

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4  
Justice

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LIBERATORE PANICCIA and MARIA x  
PANICCIA,

Index  
Number 5103 2002

Plaintiffs,  
-against-

Motion  
Date November 3, 2004

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY, JFK-IAT, AMEC  
CONSTRUCTION MANAGEMENT, INC.,  
MORSE DIESEL INTERNATIONAL, INC.,  
VRH CONSTRUCTION CORP., SIRINA  
FIRE PROTECTION CO. and A.M.  
MARCA, INC.,

Motion  
Cal. Numbers 19, 20, 21

Defendants.

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x

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY, JFK INTERNATIONAL  
AIR TERMINAL, LLC, AMEC  
CONSTRUCTION MANAGEMENT, INC.,  
and SIRINA FIRE PROTECTION CO.,

Third-Party Plaintiffs,  
-against-

CITYWIDE DEMOLITION and RUBBISH  
REMOVAL INC.,

Third-Party Defendants.

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x

The following papers numbered 1 to 49 read on these separate motions by defendants/third-party plaintiffs The Port Authority of New York and New Jersey (Port Authority), JFK International Air Terminal, LLC (JFK-IAT), AMEC Construction Management, Inc. f/k/a Morse Diesel International, Inc. (AMEC) and Sirina Fire Protection Co. (Sirina) for summary judgment in their favor dismissing plaintiffs' Labor Law §§ 200, 240(1) and 241(6) causes of action as against them and further dismissing plaintiffs' complaint and all cross claims against defendants/third-party plaintiffs Port Authority and Sirina; by defendants/ third-party plaintiffs Port Authority, JFK-IAT, and AMEC for summary judgment directing third-party defendant Citywide to defend, indemnify, and hold harmless

defendants/third-party plaintiffs Port Authority, JFK-IAT, and AMEC in this action and to reimburse them for all costs and expenses, including attorney's fees, incurred as a result of the claims made against the indemnitees and in defense of this action, on the grounds that third-party defendant Citywide is unable to establish a triable issue of fact with respect to its contractual obligation to defend, indemnify and hold harmless defendants/third-party plaintiffs Port Authority, JFK-IAT, and AMEC in this action, together with costs and disbursements; and by defendant A.M. Marca, Inc. (Marca) for summary judgment in its favor dismissing plaintiffs' complaint and all cross claims against it and on this cross motion by defendant VRH Construction Corp. (VRH) for summary judgment in its favor dismissing plaintiffs' complaint and all cross claims against it.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits .....	1-18
Notice of Cross Motion - Affidavits - Exhibits.	19-22
Answering Affidavits - Exhibits .....	23-32
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Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and determined as follows:

Plaintiffs seek damages for personal injuries allegedly sustained by plaintiff Liberatore Paniccia on March 24, 2001, when he slipped and fell on wet, mushy cement on the ground at Terminal 4 at J.F.K. International Airport, which is owned by non-party The City of New York, leased to defendant/third-party plaintiff Port Authority pursuant to a long-term written agreement, and subleased to defendant/third-party plaintiff JFK-IAT. At the time of the accident, plaintiff Liberatore Paniccia was employed as a truck driver by third-party defendant Citywide Demolition and Rubbish Removal, Inc. (Citywide). Plaintiff delivered empty and removed full rubbish containers from the construction site of a new International Arrivals Building at Terminal 4. Defendant/third-party plaintiff AMEC was hired as the construction manager of the terminal construction project pursuant to a contract with defendant/third-party plaintiff JFK-IAT. Separate and apart from its contract with defendant/third-party plaintiff AMEC, JFK-IAT leased tenant space within the new arrivals building to various retailers. These retail tenants contracted independently with their own contractors to build out their respective retail spaces. One of the retail tenants is non-party Travelex. Defendant VRH was hired as the general contractor for the building out of non-party Travelex's space. Defendant Marca was a subcontractor hired by defendant VRH to perform concrete work for the Travelex space. Defendant Marca hired non-party Mill Rental, Inc. (Mill) to provide concrete pumping equipment and non-party City Ready Mix, Inc. (CRM)

