

<b>Banks v Bovis Lend Lease, Inc.</b>
2019 NY Slip Op 30516(U)
February 13, 2019
Supreme Court, New York County
Docket Number: 151117/2013
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM**

*Justice*

-----X INDEX NO. 151117/2013

THOMAS BANKS,

MOTION DATE N/A, N/A, N/A

Plaintiff,

MOTION SEQ. NO. 004 005 006

- v -

BOVIS LEND LEASE, INC., LEND LEASE (US) CONSTRUCTION  
INC., THE MOUNT SINAI MEDICAL CENTER, INC., THE MOUNT  
SINAI HOSPITAL, MORGAN CONSTRUCTION ENTERPRISES,  
INC.,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86,  
87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 127, 128, 129, 130, 131, 132, 133, 134, 135,  
136, 137, 138, 139, 140, 141, 142, 146, 149, 150, 153

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105,  
106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126,  
143, 144, 145, 147, 148, 151, 152, 154

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 155, 156, 157, 158,  
159, 160

were read on this motion to/for STRIKE PLEADINGS

Plaintiff, a journeyman electrician employed by third-party defendant Rigid Electric, Inc. (Rigid), sustained personal injuries on July 3, 2012, when he tripped and fell over a piece of Masonite board at the work site at defendant Mount Sinai Medical Center (Mt. Sinai) in the city, state, and county of New York. The parties appeared for oral argument on February 13, 2019 (Angela Bonello, Senior Court Reporter). This Decision and Order addresses motion sequences 004, 005, and 006.

In motion sequence 004, Rigid moves pursuant to CPLR 3212 to dismiss the third-party complaint by general contractor Morgan Construction Enterprises, Inc. (Morgan) and Mount Sinai. Mt. Sinai now cross-moves for summary judgment of its claim for contractual indemnification against Rigid. Each side opposes the other's motions.

In motion sequence 005, Second Third-Party Defendant Linear Contracting, Inc. (Linear), the subcontractor that laid down the Masonite boards at the worksite, moves pursuant to CPLR 3212 to dismiss the Second Third-Party Plaintiffs, Mt. Sinai and Morgan's complaint against it for breach of contract, failure to procure insurance, and indemnification, and to dismiss the Plaintiff's Labor Law §§ 200/common law negligence, 240(1), 241(6) claims against Mt. Sinai and Morgan. Mt. Sinai and Morgan partially opposed Linear's motion and Plaintiff opposes Linear's motion.

In motion sequence 006, Linear moves to strike the note of issue as plaintiff alleges a new injury in his supplemental bill of particular.

#### Motion Sequence 004

Plaintiff alleges that he tripped over uneven, warped and/or unsecured Masonite boards that covered the new floors as he was walking back to work in the radiology suite from the bathroom. Morgan hired Linear to place the Masonite boards on the floor to protect it. Morgan's project superintendent and project manager oversaw the subcontractors' work and site safety in this radiology suite (NYSCEF doc no 114 – Conroy tr., pp 30-31, 34, 36); Mount Sinai had its own safety team (*id.*, p 36).

Article 12 of the subcontract between Morgan and Rigid states that Rigid will indemnify Mount Sinai and Morgan for personal injury caused by, arising out of, resulting from or occurring in connection with the performance of the work by and/or any act or omission of Rigid (NYSCEF doc no 100). Rigid was hired to perform electrical work at the premises.

Rigid's motion for summary judgment is granted. First, there is no evidence that it created the alleged defective condition or that it had the duty to maintain the premises. Second, the indemnification provision was not triggered. Plaintiff does not allege that he was performing work at the time of his injury, instead, he claims that his injury occurred as he was walking from the bathroom on the premises to his work site. Accordingly, the since Plaintiff's injury did not occur in the course of performing electrical work, the indemnification provision is inapplicable.

#### Motion Sequence 005

Mt. Sinai's claim for common law indemnification is be dismissed since there is no evidence that Linear's actions caused Plaintiff's accident or that it was negligent (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011]). While Mt. Sinai's opposition claims that Linear had a duty to periodically inspect the Masonite for defects, it cites no deposition testimony supporting its claim. Both Mel Conroy, Morgan's superintendent, and Joseph Orobello, Linear's foreman,

testified that Conroy would perform walkthroughs and inspect the premises, and that if he observed a defective piece of Masonite, he would notify Linear to repair it (NYSCEF doc no 139, Conroy Trans, pp. 24:15-27:5; 43:5-23; 45:9-47:4; NYSCEF doc no 141, Orobello Trans pp. 48:22-49:7). Conroy also testified that Morgan was responsible for the protection put on the floor (Conroy Trans., 53:3-9). Moreover, Michael Cain, project manager at Mt. Sinai, testified that Mt. Sinai conducted weekly inspections of the premises, including the Masonite boards (NYSCEF doc no 113, p.24:21-25:8; 36:10-17). Accordingly, since Linear was not negligent, the second third-party complaint and all cross-claims are dismissed against it.

Next, Plaintiff's claim under Labor Law 200/common law negligence against Mt. Sinai and Morgan is maintained since an issue of fact exists as to whether Mt. Sinai and Morgan had constructive notice of the alleged defective condition. Specifically, both Mt. Sinai and Morgan fail to specify when they last inspected the area where Plaintiff's accident occurred (*see Jahn v SH Entertainment, LLC*, 117 AD3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]). Linear's argument that other laborers or parties at the premises did not see the defective condition prior to Plaintiff's accident does not demonstrate that either Mt. Sinai or Morgan did not have constructive notice of the condition.

Plaintiff's Labor Law §241(6) claims pursuant to Industrial code §23-1.7(e)(3) is dismissed because the Masonite was placed on the floor for the purpose of protecting the floor and was not "debris or dirt" (*Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]). Plaintiff's claims under Industrial Code §§ 23-1.5 and 23-2.1 are also dismissed as inapplicable; Plaintiff does not address Linear's argument on these two codes (*see Kempisly v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

However, the branch of Linear's motion to dismiss Plaintiff's section 240(1) claim pursuant to Industrial Code 23-1.7(e)(1) is denied since an issue of fact exists as to whether the Masonite Plaintiff allegedly tripped on is a tripping hazard.

Mt. Sinai's claims for contractual indemnification and breach of contract against Linear are dismissed as the parties did not enter into a written contract. Plaintiff's claim under Labor Law §240(1) is also dismissed since there is no evidence that his accident was gravity related.

#### Motion Sequence 006

Motion sequence 006 is resolved pursuant to the annexed Order dated February 13, 2019.

Conclusion

Accordingly, it is hereby

ORDERED that third-party defendant Rigid Electric, Inc.'s motion pursuant to CPLR 3212 for summary dismissal of third-party complaint against it (mot. seq. 004) is granted, and the third-party complaint against Rigid is severed and dismissed; it is further

ORDERED that third-party Mount Sinai Medical Center, Inc.'s cross-motion pursuant to CPLR 3212 granting its third-party claim for contractual indemnity (mot. seq. 004) is denied; it is further

ORDERED that the branch of Linear Contracting Inc.'s motion pursuant to CPLR 3212 for summary dismissal of the second third-party complaint all cross-claims against it (mot. seq. 005) is granted, and the second third-party complaint is severed and dismissed; it is further

ORDERED that the branch of second third-party defendant Linear Contracting, Inc.'s motion pursuant to CPLR 3212 for summary dismissal of Plaintiff's claim under Labor Law 200/common law negligence (mot. seq. 005), is denied; it is further

ORDERED that the branch of Linear's motion to dismiss Plaintiff's Labor Law 240(1) claim (mot. seq. 005) is granted; it is further

ORDERED that the branch of Linear's motion pursuant to CPLR 3212 for summary dismissal of Plaintiff's claims under Labor Law 241(6) (mot. seq. 005), is granted to the extent that Plaintiff's claims under Industrial Code sections 23-15, 23-2.1 and 23-1.7(e)(2), are dismissed; it is further.

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that motion sequence 006 is resolved pursuant to the annexed Order of February 13, 2019.

This constitutes the Order of the court.

2/13/2019  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE