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| <b>Iapolla v 56th &amp; Park (NY) Owner, LLC</b>   |
| 2018 NY Slip Op 30404(U)   |
| March 7, 2018  |
| Supreme Court, New York County   |
| Docket Number: 155901/14   |
| Judge: Lynn R. Kotler  |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MICHAEL IAPOLLA

INDEX NO. 155901/14

- v -

MOT. DATE

MOT. SEQ. NO. 006

56TH AND PARK (NY) OWNER, LLC et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). 153-169

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). 185-196, 206-218

Replying Affidavits

NYSCEF DOC No(s). 219, 224-229, 230-231, 232

This is a personal injury action arising from a trip and fall over debris at a construction site. Defendant/third-party defendant A.S.R. Electrical Contracting, Inc. ("ASR") moves for summary judgment in its favor dismissing all claims asserted by plaintiff and defendants/third-party plaintiffs and all cross-claims. Defendant/third-party plaintiffs 56th and Park (NY) Owner, LLC ("Owner"), CIM Group LLC, ("CIM"), Macklowe Properties, Inc. ("Macklowe") and Lend Lease (US) Construction LMB Inc. ("Lend Lease") cross-move for summary judgment in their favor dismissing plaintiff's complaint and oppose ASR's motion. Plaintiff also cross-moves for summary judgment against the Owner and Lend Lease, and oppose ASR's motion. Issue has been joined. Pursuant to a decision/order dated May 19, 2016 by the Honorable Joan Kenney, which this case was previously assigned to, the parties were directed to file dispositive motions no later than 30 days from the filing of note of issue.

Plaintiff filed note of issue on April 14, 2017. ASR's motion was filed on May 15, 2017, the cross-motion by the Owner, CIM, Macklowe and Lend Lease (collectively "codefendants") was filed June 20, 2017 and plaintiff's cross-motion was filed June 26, 2017. Based upon the 5/19/16 Order, ASR's motion was timely filed but the cross-motions were not. The court may consider an untimely cross motion for summary judgment in the absence of good cause where a timely motion for summary judgment was made seeking "nearly identical" relief (Filannino v. Triborough Bridge and Tunnel Authority, 34 AD3d 280 [1st Dept 2006]). The reasoning behind this rule is that the court may search the record and grant summary judgment to any party without the necessity of a cross-motion. (Id.) Here, ASR moved for summary judgment dismissing plaintiff's claims against it, arguing that: [1] the labor law claims against it fail as a matter of law because ASR is not an owner or general contractor; [2] Labor Law § 240 does not apply to this case; [3] the claimed violations of the Industrial Code in support of the Labor Law § 241(6) were not violated; [4] there is no evidence that ASR worked on the floor where plaintiff's accident occurred; [5] there is no evidence that plaintiff tripped over an electrical conduit; [6] there is no evidence

Dated: 3/7/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE

that a dangerous condition occurred prior to the accident; and [7] ASR did not have notice of any dangerous condition which caused plaintiff's accident.

In its cross-motion, plaintiff withdraws the Labor Law § 240 claim against all parties, but with respect to ASR's claims, opposes dismissal of the Labor Law § 241(6) claim and Labor Law § 200/common negligence claims. Plaintiff's arguments are sufficiently related to ASR's, therefore the court will consider his cross-motion. To the extent that plaintiff seeks relief against the codefendants, however, that request for relief is not related to the timely motion and therefore is denied as untimely.

In support of its motion to dismiss the third-party claims against it, ASR argues that it obtained the insurance it was required to under the contract and that there is no evidence that plaintiff's accident arose out of ASR's work. Meanwhile, the codefendants argue that ASR has failed to offer competent evidence that plaintiff's accident did not arise out of ASR's work. That argument will be considered by the court. The codefendants' remaining arguments, however, pertain to its request for summary judgment dismissing plaintiff's claims. Those arguments do not relate to ASR's timely motion, and therefore, are also denied as untimely.

At the outset, the court must address the fact that on reply, ASR has submitted copies of transcripts of four depositions that were conducted after ASR filed its motion for summary judgment. The codefendants argue that these new depositions were improperly offered for the first time on reply and should not be considered by the court. Ordinarily, courts should not consider issues first mentioned in reply in support of a motion for summary judgment (see i.e. *Burlington Ins. Co. v. Guma Const. Corp.*, 66 AD3d 622 [2d Dept 2009]). The court, however, may consider these arguments if the adversary has not suffered any prejudice as a result. (*Id.*) Since the parties had an opportunity to submit a reply subsequent to ASR's submission, the court will overlook this procedural defect and consider ASR's arguments and the subject transcripts.

