

**Diaz v Neighborhood Partnership Hous. Dev. Fund
Co., Inc.**

2016 NY Slip Op 30896(U)

April 19, 2016

Supreme Court, Bronx County

Docket Number: 309860/09

Judge: Julia I. Rodriguez

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

-----X Index No. 309860/09

Jose Robert Diaz,
Plaintiff,

-against-

DECISION and ORDER

Neighborhood Partnership Housing
Development Fund Company, Inc.,
Defendants.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's motion for summary judgment, as to liability, and Defendant/Third-Party Plaintiff's motion for summary judgment, dismissing the complaint, and in its favor as to liability in the third-party action against Transcorp Construction Corp. ('Transcorp').

<u>Papers Submitted</u>	<u>Numbered</u>
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This is an action for personal injuries allegedly sustained by Plaintiff on June 19, 2009 while working as a helper in the basement of a building located at 267 West 113rd St., New York, NY. At the time of the accident, Plaintiff was assisting his foreman in drilling a hole through a concrete wall when the drill, being held by his foreman, slipped and struck Plaintiff in his right wrist. In the complaint, Plaintiff alleges causes of action for negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

Plaintiff now moves for summary judgment, as to liability, on his Labor Law §§ 200, 240(1) and 241(6) claims.

Defendant/Third-Party Plaintiff Neighborhood Partnership moves for summary judgment against Plaintiff, dismissing the complaint, and in its favor, as to liability, against Third-Party

Defendant Transcorp Corporation, Inc. (“Transcorp”) on its claims for contractual indemnification and breach of contract for failure to procure insurance.

In support of summary judgment, Plaintiff submitted, *inter alia*, the affidavit and deposition testimony of Plaintiff, the deposition testimony of Stephanie Becker, Amran Niazi and Kostas Perselis, the affidavit of Leo J. DeBobes and a copy of the contract between South Harlem Development Corporation, Transcorp and Defendant. In his affidavit, Plaintiff states that, at the time of the accident, he was employed by Royal Electric & Wiring (“Royal Electric”) and “had been assigned to work with the foreman, Kostas Perselis.” When he arrived at the job site, he went to the basement. He did not see “any other employee or Safety persons on the job site.” He was told by Kostas Perselis “to hold a Kindorf so that the drill being used would not go down and would show Kostas where to drill the hole.” The first hole was drilled and “Kostas was to drill the second hole.” While Kostas was using the drill, “it left the wall and hit [Plaintiff’s] right wrist.”

At his deposition, Plaintiff testified as follows: At the time of the accident, he was employed by Royal Electric as a helper. Only he and Kostas, the foreman, were working at the job site at the time of the accident. When he arrived at the site, he unloaded tools from the van and brought them to the basement. Kostas told him that he was going to be doing a service move – moving the electrical service coming into the building from “one side to the other.” To do that, they needed to start drilling through the concrete. Kostas “pulled out” something that looked like a “handheld core drill.” He did not know the exact name of the tool because he was “new to the company.” He had never seen that type of tool before. “It is a small trigger at the end of it and it has the core drill bit, big twelve-inch, four-inch-wide bit” and its purpose is to “drill concrete.” It is the same drill bit that is used for the core drill that is mounted to the floor “but it’s like a little handheld.” Kostas was drilling “toward the bottom” of a concrete wall that was about six to eight inches thick. Kostas had to drill two holes. Kostas drilled the first hole without his assistance. The first hole was “maybe half an inch off the floor.” The second hole was “another half-inch” above the first hole. The second hole was bigger than the first. Kostas used a two-inch drill bit for the first hole and a four-inch drill bit for the second hole. When he

changed the bit, he gave it an “extra tightening.” Because Kostas had to line the holes up “a specific way,” he called Plaintiff over to “hold the Kindorf” to help keep the drill in place. A Kindorf is a piece of metal with holes in it. The Kindorf was “skinny” and about two feet long. The drill was not mounted to the Kindorf and the Kindorf was not mounted to the wall. In his experience, a Kindorf would not normally be used in this way. Kostas told him to stand to Kostas’ right while Kostas drilled the hole. Kostas held the drill in his right hand and was facing the wall as he tried to drill into the concrete. Plaintiff’s back was against the wall and he was facing Kostas. The drill was to Plaintiff’s right. Kostas told him “to hold the Kindorf above the first hole and Kostas was resting the core bit on top of the Kindorf to drill the second hole.” Plaintiff was “hunched down” and held the Kindorf with both of his hands. His right hand was closer to the core drill. After Kostas was drilling for a “couple of minutes,” the drill started “spinning off.” The first time the drill spun off, it moved towards Plaintiff but did not touch him. He told Kostas that he could feel the drill vibrating. Then, Kostas told him to hold the Kindorf closer to the drill. He told Kostas to mount the Kindorf to the wall but Kostas said “No.” A few seconds later, the drill spun off again and struck his wrist. At the time, he was wearing gloves that he brought to the job site. He had to turn his head while he held the Kindorf because he felt “little debris and little rocks.” He was not wearing goggles because Kostas told him not to bring them to the job site.

