

**Maharaj v DirecTV Group, Inc.**

2007 NY Slip Op 32289(U)

July 17, 2007

Supreme Court, Queens County

Docket Number: 0017159/2004

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

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ADESH MAHARAJ and NIKIE MAHARAJ

Index No: 17159/04

Plaintiff

Motion Date: 6/6/07

-against-

Motion Cal. No.:12

THE DIRECTV GROUP, INC., DIRECTV, INC.,  
DIRECTV DVR, DIRECTV LATIN AMERICA, LLC,  
DIRECT TELEVISION OF AMERICA, PRIMETV,  
Individually and/or d/b/a SPECTRUM  
SATELLITE SERVICES and/or d/b/a DIRECT  
TELEVISION OF AMERICA, PRIME TELEVISION,  
Individually and/or d/b/a DU FLO  
AEROSPRAY INC., GENERAL MOTORS,  
PHILIP INGARDIA, HUGHES ELECTRONICS CORP.,  
and HUGHES NETWORK SYSTEM

Motion Seq. No.: 5

Defendant

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THE DIRECTV GROUP, INC., DIRECTV, INC.,  
DIRECTV LATIN AMERICA, LLC, SPECTRUM  
SATELLITE SERVICES and/or d/b/a DIRECT  
TELEVISION OF AMERICA, GENERAL MOTORS,  
HUGHES ELECTRONICS CORP., and HUGHES  
NETWORK SYSTEM

Third-party Plaintiffs

-against-

SUREWAY ANTENNA SERVICES, INC. and  
JOSE ROJAS d/b/a SUREWAY ANTENNA  
SERVICES

Third-party Defendant

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The following papers numbered 1 to 25 read on this motion by plaintiff for an Order vacating the dismissal of this action and restoring it to the trial calendar; separate cross-motions by defendant, Ingardia, and defendants the DirectTV Group, Inc., DirectTV, Inc., DirectTV DVR, DirectTV Latin America, LLC, Direct Television of America, PrimeTV, Individually and/or d/b/a

Spectrum Satellite Services and/or d/b/a Direct Television of America, Prime Television, Individually and/or d/b/a Du Flo Aerospray Inc., General Motors, Hughes Electronics Corp., and Hughes Network System (collectively referred to as the DirecTV defendants) for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against the respective moving defendants; and cross-motion by plaintiff for summary judgment in his favor against the defendants, DirecTV Group, Inc., DirecTV, Inc., DirecTV Latin America, LLC, General Motors, Hughes Electronics Corp., and Hughes Network System as to liability on his claims based upon violations of Labor Law §§ 240(1) & 241(6).

	<u>PAPERS</u> <u>NUMBERED</u>
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Upon the foregoing papers it is ordered that these motions are determined as follows.

The plaintiff's motion for an Order vacating the order, dated July 11, 2006, which dismissed this action and restoring this case to the trial calendar is granted on consent pursuant to the stipulation of the parties dated, April 5, 2007.

Accordingly, all parties shall appear for a pretrial conference before Justice Schulman on August 14, 2007 at 9:30a.m. in TSP, courtroom 25.

In addition, since the parties have established "good cause" for the untimely summary judgment motions (Brill v. City of New York, 2 NY3d 648, 652 [2004]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]) the motions will be determined on the merits.

The defendant, Philip Ingardia's motion for summary judgment is granted and the complaint and all cross-claims, insofar as they assert causes of action as against PHILIP INGARDIA are dismissed. The remainder of the action is severed.

The Plaintiff's and the DirecTV defendants' motions are denied in all respects.

This is an action to recover for personal injuries the plaintiff allegedly sustained on July 28, 2001 while installing a DirecTV system at the private home of the defendant, Ingardia.

