

**Baker v Keyspan Gas E. Corp.**

2011 NY Slip Op 30157(U)

January 12, 2011

Sup Ct, Nassau County

Docket Number: 17817/08

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
WILLIE BAKER and TAYNA BAKER,

Plaintiffs, INDEX NO. 17817/08

-against- MOTION DATE: 11/23/10  
SEQUENCE NO. 002

KEYSPAN GAS EAST CORPORATION,  
  
Defendant.

-----X

<b>Notice of Motion, Affs. &amp; Exs.....</b>	<u>1</u>
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Upon the foregoing papers, it is ordered that the motion by defendant, Keyspan Gas East Corporation ("Keyspan"), for summary judgment dismissing plaintiffs' claims based upon Labor Law §200 and §240 is granted, and for summary judgment dismissing plaintiffs' claims based upon Labor Law §241(6) is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The incident which forms the basis of this lawsuit occurred on December 27, 2006 in the roadway in front of 223 West Shore Drive, Massapequa, New York. It is alleged that on the date of the accident, plaintiff was employed by Asplundh Contracting, who had been hired by Keyspan to extend gas service to a new home located at 223 West Shore Drive in Massapequa. Plaintiff and Asplundh foreman, George Vitti, were the only workers at the site on the date of the accident. In order to extend gas service to the premises, the gas main had to be located and then an excavation in the roadway had to be performed to expose the gas main. Using a backhoe, Mr. Vitti then excavated a trench in the roadway for the new gas service.

After the trench was dug, plaintiff went into the trench and used a trenching shovel to

level off the bottom of the trench. As plaintiff was leveling off the bottom of the trench, a piece of concrete (asphalt) fell and pinned the plaintiff's legs, allegedly causing him personal injuries.

Defendant argues that it should be granted summary judgment on the grounds that it cannot be found liable pursuant to Labor Law Sections 200, 240, or 241(6).

With respect to the portion of defendant's motion which requests summary judgment pursuant to Labor Law §240, summary judgment is granted without opposition, as plaintiff has failed to oppose defendant's prima facie showing of entitlement to summary judgment on the grounds Labor Law §240 does not apply to this type of trench case because the hazard at the construction site which allegedly caused plaintiff's injury was not an elevation-related risk and because the object which struck the plaintiff was not being hoisted or secured at the time of the accident.

With respect to Labor Law §200, defendant argues that it did not exercise supervision and control of the details of the work which caused the accident and did not have notice, actual or constructive, of the allegedly unsafe condition. In support of its position, defendant relies upon an affidavit of Keyspan Gas East Corporation Inspector, Angelo Capone, who attests that he was assigned to the job at issue, which was being performed by Asplundh Construction. He attests that he was not present for any of the work performed by the Asplundh crew on the date of the accident. He also attests that Keyspan did not have a work crew at that site on the date of the accident.

Defendant also relies upon the testimony of the plaintiff in support of its argument that it does not bear liability pursuant to Labor Law §200. Defendant argues that plaintiff, Willie Baker, testified that Asplundh's foreman would tell him what type of job they would be doing that day. Plaintiff also testified that Asplundh would supply safety equipment to him, along with the tools necessary to complete the job. Plaintiff further testified that the Asplundh foreman would direct him where to place safety cones, how to determine where the gas main was located, where to dig the trench, and how deep the trench would be. Further, plaintiff testified that the Asplundh foreman would dig the actual trench using the trenching machine. Accordingly, Movant argues that Asplundh, and not Keyspan, exercised supervision and control of the details of the work which actually caused the accident. Accordingly, Movant argues that Keyspan cannot be held liable under Labor Law §200.

In opposition, plaintiff cites deposition testimony of Keyspan's witness, Mark Bromschwig, a senior gas field supervisor in charge of supervising twenty-two Keyspan field inspectors that inspect contractor gas projects. Mr. Bromschwig testified that for each construction site, there is an "ongoing inspection" and that the inspectors try to be there daily. He also testified that reports are written by the inspectors daily and that it is part of the inspectors' job to see that excavations are made safely and securely. Mr. Bromschwig further testified that Keyspan's inspector "has the right to shut the job down right then and there if it is so unsafe." Further, plaintiff cites to the Agreement between Keyspan and Asplundh, which reads that "all work will be subject to the Engineer's inspection, direction and approval," and that the contractor, upon Keyspan's direction, "shall remove, replace or correct any work" not performed in accordance with the provisions of the Agreement.