to provide delivery of ready-mixed concrete. Defendant/third-party plaintiff AMEC hired third-party defendant Citywide to provide and cart rubbish containers. Plaintiff was in the process of delivering an empty container when he slipped on the alleged dangerous condition located in an exterior fenced-in courtyard area, the entrance to which was controlled by defendant/third-party plaintiff AMEC's security guards. The day before plaintiff Liberatore Paniccia's accident, defendant Marca was performing concrete work at the subject terminal. Cement trucks from non-party CRM delivered cement which was used by defendant Marca and non-party Mill provided concrete pumping equipment. Plaintiff testified that he saw two cement trucks marked City Concrete in the courtyard on the day before his accident. Michael D'Amato, an employee of defendant/third-party plaintiff AMEC, testified that on the day before the accident, he witnessed a cement truck being washed out after its delivery in the area where plaintiff allegedly fell.

Plaintiff commenced this action against defendants alleging negligence and violations of Labor Law §§ 200, 240(1) and § 241(6).

Initially, the branches of the motions of defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, and Sirina and defendant Marca, and the branch of the cross motion of defendant VRH seeking to dismiss plaintiffs' Labor Law § 240(1) cause of action are denied as academic as plaintiffs have withdrawn their claims under Labor Law § 240(1).

The branches of the motions of defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, and Sirina and defendant Marca, and the branch of the cross motion of defendant VRH seeking to dismiss plaintiffs' Labor Law § 241(6) cause of action are granted. The work plaintiff was performing at the time of the injury does not constitute "construction, excavation or demolition work" within the meaning of Labor Law § 241(6). (See generally Nagel v D&R Realty Corp., 99 NY2d 98 [2002]; see also Antonczyk v Congregation Mosdos D'Rabini of Monsey, Inc., 309 AD2d 776 [2003]; Acosta v Banco Popular, 308 AD2d 48 [2003]; Paciente v MBG Development, Inc., 276 AD2d 761 [2000]; Koch v E.C.H. Holding Corp., 248 AD2d 510 [1998].) Moreover, the Industrial Code regulation relied upon by plaintiffs, 12 NYCRR 23-1.7(d), is inapplicable to this case as plaintiff Liberatore Paniccia slipped in an open area of the construction site and not within a defined walkway or passageway. (See Morra v White, 276 AD2d 536 [2000]; see also Constantino v Kreisler Borg Florman General Construction Co., Inc., 272 AD2d 361 [2000]; Barnes v DeFoe/Halmar, 271 AD2d 387 [2000].)

The protection of Labor Law § 200 is not confined to construction work, but codifies the common-law duty of an owner or employer to provide employees a safe place to work. (See Jock v Fien, 80 NY2d 965 [1992].) It applies to owners, contractors, or

their agents (see Russin v Louis N. Picciano & Son, 54 NY2d 311 [1981]) who exercise control or supervision over the work or either created the allegedly dangerous condition or had actual or constructive notice of it. (See Lombardi v Stout, 80 NY2d 290 [1992]; see also Yong Ju Kim v Herbert Construction Co., Inc., 275 AD2d 709 [2000]; Seaman v A.B. Chance Co., 197 AD2d 612 [1993].)

In this case, issues of fact exist concerning who caused the alleged wet, mushy cement condition upon which plaintiff Liberatore Paniccia fell, and as to which parties supervised or had authority to control the subject construction site. (See Russin v Picciano & Son, supra; see also Barnes v DeFoe/Halmar, supra.) Issues of fact also exist concerning whether defendants/third-party plaintiffs JFK-IAT and AMEC and defendants VRH and Marca had notice of the allegedly dangerous condition. (See Alvarez v Long Island Fireproof Door Co., Inc., 305 AD2d 343 [2003]; see also Shipkoski v Watch Case Factory Assocs., 292 AD2d 589 [2002]; Yong Ju Kim v Herbert Construction Co., Inc., supra.)

