

**Cannella v Workmen's Circle Home & Infirmary  
Found. for the Aged**

2016 NY Slip Op 32624(U)

December 19, 2016

Supreme Court, Bronx County

Docket Number: 300163/11

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----X **Index No. 300163/11**

Peter Cannella,  
Plaintiff,

-against-

**DECISION and ORDER**

Workmen's Circle Home And Infirmary  
Foundation For The Aged, New York State  
Branches, et al.,

Defendants.

Present:

Hon. Julia I. Rodriguez  
Supreme Court Justice

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Barr & Barr, Inc.,  
Third-Party Plaintiff

-against-

**Index No. 84192/11**

Morales Electrical Contracting, Inc., Shelter  
Electric Maintenance Corp. and Cord  
Contracting Co., Inc.,

Third-Party Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion for summary judgment pursuant to Labor Law §§200 and 241(6), third-party defendants Morales Electrical Contracting, Inc. and Shelter Electric Maintenance Corp.'s cross-motion for summary judgment and third-party plaintiff's motion for summary judgment..

<u>Papers Submitted</u>	<u>Numbered</u>
Pls. Notice of Motion, Affirmation & Exhibits	1
Workmen's Circle & Barr's Affirmation in Opposition & Exhibits	2
Morales & Shelter Notice of Cross-Motion & Affirmation	3
Pls. Reply Affirmation	4
Barr's Notice of Motion, Affirmation & Exhibits	5

This action arises from an accident that occurred on August 9, 2009 wherein plaintiff tripped and fell over a piece of electrical cable at a construction worksite. At the time of the

accident, plaintiff was employed as a carpenter by Cord Contracting Co., Inc.<sup>1</sup> Defendant Workmen's Circle and Infirmary Foundations for the Aged, New York State Branches, Inc. ("Workmen's") owned the subject property. Defendant/Third-Party Plaintiff Barr & Barr, Inc. ("Barr") was the construction manager for the project.

Plaintiff now moves for summary judgment, as to liability, on his Labor Law §200 claims against defendants Barr, Morales Electrical Contracting, Inc. ("Morales") and Shelter Electric Maintenance Corp. ("Shelter"); and for summary judgment, as to liability, on his Labor Law §241(6) claims against defendants Workmen's and Barr.

Defendants Morales & Shelter cross-move for summary judgment, dismissing the complaint and the third-party complaint against Morales, on the ground that Shelter purchased Morales on June 30, 2009 and assumed all liabilities, contracts and obligations of Morales. Morales & Shelter cross-move for summary judgment, dismissing the complaint and the third-party complaint against Shelter, on the ground that Shelter was not negligent.

Defendant/Third-Party Plaintiff Barr moves for summary judgment, as to liability, on its third-party complaint against third-party defendants Morales & Shelter in which it asserts claims for contribution, a defense, common law and contractual indemnification and failure to procure insurance.<sup>2</sup>

In support of summary judgment, plaintiff submitted, *inter alia*, his deposition testimony, the deposition testimony of Richard Klockner and John Imbasciani, and the affidavit of Kathleen Hopkins. At his deposition, plaintiff testified as follows: He slipped and fell on a piece of BX electrical cable at his worksite while he was carrying sheetrock through a walkway from one room to another room. There was a "general pile of debris" consisting of the BX cable and miscellaneous construction garbage in the walkway to his right. This debris pile was 3 to 4 feet

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<sup>1</sup>The third-party action against Cord Contracting Co., Inc. was discontinued pursuant to a stipulation dated January 15, 2013.

<sup>2</sup>In his affirmation, Barr's counsel does not address Barr's claims for common law indemnification and that it is owed a defense by Morales and/or Shelter in any detail. As such, the Court will not consider these claims.

wide and it was not a "neat pile." An electrician was working on the left of the walkway where there were wires hanging from the ceiling which prevented him from walking farther away from the debris. He attempted to walk where there was the least amount of debris. As he walked along the walkway toward the room he was bringing the sheetrock to, he felt something under his boot and lost his balance. As he lost his balance, he tried to break his fall and felt his right knee twist. After he fell, he looked to see what he felt under his boot and found the debris to be a 6 to 12-inch long BX cable. The BX cable was silver in color, but he did not notice it because he was making sure that the sheetrock he was carrying did not come into contact with the electrician to his left.

