

**O'Shea v New York City School Constr.  
Auth.**

2007 NY Slip Op 31691(U)

June 12, 2007

Supreme Court, Queens County

Docket Number: 0000746/2003

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14  
Justice

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JOHN O'SHEA	x	Index Number <u>746</u> 2003
- against -		Motion Date <u>February 20,</u> 2007
NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, et al.		Motion Cal. Numbers <u>27 &amp; 28</u>  Motion Seq. Nos. <u>1 &amp; 2</u>

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The following papers numbered 1 to 19 read on this motion by plaintiff for partial summary judgment on the issue of liability and for leave to serve a supplemental bill of particulars, and a separate motion by defendants for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits .....	1-8
Answering Affidavits - Exhibits .....	9-14
Reply Affidavits .....	15-19

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of disposition and are determined as follows:

Plaintiff, an apprentice bricklayer employed by nonparty Kel-Tech, allegedly was injured when he slipped and fell approximately 10 feet to the ground from a scaffold at a New York City School Construction Authority (NYCSCA) construction site for a new building for P.S. 28. Defendant M.A. Angeliades, Inc. was the general contractor for the construction project pursuant to a written contract with defendant NYCSCA. At the time of the accident, plaintiff was one of several workers assigned to do the "wash down," which involved cleaning the brick on the building facade with an acid and water mixture, and then hosing down the brick with water. Defendants have not refuted plaintiff's claim

that the scaffold the workers were using for this job did not have any guardrails or handrails in place.

The complaint herein alleges causes of action for violation of Labor Law §§ 200, 240(1) and 241(6). Plaintiff seeks to discontinue the section 200 claim. Defendants have made a prima facie showing of entitlement to judgment dismissing said cause of action, as well as any common-law negligence claim, by establishing that they did not supervise or control the work being performed by plaintiff and neither created nor had actual or constructive notice of the alleged dangerous condition. (See, Karapati v K.J. Rocchio, 12 AD3d 413 [2004]; DeBlase v Herbert Constr. Co., 5 AD3d 624 [2004].) Thus, the cause of action for violation of Labor Law § 200 is discontinued with prejudice. (CPLR 3217[b], [c].) To the extent the complaint can be read to include a common-law negligence cause of action, defendants are awarded summary judgment dismissing that cause of action.

Defendants are also granted summary judgment dismissing the cause of action under Labor Law § 241(6). Plaintiff's section 241(6) claim is predicated upon an alleged violation of 12 NYCRR 23-1.7(d) which, in pertinent part, requires that water or any other foreign substance which may cause slippery footing on a scaffold "shall be removed, sanded or covered to provide safe footing." The only evidence in the record as to the origin of the wet condition of the scaffold alleged to have caused plaintiff to slip is plaintiff's own testimony at a General Municipal Law § 50-h hearing that the planks of the scaffold were wet from the work being performed and that there could have been acid on some areas as well. He also testified that the acid used in the cleaning mixture makes the water slippery. Under these circumstances, the allegedly dangerous condition was an integral part of the work being performed and did not constitute a slipping hazard within the meaning of 12 NYCRR 23-1.7(d). (See, Stafford v Viacom, Inc., 32 AD3d 388 [2006]; Castillo v Starret City, 4 AD3d 320 [2004]; Salinas v Barney Skanska Constr. Co., 2 AD3d 619 [2003].)

The parts of the motions by plaintiff and defendants that are for summary judgment on the cause of action for violation of Labor Law § 240(1) are denied. Labor Law § 240(1) requires that contractors and owners provide workers with appropriate safety devices to protect them against such specific gravity-related accidents as falling from a height. (See, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Godoy v Baisley Lumber Corp., \_\_\_ AD3d \_\_\_, 2007 NY App Div LEXIS 6384.) To prevail on a cause of action under section 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries sustained. (See, Bland v

