

**Cu v New York Hotel Trades Council & Hotel Assn. of
N.Y. City Health Ctr. Inc.**

2023 NY Slip Op 33326(U)

September 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 508810/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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MARIO CU,

Plaintiff,

-against-

**THE NEW YORK HOTEL TRADES COUNCIL
AND HOTEL ASSOCIATION OF NEW YORK
CITY HEALTH CENTER, INC., SKANSKA
USA BUILDING, INC., PARKVIEW PLUMBING
AND HEATING, INC., and CURRENT FIRE
PROTECTION, INC.,**

Defendants.

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DECISION/ORDER

Index No. 508810/2019

Submitted 9/7/23

MS # 2 & 3

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of
defendants' motions to dismiss the complaint and for related relief**

| Papers | Numbered |
|--|-----------------------------|
| Notices of Motion, Affirmations, Exhibits Annexed..... | <u>81-104, 111; 108-110</u> |
| Affirmations in Opposition and Exhibits Annexed..... | <u>112; 114; 113</u> |
| Reply..... | <u>115-116</u> |

Upon the foregoing cited papers, the decision/order on these motions is as follows:

In Motion Seq. #2, defendants Parkview Plumbing and Heating, Inc. ("Parkview") and Current Fire Protection, Inc. ("Current Fire") move for summary judgment and dismissal of plaintiff's complaint, which asserts claims pursuant to Labor Law §§ 200 and 241(6), as well as for common law negligence. In Motion Seq. #3, defendants The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. ("Trades Council") and Skanska USA Building, Inc., ("Skanska") cross-move for summary judgment dismissing any cross claims asserted against them by the co-defendants, as

well as for an order granting them summary judgment on their cross claims for contractual and common law indemnification from defendant Parkview.

Labor Law §241(6) is not actionable against defendants Parkview or Current Fire, as they are not proper Labor Law defendants. There is no evidence that either of these companies were statutory agents of the owner or general contractor with the requisite authority to oversee the plaintiff's work, or general authority over site conditions such that they could be held liable pursuant to the Labor Law. The moving defendants were subcontractors on the construction project where the plaintiff was injured. They were not the general contractor, the owner, the construction manager, or statutory agents of the general contractor, owner, or construction manager. The movants were not delegated any site safety or general housekeeping responsibilities. They were not delegated any authority to supervise, direct or control the plaintiff or the work he was performing.

Turning to the plaintiff's claims pursuant to Labor Law §200 and common law negligence, the court finds that the evidence provided in support of the motion establishes that neither Parkview nor Current Fire caused or created the hole that plaintiff claims was a hazardous condition which caused him to trip and fall, and, as such, they are entitled to summary judgment.

Plaintiff was employed by non-party EJ Electric and was working at a job site at 620 Fulton Street in Brooklyn. On May 9, 2017, while he was working, he claims that he stepped into a hole on the eleventh floor of the building, fell, and was injured. Trades Council was the building's owner, and Skanska was the construction manager. Parkview was installing the plumbing, and Current Fire was installing the sprinkler system. The hole was located in an area where bathrooms were to be installed. Trades Council and Skanska claim that because the accident took place in a location which was going to be

a bathroom, the hole “must have been created by the plumbers” [Doc 109 ¶35]. Plaintiff’s accident report states [Doc 41] that “while carrying a bundle of conduit, Mario stepped into an unprotected core hole.”

Plaintiff testified that he had been working at this site for about six weeks. He was “an inside wireman” [Doc 94 Page 21]. He is a member of Local 3. He said there were several trades working on the same floor as he was working. He had taken a roll of conduit and was bringing it from the storage area to the work site. Any holes that his company had made “had conduit or wire in them “ by the date of his accident [Page 63]. He described the hole he twisted his ankle in as “it seemed like they did not even finish yet, they were still in the middle of whatever they were doing” [Page 65]. He elaborated that “I did not know what it was until I walked over to the hole to see what I actually stepped in, everything was the same color and it looked like it was pushed downward, I looked directly above it. . . . like a depression in the floor” [Page 72]. He thought it would have been created by a “chipping gun” [*id.*].