At her deposition, Stephanie Becker, a Project Manager for Neighborhood Partnership, testified that her job is to make sure the project is running smoothly in terms of construction being completed on time. As the project manager, Neighborhood Partnership was not involved in the safety aspect of the job. Neighborhood Partnership was the Sponsor of the project and the owner of the premises.

At his deposition, Amran Niazi, Transcorp’s President, testified that he signed the contract between South Harlem Development, Neighborhood Partnership and Transcorp. Transcorp was to do primarily carpentry work. Kostas was the foreman at the job site. No one at Neighborhood Partnership directed or controlled the means, manner or method of the work of Transcorp.

At his deposition, Kostas Perselis testified that he was the foreman at the job site. The core drill that he was using belonged to Royal Electric. It was Royal Electric's responsibility to maintain the core drill. Plaintiff was holding a Kindorf so the drill "would not go down." When he "went to open the hole it started making the hole, but the drill jumped on the Kindorf and it scratched [Plaintiff's] arm a little bit."

In his affidavit, Leo J. DeBobes, a Board Certified Safety Professional, states that he reviewed the bill of particulars, the deposition testimony, workers' compensation injury report and three photos of Plaintiff's sutured wound on his right palm. Based upon his review of those "documents," DeBobes concluded that Neighborhood Partnership was negligent in that they "failed to ensure that the drill was properly selected, used, positioned and maintained in a safe manner as required by codes, standards and generally accepted safe practice within the industry." Specifically, DeBobes asserts that Neighborhood Partnership violated New York State Industrial Code §§ 23-1.5(a) and certain OSHA regulations. In addition, DeBobes details a number of failures concerning the means, manner and method of Transcorp's work at the job site.

* * * * *

I. Labor Law § 200

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to provide construction site workers with a safe place to work. *See Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). An implicit precondition to this duty to provide a safe place to work 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. As such, liability under this section may be imposed only against parties that have the authority to control the activity bringing about the injury. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). Thus, where an alleged defect or dangerous condition arises from a contractor's methods and the owner exercises no supervisory control over the work, no liability attaches under section 200. *See Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350, 819 N.Y.S.2d 732 (1st Dept. 2006). Nor will liability attach

if the owner or contractor lack actual or constructive notice of the dangerous condition that caused the plaintiff's injury. *Id.* The deposition testimony of Plaintiff, Kostas, Becker and Niazi establishes that Neighborhood Partnership did not supervise or control the work of Plaintiff and had no knowledge of how the work was being performed by Plaintiff's employer. As such, Plaintiff has not established his *prima facie* entitlement to judgment as a matter of law on his claim pursuant to Labor Law § 200.

II. Labor Law §240(1)

At the outset, the Court notes that, while in her affirmation, Plaintiff's counsel asserts that Plaintiff is entitled to recover from Neighborhood Partnership pursuant to Labor Law § 240(1), counsel fails to address how the facts of this case implicate that provision. Section 240(1) provides for extra safety protection to the laborer engage in certain contemplated occupational hazards that involve elevation risk and are related to the effects of gravity. *Ross v. Curtis-Palmer Hydro-Electric Co., supra.* The occupational hazards entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *See Toeffer v. Long Island Rail Road*, 4 N.Y.3d 399 (2005). Specifically, the statute imposes liability in situations in which a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site. *See Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). The extraordinary protections of the statute extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. *See Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914 (1999). Here, there was no elevation risk in the work that Plaintiff was performing when he was injured as Kostas was drilling a hole approximately one inch above the ground in the basement of a building. As such, this section is inapplicable. Therefore, Plaintiff has not established his *prima facie* entitlement to judgment as a matter of law on his claim pursuant to Labor Law § 240(1).

III. Labor Law § 241(6)

In order to support a claim under this section, a plaintiff must allege a violation of a specific "concrete" provision of the Industrial Code. *See Ross v. Curtis-Palmer Hydro-Elec.*

Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49 (1993). Plaintiff contends that Neighborhood Partnership violated Industrial Code §§ 23-1.5 (a), (c)(1), (c)(3) and 23-1.27, and certain OSHA standards. Industrial Code § 23-1.5 is a regulation that relates to general safety standards, and, accordingly, will not provide a basis for relief for a claim under Labor Law § 241(6). See *Maldonado v. Townsend Ave. Enters., Ltd. Partnership*, 294 A.D.2d 207, 741 N.Y.S.2d 696 (1st Dept. 2002); *Hawkins v. City of New York*, 275 A.D.2d 634, 635, 713 N.Y.S.2d 311 (1st Dept. 2000); *Greenwood v. Shearson, Lehman & Hutton*, 238 A.D.2d 311, 313, 656 N.Y.S.2d 295 (2nd Dept. 1997); *Williams v. White Haven Mem. Park*, 227 A.D.2d 923, 643 N.Y.S.2d 787 (4th Dept. 1996). Industrial Code § 23-1.27 addresses the use of mechanical, hydraulic and pneumatic jacks. As no such devices were used in this case, this section is inapplicable. Also, violations of OSHA standards do not provide a basis for liability under Labor Law § 241(6). See *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 693 N.E.2d 1068 (1998); *Schiulaz v. Arnell Construction Corp.*, 261 A.D.2d 247, 248, 690 N.Y.S.2d 226 (1st Dept. 1999). *Vernieri v. Empire Realty Co.*, 219 A.D.2d 593, 598, 631 N.Y.S.2d 378 (2nd Dept. 1995). As such, Plaintiff has not established his *prima facie* entitlement to judgment as a matter of law on his claim pursuant to Labor Law § 241(6).

