

**San Pietro v New York Times Bldg., LLC**

2011 NY Slip Op 32251(U)

August 11, 2011

Sup Ct, NY County

Docket Number: 113065/2007

Judge: Marcy S. Friedman

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

PRESENT **MARCY S. FRIEDMAN**

PART 57

Index Number : 113065/2007

SAN PIETRO, JOSEPH

vs

NEW YORK TIMES BUILDING

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. 113065/07

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

MOTION SEQ. NO. 007

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion  for summary judgment

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

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

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

PAPERS NUMBERED	
1-10	
2,3	
4	

*Memo of Law M1, M2*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

**FILED**

AUG 18 2011

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/11/11

*Marcy S. Friedman*  
**MARCY S. FRIEDMAN**<sup>c.</sup>

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
JOSEPH SAN PIETRO, x  
*Plaintiff,*

- against -

NEW YORK TIMES BUILDING, LLC and AMEC  
CONSTRUCTION MANAGEMENT INC.  
*Defendants,*

\_\_\_\_\_  
NEW YORK TIMES BUILDING, LLC and AMEC  
CONSTRUCTION MANAGEMENT INC., x  
*Third-Party Plaintiffs,*

- against -

BENSON INDUSTRIES, INC.,  
*Third-Party Defendants,*

\_\_\_\_\_  
BENSON INDUSTRIES, INC., x  
*Second Third-Party Plaintiff,*

- against -

SEELE L.P.,  
*Second Third-Party Defendants.*

\_\_\_\_\_ x

Index No.: 113065/2007

DECISION/ORDER

**FILED**

**AUG 18 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

In this Labor Law action, plaintiff Joseph San Pietro sues to recover for personal injuries allegedly sustained when he tripped over a two-by-four while working at the New York Times Building on September 14, 2007. Defendants New York Times Building, LLC (NY Times) and AMEC Construction Management Inc. (AMEC) move for summary judgment dismissing

plaintiff's complaint against them. NY Times and AMEC also move for summary judgment on their claims for contractual indemnification and breach of contract for failure to procure insurance against third-party defendant Benson Industries, Inc. (Benson). Plaintiff does not oppose the branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 240(1) claim. (P.'s Aff. in Opp., ¶ 7.)

The following relevant facts are undisputed: At the time of the accident, NY Times owned "portions of the premises under construction known as the New York Times Building located at Eighth Avenue." (Ds.' Answer, ¶ 2.) NY Times hired AMEC as the construction manager for the site. (Id. at ¶ 3.) AMEC, in turn, hired Benson to install a "curtain wall" at the premises. (See AMEC and Benson Contract [Benson Subcontract] [Ds.' Motion, Ex. D]; Dep. of Daniel O'Brien [Benson's Superintendent] at 8 [Id., Ex. K].) Plaintiff was employed by Benson as an ironworker. (P.'s Dep. at 31 [Ds.' Motion, Ex. F].)

Plaintiff testified that his accident occurred as follows: On the day of his accident, plaintiff was using a scaffold to spray water on the side of the building to perform a "water test." (See P.'s Dep. at 18-19.) After he and a co-worker, Michael Sikes, had completed the spraying, they "had to move the scaffold off the [sidewalk] bridging, [and] that is when the accident occurred." (Id. at 21.) Plaintiff and Sikes picked the scaffold up to "waist height or so" so that they could move it. (Id. at 22.) Sikes lost his balance and all the weight of the scaffold was on plaintiff. (Id.) According to plaintiff: "I was trying to hold all of the weight of the scaffold, it's very heavy, I tripped over the debris that was on the bridging and the weight turned me to the side and I just fell." (Id. at 23.) The debris was a two-by-four, approximately four to five feet long, lying "there by itself on the bridging." (Id. at 24.) Plaintiff stated that he could not see the

debris before the accident because the scaffold covered it, and that he did not know how the debris came to be under the scaffold. He testified that, as an ironworker, he did not work with wood. (Id. at 24, 28-30, 36-37.)

