Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

LEWIS A. BAILEY,

Plaintiff,

-against-

BEECHWOOD ARVERNE LLC and BENJAMIN-BEECHWOOD LLC,

Defendants.

BEECHWOOD ARVERNE LLC and BENJAMIN-BEECHWOOD LLC,

Third-Party Plaintiffs,

-against-

T & D ASSOCIATES, LTD.,

Third-Party Defendant.

Index No. 9985/06

Motion
Date December 1, 2009

Motion
Cal. No. 2

Motion
Sequence No. 5

PAPERS
NUMBERED

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Upon the foregoing papers it is ordered that the motion by third-party defendant, T&D Associates, Ltd. ("T&D Associates") for summary judgment dismissing the third-party complaint of third-party plaintiffs Beechwood Arverne LLC ("Beechwood Arverne") and Benjamin-Beechwood LLC ("Benjamin-Beechwood") is hereby denied.

This is a personal injury action whereby plaintiff, Lewis A. Bailey was struck by an excavator machine while working as a laborer at a worksite jointly owned by defendants/third-party plaintiffs, Beechwood Arverne and Benjamin-Beechwood. T&D Associates maintains that it rented the excavator machine with an operator, to Rockaway Beach Boulevard Construction ("Rockaway Beach"), who was allegedly the general contractor and plaintiff's employer. As a result of the accident, third-party plaintiff commenced an action for contractual indemnification, common law

indemnification, failure to procure insurance, and contribution.

I. Third-Party Defendant's Motion for Summary Judgment against Third-Party Plaintiffs

In the first branch of the motion, third-party defendant presented a prima facie case for summary judgment against third-party plaintiffs' contractual indemnification and failure to procure insurance claims because third-party defendant established that there is no viable contractual promise to defend, indemnify, or procure insurance for the joint owners. Rather third-party plaintiffs rely on a contract dated after the accident, which relates to entirely different work than that engaged in by plaintiff on the date of the accident. A prima facie case has been established that the agreement in existence at the time of the accident contained no indemnification or contribution clause. Third-party plaintiffs rely on indemnification language found in subsequent contracts which are dated after plaintiff's accident and relate to separate jobs.

Third-party plaintiffs fail to oppose third-party defendant's argument.

As third-party defendant presented a prima facie case for summary judgment against third-party plaintiffs' contractual indemnification and failure to procure insurance claims, and as third-party plaintiffs fail to oppose third-party defendant's argument, this branch of the motion is granted and third-party plaintiffs' contractual indemnification and failure to procure insurance claims are dismissed.

Furthermore, in the second branch of the motion, T&D Associates makes a prima facie case that at the time of the accident, T&D Associates lent its excavator machine and employee to the owner/general contractor and argues that at the time of the accident, plaintiff was injured by a co-worker and so the third-party claim for contribution would be barred by Worker's Compensation Law § 11. A special employee is an individual who is transferred for a limited time of whatever duration to the service of another (Thompson v. Grumman Aerospace Corp., 78 NY2d 553 [1991]). If a worker is employed by a fellow worker who is also a special employee, plaintiff's action against the general employer will be barred by the Workers' Compensation Law § 11. T&D Associates established that it merely lent the excavator machine and the excavator machine operator to the general contractor. The owners and general contractor had sole supervision of both the machine operator and all laborers at the project, directed all workers as to where and how to perform their work obligations, and oversaw their daily activity. Therefore, T&D Associates had no control over the task that the machine operator or the laborers performed and could not have supervised the work as if it was on site.

In opposition, third-party plaintiffs argue that it was T&D Associates' employee that operated the excavator that struck the plaintiff. Third-party plaintiffs argue that it was T&D's employee that was operating the excavator that either struck the plaintiff or was operated in such a manner that caused plaintiff to dive to the ground to avoid being struck by it. Third-party plaintiffs additionally contend that the excavator operator was not a special employee of either Benjamin Beechwood or of Rockaway Beach Boulevard Construction and that T&D Associates cannot show that Benjamin-Beechwood supervised, directed or controlled "the manner, details and ultimate result" of the excavator operator's work.

The Court finds that there is a triable issue of fact as to whether the excavator operator was an employee of Benjamin-Beechwood or of T&D Associates. There is a triable issue of fact as to whether T&D Associates relinquished the excavating machine and the excavator operator to Benjamin-Beechwood. Accordingly, this branch of the motion is denied.

Additionally, in the third branch of the motion, T&D Associates establishes a prima facie case that it did not supervise or control the injury producing work, so it cannot be held liable for contribution under Labor Law § 200. Labor Law § 200 codifies the common-law duty of an owner or contractor to provide construction site workers with a safe working environment, provided that the owner or contractor has supervisory control over the performance of the activity causing the injury (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). T&D Associates established a prima facie case that it did not supervise or control the injury-producing work under Labor Law § 200. T&D Associates proved that on the date of the accident, T&D Associates entered into a daily rental agreement with Rockaway Beach for an excavator machine and an excavator machine operator. Under the agreement, T&D Associates merely provided the equipment to Rockaway Beach, and once the machine was delivered, T&D Associates relinquished all supervision and control over the type or manner of work engaged in by the operator. The rental agreement specifically states that "[a]ll work performed under your supervision." T&D establishes that the general contractor/owners of the property directed where the excavator and operator were assigned and who would work with the excavator on any specific task. Further, all site safety was controlled solely by the owner and general contractor.

In opposition, third-party plaintiffs argue that they did not exercise control over the injury-producing activity and neither third-party plaintiff had notice of the condition. Third-party plaintiffs present the sworn affidavit of Alexis Vallardes, an excavation operator for T&D Associates, which affidavit states that Benjamin Beechwood did not direct the means or methods he used in operating the excavator, and Mr. Vallardes did not receive any directions or instructions from Benjamin

Beechwood concerning the performance of his work on the date of plaintiff's accident. Additionally, Benjamin-Beechwood did not have actual or constructive notice of the manner in which the excavator was operated on the date of plaintiff's accident.

As the Court finds that there is a triable issue of fact as to whether T&D Associates supervised or controlled the injury producing work, the third branch of the motion is denied.

Finally, in the fourth branch of the motion, T&D Associates established a prima facie case that none of the Industrial Code sections cited by the plaintiff apply to the accident, T&D Associates cannot be held liable for any Labor Law § 241(6) claims. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., 4 NY3d 399 [2005]); Bland v. Manocherian, 66 NY2d 452 [1985]; Kollmer v. Slater Electric, Inc., 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." (Rizzuto v. LA Wenger Contracting, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards," but rather must establish "concrete specifications." (See, Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]; Williams v. Whitehaven Memorial Park, 227 AD2d 923 [4th Dept 1996]). Plaintiff's Bill of Particulars alleges violations of Industrial Code §§ 23-1.5, 23-1.7(a), (d), 23-9.4 and 23-9.5. Section 23-1.5 is a general safety regulation and courts have held that it is not a sufficient predicate to Labor Law § 241(6) (see, Cun-en Lin v. Holy Family Monuments, 18 AD3d 800 [2d Dept 2005]). Section 23-1.7(a) deals with protection from overhead hazards and falling objects. In the instant case, plaintiff was injured when an excavator machine allegedly hit him in the back. There were no falling objects or a need for overhead protection. Therefore, section 23-1.7(a) is not applicable. Section 23-1.7(d) addresses slipping hazards, and as there is no allegation of plaintiff slipping, but rather plaintiff was walking on dirt when the accident happened, this regulation is not applicable. Section 23-9.4 addresses the stability, inspections, footings, hoisting mechanisms, attachments of loads, capacity and general operating instructions for power shovels and backhoes involved in material handling. None of the subsections relate to plaintiff's allegations. Also, this case does not involve the handling of a material, as with a hoist or a load. Since the case involves the use of an excavator, the regulation is inapplicable (see, Vicari v. Triangle Plaza II, LLC, 16 AD3d 672 [2d Dept 2005]). Finally, Industrial Code § 23-9.5 involves the use of excavator machines.

Courts have held that this regulation does not apply to an accident where plaintiff was hit by an excavator (see, Vicari, supra).

In opposition, third-party plaintiffs also argue that they established a prima facie case plaintiff's cause of action under Labor Law § 241(6) must be dismissed because the alleged Industrial Code violations are inapplicable to the facts of this case. Section 23-1.7(a) deals with overhead protection and falling objects. In the instant case, there were no falling objects or a need for overhead protection. Therefore, section 23-1.7(a) is not applicable. Subsection (d) refers to slipping hazards. The Courts have held that this provision does not apply to open areas of a construction site (see, Enriquez v. B&D Development, Inc., 2009 WL 111636543 [2d Dept 2009]). In the instant case, plaintiff was not injured by a slipping hazard and since his accident occurred in the open area of the construction site, the provision does not apply to the facts of this case. Industrial Code Section § 23-9.4 applies only to excavators that are being used to lift and carry material. Since the case involves the use of an excavator which was digging and not lifting or carrying materials, the regulation is inapplicable (see, Vicari v. Triangle Plaza II, LLC, 16 AD3d 672 [2d Dept 2005]). Furthermore, Industrial Code § 23-9.5 was not violated. Said section states in relevant part that "[n]o person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket whole the shovel is in operation." Defendants established that the plaintiff was given specific instructions to stand out of the range of the back of the power shovel and the swing of the bucket, and so it was clear that he was not permitted to stand within range of the excavator. Therefore, Industrial Code § 23-9.5 was not violated.

In opposition plaintiff argues that T&D's motion should be denied since the record shows that plaintiff was injured due to a violation of Industrial Code § 23-9.5. Plaintiff argues Mr. Bailey was struck by an excavating machine which began to operate as he passed by the machine. Section 23-9.5 prohibits operation of an excavating machine when any person is within reach of the machine. Plaintiff additionally argues that violation of Industrial Code § 23-9.5(c) has been held to be sufficiently concrete to support a claim under Labor Law § 241(6), citing Weber v. City of Dunkirk, 266 AD2d 1050 [4th Dept 1996]). Finally, plaintiff argues that Mr. Bailey was not a member of the pit crew and provides an affidavit of Alexis Vallardes, which states that Mr. Bailey was not a member of the pit crew.

The Court finds that there is a triable issue of fact as to whether Industrial Code § 23-9.5 was violated. As it is undisputed that the other cited code sections are inapplicable, summary judgment is granted to third-party defendants on all Labor Law § 241(6) claims other than § 23-9.5.

II. Defendants' Cross Motion for Summary Judgment against Plaintiff

That branch of defendants/third-party plaintiffs, Beechwood Arverne LLC ("Beechwood Arverne") and Benjamin- Beechwood LLC's (Benjamin-Beechwood) (hereinafter collectively referred to as "defendants") cross motion for summary judgment dismissing the Complaint of the plaintiff, Lewis A. Bailey is decided as follows:

In the first branch of the cross motion, defendants established a prima facie case that the Complaint should be dismissed against Beechwood Arverne because this entity is not an owner, contractor, or agent. It is well-settled law that liability can only be imposed under Labor Law §§ 241(6) and 200 can only be imposed upon owners, contractors, or their agents (see, Ross v. Curtis Palmer Hydro-Electric Co., 81 NY2d 194 [1993]). Defendants established that Beechwood Arverne was not formed until a month after plaintiff's accident. Plaintiff failed to oppose this argument. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted." (Kuehne & Nagel, Inc. v. Baider, 36 NY2d 539 [NY 1975]; see also, Tortorello v. Carlin, 260 AD2d 201 [1st Dept 1999]). Accordingly, the Court finds that as Beechwood Arverne was not in existence at the time of plaintiff's accident, it cannot be held liable for plaintiff's injuries pursuant to Labor Law § 241(6) or § 200. Accordingly, the Complaint is dismissed as against Beechwood Arverne.

