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Time To Repair the Split in Application of Labor Law §200

In three of the Appellate Division Departments, a plaintiff wishing to impose Labor Law §200 liability on an owner or general contractor in a "means and methods" case must establish that the owner or GC "actually exercised" control over the means and methods of the work. However, in the Second Department, since 'Ortega v. Puccia,' an owner or GC may be held liable if it had "authority" to control the means and methods of the work. In this article, the authors suggest it is well past time to remedy this split between the Departments.

By **Timothy R. Capowski and John F. Watkins** | September 04, 2019

It is well past time to remedy the split between the Appellate Division departments regarding Labor Law §200. In the Court of Appeals and three Appellate Division Departments, a plaintiff wishing to impose Labor Law §200 liability on an owner or general contractor (GC) in a "means and methods" case must establish that the owner or GC actually exercised control over the means and methods of the work. But since *Ortega v. Puccia* in the Second Department (57 A.D.3d 54, 60 (2d Dept. 2008)), an owner or GC may be held liable if it had *authority* to control the means and methods of the work. This inconsistency has even been noted in the Pattern Jury Instructions:

> The pattern charge regarding owners' and general contractors' liability for injuries arising from the means and manner of the work reflects the view that, in this class of cases, an owner or general contractor may be held liable under Labor Law §200 only if it actually controlled or supervised the work...However, relying on *Comes v. New York State Elec. and Gas Corp.*, supra, and *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998), the Second Department has held that the authority to control or supervise the work is sufficient, *Ortega v. Puccia*, 57 A.D.3d 54 (2d Dept 2008). Thus, in cases tried within the Second Department, the charge must be modified accordingly.

PJI 2:216 (Caveat 2).

This inconsistency not only weakens the trust market participants must place in the court system—because of course no developer or contractor can see any reason that one rule should hold in Queens and another in Manhattan—it warps the Second Department's Labor Law jurisprudence, because naturally owners and GCs always retain some measure of authority over their subcontractors. This reality has forced the Second Department to distinguish between merely "general supervisory authority," which does not give rise to liability, and the sort of supervisory authority that does give rise to liability. The distinction between the two is so elusive that it provides little guidance for litigants seeking settlement or for attorneys seeking to craft contracts that avoid the sort of authority that creates liability.

Value of Majority Rule

The Legislature, in enacting Labor Law §200, intended only to codify "the existing common law duty to protect the health and safety of employees, not to create a new obligation.'" *In Re Joint Eastern & Southern Dist. Asbestos Litig.*, 827 F. Supp. 1014, 1052-53 (S.D.N.Y.1993), aff'd in part rev'd in part on other grounds, 52 F.3d 1124 (2d Cir.1995)." The common law, of

course, sought to impose liability on negligent actors, i.e., to allocate loss following fault. The Second Department's *Ortega* rule departs from the common law, imposing "widespread 'upstream' liability on general contractors and owners in situations where they played no role in the injury-producing situation." *Lamela v. City of New York*, 560 F. Supp. 2d 214, 222-23 (E.D.N.Y. 2008), aff'd, 332 F. App'x 682 (2d Cir. 2009).

Moreover, actual exercise is an understandable and workable bright-line requirement that allows for a predictability that fosters settlement and encourages investment. In particular, it mirrors the prerequisite for recovery for common law indemnification, which market participants are already familiar with. See *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 377-78 (2011) ("a party's (e.g., a general contractor's) *authority* to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification...[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who *exercise actual* supervision.") The *Ortega* rule, in contrast, is inherently difficult in application—the question of what amounts to merely "general" supervisory authority is inherently fraught with nuance and unpredictability. It is also, as shown herein, unjustified in law.

Departure From 'Ortega' Rule

The Second Department in *Ortega* established its minority rule by relying on eight decisions for support:

> [W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (see *Rizzuto v. L.A. Wenger ContR.Co., Inc.*, 91 N.Y.2d 343, 352; *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317; *Gallello v. MARJ Distrib., Inc.*, 50 A.D.3d 734, 735; *Dooley v. Peerless Importers, Inc.*, 42 A.D.3d 199, 204-205; *Guerra v. Port Auth. of N.Y. & N.J.*, 35 A.D.3d 810, 811; *Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 683; *Everitt v. Nozkowski*, 285 A.D.2d at 443; *Reynolds v. John T. Brady & Co.*, 38 A.D.2d 746, 746-747).

Ortega, 57 A.D.3d at 61-62.