Based on the foregoing, Plaintiff's motion is **denied** in its entirety without regard to the sufficiency of the opposition.

In support of Neighborhood Partnership's motion for summary judgment, dismissing the complaint, and in its favor, as to liability, on its third-party claims for indemnification and breach of contract, Neighborhood Partnership submitted, *inter alia*, the deposition testimony of Plaintiff, Kostas Perselis, Stephanie Becker and Amran Niazi, and a copy of the contract between South Harlem Development Corporation, Transcorp and Neighborhood Partnership. At his deposition, Plaintiff testified that Kostas Perselis told him to hold the Kindorf against the wall to prevent the drill from dropping down. Both Becker and Niazi identified the contract at their respective depositions. Also, Niazi testified that no one from Neighborhood Partnership directed or controlled the means, manner or method of the work of either Transcorp or the electrical subcontractor Royal Electric.

The contract identifies Transcorp as the Contractor and provides, in pertinent part:

. . . Contractor shall additionally indemnify and hold harmless to the fullest extent permitted by law, the Manager/Developer, Sponsor, HPD the Lender . . . against any and all liabilities, obligations, claims, causes of action, judgments, damages, penalties, costs and expenses (including without limitation, attorneys' fees and expenses) arising from any act, omission, negligence, potential claims and losses whether real or alleged, of the Contractor, its subcontractors, sub-subcontractors, material suppliers and other agents or personnel of the Contractor during the performance of the Contract excepting only the gross negligence of Manager/Developer. The contractor, at its own expense, shall defend the Indemnified Parties in court from any of such parties.

. . .

. . . The Contractor shall furnish, prior to commencement of the Work together with evidence of full payment therefor and maintain in full force and effect until acceptance of Final Payment under the Contract Documents except as otherwise set forth under this Article, insurance policies providing the coverage set forth below required by Lender, Sponsor and Manager Developer. . . .

In opposition to Neighborhood Partnership's motion for summary judgment, dismissing the complaint, Plaintiff makes the same arguments and relies upon the same evidence submitted in support of his motion for summary judgment. Plaintiff did not oppose Neighborhood Partnership's motion for summary judgment in its favor, as to liability, on its third-party claims against Transcorp.

Transcorp and Royal Electric support Neighborhood Partnership's motion for summary judgment, dismissing the complaint, but oppose Neighborhood Partnership's motion for summary judgment in its favor on its third-party claims against Transcorp for indemnification and breach of contract for failure to procure insurance. In opposition, Transcorp and Royal Electric contend that because Transcorp did not control, supervise, direct or manage the work which Plaintiff was performing, Transcorp cannot be held negligent and, therefore, it is not obligated to indemnify Neighborhood Partnership. In addition, in her affirmation, counsel alleges that Transcorp purchased the requisite insurance but that Neighborhood Partnership "had

its own insurance which is being used to defend it in this matter. Neighborhood has not incurred any legal expenses but for the cost of the premium. As such, as for calculation of damages, Neighborhood is only entitled to reimbursement, if any, [of] the cost of obtaining its own liability coverage.”


* * * * *

Based upon the deposition testimony of Plaintiff, Perselis, Becker and Niazi, Neighborhood Partnership has established its *prima facie* entitlement to judgment as a matter of law on its motion for summary judgment, dismissing the complaint. In opposition, for the reasons discussed with respect to Plaintiff’s motion for summary judgment, Plaintiff has failed to raise a triable issue of fact.

However, Transcorp’s argument that it is not obligated to indemnify Neighborhood Partnership because it cannot be held negligent lacks merit. Under the terms of the contract, the Sponsor is to be indemnified by Transcorp “against any and all liabilities, obligations, claims, causes of action . . . **arising from any act, omission, negligence, potential claims and losses whether real or alleged of the contractor, its subcontractors, sub-subcontractors . . .**” (Emphasis added). As such, irrespective of its own negligence, Transcorp is obligated to defend and indemnify Neighborhood Partnership. However, with respect to its breach of contract claim based upon Transcorp’s alleged failure to procure insurance, Neighborhood Partnership submitted no evidence to establish that the requisite insurance was not procured. Notably, at his deposition, Niazi testified that the requisite insurance had been procured.

Based on the foregoing, Neighborhood Partnership’s motion for summary judgment, dismissing the complaint, is **granted** and the complaint is hereby dismissed. Neighborhood Partnership’s motion for summary judgment in its favor, as to liability, on its indemnification and breach of contract claims is **granted** solely to the extent that Transcorp is obligated to defend and indemnify Neighborhood Partnership; otherwise, it is **denied**.

Dated: Bronx, New York
April 19, 2016



Hon. Julia I. Rodriguez, J.S.C.