At his deposition, Richard Klockner testified as follows: On the date of the accident, he was a superintendent employed by Barr. His duties included "[c]oordinat[ing] job activities, the work of subcontractors, making sure that their work conforms, drawings and inspections." Barr hired laborers to clear the work site of debris. The laborers walked the floor of the worksite cleaning up debris as necessary. He walked the floor of the worksite, including the accident site, and addressed any debris issues on his walks.

At his deposition, John Imbasciani testified as follows: At the time of the accident, he was an electrical foreman for Shelter. Shelter had purchased Morales during the construction project and, on the date of the accident, Shelter was officially performing electrical work at the worksite. Shelter's employees were told to toss any debris into a pile, normally in the corner of the room in which they were working, and that Barr's laborers were to clear the piles. His men were working at or near the accident site doing lighting and other basic electrical work. BX cable was used by Shelter employees and was part of the rubbish piles.

In her affidavit, Kathleen Hopkins states as follows: She is a Certified Site Safety Manager whose areas of specialty include construction site accident investigations and hazard analysis and causation. As part of her analysis in this case, she reviewed the verified bill of particulars, subcontract agreement between Barr and Morales, workers' compensation reports, and the deposition testimony of plaintiff, Klockner and Imbasciani. In her opinion, Barr and Workmen's are liable for plaintiff's injuries under Labor Law §241(6) because they failed to

ensure compliance with and were in violation of 12 NYCRR §§23-1.7(e)(1) and (e)(2). Section (e)(1) applies here because this section “confers a specific command that all passageways are required to be kept free from accumulations of debris and from any other obstructions which could cause tripping.” Section (e)(1) was violated because plaintiff “stepped on an approximately 6 to 12-inch in length piece of circular metal BX electrical cable debris in the approximately 2 feet in width walkway/passageway into his working room causing him to trip and lose his balance.” Section (e)(2) applies here because this section “confers a specific command that the parts of floors where persons work or pass are required to be kept free from accumulations of debris and from scattered materials.” Section (e)(2) was violated because plaintiff’s only walkway/passageway access into his working room was not kept free from debris. Also, defendants Barr and Shelter failed to ensure compliance with, and thus were in violation of, the Labor Law §200 provisions in that plaintiff’s working area was not so equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the safety and health of plaintiff. All equipment and devices in such places are required to be so placed, operated and guarded as to provide reasonable and adequate protection to plaintiff. Barr and Shelter knew or should have known that plaintiff was working in a room with only one access which was through an adjoining room and that Shelter electricians were working in that adjoining room installing and pulling BX electric cables which would result in BX debris. Barr employed laborers for housekeeping and should have ensured that the laborers placed debris containers in that room for proper disposal of all electrical debris, yet they failed to do so. Barr and Shelter failed to ensure that their electrical debris “was not disposed of by being discarded, thrown away, in an unsafe manner in which a piece of their BX cable landed in the Plaintiff’s walkway/passageway.” Barr and Shelter had the duty, responsibility and authority to ensure that, at all times, the walkway/passageway for plaintiff to access his working room was kept “clean and clear at all times,” yet they failed to do so. These failures show that plaintiff was not provided with reasonable and adequate protection for his health and safety.

In opposition to summary judgment, defendants Barr and Workmen’s submitted the bill of particulars and the deposition testimony of plaintiff, Klockner and Imbasciani. Barr and

Worker's point to the following deposition testimony of plaintiff: At the time of the accident, he was carrying an approximately 4 by 40-inch piece of sheetrock by himself through a corridor/room adjacent to the room in which he was installing sheetrock. Prior to his accident, he had already that morning carried more than one piece of sheetrock through that corridor and into the room in which he was installing sheetrock. An electrician was present in the corridor each time he carried a piece of sheetrock through that corridor. Before his accident, he did not encounter any problem with BX cable on the floor. There was a space about two-feet wide between the electrician and the debris in which he could walk. The debris in the corridor was "most likely" scraps the laborers swept up and put into a pile. The pile of debris was up against the wall to plaintiff's right and was about two-feet high, four-feet wide and ran out from the wall about three feet. The electrician was working on a ladder and he could not go to the left of the ladder because "you had cables drooping along the side . . . from wherever he was pulling the ladder." The electrician had "most of the room blocked up." He had "a little space [he] was able to go through to walk." There was a pile of debris on the right-hand side and "a little debris all over the place." He was carrying the sheetrock on his right-hand side with his right hand on the bottom and his left hand on the top. His right foot stepped on the BX cable causing him to trip. He did not see any debris in the two-foot wide pathway he was taking through the corridor. He does not remember where he was looking just before the accident but he was not looking down at the floor. He walked through the corridor between five and ten times on the morning of the accident, prior to the accident. After his accident, he carried another approximately three or four pieces of sheetrock through the corridor. The piece of BX cable that he tripped on was similar to the cable the electrician on the ladder was installing. He does not know how long the piece of BX cable had been on the floor prior to his fall or where it came from. He is not sure whether there was any BX cable debris outside of the pile of debris other than the piece that he tripped on.