However, review of the eight decisions cited in *Ortega* to justify this "better standard" reveals that they do not actually support, and instead undermine, the interpretation formulated in *Ortega*. *Rizzuto* appears to be the source of the confusion: The Court of

Appeals expressly held that an issue of fact existed as to whether "defendant had control over the methods of the subcontractors and other worksite employees" and therefore "possessed the requisite supervisory control over that portion of the work activity bringing about the injury" to be held liable. 91 N.Y.2d at 353. This is the majority rule. But in so holding, the Court of Appeals also referred to *authority to control* as an "*implicit pre*condition" to recovery (emphasis added).

Given that an "implicit precondition" of authority is necessarily *secondary to the explicit requirement* (that years of case precedent had established) of actual exercise of supervision or control, the *Rizzuto* court seems to have simply meant to point out, somewhat pragmatically, that authority to control is *necessary* for liability under §200. Of course, not everything necessary is also sufficient. Had the *Rizzuto* court meant to overturn existing law and hold that authority was *sufficient*, it would have done so expressly, and not bothered to note that a finder of fact could conclude that the authority had been exercised. Cf. N.Y. Stat. §153 ("A change in long established rules of law is not deemed to have been intended by the Legislature in the absence of a clear manifestation of such intention.").

The "implicit precondition" language found its way into *Rizzuto* by way of *Russin*, which was also relied upon by the *Ortega* panel, and which also did not support *Ortega* or signal any kind of sea change bearing on the statutory interpretation of §200 or the common law negligence standard. Indeed, in *Russin*, the Court of Appeals succinctly explained, "We agree with the Appellate Division that the prime contractors incur no liability for personal injuries arising out of work not specifically delegated to them." *Russin*, 54 N.Y.2d at 315. By pointing out that authority to control the activity bringing about the injury was "[a]n implicit precondition to this duty to provide a safe place to work," the *Russin* court was merely pointing out the obvious, and addressed the ultimate question of whether the contractors actually exercised such control.

Of the other six decisions relied upon by the *Ortega* court, none actually provides any meaningful support for the minority rule it fashioned. In fact, review of these decisions reveals that they tend to undermine it. Two, *Dooley v. Peerless Importers, Inc.*, 42 A.D.3d 199, 205 (2d Dept. 2007) and *Perri v. Gilbert Johnson Enterprises, Ltd.*, 14 A.D.3d 681, 683-34 (2d Dept. 2005), applied the majority rule. Two, *Reynolds v. John T. Brady & Co.*, 38 A.D.2d 746, 747 (2d Dept. 1972) and *Gallello v. MARJ Distributors, Inc.*, 50 A.D.3d 734, 735 (2d Dept. 2008) were not "means and methods" cases, and only discuss the rule in dicta. The last two only seemingly support the *Ortega* rule: The court in *Everitt v. Nozkowski*, 285

A.D.2d 442, 444 (2d Dept. 2001) made a predicate finding of actual supervision and control, and briefs in *Guerra v. Port Authority of New York & New Jersey*, 35 A.D.3d 810, 811 (2d Dept. 2006) reveal ample evidence of actual supervision (see *Guerra* Apps' Br., 2006 WL 4471823, at 25).

As can be seen, the whole body of case law cited in *Ortega* does not actually support a departure from the requirement of actual exercise of supervision or control, and it is most respectfully urged that the foregoing cases were misapplied. It is only *Ortega* and the subsequent case law in the Second Department that has transmogrified the "implicit precondition" into a new, lesser requirement.

Similarly, the Second Department's policy concern does not seem justified. The *Ortega* court explained that the majority rule "would, we believe, encourage defendants to purposefully absent themselves from worksites to provide insulation from liability under the statute, as well as under the common law." *Ortega*, supra at 62. This stated concern does not seem to withstand review under modern-day construction-site practices. Owners and GCs simply do not absent themselves to avoid liability where the majority rule holds: Their exposure to strict liability under Labor Law §§240(1) and 241(6) and self-interest in the safe and timely progress and completion of the work more than suffices to ensure their presence.

Finally, the application of this minority rule has resulted in confusion, such that the Second Department has itself sporadically applied the majority rule post-*Ortega*. See *Portalatin v. Tully Const. Co.-E.E. Cruz & Co.*, 155 A.D.3d 799, 800 (2d Dept. 2017); *Hernandez v. Pappco Holding Co., Ltd.*, 136 A.D.3d 981, 982-83 (2d Dept. 2016); *LaRosa v. Internap Network Serv. Corp.*, 83 A.D.3d 905, 909 (2d Dept. 2011).

Conclusion

Over a decade ago, the Second Department, with thin legal justification, departed from a majority rule that mirrored the will of the legislature. In doing so it created market uncertainty, increased litigation, discouraged settlement, and weakened trust in the even application of justice. The so-called policy benefits of this departure are, at best, ephemeral. The *Ortega* rule should be abandoned and the majority rule restored in the Second Department for a consistent rule throughout New York state.

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