

Thomas v 250/PAS Assoc.

2010 NY Slip Op 31200(U)

May 17, 2010

Supreme Court, New York County

Docket Number: 106062/06

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

Thomas

INDEX NO. 106062/06
MOTION DATE 3/12/10
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

- v -

250/PAS Associates

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
MAY 19 2010

PAPERS NUMBERED

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

Motion sequence 011 and 012 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the part of defendant Best Value Construction, Inc.'s (Best Value) motion, (sequence 011) pursuant to CPLR 3212, for summary judgment dismissing plaintiff Malcolm Thomas's Labor Law §§ 240 (1) and 241 (6) claims, as well as defendants 250/PAS and Jeffrey's cross claims, as against it is granted, and these claims and cross claims are severed and dismissed as against this defendant, and the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied; and it is further

ORDERED that defendants 250/PAS and Jeffrey's motion, pursuant to CPLR 3212, (sequence 012) for summary judgment dismissing plaintiff's complaint, as well as all cross claims asserted against them, is granted, and the complaint and cross claims are severed and dismissed as against these defendants, and the Clerk is directed to enter judgment in favor of these defendants with costs and disbursements as taxed by the Clerk, and the motion is otherwise denied, as moot; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for defendant Best Value Construction, Inc. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 5/17/10

[Signature]
HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

-----X
MALCOLM THOMAS,

Index No.: 106062/06

Plaintiff,

-against-

250/PAS ASSOCIATES, BEST VALUE CONSTRUCTION,
INC., LAZAR MECHANICAL CORP., JEFFREY
MANAGEMENT CORP. and THESSABUL, LLC,

Defendants.

-----X
Edmead, J.:

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 011 and 012 are hereby consolidated for disposition.

This is an action to recover damages sustained by a plumber when he was struck by a falling scaffold while he was working at a construction site located at 242-250 Park Avenue South, New York, New York on August 17, 2005.

In motion sequence number 011, defendant Best Value Construction, Inc. (Best Value) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Malcolm Thomas's Labor Law §§ 240 (1) and 241 (6) claims, as well as all cross claims, as against it.

In motion sequence number 012, defendants 250/PAS Associates (250/PAS) and Jeffrey Management Corporation (Jeffrey) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, as well as all claims, as against them. In the alternative, these defendants move, pursuant to CPLR 3212, for summary judgment in their favor on their cross claims against defendants Best Value, Lazar Mechanical Corporation (Lazar) and Thessabul, LLC (Thessabul).

BACKGROUND

On the date of the accident, defendant 250/PAS owned the premises and defendant Jeffrey managed the premises where the accident took place. Defendant Thessabul leased the first floor of the premises with the intention of constructing a restaurant at the premises (the project). Thessabul hired defendant Best Value to serve as general contractor for the project, as well as various contractors to carry out the construction work. Thessabul contracted with defendant Lazar to perform HVAC work and non-party CB Company (CB) to perform plumbing work on the project. Specifically, CB's duties included capping off existing lines, running new gas and water lines, roughing out bathrooms and installing sprinkler systems. Plaintiff served as CB's foreman mechanic on the project.

Plaintiff testified that, upon arriving at the premises on the morning of the accident, he proceeded to the kitchen area to retrieve his tools from the CB gang box and lay out his work for the day. In order to reach his work area, which was located in the kitchen, it was necessary for plaintiff enter through the freight entrance located on the side of the building. As plaintiff entered the kitchen, he noticed a double-stacked yellow scaffold blocking the area where he intended to work that morning. Plaintiff asked Best Value foreman Lescek Dziki (Dziki) to have the scaffold, which had the word "Lazar" printed on it, removed from the area (250/PAS and Jeffrey's Notice of Motion, Exhibit F, Plaintiff's Deposition, at 42).

After speaking with Dziki, plaintiff proceeded into the kitchen and began taking measurements for his plumbing work. Plaintiff explained that small holes had been cut in the kitchen floor for drain installation. Plaintiff maintained that the drain holes were either made by Best Value or CB.

Immediately prior to his accident, plaintiff was walking backwards with a tape measure in his hand. The next thing plaintiff remembered was a Lazar worker apologizing to him and telling him that the wheel of the scaffold hit a hole as it was being moved out of the way. Plaintiff maintains that he was injured when the scaffold tipped over and struck him in the back of his neck between his shoulder blades. In addition, plaintiff was hurt when his legs fell into a 12-inch-deep by two-foot-wide hole. Plaintiff noted that workers from CB, Lazar and Best Value were present at the site at the time of plaintiff's accident.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS 250/PAS AND JEFFREY AND BEST VALUE

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but also applies where the work itself involves risks related to differences in elevation (*Binetti v MK West Street Company*, 239 AD2d 214, 214-215 [1st Dept 1997]; see *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 500-501)).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe College*, 12 AD3d 261, 262 [1st Dept 2004]). “The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal

citations omitted])” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Initially, it should be noted that, in its opposition papers, plaintiff states that he does not oppose that part of defendants’ motions which seek to dismiss plaintiff’s Labor Law § 240 (1) claim as against them. As conceded by plaintiff, plaintiff’s injuries did not result from a special elevation-related hazard under Labor Law § 240 (1), but “rather from the usual and ordinary dangers which exist on a construction site” (*Wells v British American Development Corporation*, 2 AD3d 1141, 1143 [3d Dept 2003]; *Misseritti v Mark IV Construction Company*, 86 NY2d 487, 491 [1995]; *Parker v Ariel Associates Corporation*, 19 AD3d 670, 672 [2d Dept 2005]). Thus, defendants 250/PAS and Jeffrey and defendant Best Value are entitled to summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim as against them.

PLAINTIFF’S LABOR LAW § 241 (6) CLAIM AGAINST DEFENDANTS 250/PAS AND JEFFREY AND DEFENDANT BEST VALUE

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-*

Electric Company, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.7 (e) (1) and (2), plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on those provisions.

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific enough to support a Labor Law § 241 (6) claim (*Smith v McClier Corporation*, 22 AD3d 369, 370 [1st Dept 2005]; *Lopez v City of New York Transit Authority*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (e) (1), which deals with "tripping" hazards in passageways, does not apply to the facts of this case (*see Parker v Ariel Associates Corporation*, 19 AD3d at 672). Here, plaintiff's injuries were not caused by him tripping on dust or debris. Instead, plaintiff's injuries were caused when the wheel of the scaffold that was being pushed fell into a hole, causing it to tip over and fall onto plaintiff. Moreover, plaintiff was not in a

passageway at the time of the accident, but instead, plaintiff was in the kitchen where he was to perform his assigned work for the day (*Adams v Glass Fab, Inc.*, 212 AD2d 972, 973 [4th Dept 1995]).

Industrial Code 12 NYCRR 23-1.7 (e) (2) is also inapplicable to the facts of this case, as, in addition to relating to tripping hazards, that section requires that floors or other work areas be kept free from the accumulation of dirt and debris, as well as from scattered tools and materials and sharp projections. As stated previously, plaintiff's accident was caused when the scaffold's wheel fell into a hole, and thus, it was not as a result of tripping, debris or scattered tools (*see Waitkus v Metropolitan Housing Partners*, 50 AD3d 260, 260 [1st Dept 2008]; *id.*).

Thus, defendants 250/PAS and Jeffrey and defendant Best Value are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2).

PLAINTIFF'S COMMON-LAW NEGLIGENCE CLAIM AS AGAINST DEFENDANTS 250/PAS AND JEFFREY

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work’ [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

Defendants 250/PAS and Jeffrey move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against them. However, it should be noted that defendant Best Value did not move for summary judgment dismissing these claims as against it.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

Here, both situations are applicable. First, as plaintiff's accident was proximately caused when the scaffold was pushed over a floor which contained uncovered holes without first covering those holes, plaintiff's accident resulted from the means and methods used by the contractor to do its work. Second, as the holes were left unguarded and uncovered in the first place, such that a scaffold wheel might fall into one of them, plaintiff's accident also resulted from an unsafe condition.

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]; *Comes v New York State Electric & Gas Corporation*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57

AD3d 54, 61 [2d Dept 2008]).

“A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when the defendant bears responsibility for the manner in which the work is performed” (*Orellana v Dutcher Avenue Builders, Inc.*, 58 AD3d 612, 614 [2d Dept 2009], quoting *Ortega v Puccia*, 57 AD3d at 62).

Here, the evidence in this case is insufficient to establish that defendants 250/PAS and Jeffrey, as owner and manager of the premises, had any supervisory control or input regarding the injury-producing work, i.e., the moving of the scaffold, so as to impose liability pursuant to the statute. To that effect, a review of the record indicates that these defendants were not involved with the construction work going on at the premises, nor did they hire or supervise any of the contractors associated with the project or hold any meetings at the job site.

In its opposition to defendants 250/PAS and Jeffrey’s motion, Best Value argues that defendants 250/PAS and Jeffrey did retain control over the premises, and thus, they are liable for any injuries that occur on the premises. Best Value puts forth the testimony of Randi Seider (Seider), Jeffrey’s manager, who testified that Jeffrey employed an assistant superintendent and freight elevator operator, Joseph Louazo (Louazo), who was present at the premises every day and served as Jeffrey’s “eyes and ears for the project” (Best Value’s Notice of Motion, Exhibit I, Seider Deposition, at 38). Seider also testified that he personally walked the construction site once per week, and that if he saw an unsafe condition, he had the authority to stop construction.