### Facts

The relevant facts are largely undisputed. At the time of his accident, plaintiff was a Union Ironworker employed by nonparty JF Stearns at the construction project located at 413 Park Avenue, New York, New York (the "premises"). ASR was the electrical contractor at the project and Lend Lease was the general contractor. Owner owns the premises.

Plaintiff testified at his deposition that he was instructed by his employer to retrieve some materials on the fifth floor of the main building. As plaintiff walked approximately fifteen to twenty feet into the main building from the annex building to get those materials, he slipped and fell on an "aluminum color" "thin pipe" on the floor that "looked like electrical conduit" on the ground. The pipe was three-quarters of an inch or one inch in diameter. Plaintiff had not been on the fifth floor of the main building that day prior to his accident. Plaintiff did not see the pipe before he fell.

Plaintiff slipped when his left foot came into contact with the pipe. Then, plaintiff testified that:

My – my weight – as I slipped, my weight went onto my right leg which torqued, it was twisted my knee. My knee buckled the wrong – just wrong. It was bad, and I fell to the floor.

ASR claims that plaintiff testified the pipe was amongst other work materials on the floor, however, plaintiff clearly testified on this point as follows:

Q. You mentioned that you saw other material around the electrical conduit. What other material did you see around the electrical conduit?

- A. I didn't see anything around the electrical conduit. I saw ropes, blocks we call them (indicating), there was structural Tees on the floor. The structural Tees, that's not ours. That was somebody else's steel pieces on the floor.

Lend Lease produced Patrick McAlarney for a deposition, who was the site safety manager for Lend Lease at the project. McAlarney testified that the electrical conduit which plaintiff identified as the type of pipe that caused his accident was the type of conduit that ASR used at the project. McAlarney did not recall plaintiff's accident, but prepared an Events Incident Report which states that the plaintiff slipped on one inch by ten foot conduit.

ASR's witness, Denis Healy, was produced for a deposition. Healy was employed by ASR as a sub-foreman at the project. Healy supervised a gang of electricians responsible for temporary lighting at the project, but stated that his gang did not use electrical conduit. Healy testified that ASR installed electrical conduit as part of their job at the project but was unable to identify the type of conduit depicted in photographs which plaintiff previously identified as the cause of his accident. Nor could Healy state that the conduit identified by plaintiff as the cause of his accident belonged to ASR.

Healy did testify that ten foot conduits would be cut as needed and that ASR would routinely store any cut pieces of conduit in boxes so that someone wouldn't "trip over or roll." Otherwise, ASR typically stored conduit on racks which were located on every floor. Healy also testified that ASR had twenty-seven employees working on the project in June 2014. Healy could not recall when the last time ASR performed work on the fifth floor, and to his knowledge, Healy did not believe that ASR had any records which showed where ASR's employees worked on the date of plaintiff's accident.

In its reply, ASR submitted deposition transcripts for Robert Tesoriero, ASR's foreman at the project and Adam Chaikin, ASR's project manager for the project. ASR has also provided transcripts for two non-parties, Angel Amengual, and Ronald Hack, former foreman who worked for ASR at the project.

Tesoriero testified that his crew worked on power distribution and in late May to early June, 2014, his crew worked "from the mid to the upper part of the tower, 40 up for the most part." Meanwhile, Tesoriero testified that other ASR crews worked on the lower floors. Healy was responsible for providing "temporary light throughout the building and power." Amengual was responsible for "power distribution from where it originated" in the sub-basement. Finally, Hack was the general foreman.

When showed a picture of the conduit which plaintiff identified as causing his accident, Tesoriero testified that he couldn't identify it and that "[i]t could be a number of trades' conduit." Amengual and Hack did, however, identify the pipe as a type of conduit that ASR would have used at the project.

There were three or four other electrical subcontractors working at the project at the time of plaintiff's accident. While Tesoriero stated that ASR did not share materials with other subcontractors, The former ASR foreman both testified that other trades would share materials.

Hack did not believe ASR worked on the fifth floor before or at the time of plaintiff's accident because "[t]here were only five – four floors below the working deck" so Hack didn't "believe that there was any work going on on five at that time." Amengual did not know if ASR performed any work on the fifth floor. Chaikin, however, admitted that ASR did perform work on the fifth floor and would have used conduit pipes. Chaikin further stated that ASR did not have any records to indicate when it was working on the fifth floor.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient

evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff's Labor Law § 241[6] against ASR must be dismissed as a matter of law because ASR is not statutorily liable. Labor Law § 241[6] applies to "[a]ll contractors and owners and their agents... when constructing or demolishing buildings or doing any excavating in connection therewith..." ASR is not an owner, nor was it the general contractor. Further, since there is no dispute that ASR did not have the power to enforce safety standards or choose subcontractors, it is not a contractor within the meaning of the statute (see i.e. *Bart v. Universal Pictures*, 277 AD2d 4 [1st Dept 2000]). Further, the parties do not argue that ASR was the owner or general contractor's agent.

