

<b>Hammer v ACC Constr. Corp.</b>
2019 NY Slip Op 31973(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 152347/2014
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55**

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DANIEL HAMMER,

Plaintiff,

- against -

Index No. 152347/14

ACC CONSTRUCTION CORPORATION, 370  
SEVENTH AVENUE ASSOCIATES, LLC,  
BROADWALL MANAGEMENT CORP.,  
COMSCORE, INC., and PREMIER ELECTRIC,  
INC.,

**Decision and Order**

Mot. Seq. No. 007

Defendants.

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ACC CONSTRUCTION CORPORATION, 370  
SEVENTH AVENUE ASSOCIATES, LLC, and  
COMSCORE, INC.,

Third-Party Plaintiffs,

- against -

GODSELL CONSTRUCTION CORP.,

Third-Party Defendant.

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**Hon. James E. d'Auguste**

In this action, defendants/third-party plaintiffs ACC Construction Corporation (“ACC”), 370 Seventh Avenue Associates, LLC (“370”), and Comscore, Inc. (“Comscore”) (collectively, “moving defendants”) move for an order (1) pursuant to CPLR 3212, for summary judgment seeking dismissal of plaintiff Daniel Hammer’s claims under New York State Labor Law (“Labor Law”) Sections 200, 240(1), and 241(6), and common law negligence, (2) pursuant to CPLR 3212, for summary judgment granting their claims for contribution, contractual indemnification, common law indemnification, breach of contract, and failure to procure insurance against third-party defendant Godsell Construction Corp. (“Godsell”), (3) granting

their cross-claims for contribution, contractual indemnification, common law indemnification, breach of contract, and failure to procure insurance against defendant Premier Electric, Inc. (“Premier”), and (4) granting leave to amend the answer of Comscore to include a cross-claim for contractual indemnification against Premier and granting that cross-claim in its favor. Plaintiff, Godsell, and Premier oppose the instant motion.

### **Background**

Plaintiff alleges that on September 19, 2012, during his employment with Godsell, he tripped and fell on electrical wiring that was protruding several inches out of a shallow trench (“the accident”). *See* NYSCEF Doc. Nos. 142, ¶¶ 105-108; 154, Tr. 57:8-62:22. Plaintiff further alleges that the negligence of defendants, in causing the defect to exist on the premises, caused his injuries. *See* NYSCEF Doc. No. 154, Tr. 57:8-62:22. Plaintiff claims that he injured himself on property owned by defendant 370 and located at 7 Pennsylvania Plaza in Manhattan (“the building”). *See id.* Defendant 370 leased a portion of the building to Comscore. NYSCEF Doc. No. 165. Comscore retained ACC to be the general contractor or construction manager of a construction project to take place at the building. *See* NYSCEF Doc. Nos. 142, ¶¶ 46; 143; 159. ACC subcontracted out a portion of the construction project to plaintiff’s employer, Godsell, and retained Premier to perform electrical work in connection with the construction project in the building. *See* NYSCEF Doc. Nos. 142, ¶¶ 53-54; 154; 162; 163. The room that the alleged accident took place in was being constructed as a conference room. NYSCEF Doc. No. 189, ¶ 55. The tradesmen who left the bundle of wires in question, which plaintiff allegedly tripped over, were still working in the room at the time that the subject accident occurred. *Id.*, ¶¶ 55, 59.

On March 17, 2014, plaintiff commenced the instant action against defendants. Moving defendants then brought a third-party action against Godsell.

### Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Santiago v. Filstein*, 35 A.D.3d 184, 185-86 (1st Dep’t 2006) (quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985)). The burden then shifts to the motion’s opponent “to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dep’t 2006) (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980)); see also *DeRosa v. City of New York*, 30 A.D.3d 323, 325 (1st Dep’t 2006). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dept 2002).

#### **Labor Law Section 240(1) Claim**

Moving defendants seek summary judgment dismissing plaintiff’s Labor Law section 240(1) claim as against them. Plaintiff concedes and withdraws this claim. NYSCEF Doc. No. 181, ¶ 4. Therefore, this branch of the instant motion is granted.

