motion, Ex, G. Further, Horizon and Britt contend that Mid Island and Ranger share the same office space, the same office manager, and have employees in common. However, it is noted that neither the third-party complaint nor the second third-party complaint alleges a cause of action based on alter ego liability, which appears to be the thrust of Horizon and Britt's argument.

In opposition to this motion, plaintiff has submitted an affidavit in which he testifies:

"2. For the entire time that I worked on the project no one ever instructed me not to walk on the wall where I fell. My coworkers and I walked along the walls on many occasions prior to the day of the accident, and no one ever indicated that we should not.

3. No one from Ranger Steel or from the general contractor ever instructed our crew that we should go to the work truck to retrieve the A-frame ladder in order to do our work. I never saw anyone use the A-frame ladder on the project to get on top of the wall."

Plaintiff's Opp., Ex. A.

Plaintiff contends that he was never told of the existence of any safety devices available at the project site, and that his injury was the result of a dangerous condition on the property, specifically, leaving bent pieces of rebar in the area where he was working. Also, plaintiff states that he does not contest the

lack of supervisory control over him by Horizon and Britt.

In addition, with respect to his cause of action based on a violation of Labor Law § 241 (6), plaintiff only argues that Industrial Code § 23-1.7 (e) (2) was violated and, therefore, the allegations of violations of other sections of the Industrial Code that appear in the complaint and bill of particulars are deemed abandoned.

In motion sequence 006, Mid Island seeks summary judgment dismissing the third-party complaint asserted as against it, based on the assertion that Mid Island neither supervised nor controlled plaintiff's work, nor was there a formal contract between Horizon and Mid Island, although Mid Island does not dispute that it did fabricate the steel for the project. Mid Island maintains that it never installed the steel at the project site. Consequently, as previously stated in its opposition to motion sequence number 005, plaintiff's injuries were in no way caused by any act or omission on the part of Mid Island.

#### **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 (1<sup>st</sup> 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 (1<sup>st</sup> 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, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of Horizon and Britt's motion seeking summary judgment dismissing plaintiff's causes of action based on common-law negligence and violation of Labor Law § 200 is denied.

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).

In the case at bar, plaintiff is arguing that there was a dangerous condition, the rebar on the top of the wall, which caused his accident and resultant injuries, and that he was never informed that he should not walk on the wall.

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 either created the unsafe condition, or that it had actual or constructive knowledge of the unsafe condition that caused the accident. See *Murphy v Columbia University*, 4 AD3d 200 (1<sup>st</sup> Dept 2004). Moreover, to constitute constructive notice, the alleged defect must be visible and apparent for a sufficient length of time before the accident in order to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836 (1986).

In the instant matter there is a question of fact as to whether the placement of the rebar on the top of the wall was standard practice or a dangerous condition, as well as a question of fact as to whether plaintiff was the proximate cause of his accident by disobeying instructions not to walk on the wall.

Under these circumstances, granting summary judgment would be improvident. *Pasquarello v Citicorp/Quotron*, 251 AD2d 477 (2d Dept 1998) (questions of fact regarding a claim of common-law negligence and violations of Labor Law § 200 preclude granting summary judgment).

That portion of Horizon and Britt's motion seeking summary judgment on plaintiff's cause of action based on a violation of Labor Law § 240 (1) is denied, based on this court's earlier

determination, dated October 20, 2010, that too many disputed facts remain to grant summary judgment.

Similarly, that portion of Horizon and Britt's motion seeking summary judgment on plaintiff's cause of action based on a violation of Labor Law § 241 (6) is also denied.

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 applicable Industrial Code provision which sets forth a specific standard of conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998).

12 NYCRR 23-1.7 (e) (2), Tripping & Other Hazards, states:

"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."

This section of the Industrial Code has been found sufficiently specific to support a cause of action based on a violation of section 241 (6) of the Labor Law. *Randazzo v Consolidated Edison Company of New York*, 271 AD2d 667 (2d Dept 2000).

However, as with plaintiff's cause of action based on a violation of Labor Law § 240 (1), questions of fact exist which preclude granting summary judgment on plaintiff's Labor Law § 241 (6) claim.

Horizon, Britt and Ranger maintain that plaintiff was told not to walk on the wall and that, by doing so, plaintiff was the sole proximate cause of his accident. Conversely, plaintiff affirms that workers regularly walked on the wall to perform their jobs, and that he was not provided with any ladder by which he could reach the column so as to plumb the column without walking on the wall. Based on these factual contradictions, the court cannot grant summary judgment on this issue.

Mid Island's motion for summary judgment dismissing the third-party complaint asserted as against it for common-law and contractual indemnification is granted and, consequently, that portion of Horizon and Britt's motion seeking summary judgment on its third-party claim as against Mid Island for common-law and contractual indemnification is denied.

To maintain a cause of action based on common-law or

contractual indemnification, the party seeking to enforce the contractual provision must evidence some actual negligence on the part of the indemnitor. *Brown v Two Exchange Plaza Partners*, 76 NY2d 172 (1990); *Benedetto v Carrera Realty Corp.*, 32 AD3d 874 (2d Dept 2006). No evidence has been presented that Mid Island was in any way negligent in its manufacture of the steel for the project, or that such manufacture was the cause, in whole or in part, of plaintiff's accident. Furthermore, there is no contract between Mid Island and Horizon which could sustain a cause of action for contractual indemnification. For these reasons, Mid Island cannot be found obligated to indemnify Horizon or Britt, should they eventually be found liable for plaintiff's injuries, and Mid Island's motion seeking summary judgment dismissing the third-party complaint is granted.

Lastly, that portion of Horizon and Britt's motion seeking common-law and contractual indemnification from Ranger is denied.

Ranger is plaintiff's employer and may only be held responsible to indemnify third persons for plaintiff's injuries under a theory of common-law indemnification if plaintiff suffered a serious injury as defined in the Workers' Compensation Law. *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, *supra*. No evidence or allegation appears in this matter to suggest that plaintiff suffered a serious injury as defined by the Workers' Compensation Law. Therefore, Horizon and Britt's motion for

summary judgment as against Ranger based on a cause of action for common-law indemnification is denied.

Moreover, too many questions of fact exist with respect to Manz' authority to sign a contract on behalf of Ranger to grant summary judgment on the issue of Ranger's obligation for contractual indemnification. Furthermore, the court notes that the primary thrust of Horizon and Britt's argument theory for granting them summary judgment on this issue is based on a theory of piercing the corporate veil and alter ego, neither of which theories is pleaded in the third-party complaint. *Arfa v Zamir*, 76 AD3d 56 (1<sup>st</sup> Dept 2010) (summary judgment denied on a theory not plead in the complaint); *Gustavsson v County of Westchester*, 264 AD2d 408 (2d Dept 1999).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that defendants' motion (motion sequence number 005) is denied in its entirety; and it is further

ORDERED that third-party defendant Mid Island Steel Corp.'s motion (motion sequence number 006) seeking summary judgment dismissing the third-party complaint is granted and the third-party complaint is <sup>severed and</sup> dismissed with costs and disbursements to said third-party defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

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

ORDERED that the remainder of this action shall continue.

Dated: 12/23/10

ENTER:

Ley

Louis B. York, J.S.C.

**FILED**

DEC 23 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**LOUIS B. YORK**  
J.S.C.