

<b>Costello v Judlau Contr., Inc.</b>
2021 NY Slip Op 31841(U)
June 1, 2021
Supreme Court, New York County
Docket Number: 151845/2016
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS PART 11**

*Justice*

-----X

MICHAEL COSTELLO,

Plaintiff,

- v -

JUDLAU CONTRACTING, INC., OHL USA, INC.,  
PARSONS BRINCKERHOFF, INC.

Defendants.

-----X

INDEX NO. 151845/2016

MOTION DATE 08/24/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and oral argument held on May 13, 2021, the court grants in part Defendants Judlau Contracting, Inc.’s (“Judlaw”), OHL USA, Inc.’s (“OHL”) and Parsons Brinckerhoff, Inc.’s (“PB”) (collectively, “Defendants”) motion for summary judgment dismissal of Plaintiff Michael Costello’s (“Plaintiff”) complaint to the extent that the court 1) grants summary judgment in Defendant OHL’s favor as to all claims against it, since Plaintiff agreed to withdraw its claims against Defendant OHL; 2) grants summary judgment in Defendants Judlaw’s and PB’s favor as to Plaintiff’s Labor Law § 240(1) claims, as Plaintiff agreed to withdraw this claim against all Defendants; 3) reserves decision on Plaintiff’s claims under Labor Law § 241(6) as against Defendants Judlaw and PB, as the court grants Plaintiff’s cross-motion and accepts his supplemental bill of particulars which added alleged Industrial Code violations; 4) grants summary judgment as to Plaintiff’s claims under Labor Law § 200 and common-law negligence against Defendant PB; and 5) denies summary judgment as to Plaintiff’s Labor Law § 200 and common-law negligence claims against Defendant Judlaw.

Additionally, the court grants Plaintiff's cross-motion for leave to serve a supplemental bill of particulars *nunc pro tunc* and accepts Plaintiff's supplemental bill of particulars, dated October 7, 2020, filed on NYSCEF as document number 43.

### Defendants' Summary Judgment Motion

Plaintiff seeks damages for injuries he allegedly suffered on October 29, 2014 when he stepped off of a ladder and tripped, slipped, and fell against a wall when he stepped into a pile of debris on the floor behind the ladder. At the time of the accident, Plaintiff and his partner were installing electrical ceiling fixtures at the Second Avenue Subway construction site. Plaintiff's complaint includes claims against Defendants based on common-law negligence and Labor Law §§ 200, 241(6) and 240(1).

Plaintiff alleges in substance that the accident arose from a dangerous condition caused by debris which fell from a dumpster overfilled with construction debris that was pushed by Judlau employees. Plaintiff alleges in substance that the debris was not on the ground when he and his partner set up the ladder and they saw Judlau laborers behind them pushing dumpsters filled with debris. Plaintiff and his partner ascended the ladder about ten to fifteen minutes prior to the accident. Plaintiff's partner recognized that the debris that allegedly caused Plaintiff's fall was the same type of demolition debris that Judlau laborers had in the dumpsters. Plaintiff further alleges in substance that Defendants are liable for Plaintiff's injuries under Labor Law § 241(6) as they violated provisions of the Industrial Code, including 12 N.Y.C.R.R. §§ 23-1.7 (d), (e)(1), (e)(2) and (f) because they caused and/or allowed the tripping/slipping hazard.

Plaintiff worked for an electrical subcontractor, Hatzel & Buehler, Judlau was the general contractor of the project and PB was the construction manager of the project.

Defendants alleged in substance that OHL is the parent company of Judlau and was not a signatory to the contract regarding this project. Additionally, Defendants argue that OHL did not have any role in the operations related to the contract, nor any involvement with the project. Therefore, OHL should not be a party to this action. Based on an affidavit submitted in support of Defendants' summary judgment motion, Plaintiff agreed to withdraw its Labor Law claims against OHL. As such, the court dismisses all claims against OHL.

Defendants further argue in substance that PB was not an owner or a general contractor, nor an agent of an owner or general contractor. Defendants state that PB was a construction manager on the project and it should not be held liable for Plaintiff's injuries because it did not direct or supervise any of the contractors or the injury-producing work being performed. The contract required PB's work to include monitoring and coordination of the job site, which did not rise to the level of liability.

Defendants further argue in substance that Plaintiff's Labor Law § 240(1) claim should be dismissed because Plaintiff's alleged injuries were not related to a fall from a height. Plaintiff subsequently withdrew all of his claims under Labor Law § 240(1).

Defendants further argue that Plaintiff's claims under Labor Law § 241(6) must be dismissed because Plaintiff failed to set forth the specific sections of the Industrial Code which Defendants allegedly violated. However, as set forth below, the court grants Plaintiff's cross-motion for leave to file a supplemental bill of particulars *nunc pro tunc* to include the specific sections of the alleged Industrial Code violations.

Defendants argue in substance that Plaintiffs Labor Law § 200 and common-law claims should be dismissed against Defendants because Plaintiff's testimony regarding the cause of the incident is based upon pure speculation and Plaintiff cannot establish direction and control of

Plaintiff's work being performed at the time of the alleged accident. Defendants further argue in substance that there was no evidence that the debris that was allegedly on the ground at the base of the ladder actually fell from a dumpster being pushed by any of Defendants' laborers. Defendants further argue that there is no evidence that Defendants created the condition, nor that they had actual or constructive notice of the alleged condition.

However, Plaintiff argues in substance that there is a question of fact as to whether PB acted as agents of MTA, who were the owners for the project. Plaintiff further alleges that Defendants Judlau and PB are liable under Labor Law § 200 and common-law negligence regardless of their control over Plaintiff's work because their employees caused and created a dangerous condition which caused Plaintiff's accident and it was not caused by the means and methods of Plaintiff's work. Plaintiff further alleges in substance that Defendants Judlau and PB are also liable for Plaintiff's injuries for their failure to provide Plaintiff with a safe place to work by exposing him to a dangerous tripping/slipping condition at their work site.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

It is well settled that Labor Law § 200 is the codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). General contractors may be held liable for unsafe premises conditions if they created or had actual or constructive notice of the condition and had control of the place where the injury occurred (*Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1<sup>st</sup> Dept 2004]). A plaintiff is not required to prove a general contractor's supervision and control over plaintiff when a plaintiff alleges that the injury arose from the condition of the work place created by or known to the general contractor, rather than the method of the plaintiff's work (*Roppolo v Mitsubishi Motor Sales of Am., Inc.*, 278 AD2d 149, 150 [1<sup>st</sup> Dept 2000]).

Based upon the admissible evidence submitted, the court grants Defendants' motion in part to the extent that the court (1) dismisses all claims against Defendant OHL; (2) dismisses Plaintiff's Labor Law § 240(1) claims against all Defendants; (3) reserves decision on Plaintiff's Labor Law § 241(6) claims, accepts Plaintiff's supplemental bill of particulars *nunc pro tunc*,

permits additional discovery and permits the remaining parties to file a supplemental summary judgment motion on this claim; (4) grants dismissal of Plaintiff's Labor Law § 200 and common-law claims against Defendant PB and (5) denies Defendants' motion for summary judgment as to Plaintiff's Labor Law § 200 and common-law claims against Defendant Judlau only.

The court finds that, although Defendants demonstrated their entitlement to summary judgment in their favor as a matter of law, Plaintiff raised material issues of disputed facts sufficient to defeat this motion as to Plaintiff's Labor Law § 200 and common-law claims against Judlau, including, but not necessarily limited to, whether Plaintiff's trip/slip and fall was caused by a dangerous or hazardous condition; whether Judlau violated Labor Law § 200 and the common-law by failing to provide Plaintiff with reasonable and adequate protection; whether they failed to use reasonable care in making or keeping the workplace safe, providing Plaintiff with a reasonably safe place to work, and/or by causing or allowing construction debris to fall and remain on the floor at the bottom of Plaintiff's ladder; and whether Judlau laborers created the hazard by causing or allowing the debris to fall from an overfilled dumpster that they wheeled past Plaintiff's ladder and/or by failing to correct such condition. Therefore, the court denies Defendants' motion as to Plaintiff's Labor Law § 200 and common-law claims against Defendant Judlau.

However, the court grants dismissal of Plaintiff's Labor Law § 200 and common-law claims against Defendant PB and finds that Plaintiff failed to establish by admissible evidence the existence of a factual issue requiring a trial of the action as to PB's liability under these claims. The evidence demonstrated that PB is not an owner or general contractor, but a construction manager of the site. Additionally, there is no evidence that PB acted as a statutory agent of the owner or general contractor. The court is not persuaded by Plaintiff's arguments that

a question of fact exists as to whether PB is an agent of the owner, MTA, nor that it assumed a level of responsibility necessary for liability. Also, there is no evidence that PB created or caused the allegedly dangerous condition, or that it directed or supervised Plaintiff's work.

Therefore, Plaintiff's claims under Labor Law § 200 and common-law negligence against Defendant Judlaw remain and the court reserves decision as to Plaintiff's claims under Labor Law § 241(6) as against Defendants Judlaw and PB.

#### Plaintiff's Cross-Motion

Plaintiff cross-moves for leave to serve a supplemental bill of particulars *nunc pro tunc*, pursuant to CPLR 3043, to identify specific Industrial Code violations under Labor Law 241(6). Plaintiff filed a supplemental verified bill of particulars, dated October 7, 2020, filed as NYSCEF document number 43, alleging that Defendants violated 12 N.Y.C.R.R. §§ 23-1.7 (d), (e)(1), (e)(2) and (f). Plaintiff alleges in substance that Defendants had prior notice of these allegations, they did not involve any new factual allegations, raised no new theories of liability and caused no prejudice to Defendants.

The court finds that Plaintiff demonstrated good cause and explained his failure to include the specific Industrial Code provisions in his bill of particulars. Also, the court agrees with Plaintiff that Defendants will not suffer prejudice if the court grants Plaintiff's request to accept the supplemental bill of particulars as the court will permit Defendants Judlaw and PB to have additional discovery and file a supplemental summary judgment motion on these claims. Specifically, Defendants' correspondence, dated May 17, 2021, requests an opportunity to depose Phil Buccine, who submitted an affidavit in support of Plaintiff's opposition to Defendants' motion. The court grants this request and provides Defendants an opportunity to attempt to depose Mr. Buccine within thirty (30) days of the date of this order.

Additionally, the court permits Defendants to file a supplemental summary judgment motion regarding Plaintiff's Labor Law § 241(6) claims on or before August 2, 2021, Plaintiff's opposition papers are due on or before August 23, 2021, and Defendants Judlau's and PB's reply papers are due on or before August 31, 2021.


As such, it is hereby

ORDERED that the court grants in part Defendants Judlau Contracting, Inc.'s, OHL USA, Inc.'s and Parsons Brinckerhoff, Inc.'s motion for summary judgment dismissal of Plaintiff Michael Costello's complaint to the extent that the court:

- 1) grants summary judgment in favor of Defendant OHL USA, Inc. as to all of Plaintiff Michael Costello's claims against it;
- 2) grants summary judgment in favor of Defendants Judlau Contracting, Inc. and Parsons Brinckerhoff, Inc. as to Plaintiff's Labor Law § 240(1) claims against them;
- 3) grants summary judgment in favor of Defendant Parsons Brinckerhoff, Inc. as to Plaintiff's Labor Law § 200 and common-law negligence claims against it;
- 4) denies summary judgment as to Plaintiff's Labor Law § 200 and common-law negligence claims against Defendant Judlau Contracting, Inc.; and
- 5) reserves decision as to Plaintiff's claims under Labor Law § 241(6) as against Defendants Judlau Contracting, Inc. and Parsons Brinckerhoff, Inc.; and it is further ORDERED that the court grants Plaintiff's cross-motion for leave to serve a supplemental bill of particulars *nunc pro tunc* and accepts Plaintiff's supplemental bill of particulars, dated October 7, 2020, filed on NYSCEF as document number 43; and it is further

ORDERED that the court grants Defendants Judlau Contracting, Inc. and Parsons Brinckerhoff an opportunity to attempt to depose out-of-state witness Phil Buccine within thirty (30) days of the date of this order; and it is further

ORDERED that the court permits Defendants Judlau Contracting, Inc. and Parsons Brinckerhoff to file a supplemental summary judgment motion addressing Plaintiff's Labor Law § 241(6) claims on or before August 2, 2021, Plaintiff's opposition papers are due on or before August 23, 2021, and Reply papers are due on or before August 31, 2021.

<u>6/1/2021</u> DATE			 ERIKA M. EDWARDS, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER