

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

ANNA MANGANELLO, Administratrix of
the Estate of RENATO WONG and
ANNA MANGANELLO, SERGIO WONG, STEVEN
WONG, DIANA WONG, Surviving Children
of RENATO WONG and JUANA WONG,

x Index
Number 5255 2004
Motion
Date April 26, 2006

Plaintiffs,

Motion
Cal. Number 27

- against -

JOAN HAMILTON, JOY HAMILTON, WINIFRED
HAMILTON, WINSTON HAMILTON and
PAMELA BROWN HAMILTON,

Defendants.

JOAN HAMILTON, JOY HAMILTON, WINIFRED
HAMILTON, WINSTON HAMILTON and
PAMELA BROWN HAMILTON,

Third-Party Plaintiffs,

- against -

CHIMNEY & FURNACE VACUUM CLEANING
CORP. and AAA CHIMNEY & FURNACE
CLEANING CO.,

Third-Party Defendants.

x

The following papers numbered 1 to 17 read on this motion by plaintiffs for an order granting summary judgment on the cause of action for a violation of Labor Law §240(1). Defendants and third-party plaintiffs cross move for an order granting summary judgment dismissing the complaint, and in the alternative seeks summary judgment on their first cause of action in the third party action for common law indemnification.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation- Exhibits(A-I).....	1-4
Notice of Cross Motion-Affirmation-Exhibits(A-J)- Memorandum of Law.....	5-8
Opposing Affirmation-Exhibit(A).....	9-11
Reply and Opposing Affirmation.....	12-13
Reply Affirmation.....	14-15
Reply Affirmation.....	16-17

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

Defendant Joy Hamilton, and her sisters Joan Hamilton, Winifred Hamilton and Pamela Brown Hamilton each had a 25% ownership interest in a six story residential building located at 633 West 152nd Street in Manhattan. Joy and Joan Hamilton both resided in this building. Joy Hamilton testified that the building's metal chimney was completely rusted and that she hired AAA Chimney & Furnace Cleaning Co. (AAA Chimney), to replace the chimney, but that her sister Joan signed the agreement with AAA Chimney. Joy Hamilton testified that on August 16, 2002 she let two men from AAA Chimney into the building, showed them where the chimney was located on the west side of the building and showed them where they could access the building, and the roof. She stated that she then left the building and went to her place of work where she was later notified about the decedent's accident. Ms. Hamilton testified that none of the pieces of the chimney were missing when she left for work that day.

Plaintiff's decedent Rentato Wong was employed by AAA Chimney and was the foreman on the subject job. His team of workers included Andres Santana, a helper and Juan Palasi. On August 16, 2002, the three men arrived at the job site and were taken to the back of the building by someone who Mr. Santana identified as the "super". Mr. Santana testified that the chimney pipe was rotten and loose, that it was wavy rather than straight, and that it was not held in place by any brackets. He also stated that the lower portion of the chimney was missing. He stated that it was a windy day and that the three of them went up to the roof with their equipment, and attached a C hook to the parapet wall. None of the workers were wearing hard hats, although Santana stated that they had hard hats in their truck. He stated that they used an electric saw to cut off the top piece of the chimney, which was approximately four feet in diameter and that they left this piece on the roof. They then used a rope to lower the saw to the ground. Mr. Santana testified that Juan Palasi remained on the roof and tied a rope around the top piece of the chimney bank, while Santana and Wong went down to the street. Mr. Santana stated that he was helping Mr.

Wong put on his safety belt, and that Wong had clipped on the bosun chair, when he heard a noise and saw three or four pieces of pipe coming down from the roof. He stated that he tried to pull Wong out of the way, when Wong was hit in the head and body with two pieces of the pipe. Mr. Wong was knocked to ground and where he lay bloody and moaning. He was taken to the hospital and later died that day from his injuries. Mr. Santana testified that the pieces of pipe that fell from the roof came from the section immediately below the portion that had been cut off. Mr. Santana testified that these pieces of pipe were not being dismantled, raised, lowered or hoisted at the time they fell. It is undisputed that no safety devices were used to secure the loose and rusted chimney pipe. Mr. Santana, however, stated that he had been taught that when a pipe was loose that he should get on the bosun chair from the top, and tie every piece of pipe on the way down, and that if the pipe was black iron like the subject pipe, it should be cut and a rope tied through each piece. He stated that the entire chimney was rotten and loose and that the wind may have caused the pieces of pipe to fall off the roof.

