

<b>Miller v City of New York</b>
2021 NY Slip Op 31004(U)
March 18, 2021
Supreme Court, New York County
Docket Number: 162491/2015
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X  
ROBERT MILLER,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE CITY OF NEW YORK  
DEPARTMENT OF HOUSING, PRESERVATION AND  
DEVELOPMENT, CRP/EXTELL PARCEL K, L.P.,  
TISHMAN CONSTRUCTION CORPORATION OF NEW  
YORK, W5 GROUP, LLC, PAR PLUMBING CO., INC.

Defendant.  
-----X

INDEX NO. 162491/2015

MOTION DATE 08/17/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 122, 125, 126, 128, 132, 137

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is

In this personal injury action, Plaintiff Robert Miller (“Plaintiff”) allegedly sustained injuries on September 8, 2014 at 1:30 p.m., when he was caused to trip and fall on a copper pipe on the 18th Floor of the premises located at 40 Riverside Boulevard, in the County, City and State of New York. Defendant CRP/Extell Parcel K, L.P. (“Defendant CRP/Extell”) owned the subject premises<sup>1</sup> and Defendant Tishman Construction Corporation of New York (“Defendant Tishman”) was hired by CRP/Extell as the construction manager of the project. Defendant W5 Group, LLC (“Defendant W5 Group”) was retained by Tishman as the carting and cleaning contractor to clean the floor or pick up garbage. Defendant Par Plumbing Co. (“Defendant Par

<sup>1</sup> Plaintiff has previously discontinued its action as against THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT OF HOUSING, PRESERVATION AND DEVELOPMENT.  
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Motion No. 003

Plumbing”) was hired by Tishman to work on the bathrooms, kitchens, plumbing risers and plumbing roughing.

Plaintiff’s Second Amended Summons and Complaint alleges negligence, violations of Labor Law § 200, and Labor Law § 241(6). Defendants CRP/Extell and Tishman and Defendant Par Plumbing move pursuant to CPLR § 3212 granting summary judgment in favor of the Defendants dismissing the plaintiffs’ complaint in its entirety and granting their cross-claims against defendant W5 Group for contractual indemnity and breach of contract.

This court recently issued a decision in motion sequence 002, which granted Plaintiff’s motion for partial summary judgment as to the Labor Law § 241(6) claim. Accordingly, that portion of Defendants’ motion will not be further addressed in this decision.

#### **Factual Allegations**

Plaintiff alleges that on September 8, 2014, at approximately 1:30 p.m., while working on the project site located at 40 Riverside Boulevard, New York, New York (“the subject premises”), on the 18<sup>th</sup> floor, he was caused to trip and fall over a piece of copper pipe. As admitted in the motion of CRP/Extell, the property where Plaintiff’s accident occurred was owned by Defendants CRP/Extell and Tishman Construction Corporation of New York was the construction manager for the project at issue (NYSCEF Doc. No. 91).

#### **Plaintiff’s Deposition**

Plaintiff testified that he was walking in the main passageway towards the hoist while carrying a dry concrete bag at the time of this accident (NYSCEF Doc. No. 108 at p. 18 and p. 24). Plaintiff testified that he stepped on a plumber’s pipe which caused him to slip and fall backwards (NYSCEF Doc. No. 108 at p. 24). Plaintiff described the plumber’s pipe as a copper pipe that was an inch in diameter (NYSCEF Doc. No. 108 at p. 25). Plaintiff indicated that the

plumber's pipe was located in the main passageway and that he did not see it prior to his accident (NYSCEF Doc. No. 108 at p. 25). Plaintiff stated that he could not recall seeing other pipes, materials or debris on the floor in the area of his accident (NYSCEF Doc. No. 108 at p. 25). Plaintiff only saw plumbers, electricians and carpenters working on the floor of his accident at the time of his accident. (NYSCEF Doc. No. 108 at p. 32 and p. 57). Plaintiff said that he believes a plumber from Par Plumbing may have left the plumbing pipe behind on the floor (NYSCEF Doc. No. 108 at p. 32 and p. 33).

#### Tishman Deposition

Defendant Tishman produced witness Bryan Boylan to be deposed. Mr. Boylan testified that he holds the position of Senior Project Manager for the project in question (NYSCEF Doc. No. 110 at p.8 and 12). Tishman was the Construction manager, CRP/EXTELL was the owner of the subject premises, and Par Plumbing was hired by Tishman as a subcontractor for the subject project (NYSCEF Doc. No. 110 at p.14). In its capacity as construction manager, Tishman retained various subcontractors, including Par Plumbing and W5 (NYSCEF Doc. No. 91). In addition to hiring the subcontractors pursuant to its construction management agreement, Tishman was responsible for establishing, initiating, maintaining and supervising all safety precautions and programs in connection with the construction work (NYSCEF Doc. No. 117). Tishman also had the authority to stop work if it observed a hazardous condition (NYSCEF Doc. No. 110).

Mr. Boyle testified that Par Plumbing was hired to work on the bathrooms, kitchens, plumbing risers and plumbing roughing (NYSCEF Doc. 110 at p.19). He stated that Waldorf Demolition (which was doing business as W5 Group LLC) was the carting and cleanup contractor that would clean the floor of debris and take the garbage off site (NYSCEF Doc. 110

at pp. 26-27). Furthermore, Mr. Boyle testified that Waldorf was responsible for cleaning the floors of the entire building daily, as required by contract (NYSCEF Doc. 110 at pp. 28-29).

#### Par Plumbing Deposition

Par Plumbing produced Lawrence Frawley, a supervisor to be deposed. Mr. Frawley testified that Par Plumbing was hired by Tishman (NYSCEF Doc. No. 111 at p. 19). Mr. Frawley stated that Par Plumbing would use copper piping for temporary water lines at the project (NYSCEF Doc. No. 111 at p. 20). Par Plumbing would also use copper pipes for domestic water lines (NYSCEF Doc. No. 111 at p. 24), hooking up the water pumps (NYSCEF Doc. No. 111 at pp. 25-26), piping for faucets (NYSCEF Doc. No. 111 at p. 28) and piping for water heaters (NYSCEF Doc. No. 111 at p. 33). Mr. Frawley said that, on the date of the Plaintiff's accident, Par Plumbing was installing shower bodies and tubs on the 18th floor (NYSCEF Doc. No. 111 at p. 37). Mr. Frawley testified that this type of work would require copper pipes that went to the body of the tub (NYSCEF Doc. No. 111 at p. 40). Mr. Frawley stated that Par Plumbing would put its work debris into canvas baskets that are then wheeled to the hoist (NYSCEF Doc. No. 111 at p. 72).

#### W5 Group Deposition

James Costello testified that he is employed by W5 Group as a Project Manager (NYSCEF Doc. 112 at pp. 7-8). With regards to the subject project, Mr. Costello stated that W5 Group was hired to provide general cleanup labor and disposal of garbage for a two-year period (NYSCEF Doc. 112 at p.10). Mr. Costello said that the general cleanup consisted of sweeping and keeping the floors clean, mopping the Tishman offices, emptying containers of garbage in their truck and returning them to the floors (NYSCEF Doc. 112 at p.14). Mr. Costello further testified that this work was done towards the end of the workday so that the job site would be

clean for the morning (NYSCEF Doc. 112 at p.16). Mr. Costello stated that W5 Group would provide carts for the trades to put their debris into (NYSCEF Doc. 112 at pp. 24-25). Further, Mr. Costello testified that, prior to September 8, 2014, no one made any complaints regarding the manner in which W5 Group removed debris (NYSCEF Doc. 112 at p.35). Mr. Costello testified that in the event debris fell off of a canvas bag while it was being pushed by a W5 Group laborer, the W5 Group laborer would pick it up and place it back into the canvas bag (NYSCEF Doc. 112 at p.35).

### Analysis

#### Summary Judgment Standard

Defendants CRP/Extell and Tishman and Defendant Par Plumbing move pursuant to CPLR § 3212 granting summary judgment in favor of the Defendants dismissing the plaintiffs' complaint in its entirety and granting their cross-claims against defendant W5 Group for contractual indemnity and breach of contract. "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 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 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 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70

AD3d 563 1st Dept 2010)) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1)

Defendants move for summary judgment on Plaintiff's cause of action under Labor Law § 240(1). Plaintiff does not provide any opposition to this specific issue. Labor Law § 240(1), popularly known as the Scaffold Law, was designed to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (*see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267, 841 NYS2d 249 [2007]). As the facts of the case do not in any way trigger the protections under Labor Law § 240(1), Defendants' motion for summary judgment is granted as to this cause of action.

Labor Law § 200/Common Law Negligence

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a reasonably safe place to work (*see Comes v NY State Elec. & Gas Coro.*, 82 NY2d 876 [1993]; *Lorabardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 [1992]). Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323, 329 [2008]). In the present case, the piece of plumbing pipe that Plaintiff tripped over constituted a dangerous and defective premises condition. Therefore, liability will attach dependent on Defendants' creation or actual or constructive notice of the condition (*see Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621 [1st Dept 2015]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

“To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

“The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken” (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). However, a “‘general awareness’ is legally insufficient to charge defendants with constructive notice of the specific condition that resulted in plaintiff's injuries” (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 736 [1st Dept 2005], *affd* 6 NY3d 734 [2005]).

In this case, Defendants have failed to demonstrate that they lacked constructive notice, as they do not submit any evidence as to when the area was last inspected or evidence that the pipe could not have been detected based upon a reasonable inspection (*see Velez v City of New York*, 134 AD3d 447, 447 [1st Dept 2015] [defendants “failed to demonstrate that they lacked constructive notice of the alleged condition by offering evidence as to the time that the area where plaintiff fell was last inspected”]; *Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015] [triable issues of fact as to constructive notice of the defective condition since the record was unclear as to when the staircase was last inspected prior to plaintiff's fall]; *Colon v Bet Torah, Inc.*, 66 AD3d 731, 732 [2d Dept 2009] [site owner failed to demonstrate that it lacked constructive notice of alleged dangerous condition where it failed to submit any evidence as to when grease pit cover was last inspected]).

Defendants have not demonstrated their *prima facie* entitlement to judgment as a matter of law. Accordingly, Defendants' summary judgment motion is denied as to the Labor Law § 200/common-law negligence cause of action.

Labor Law § 241(6)

As discussed above, Plaintiff's motion for partial summary judgment as to Labor Law § 241(6) against Defendants CRP/Extell Parcel K, LLP and Tishman Construction Corporation of New York was previously granted. Accordingly, that portion of Defendants' motion will not be further addressed in this decision.

Cross Motion

Defendants CRP/Extell and Tishman cross move against Defendant W5 Group for contractual indemnity and breach of contract. Defendant W5 Group does not submit opposition.

Defendants CRP/Extell and Tishman contend that pursuant to an August 12, 2013 contract between Defendant Tishman and Defendant W5 Group, W5 Group agreed to defend and indemnify the owner (CRP/Extell) and the construction manager (Tishman) for all claims caused by, resulting from, arising out of or occurring in connection with W5 Group's carting and cleaning of the subject premises (NYSCEF Doc. No. 116).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances' " (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777, 521 NYS2d 216 [1987] [*quoting Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153, 344 NYS2d 336 [1973]]). Specifically, the contract between Tishman and W5 Group requires W5 Group to "indemnify, defend and hold harmless the Owner, Construction Manager, such other Indemnitees...from and against all claims or causes of action arising out of or resulting from the acts or omissions of the Contractor in connection with the Contract Documents, the performance of, or failure to perform, the Work or the Contractors operations..." (NYSCEF Doc. No. 116, p. 6). Accordingly, Defendants CRP/Extell and Tishman motion for summary judgment

on their cross claim for contractual indemnity is granted (*see Torres v Morse Diesel Int'l, Inc.*, 14 AD3d 401, 788 NYS2d 97 [2005]).

**Conclusion**

Defendants CRP/Extell and Tishman’s and Defendant Par Plumbing’s motion for summary judgment is granted to the extent that the causes of action under Labor Law § 240(1) is granted and is denied as to Labor Law § 200 and § 241(6). Defendants CRP/Extell and Tishman’s and Defendant Par Plumbing’s cross motion for summary judgment as to contractual indemnification against Defendant W5 Group is granted.

It is hereby,

ORDERED that the motion for summary judgment of Defendants CRP/Extell and Tishman and Defendant Par Plumbing is partially granted to the extent that the cause of action under Labor Law § 240(1) is dismissed against them; and it is further

ORDERED that the motion for summary judgment of Defendants CRP/Extell and Tishman and Defendant Par Plumbing is denied as to the causes of action under Labor Law § 200 and § 241(6); and it is further

ORDERED that the cross motion for summary judgment as to contractual indemnification of Defendants CRP/Extell and Tishman against Defendant W5 Group is granted.

3/18/2021  
DATE

  
SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: