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| Costello v Judlau Contr., Inc. |
| 2021 NY Slip Op 32670(U) |
| December 15, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 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

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MICHAEL COSTELLO,

Plaintiff,

- v -

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

Defendants.

-----X

INDEX NO. 151845/2016

MOTION DATE 07/30/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants in part Defendants Judlau Contracting, Inc.'s ("Judlau") and Parsons Brinckerhoff, Inc.'s ("PB") (collectively, "Defendants") supplemental motion for summary judgment dismissal of Plaintiff Michael Costello's ("Plaintiff") Labor Law § 241(6) claims against them to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff's Labor Law § 241(6) claims against PB, grants dismissal of the claims as to the alleged violations of Industrial Code §§ 23-1.7(d) and (f) as against Judlau, but denies dismissal as to Plaintiff's claims under Industrial Code §§ 23-1.7(e)(1) and (e)(2) as against Judlau.

Among other determinations, in the court's previous decision and order, dated June 1, 2021 (NYSCEF Doc. No. 61), the court reserved decision on dismissal of Plaintiff's Labor Law § 241(6) claims as against Judlau and PB; determined that PB was the construction manager of the project; granted Plaintiff's cross-motion for the court to accept a supplemental bill of particulars *nunc pro tunc* which included specific sections of the Industrial Code in support of

Plaintiff's Labor Law § 241(6) claim; and the court permitted Judlau and PB to file a supplemental summary judgment motion addressing these claims.

Defendants Judlau and PB now move for summary judgment dismissal of Plaintiff's Labor Law § 241(6) claims based upon the specified provisions of the Industrial Code. Therefore, although the court designated this motion as motion sequence 002, it is actually a supplemental motion under motion sequence 001. Plaintiff opposes the motion, but failed to challenge dismissal of the claims against PB.

Plaintiff brought this action against Judlau, PB and OHL USA, Inc.¹ for injuries he allegedly suffered on October 29, 2014 when he stepped off of a ladder onto a pile of construction debris which caused him to trip, slip, and fall against a wall. At the time of the accident, Plaintiff and his partner were installing electrical ceiling fixtures at the Second Avenue Subway construction site. 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 testified in substance that the debris consisted of sheetrock, wood and pipe. 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.

¹ The court granted dismissal of Plaintiff's complaint against Defendant OHL USA, Inc. in its previous decision and order, dated June 1, 2021.

§§ 23-1.7 (d), (e)(1), (e)(2) and (f) because they caused and/or allowed the tripping/slipping hazard.

Labor Law § 241(6) imposes a nondelegable duty upon an owner or subcontractor, regardless of who controls or supervises the site, to use reasonable care to provide reasonable and adequate protection and safety to employees working at the site (*St. Louis v N. Elba*, 16 NY3d 411, 413 [2011]). Therefore, Plaintiff's Labor Law § 241(6) claim is not dependent on the degree of Defendant's control over his work, rather it is dependent on the application of the specific Industrial Code provision and a finding that the violation of the provision was a result of negligence (*Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [citation omitted]).

Here, the court grants the portion of Defendants' motion seeking dismissal of Plaintiff's Labor Law § 241(6) claims against PB because the court previously determined that PB was a construction manager on the project and was not an owner, general contractor, or agent of either one. Therefore, PB cannot be liable for Plaintiff's injuries under Labor Law § 241(6).

As to the portion of the motion related to Judlau, the court finds that Judlau met its burden of demonstrating its entitlement to dismissal of Plaintiff's Labor Law § 241(6) claims pertaining to alleged violations of Industrial Code §§ 23-1.7(d) and (f) and that Plaintiff failed to raise material issues of fact based upon the admissible evidence to dispute these arguments. The court finds that, although Plaintiff alleges that he slipped and tripped on the debris, Defendants demonstrated that there was no evidence that Plaintiff's fall was caused by a slippery condition which consisted of ice, snow, water, grease, or a foreign substance as contemplated by Industrial Code § 23-1.7(d). Plaintiff alleged that the debris consisted of sheetrock, wood and pipe and then he discussed seeing one foot pieces of wood blocks. Plaintiff, nor his co-worker discussed the

presence of water, ice, grease, saw dust, mud, or any other type of foreign substance which created a slippery condition. As such, the court need not determine whether the foreign substance was integral to Plaintiff's work and the court dismisses this claim.

Additionally, the court finds that Defendants demonstrated that Industrial Code § 23-1.7(f) does not apply to the facts of this case as Plaintiff did not fall while using a vertical passage as defined by the statute and there was no allegation that the ladder was unsafe in any way. Therefore, the court dismisses this claim as well.

However, the court denies the portion of Judlau's motion seeking dismissal of Plaintiff's Labor Law § 241(6) claims pertaining to Industrial Code §§ 23-1.7(e)(1) and (e)(2) and finds that Plaintiff demonstrated material questions of fact in dispute to be determined by a trier of fact as to these claims. Such questions include, but are not necessarily limited to, whether the area where Plaintiff fell on the divided subway platform can be deemed to be a passageway as contemplated by Industrial Code § 23-1.7(e)(1) and whether the alleged construction debris which caused Plaintiff's fall was an accumulation of dirt and debris as contemplated by §§ 23-1.7(e)(1) and (e)(2).

As such, the court denies dismissal of Plaintiff's Labor Law § 241(6) claims pertaining to Industrial Code §§ 23-1.7(e)(1) and (e)(2) as against Judlau.

The court has considered any additional arguments raised by the parties which are not discussed herein and the court denies all requests for relief not expressly granted herein.

As such, it is hereby

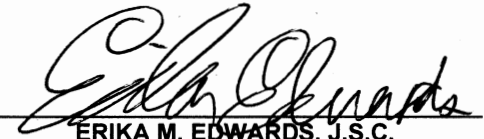
ORDERED that the court grants in part Defendants Judlau Contracting, Inc.'s and Parsons Brinckerhoff, Inc.'s supplemental motion for summary judgment dismissal of Plaintiff Michael Costello's Labor Law § 241(6) claim against them to the extent that the court grants

dismissal of Plaintiff's Labor Law § 241(6) claims against Defendant Parsons Brinckerhoff, Inc., grants dismissal of the claims pertaining to alleged violations of Industrial Code §§ 23-1.7(d) and (f) as against Defendant Judlau Contracting, Inc., but denies dismissal as to Plaintiff's claims under Industrial Code §§ 23-1.7(e)(1) and (e)(2) as against Defendant Judlau Contracting, Inc.; and it is further

ORDERED that since the court granted dismissal of all of Plaintiff's claims against Defendants Parsons Brinckerhoff, Inc. and OHL USA, Inc. the Clerk of the Court is directed to enter judgment in favor of Defendants Parsons Brinckerhoff, Inc. and OHL USA, Inc. as against Plaintiff without costs to any party.

This constitutes the decision and order of the court.

12/15/2021
DATE


ERIKA M. EDWARDS, J.S.C.

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| 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 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 |