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# Traub Lieberman Attorneys Lisa M. Rolle and Vito John Marzano Secure Dismissal of Indemnification and Breach of Contract Claims Asserted against Subcontractor

Related Attorneys: Lisa M. Rolle

On August 7, 2019, TLSS Partner Lisa M. Rolle and associate Vito John Marzano obtained a dismissal of all claims on behalf of their client, the subfloor subcontractor at the worksite, in a severed action filed in the Supreme Court of the State of New York, County of Kings.

In April 2014, plaintiff commenced suit against several defendants, including the general contractor, after he sustained an injury when he fell through temporary plywood while installing a staircase at a worksite in Brooklyn. In May 2018, plaintiff filed a note of issue and certified the matter as ready for trial. Immediately thereafter, the general contractor initiated a second third-party action against the subcontractor seeking common-law and contractual indemnification and breach of contract. The Court subsequently granted Traub Lieberman's motion to sever the second third-party action and instructed the general contractor to file a new action.

After the general contractor recommenced suit, Traub Lieberman, on behalf of its client, the subcontractor, immediately moved to dismiss for failure to state a cause of action. In relevant part, Traub Lieberman pointed to the deposition testimony of the general contractor's principal to establish that the subcontractor had finished its work on the permanent subfloor no less ten months to over a year prior to plaintiff's accident, and that the subfloor required no alteration, repair or maintenance prior to or as a result of plaintiff's accident. Further, the general contractor's testimony pointed to work performed by another subcontractor that directly resulted in plaintiff's injuries. It was also brought to the Court's attention that plaintiff had testified that he fell through a temporary plywood floor, and that the subcontractor had only installed a permanent subfloor.

In opposition, the general contractor attempted to, among other things, poke holes in plaintiff's testimony by pointing out that the record establishes that no temporary floor was present at the time of plaintiff's accident. On reply, Traub Lieberman called the Court's attention to the general contractor reliance on the same deposition testimony to prosecute its identical claims against other subcontractors in the underlying action and, accordingly, argued that the general contractor should be held to those arguments and not be able to ignore its own principal's sworn testimony simply because it undermines its legal theory in the instant action.

The Court accepted the deposition testimonies as evidentiary material, which, under New York law, morphs the inquiry on a motion to dismiss for failure to state a cause of action from whether a party has stated a cause of action to whether one has a cause of action.

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It then concluded that the general contractor's deposition testimony established that the subcontractor was not present on the site on the date of the accident, and that the subfloor was not altered or modified in any way after being completed. It further noted that the general contractor had installed guardrails around openings left for staircases, but that plaintiff's employer, another subcontractor, had removed them to install staircases. Plaintiff was injured when he fell through a platform/landing installed by his own employer. The Court concluded that Traub Lieberman, on behalf of its client, demonstrated that the material facts claimed by the general contractor in the pleading were not facts at all, and therefore dismissed the complaint in its entirety.