SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

JUSTIN A. HUBLEY, Plaintiff, - against - **DOMINION CONSTRUCTION CORP., TACK DEVELOPMENT CORP.,** and **LAKE AVENUE PROPERTIES, LLP.,** Defendants.	**INDEX NO.:**	**2003-25703**
	MOTION SEQ. NO.: ORIG. MOTION DATE:	001 - MG O7/12/05
	MOTION SEQ. NO.: ORIG. MOTION DATE:	002 - MG O7/12/05
	MOTION SEQ. NO.: ORIG. MOTION DATE:	003 - MD O8/12/05
	FINAL SUBMIT DATE:	01/18/06

UPON the following papers numbered 1 to 71 read on these Motions:
Defendant TACK's Notice of Motion (001) & Supporting Papers 1-15, & Exhibits A-H
Plaintiff's Notice of Cross-Motion (002) & Supporting Papers 16-39, & Exhibits A-I
Defendant DOMINION's Notice of Cross-Motion (003) & Supporting Papers 40-50, & Exhibit A
Plaintiff's Reply Affirmation, Affirmation In Opposition & Supporting Papers 51-65
Defendant DOMINION's Reply Affirmation& Supporting Papers 66-71
it is,

ORDERED, that the application of Defendant TACK is hereby granted in all respects; the application of Plaintiff is hereby granted in all respects; and the application of Defendant DOMINION is hereby denied in all respects.

Defendant TACK moves this Court for an Order, pursuant to CPLR 3212(a), granting the Defendant TACK summary judgment and dismissing Plaintiff's Complaint, and any Cross-Claims in their entirety, as there are no triable issues of fact pertaining to Defendant TACK to preclude such relief.

The Court notes that, after convincing arguments proffered by Counsel for said Defendant, Plaintiff responded, in Plaintiff's Cross-Motion discussed herein below (pertinent to Defendant DOMINION), with the following, relevant to this party and this Motion:

> "***D.*** ***DEPOSITION TESTIMONY OF TACK BY PETER HOFRICHTER***
> *19.* *Tack was deposed herein by Peter Hofrichter on April 28, 2004. A copy of his deposition testimony is annexed hereto as Exhibit "**I**". At the time of the accident, Mr. Hofrichter was the managing agent/real estate broker for Tack. (Ex. I, p. 5).) In sum, Tack leased the buildings at the Premises for Lake and managed them after their construction was completed; Tack had no involvement with the construction of the building where the accident occurred. (Id. at 17.)*"

That being said, there are therefore no triable issues of fact against Defendant TACK to be determined.

Plaintiff moves this Court for an Order, pursuant to CPLR 3212, granting partial summary judgment in favor of Plaintiff and against Defendant DOMINION, on the issue of liability, setting this matter down for a trial on the issue of damages only.

The deposition of Plaintiff sets forth testimony demonstrating the following: that he was working at least 20 feet above the ground on the date of the accident, installing metal roofing over joists or beams, when he fell through the buildings skeleton, striking his head and back on the roof material and steel beam, respectively; that furthermore no safety devices whatsoever were provided to him by any entity involved in the construction project; and that the only reason he did not fall to the ground was his own actions in grabbing and holding on to the steel joist.

The deposition of Michael O'Connor, Construction Supervisor for Defendant DOMINION on the day of the accident, sets forth testimony demonstrating the following: that Defendant DOMINION was the General Contractor on the project where this accident occurred; that it was his job to coordinate schedules of subcontractors on construction jobs for said Defendant at the time of the accident; that he gave orders to Plaintiff as to the type of work Plaintiff would perform at the premises on any workday; that he instructed Plaintiff to install the decking on the roof that Plaintiff was working on at the time of the accident; that he gave no safety instructions to Plaintiff; that said Defendant did not supply any safety harness at the premises, and no safety harnesses or nets existed at the premises on the date of the accident, even though said Defendant owned safety harnesses that were maintained at it's shop in Farmingdale; that he estimated the bar joists where Plaintiff was working to be 18 to 20 feet above the dirt floor of the building; that while scaffolding existed at the premises, he never told any workers to use it while installing roof decking; and that when called to the scene of the accident, he observed Plaintiff hanging from a joist.

It is either admitted or undisputed that Defendant DOMINION was the General Contractor at the project on the date of the accident; that Plaintiff fell at least the distance of his body length at the time of the accident; that only his own actions prevented him from falling further; that at the time of the accident Plaintiff was provided with no safety or protective devices or information; and that the accident herein was the result of a gravity-related fall from an elevated work site.

A motion for summary judgment may be based upon the testimony of the parties given at their respective depositions. ***Alvarez v. Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 (1986); ***Olan v. Farrell Lines, Inc.***, 64 NY2d 1092, 489 NYS2d 884 (1985).

§ 240(1) of New York State Labor Law states, in pertinent part:

> "*...all contractors, owners and their agents,...in 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.*"

Known as the 'Scaffold Law', § 240(1) specifically recognizes the exceptionally dangerous conditions posed by elevation differentials at work sites, therefore prescribing safety precautions for workers laboring under unique gravity related hazards. ***Misseritti v. Mark VI Constr. Co.***, 86 NY2d 487, 490-491 (1995).

The purpose of Labor Law § 240(1) is to protect workers by placing the "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*see,* ***Ross v. Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 500, 601 NYS2d 49, 618 NE2d 82 [1993]; ***Racovich v. Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219, 583 NE2d 932 [1991]; 1969 NY Legis Ann, at 407), instead of on workers, who "are scarcely in a position to protect themselves from accident". ***Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 520, 493 NYS2d 102, 482 NE2d 898 (1985),*** *quoting,* ***Koenig v. Patrick Constr. Corp.***, 298 NY 313, 318, 83 NE2d 133 (1948).

It is well settled that Labor Law § 240(1) is applicable where the proximate cause of injury or death is a fall from an elevated workspace lacking the requisite safety devices. ***Racovich v. Consolidated Edison Co.***, *supra.* 240(1) imposes a non-delegable duty and absolute liability upon owners, contractors and their agents for failing to furnish or erect safety devices that are necessary to protect workers from injury proximately related to the lack of those implements. ***Bland v. Manocherian***, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985). Where a worker has not been provided with safety equipment and is injured in an accident arising out of an elevation-related risk associated with his work, a *prima facie* case of liability is established pursuant to Labor Law § 240(1). *See,* ***Burris v. City of Beacon***, 257 AD2d 586, 684 NYS2d 265 (2nd Dept 1999).

To grant summary judgment, it must clearly appear that there are no material issues of fact (***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 [1957]). 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 (***Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]; ***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 [1957]).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, 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 requiring a trial of the action. ***Zuckerman v. City of New York***, 49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 (1980).

Plaintiff has more than adequately met its burden of establishing 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, and the burden then shifted to Defendant DOMINION.

Defendant DOMINION moves this Court for an Order granting summary judgment in favor of Defendant DOMINION, pursuant to CPLR 3212, dismissing Plaintiff's Verified Complaint, and particularly that portion of the second cause of action that alleges and relies upon a claimed violation of § 240(1) of Labor Law, and all Cross-Claims regarding same, on the ground that there exist no issues of material fact that require trial, and judgment may be granted as a matter of law.

The Court's function on in deciding a motion for summary judgment is issue finding, not issue determination (***Sillman v. Twentieth Century Fox Film Corp.,*** 3NY2d 395, 144 NE2d 387, 165 NYS2d 498). Summary judgment is a drastic remedy, and therefore should not be granted where there exists any doubt as to the existence of a triable issue (***Rotuba Extruders v. Ceppos,*** 46 NY2d 223, 385 NE2d 1068, 413 NYS2d 141). When the existence of an issue of fact is even arguable or debatable, a motion for summary judgment should be denied (***Stone v. Goodson,*** 8 NY2d 8, 167 NE2d 328, 200 NYS2d 627). It is the role of the Court to determine if bonafide issues of fact exist, not to resolve issues of credibility (***Gaither v. Saga Corp.,*** 203 AD2d 239, 609 NYS2d 654; ***Black v. Chittenden,*** 69 NY2d 665, 503 NE2d 1370, 511 NYS2d 833).

This Court finds that Defendant DOMINION failed to proffer evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial.

For all the reasons stated herein above, it is, therefore,

ORDERED, that the application of Defendant TACK for an Order, pursuant to CPLR 3212(a), granting the Defendant TACK summary judgment and dismissing Plaintiff's Complaint, and any Cross-Claims in their entirety, as there are no triable issues of fact pertaining to Defendant TACK to preclude such relief, is hereby granted in all respects; and it is further

ORDERED, that the application of Plaintiff for an Order, pursuant to CPLR 3212, granting partial summary judgment in favor of Plaintiff and against Defendant DOMINION, on the issue of liability, setting this matter down for a trial on the issue of damages only, is hereby granted in all respects; and it is further

ORDERED, that the application of Defendant DOMINION for an Order granting summary judgment in favor of Defendant DOMINION, pursuant to CPLR 3212, dismissing Plaintiff's Verified Complaint, and particularly that portion of the second cause of action that alleges and relies upon a claimed violation of § 240(1) of Labor Law, and all Cross-Claims regarding same, on the ground that there exist no issues of material fact that require trial, and judgment may be granted as a matter of law, is hereby denied in all respects; and it is further

ORDERED, that, in light of the decisions of this Court herein, and the prior stipulation of March 23, 2004, discontinuing this action against Defendant LAKE AVENUE PROPERTIES, LLP., the caption of this matter be amended to read as follows:

JUSTIN A. HUBLEY,

Plaintiff ,

- against -

DOMINION CONSTRUCTION CORP.,

Defendants.

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and it is further

ORDERED, that the attorneys for the remaining parties are directed to appear in Room 203A of the Courthouse located at 235 Griffing Avenue, Riverhead, New York, for a preliminary conference on May 10, 2006, at 9:30 AM of that day, to address a schedule for clearing up any and all disclosure, discovery and inspection issues before moving this matter swiftly to trial on the issue of damages; and it is further

ORDERED, that Counsel for Plaintiff is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all the remaining parties, and upon the Calendar Clerk of this Court within twenty (20) days of the date of this order.

Dated: Riverhead, New York
April 6, 2006

HON. JEFFREY ARLEN SPINNER, J.S.C.

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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