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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MD, MD

RICHARD J. ERICKSON,

Plaintiff,

-against-

CROSS READY MIX, INC. and "JOHN DOE", an agent, servant and/or employee of Cross Ready Mix, Inc., TURNER CONSTRUCTION COMPANY, ELITE READY MIX CORPORATION and "JOHN DOE", an agent, servant and/or employee of Elite Ready Mix Corporation,

Defendants.

Motion Sequence #22, #23
Submitted November 1, 2011

INDEX NO: 11947/05

TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiff,

-against-

COMMODORE CONSTRUCTION CORP.,

Third-Party Defendant.

The following papers were read on these motions:

Notice of Motion and Affs.....1
Notice of Cross-Motion and Affs.....2
Affs in Opposition.....3
Affs in Reply.....4
Affs in Sur Reply.....5

Upon the foregoing, it is ordered that this motion by Plaintiff, Richard J. Erickson, pursuant to CPLR 3212, for an order granting him partial summary judgment as to defendant Turner Construction Company and to enter judgment against the defendant Turner Construction Company for its purported failure to comply with an Order of the Supreme Court, Appellate Division, Second Department, dated November 23, 2010, is denied.

The Cross-Motion by Defendant, Turner Construction Company, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the plaintiff's Labor Law §241(6) claim and all cross claims asserted against said defendant and for an Order, pursuant to CPLR 3212, granting it summary judgment on it's contractual indemnification claims against third party defendant Commodore Construction Corp., is denied

As stated in the Decision and Order of the Supreme Court, Appellate Division, Second Department, dated July 13, 2010, the facts of this case are established as follows:

As the general contractor of a construction site where a commercial building was being renovated, the defendant/third party plaintiff, Turner Construction Company ("Turner"), hired the third party defendant, Commodore Construction Corp. ("Commodore") to perform certain concrete masonry work. In turn, Commodore hired the defendant Cross Ready Mix, Inc. ("Cross Ready") to deliver the concrete necessary for, among other things, creating the concrete bases for approximately four light posts outside the building.

On the day of the accident, November 4, 2003, Cross Ready had committed to making more deliveries than it could fulfill using its own trucks. In order to make all of its deliveries, it hired two trucks and accompanying drivers from the defendant Elite Ready Mix Corporation ("Elite Ready Mix") for the day. Cross Ready sent a cement truck and driver

to the construction site where, upon arrival, the driver began pouring cement into certain forms used to create concrete curbs in front of the building. Thereafter, the truck proceeded to the back of the building, where the plaintiff and his co-worker, Michael Schutt, both of whom were Commodore employees, were preparing the forms into which the concrete would be poured for the light post bases. While the plaintiff and Schutt had their backs to the truck, the driver began to back up in their direction. Upon seeing this, Schutt attempted to make himself visible in the driver's side-view mirror so that he could direct him to stop backing up. As Schutt was trying to position himself in this manner, he witnessed the truck back up over a pile of debris and the truck to tilt to one side, causing the 12-foot chute attached to the back of the truck to swing and strike the plaintiff, knocking him into the hole surrounding the form for the light post base. The plaintiff allegedly sustained injuries as a result of this contact with the chute and his subsequent fall.

The plaintiff commenced this action against Turner, Cross Ready and Elite alleging violations of Labor Law §§200, 240(1) and 241(6), and common law negligence. Turner commenced a third party action against Commodore seeking contractual indemnification, among other things. The actions were subsequently consolidated.

On or about March 23, 2007, plaintiff filed and served a Note of Issue certifying that discovery was complete and placing this matter on the Court's trial calender. Subsequently, the defendants and the third party defendant all brought motions seeking summary judgment dismissal of the plaintiff's complaint. On the day prior to oral argument and the submission of the motions for summary judgment, June 9, 2008, plaintiff served a Supplemental Bill of Particulars and for the first time set forth Industrial Code sections alleged to serve as a predicate to his Labor Law §241(6) cause of action, including but not

limited to 12 NYCRR 23-9.7(d). By decision dated September 22, 2008, this Court (Martin, J.), granted plaintiff's motion to compel acceptance of the Supplemental Bill of Particulars as to the Industrial Code sections only and not as to the newly alleged injuries.

Thereafter, in another Decision and Order of this Court dated April 17, 2009, this Court (Martin, J.) rejected plaintiff's allegations as to the specific nature and applicability of the alleged Industrial Code sections (including 12 NYCRR 23-9.7[d]) and dismissed the Labor Law §241(6) cause of action as against all defendants, including Turner.

Subsequently, pursuant to a Decision and Order of the Appellate Division, Second Department dated July 13, 2010, the Court reversed and modified the Decision and Order of this Court dated April 17, 2009 to the extent that this Court had denied, upon renewal, that part of Turner's motion seeking summary judgment dismissal of the plaintiff's Labor Law §241(6) cause of action predicated on an alleged violation of 12 NYCRR 23-9.7(d). That is, the Second Department ruled that:

> That provision [12 NYCRR 23-9.7(d)] requires that "[t]rucks shall not be backed or dumped in places where persons are working nor backed into hazardous locations unless guided by a person so stationed that he sees the truck drivers and the spaces in back of the vehicles" (12 NYCRR 23-9.7 [d]).
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> *Evidence that the cement truck which struck the plaintiff at the construction site backed into the area where he was working, without being guided by another person who was properly positioned, is sufficient to raise a triable issue of fact as to whether Turner's violation of 12 NYCRR 23-9.7 (d) was a proximate cause of the plaintiff's injuries****
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> To the extent that the Supreme Court held that Turner, as the general contractor, was not liable under Labor Law § 241 (6) since it did not own or operate the truck, the Supreme Court erred. Labor Law § 241 (6) "creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where . . . a specific, positive command[ ] or a concrete specification of a regulation promulgated by the Commissioner . . . has been violated" *** Accordingly, upon renewal, the Supreme Court should have adhered to the determination in its prior order denying that branch of Turner's cross

> motion which was for summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it was predicated upon an alleged violation of 12 NYCRR 23-9.7 (d).
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> (Citations Omitted and Emphasis Added).

Upon the instant motion, plaintiff seeks summary judgment on the Labor Law §241(6) cause of action predicated upon 12 NYCRR 23-9.7(d). Defendant Turner opposes and in turn cross moves pursuant to CPLR 3212, for an Order granting it summary judgment dismissing the plaintiff's Labor Law §241(6) claim. Said part of plaintiff's motion and defendant Turner's cross motion are both denied.

In addition to the fact that the Appellate Division's decision is binding precedent on this Court, pursuant to the doctrine of law of the case, once a point has been decided in a case, it cannot be relitigated within it (*McGrath v Gold*, 36 NY2d 406; *Hampton Val. Farms, Inc. v Flower & Medalie*, 40 AD3d 699). That is, the doctrine of the law of the case makes the decided point binding not only on the parties, but on the court as well: no other judge of coordinate jurisdiction may undo the decision (*Fadden v Cambridge Mut. Fire Ins. Co.*, 51 Misc.2d 858 *aff'd* 27 AD2d 487). Therefore, the Second Department's ruling that there "is sufficient evidence to raise an issue of fact as to whether Turner's violation of 12 NYCRR §23-9.7(d) was a proximate cause of the plaintiff's injuries" is not only binding precedent, but it is also law of the case herein.

The matter will therefore proceed to trial on this issue.

Accordingly, plaintiff's application for an Order, granting him partial summary judgment on his Labor Law §241(6) claim against Turner, and defendant, Turner's application for an order granting it summary judgment dismissing the plaintiff's Labor Law

§241(6) claim, are both denied.

That Turner also seeks summary judgment on it's contractual indemnification claims against third party defendant Commodore Construction Corp, said application is also denied. As previously stated by this Court, in its decision dated September 22, 2008 and affirmed by the Second Department in it's Decision and Order dated July 13, 2010 (75 AD3d 519), summary judgment before an apportionment of fault is premature (*Barnes v DeFoe/Halmar*, 271 AD2d 387, 388; *Chun v Ecco III Enters.*, 268 AD2d 454, 454–455).

Therefore, Turner's motion for summary judgment on it's contractual indemnification claim is also denied.

Finally, inasmuch as plaintiff agrees that the defendant Turner has now complied with Order of the Appellate Division Second Department dated November 23, 2010 awarding him costs in the amount of $100, plaintiff's application for a judgment against Turner is denied as moot.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

Dated: DEC 09 2011

UTE WOLFF LALLY, J.S.C.

ENTERED
DEC 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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