On the day of the accident, the plaintiff, an employee of third-party defendant, Sureway Antenna Services, Inc. (Sureway), was dispatched to the home of the defendant, Ingardia to install a DirecTV system. The house is a two story structure with a roof having three levels. The plaintiff testified at his deposition that he intended to place the satellite dish at the front of the house on the lowest roof, however, the homeowner, defendant Ingardia, did not like this location and insisted that the plaintiff put the dish on the highest peak of the roof as it was on a neighbor's house. To place the dish where Ingardia wanted, plaintiff needed a 40 foot ladder which he did not have. In order to access the roof, plaintiff used one of his ladders to get up onto the lower roof, placed his 10 foot extension ladder on the lower roof leaning against the edge of the second floor roof. Plaintiff stated that he did not have a helper that day to hold the ladder and he secured the ladder by putting 3" sheet rock screws through the ladder's footing into the roof and by tying the top of the ladder to the spikes holding the gutter. Before using it, he tested it for stability by stepping up two or three rungs. Plaintiff also testified that after he had gone up and down the ladder twice while installing the dish, and while he was standing on the second lowest rung of the ladder "neatening" the wires, he felt the ladder move so he jumped off and landed face down on the roof where the ladder sat and injured his ankle. All of the tools and equipment, including the ladders and fasteners, were plaintiff's property.

The defendant, Ingardia, now moves for summary judgment dismissing the complaint and all cross-claims asserted against him on the grounds, inter alia, that he is exempt from the liability imposed by Labor Law §§ 240(1) and 241(6) as the owner of a one or two family dwelling who did not direct or control the work; and since he did not supervise, direct or control the work, he cannot be held liable under Labor Law §§ 200 or common law negligence.

The DirecTV defendants' also move for summary judgment dismissing the complaint and all cross-claim asserted against them on the grounds (1) that the defendants, DirecTV Group, Inc., DirecTV DVR, DirecTV Latin America, LLC, Direct Television of America, Spectrum Satellite Services, Du Flo Aerospray Inc.,

General Motors, Hughes Electronics Corp., and Hughes Network System some of these entities do not exist, DirecTV DVR is a product and the other defendants had nothing to do with the distribution and/or installation of a satellite system and nothing to do with this case; (2) that DirecTV, Inc. and/or PrimeTV, cannot be held liable pursuant to Labor Law § 200 or common-law negligence because they did not supervise, direct or control the plaintiff's work and they did not create, control or have notice of the dangerous condition which was a cause of the plaintiff's injuries; (3) that DirecTV, Inc. and/or PrimeTV cannot be held liable under Labor Law § 240(1) or § 241(6) because they were not contractors or "general contractors" within the meaning of the Labor Law; and (5) that the sole proximate cause of the accident was the plaintiff's action in proceeding with the installation knowing he did not have the proper equipment.

Plaintiff opposes both motions by the defendants, and cross-moves for summary judgment as to liability on his Labor Law § 240(1) and § 241(6) claims as against the defendants, DirecTV Group, Inc., DirecTV, Inc., DirecTV Latin America, LLC, General Motors, Hughes Electronics Corp., and Hughes Network System on the ground that the Ingardia, the owner directed and controlled plaintiff's work and the DirecTV defendants as the "general contractors" are absolutely liable under the statutes to plaintiff who was "altering" a structure. Plaintiff also argues that the recalcitrant worker doctrine is inapplicable and does not bar the plaintiff's action.

Labor Law § 240(1) and § 241(6) impose upon owners, general contractors and their agents non-delegable duties to provide workers with proper safety devices and adequate protection (see Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500-502 [1993];, Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 520 [1985]; Haines v. New York Tel. Co., 46 NY2d 132, 136-137 [1978]). The purpose of Labor Law § 240(1) and 241(6) is to protect workers by placing the "ultimate responsibility" for work site safety on the owner and general contractor and their agent who have the power to enforce safety standards and to choose responsible contractors (see, Rizzuto v. Wenger Contracting Co., 91 NY2d 343, 348-349 [1998]; Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 500; Rocovich v. Consolidated Edison Co., 78 NY2d 509, 513 [1991]; Russin v. Picciano & Son, 54 NY2d 311, 317 [1981]; Allen v. Cloutier Constr. Corp., 44 NY2d 290, 297-298[1978] ). Inasmuch as this duty is non-delegable, it cannot be avoided by contractually delegating direction and control of the work to others (Ross v. Curtis-Palmer Hydro-Elec. Co., supra; Haines v. New York Tel. Co., supra at 136), leaving