In the second branch of the cross motion, defendants established a prima facie case that plaintiff's claims against Benjamin-Beechwood must be dismissed because they are barred by the Workers Compensation Law. In the instant case, a prima facie case was established that plaintiff was an employee of Rockaway Beach Boulevard Construction ("Rockaway Beach") and that Benjamin-Beechwood and Rockaway Beach share offices and employees, and so the moving defendants contend that it and Rockaway Beach are alter egos of each other for purposes of the exclusivity provisions of the Workers' Compensation Law (see, Crespo v. Pucciarelli, 21 AD3d 1048 [2d Dept 2005]). Moreover, defendants assert Benjamin-Beechwood, the owner of the property, is a limited liability company, the members of which are identical to the plaintiff's employer, Rockaway Beach. It is well-settled law that an employee who elects to receive compensation benefits may not sue his employer in an action at law for the injuries sustained (see, Balamos v. Elmhurst Realty Co. I, LLC, 56 AD3d 705 [2d Dept 2008]). Additionally, a plaintiff injured during the course of his employment cannot maintain an action to recover damages for personal injuries against the owner of the premises upon which the accident occurred if the owner is also an officer of the corporation that employed the plaintiff (see, Coppola v. Singer, 211 AD2d 744 [2d

Dept 1995]; Lapinski v. Gusman Realty Corp., 211 AD2d 762 [2d Dept 1995]). The evidence demonstrates a prima facie case that Benjamin-Beechwood is plaintiff's employer for purposes of the exclusivity provisions of the Workers' Compensation Law.

In opposition, plaintiff argues that Benjamin-Beechwood's own moving papers establish that Rockaway Beach and Benjamin-Beechwood are distinct legal entities, and thus under New York law, the owner cannot raise the workers compensation defense, citing O'Connor v. Spencer (97) Investment Ltd., 2 AD3d 513 [2d Dept 2003]). Plaintiff contends that plaintiff's employer at the time of the incident was Rockaway Beach. Plaintiff further contends that Benjamin Arverne and former defendant, Benjamin Arverne Building Corp. constituted the members of Rockaway Beach, and Benjamin Arverne and former defendant Beechwood Arverne Building Corp. also constitutes the members of property owner, Benjamin-Beechwood. Plaintiff concludes that the owner of the construction site, Benjamin-Beechwood and Mr. Bailey's employer, Rockaway Beach were limited liability companies that had common ownership by another limited liability company and by a corporation.

The Court finds that plaintiff raises a triable issue of fact as to whether Benjamin-Beechwood and Rockaway Beach are alter egos of each other (see, Crespo v. Pucciarelli, 21 AD3d 1048 [2d Dept 2005]). There is a triable issue of fact as to whether Benjamin-Beechwood and Rockaway Beach are distinct legal entities. Therefore, there is a triable issue of fact as to whether Benjamin-Beechwood is shielded from tort liability. As there are triable issues of fact, summary judgment is unwarranted.

In the third branch of the cross motion, defendants established a prima facie case plaintiff's cause of action under Labor Law § 241(6) must be dismissed because the alleged Industrial Code violations are inapplicable to the facts of this case. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury. Plaintiff's Bill of Particulars alleges violations of Industrial Code §§ 23-1.5, 23-1.7(a), (d), 23-9.4 and 23-9.5. Rule 23-1.5 is a general safety standard, which is not a sufficient predicate for liability under Labor Law § 241(6) (see, Rau v. Bagels n Brunch, Inc., 57 AD3d 866 [2d Dept 2008]). Section 23-1.7(a) deals with overhead protection and falling objects. In the instant case, there were no falling objects or a need for overhead protection. Therefore, section 23-1.7(a) is not applicable. Subsection (d) refers to slipping hazards. The Courts have held that this provision does not apply to open areas of a construction site (see, Enriquez v. B&D Development, Inc., 2009 WL 111636543 [2d Dept 2009]). In the instant case, plaintiff was not injured by a slipping hazard and since his accident occurred in the open area of the construction

site, the provision does not apply to the facts of this case. Industrial Code § 23-9.4 applies only to excavators that are being used to lift and carry material. Since the case involves the use of an excavator which was digging and not lifting or carrying materials, the regulation is inapplicable (see, Vicari v. Triangle Plaza II, LLC, 16 AD3d 672 [2d Dept 2005]). Furthermore, Industrial Code § 23-9.5 was not violated. Said section states in relevant part that "[n]o person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket whole the shovel is in operation." Defendants established that the plaintiff was given specific instructions to stand out of the range of the back of the power shovel and the swing of the bucket, and so it was clear that he was not permitted to stand within range of the excavator. Therefore, Industrial Code § 23-9.5 was not violated.

