

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

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SHERRY ROMANG,			Number	<u>20545</u> 2004
	Plaintiff,		Motion	
	- against -		Dates	<u>July 19,</u> 2006
			Motion	
WELSBACH ELECTRIC CORPORATION and			Cal. Number	<u>23</u>
WELSBACH ELECTRIC CORP. OF L.I.,				
	Defendants.			
<hr/>		x		

The following papers numbered 1 to 11 read on this motion by defendant Welsbach Electric Corp. (Welsbach) for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Answering Affidavits - Exhibits.....	7-9
Reply Affidavits.....	10-11

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff was injured during the course of her employment with Modern Continental Construction Co., Inc. (Modern Continental), the general contractor on a construction project for the rehabilitation of the Long Island Expressway, when she fell into an excavated dirt hole while walking between her vehicle and a portable light tower she was assigned to operate. The hole had been excavated by Modern Continental to allow the underground installation of electrical equipment by Welsbach, a subcontractor retained by Modern Continental to perform certain electrical work on the project. Plaintiff seeks to recover against Welsbach based upon allegations of common-law negligence and violation of Labor Law §§ 200, 240(1) and 241(6).

Defendant Welsbach is not subject to liability under Labor Law § 240(1) or Labor Law § 241(6). Welsbach was not the owner or general contractor on the highway construction project. (Labor Law §§ 240(1), 241(6).) The nondelegable liability imposed by sections 240 and 241 attaches to a subcontractor such as Welsbach as a statutory agent only when the subcontractor has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of the injury. (See, Coque v Wildflower Estates Devs., ___ AD3d ___, 818 NYS2d 546 [2006]; Armentano v Broadway Mall Props., 30 AD3d 450 [2006].) The evidence establishes as a matter of law that Welsbach had no authority to supervise or control the work being performed by plaintiff when she was injured.

Moreover, plaintiff's work was wholly unrelated to an elevation-related hazard and, therefore, was not within the purview of Labor Law § 240(1). (See, Aquilino v E.W. Howell Co., 7 AD3d 739 [2004]; Edwards v C&D Unlimited, 289 AD2d 370 [2001].) In addition, the Industrial Code provision cited by plaintiff as the basis of her Labor Law § 241(6) claim is inapplicable to the facts of this case. (12 NYCRR 23-1.29[a]; see generally, Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]; Ruland v Long Is. Power Auth., 5 AD3d 580 [2004].)

The evidence presented also precludes the imposition of liability on Welsbach based upon common-law negligence or Labor Law § 200. It is undisputed that Welsbach did not create the excavation that caused plaintiff's injury. Nor did Welsbach supervise or control plaintiff's work. (See, Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681 [2005]; Karapati v K.J. Rocchio, Inc., 12 AD3d 413 [2004].) Furthermore, pursuant to specific exclusions in its subcontract with Modern Continental, Welsbach had no obligations with regard to excavation, backfill or restoration; the protection of vehicular or pedestrian traffic; or lighting for nighttime operations. Thus, while Welsbach was responsible for the electrical work performed in the excavation dug by plaintiff's employer, Welsbach had no duty of care with regard to the unsafe condition alleged to have caused plaintiff's injuries.

Dated: 9/26/06

J.S.C.