

**Warrick v THC Realty Dev., L.P.**

2010 NY Slip Op 32330(U)

August 25, 2010

Supreme Court, Suffolk County

Docket Number: 08-17278

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. DENISE F. MOLIA  
Justice of the Supreme Court

MOTION DATE 4-30-10 (#002)  
MOTION DATE 5-17-10 (#003)  
MOTION DATE 6-18-10 (#004, #005, #006)  
ADJ. DATE 7-16-10  
Mot. Seq. # 002 - MD  
# 003 - MotD  
# 004 - MG  
# 005 - XMD  
# 006 - XMD

-----X  
PAULINAS WARRICK & LUCILLE WARRICK, :  
 :  
 : Plaintiffs, :  
 :  
 : - against - :  
 :  
 : THC REALTY DEVELOPMENT, L.P., CASHIN :  
 : ASSOCIATES, P.C., JKB CONTRACTING, INC. :  
 : and GOSHOW ARCHITECTS, L.L.P., :  
 : Defendants. :  
-----X  
CASHIN ASSOCIATES, P.C., :  
 :  
 : Third-Party Plaintiff, :  
 :  
 : - against - :  
 :  
 : GOSHOW ARCHITECTS, L.L.P., :  
 :  
 : Third-Party Defendant. :  
-----X

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Upon the following papers numbered 1 to 173 read on these motions for summary judgment and for leave to serve an amended cross claim; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; 28 - 49; 50 - 63; Notice of Cross Motion and supporting papers 64 - 82; 83 - 89; Answering Affidavits and supporting papers 90 - 102; 103 - 120; 121 - 122; 123 - 124; 125 - 126; 127 - 128; 129 - 130; 131 - 133; 134 - 135; 136 - 147; 148 - 149; Replying Affidavits and supporting papers 150 - 151; 152 - 153; 154 - 155; 156 - 157; 158 - 159; 160 - 162; 163 - 164; 156 - 167; 168 - 169; Other memoranda of law 170 - 171; 172 - 173; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that these motions are consolidated for the purpose of this determination; and it is further

**ORDERED** that the motion (#002) by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to the defendants' liability, based upon their violation of Labor Law § 240 (1), is denied, and it is further

**ORDERED** that the motion (#003) by defendant JKB Contracting, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' Labor Law §§ 200 and 241(6), and common-law negligence claims, and any cross claims asserted against it, is granted to the extent that the plaintiff's Labor Law § 241 (6) claim is dismissed, and is otherwise denied; and it is further

**ORDERED** that the motion (#004) by defendant JKB Contracting, Inc. for an order pursuant to CPLR 3025 (b) granting leave to serve an amended cross claim asserting a claim for common-law indemnification over and against Goshow Architects, L.L.P., is granted; and it is further

**ORDERED** that the cross motion (#005) by defendant Cashin Associates, P.C. for an order pursuant to CPLR 3212 granting summary judgment (1) dismissing the complaint, (2) in its favor on its cross claims, and (3) in its favor on its third-party claim for common-law indemnification over and against Goshow [Architects, L.L.P.], is denied as untimely; and it is further

**ORDERED** that the cross motion (#006) by defendant THC Realty Development, L.P. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and the cross claims asserted against it by Cashin Associates, P.C. and JKB Contracting, Inc., is denied as untimely.

The injured plaintiff, Paulinas Warrick, commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1) and 241 (6), and common-law negligence, for injuries he suffered in a fall from a fixed ladder at a renovation site on February 9, 2004. The owner of the property, nonparty SUNY Stony Brook, engaged several prime contractors, including defendant THC Realty Development, L.P. (THC), which was employed to perform general construction,<sup>1</sup> defendant Cashin Associates, P.C. (Cashin), which was employed as the construction manager, and defendant JKB Contracting, Inc. (JKB), which was employed to perform the HVAC work. JKB, in turn, subcontracted the demolition of the old HVAC piping and the installation of the new HVAC piping and units to nonparty Warrick Mechanical.

