

<b>Benes v Hazen &amp; Sawyer, P.C.</b>
2015 NY Slip Op 30729(U)
May 1, 2015
Supreme Court, Suffolk County
Docket Number: 11-7642
Judge: Arthur G. Pitts
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Benes v Hazen & Sawyer, P.C.  
Index No. 11-7642  
Page No. 2

**ORDERED** that this motion (003) by defendant Hazen and Sawyer, P.C. and Hazen and Sawyer Environmental Consultants, Inc. for summary judgment and this motion (005) by Five Star Electric Corp. for summary judgment are consolidated and determined together with the cross motion (004) by WDF, Inc. for summary judgment; and it is further

**ORDERED** that this motion (003) by defendant Hazen and Sawyer, P.C. and Hazen and Sawyer Environmental Consultants, Inc. (“Hazen”) for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and all cross-claims is determined herein; and it is further

**ORDERED** that this cross motion (004) by WDF, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor is determined herein; and it is further

**ORDERED** that this motion (005) by Five Star Electric Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross-claims is granted.

This is an action to recover damages for injuries to plaintiff’s right knee that he allegedly sustained on July 28, 2010 when he tripped over a horizontal section of rebar that was running through a U-shaped rebar installed along the edges of a concrete platform base at a construction site located at the New York City Department of Environmental Protection’s waste-water treatment project at 150-20 134<sup>th</sup> Street, in Jamaica, New York. At the time of the accident, plaintiff was employed as an electrician by third-party defendant Eaton Electric, Inc. (“Eaton”)<sup>1</sup>. The New York City Department of Environmental Protection (“DEP”) hired defendant Hazen as the construction manager and defendant Five Star Electric Corp. (“Five Star”) as the prime electrical contractor. Five Star, in turn, subcontracted electrical work to plaintiff’s employer, Eaton. The DEP hired defendant WDF, Inc. (“WDF”) as the prime concrete contractor that poured the transformer pad and installed rebar for curbing around the pad.

Plaintiff alleges a first cause of action for common-law negligence and a second cause of action for violation of Labor Law § 200 alleging that the jutting rebar were improperly delineated and constituted a dangerous and defective condition; a third cause of action for violation of Labor Law § 240 for failure to provide proper safety devices; and a fourth cause of action for violation of Labor Law § 241 (6) for failing to comply with the following provisions of the Industrial Code: 12 NYCRR §§ 23-1.5, 23-1.7(d), (e)(1) and/or (e)(2). Defendants’ answers contain cross claims for contribution, common-law and contractual indemnification, and breach of contract.

Hazen now moves for summary judgment on the grounds that it was not a statutory agent under the Labor Law or, in the alternative, that plaintiff fails to make a prima facie case against it under the Labor Law statutes or common-law negligence. Its submissions in support of the motion include the pleadings; the deposition transcripts of plaintiff, Leo Dudin on behalf of Hazen, Louis Roman on behalf of Five Star, and Daniel Zane on behalf of WDF; and the agreement between Hazen and the DEP.

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<sup>1</sup> By stipulation of discontinuance dated April 30, 2013, Five Star discontinued the third-party action against Eaton without prejudice.

Benes v Hazen & Sawyer, P.C.

Index No. 11-7642

Page No. 3

WDF cross-moves for summary judgment dismissing the third cause of action for violation of Labor Law § 240 on the ground that plaintiff tripped and fell at ground level; dismissing the fourth cause of action for violation of Labor Law § 241 (6) on the ground that the alleged Industrial Code sections are too general or vague or inapplicable to the subject circumstances; and dismissing the first two causes of action on the grounds that it was not an owner of the site, plaintiff's employer or a general contractor, or otherwise exercised supervisory control over the methods and manner of plaintiff's work. In addition, WDF asserts that to the extent that plaintiff claims that it created a dangerous condition by installing the rebar, no negligence claim exists under Labor Law § 200 inasmuch as the original installation was made in accordance with project and contract specifications after which, WDF was ordered by site engineers and safety authorities, including Hazen, to leave the subject rebar intact and untouched pending a change in design plans and further instructions to WDF. WDF incorporates by reference the pleadings, papers, depositions, memoranda of law and exhibits in Five Star's motion.