Labor Law § 240(1) creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see Ross v Curtis-Palmer Hydro-Electric Co., supra at 501; Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]). The legislative purpose behind Section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor instead of on workers, who are "scarcely in a position to protect themselves from accident" (see Rocovich v Consolidated Edison, supra at 501). Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Tietz Center for Nursing Care, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (Ross v Curtis-Palmer Hydro-Electric Co., supra, at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see Bland v Manocherian, 66 NY2d 452[1985]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]). However, an injured plaintiff's contributory negligence is not a defense (see Stolt v General Foods, 81 NY2d 918

[1993]).

The court finds that plaintiffs' decedent was exposed to a gravity-related hazard within the meaning of Labor Law § 240(1) (see Salinas v Barney Skanska Constr. Co., 2 AD3d 619 [2003]; Heidelmark v State of New York, 1 AD3d 748[2003]; Thomas v 2 Overhill Rd. Assoc., 1 AD3d 174 [2003]; Van Eken v Consolidated Edison Co of N.Y., 294 AD2d 352, 353 [2002]). Contrary to the defendants' contentions, the fact that the subject pipes were not being raised, lowered, hoisted or secured at the time of the accident, does not warrant the dismissal of the complaint. In light of the nature and purpose of the work being performed at the time of the accident, there was a significant risk that an unsecured and rotten chimney pipe would fall, causing injury to a worker on the ground, such as the decedent. Accordingly, the owner and contractor were obligated under Labor Law § 240 (1) to use appropriate safety devices to secure the chimney pipe in question. Plaintiffs have established that on other jobs involving loose pipes, Mr. Wong and his team used ropes in order to secure and remove pieces of iron chimney pipes, and that the subject chimney pipes fell "because of the absence...of a safety device of the kind enumerated in the statute" (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001]; see Gampietro v Lehrer McGovern Bovis, Inc., 303 AD2d 996, 997 [2003]). This is precisely a situation "where a...securing device of the kind enumerated in the statute would have been necessary or even expected" (Narducci, supra at 268; see Outar v City of New York, 5 NY3d 731[2005]; Keaney v City of New York, 24 AD3d 615[2005]; Petteys v City of Rome, 23 AD3d 1123 [2005]; Costa v Piermont Plaza Realty, Inc., 10 AD3d 442, 444 [2004]; Bornschein v Shuman, 7 AD3d 476, 477-479 [2004]; Tylutki v Tishman Tech., 7 AD3d 696[2004]; Salinas v Barney Skanska Constr. Co., supra; Orner v Port Auth. of N.Y. & N.J., 293 AD2d 517 [2002]; Cosgriff v Manshul Constr. Corp., 239 AD2d 312[1997]). Plaintiffs have met their prima facie burden of entitlement to judgment as a matter of law by demonstrating that the absence of a safety device of the kind enumerated in the statute proximately caused the decedent's injuries and death. Since there are no triable issues of fact regarding the cause of the decedent's injury or the lack of safety equipment used to secure the chimney, plaintiffs' motion for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action is granted, and defendants' cross motion for summary judgment dismissing this cause of action is denied.

In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Picciano & Son, 54 NY2d 311, 317 [1981]; see Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Singleton v

Citnalta Constr. Corp., 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see LaRose v Resinick Eighth Ave. Assoc., LLC, 26 AD3d 470; [2006]; Gatto v Turano, 6 AD3d 390, 391 [2004]; Abayev v Jaypson Jewelry Manufacturing Corp., 2 AD3d 548 [2003]; Duncan v Perry, 307 AD2d 249 [2003]; Giambalvo v Chemical Bank, 260 AD2d 432 [1999]; Cuartas v Kourkoumelis, 265 AD2d 293 [1999]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see Loiacono v Lehrer McGovern Bovis, 270 AD2d 464, 465 [2000]). 'Where the alleged dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches' (Yong Ju Kim v Herbert Constr. Co., 275 AD2d 709)" (Rosenberg v Eternal Mems., 291 AD2d 391, 391-392 [2002]; see also Perri v Gilbert Johnson Enterprises, 14 AD3d 681 [2005]; Toefer v Long Is. R.R., 308 AD2d 579, 581 [2003]; affd 4 NY3d 399 [2005]). Here, there is no evidence that the Hamilton defendants supervised or controlled the work performed by plaintiffs' decedent, his co-workers, or their employer. In addition, although the defendants were aware of the fact that the chimney was rusted and needed to be replaced, there is no evidence that the chimney pipes would have fallen on its own. Rather, the evidence presented establishes that the defendants did not create the dangerous condition, and that this condition resulted from the contractor's own methods of dismantling the chimney. Accordingly, that branch of defendants' cross motion which seeks to dismiss plaintiff's Labor Law § 200 and common-law claims, is granted.

That branch of defendants' cross motion which seeks to dismiss plaintiffs' claims under Labor Law §241(6) is granted. In order for an owner to be liable under Labor Law § 241(6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command (see Rizzuto v Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Vernieri v Empire Realty Co., 219 AD2d 593 [1995]). In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (see Thompson v Ludovico, 246 AD2d 642 [1998]; Vernieri v Empire Realty Co., supra). The evidence presented here does not established that the area where the decedent worked or was required to pass was normally exposed to falling materials or objects so as to require suitable overhead protection, so as to support a violation of 12 NYCRR 23-1.7(a). 12 NYCRR 23-1.15 pertains to

safety railings and plaintiffs have not established that this section is applicable here. The plain language of 12 NYCRR 23-1.19 and 23-2.1 requires the use catch platforms, "during the construction of exterior masonry walls of any building or other structure, except chimneys". As chimneys are specifically excluded, these sections of the Industrial Code are not applicable to this case. 12 NYCRR 23-2.1 which pertains to the storage and maintenance of equipment, and the disposal of debris, is not applicable here, as the dismantling of the chimney is not the tantamount to the disposal of debris. Finally, as the decedent and his co workers were all supplied with hard hats but did not wear them, plaintiffs cannot establish that the hard hats failed to give proper protection in violation of 12 NYCRR 23-1.8 (Personal Protective Equipment), plaintiffs cannot establish that the hard hats (which they chose not to wear, plaintiffs cannot establish that the hard hats is a violation of. Accordingly, defendants' cross motion to dismiss plaintiffs' claims under Labor Law § 241(6) is granted.

That branch of defendants' cross motion which seeks summary judgment on their claim for common law indemnification against the third party defendants is granted. It is undisputed that the decedent sustained a grave injury with the meaning of Section 11 of the Workers' Compensation Law, so as to permit this third party claim. As a general rule, an owner or general contractor held vicariously liable for a plaintiff's injuries pursuant to Labor Law § 240(1) is entitled to full common-law indemnification from the "actor who caused the accident" (see, Chapel v Mitchell, 84 NY2d 345 [1994]; Young v Casabonne Bros. Inc., 145 AD2d 244 [1989]). The evidence presented establishes that the decedent's injuries were caused by the work methods utilized by AAA Chimney and that the Hamilton sisters, although vicariously liable, are free of any negligence. The Hamilton sisters therefore are entitled to a judgment in their favor of on their third-party claim for common law indemnification.

In view of the foregoing, plaintiffs' motion for summary judgment on the issue of liability on the Labor Law §240 claim is granted, and that branch of the defendants' cross motion which seeks to dismiss this cause of action is denied. The remainder of defendants' cross motion which seeks to dismiss plaintiffs' claims for negligence and for violations of Labor Law §§ 200 and 241(6) is granted, and defendants' request for summary judgment on the third party claim for common law indemnification is granted.

Dated: June 28, 2006

J.S.C.