Accordingly, the branch of the motion of defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, and Sirina seeking to dismiss plaintiffs' negligence and Labor Law § 200 causes of action as against defendants/third-party plaintiffs JFK-IAT and AMEC and the branches of the motion of defendant Marca and the cross motion of defendant VRH seeking to dismiss plaintiffs' negligence and Labor Law § 200 causes of action as against them are denied.

The branch of the motion of defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, and Sirina seeking to dismiss plaintiffs' negligence and Labor Law § 200 causes of action as against defendant/third-party plaintiff Sirina is granted.

Defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC and Sirina presented competent evidence demonstrating defendant/third-party plaintiff Sirina's entitlement to summary judgment as a matter of law. This evidence established that defendant/third-party plaintiff Sirina, which installed a fire suppression system for the new building, did not supervise or control the work at the job site and did not create or have actual or constructive notice of the allegedly dangerous condition. The unsworn witness statement of Mike Bugliaro, submitted by plaintiffs and third-party defendant Citywide in opposition, does not constitute evidentiary proof in admissible form sufficient to raise a triable issue of fact. (See Zuckerman v City of New York, 49 NY2d 557 [1980].)

The branch of the motion of defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, and Sirina for summary judgment dismissing plaintiffs' negligence and Labor Law § 200 causes of action as against defendant/third-party plaintiff Port Authority is granted.

Defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, and Sirina established that defendant/third-party plaintiff Port Authority did not direct or control the work at the job site and did not create or have actual or constructive notice of the allegedly dangerous condition. (See generally Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998].) Defendants/third-party plaintiffs Port Authority, JFK-IAT, AMEC, AND Sirina also established that defendant/third-party plaintiff Port Authority was an out-of-possession landlord which did not retain control over the subject premises and was not contractually obligated to repair or maintain the premises. (See Putnam v Stout, 38 NY2d 607 [1976]; see also Tatar v Port Authority of New York and New Jersey, 291 AD2d 554 [2002]; Stark v Port Authority of New York and New Jersey, 224 AD2d 681 [1996].) In addition, while defendant/third-party plaintiff Port Authority had a right of re-entry, there was no evidence of any structural or design defect in violation of a specific statutory provision. (See Stark v Port Authority of New York and New Jersey, supra; see also Velazquez v Tyler Graphics, Ltd., 214 AD2d 489 [1995].)

The motion of defendants/third-party plaintiffs Port Authority, JFK-IAT, and AMEC seeking summary judgment in their favor and against third-party defendant Citywide is granted.

Defendants/third-party plaintiffs Port Authority, JFK-IAT and AMEC presented competent evidence demonstrating their entitlement to summary judgment as a matter of law. This evidence established that third-party defendant Citywide is contractually obligated by the provisions on the reverse side of purchase order D666372U to defend, indemnify, and hold harmless defendants/third-party plaintiffs Port Authority, JFK-IAT, and AMEC. Third-party defendant Citywide, in opposition, failed to present competent evidence raising a triable issue of fact. Contrary to third-party defendant Citywide's contention, General Obligations Law § 5-322.1 is inapplicable to this contract, which is not for the construction or maintenance of a building. (See Pierre v Crown Fire Protection Corp., 240 AD2d 386 [1997].) Third-party defendant Citywide's claim that its president, Michael Iacono, did not read the terms and conditions of the subject purchase order is also insufficient to defeat summary judgment. (See DaSilva v Musso, 53 NY2d 543 [1981]; see also Guerra v Astoria Generating Co., L.P., 8 AD3d 617 [2004]; Daniel Gale Assocs., Inc. v Hillcrest Estates, Ltd., 283 AD2d 386 [2001].)

Dated:

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J.S.C.