Five Star moves for summary judgment dismissing plaintiff's Labor Law § 240 cause of action on the ground that there are no gravity-related allegations. In addition, Five Star seeks dismissal of plaintiff's Labor Law § 241 (6) cause of action on the ground that the alleged Industrial Code regulations constitute either a general safety standard (12 NYCRR § 23-1.5), or are inapplicable to the circumstances herein (12 NYCRR §§ 23-1.7[d], [e][1]), or are related to a hazard that was an integral part of the work of the construction project (12 NYCRR §1.7 [e][2]). Five Star also asserts that the Labor Law § 200 claim must be dismissed inasmuch as the rebar was an integral part of the work and was not a dangerous or defective condition, Five Star did not install said rebar or have any control over the worksite, and in any event, the rebar was an open and obvious condition. Its submissions in support of its motion include the pleadings; and the deposition transcripts of plaintiff, Leo Dudin on behalf of Hazen, Louis Roman on behalf of Five Star, and Daniel Zane on behalf of WDF.

Plaintiff testified at his deposition that prior to the accident, he and other Eaton workers had been instructed by "Frank" the foreman that they would be pulling cables through underground pipe ducts from manhole to manhole in different facilities around the entire complex, which cables would be brought up to a transformer on the west side of the job site. He informed that the other foreman was Mike Waldron. In addition, plaintiff testified that the accident occurred prior to 9 a.m. at the location of the 15-foot by 15-foot concrete transformer pad. He explained that as he was about to step off of the pad to go to a manhole, his left foot got caught on a piece of rebar causing him to fall forward, his right foot to step into a slight depression in the ground, and his right knee to twist. Plaintiff stated that he did not recall either he or anyone else making any complaints to anyone at the project site about the rebar prior to the accident. Plaintiff admitted observing the rebar that morning prior to his fall and stepping over it once or twice to get up onto the pad. Plaintiff's partner Leo took photographs of the area of the accident within half an hour of its occurrence and plaintiff testified that the photographs marked as defendant's exhibits B and C depicted the subject rebar.

At his deposition, Leo Dudin testified that at the time of the accident, he was a resident engineer for Hazen overseeing the construction of the treatment plant to ensure compliance with contract documents; that there was a contract between the DEP and Hazen for construction management work in the upgrade of the treatment plant; that to his knowledge there was no general contractor at this site; and that there were

Benes v Hazen & Sawyer, P.C.

Index No. 11-7642

Page No. 4

approximately 10 Hazen employees on the site on the date of the accident consisting of resident engineer, assistant resident engineer, mechanical inspectors, electrical inspector, HVAC inspector and office staff. Mr. Duden stated that Hazen oversaw the quality of WDF's work, and that WDF constructed the concrete pad and installed the green-colored, u-shaped rebar that was to be part of a curb around the pad that would support a wrought iron fence. He also testified that several weeks prior to plaintiff's accident, he had noticed that the horizontal rust brown colored steel rebar "had been used to secure the U-shaped rebar when it was being placed in concrete to keep them from shifting." Mr. Dudin stated that said rebar was to be removed. He added that he, together with the inspectors overseeing civil or electrical work, would visit the subject area several times a week to oversee that everything was going according to contract specifications. Mr. Dudin also stated that each of the contractors had a weekly toolbox meeting in which all aspects of safety were discussed. He was unaware of any prior complaints concerning the subject rebar. Mr. Dudin further stated that said condition did not appear to be an obvious tripping or safety hazard.

Louis Roman testified at his deposition that at the time of the subject accident he was project superintendent for Five Star, the prime electrical contractor; that Mike Waldron would be at the job site for Eaton; and that Kevin Blais was the site safety officer for Five Star. In addition, he testified that prior to said accident he received no complaints from the workers he supervised concerning getting on or off of the concrete pad due to the rebar nor did he receive any such complaints from Mike Waldron. Mr. Roman explained that Mike Waldron of Eaton was responsible for performing any electrical work, other than engineering, for Five Star and that Five Star's role was supervisory. He informed that on the occasions he attended safety meetings with Eaton, the agenda would be planned by Kevin Blais and sometimes the construction manager Leo of Hazen would request the discussion of a specific safety topic. According to Mr. Roman, daily inspections of the subject area were the responsibility of Eaton. He stated that he did not recall either he or anyone else receiving any complaints concerning the subject rebar.

At his deposition, Daniel Zane testified that he is project manager for WDF. He identified a memo dated August 6, 2008 from Mr. Dudin of Hazen to WDF concerning "Administration Building: Curbs at Transformer Yard" indicating that the curbs were not to be placed at that time and that the design engineer, which Mr. Zane informed was Metcalf & Eddy, would "formalize a solution for this area."<sup>2</sup> In addition, Mr. Zane testified that he was not on the project in 2008. He stated that he believed that the subject U-shaped rebar with horizontal rebar running through it had been installed in 2008, and that it remained in the same condition at the time of plaintiff's accident because WDF was attempting to find a solution for the prevention of accumulation of water around the transformer. According to Mr. Zane, "[y]ears later a change order was issued to remove the rebar and put a smooth concrete surface where the curb was supposed to be." He also testified that he was unaware of any complaints concerning the subject condition from 2008 until after plaintiff's accident. Mr. Zane further testified that the U-shaped rebar was embedded in the concrete so that it tied the curb to the main structure and that the purpose of the horizontal rebar was to reinforce the concrete.

"Labor Law §§ 240 (1) and 241 (6) apply to owners, contractors, and their agents" (*Medina v R.M. Resources*, 107 AD3d 859, 860, 968 NYS2d 533 [2d Dept 2013]; see Labor Law §§ 240 [1]; 241 [6];

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<sup>2</sup> Plaintiff submitted said memo in his opposition papers.

Benes v Hazen & Sawyer, P.C.

Index No. 11-7642

Page No. 5

*Albanese v City of New York*, 5 NY3d 217, 219, 800 NYS2d 538 [2005]; *Holifield v Seraphim, LLC*, 92 AD3d 841, 842, 940 NYS2d 100 [2d Dept 2012]). The label given a defendant, whether “construction manager” or “general contractor,” is not determinative (see *Myles v Claxton*, 115 AD3d 654, 981 NYS2d 447 [2d Dept 2014]). Although a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 200, 240 (1) and 241(6), it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (see *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]; *Pino v Irvington Union Free Sch. Dist.*, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]). “A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured” (*Medina v R.M. Resources*, 107 AD3d at 860, 968 NYS2d 533; *Esteves–Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 804, 961 NYS2d 497 [2d Dept 2013]; see also *Fucci v Plotke*, 124 AD3d 835, 836, 3 NYS3d 67 [2d Dept 2015]). General supervisory authority over the work is insufficient in itself to impose liability under the Labor Law (see *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702, 871 NYS2d 220 [2d Dept 2008]; see also *Fucci v Plotke*, 124 AD3d at 837, 3 NYS3d 67).

Pursuant to Article II, (A), (1) of the agreement dated December 15, 2004 between the DEP and Hazen, Hazen as “Construction Manager” (CM) agreed “to provide to the satisfaction of the Commissioner [of the DEP] all Construction Management Services including resident engineering inspection of construction required in connection with the actual construction of the Project, which includes all general construction and incidental work, as well as determining and advising the Commissioner whether the construction conforms to the plans, specifications and requirements of the construction contract documents and good construction practice.” Under Article II, (B), (4), (b) of said agreement, Hazen was to designate a Construction Manager/Resident Engineer who would be responsible for directing and coordinating all of its Resident Engineering Inspection Services.

Attachment 1 of said agreement entitled “Specific Requirements,” concerning “Task 2-Resident Engineering Inspection,” provides:

The CM shall be the representative of the Department at the site, and ... shall have the power, in the first instance, to inspect the performance of the work as delineated in Article 31-THE RESIDENT ENGINEER of the Standard Construction Contract Agreement Section of the Construction Contracts.