Barr and Worker's point to the following deposition testimony of Klockner: The workmen present on the date of the accident were laborers employed by Barr, electricians employed by Morales, and carpenters employed by Cord. At some point during the project

Shelter took over for Morales. The laborers employed by Barr cleaned debris on the worksite throughout the day, as needed. It was the responsibility of the subcontractors to put the debris they generate into a central pile. Then the Barr laborers would place the piles of debris in a garbage container and move the garbage container to the container area where the garbage company would pick up the garbage containers. Approximately 50 percent of his day was walking the jobsite. On his walk-throughs, if he noticed rubbish that needed to be removed he would address it by requesting the laborers to clean it up.

Barr and Worker’s point to the following deposition testimony of Imbasciani: On the day of the accident, he supervised the installation of electrical work as Shelter’s foreman. The electricians working under him on the project would “throw” the debris into a pile and “leave a pile on the side,” then laborers working for Barr would cart the rubbish away. If he saw cable on the floor that needed to be put into the pile, he would instruct his men to do so. A worker would “toss” a cable into the pile when “it became a hindrance to . . . installing in a certain area.” The worker would “just take it out and just toss it out of [his] way so [he] can continue [the] work.” The central pile would be the “corner of the room or a specific area where the labor[ers] said to put it . . . Usually it’s just in the room where [Shelter employees] were working.” The workers would usually decide where to place the pile by using “[c]ommon sense.” He never received a complaint from anyone about BX cable on the floor creating a hindrance or a problem for other workers.

\* \* \* \* \*

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dept.



1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

I. Labor Law § 200

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to provide construction site workers with a safe place to work. *See Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. As such, liability under this section may be imposed only against parties that have the authority to control the activity bringing about the injury. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). Thus, where an alleged defect or dangerous condition arises from a contractor's methods and the owner exercises no supervisory control over the work, no liability attaches under section 200. *See Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350, 819 N.Y.S.2d 732 (1<sup>st</sup> Dept. 2006). Nor will liability attach if the owner or contractor lack actual or constructive notice of the dangerous condition that caused the plaintiff's injury. *Id.*

II. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety for construction workers. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). As the duty to comply with the regulation is nondelegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the work-site in order to establish a Labor Law § 241(6) claim. *See Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998); *Ross v. Curtis-Palmer Hydro-Electric Co.*, *supra* at 502. In order to support a claim under this section, a plaintiff must allege a violation of a specific "concrete" provision of the Industrial Code. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49 (1993). Here, plaintiff alleges violations of 12 NYCRR §§23-1.7(e)(1) and (e)(2). Section (e)(1) requires that all passageways be kept free from accumulations of debris and from any other obstructions



which could cause tripping. Section (e)(2) requires that floors where persons work or pass be kept free from accumulations of debris and scattered materials.

Based upon all of the deposition testimony and the affidavit of Kathleen Hopkins, triable issues of fact exist, at a minimum, as to whether the construction debris, including the BX cable, constituted a tripping hazard, whether plaintiff was provided with reasonable and adequate protection while working at/near the accident site, whether either Barr, Morales or Shelter was negligent, and plaintiff's comparative negligence, if any.

In the third-party action, Barr alleges causes of action for contribution, common law and contractual indemnification and failure to procure insurance. Barr now seeks summary judgment granting a conditional judgment ordering Morales and Shelter to indemnify Worker's and Barr, and to defend and insure Barr in the instant action.

In support of its motion, Barr submitted, *inter alia*, the deposition testimony of Imbasciani, the Subcontract Agreement for electrical services between Barr and Morales, and a Novation Agreement executed by Barr, Morales and Shelter. The Subcontract Agreement provides, in pertinent part, the following:

13. REMOVAL OF RUBBISH.

The Subcontractor, daily or less frequently as the Construction Manager may require, shall gather and neatly pile all its trash debris and other materials to be disposed of in areas on each floor designated by the Construction Manager or in trash chutes or containers on each floor provided by the Construction Manager. Removal of the materials from the designated areas or trash chutes will be by others. . . .

