Klewinowski v City of New York
2011 NY Slip Op 32456(U)
September 13, 2011
Sup Ct, NY County
Docket Number: 110740/2008
Judge: Judith J. Gische
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[* 1] SCANNED ON 9/15/2011

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 110740/2008
KLEWINOWSKI, ZENON
VS.
WELSBACH ELECTRIC
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. 005
MOTION CAL. NO. ______

this motion to/for ______

PAPERS NUMBERED

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

FILED
SEP 15 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: SEP 13 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

--X

Zenon Klewinowski and Magorzata Klewinowski,

Plaintiff (s),

-against-

City of New York, Amman & Whitney Consulting Engineers, P.C., Welsbach Electric Corp., and Consolidated Edison Company of New York, Inc.,

Defendant (s).

--X

DECISION/ORDER
Index No.: 110740-2008
Seq. No.: 005, 007, 008, 009

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

SEP 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Seq. No. 5	
Klewinowski n/m (partial 3212) w/BEO, HH affids, exhs	1
Welsbach opp w/AMK, PT affid, exhs	2
A&W opp w/GPA affirm	3
City opp w/TAP affirm, exhs	4
Klewinowski reply to Welsbach w/BEO affid, exhs	5
Klewinowski reply to A&W w/BEO affid, exhs	6
Klewinowski reply to City w/TT affid, exhs	7
Motion Seq. No. 7	
Welsbach n/m (3212) w/AMK affid, exhs	8
Klewinowski opp w/ED affid, exhs	9
City partial opp w/TAP affirm, exhs	10
Welsbach reply w/AMK, exhs	11
Motion Seq. No. 8	
City n/m (3212) w/TAP affirm, exhs (plus sep volume)	12, 13
Klewinowski opp w/ED affid, exhs	14
A&M partial opp w/GPA affirm	15
City reply to Klewinowski w/TAP affirm	16
City reply to A&M w/TAP affirm	17

Motion Seq. No. 9

A&W n/m (3212) w/GPA affirm, EC affid, exhs 18
Klewinowski's opp w/ED affirm, exhs 19
City partial opp w/TAP affirm, exh 20
A&W reply 21

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.;

Plaintiff Zenon Klewinowski ("Klewinowski") alleges that defendants violated sections 240 [1], 241 (6) and 200 of the New York State Labor Laws ("Labor Law § ____") and that these violations were the proximate cause of his injuries. Issue has been joined by defendants the City of New York ("City"), Amman & Whitney Consulting Engineers, P.C. ("A&W"), and Welsbach Electric Corp. ("Welsbach"). The claims by and against defendant Consolidated Edison Company of New York were previously dismissed (Order, Gische J., 4/7/11). Klewinowski filed his note of issue on August 12, 2010. The court has before it timely motions for summary judgment by the plaintiff and the three remaining defendants (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]). The motions are hereby consolidated for determination in this decision and order.

Facts and Arguments

Klewinowski alleges that he was injured on March 20, 2008 while working as a laborer for non-party Tully Construction Co. ("Tully" or "employer") on the Houston Street Reconstruction project in Manhattan ("the project") when a light pole was knocked down and struck him. He was in an induced coma for eight (8) days and sustained numerous fractures, including a broken pelvis.

The area under construction is a public street owned by the City. The City had a contract with Tully, the City's general contractor, for that project. Tully, in turn, entered into a contract with Welsbach, an electrical contractor, for it to perform electrical work and do such things as erect temporary light poles. The City also entered into a separate contract with A&W to perform engineering services as a "resident engineer" on the same project.

At the time of the accident, Klewinowski was standing at the west side of the median, at the intersection, waiting to begin saw-cutting the roadway. Another employee Tully was operating a Caterpillar 315 with an excavating arm or "boom" attached to it. The boom was being used to move pipes located on one side of the Houston street median to another. As a water main pipe was being moved, the Tully employee lifted the boom thereby coming into contact with an overhead wire. The wire, which was attached on one side to a temporary traffic signal pole and a permanent light pole on the other, supplied power to the temporary lights in the median. The temporary light pole (approximately 20 feet tall), tipped over and fell on plaintiff. The other, permanent, pole bent but remained upright. The temporary pole was bolted into a concrete base (known as a "deadman") which was approximately 30 inches square and 30 inches high. It was not bolted into the street. Klewinowski alleges that he is entitled to summary judgment on his Labor Law § 240 [1] claim because it imposes strict liability on contractors owners and their agents and each defendant meets this criteria. He has not moved with respect to his Labor Law §§ 241 [6] and 200 claims but they are the subject of defendants' motions. He contends the City is liable for his injuries because it is the owner of the project, A&W had a contractual obligation to monitor the work being performed at the job

site, including the use of the Caterpillar, and Welsbach owned and negligently installed the overhead wire and concrete base onto which the pole (which it also erected) was mounted.

The City, Welsbach and A&W separately oppose plaintiff's motion and seek summary judgment dismissing all of his Labor Law claims and all cross claims between them. While the defendants adopt one another's arguments as to why the plaintiff's complaint should be dismissed, they raise opposing arguments about why, if the complaint is not dismissed, they are still entitled to summary judgment on their cross claims.

Vito Delledera, a Tully employee, was an eyewitness to the accident and he was deposed. He testified that the pipe, which was approximately 12 feet long, was suspended from the boom by a chain in a sling like fashion. Two Tully employees were attempting to keep the pipe steady and prevent it from swinging back and forth as the Caterpillar moved along the roadway, preparing to turn left onto Crosby street. The pipe itself was suspended approximately 3 feet above the open roadway when the accident occurred. Delledera also testified that he while he was walking behind the Caterpillar, he noticed that the wire was wrapped onto the "top of the arm of the machine" so he began "yelling for the machine to stop." The operator of the Caterpillar (apparently) did not hear him and continued along for another 7 to 8 feet, with the wire getting tauter as it wrapped around the "arm" of the boom, eventually pulling the temporary pole down. As for the "dead-man," Delledera testified that "it was still on the ground. . . we couldn't lift the dead-man, we [lifted] the pole which ...wasn't very heavy. The dead-man, we [weren't] able to lift. It was on an area where [we were] able to lift it up enough and

pulled [Klewinowski] out of there." When Welsbach arrived, their workers picked up all the debris and reinstalled the light pole onto the dead-man

Anthony Latorraca, another eyewitness, was deposed on behalf of Con Edison, a defendant who is no longer in the case. He testified that the wire was slightly lower than the poles, the wires and poles were installed by Welsbach. Although he "frequently" saw Welsbach personnel at the site, once they erected poles they moved onto another location. Latorraca stated that the Caterpillar was only operated by Tully employees.

Charles Guarino, the operator of the Caterpillar, provided his sworn affidavit stating that excavator's boom came in contact with the overhead wire and that the shovel was raised in the air to allow the pipes to be transported. He states that he believed the cable were strung at a "sufficient height above the roadway at the lowest point."

Esmeraldo Caballero, employed by A&W as an inspector on the day of the accident, also provides his sworn affidavit stating that he inspected Welsbach's installation of the temporary traffic pole. He states the height of the wire where it sagged was more than 18 feet above the ground.

Klewinowski's expert, Herbert Heller, Jr., a civil engineer, opines that the wire could not have been more than 18 feet off the ground because the height of the Caterpillar's cab is 10' 4" and that "the part of the Cat 315 that first hit the overhead wire, which is not high above the cab, is less than 18 feet high." He opines further that the wire was not high enough to accommodate the Cat 215 because "[it] is a machine with a boom that can easily be extended greater than 18 feet in the air."

Law Applicable to Motions for Summary Judgment

On a motion for summary judgment, it is the movant's burden to set forth

evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

Discussion

Are Welsbach and/or A&W proper Labor Law defendants?