...

It is the responsibility of the Construction Contractors, and not the responsibility of the CM, to determine the means and methods of construction, as defined in Article 2, Paragraph 2.1.21 of the Standard Construction Contract Agreement. However, if it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property, or will not produce finished work in accordance with the terms of the

Benes v Hazen & Sawyer, P.C.  
Index No. 11-7642  
Page No. 6

Construction Contracts, such means and methods must be reported to the Commissioner, or to the Commissioner's duly authorized representative.

Here, the proffered deposition testimony, the aforementioned terms of the subject agreement, and the memo dated August 6, 2008 from Mr. Dudin of Hazen to WDF reveal triable issues of fact as to whether Hazen was delegated the authority and duties of a general contractor, and whether it exercised supervisory control and authority over the concrete work being done by WDF (*see Campoverde v Sound Housing, LLC*, 116 AD3d 897, 983 NYS2d 817 [2d Dept 2014]).

“As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker” (*Barrios v City of New York*, 75 AD3d 517, 518, 905 NYS2d 255 [2d Dept 2010]; *see Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 961 NYS2d 513 [2d Dept 2013]). Five Star, as the prime electrical contractor, is liable under Labor Law §§ 240 (1) and 241 (6) as a statutory agent of the owner, since it had the authority to supervise and control the particular work in which the plaintiff was engaged at the time of his injury (*see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; *Nasuro v PI Assocs., LLC*, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]). In addition, WDF, the prime concrete contractor, failed to establish, prima facie, that it lacked the authority to supervise and control the work giving rise to the injured plaintiff's accident (*see White v Village of Port Chester*, 92 AD3d 872, 940 NYS2d 94 [2d Dept 2012]).

The moving defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the third cause of action for violation of Labor Law § 240 (1) insofar as asserted against them by establishing that the accident did not involve an elevation-related risk (*see Mancuso v MTA New York City Tr.*, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]; *Heizman v Long Is. Light. Co.*, 251 AD2d 289, 674 NYS2d 59 [2d Dept 1998]). In opposition, plaintiff failed to raise a triable issue of fact with respect to said claim (*see id.*). Plaintiff admits in his opposition papers that his fall was not gravity related and does not oppose dismissal of said claim. Therefore, the branches of the respective motions for summary judgment dismissing the third cause of action for violation of Labor Law § 240 (1) are granted.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501-502, 601 NYS2d 49 [1993]). Said provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]; *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d at 505, 601 NYS2d 49). Comparative negligence is a valid defense to a Labor Law § 241(6) cause of action (*see Misicki v Caradonna*, 12 NY3d at 515, 882 NYS2d 375; *Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 999 NYS2d 848, 851 [2d Dept 2014]).

Benes v Hazen & Sawyer, P.C.

Index No. 11-7642

Page No. 7

Inasmuch as 12 NYCRR 23-1.5 (a) merely sets forth a general standard of care for employers, it cannot serve as a predicate for liability pursuant to Labor Law § 241(6) (see *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]). In addition, 12 NYCRR 23-1.7 (d) relating to slipping hazards is inapplicable to the subject circumstances as plaintiff claims that he tripped, rather than slipped on rebar. Moreover, 12 NYCRR 23-1.7(e)(1), which requires owners and general contractors, inter alia, to keep all passageways free of debris which could cause tripping, is inapplicable because the accident site was not a passageway but a ground-level, open work area (see *Cody v State*, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; *McKee v Great Atlantic & Pacific Tea Co.*, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]).

12 NYCRR 23-1.7 (e)(2) relating to tripping and other hazards in working areas 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” (12 NYCRR 23-1.7 [e][2]). However, it has no application where the object that caused the plaintiff’s injury was an integral part of the work being performed (see *Castillo v Starrett City*, 4 AD3d 320, 772 NYS2d 74 [2d Dept 2004]; *Harvey v Morse Diesel Intl.*, 299 AD2d 451, 750 NYS2d 117 [2d Dept 2002]). Plaintiff argues in opposition that the two-year period of uncertainty concerning the construction design of the curbing of the transformer pad at the time of plaintiff’s accident and the ultimate removal of the subject rebar raises an issue of fact as to whether said rebar was an integral part of the work.