While plaintiff claims that ASR should be on the verdict sheet as to their liability for a violation of Section 241[6], because ASR may have controlled the activity that brought about the accident, this argument is unavailing. The inquiry would focus on whether ASR controlled plaintiff's work, and it is of no moment whether ASR controlled its own employees' work with regards to use and storage of electrical conduit. Accordingly, the Labor Law § 241[6] claim against ASR is severed and dismissed.

Similarly, the Labor Law § 200 claim against ASR must also be dismissed. Here, there is no dispute that ASR did not direct plaintiff to retrieve the items that he was walking towards when he slipped and fell nor did it otherwise control plaintiff's work. Therefore, the Labor Law § 200 claim against ASR is also severed and dismissed.

As for the common law negligence claim, ASR has not established as a matter of law that it was not negligent in the use and/or storage of electrical conduit, thereby causing plaintiff's accident. Indeed, there is no dispute that ASR used the type of electrical conduit at the project that plaintiff slipped on. While ASR maintains that its electrical conduit was either stored in boxes or on a rack, ASR has not met its *prima facie* burden of establishing with competent evidence that its employees did not leave the subject piece of pipe on the floor prior to plaintiff's accident. Indeed, Healy's testimony on this point is not probative because he admitted during his deposition that his gang did not use electrical conduit. Therefore, his testimony about what ASR employees did is of no moment.

Further, the remaining depositions of ASR's current and former employees are contradictory as to if and when ASR performed work on the fifth floor of the building, whether the pipe that plaintiff identified in the photograph was electrical conduit that ASR used at the project, where and how ASR stored its electrical conduit and whether ASR shared materials with other trades. ASR has not come forward with any documentary evidence which establishes what work was being performed at or about the time of plaintiff's accident. Nor has ASR shown as a matter of law that the pipe plaintiff identified as the cause of his slip and fall was not electrical conduit. Summary judgment is a drastic remedy, and ASR has not met its burden on this motion.

Accordingly, since ASR has failed to establish that it did not cause or create the condition which in turn caused plaintiff's accident, the motion for summary judgment dismissing the common law negligence claim must be denied.

Relatedly, plaintiff's cross-motion for summary judgment against ASR is denied, since he has not established, as a matter of law, that ASR did cause or create the subject dangerous condition.

The court now turns to ASR's motion for summary judgment dismissing the third-party claims against it. The third-party plaintiffs have asserted the following claims against ASR: [1] contractual indemnification; [2] common law indemnification/contribution; [3] reimbursement for attorneys fees; and [4] failure to procure insurance. As for the first two causes of action, because ASR cannot establish that plaintiff's injury was not "caused by, arising out of, resulting from, or occurring in connection with" ASR's performance (Contract between Lend Lease and ASR), the motion for summary judgment dismissing these two claims is denied.

ASR has, however, provided a copy of an insurance policy it procured from U.S. Specialty Insurance Company. The policy does not specifically name Owner or Lend Lease as an additional insured and aside from simply stating that the policy "compl[ies] with the requirements of the subject contract", ASR has not provided a substantive argument in support of this claim. Accordingly, ASR has not established as a matter of law that the third or fourth causes of action in the third-party complaint should be severed and dismissed, either.

As for the codefendants' cross-motion with respect to their third-party complaint, while they noticed a request for summary judgment on same, they only argue that ASR's motion seeking dismissal of the third-party complaint must be denied. Therefore, the court deems this request for relief abandoned.

### CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** plaintiff's Labor Law § 240 claims against all defendants are withdrawn; and it is further

**ORDERED** that ASR's motion for summary judgment is granted only to the extent that plaintiff's Labor Law §§ 241[6] and 200 claims against ASR are severed and dismissed; and it is further

**ORDERED** that ASR's motion is otherwise denied; and it is further

**ORDERED** that plaintiff's cross-motion for summary judgment on his common law negligence claim against ASR is denied; and it is further

**ORDERED** that the codefendants' cross-motion for summary judgment on the third-party complaint is denied as abandoned; and it is further

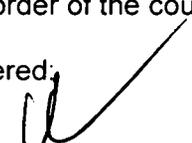
**ORDERED** that the balance of plaintiff's and codefendants' cross-motions for summary judgment are denied as untimely.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

2/7/18  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.