However, “general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed” (*Hughes v Tishman Construction Corporation*, 40 AD3d 305, 311 [1st Dept 2007];

Burkoski v Structure Tone, Inc., 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

In addition, plaintiff's injuries also resulted from an unsafe condition created by the uncovered and exposed holes in the floor of the kitchen where plaintiff was working at the time of the accident. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Keating v Nanuet Board of Education*, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; *Thomas v Claffee*, 24 AD3d 749, 751 [2d Dept 2005]; *Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, defendants 250/PAS and Jeffrey are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claim as against them, as it has not been sufficiently established that these defendants created the unsafe condition in any way. In addition, although there was testimony to the effect that Seider and Jeffrey's superintendent were present at the job site, it has not been sufficiently demonstrated that they had actual or

constructive notice of the unsafe condition at issue in this case. For example, there was no testimony that these defendants received any complaints about the unsafe condition of the kitchen floor.

Thus, defendants 250/PAS and Jeffrey are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as all cross claims, against them. Accordingly, it is not necessary to address that part of their motion seeking summary judgment in their favor on their cross claims against defendants Best Value, Lazar and Thessabul, as these cross claims are now moot.

BEST VALUE'S MOTION TO DISMISS ALL CROSS CLAIMS AS AGAINST IT

Initially, it should be noted that, as plaintiff's complaint and all cross claim as against defendants 250/PAS and Jeffrey have been dismissed as against them, Best Value is entitled to summary judgment dismissing these defendants' cross claims against it, as they are now moot.

In addition, as the contract between Best Value and Thessabul does not obligate Best Value to indemnify any party, Best Value is entitled to summary judgment dismissing any contractual indemnification claims asserted against it. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

However, Best Value is not entitled to summary judgment dismissing defendants Lazar and Thessabul's cross claims for common-law indemnification and contribution asserted against

it. “To establish a claim for common-law indemnification, ‘the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident’” (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493, 495 [1st Dept 2004]).

“Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]” (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61-62 [2d Dept 2003]).

Although there is no evidence in the record to indicate that Best Value owned the scaffold at issue in this case, a question of fact exists as to whether, as general contractor, Best Value directed or controlled the means or methods of moving the scaffold from one location to another. A question of fact also exists as to the extent of Best Value’s responsibility for making sure that the job site was safe from unsafe conditions. In addition, questions of fact exist as to whether Best Value created the unsafe condition by its failure to have the holes covered or cordoned off, and whether Best Value had actual or constructive notice of the unsafe condition (*see Mazzu v Benderson Development Company*, 224 AD2d 1009, 1012 [4th Dept 1996] [question of fact existed as to whether defendant had actual or constructive notice of unsafe condition where it provided the materials for pool repair and its vice-president came to the job periodically to see how the work was progressing]).

It should be noted that, “the open and obvious nature of the allegedly dangerous condition in this case ‘does not negate the duty to maintain [the] premises in a reasonably safe condition, but [instead], bears only on the injured person’s comparative fault’” (*Verel v Ferguson Electric Construction Company*, 41 AD3d at 1156, quoting *Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863 [4th Dept 2006]).

Thus, in light of factual issues concerning whether or not any negligence on the part of defendant Best Value may have contributed to the accident, “the issue of common-law indemnification [as against Best Value] is not yet ripe for adjudication” (*Murphy v WFP 245 Park Company*, 8 AD3d 161, 162 [1st Dept 2004]; *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant Best Value Construction, Inc.’s (Best Value) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Malcolm Thomas’s Labor Law §§ 240 (1) and 241 (6) claims, as well as defendants 250/PAS and Jeffrey’s cross claims, as against it is granted, and these claims and cross claims are severed and dismissed as against this defendant, and the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied; and it is further

ORDERED that defendants 250/PAS and Jeffrey’s motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s complaint, as well as all cross claims asserted against them, is granted, and the complaint and cross claims are severed and dismissed as against these defendants, and the Clerk is directed to enter judgment in favor of these defendants with costs

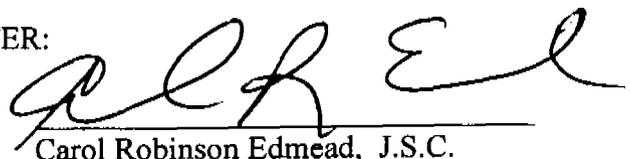
and disbursements as taxed by the Clerk, and the motion is otherwise denied, as moot; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for defendant Best Value Construction, Inc. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

DATED: May 17, 2010

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
MAY 19 2010
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