

<b>Pereira v Hunt/Bovis Lend Lease Alliance II</b>
2017 NY Slip Op 31828(U)
July 21, 2017
Supreme Court, Queens County
Docket Number: 13985/2008
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12  
Justice

\_\_\_\_\_  
JOHN PEREIRA, as Trustee of TRICIA ROWAN,  
debtor.

Plaintiffs.

-against-

HUNT/BOVIS LEND LEASE ALLIANCE II,  
A JOINT VENTURE, HUNT CONSTRUCTION  
GROUP, INC., BOVIS LEND LEASE, INC.,  
QUEENS BALL PARK COMPANY, LLC,  
METS DEVELOPMENT COMPANY, LLC,  
and 5 STAR HARDWARE & ELECTRIC  
CORPORATION.

Defendants.

Index  
Number: 13985/2008

Motion Date:  
April 21, 2016

Seq. Nos. 1, 2 & 3

FILED  
JUL 25 2017  
CLERK OF THE COURT  
QUEENS COUNTY

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X

The following papers numbered 1 to 41 were read on the (1) motion by Five Star Electric Corp. (Five Star), to dismiss the complaint, insofar as asserted against it, and to dismiss the cross claims asserted by Hunt/Bovis Lend Lease Alliance II ("Hunt/Bovis"), Queens Ballpark Company, LLC ("QBC"), and Mets Development Company, LLC ("MDC"); (2) motion by Hunt/Bovis, QBC and MDC (herein, "the owner defendants"), for summary judgment in their favor dismissing the complaint pursuant to CPLR 3212; and (3) motion by plaintiff for partial summary judgment in her favor on her claim pursuant to Labor Law section 241(6).

	<u>Papers Numbered</u>
Defendant Five Star's Notice of Motion, affidavits and exhibits.....	1-7
Owner Defendants' Notice of Motion, affidavits and exhibits.....	8-11
Plaintiff's notice of motion, affirmation, exhibits and affidavit.....	12-15
Owner Defendants' affirmation in partial opposition to Five Star's motion, affidavit.....	16-17
Five Star's affirmation in partial opposition to Owner Defendants' Motion, affidavits, exhibit.....	18-21
Owner Defendants' affirmation in opposition to plaintiff, affidavit.....	22-23
Plaintiff's affirmation in opposition and reply, affidavit.....	24-25
Five Star's affirmation in opposition to plaintiff, affidavits, exhibits.....	26-29
Plaintiff's affirmation in reply to Five Star, affidavit.....	30-31
Owner Defendants' reply to plaintiff, affidavit.....	32-33
Owner Defendants' reply to Five Star, affidavit.....	34-35
Five Star's reply to plaintiff, affidavit.....	36-37

Upon the foregoing papers it is ordered that the motions are determined as follows:

Plaintiff in this labor law/negligence action seeks damages for personal injuries sustained on October 3, 2007, when Tricia Rowan tripped and fell over electrical cables as she walked to her work area. The project consisted of the construction of the home stadium of the New York Mets, which was owned by QBC. Bovis was the construction manager/general contractor for the project. Rowan was employed as an apprentice steamfitter for non-party Rael Automatic Sprinkler Co. ("Rael"), a subcontractor retained by Hunt/Bovis to perform sprinkler work at the project. Bovis also retained Five Star as a subcontractor to perform electrical work at the project.

Plaintiff alleges that defendants were negligent and that they violated New York Labor Law, sections 240, 241[6] and 200. As noted above, defendants move for summary judgment in their favor dismissing all claims against them; and defendant Hunt/Bovis moves for summary judgment on their claims for contractual indemnification from Five Star. Plaintiff moves for summary judgment in Plaintiff's favor on the Labor Law 241(6) claims.

## Facts

Rowan testified upon an examination before trial, as follows: she was an employee of Rael Automatic Sprinkler Co. when she tripped and fell over electrical cables as she walked to her work area. On the morning of the accident, Rowan reported to the Rael shanty, where she met with fellow co-workers. She followed her co-workers to their work area, which required them to walk up a flight of stairs, across a concrete floor, and then across a span of corrugated metal decking material, commonly called "Q-decking." Plaintiff walked across the Q-decking, placing each foot on the raised portion of the Q-decking, with the troughs in between. At some point, the Q-decking ended and there was a step down of approximately four to six inches to a lower level of Q-decking. The lower level of Q-decking had a "mess" of cables running across it. There were no trades working on the Q-decking at the time of the incident. Rowan testified that she stepped down and onto the lower level of Q-decking and when she did so, her foot "got caught" in the cables. When her foot got caught, Rowan fell over onto her side and came into contact with the Q-decking and a piece of uncapped rebar. Plaintiff testified that walking across the Q-decking was "the only way to go" to the Rael work area, which was on a concrete section beyond the Q-decking. Rowan stated that she had walked across the Q-decking and cables on the day prior to the incident, without any problems.