The plaintiff testified at his deposition that he was the president of Warrick Mechanical

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<sup>1</sup> Although THC's contract with the owner refers to THC as the "general contractor" and it is sometimes referred to as the general contractor by the parties, it was one of several prime contractors.

(Warrick), that he was an experienced welder, and that, on the day of his accident, he was the only person from Warrick working in the building. The two-story building also had a “penthouse,”<sup>2</sup> located above the second floor, which housed the HVAC units. A metal ladder, which was permanently “affixed” via bolts on the floor and welds to the penthouse itself, provided the only access to the penthouse “hatch.” The plaintiff testified, in relevant part, that the subject “toe ladder” was too close to an adjacent wall, so that only the toe portion of his boot would fit on the round latter rung while climbing or descending, and that he complained about the ladder’s placement to both Cashin and THC. A rope was often attached to the ladder so that a bucket secured to the rope could be used to raise and lower tools and equipment. According to the plaintiff, the electrical and plumbing contractors were also working in the penthouse and, when he went up the ladder the morning of his accident, there was no rope attached to the ladder. However, sometime during the morning, a rope had been attached to ladder. As the plaintiff descended the ladder, his foot got tangled in the rope and, as he attempted to free himself, he was unable to properly place his other foot on a ladder rung, his foot slipped, and he fell to the floor.

Robert Legler, the project manager for THC, testified at his deposition that THC, as the general construction contractor, performed all the carpentry, demolition, masonry, and interior painting for the renovation project. All the work was performed by subcontractors hired by THC, including the subcontractor which removed, repainted, and then replaced the subject ladder in the same area sometime in 2003 pursuant to the “specs” provided by the architect, defendant Goshow Architects, LLP (Goshow). According to Legler, he used the subject ladder once a day and saw the rope attached to side of the ladder, but he did not have a problem with the rope or the placement of the ladder adjacent to the wall. One of THC’s subcontractors removed and then re-constructed the closet walls which housed the replaced ladder. Legler testified that each prime contractor was responsible for the site safety of its own subcontractors and that Cashin, as the job manager and coordinator, had the same degree of responsibility for site safety as any prime contractor. He stated that Cashin would bring its concerns to the attention of the sub or prime contractor, and could stop work which it felt was unsafe.

Stephen Brix, Cashin’s vice president, testified at his deposition that it was Cashin’s function, as the construction manager, to act as the owner’s on-site representative. Brix was present daily and his mandate was to make sure that the architect’s plans and specifications were being met, to make sure the products used were the ones submitted and approved by the architect, and, among other things, to monitor the safety programs of the various prime contractors. However, Cashin had no supervision or authority over the means and methods utilized by the various contractors and it was not Brix’s responsibility to conduct safety meetings. Accordingly to Brix, he had used the ladder, observed the rope attached to the side of the ladder, and knew it was used to raise and lower tools and parts. When using the ladder to get to the penthouse, he had no difficulty with the rope or the ladder’s placement, and he received no complaints about either. There were times when the rope was not present and he was not certain which contractor or subcontractor attached the rope at any given time.

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<sup>2</sup> The plaintiff described the penthouse as a “mechanical building” which was approximately 80 feet by 40 feet. He stated that he would go up to the penthouse in the morning, come down for lunch, and then return to the penthouse until the end of the day.

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John Ellerson, JKB's employee, testified at his deposition that JKB was the prime HVAC contractor, that he was at the site almost daily, that he supervised JKB's subcontractors, including Warrick, and that he was aware that the ladder was removed and then replaced. He described the subject ladder as a "toe ladder" and he stated that he used it many times. Early into the job, he told Brix that the ladder was a hazard because it did not permit full placement of a work boot, the rungs were round and, therefore, slippery, and the access hatch was inadequate. He testified that he observed a rope attached to the ladder being used to hoist materials, that all the trades working in the penthouse used that method to get their tools or materials up, that he saw the rope "tangled" up through the rungs and that, over the course of the project, more than one rope had been used (i.e., different contractors used different ropes). Ellerson stated that he attended all the job site meetings.

Satinder Sondhi, also JKB's employee, testified at his deposition that he was an assistant project manager, that both he and John Ellerson supervised JKB's subcontractors, and that he used the subject ladder to access the penthouse. He stated that Brix would communicate with JKB if he noticed work that was not being properly or safely performed. Although Sondhi left JKB's employ before the project was finished, he did observe a rope next to the ladder being used to hoist materials up to the penthouse.

Stephen Mitchell, Goshow's associate, testified at his deposition that Goshow redesigned the interior of the building. According to his testimony, the building was gutted, the walls of the closet which housed the ladder were removed to allow installation of new equipment, the ladder was removed, and the closet was then reconstructed and the same ladder was replaced, all in accordance with Goshow's plans.

Initially, the Court finds that "the permanently affixed ladder from which the injured plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect the injured plaintiff from elevation-related risks" (*Gelo v City of New York*, 34 AD3d 636, 637, 823 NYS2d 699 [2006]; *Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989, 801 NYS2d 373 [2005]; *Gold v NAB Constr. Corp.*, 288 AD2d 434, 733 NYS2d 681 [2001]).<sup>3</sup> Accordingly, the Court finds that the absolute liability imposed by Labor Law § 240 (1) is inapplicable, as a matter of law, to the plaintiff's fall.

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<sup>3</sup> The Court is aware of the seemingly contrary holdings of the Appellate Division First Department (see, *Griffin v New York City Transit Auth.*, 16 AD3d 202, 791 NYS2d 98 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 781 NYS2d 506 [2004]; *Crimi v Neves Assoc.*, 306 AD2d 152, 761 NYS2d 186 [2003]). However, the Second and Third Departments have consistently rejected finding that permanent ladders or stairs are safety devices within the meaning of Labor Law § 240 (1). Indeed, "a stairway which is, or is intended to be, permanent – even one that has not yet been anchored or secured in its designated location, or completely constructed – cannot be considered the functional equivalent of a ladder or other 'device' as contemplated by [Labor Law] section 240 (1)" (*Milanese v Killerman*, 41 AD3d 1058, 1060-1061, 838 NYS2d 256 [3d Dept 2007], quoting *Williams v City of Albany*, 245 AD2d 916, 917, 666 NYS2d 800 [3d Dept 1997], *lv dismissed* 91 NY2d 957, 671 NYS2d 717 [1998]; see also, *Caruana v Lexington Vil. Condominiums at Bay Shore*, 23 AD3d 509, 806 NYS2d 634 [2d Dept 2005]; *Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 801 NYS2d 373 [2d Dept 2005]). "Such a structure functions as a permanent passageway between two parts of the building, not as a 'tool' or 'device' that is employed for the express purpose of gaining access to an elevated worksite" (*Milanese v Killerman*, *supra* at 1061, *Williams v City of Albany*, *supra* at 917; see also, *Gelo v City of New York* [2d Dept], *supra*; *Gallagher v Andron Constr. Corp.* [2d Dept], *supra*; *Gold v NAB Constr. Corp.* [2d Dept], *supra*). Accordingly, the Court has applied this standard to the plaintiff's section 240 (1) claim.

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Therefore, the plaintiff's motion for summary judgment as to the defendants' liability on this claim is denied and, upon searching the record, dismisses the plaintiff's section 240 (1) claim as against all defendants (CPLR 3212 [b]; *Rogers v C/S Assoc. Ltd. Partnership*, 273 AD2d 523, 708 NYS2d 524, *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000]).

Labor Law § 241 (6) imposes a “nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]). To recover on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra* at 503-505). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, *supra* at 349).

Here, the plaintiff's bill of particulars alleges that the defendants violated the regulations found at 12 NYCRR §§ 23-1.7, 23-1.22, 23-1.24, 23-5.1, 23-1.8, 23-1.5, 23-1.15, 23-1.16, 23-1.17, and 23-1.21 at (b)(2), (3),(4) (i-iv), (5), (7), (8), (9) (10). The Court has reviewed these sections and finds them either too general to support a Labor Law § 241 (6) claim or inapplicable to the plaintiff's fall, and the plaintiff has not addressed any of the sections in his opposition. Since violations of Occupational Safety and Health Administration (OSHA) regulations do not support claims under the liability imposed pursuant to Labor Law § 241 (6) (*Rizzuto v L.A. Wenger Contr. Co.* *supra* at 351; *Fisher v WNY Bus Parts*, 12 AD3d 1138, 1140, 785 NYS2d 229 [2004]), the Court will not address the alleged OSHA violations. Accordingly, so much of JKB's motion which seeks summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim is granted and this claim is dismissed as to all defendants (CPLR 3212 [b]; *Rogers v C/S Assoc. Ltd. Partnership*, *supra*).

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercise control or supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the plaintiff alleges that a proximate cause of his injuries can be attributed to an allegedly dangerous condition at the work site, a defendant may be liable under Labor Law § 200 and for common-law negligence if it had any control over the place where the injury occurred and had actual or constructive notice of the dangerous condition (*Nasuro v PI Assoc.*, 49 AD3d 829, 858 NYS2d 178 [2008]; *Gadani v Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 841 NYS2d 709 [2007]). A defendant moving for summary judgment dismissing a Labor Law § 200 claim must establish, as a matter of law, that it neither created nor had actual or constructive notice of the dangerous condition alleged (*Weinberg v Alpine Improvements*, 48 AD3d 915, 917-918, 851 NYS2d 692 [2008]; *Gadani v Dormitory Auth. of State of N.Y.*, *supra* at 1220-1221; *Wolfe v KLR Mech.*, 35 AD3d 916, 826 NYS2d 458 [2006]). Here, the evidence established that JKB had notice of the dangerous condition which the plaintiff alleges caused his injuries (*Van Salisbury v Elliot-Lewis*, 55

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AD3d 725, 867 NYS2d 454 [2008]) and that it brought its concerns about the ladder to the attention of Cashin's employee. The issue of whether JKB had any further obligation to its subcontractor, Warrick, regarding safe access to the penthouse cannot be resolved herein. Accordingly, summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence causes of action is denied to JKB.

As to the cross motions for summary judgment by Cashin and THC, the Court notes that they are procedurally defective because they were made more than 120 days after the filing of the note of issue, without any showing of good cause for the delay (CPLR 3212 [a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]); *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). The remaining relief requested by Cashin and THC (the Labor Law §§ 240[1] and 241 [6] claims having already been disposed off) is denied. Contrary to the movants' arguments, the remaining relief was not based upon arguments "nearly identical" to the arguments made by JKB in its timely motion for summary judgment (*see, Podlaski v Long Is. Paneling Ctr. of Centereach*, 58 AD3d 825, 873 NYS2d 109 [2009]).

Lastly, JKB seeks leave to serve an amended cross claim seeking common-law indemnification over and against Goshow. JKB's original cross claim asserted a claim for contribution but neglected to assert a claim for common-law indemnification. Since the claim for contribution here is, in effect, a claim for partial indemnification, the Court can discern no unfair surprise or prejudice to Goshow by amending the cross claims to add a claim for common-law indemnification (CPLR 3025 [b]; *see, Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 471 NYS2d 55 [1983]; *Abrahamian v Tak Chan*, 33 AD3d 947, 824 NYS2d 117 [2006]). Accordingly, leave to serve the amended cross claim is granted and the amended cross claim shall be served no later than 30 days after service upon Goshow of a copy of this order with notice of its entry.

The plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, dismissed herein, are severed and all remaining claims shall continue.

Dated: 8-25-2010

**Hon. Denise F. Molia**

J.S.C.

       FINAL DISPOSITION   X   NON-FINAL DISPOSITION