The contract between Skanska and Parkview is at Document 36. It is more than 300 pages long, and states that Parkview was hired as the plumbing contractor at a project known as the Brooklyn Health Center. It states that Parkview shall “coordinate, permit and perform all site service connections including but not limited to sewer, water (domestic and fire service) and storm service. This includes coordination and permitting with all agencies required including but not limited to DEP, DOT and DOB” [¶2]. The contract continues [Parkview] “shall furnish and install all work that is to be performed by the plumbing trade contractor. This work shall include but is not limited to piping, fittings, insulation, valves, gaskets, meters, gages, plumbing fixtures, plumbing equipment, including all necessary hangers, supports and bracing, labeling, testing, start-up,

commissioning and as-built drawings required to perform a complete system” [¶12]. Finally, it states that “Plumbing fixtures from the cellar level through the 6th floor are to be furnished and installed by this subcontractor. For floors 7-11 plumbing fixtures are to be rough-in only; all other elements by tenant” [¶18]. Thus, on the floor where plaintiff had his accident, Parkview was hired, with regard to the plumbing fixtures, solely to rough-in the place where the fixtures were to be installed. However, there is no evidence that the place where plaintiff had his accident was intended to be the location of a plumbing fixture.

Parkview’s witness Chris Strnad testified that he did not know the purpose of the hole in the photo, or how it was made. He said the photo did not show enough for him to identify the purpose of the pipes in the photo. The copper pipes could be for water, or for the HVAC system [Doc 102 Page 39]. He was unable to correlate the picture to the plumbing installation diagram. He could not say if the other item was a waste line or a vent line. Or something done by another trade. He said the hole looked like it was chopped by a chopping gun, and Parkview does not use them. He said that if he had seen the hole, Parkview’s foreman would call the safety contractor hired by Skanska to nail plywood down [Page 48]. But he had not seen it. Mr. Strnad testified that the hole should have been immediately covered, and it was Skanska’s responsibility to do so [Page 51].

Kevin Gillen testified for Current Fire. His company installed the sprinkler system. He said a core hole is one that is made after the concrete is poured [Doc 100 Page 22]. Sleeve holes are made by making space before the concrete is poured. Sprinklers were installed in the hallways and in the bathrooms. He was shown the 11th floor “contract drawing” for the sprinkler system. All of the pipes, sprinkler heads and standpipe are in the drawing [Page 27]. The attorneys attempted to have Mr. Gillen correlate the place where plaintiff had his accident to the sprinkler drawing without success. He was then

shown the photo of the place where plaintiff fell. He said the pipe “looks like drain piping” and that it is not used for fire protection [Page 37]. He said the copper pipes were not used by Current Fire for its sprinkler system installation. The black pipe he said was probably a drainpipe, also not used for their sprinkler installation. He was then asked [Page 39] “looking at the layout of those pipes, would there be any fire protection piping in this area?” and he said “no.” Finally, he was asked if Current Fire would have had any need to make any holes or other penetrations of the flooring for the purposes of their work in the area in the photo, and he said “no” [Page 40]. He was then asked if he knew the purpose of the “opening” in the floor, and he said “no” [Page 46]. He did not know which trade would have created it.

Co-defendants Trades Council and Skanska oppose the motion, solely with an attorney’s affirmation. Counsel avers that “Parkview and Current Fire . . . created the hole within the scope of their work.” The court finds that this affirmation from counsel is mere speculation. It is not enough to raise a triable issue of fact. Similarly, plaintiff opposes the motion solely with an affirmation of counsel, who argues that “it is clear that a question of fact exists as to whether defendants created the defective condition alleged by the plaintiff to have caused his incident.” The contract between the owner and Skanska [Doc 39] anticipates many trades being hired for this new twelve story medical building. The floor depression could have been caused by other trades or subcontractors of the trades. However, plaintiff is protected by the Labor Law, as a worker at the job site. It is up to the building’s owner and the general contractor to determine which trade might be responsible, and if they wish, to seek indemnification from that company.

Accordingly, Parkview and Current Fire’s motion (seq. 2) is granted. As there are no cross claims against Parkview or Current Fire asserted by any of the other defendants,

the complaint is dismissed in its entirety as against Parkview and Current Fire. While Parkview has asserted cross claims in its answer against Current Fire, the dismissal of the complaint against Parkview results in the dismissal of Parkview's cross claims against Current Fire.

Similarly, the branch of MS #3 which seeks summary judgment dismissing the cross claims asserted against Trades Council and Skanska by Parkview and Current Fire is also rendered moot as a result of the court's dismissing the complaint as against defendants Parkview and Current Fire in MS #2.

Turning to the branch of Trades Council and Skanska's motion for summary judgment on their cross-claims for common law and contractual indemnification against defendant Parkview, the court finds that movants did not assert any cross-claims of any kind in their answer, and so this branch of their motion must be denied. Now that Parkview has been dismissed from this action, if defendants Trades Council and Skanska want to seek indemnification, they will have to commence a plenary action.

The foregoing constitutes the decision and order of the court.

Dated: September 26, 2023

ENTER :



Hon. Debra Silber, J.S.C.