In opposition, plaintiff argues that Industrial Code § 23-9.5 is applicable to the case at bar and supports a claim under Labor Law § 241(6) since Mr. Bailey was struck by an excavating machine which began to operate as he passed by the machine. Section 23-9.5 prohibits operation of an excavating machine when any person is within reach of the machine. Plaintiff contends that violation of Industrial Code § 23-9.5(c) has been held to be sufficiently concrete to support a claim under Labor Law § 241(6), citing Weber v. City of Dunkirk, 226 AD2d 1050 [4th Dept 1996]). Furthermore, plaintiff claims that while Benjamin-Beechwood argues that since Mr. Vallardes claims that all workers were instructed not to walk near the excavating machine, and Mr. Bailey was instructed not to walk near the excavating machine, Mr. Bailey's labor law claim is defeated, such argument is fallacious because Mr. Bailey did not receive any such instructions.

The Court finds that plaintiff raises a triable issue of fact as to whether plaintiff was specifically instructed not to walk near the excavating machine, and therefore, a triable issue of fact is raised as to Labor Law § 23-9.5. As all of the other Industrial sections are undisputedly inapplicable, summary judgment is granted to defendants on all of the other Industrial Code sections.

In the fourth branch of the cross motion, defendants established a prima facie case that plaintiff's Labor Law § 200 cause of action must be dismissed because neither Beechwood-Arverne nor Benjamin-Beechwood exercised control over the injury producing activity and neither had notice of the condition. Labor Law § 200 codifies the common law duty of an owner or contractor to provide construction site workers with a safe working environment, provided that the owner or contractor has supervisory control over the performance of the activity causing the injury (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). Defendants established a prima facie case that they did

not supervise or control the injury-producing work under Labor Law § 200. Pursuant to the affidavit of Alexis Vallardes, who at the time of the accident was working for T&D Construction as an excavator operator, Benjamin-Beechwood did not direct the means or methods he used in operating the excavator and Alexis Vallardes did not receive any instructions or directions from Benjamin-Beechwood concerning the performance of his work on the date of the accident. Additionally, a prima facie case was established that Benjamin-Beechwood did not have actual or constructive notice of the manner in which the excavator was operated on the date of plaintiff's accident.

In opposition, plaintiff provides no argument on this point. As plaintiff provides no argument on this point, the Court finds that defendants established that plaintiff's Labor Law § 200 cause of action must be dismissed because neither Beechwood Arverne nor Benjamin-Beechwood exercised control over the injury producing activity and neither had notice of the condition.

In the fifth branch of the cross motion, defendants cross-move for common-law indemnification from T&D Associates, Ltd ("T&D Associates"). Defendants/third-party plaintiffs contend that in the event the Court finds the moving defendants liable for plaintiff's accident, then the moving defendants are entitled to common-law indemnification and contribution from T&D Associates because the evidence proves that T&D's employee operated the excavator involved in plaintiff's accident, without any supervision, direction or control on the part of third-party plaintiffs.

In opposition, T&D Associates argues that it was not T&D's employee that operated the excavator machine, but rather it was Rockaway Beach's employee that operated the excavator machine. T&D Associates argues that all it did was rent an operator and a machine to Rockaway Beach, with the rental agreement providing "[a]ll work performed under your supervision," meaning the supervision of Rockaway Beach.

That branch of defendants cross motion seeking common-law indemnification from T&D Associates, Ltd ("T&D Associates") is hereby rendered not yet ripe. Since there are outstanding issues concerning the indemnitee's own negligence, summary judgment is premature (see, Meyer v. City of New York, 2009 NY Slip Op [Sup Ct, New York County; Prenderville v. International Service Systems, 10 AD3d 334 [1st Dept 1004]; Gomez v. National Center for Disability Services, Inc., 306 AD2d 103 [1st Dept 2003]).

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: March 22, 2010

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Howard G. Lane, J.S.C.