Manocherian, 66 NY2d 452 [1985]; Tylman v School Constr. Auth., 3 AD3d 488 [2004].) Where, as here, the scaffold supplied to a worker as a safety device did not collapse, move or malfunction, the mere fact that the worker fell off the scaffolding surface is insufficient, in and of itself, to establish that the device did not provide proper protection pursuant to Labor Law § 240(1). (See, Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]; Tylman v School Constr. Auth., *supra*; *cf.*, Panek v County of Albany, 99 NY2d 452 [2003].) Rather, the issue of whether such a scaffold provided proper protection is generally a question of fact for the jury. (See, Alava v City of New York, 246 AD2d 614 [1998]; Beesimer v Albany Ave./Rte. 9 Realty, 216 AD2d 853 [1995]; *see also*, Blake v Neighborhood Hous. Servs. of New York City, *supra*.) Thus, plaintiff has not made a prima facie showing of a statutory violation.

Contrary to defendants' assertions, the availability of a particular safety device will not shield an owner or general contractor from liability under section 240(1) if the device alone is not sufficient to provide safety without the use of additional devices. (See, Nimirovski v Vornado Realty Trust Co., 29 AD3d 762 [2006]; *see also*, Bland v Manocherian, *supra*, at 461-462; Beesimer v Albany Ave./Rte. 9 Realty, *supra*.) Defendants have failed to establish, prima facie, either that plaintiff was provided with proper additional safety devices, or that no such devices were necessary. (See, Karapati v K.J. Rocchio, *supra*; Gange v Tilles Inv. Co., 220 AD2d 556 [1995].) This is not an instance where there is no evidence as to the origin of the condition that caused plaintiff to slip (*cf.*, Molyneaux v City of New York, 28 AD3d 438 [2006]), or where there is no proof of a risk related to the elevated work being performed that may require additional protection. (*Cf.*, Springer v Keith Clark Publ. Co., 171 AD2d 914 [1991].) Furthermore, even though the subject scaffold was less than 20 feet from the ground and, therefore, not required by statute to be equipped with guardrails (Labor Law § 240[2]), the absence of safety rails is relevant to the question of whether the scaffold provided the proper protection mandated by Labor Law § 240(1). (See, Bland v Manocherian, *supra*, *affq* Wright v State of New York, 110 AD2d 1060 [1985]; Beesimer v Albany Ave./Rte. 9 Realty, *supra*.) The general standard of section 240(1) "mandates guardrails on scaffolds less than 20 feet in height wherever a risk is posed to a construction worker so as to require guardrails to provide such worker with 'proper protection'." (Bland v Manocherian, *supra*, at 461.) In the instant case, questions of fact exist as to whether, in view of the wash-down work being performed by the workers on the scaffold and the attendant risk of wet planks, the scaffolding should have been equipped with guardrails or some other device to provide the necessary protection

to plaintiff. (See, Bland v Manocherian, supra; Lezcano v Metropolitan Life Ins. Co., 11 AD3d 303 [2004]; see also, Godoy v Baisley Lumber Corp., supra.)

The court notes that plaintiff testified at his deposition that there was netting around the scaffold with an opening where the netting could be pushed aside like a curtain. He further testified that he had gained access to the scaffold surface through this opening after climbing up the side of the scaffold and that he did not get tangled in the netting when he fell because he fell through the opening. There is no evidence as to whether the opening in the netting was a feature of the netting's design or a defect. Nor is it clear from the record or from the parties' presentations whether this netting was intended to serve as a safety device for the elevated workers or had some other function.

Defendants' contention that plaintiff's own conduct was, as a matter of law, the sole proximate cause of his injuries is without merit. (Cf., Blake v Neighborhood Hous. Servs. of New York City, supra.) Although plaintiff admittedly climbed up the side of the scaffold rather than the stairway when returning to work after a break, the unrefuted evidence in the record establishes that the accident did not occur until after he had stepped onto the planks of the scaffold.

The part of plaintiff's motion that is for leave to serve a supplemental bill of particulars is granted on consent.

Dated: June 12, 2007

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J.S.C.