

**Moleon v Kreisler Borg Florman General  
Construction Company, Inc.**

2003 NY Slip Op 30013(U)

September 22, 2003

Supreme Court, New York County

Docket Number: \_300121/9782

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN  
*Justice*

PART 5

*Wolman M*

INDEX NO. 121 978-88

MOTION DATE 5/8/03

*- v -*  
*Kreiser Perry Edelman*  
*etc*

MOTION SEQ. NO. 07

MOTION CAL. NO. 56

The following papers, numbered 1 to 5 were read on this motion to/for JS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
*Note of X-m*  
Answering Affidavits — Exhibits  
*MS App*  
Replying Affidavits

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____
5	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment by third party defendant Utica First Insurance Company is withdrawn as per attached letter dated April 8, 2003. Plaintiff's cross motion is decided in accordance with the attached memorandum decision and order.

**SCANNED**

SEP 30 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/22/03

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
HON. MICHAEL D. STALLMAN

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 5**

-----X  
Marc Moleon,

Plaintiff,

- against -

Kreisler Borg Florman General Construction Company, Inc.,  
Century Contracting Corp., the City of New York,  
New York City Health and Hospitals Corporation, the  
City of New York Department of Design and Construction,  
The Administration for Childrens Services,

Defendants.  
-----X

Sentry Contracting, Inc.,

Third-party Plaintiff,

- against -

**AMG** Construction, Inc., and Utica First Insurance Company,

Third-Party Defendants.  
-----X

**HON. MICHAEL D. STALLMAN, J.:**

In this personal injury action arising from a workplace accident, third-party defendant Utica First Insurance Company (Utica) moved for summary judgment for a declaration that it is not obligated to indemnify third-party plaintiff Sentry Contracting, Inc. (Sentry), or, in the alternative, for an order severing Sentry's third-party action (motion sequence number 007). That motion is withdrawn as moot. See letter of Utica's counsel dated April 8, 2003.<sup>1</sup> Plaintiff Moleon cross-moves for partial summary judgment finding all co-defendants liable under Labor Law §240(1). In their opposition, Sentry and Kreisler ask that the Court search the record **and** award summary judgment in their favor.

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<sup>1</sup> The Appellate Division, First Department granted the declaration sought by Utica, mooted the instant motion. Order, April 3, 2003.

**Index No.: 121978/00**

**Decision and Order**

**Index No.: 590424/01**

## BACKGROUND

Plaintiff alleges that on July 26, 2000 he was injured when he fell off of the roof of a building where he was employed as a bricklayer and stonemason. That building, located at 428 First Avenue, is known both at the Bellevue Kids Center at Bellevue Hospital and the New Children's Center (the Bellevue building). Defendant City of New York owns the Bellevue building, and through its Department of Design and Construction, had contracted to renovate it for occupation by the Administration for Children's Services (collectively, the City, or the City defendants). The City hired co-defendant Kreisler Borg Florman General Construction Company, Inc. (KBF) as the construction manager/general contractor for the renovation project, and KBF subcontracted with co-defendant Sentry Contracting, Inc.<sup>2</sup> (Sentry) to perform masonry work. Sentry, in turn, subcontracted with AMG Construction, Inc. (AMG), Moleon's employer, to perform all of the exterior restoration on the Bellevue building. Utica is AMG's insurance carrier.

At his deposition, plaintiff stated that his job duties included re-pointing the bricks and re-surfacing the stones on the sloped roof on the fourth floor of the Bellevue building. T. at 46, 68. Moleon testified that it was raining lightly on the morning of July 26, 2000, and that, as a consequence, he and a helper had to secure a blue rubber tarp between the fourth floor window through which they exited onto the Bellevue building's roof, and a scaffold which had been erected outside, before he could begin his work. Id., at 47, 50, 56, 60. Moleon further testified that, on that day, he had been instructed to resurface the stones on that **part** of the roof, and that he had gotten as far as mixing the surfacing cement for the job. Id., at 68-69. He stated that, at that point, other

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<sup>2</sup> In its answer, Sentry explains that it is sued here as "Century Contracting Corp.," although that name is incorrect.

workers were supposed to have cleaned the stones so that he could apply the surfacing cement. Id., at 70. Moleon testified that there were no other workers on the roof at that time, so he stepped off of the scaffold, on which he had prepared the surfacing cement, and onto the roof in order to call to the courtyard below for them to come up. Id., at 71-72, 163, 168-170. Moleon alleges that while trying to do so, he slid down the sloped roof in a standing position and fell to the courtyard below.