Labor Law § 241 (6)

Labor Law § 241(6) provides:

All contractors and owners and their agents \* \* \* shall comply with the following requirements:

- 6. 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.

It is well settled that this statute requires owners and contractors and their agents “to provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law § 241(6), plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with “concrete specifications,” as opposed to a provision that “establish[es] general safety standards.” (Id. at 505.) “The former give rise to a nondelegable duty, while the latter do not.” (Id.)

In opposition to defendants’ motion, plaintiff alleges that defendants violated Industrial Code §§ 23-1.7(e)(2) and 23-2.1(a)(1). (P.’s Opp., ¶¶ 24-25.) Defendants argue that the enumerated sections are either inapplicable to the facts at bar or are insufficiently specific to

support a claim under this section. (See Ds' Aff. in Support, ¶¶ 7, 36-41.)<sup>1</sup>

Section 23-2.1(a)(1),<sup>2</sup> which requires the storage of building materials “in a safe and orderly manner,” is inapplicable to plaintiff’s accident because it occurred in a work area, not a “passageway, walkway, stairway or other thoroughfare.” (See Barrios v Boston Props. LLC, 55 AD3d 339 [1st Dept 2008], citing Waitkus v Metropolitan Hous. Partners, 50 AD3d 260 [1st Dept 2008].)

Section 23-1.7(e)(2) is sufficiently specific to give rise to liability under Labor Law § 241(6). (See Smith v McClier Corp., 22 AD3d 369 [1st Dept 2005].) This section provides that “[t]he 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.” Defendants submit no authority for their contention that the section’s reference to “accumulations” of debris and “scattered” materials requires that there be more than one piece of debris to constitute a violation of this section. (Ds’ Aff. in Support, ¶ 38.) Indeed, defendants ignore authority to the contrary. (See e.g. Canning v Barney's New York, 289 AD2d 32, 34-35 [1st Dept 2001] [finding that a piece of “tie wire,” constituted debris for the purpose of the section]; Giza v New York City School Constr. Auth., 22 AD3d 800 [2d Dept 2005] [finding triable issue of fact as to whether

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<sup>1</sup> Although denominated the “construction manager,” for the project, AMEC does not argue that it is not subject to vicarious liability under the Labor Law.

<sup>2</sup> 12 NYCRR 23-2.1(a)(1) provides:

(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

the piece of plywood on which plaintiff fell was an integral part of the work]; Rosemin v Oved, 254 AD2d 343 [2d Dept 1998] [finding triable issue of fact as to whether this section was violated when plaintiff tripped and fell over a piece of wood at a construction site].) Nor do defendants submit any evidence showing that the two-by-four was consistent with “the work being performed” by plaintiff, particularly given plaintiff’s uncontradicted testimony that he did not work with wood at the site.

To the extent that defendants argue that the bridging upon which plaintiff was injured was not a “part[] of floors, platforms and similar areas where persons work or pass,” this argument is without merit. It is undisputed that in order to perform their work, Benson’s employees had to go up onto the sidewalk bridge in order to reach the scaffold. (Dep. of George Mow [AMEC’s Project Manager] at 37 [Ds.’ Motion, Ex. L].)

Defendants accordingly fail to make a prima facie showing that § 23-1.7(e)(2) is inapplicable to the facts at bar. The branch of defendants’ motion seeking to dismiss plaintiff’s claim under § 241(6) should be granted only to the extent that it is based on Industrial Code § 23-2.1(a)(1).

#### Labor Law § 200

Labor Law § 200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993].) An implicit precondition to this duty “is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” (See Russin v Picciano & Son, 54 NY2d 311, 317 [1981].) Thus, “[w]here the alleged defect or dangerous condition arises

from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200." (Comes, 82 NY2d at 877. See also Ross, 81 NY2d at 505 [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.) Neither a "general right to supervise" nor retention of contractual inspection privileges amounts to the control necessary to impose liability under Labor Law §200 or a common law negligence claim. (Brown v New York City Economic Dev. Corp., 234 AD2d 33 [1<sup>st</sup> Dept 1996]. See Gonzalez v United Parcel Serv., 249 AD2d 210 [1st Dept 1998].) An owner or general contractor thus will not be liable under section 200 where the evidence demonstrates that the plaintiff's employer, and not the owner or general contractor, specifically controlled the methods by which the plaintiff's work was performed. (See Reilly, 303 AD2d at 215.)

Where, however, the injury arises out of "a dangerous condition on the site" rather than "the methods or materials" used by the worker or his employer, it is "not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury-producing work," only that it "had notice of the condition." (Minorczyk v Dormitory Auth. of State of New York, 74 AD3d 675 [1st Dept 2010]; Seda v Epstein, 72 AD3d 455 [1st Dept 2010]; Murphy v Columbia Univ., 4 AD3d 200 [1<sup>st</sup> Dept 2004].) "General awareness" that a dangerous condition may be present is insufficient. (See Gordon v American Museum of Natural History, 67 NY2d 836, 838 [1986].) "The notice must call attention to the specific defect or hazardous condition and its specific location." (Mitchell v New York Univ., 12 AD3d 200, 201 [1<sup>st</sup> Dept 2004].) Furthermore, constructive notice of a defect requires that the "defect must be visible and apparent and it must exist for a sufficient length of time prior to the

accident to permit defendant's employees to discover and remedy it." (Gordon, 67 NY2d at 837.)

Where debris causes an accident, an issue arises as to whether the debris is a dangerous condition on the work site, requiring an inquiry into whether the defendants created the condition or had notice of it, or whether the accident was the result of the means and manner in which the work was performed, requiring an inquiry into whether the defendants had authority to supervise and control the work. (Cody v State of New York, 82 AD3d 925, 926-927 [2d Dept 2011].)

Where the debris is part of the construction materials being used by the plaintiff or his co-workers in ongoing construction, the accident will be found to have resulted from the means and manner in which the work was performed. (Id. at 926 [trip on piece of lumber —“one of the materials being used by the claimant's coworkers”]; Gomez v City of New York, 56 AD3d 522 [2d Dept 2008] [trip on wire mesh into which concrete would be poured as part of construction of floor]; Mas v Kohen, 283 AD2d 616 [2d Dept 2001] [injury due to hole in floor dug by plumbers or electricians].) In contrast, debris left after construction work has been found to constitute a dangerous condition. (See Murphy v Columbia Univ., 4 AD3d 200, supra [trip over debris left by electricians or tile workers who had last worked in the area two days earlier]; Aguilera v Pistilli Constr. & Dev. Corp., 63 AD3d 763 [2d Dept 2009] [slip on debris left on stairway on work site]; Keating v Nanuet Bd. of Educ., 40 AD3d 706 [2d Dept 2007] [accident caused by slippery rocks and unprotected skylight on roof].)

Here, given the absence of any dispute that plaintiff and his co-workers did not work with wood, the court finds as a matter of law that the two-by-four constituted a dangerous workplace condition. The issue is therefore whether defendants created or had actual or constructive notice

of the condition.

NY Times and AMEC deny that they created the condition or had actual or constructive notice of the two-by-four on the bridging. (See Ds.' Aff. in Support, ¶¶ 27-29, 49.) In support of this contention, they rely chiefly upon plaintiff's testimony, cited above, that he did not know how long the two-by-four had been on the bridging, or how it came to be there.

In opposition, plaintiff cites AMEC's project manager's testimony acknowledging that AMEC was responsible for and "controlled" debris removal at the project, including debris on the sidewalk bridges. (See Mow Dep. at 17, 30.) As testified to by the project manager, AMEC hired a "site safety director" who had authority to stop work if there was an unsafe condition and to direct subcontractors to remedy the situation. (*Id.* at 17.) AMEC allowed the storefront subcontractor, second third-party defendant Seele L.P. (Seele), to store materials for its work on the bridge and to use the bridge as a "staging area." (*Id.* at 32.) However, AMEC was aware that Benson employees would have access to, and conduct work on, the sidewalk bridge. (*Id.* at 37).

On this record, defendant AMEC fails to eliminate triable issues of fact as to whether it had constructive notice of the existence of the debris. Although AMEC was responsible for debris removal, it fails to make any showing that it had regular procedures for inspecting the bridging, or any showing as to whether, or when, it made its last inspection of the area where plaintiff's accident occurred. Absent such a showing, AMEC does not demonstrate as a matter of law that it could not have known of the debris within a reasonable time prior to the accident, and therefore is not chargeable with constructive notice. (See *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]; *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436 [2d Dept 2005];

Joachim v 1824 Church Ave., Inc., 12 AD3d 409 [2d Dept 2004].) Put another way, AMEC “cannot obtain summary judgment by pointing to gaps in plaintiff’s proof. Rather, [it] must adduce affirmative evidence” to show that it did not have notice of the condition. (Torres v Industrial Container, 305 AD2d 136 [1st Dept 2003].)

It is undisputed, however, that defendant NY Times did not supervise or control the work areas and did not have any presence at the project site. As plaintiff fails to raise a triable issue of fact as to defendant NY Times’ constructive notice of the dangerous condition, his claims against NY Times under Labor Law § 200 and for common law negligence must be dismissed.

#### Indemnification and Failure to Procure Insurance

Defendants also seek summary judgment on their claims for indemnification against Benson. Defendants rely on section 5 of AMEC’s subcontract with Benson, which provides:

“To the extent permitted by law, Subcontractor shall indemnify, defend, save and hold the Owner, the Contractor, the Contractor’s Sureties, the Architect . . . and their respective partners, parents, affiliates, agents, officers, employees and anyone else acting for or on behalf of any of them (herein collectively called “Indemnitees”) harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with the performance of Work by the Subcontractor, or any act or omission of Subcontractor.”

Thus, the contract provides for indemnification when a claim arises out of Benson’s work, even though Benson has not been negligent. (See Brown v Two Exchange Plaza Partners, 76 NY2d 172 [1990]; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1st Dept 1999].) Where such a contract is in effect, the party “seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant.” (Correia, 259 AD2d at 65,

citing Brown, 76 NY2d 172.)

As held above, AMEC fails to demonstrate that it is free from negligence, as a triable issue of fact exists as to whether it had constructive notice of the defective condition at the site. To the extent that AMEC seeks partial indemnification, summary judgment is “premature since no allocation [can] be made until the factual issue as to whether [defendants were] negligent, and if so, to what extent, has been determined.” (Id. at 64.) Accordingly, the branch of AMEC’s motion for contractual indemnification must be denied.

In contrast, NY Times demonstrates that there are no issues of fact as to its negligence, and that its liability, if any, is solely statutory liability imposed by Labor Law § 241(6). (See id. at 64-65.) Accordingly, NY Times should be awarded judgment as to liability against Benson on its claim for contractual indemnification, conditioned upon a finding at trial that NY Times is liable under Labor Law § 241(6).

Defendants also move for summary judgment on their claim against Benson for its alleged failure to procure insurance naming them as additional insureds. Section 6 of the Benson subcontract provides: “Prior to commencing the Work, Subcontractor shall procure and thereafter maintain at its own expense . . . insurance coverage as described in the “Insurance Schedule” attached to this subcontract as Schedule E to Exhibit II.” (Ds.’ Motion, Ex. D.) Schedule E § 2 requires Benson to procure “Commercial General and Excess Liability Insurance.” It specifies the “Coverage Endorsements Required,” which include: “b) Occurrence Bodily Injury and Property Damage Liability,” and “e) Blanket Broad Form Contractual Liability, including the Indemnification set out in the General Conditions and all other contracts relative to the project.”