The term "owner" under Labor Law § 240 [1] encompasses "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit" (Zaher v. Shopwell, 18 AD3d 339, 339 [1st Dept 2005] *citing* Cupertino v. Ward, 100 AD2d 565, 566 [1st Dept 1984]). Neither Welsbach nor A&W are the owners of the construction project and, therefore, liability does not attach to either of these defendants as an "owner."

Where a "contractor" is involved, this refers to a contractor who has contractual supervisory authority over the worked performed, such as the general contractor (Burke v. Hilton Resorts Corp., 85 A.D.3d 419 [1st Dept. 2011]). A subcontractor is responsible for the safe performance of the work only within the scope of its own contract or subcontract (Jones v. West 56th Street Associates, 33 A.D.3d 551 [1st Dept 2006]; Armentano v. Broadway Mall Properties, Inc., 30 A.D.3d 450 [2nd Dept 2006]). On the day of the accident, Tully was moving pipes using a Caterpillar being operated by a Tully employee. Plaintiff, also a Tully employee, was waiting to cut the road bed with a saw. The work being performed by Klewinowski when he was injured was not within the scope of the Welsbach subcontract and wholly unrelated to the Welsbach's work at the job site.

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If the entity or person is neither an "owner" nor the general contractor, then liability may still attach if s/he or it is an "agent." The term "agent" under Labor Law § 240 [1] applies to someone who acts for the owner or general contractor by standing in their shoes and performing their duties and obligations. Only upon obtaining the authority to supervise or control the particular work in which the plaintiff was engaged at the time of the injury does the third party fall within the class of those having nondelegable liability as an '"agent" under Labor Law § 240 (Walls v. Turner Const. Co., 4 N.Y.3d 861 [2005]; Russin v. Picciano & Son, 54 N.Y.2d 311, 318 [1981]). An entity or person may be a statutory agent even if the person or entity does not actually exercise that supervisory authority with respect to plaintiff's particular task if such supervisory authority is contractual (Burke v. Hilton Resorts Corp., 85 A.D.3d 419 [1st Dept 2011]; Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 [1981]; Weber v. Baccarat, Inc., 70 A.D.3d 487 [2010]). However, the liability of a contractor as agent for a general contractor or owner for job site injuries is limited to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created (Russin v. Picciano & Son, 54 NY2d at 318).

Welsbach has proved that it is not a statutory "agent" within the meaning of the Labor Laws. While it may have owned the pole, wire, etc., and installed them at the project (points addressed at greater length later in this decision), Welsbach did not exercise any supervisory authority with respect to the work being performed at the time of plaintiff's accident nor did it have any contractual obligation to do so.

A&W, however, has failed to prove that it is entitled to summary judgment

because it is not an "agent" within the meaning of the Labor Laws. Pursuant to A&W's contract with the City, the City delegated a number of key supervisory and managerial obligations which may have transcended it from being just another contractor on the Houston street project.

By contract A&W undertook to provide "engineering services," but such services include "all services necessary and required for the inspection, management, coordination and administration of the Project, so that the required construction work is properly executed, completed in a timely fashion and conforms to the requirements of the construction contract and to good construction practice." (6.1, A&W contract). Pursuant to section 6.1.2 of the contract, A&W was also obligated "serve as the representative of the Department[1] at the site" and was "responsible for the inspection, management and administration of the performance of the work . . ." In terms of other contractors at the project, A&W had the authority to insure that:

> the construction contractor(s) has obtained all necessary permits, certificates, licenses or approvals, required for the performance of the work by the New York City Building Code or any other applicable law, rule or regulation of any government entity. Assure that no work proceeds in the absence of such necessary permits, certificates, licenses or approvals
> (6.4.1, A&W contract)

Under section 6.4.2, A&W had the authority to make recommendations regarding the approval of proposed subcontractors and material vendors and pursuant to section 6.4.3. A&W undertook responsibility for "technical inspection, management and

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[1]Referring to the Department of Design and Construction, an agency through which the City (i.e. the owner of the project) acts.

administration of the work on the Project until final completion and acceptance..." A&W was also responsible for preventing the installation of the work, or the furnishing of material or equipment not properly approved or non-compliant with the requirements of the construction contracts (6.4.3[c], A&W contract). Section 6.4.5 of the A&W contract required A&W to "evaluate the means and methods of construction proposed by the contractor(s) and advise the commissioner in the event the Engineer reasonably believes that such proposed means and methods of construction will constitute or create a hazard to the work, or persons or property, or will not produce finished work in accordance with the construction contract(s)." A&W also had personnel monitoring the conditions at the project, conducting daily site patrols and inspecting temporary traffic poles once installed.

Given these broad, significant, key and wide ranging responsibilities delegated to A&W by the owner, A&W has failed to prove that, as a matter of law, it is not a statutory agent. Therefore, A&W's motion for summary judgment dismissing the Labor Law claims against it for that reason is denied.

Is this a Labor Law § 240 [1] case?

Labor Law § 240 [1], commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1st Dept 2007] *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 [1995]). Labor Law § 240 [1] requires property contractors, owners and their agents to furnish or cause to be furnished safety devices, such as ladders and scaffolds, which are "so constructed, placed and operated as to

give proper protection" to workers.

A plaintiff is not entitled to the protections of this section unless his or her injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]; Makarius v. Port Authority of New York and New Jersey, 76 A.D.3d 805 [1 Dept. 2010]). Although plaintiff contends that Runner "altered the landscape of Labor Law § 240 [1] jurisprudence..." this is an incorrect statement of the law. Runner did not abrogate prior case law requiring that : 1) there be a significant height differential between the work being performed and the object being pulled, hoisted, etc.; 2) the size and weight of the object; and 3) whether the plaintiff's injuries were the direct consequence of defendant's failure to provide adequate protection against a risk arising from a physically significant elevation (Makarius v. Port Authority of New York and New Jersey, --- N.Y.S.2d ----, 2010 WL 3463488 [1st Dept 2010]; Runner v. New York Stock Exch., Inc., supra).

In Runner, the court restated a well established legal principle that "the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk" (Runner v New York Stock Exch., Inc., 13 NY3d at 603). The court went further, however, to state that "the single dispositive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Id.) Since not every instance of a falling object constitutes a

violation of Labor Law § 240 [1], a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 [1] and those caused by general hazards specific to a workplace (Makarius v. Port Authority of New York and New Jersey, 76 A.D.3d at 807 *internal citations omitted*).

In order to make a prima facie showing of entitlement to judgment as a matter of law on his Labor Law § 240 [1] claim, plaintiff must demonstrate not only that defendants violated the statute, i.e., failed to provide him with an adequate safety device, but also that the violation was a proximate cause of the accident (see, e.g. Panek v. County of Albany, 99 NY2d 452, 457 [2003]. Klewinowski has not met his burden of proving that his accident was due to a statutory violation of Labor Law § 240 [1].

First, unlike the plaintiffs in Runner and other cases involving falling objects, the pipe that was chained to and being transported by the Caterpillar on its boom or arm did not break free from its shackles and fall down onto the plaintiff. Thus, descriptions by plaintiff that the pipe was swaying or needed two people to steady it are simply red herrings. As described by each eyewitness, including the plaintiff, the boom of the Caterpillar becoming entangled in the overhead wire strung between the two poles. When that occurred, the wire began to stretch tighter and tighter until it pulled down the temporary light pole, causing it to topple onto Klewinowski, pinning him beneath it.

The work Klewinowski was performing when the incident occurred was wholly unrelated to an elevation-related hazard and, therefore, not within the purview of Labor Law § 240 [1] (see, Romang v. Welsbach Electric Corp., 47 AD3d 789 [2nd Dept 2008]). He was not involved in moving the pipes or the Caterpillar. He was waiting to start saw cutting the road way.