Here, the rebar upon which plaintiff allegedly tripped had already been installed and thus was integral to the ongoing work, whether or not its removal was contemplated; and the rebar did not constitute debris, scattered tools and materials, or a sharp projection, thereby defeating plaintiff’s claim of a violation of 12 NYCRR 23-1.7(e)(2) (see *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614, 969 NYS2d 13 [1st Dept 2013]; *Tucker v Tishman Constr. Corp. of New York*, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007]; compare *Lopez v New York City Dept. of Env’tl. Protection*, 123 AD3d 982, 999 NYS2d 848 [2d Dept 2014] [plaintiff was impaled by an uncapped piece of vertical rebar that constituted a “sharp projection” under 12 NYCRR 23-1.7 [e][2]). Based on the foregoing, the branches of the respective motions for summary judgment dismissing the fourth cause of action for violation of Labor Law § 241 (6) are granted.

“Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work” (*Ortega v Puccia*, 57 AD3d 54, 60, 866 NYS2d 323 [2d Dept 2008]; see *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d at 505, 601 NYS2d 49). When a claim arises out of an alleged dangerous premises condition, a contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition (see *Doxey v Freeport Union Free Sch. Dist.*, 115 AD3d 907, 982 NYS2d 539 [2d Dept 2014]; *White v Village of Port Chester*, 92 AD3d 872, 940 NYS2d 94 [2d Dept 2012]).

Here, the adduced evidence raises triable issues of fact as to whether Hazen, as construction manager, had supervisory control and authority over the work site, and whether it had actual or constructive notice of the alleged hazardous condition (see *Creese v Long Island Lighting Co.*, 98 AD3d 708, 950 NYS2d 167

Benes v Hazen & Sawyer, P.C.

Index No. 11-7642


Page No. 8

[2d Dept 2012]). In addition, the proffered proof raises issues of fact as to whether WDF, as prime concrete contractor, cannot be held liable because it lacked control over the work site at the time of plaintiff's accident as it had been instructed by the construction manager Hazen prior thereto not to continue installing the curbs around the transformer pad and to await a design change and whether concomitantly it cannot be held liable based on notice (*see generally Bruno v Board of Educ. of Cent. School Dist. #5*, 74 AD3d 1114, 907 NYS2d 23 [2d Dept 2010]; *see also Ruperti v Avalon Gold, LLC*, 103 AD3d 701, 959 NYS2d 703 [2d Dept 2013]). Therefore, those portions of the motions of Hazen and WDF for summary judgment dismissing the first cause of action for common-law negligence and second cause of action for violation of Labor Law § 200 as against them are denied.

However, no evidence was submitted demonstrating that Five Star, the prime electrical contractor, had both control over the work site and actual or constructive notice of the dangerous condition (*see Settimo v City of New York*, 61 AD3d 840, 878 NYS2d 89 [2d Dept 2009]). Thus, Five Star met its burden of demonstrating its entitlement to judgment as a matter of law and plaintiff failed to raise a triable issue of fact in opposition (*see id.*). It so follows that the portion of its motion for summary judgment dismissing the first cause of action for common-law negligence and second cause of action for violation of Labor Law § 200 as against it is granted.

Accordingly, the motion (005) by Five Star for summary judgment dismissing the complaint and all cross claims as against it is granted. In addition, the motion (003) by Hazen and cross motion (004) by WDF for summary judgment are granted solely with respect to dismissal of plaintiff's third cause of action for violation of Labor Law § 240 (1) and fourth cause of action for violation of Labor Law § 241 (6) as against them. The action is severed and continued as against Hazen and WDF with respect to plaintiff's remaining first cause of action for common-law negligence and second cause of action for violation of Labor Law §200.

Dated: May 1, 2015

  
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J.S.C.

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