Benson's policy, through Zurich American Insurance Company (Zurich), provides that an additional insured is "any person or organization whom [Benson is] required to add as an additional insured on this policy under a written contract or written agreement," "but only if the bodily injury . . . results from [Benson's] negligence." (See Additional Insured – Automatic - Owners, Lessees or Contractors – Broad Form Endorsement, §§ [A], [B][1] [Benson's Aff. in Opp., Ex. B].)

It is undisputed that Zurich disclaimed coverage to AMEC and NY Times on the ground that "there is no indication that this claim arises out of any negligent act committed by Benson." (Zurich Letter dated April 2, 2008 [Ds.' Motion, Ex. M].) NY Times and AMEC argue that the insurance that Benson procured fails to meet the contractual requirement because it limits coverage to negligently caused injuries. Benson makes no showing that the Coverage Endorsements required by the Benson subcontract limited the required insurance to injuries caused by negligence.

Benson does not contend that it was not obligated to name NY Times and AMEC as "additional insureds" on its policy. Rather, Benson first argues that NY Times is not entitled to coverage as an additional insured because it was not an "owner" entitled to insurance. In support of this contention, it submits a title search to show that NY Times was not the owner of record of the subject premises. (Benson's Aff. in Opp., Ex. A1-3.) Benson ignores that under its subcontract with AMEC, the New York Times Building, LLC is specifically identified as the owner. (Benson Subcontract at 3.) Moreover, NY Times admitted in its Answer that it was the owner of "portions of the premises." (Ds.' Ans., ¶ 2.) The title documents are accordingly irrelevant to whether plaintiff is the owner for purposes of the contract between AMEC and

Benson.

The court rejects Benson's further contention that because defendants have obtained coverage from another insurance company, defendants "should [not] be able to benefit from obtaining double coverage" from Benson's insurer. (Benson's Aff. in Opp., ¶ 6.) Where, as here, a party has breached a contractual obligation to procure insurance for another party, and the other party has procured its own insurance, it may recover out-of-pocket damages caused by the breach. (See Inchaustegui v 666 5th Ave. L.P., 96 NY2d 111, 114-115 [2001]; Wong v New York Times Co., 297 A.D.2d 544, 547-548 [1st Dept 2002].)

Benson's contention that plaintiff's accident did not arise out of Benson's work is wholly unpersuasive. The court has considered Benson's remaining contentions and finds them without merit. Defendants are accordingly entitled to summary judgment as to liability on their insurance procurement claim. (See Nrecaj v Fisher Liberty Co., 282 AD2d 213 [1st Dept 2001].)

Accordingly, it is

ORDERED that the motion of New York Times Building, LLC and AMEC Construction Management Inc. is granted to the extent that it is

ORDERED that plaintiff's Labor Law § 240(1) claim and Labor Law § 241(6) claims are dismissed, except to the extent that plaintiff's § 241(6) claim is based on Industrial Code § 23-1.7(e)(2); and it is further

ORDERED that plaintiff's Labor Law § 200 claim is dismissed as against defendant New York Times Building, LLC; and it is further

ORDERED that New York Times Building, LLC and AMEC are awarded summary judgment as to liability on their claim against Benson Industries, Inc. for failure to procure

insurance, with damages to be determined at trial or at any other disposition of the underlying action herein; and it is further

ORDERED that New York Times Building, LLC is awarded judgment as to liability on its contractual indemnification claim against Benson Industries, Inc., conditioned on a finding at trial that New York Times Building, LLC violated the Labor Law.

**FILED**

This constitutes the decision and order of the court.

**AUG 18 2011**

Dated: New York, New York  
August 11, 2011

  
NEW YORK  
COUNTY CLERK'S OFFICE  
MARCY FRIEDMAN, J.S.C.