the owner and general contractor strictly and vicariously liable regardless of fault or control (see Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 502; Allen v. Cloutier Constr. Corp., supra). When the work giving rise to the duty imposed by Labor Law § 240(1) and § 241(6) is delegated, by a subcontract or otherwise, the subcontractor also obtains the authority to supervise and control that work thereby enlarging the class of entities liable by making the subcontractor or designee a statutory "agent" of the owner or contractor (see Walls v. Turner Const. Co., 4 NY3d 861, 863-864 [2005]; Blake v. Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 293 [2003]; Russin v. Picciano & Son, supra at 318; Kenny v. Fuller Co., 87 AD2d 183, 190 [1982], lv denied 58 NY2d 603 [1982]; Larabee v. Triangle Steel, 86 AD2d 289, 292 [1982]). Thus, "[l]iability for violations of Labor Law § 240(1) and § 241(6) may be imposed against contractors, owners, and those who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors" ( Aranda v. Park E. Constr., 4 AD3d 315, 316 [2004]). It is not the title of a party that determines liability, but rather its authority to supervise and control and its exercise thereof (see Delahaye v. Saint Anns School, \_\_\_ AD3d \_\_\_ [2007], 836 NYS2d 233; Lodato v. Greyhawk North America, LLC, 39 AD3d 491 [2007]; see also Walls v. Turner Constr. Co., supra at 864).

Labor Law § 240(1) is designed to protect a workers from the harm directly resulting from a gravity-related accident, such as falling from an elevated height or being struck by a falling object (see, Ross v. Curtis-Palmer Hydro-Elec. Co., supra; Rocovich v. Consolidated Edison Co., supra). Labor Law §241(6) is not aimed solely at elevation related risks, however, to recover on a cause of action based upon the violation of Labor Law §241(6) a plaintiff must plead and prove the violation of a particular provision of the Industrial Code which sets forth specific safety standards applicable to the facts of the case, and that the violation was a proximate cause of his injury (Ross v. Curtis-Palmer Hydro-Elec. Co., supra; Fair v. 431 Fifth Ave. Assocs., 249 AD2d 262 [1998]; Herman v. St. John's Episcopal Hosp., 242 AD2d 316 [1997]; Vernieri v Empire Rlty. Co., 219 AD2d 593 [1995]; Creamer v. Amsterdam H.S., 241 AD2d 589 [1997]).

Labor Law § 200, which governs general safety in the workplace, embodies common-law negligence standards, and imposes upon owners, employers and contractors the affirmative duty to exercise reasonable care to provide and maintain for employees a safe place to work (see, Comes v. New York State Elec. & Gas Corp., supra; Allen v. Cloutier Constr. Corp., supra). To be

liable under Labor Law § 200, an owner, a general contractor or their agent must have the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition (see, Rizzuto v. Wenger Contr. Co., supra; Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 505-506; Lombardi v. Stout, supra at 294, Russin v. Picciano & Son, supra at 317).

While Labor Law §§ 240(1) and 241(6) impose certain nondelegable duties upon contractors, owners and their agents, these statutes specifically exempt the owners of one and two-family dwellings who contract for but do not direct or control the work. The term "directed or controlled" has been strictly construed to mean supervision of "the manner and method" by which the work is to be performed (Duda v. John W. Rouse Const. Corp., 32 NY2d 405, 409 [1973]; Ferrero v. Best Modular Homes, Inc., 33 AD3d 847 [2006], lv dismissed 8 NY3d 841 [2007]).

On a motion for summary judgment, the movant has the burden to establish, prima facie, entitlement to judgment as a matter of law by tendering sufficient evidence demonstrating the absence of any material issues of fact (see Zuckerman v. City of New York, 49 NY2d 557 [1980]). The failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853 [1985]).

Applying the above principles the court will address the summary judgment motions of the parties.

The defendant, Ingardia has established, prima facie, his entitlement to summary judgment through, inter alia, the deposition testimony of the plaintiff which demonstrated that Ingardia did not direct or control plaintiff's work. In opposition, plaintiff has failed to raise a triable issue of fact. Contrary to Plaintiff's claim, insisting on the location of the satellite dish, no matter how strongly, or as plaintiff claims, "directing" plaintiff to put the dish on the peak of the roof, is not control or direction within the meaning of the Labor Law. Ingardia did not give any instructions or direction regarding how and by what method and means plaintiff was to install the satellite dish. He didn't provide plaintiff with any tools or equipment and was not present when the plaintiff placed the ladder to the roof. Plaintiff does not claim that the accident occurred as a result of a defective condition of the premises. Demanding that plaintiff place the satellite dish at a particular location and position the wires so they could not be seen is merely the expression of the homeowner's concerns during the preliminary planning stages of a project (see Cannon v.

Putnam, 76 NY2d 644, 648 [1990]; Arama v. Fruchter, 39 AD3d 678 [2007]; Jumawan v. Schnitt, 35 AD3d 382, 383 [2006] lv denied 8 NY3d 809 [2007]; Crowningshield v. Kim, 19 AD3d 975 [2005], lv denied 5 NY3d 711 [2005]; Decavallas v. Pappantoniou, 300 AD2d 617 [2002]; Jacobsen v. Grossman, 206 AD2d 405 [1994]; ).

In addition, since Ingardia did not supervise or control the plaintiff's work and plaintiff does not claim that the accident was caused by a dangerous condition on the premises, Ingardia cannot be held liable under to Labor Law § 200 or for common-law negligence (see Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Lombardi v. Stout, supra at 295 [1992]; Allen v. Cloutier Constr. Corp., supra at 299 [1978]; Crowningshield v. Kim, supra; Decavallas v. Pappantoniou, supra; Jacobsen v. Grossman, supra). Accordingly, the defendant's motion dismissing the complaint, and all cross-claims asserted against the defendant Ingardia is granted.

The DirecTV defendants' motion to dismiss the complaint and all cross-claims insofar as they are asserted against them is denied. In support of the motion the DirecTV defendants argue that they cannot be held liable under Labor Law § 240(1) and 241(6) or § 200 or common law negligence because none of the defendants are "contractors" or "general contractor" and none of the defendants had any involvement in the work, they were not present at the site and exercised no supervision or control over the plaintiff's work. The only evidence submitted in support is the deposition testimony of Michael Owens, employed by DirecTV, Inc. as the director of distribution and sales in the Northeast, and the deposition testimony and the affidavit of the plaintiff.

Owens' self-serving testimony is insufficient to sustain the defendants' burden on this motion. Owens testified that DirecTV, Inc. is in the business of providing video services via satellite to consumers, that the service is marketed through various retailers pursuant to Sales Agency Agreements with the retailer, that the equipment is manufactured by Sony and RCA to DirecTV's specifications and sold through distributors. Owens further testified that DirecTV does not have any involvement in retail sales, installing the system or hiring contractors to instal as these activities are delegated via the "Sales Agency Agreements". Owens also identified some of the defendants and denied any knowledge of others. The defendants did not submit any Sales Agency Agreement or any contracts or records which formed the basis of Owens' testimony or which are relevant in this action. Nor did the defendants produce any documentary evidence as to the relationship among the DirecTV defendants. It is noted that although a "Standard Installer Agreement" is annexed to the

third-party complaint (Exhibit 4 in plaintiff's cross-motion for summary judgment) this agreement is between Sureway and Digivision Satellite Services. There is no evidence by any party regarding the identity, involvement or relationship of Digivision to any defendant in this case.

In any event, the plaintiff's affidavit and deposition testimony, also submitted by defendants, that Ingardia called DirecTV which was soon followed by a call from plaintiff's supervisor, and that Ingardia called PrimeTV, after which plaintiff began the installation, are sufficient to raise material issues of fact, inter alia, as to the defendants' authority to supervise and control the plaintiff's work and/or whether and to what degree they exercised actual control over the plaintiff's work, and whether they had actual knowledge of the condition, i.e. lack of appropriate equipment, which was a proximate cause of the plaintiff's injury. Insofar as the defendants' claim that the plaintiff's causes of action based upon Labor Law §241(6), § 200 and common law negligence should be dismissed as being unopposed by plaintiff, defendants' argument is unpersuasive. Even assuming that plaintiff does not oppose these branches of the defendants' motion, dismissal is not warranted. The failure of defendants to establish, prima facie, their entitlement to judgment as a matter of law, requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York Univ. Med. Center, supra).

The defendants' contention that plaintiff's conduct of performing the installation knowing he did not have the proper equipment or a helper was the sole proximate cause of the accident is without merit. Where, as here, it is undisputed that plaintiff was not provided with a 40 foot ladder which was necessary to perform the installation, and the lack of such ladder was a proximate cause of the accident, then under no circumstances can the plaintiff's conduct be found to be the "sole" proximate cause of the accident based on the claim that he failed to use the equipment that was not provided, or that he was negligent in the placement or operation of the equipment he had available (see Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]; Ewing v. ADF Constr. Corp., 16 AD3d 1085 [2005]).

Accordingly the DirecTV defendants' motion is denied.

With respect to the plaintiff's motion for summary judgment on his Labor Law § 240(1) and § 241(6) claims, it must also be denied.

Although there is no genuine issue of fact that plaintiff was injured while working on the roof, an elevated work site, and injured as a result of the absence of proper protective devices which were so placed and operated so as to provide proper protection, there exist issues of fact as to which, if any of the DirecTV defendants may be held liable under the Labor Law as a contractor or agent of the owner or contractor. Plaintiff has submitted no evidence in support of his counsel's conclusory assertion that the DirecTV defendants are the "general contractors".

In addition, the evidence before the court raises material issues of fact as to whether the plaintiff was involved in the "alteration" of a structure and/or involved in construction, as defined in the Industrial Code 23-1.4(b)(13) to be entitled to the protection of Labor Law § 240(1) and § 241(6) respectively. Altering, for purposes of section 240(1) was defined by the Court of Appeals in Joblon v. Solow, 91 NY2d 457, 465 [1998] as "making a significant physical change to the configuration or composition of the building or structure ". In determining whether a project constitutes "altering," the court "must examine the totality of the work done on the project to determine whether it resulted in a "significant physical change"( Aguilar v. Henry Mar. Serv., 12 AD3d 542, 543 [2004]). Although the courts have found projects similar to the one at issue in this case to be an "alteration" (see e.g. Weininger v. Hagedorn & Co., 91 NY2d 958 [1998], rearg. denied 92 NY2d 875 [1998]; Joblon v. Solow, supra; Enge v. Ontario County Airport Management Company, LLC, 26 AD3d 896 [2006]; Tassone v. Mid-Valley Oil Co. Inc., 291 AD2d 623 [2002], lv denied 100 NY2d 502 [2003]; Malsch v. City of New York, 232 AD2d 1; but see Kesselbach v. Liberty Haulage, Inc., 182 AD2d 741 [1992]) none of those cases involved a single family home and the finding was based upon consideration of the kind of work and the extent of the work the plaintiff performed to carry out the overall task. In the instant case, the plaintiff has failed to set forth what he did to install the system and, therefore, a triable issue of fact exists as to whether the installation of the satellite system in this case constitutes "alteration" within the meaning of Labor Law § 240(1) and "construction" as defined in the Industrial Code precluding granting summary judgment.

As for the document labeled a "Supplemental Bill of Particulars", dated May 4, 2007 submitted by the plaintiff for the first time in opposition to Ingardia's cross-motion, it is, in fact, an Amended Bill of Particulars. Plaintiff should have sought leave of court prior to serving this pleading, if it was served, as the amendment was sought after the note of issue was filed (CLR 3025[b]; CLR 3042[b]). While such leave may be granted

until the eve of trial (see Rose-Glick man v. Beth Israel Medical Center, 309 AD2d 846 [2003]; Bareiro v. City of New York, 265 AD2d 516 [1999]), and the court may consider the alleged violations raised for the first time in opposition to a motion for summary judgment (see Dowd v. City of New York, \_\_\_ AD3d \_\_\_ [2007], 2007 WL 1502242; Latino v. Nolan and Taylor-Howe Funeral Home, 300 AD2d 631 [2002]; Kelleir v. Supreme Indus. Park, 293 AD2d 513, 514 [2002]), the plaintiff has not moved for leave to serve the amended bill of particulars.

Dated: July 17, 2007  
D# 31

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J.S.C.