In addition, plaintiff argues that even if the inspector, Angelo Capone, was not present on the date of the accident, the project began on December 20, 2000 and Mr. Capone's affidavit is silent regarding his daily inspections prior to the date of the plaintiff's accident. Plaintiff also argues that Keyspan knew or should have known that there was a risk of asphalt falling into the trench in which plaintiff was working, as their own Safe Operating Procedures indicate that the soil type in the Sector where the plaintiff was working is Type C. Type C soil is defined by OSHA as "granular soils such as gravel, sand and loamy sand," and plaintiff argues that such soil requires shoring of excavation sites over three feet to prevent erosion, slides, and cave-ins at the base of such sites. Finally, plaintiff argues that Keyspan's Mark Bromschwig testified that he sometimes has to secure equipment for the subcontractors and that plaintiff, Willie Baker, testified that the trenching machine used to create the trench was brought to the jobsite by someone other than Asplundh. The court notes, however, that there is no evidence in the record before it to indicate who brought the trenching machine to the work site.

Labor Law §200 is the codification of the common-law duty to provide workers with a safe work environment. (*Everitt v. Nozkowski*, 285 A.D.2d 442 (2d Dept. 2001)). To establish liability against an owner or general contractor pursuant to Labor Law §200, it must be established that the owner or general contractor exercised supervision or control over the work performed at the site, or had actual or constructive notice of the allegedly unsafe condition. *Parisi v. Loewen Development of Wappinger Falls, LP*, 5 A.D.3d 648, 774 N.Y.S.2d 747 (2d

Dept. 2004). For liability to be imposed, the owner or general contractor must have directed and controlled the manner in which the work was performed, not merely possessed general supervisory authority. (*Id.*; see also, *Dennis v. City of New York*, 304 A.D.2d 611, 758 N.Y.S.2d 661 (2d Dept. 2003)). The retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law §200. (*Dennis*, 304 A.D.2d at 612). The contractual duty to oversee the performance of work, inspect the work site and ensure compliance with safety regulations does not constitute supervision and control over the subcontractor's methods of work. (*D'Antuono v. Goodyear Tire & Rubber Co.*, 231 A.D.2d 955, 648 N.Y.S.2d 488 (4<sup>th</sup> Dept. 1996)).

The record before the court indicates only that defendant, Keyspan, retained general supervisory powers, not that it exercised control of the performance of the work. All evidence indicates that Keyspan inspected the work done by Asplundh to ensure compliance with the Agreement, but that Keyspan did not dictate the manner in which the work was done or supervise the work which allegedly caused injury to the plaintiff. Further, there is no evidence before the court that Keyspan had actual or constructive notice of the alleged dangerous condition which caused plaintiff's injury. Even if Keyspan knew what type of soil existed at the work site, there is no evidence that Keyspan knew or should have known that there was a risk of asphalt falling into the trench in which plaintiff was working. Accordingly, defendant, Keyspan, cannot be found liable pursuant to Labor Law §200.

Lastly, addressing the portion of defendant's motion that requests summary judgment pursuant to Labor Law §241(6), defendant argues that in order to sustain a cause of action based upon a violation of Labor Law §241(6), a plaintiff must demonstrate the violation of an Industrial Code regulation setting forth a specific standard of conduct applicable to working conditions which existed at the time of the accident. (*Roberts v. Worth Construction*, 21 A.D.3d 1074, 802 N.Y.S.2d 177 (2d Dept. 2005)). Within its moving papers, defendant argues that each of the sections of the Industrial Code which plaintiffs allege in their Bill of Particulars is inapplicable to the case at hand and were not violated by the defendant. In opposition, plaintiffs argue that defendant violated Industrial Code 12 N.Y.C.R.R. §§ 23-4.2 [as plaintiffs only allege violations

of subsections (a), (g), (i), and (k) within their Bill of Particulars, said subsections are the only subsections of §23-4.2 which shall be addressed by this Court] and Section 23-4.4, but concedes that the remaining sections of the Industrial Code set forth in their Bill of Particulars are not applicable to the case at hand. Accordingly, the Court will only address Movant's arguments with respect to said sections.

Industrial Code Section 23-4.2 provides for sheeting, shoring, or bracing of excavation sites to prevent erosion, slides, and cave-ins at the base of such excavation sites. To begin, Industrial Code Section 23-4.2(a) specifically states that "any trench or excavation in clay, sand, silt, loam or nonhomogeneous soil which has sides or banks more than three feet but less than five feet in depth shall be provided with side or bank protection in compliance with this Part (rule)." Movants point to the deposition testimony of Mark Bromschwig, in which he testified that when he arrived at the scene of the accident after the accident, the depth of the trench was twenty-four inches. Accordingly, movants argue, Section 23-4.2(a) does not apply.