Moleon commenced this action on October 18, 2000. His complaint alleges negligence on the part of all of the named co-defendants, and his bill of particulars cites the common-law standard, Labor Law §§ 200, 240 (1) and 241 (6), and Industrial Code §§ 23-1.7 (d) & (e), 23-1.15, 23-1.16, 23-1.17 and 23-1.24, as the bases for imposing liability. His cross-motion, however, only seeks partial summary judgment finding the co-defendants liable under Labor Law § 240 (1).

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Trans. Auth., 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should be employed only when there is no doubt as to the absence of such triable issues. See e.g. Andre v Pomerov, 35 NY2d 361 (1974); Pirrelli v Long Island R.R., 226 AD2d 166 (1st Dept 1996).

Moleon's cross-motion seeks partial summary judgment finding the City defendants, KBF and Sentry liable under Labor Law § 240 (1). That statute provides that:

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, \* \* \*, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals has repeatedly held that this provision "imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty that proximately causes a plaintiff's injury." See e.g. Panek v County of Albany, 99 NY2d 452, 457 (2003). This liability specifically applies to any hazardous activity which is:

\* \* \* related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.

See John v Baharestani, 281 AD2d 114, 118 (1<sup>st</sup> Dept 2001) (worker fell through a makeshift scaffold composed of planks which had been lain between a third floor external balcony and a pallet on a raised forklift where bricks had been stored); quoting Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (1991). Moleon argues that he was injured as a result of a height-related risk, for which the statute imposes absolute liability on both the City defendants, as owners, and on the remaining defendants, as contractors. See Notice of Cross-Motion, ¶¶ 11-12. Defendants have raised three arguments in opposition to the cross-motion.

KBF and the City defendants argue that Moleon has failed to either allege or sufficiently demonstrate that the absence of safety devices at the job site was a "proximate cause" of his injuries.

Additionally, KBF and the City defendants argue that it was not foreseeable that Moleon would enter onto the roof from which he fell and was injured. They assert that an independent, intervening act may constitute a superceding cause which will negate the required element of proximate causation in a plaintiffs Labor Law § 240 (1) claim.

Finally, Sentry separately joins with KBF's and the City's opposition, and also raises the argument that, as a subcontractor, it was not obligated to provide Moleon with any safety equipment.

Plaintiff has not met his burden of demonstrating as a matter of law each of the elements required for a Labor Law 240 claim. Conversely, upon a search of the record reverse summary judgment in favor of defendants is not warranted, particularly given the factual questions discussed. The record before the Court does not indicate that any party is entitled to judgment as a matter of law at this time.

Based on the submission before the Court, it is unclear whether plaintiff was supposed to do his assigned work exclusively while on the scaffold or whether it was to be done, in part, while standing on the surface of the roof. It is also not clear whether plaintiff was directed to put up the tarpaulin and, if so, in what manner, or whether he himself chose to do it. It also cannot be said as a matter of law on these papers, that alighting from the scaffold and going to the roof was his only available means of asking others to help.

It is not clear from these submissions exactly how or where plaintiff was supposed to perform his assigned work on the date in question. Moreover, it cannot be determined from these papers as a matter of law that a safety belt or harness would have been necessary or appropriate for plaintiffs assigned job duties if performed in the manner in which he was instructed. Another factual issue presented that cannot be resolved here is whether and to what extent, plaintiff, by his own actions,

(e.g. getting off scaffold onto the apparently sloped roof while alone) caused or contributed to the accident. In sum, it cannot be said, as a matter of law on this record, that the statutory duty was breached or that such a breach was a substantial factor causing plaintiffs accident.

Accordingly, for the foregoing reasons it is hereby

**ORDERED** that the motion of third-party defendant Utica First Insurance Company for summary judgment dismissing the third-party complaint, pursuant to CPLR 3212, is withdrawn as moot; and it is further

**ORDERED** that plaintiffs cross-motion for partial summary judgment is denied.

This constitutes the decision and order of the **Court**.

**Dated:** New York, New York  
September 22, 2003

**ENTER**



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**HON. MICHAEL D. STALLMAN, J.S.C.**