#### **Labor Law Section 241(6) Claim**

Moving defendants seek summary judgment dismissing plaintiff’s Labor Law section 241(6) claim as against them. Plaintiff opposes this branch of the motion. Labor Law section 241(6) provides, in relevant part, as follows:

All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Labor Law section 241(6) imposes a nondelegable duty “on owners and contractors to ‘provide reasonable and adequate protection and safety’ to workers.” *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502 1993) (citation omitted). However, Labor Law Section 241(6) is not self-executing. In order to show a violation of this statute, and withstand a motion for summary judgment, it must be shown that the defendant violated a specific applicable and implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Plaintiff’s verified bill of particulars alleges violations of Industrial Code provisions 12 NYCRR 23-1.7(b)(1)(i) and (iii), (d), (e), (f); 12 NYCRR 23-1.11(a)-(c); 12 NYCRR 23-1.15; 12 NYCRR 23-1.16; 12 NYCRR 23-1.17; 12 NYCRR 23-1.22(b)(1)-(4); 12 NYCRR 23-1.22(c)(1)-(2); 12 NYCRR 23-1.24; and 12 NYCRR 23-2.7. NYSCEF Doc. No. 152. Moving defendants contend that the cited Industrial Code provisions are inapplicable or were not violated. Plaintiffs, however, oppose this branch of moving defendants’ motion with regard to Industrial Code provision 12 NYCRR 23-1.7(e)(2). Plaintiff, however, has not opposed this branch of moving defendants’ motion with regard to any of the remaining aforementioned Industrial Code provisions and, as such, said claims are dismissed as against the moving defendants. *See Rivera v. Anilesh*, 32 A.D.3d 202, 204-205 (1st Dep’t 2006), *aff’d*, 8 N.Y.3d 627 (2007) (deeming an argument abandoned when not discussed in the plaintiff’s opposition papers).

Industrial Code provision 12 NYCRR 23-1.7(e)(2) provides as follows:

Working areas. The 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.

Courts have found 12 NYCRR 23-1.7(e)(2) to be sufficiently specific to serve as a predicate for a Labor Law Section 241(6) claim. *Jara v. N.Y. Racing Ass'n, Inc.*, 85 A.D.3d 1121, 1123 (2d Dep't 2011); *Boss v. Integral Constr. Corp.*, 249 A.D.2d 214, 215 (1st Dep't 1998). Although this regulation is sufficiently specific, section 23-1.7(e)(2) does not apply to these facts because plaintiff's accident did not occur as a result of "accumulations of dirt and debris," "scattered tools and materials," or "sharp projections . . . consistent with the work being performed." See *Dalanna v. City of New York*, 308 A.D.2d 400, 401 (1st Dep't 2003) (finding that "the bolt, which was embedded in the ground, was not 'dirt,' 'debris,' 'scattered tools and materials' or a 'sharp projection [],' as required by [12 NYCRR 23-1.7(e)(2)]" (first alteration in original)). Since the wiring was to be used for the conference room that was being constructed, the bundled wires were an integral part of the work being performed. See *Alvia v. Teman Elec. Contr.*, 287 A.D.2d 421, 423 (2d Dept 2001) (finding that 12 NYCRR 23-1.7(e)(2) was not applicable where "the object on which the plaintiff tripped ... was an integral part of the work he was performing" (alteration in original) (citation omitted)); see also *Appelbaum v. 100 Church L.L.C.*, 6 A.D.3d 310, 310 (1st Dep't 2004). Thus, that part of plaintiff's Labor Law Section 241(6) claim that is predicated on an alleged violation of 12 NYCRR 23-1.7(e)(2) is also dismissed against the moving defendants.

### **Labor Law Section 200 and Common-Law Negligence Claims**

Moving defendants seek summary judgment dismissing plaintiff's Labor Law Section 200 and common-law negligence claims as against them. Plaintiff opposes this branch of the instant motion.

Labor Law section 200(1) provides as follows:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Labor Law section 200 is a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site for their employees and, therefore, the same standards of recovery apply to both theories of liability. *See Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998). “Liability pursuant to Labor Law § 200 may fall into two broad categories: workers ‘injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed.’” *McLean v. 405 Webster Ave. Assoc.*, 98 A.D.3d 1090, 1093 (2d Dep’t 2012) (quoting *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep’t 2008)).

To prevail on a claim under Labor Law section 200 and common-law negligence, where the injury arises out of the means or methods of the construction work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury. *See Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 306 (1st Dep’t 2007); *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350 (1st Dep’t 2006). Nonetheless, general supervision over the work, including coordination of the trades and inspection of quality of the work, is insufficient to impose liability under either theory. *Hughes*, 40 A.D.3d at 306. There is no evidence in the record indicating that moving defendants supervised or controlled plaintiff’s work. The record indicates that plaintiff was the foreman for Godsell and, further, he testified during his deposition that he “controlled and ran the carpenters’ work as a foreman.” NYSCEF

Doc. No. 154, Tr. 26:15-19. Plaintiff also testified that Richard Hubert, ACC's superintendent, generally instructed plaintiff on the areas in which he should work. *Id.*, Tr. 37:7-16. Nothing in plaintiff's testimony indicates that any of the moving defendants or their employees had a right to do anything more than generally supervise the work. *Hughes*, 40 A.D.3d at 306. Specifically, Huber did not give plaintiff any instruction as to how to perform the work, and plaintiff testified that "Godsell had no supervisor" at the building for the construction project. *Id.*, Tr. 34:10-17. Thus, nothing in the record demonstrates that the moving defendants exercised supervision or had authority to control or direct the means and methods of the work performed.

Moreover, there is no evidence to show that the moving defendants created the alleged dangerous condition or that they had notice of said condition prior to plaintiff's accident. "When a premises condition is at issue, a [defendant] is liable under Labor Law § 200 when the [defendant] created the dangerous condition causing an injury or when the [defendant] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice." *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 129 (2d Dep't 2008). In opposition to the instant motion, plaintiff relies on deposition transcripts that show Hubert performed an inspection of the work area approximately thirty minutes prior to his accident and noticed a defect where Premier electricians were doing work. NYSCEF Doc. No. 156, Tr. 35:14-36:2. Martin Maguire, a carpenter for Godsell, similarly testified at his deposition that there were two Premier electricians near the alleged defect when he walked into the area where plaintiff was allegedly injured. NYSCEF Doc. No. 161, Tr. 62:12-63:7. However, this testimony demonstrates that the moving defendants did not create the alleged condition, nor is there any indication that they knew about it within a reasonable amount of time in order to correct the alleged defect so as to avoid injury. Additionally, no safety complaints were made to the moving defendants prior to plaintiff's

accident. *See Urbano v. Rockefeller Ctr. N., Inc.*, 91 A.D.3d 549, 550 (1st Dep't 2012).

Accordingly, plaintiff's Labor Law section 200 and common-law negligence claims are dismissed as against the moving defendants.

### **Remaining Claims**

In light of the dismissal of the main action insofar as asserted against moving defendants, the remaining branches of the motion seeking an order (1) granting moving defendants' cross-claims against Premier for contribution, contractual indemnification, common law indemnification, breach of contract, and failure to procure insurance; and (2) granting moving defendants' claims in its third-party complaint against Godsell are dismissed as academic. *See Cardozo v. Mayflower Ctr., Inc.*, 16 A.D.3d 536 (2d Dep't 2005); *Hoover v. Int'l Bus. Machs. Corp.*, 35 A.D.3d 371, 372 (2d Dep't 2006). Additionally, the branch of the instant motion seeking leave to amend Comscore's answer to include a cross-claim for contractual indemnification against Premier and granting said relief is now moot. The court need not reach any remaining contentions of the parties.

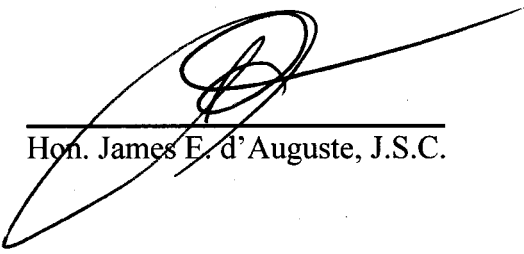
Accordingly, it is hereby

ORDERED that those branches of the motion for summary judgment, pursuant to CPLR 3212, by defendants/third-party plaintiffs ACC Construction Corporation, 370 Seventh Avenue Associates, LLC, and Comscore, Inc. dismissing plaintiff's Labor Law sections 240(1), 241(6), and 200 claims, and common-law negligence claim is granted, and the complaint against said defendants is dismissed without costs and disbursements, and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the remaining branches of the motion by defendants/third-party plaintiffs ACC Construction Corporation, 370 Seventh Avenue Associates, LLC, and Comscore, Inc. are denied.

This constitutes the decision and order of this Court.

Dated: July 8, 2019



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Hon. James E. d'Auguste, J.S.C.