23. INDEMNITY

To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, Architect, Construction Manager and . . . from and against any and all claims, losses, costs, injuries, damages and expenses, including reasonable attorneys' fees for counsel of their choice, that may be incurred by any of them as a result of, or in any way arising out of the performance or breach of contract by Subcontractor and/or errors or omissions of Subcontractor. However, this agreement to indemnify does not cover any liability of the Indemnities for

damages and injuries, to the extent that such damages and injuries are contributed to, caused by, or result from the sole or partial negligence of the Indemnities. . . .

24. INSURANCE COVERAGE

Before commencing Work the Subcontractor at Subcontractor's expense, shall procure insurance as described below . . . approved by the Construction Manager, and shall maintain such insurance until completion and final acceptance of the Work . . .

c) Before commencing the Work, the Subcontractor shall furnish the Construction Manager with (I) certificates from its insurance companies showing that the above insurance is in force, . . .

e) The following additional insured parties shall be listed on all Subcontractor's insurance policies and insurance certificates for the Project:

"Barr & Barr, Inc., Workmen's Circle Multicare Center (the Owner), . . . .

The Novation Agreement between Morales, Shelter and Barr provides, in pertinent part:

1. Whereas, [Barr], has entered into certain contracts with [Morales], as set forth in the attached list . . .
2. Whereas, as of June 30, 2009, [Morales] assigned, conveyed, and Transferred to [Shelter] all the assets of [Morales] required for the performance of the Contracts, . . .
4. Whereas, by virtue of said assignment, conveyance and transfer, [Shelter] has assumed all the duties, obligations and liabilities of [Morales] under the Contracts; . . .  
Now, therefore, in consideration of the premises, the parties hereto agree as follows:

. . .

2. [Barr] hereby consents to said assignment, conveyance and transfer to [Shelter].
3. . . . [Shelter] further assumes all obligations and liabilities of, and all claims and demands against, [Morales] under the Contracts arising on or after the date hereof.

4. [Barr] hereby recognizes [Shelter] as [Morales'] successor in interest and to the Contracts. . . .

Based upon the Novation Agreement and the deposition testimony of Imbasciani, it seems clear that, at the time of the accident, Morales had ceased performing any work at the construction site; Shelter was performing the electrical work pursuant to the contract for electrical services between Barr and Morales; and Shelter, with the approval of Barr, had assumed all obligations, liabilities of, and all claims and demands against, Morales.

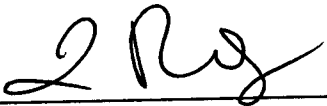
In his affirmation, Barr's counsel alleges that neither Morales nor Shelter have provided proof of the requisite insurance coverage. However, no evidence was submitted to support this allegation.

Also, given the Court's finding that triable issues of fact exist as to Barr's negligence, its application for conditional summary judgment on its indemnification claim is premature. *Cf. Conrad v. 105 Street Associates, LLC*, 55 A.D.3d 461, 866 N.Y.S.2d 635 (1<sup>st</sup> Dept. 2008); *Ianotta v. Tishman Speyer Properties, Inc.*, 46 A.D.3d 297, 852 N.Y.S.2d 27 (1<sup>st</sup> Dept. 2007); *Ortiz v. Fifth Avenue Building Associates*, 251 A.D.2d 200, 674 N.Y.S.2d 360 (1<sup>st</sup> Dept. 1998).

In support of their cross-motion for summary judgment, dismissing the third-party complaint, Morales and Shelter submitted the affirmation of counsel. In his affirmation, counsel states that Morales and Shelter "adopts [sic] both the procedural history and supporting documents contained in" the respective moving papers of Plaintiff and Barr. Counsel contends that the complaint against Morales should be dismissed as it was not performing any work at the construction site on the date of plaintiff's accident and because Shelter had assumed all of its obligations and liabilities. Counsel contends that the complaint should be dismissed against Shelter because plaintiff "claims to have tripped on one of the piles created by the contractors, as they were directed to do by Barr." Given the Court's finding that Morales was no longer performing work at the construction site and had assumed all claims against Morales by contract, the Court agrees that the third-party complaint should be dismissed as to Morales. However, as discussed, *supra*, triable issues of fact exist as to whether any of Shelter's employees were negligent.

Based upon the foregoing, plaintiff's motion for summary judgment is **denied** in its entirety. The cross-motion of Morales and Shelter is **granted solely to the extent that** the third-party complaint is hereby dismissed as to Morales. Barr's motion for summary judgment is **denied** in its entirety.

Dated: Bronx, New York  
December 19, 2016

  
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Hon. Julia I. Rodriguez, J.S.C.