In opposition, plaintiffs argue that defendant's own internal documents indicate that the type of soil present at the location of the work site at issue is "Type C," which OSHA defines as "granular soils such as gravel, sand and loamy sand." In addition, plaintiffs cite to plaintiff Willie Baker's deposition testimony, in which Mr. Baker testified that the depth of the trench was between four and four and a half feet deep. Plaintiffs argue that Keyspan's witness, Mark Bromschwig, only arrived at the site after the accident, and as there was testimony that plaintiff had been backfilling the pipe by hand before Mr. Bromschwig's arrival, there is an question as to the depth of the trench prior to his arrival. Plaintiffs also point to a schematic drawing that indicates that the trench was deeper than three feet. Accordingly, there is a question of fact as to the depth of the trench and, as such, a question of fact as to whether defendant violated Industrial Code Section 23-4.2(a).

With respect to Section 23-4.2(g), defendant argues that Section 23-4.2(g) does not apply to the heavy piece of asphalt that fell upon plaintiff, as same is not a "loose rock," as contemplated by the Code. Plaintiff argues in opposition that this section of the Code requires that "all sides or banks, slopes and areas in and adjacent to any excavation shall be stripped and cleared of loose rock or any other material which may slide, fall, roll, or be pushed upon any person located in such excavation." Plaintiff argues that the asphalt that fell upon the plaintiff is

covered by this section, as the code allows for "other material" that may slide onto a person inside an excavation. As such, plaintiffs further argue Industrial Code 23-4.2(g) was also violated by the defendant. Accordingly, there is a question of fact as to whether the defendant violated Section 23-4.2(g).

With respect to plaintiff's allegation that defendant violated Industrial Code §23-4.2(i), Movant argues that said section does not apply as it applies only to instances where "no work is being performed in an unattended open excavation." As it is undisputed that plaintiff was working in the excavation at the time of the incident, defendant argues that said section does not apply. Plaintiffs do not offer any specific opposition to defendant's contention that Section 23-4.2(i) does not apply to the matter at hand and do not raise a triable issue of fact with respect to same.

With respect to plaintiff's allegation that defendant violated Industrial Code §23-4.2(k), movant contends that said section is inapplicable as the accident did not involve plaintiff being "struck or endangered by any excavation equipment or by any material dislodged by or falling from such equipment." Plaintiffs again offer no specific opposition to defendant's contention of the applicability of Section 23-4.2(k) and do not raise a triable issue of fact with respect to same.

With respect to plaintiff's allegation that defendant violated Industrial Code §23-4.4, defendant argues that it requires sheeting, shoring, and bracing of excavations that are five feet or greater. Defendant argues that the excavation at issue was not five feet deep, so said section of the Industrial Code does not apply and was not violated. Plaintiff argues, however, that said section dictates the specific requirements as to the composition of shoring and bracing required by previous sections and that the applicability depends upon the depth of the excavation of Type C soil. Accordingly, as there is conflicting testimony as to the depth of the excavation, a question of fact exists as to the applicability of this Code provision.

Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein. (*Rizzuto v. L.A. Wenger Contracting Co., Inc.* 91 N.Y.2d 343 (Ct. of App. 1998)). It places on owners, contractors, and their agents a nondelegable duty to keep areas in which construction work is being performed safe for those

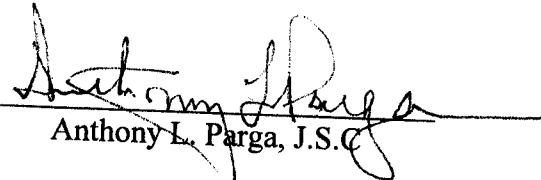
employed at such places. In order to hold a defendant liable under Labor Law §241(6), a plaintiff must demonstrate the violation of an Industrial Code regulation setting forth a specific standard of conduct applicable to working conditions which existed at the time of the accident. (*Roberts v. Worth Construction*, 21 A.D.3d 1074, 802 N.Y.S.2d 177 (2d Dept. 2005)).

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 demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

In light of the questions of fact regarding the applicability of the Industrial Code § 23-4.2(a) and (g) and § 23-4.4 (due to the conflicting testimony regarding the depth of the trench) and whether said provisions were violated by the defendant, the branch of defendant's motion seeking summary judgment dismissing plaintiff's claim as based upon Labor Law §241(6) is denied.

Accordingly, defendant's motion for summary judgment dismissing plaintiffs' claims based upon Labor Law §200 and §240 is granted, and for summary judgment dismissing plaintiffs' claims based upon Labor Law §241(6) is denied.

Dated: January 12, 2011

  
Anthony L. Parga, J.S.C.

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**ENTERED**  
JAN 14 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE