

<b>Keenan v Linmar Constr. Corp.</b>
2010 NY Slip Op 33986(U)
January 5, 2010
Supreme Court, New York County
Docket Number: 114298/06
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

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JOB KEENAN and RUTH KEENAN,

Index No. 114298/06

Plaintiffs,

-against-

LINMAR CONSTRUCTION CORP. and  
STEEL-NORTHEASTERN,

Defendants.  
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DECISION AND ORDER

**FILED**

JAN 12 2010

NEW YORK  
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SOLOMON, J.:

Defendant Linmar Construction Corp. (Linmar) moves for summary judgment dismissing the complaint, or in the alternative, for summary judgment on its cross claim for contractual and common law indemnification against defendant Northeastern Fabricators, Inc. (Northeastern), s/h/a Steel-Northeastern. The motion is denied for the reasons below.

Plaintiff Job Keenan was employed as Chief Engineer of the building located at 2 Wall Street in Manhattan, by the owner's managing agent. Four floors of the building, including the basement and ground levels, were used as a bank, which was substantially renovated for a new tenant in 2005. The tenant hired Linmar to be the general contractor for the project. Linmar hired Northeastern as a subcontractor to install structural steel. Keenan located floor plans for the premises and provided them to Linmar, and worked with contractors in the design process by identifying pipes and conduits within the premises, but otherwise had no role in the project.

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On June 30, 2005, Keenan received a report that there was an electric power outage in common areas of the building. He attempted to reset the electric circuit breakers, without success. He entered the bank to investigate the outage because electrical risers were situated there. When inside, he saw a burnt, cut electrical conduit on the second floor near a scaffold being used by Northeastern iron workers; it appeared that a worker had used a torch to sever the conduit. He called John Linmar, a principal of Linmar, who suggested calling an electrical contractor to repair the condition. The electrical contractor sent electrician Wilson Kueto, who examined the conduit and repaired it, taking a total of about two and a half hours. He worked on the scaffold, approximately eight to ten feet above the floor. Keenan alleges that he went up the scaffold to help with the repair, and his foot slipped as he climbed down the ladder, causing him to suffer a knee injury. He claims that the scaffold shook before he slipped, and that the area was dusty, so his foot may have slipped on dust.

Kueto was deposed, and testified that he and Keenan worked together at the scaffold, but that Keenan stayed on the bottom. The scaffold was secure, and he was unaware of any problem with it. He did not know that Keenan had fallen from the scaffold. He spoke with Keenan about a week later, who mentioned that he had been hurt at the building, but they did not discuss

details. He also testified that the conduit was cut by demolition workers who were cutting through steel beams cased in concrete.

Keenan commenced this lawsuit under Labor Law §§ 200, 240(1) and 241(6), and for common law negligence. Linmar moves to dismiss the complaint, arguing in particular that Keenan was outside the scope of the class of person protected under these Labor Law sections, and that Linmar did not directly supervise the work such that it could be liable under a common law negligence theory. Linmar has cross claims against Northeastern for breach of contract and contractual indemnity, and seeks summary judgment on its indemnification claim. Northeastern has cross claims against Linmar for contractual indemnification and contribution. The contracts relied upon are a purchase order (Notice of Motion, Ex. K.) and what appears to be a form for a "subcontractor" agreement that is not signed and does not mention Northeastern (Ex. M). The back of the purchase order contains a "hold harmless" provision, and the agreement contains a standard indemnification clause at paragraph 17. There is no contract requiring Linmar to indemnify or purchase insurance for Northeastern's benefit.

Northeastern produced its project manager for deposition. He testified that he had never seen the "subcontractor" agreement, and that Northeastern was hired

pursuant to a purchase order faxed to his office. The reverse of the purchase order was not in his records, and he had no indication that it had been sent. The witness also testified that Northeastern was not performing demolition at the site, and he would have known if the conduit was cut by a Northeastern employee because he would have received a charge back for the repair.

Based on this testimony, it cannot be said as a matter of law that Northeastern accepted the Linmar job subject to an indemnification provision, or that Keenan's injury arose from Northeastern's work, so Linmar's motion must be denied as against Northeastern.

Linmar's motion is granted, however, as to Keenan. There is no evidence of common law negligence as against Linmar. It did not directly supervise Keenan's work or the demolition and electrical work involved in his alleged accident, and there is no evidence that Linmar created or had notice of a hazardous condition which led to Keenan's injury.

Also, Keenan is not within the scope of the class of persons protected under Labor Law §§ 200, 240(1) and 241(6) (see, *Petermann v Ampal Realty Corp.*, 288 AD2d 54 [1<sup>st</sup> Dept 2001]). He was employed as Chief Engineer by the managing agent for the entire building. His involvement on the day of the accident arose from his effort to restore electrical power to the

building. He was not engaged in erection, demolition, repair, etc., of the building within the meaning of these statutes; rather, he was attempting to restore power for the building as a whole. This is not the kind of work the legislature intended to protect under Labor Law §§ 200, 240(1) and 241(6) (see, *Prats v Port Authority*, 100 NY2d 878 [2003]).

In *Gibson v Worthington Division - McGraw-Edison Co.* (778 NY2d 1108 [1991]), the Court of Appeals held that an injured engineer whose employer was hired to prepare a repair estimate for a damaged roof was not "employed" to carry out repairs within the meaning of Labor Law §§ 200, 240(1) and 241(6). The *Gibson* decision was interpreted by the First Department in *Campisi v Epos Constr. Corp.* as follows:

A reading of *Gibson* establishes that the relevant inquiry here is not whether the plaintiff picked up a tool to effect a repair, but whether he had been hired to take any part in the repair work. The plaintiff in *Gibson* was a design engineer who was injured while inspecting the damage to the roof of the defendant's building in preparation for submitting an estimate on the repair job. The Court held that he was not within the class of workers protected by section 240 (1) because at the time of the accident his firm had not been hired, i.e., the firm was not employed, to repair the roof.  
(299 AD2d 4, 9 [1<sup>st</sup> Dept. 2002]).

Here, although Keenan alleges that he was helping the electrician to repair the severed conduit, it is undisputed that neither he nor his employer was hired to take part in any repair work beyond that which was necessary to keep the building

operating in a routine fashion. Accordingly, Keenan is not within the class of workers protected under the relevant Labor Law provisions. Keenan's argument that he became, in effect, Linmar's employee when he called John Linmar and otherwise took steps to expedite the resumption of power to the rest of the building is unpersuasive.

In light of the foregoing, there is no basis for Northeastern's cross claims. Accordingly, it hereby is

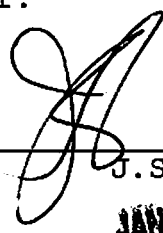
ORDERED that Linmar's motion is granted to the extent that the complaint is severed and dismissed as against it, and Northeastern's cross claims are dismissed, but is otherwise denied; and it further is

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

ORDERED that the action shall continue on the remaining claims, and counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY, for a pre-trial conference on February 1, 2010 at 2 PM.

Dated: January 5, 2010

**FILED**  
JAN 12 2010  
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J.S.C.  
**JANE S. SOLOMON**