Five Star was a subcontractor at the project and performed electrical work beginning in October 2006 pursuant to a contract it entered into with the general contractor, Hunt/Bovis. Donald Hession, an electrical foreman for Five Star at the project, testified upon an examination before trial, and submitted an affidavit indicating the following: In his position he was responsible for the installation of cables on the Q decking. Hession described the installation as a "typical installation . . . not anything out of the ordinary. . . ." The Q decking is a corrugated steel deck, and was installed by another subcontractor at the project, not Five Star. Five Star installed the cables on the Q decking where the accident occurred at the beginning of August of 2007, approximately two months prior to the accident. The purpose of the cables was to provide power to lighting and signs. Hession avers that after the cables were installed on the Q decking, they were inspected by both Hunt/Bovis and a structural engineer. Once approved, Five Star's installation of the cables was complete. Concrete is then poured on the top of the Q decking and the cables become permanently embedded in the structure of the flooring. Five Star did not coordinate or perform the concrete pour, nor was it responsible for doing so.

Anthony Falzone, the electrical superintendent for Hunt/Bovis, oversaw the electrical installation by Five Star. Falzone would walk the project and inspect the electrical work, make sure that the work was done in a timely manner and coordinate the work between the

electricians and other trades. Falzone had the authority to stop the electrical work if he observed an unsafe condition.

It was also Falzone's responsibility to oversee the installation of the cables by Five Star. Falzone testified that once the cables were placed on the Q-decking, Five Star "would have no reason to touch them." According to Falzone, the cables were installed by Five Star in accordance with Five Star's shop drawings. When shown photographs of Five Star's installation of the cables on the Q-decking, Falzone testified that the cables were "installed appropriately." Falzone stated that Five Star's placement of the cables atop the Q-decking was "not a concern" of Falzone's.

Plaintiff's co-workers Sean Patrick Healy, Martin Debobes, and Robert Steffens all submitted written statements indicating that plaintiff "slipped" on a wet condition on the premises.

Article 12 of Five Star's contract with Hunt/Bovis provides that Five Star shall defend, indemnify and hold harmless QBP and Hunt/Bovis for all claims which arise or result from or occur in connection with Five Star's performance of its work.

#### Claims against MDC

The Court grants as unopposed the branch of the owner Defendants' motion to dismiss all of the claims asserted against Defendant Mets Development Company, LLC ("MDC"), on the grounds that MDC had no involvement in the project that allegedly gave rise to Plaintiff's injuries.

#### Labor Law § 240(1) Claims

The branch of Defendant Five Star's motion and of the owner Defendants' motion to dismiss plaintiff's claim pursuant to Labor Law § 240(1), is granted as unopposed and otherwise on the merits. It is undisputed that plaintiff fell at ground level and an elevation-related risk was not implicated. Therefore, the § 240(1) claim fails. (*See Canning v Barney's New York*, 289 AD2d 32, 33 [1st Dept 2001]).

#### Labor Law § 241(6) Claims

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work

is being performed (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Brownrigg v New York City Hous. Auth.*, 119 AD3d 504 [2014]). The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (see *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). The particular safety rule or regulation relied upon by a plaintiff must mandate compliance with concrete specifications, and not simply set forth general safety standards (see *Misicki v Caradonna*, 12 NY3d at 515; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 504-505). Comparative negligence is a valid defense to a Labor Law § 241(6) cause of action (see *Misicki v Caradonna*, 12 NY3d at 515; *Long v Forest-Fehlhaber*, 55 NY2d 154, 161 [1982]; *Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839 [2009]).

Here, the cause of action alleging a violation of Labor Law § 241 (6) is predicated, in part, on Industrial Code (12 NYCRR) § 23-1.7 (e) (2), which provides that “floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.” (12 NYCRR 23-1.7 [e] [2]). This section is sufficiently specific to support a cause of action to recover damages pursuant to Labor Law § 241(6). (See *White v Village of Port Chester*, 92 AD3d 872, 877 [2012]; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2008].) However, it has no application where the object that caused the plaintiff’s injury was an integral part of the work being performed. (See *Castillo v Starrett City*, 4 AD3d 320, 322 [2004]; *Harvey v Morse Diesel Intl.*, 299 AD2d 451, 452-453 [2002]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2001].)

The branches of the parties’ respective motions seeking summary judgment on plaintiff’s Labor Law § 241(6) claim, predicated upon a violation of Industrial Code § 23-1.7[e], are denied. There exist triable issues of fact as to whether the conditions allegedly causing Rowan’s injury were “integral” to the construction project. The evidence establishes that the electrical cable over which Rowan tripped was to be covered by concrete and become a permanent part of the floor structure. However, Plaintiff contends that the “mess” of wires should have been bundled, and that the rebar should have been capped. In light of the questions of fact as to whether the complained-of conditions were “integral” to the project, summary judgment is inappropriate. (See *Rizzo v HRH Construction Corp.*, 301 AD2d 426 [1<sup>st</sup> Dept. 2003]).

The branches of Defendants’ motions to dismiss plaintiff’s Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(d), is granted, and Plaintiff’s motion

for summary judgment is denied. Rowan unequivocally testified that she tripped, not slipped on the electrical cables, and section 23-1.7(d) pertains to slipping hazards. Plaintiff later submitted evidence in the form of affidavit[s] indicating that a slippery condition caused Rowan to fall. However, these claims are contrary to her prior deposition testimony, and the court rejects them as an attempt to create feigned issues of fact designed to avoid the consequences of the earlier testimony (*see Sunshine Care Corp. v Warrick*, 100 AD3d 981, 983 [2d Dept 2012]; *see generally Soussi v Gobin*, 87 AD3d 580, 581–582 [2d Dept 2011]; *Vela v Tower Ins. Co. of NY*, 83 AD3d 1050, 1051 [2d Dept 2011]).

The branches of Defendants' motions to dismiss plaintiff's § 241(6) claims predicated upon any other regulations, are granted without opposition.

#### Labor Law § 200 and Negligence Claims

Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work. (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Liability pursuant to Labor Law § 200 may fall into two broad categories: workers "injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Here, Rowan alleged that she was injured as a result of a dangerous or defective condition at the work site.

The branch of Five Star's motion to dismiss the Labor Law § 200 against it is granted, as Five Star has established prima facie that it was not a property owner, general contractor, or statutory agent of the general contractor, with respect to the subject project. Five Star established, prima facie, that it did not have authority to supervise or control the area of the work site where the plaintiff was injured. (*See Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]). In opposition, the plaintiff failed to raise a triable issue of fact. (*Ortiz v I.B.K. Enterprises, Inc.*, 85 AD3d 1139, 1140 [2d Dept 2011].)

However, the branch of Five Star's motion seeking dismissal of the Plaintiff's common law negligence claims is denied. "[A] subcontractor ... may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (*Tabickman v Batchelder St. Condominiums By Bay, LLC*, 52 AD3d 593, 594 [2d Dept 2008]; *see also Tomyuk v Junefield Assoc.*, 57 AD3d 518, 522 [2d Dept 2008]). "An award of summary judgment in favor of a subcontractor dismissing a negligence cause of action is improper where the evidence raise [s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause

of the injured plaintiff's injuries." (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011].) Here, the evidence raises triable issues of fact as to whether the allegedly unbundled "mess" of wires laid by the subcontractor created an unreasonable risk of harm that was the proximate cause of Rowan's injuries.

The branches of the owner Defendants' motion seeking to dismiss the Labor Law § 200 and common law negligence claims asserted against them, are denied. The owner Defendants fail to meet their prima facie burden of establishing their freedom from negligence, arguing merely that the condition complained of was "open and obvious." This factor alone is insufficient as a matter of law to establish the owner Defendants' freedom from negligence. (*See, e.g., Cupo v Karfunkel*, 1 AD3d 48 [2d Dept 2003].)

#### Owner Defendants' Cross-Claims against Five Star

The branch of Five Star's motion seeking dismissal of the owner Defendants' cross-claim for breach of contract is granted, as unopposed and otherwise on the merits. Five Star proffers evidence to establish prima facie that it satisfied its contractual obligation to obtain the requisite insurance, and in opposition the owner Defendants do not raise a triable issue of fact.

With respect to the remainder of owner Defendants' cross-claims against Five Star, neither Five Star nor the owner Defendants have established their entitlement to summary judgment, as there exists a triable issue of fact as to whether Rowan's injuries were caused by Five Star's negligence. Thus, the branch of owner Defendants' motion seeking summary judgment on their contractual indemnification claim is denied as premature, as there has not been a finding of negligence on the part of Five Star. The branch of Five Star's motion seeking dismissal of the contractual indemnification, common law indemnification, and common law contribution claims is denied. (*See Crespo v. City of New York*, 303 A.D.2d 166, 756 N.Y.S.2d 183).

#### Conclusion

The branches of the motions by defendants which are to dismiss plaintiff's claim pursuant to Labor Law section 240[1], are granted without opposition.

The branches of the motions by defendants which are to dismiss plaintiff's claim pursuant to Labor Law section 241[6], predicated upon a violation of § 23-1.7 (e) (2), are denied. The branches of the motions by defendants which are to dismiss plaintiff's claims pursuant to Labor Law section, 241[6], predicated upon any other regulatory violations, are granted.



The branches of the motion by the owner defendants which are to dismiss the causes of action alleging common-law negligence and a violation of Labor Law § 200, is denied.

The branch of the motion by defendant Five Star which is to dismiss the cause of action alleging a violation of Labor Law § 200 against Five Star, is granted.

The branch of the motion by defendant Five Star which is to dismiss the cross-claim for breach of contract, is granted without opposition.

The branch of the motion by defendant Five Star which is to dismiss the cross-claims for contractual indemnification, common law indemnification, and common law contribution, is denied.

The branch of the motion by the owner defendants which is for summary judgment on its claim for contractual indemnification, is denied as premature.

The branch of the motion by owner defendants for summary judgment dismissing all claims against Mets Development Company LLC is granted without opposition.

The motion by plaintiff for partial summary judgment in her favor on her claims pursuant to Labor Law section 241(6), is denied.

This constitutes the Decision and Order of the Court.

Dated: July 21, 2017

  
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Denis J. Butler, J.S.C.