Klewinowski has not demonstrated that defendants failed to provide him with some safety device that would have prevented his accident. He has also failed to prove that his accident is directly attributable to, or that his accident was the direct consequence of, a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Thus, while something did topple over and fall (the temporary light pole), plaintiff has failed to show that this was due to a violation of Labor Law § 240 [1]. Therefore, Klewinowski's motion for summary judgment on his Labor Law § 240 [1] claims against Welsbach, A&W and the City is denied and their motions for summary judgment dismissing the Labor Law § 240 [1] claims against each one of them are granted. Furthermore, although the court has dismissed the Labor Law claims against Welsbach because it is not a statutory defendant (i.e. contractor, owner or agent), the court's decision, that plaintiff's accident was not due to a statutory violation of Labor Law § 240 [1], applies to Welsbach as well.

Labor Law § 241 [6]

Labor Law § 241 [6] imposes a non-delegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Comes v. New York State Electric & Gas Co., 82 NY2d 876 [1993]; Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]). To properly state a claim under Labor Law § 241[6], the plaintiff must identify a specific and applicable Industrial Code provision that has been violated (Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*). The question of whether the plaintiff has alleged a specific provision of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a

legal issue for the court to decide (Messina v. City of New York, 30 AD2d 121 [1st Dept 2002]).

Klewinowski alleges the following Industrial Code Regulations were violated by the defendants. Although the court has decided that Welsbach is not a statutory defendant and this decision alone would defeat plaintiff's claims against that defendant, any decision about the specificity and/or (in)applicability of these Industrial Code Regulations applies to Welsbach as well.

§ 23-1.13 Electrical hazards.

(c) Temporary electric power circuits at construction, demolition or excavation job sites.

(1) Temporary electric wiring.

(I) All temporary wiring shall be supported on proper insulators and not looped over nails or brackets. No bare wires or other unprotected current-carrying parts shall be located within eight feet above any surface where persons may work or pass unless completely guarded by a fence or other barrier.

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(iii) Elevated power lines shall have sufficient vertical clearance where they cross highways, access roads or areas traveled by trucks, cranes, shovels or other similar equipment. In no case shall such vertical clearance be less than 18 feet.

§ 23-4.1 General requirements.

(a) Stability of structures. Except in hard rock, whenever any excavation is to be performed in the vicinity of buildings, structures or utilities, the integrity, stability and structural adequacy of such buildings, structures or utilities shall be maintained at all times by the use of underpinning, sheet piling, bracing or other equivalent means to prevent damage to or failure of foundations, walls, supports or utility facilities and to prevent injury to any person. Such underpinning, sheet piling, bracing or equivalent means shall be inspected at least once each day or more often if conditions warrant. Every such inspection shall be conducted by an experienced, designated person

§ 23-4.2 Trench and area type excavations.

(k) Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.

§ 23-6.1 General requirements (materials hoisting).

(d) Loading. Material hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer. Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portions of such loads during transit. Suspended loads shall be securely slung and properly balanced before they are set in motion.

§ 23-6.2 Rigging, rope and chains for material hoists.

(d) Use of chains. (1) Chains shall not be used as slings in hoisting operations except for the raising or lowering of wooden piles, large timbers, large pieces of masonry or large stones.

§ 23-8.1 General provisions (mobile cranes, tower cranes and derricks).

(f) Hoisting the load.

(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:

(iii) The hook shall be brought over the load in such manner and location as to prevent the load from swinging when hoisting is started.

(iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

(2) During the hoisting operation the following conditions shall be met:

(ii) The load shall not contact any obstruction

23-8.2 Special provisions for mobile cranes

(d) Mobile crane travel.

(1) A mobile crane traveling to or from one job site to another or traveling on a street or highway shall not carry any jibs, attachments, buckets or other devices or

> material attached in any way to the boom whether the boom is in the folded position or not.
>
> Exception: A hydraulic crane where the jib is permanently hinged to the boom or any crane where the manufacturer authorizes that the design of such crane guarantees the safe transport of the jib or other attachments
>
> ***
>
> (3) A mobile crane, with or without load, shall not travel with the boom so high that it may bounce back over the cab.

Section 23-1.13 et seq. protects workers against electrical hazards involving power lines, surges and electrical circuits (see, Snowmen v. New York City Transit Authority, 248 AD2d 235 [1st Dept 1998]). Although it is a sufficiently specific safety directive to support a cause of action under Labor Law § 241 [6], Klewinowski has not alleged that his injuries are attributable in any way to a power surge or related phenomenon. Therefore, these standards are inapplicable to the facts of this case.

Section 23-4.1 protects workers against the collapse of structures associated with loss of stability due to excavation (Scarso v. M.G. General Construction Corp., 16 AD3d 660 [2nd Dept 2005]). This section does not apply to the facts of this case, as plaintiff presents them to be. Section 23-4.2 pertains to trenches and shoring of trenches (Settimo v. City of New York, 16 Misc.3d 1133(A) [Sup Ct., Richmond 2007]. It is also inapplicable to the case at bar because plaintiff was not working in a trench when he was injured.

Although Section 23-6.1 is sufficiently specific to support a Labor Law § 241 [6] claim, plaintiff was not injured while operating a hoist nor was he injured because of an excessive load, therefore, it cannot serve as a predicate basis for Klewinowski's Labor

Law § 241 [6] cause of action (see, Amore v. Wellmod Homes Corp., 2008 WL 2463782 [Sup Ct., Suffolk Co. 2008] *n.o.r*).

Sections 23-8.1 (f) et seq and 23-8.2 (d) et seq are specific enough to support a Labor Law § 241 [6] claim and plaintiff has raised triable issues of fact whether defendants violated these sections (see, Cammon v. City of New York, 21 A.D.3d 196 [1st Dept 2005]; Braun v. Fischbach and Moore, Inc., 280 AD2d 506 [2nd Dept 2001]). Therefore, the defendants' motions for summary judgment dismissing is granted to the extent such claim is predicated on alleged violations of the sections the court has decided are inapplicable, but denied to the extent his claims are predicated on alleged violations of sections 23-8.1 (f) et seq and 23-8.2 (d) et seq.

Labor Law § 200 and common law negligence

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Unlike Labor Law §§ 240 [1] and 241 [6], liability can only be imposed if the defendant has actually been negligent. The elements of a prima facie Labor Law § 200 claim are that the defendant: 1) exercised supervision and control over the work performed or 2) had actual or constructive notice of the dangerous condition alleged, or 3) created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st Dept. 1998]). Where the alleged failure to provide a safe work place "arises from the contractor's methods and the [defendant] exercises no supervisory control ... no liability attaches to the owner under the common law or under Labor Law § 200" (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). The control which

owners or general contractors must have in order to be liable for dangers that arise from the method of the work is the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998] *internal quotation marks and citation omitted*). Thus, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [defendant] controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (Hughes v. Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007]).

Since Welsbach is neither an owner nor general contractor, and it is entitled to summary judgment dismissing the Labor Law § 200 claim against it. Klewinowski has, however, raised triable issues of fact whether Welsbach created a dangerous condition which would tag it with liability for his accident. Although Welsbach contends it safely strung the wire and erected the temporary light pole, this cannot be decided as a matter of law. Plaintiff's expert contends the wire was simply looped around the temporary pole but it should have been connected using an insulator. According to the sworn affidavit of Peter Tuozollo (Welsbach's electrician), the wire was attached using an insulator. Therefore, Welsbach's motion for summary judgment dismissing the common law negligence claim against it must be denied.

The motion by A&W to dismiss the Labor Law § 200 and common law negligence claims is denied and those claims will have to be decided at trial. Dino Basso, Tully's supervisor, was deposed and also provides his sworn affidavit in which he states there were two prior incidents involving the overhead wire and an excavator. In each incident the operator of the excavator reportedly raised the boom striking the cable. Thus, there

are triable issues of fact whether A&W had notice of a dangerous condition.

Although the City is the owner of the project, the City has proved it did not exercise supervision and control over the work performed. The City only had one person at the site (Modi) and he did not direct nor supervise the work. The City has also proved it did not have actual or constructive notice of the dangerous condition alleged. It has also proved it did not create the condition. In opposition to the City's motion, Klewinowski has failed to raise triable issues of fact. Therefore, the City's motion for summary judgment dismissing the Labor Law § 200 and common law negligence claims against it is granted.

Contractual Indemnification

Welsbach's motion for summary judgment dismissing the claims against it for indemnification is denied as there are issues of fact whether it caused or contributed to the happening of Klewinowski's accident. Furthermore, any argument by Welsbach that it "only" had a contract with Tully fails. Pursuant to paragraph 7 of Welsbach's contract, it agreed to "indemnify and save harmless the Contractor [Tully] and/or the Owner [The City] ... from all damages or liability to which the Contractor and/or the Owner may be subjected [to] by reasons of injury, including death, at any time resulting therefrom, to the person or property of others resulting from the performance of the work of the Subcontractor [Welsbach] hereunder, or through the negligence, act or omission of the Owner, Contractor, or Subcontractor or any of their agents, servants or employees or any other person on or near the site of the project with the consent of the Subcontractor, or through any improper or defective machinery, implements or appliances used by the Subcontractor." Although Welsbach denies it was negligent, if it is determined that

Klewinowski's accident was at least, in part, due to the manner in which the temporary light pole was installed, then the indemnity obligations to the City would be triggered. However, the motion by the City for a conditional order is, also denied. There are triable issues of fact whether the plaintiff's injuries "result from" the performance of Welsbach's work.

The motion by Welsbach for summary judgment dismissing A&W's cross claim for indemnification is denied for the same reason that the court denied its motion against the City.

A&W's motion for summary judgment against Welsbach on its indemnification claim is denied because there are triable issues of fact whether A&W was actively negligent (*supra*) and a party seeking contractual indemnification must "prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (Cava Construction. Co., Inc. v. Gealtec Remodeling Corp., 58 A.D.3d 660 [2d Dept. 2009]).

The City's motion for summary judgment on its contractual indemnification cross claim against A&W must be denied. Although A&W is obligated to indemnify and hold harmless the City, this is if the claim "[arises] out of the negligent performance of [A&W's] services, including professional services, or caused by any error, omission or negligent acts of the Engineer or anyone employed by the Engineer, in the performance of this Contract." Since the issue of A&W's liability must be tried, the City's motion is premature.

Recapitulation

In accordance with the foregoing, the court has decided that Welsbach is not a

statutory defendant under the Labor Laws and, therefore, the Labor Law §§ 240 [1], 241 [6] and 200 claims against it are dismissed. However, there are issues of fact whether Welsbach was negligent.

Each defendant's motion to dismiss plaintiff's Labor Law § 240 [1] claims is granted and his Labor Law § 240 [1] claim is dismissed.

The Labor Law § 241 [6] claims, insofar as they are based upon alleged violations of Sections 23-8.1 (f) et seq and 23-8.2 (d) remain to be decided at trial. Otherwise, plaintiff's Law § 241 [6] claims are dismissed.

The Labor Law § 200 and common law negligence claims are dismissed against the City.

The Labor Law § 200 and common law negligence claims remain to be tried against A&W.

The indemnification claims remain for trial as well.

Conclusion

The motions are decided in accordance with the foregoing. Plaintiff shall serve a copy of this order on the Mediator and the Office of Trial Support so the case can be scheduled for trial. Any relief not expressly addressed is hereby denied.

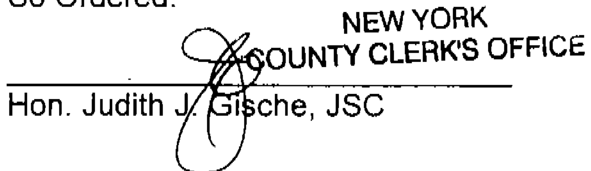
This constitutes the decision and order of the court.

FILED

SEP 15 2011

Dated: New York, New York
September 13, 2011

So Ordered:



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