[* 1]

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH Justice

PART 54

Index Number : 104754/2005
JACOBSEN, ANDREW
VS
SCIAME DEVELOPMENT
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 7/12/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

7 Papers in Motion Sequence 002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/7/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ANDREW JACOBSEN and LINDA JACOBSEN,

Plaintiffs,

-against-

INDEX NO. 104754/05
DECISION & ORDER

SCIAME DEVELOPMENT, INC., F.J. SCIAME CONSTRUCTION CO., INC., ZIEGENFUSS DRILLING, INC., and YARROW, LLC,

Defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

Motion sequences 002 and 001 are hereby consolidated for disposition.

This is a personal injury action to recover damages suffered in a construction site accident, brought pursuant to Labor Law §§ 200, 240(1) and 241(6), as well as common law negligence.[1] Plaintiff Andrew Jacobsen was injured while working as an oiler for Connecticut Wells, Inc. ("Connecticut Wells") at 26-28 Peck Slip, New York, New York (the "premises"). Plaintiff Linda Jacobsen is the wife of Mr. Jacobsen who has brought a claim of, *inter alia*, loss of consortium. Defendants Sciame Development, Inc. ("Sciame Development") and F.J. Sciame Construction Co., Inc. ("F.J. Sciame") are, respectively, the general contractor and construction manager (collectively "Sciame") which hired Connecticut Wells. Defendant Yarrow, LLC ("Yarrow"), is the owner of the premises. Defendant Ziegenfuss Drilling, Inc. ("Ziegenfuss"), is the owner and operator of the drilling rig which injured Mr. Jacobsen. Defendants now move for

[1] Defendants' motion to dismiss plaintiffs' Labor Law §213 claim is moot because plaintiffs withdrew it.

summary judgment dismissing the complaint. Plaintiffs also move for partial summary judgment on liability on their Labor Law § 240(1) claim.

I. Statement of Facts

A. Examination Before Trial ("EBT") Testimony

1. EBT of Plaintiff

Mr. Jacobsen testified that he was employed by Connecticut Wells as an oiler on the day of the accident and was responsible for checking and repairing the drilling rig, welding pipes, and operating a knuckle boom truck. He does not remember Connecticut Wells providing him any equipment. Mr. Jacobsen said that all his tools were his own, and that his personal hard hat had been given to him by a previous general contractor. He stated that he had his hard hat with him on the day of the accident, but subsequently lost it. No one at the premises gave him instructions concerning how to perform his work. The only direction Mr. Jacobsen received on the premises was from Sciame, which told him where to drill.

Mr. Jacobsen described the drilling rig as a heavy duty truck, approximately 80,000 to 100,000 pounds, with a large platform in the rear from which a mast extends approximately 20 to 30 feet into the air. Drill rods, approximately 20 feet long, 12 inches in diameter, and weighing a few tons, were attached to a hydraulic motor on the mast. The drill rods served as extensions to a drill bit, which bored into the ground. Periodically, as the drill bit bore deeper into the earth, drilling would be stopped, and another drill rod would be screwed on, forming an extension. The drill rods and drill bit rotated inside of steel pipes, slightly wider than the rods. As the drilling rig bore into the earth, the pipes would continue downward with the drill bit. When drilling was finished, the drill rods and bit would be removed, while the pipes would remain, forming the

sides of the drilled well. Mr. Jacobsen was responsible for cutting pipe sections roughly as long as the drill rods. When it was time to add another drill rod, another section of pipe would be added as well, and Mr. Jacobsen would weld it to the section already in the ground. As the drill bit drilled down, compressed air was forced into the hole as well. The air caused the earth loosened by the drilling process to be pushed back up the pipe to the surface. On top of the hydraulic motor was a bonnet, which funneled the loose earth into a discharge hose, which emptied into a large dumpster. Mr. Jacobsen testified that the discharge hose was composed of 20-foot sections, connected together with a metal coupling.

Mr. Jacobsen was injured when drilling was completed and the drill rods were being removed. He described the process of removing the drill rods. The operator of the drilling rig began to raise the drill rods and bit. Once raised, the drill rods and bit still in the hole were locked to prevent them from falling back into the hole, and then a hoist attached to the drilling rig would be utilized to remove the topmost drill rod. To stabilize the top most rod during the removal process, the hoist cable was attached to the rig on one end and to the topmost rod on the other end. The opposite end of the drill rod was attached to the hydraulic motor on the mast of the rig. The topmost rod was then hoisted into a dumpster, and the rod was placed leaning against a board, which kept it at an angle. Mr. Jacobsen then picked up the rod from the dumpster using the knuckle boom truck and placed it on the back of the knuckle boom truck. The process was repeated until all the drill rods and the drill bit had been removed from the hole and placed on the back of the knuckle boom truck.

At the time of the accident, one section of the discharge hose was attached to the bonnet located on the hydraulic motor of the rig, which was attached to the mast. Most of the time the

entire discharge hose was removed when the rods were being lifted out of the hole, but, according to plaintiff, Doug Stout, the Ziegenfuss operator of the drilling rig, had been told by someone that the process was moving too slowly. Consequently, on the day of the accident the hose was left on to save time. One end of the discharge hose was connected to the bonnet by small chains and the other end, a 20 foot length, was "wrapped up and tied off on the top" of the drilling rig because "it was in the way." Tr. pp. 157-158.

At the time of his accident, the free end of the discharge rod was tied on top of the rig to keep it out of the way. Mr. Jacobsen was standing next to the dumpster, on top of a pile of spare drill rods. Standing on the rods allowed the 5 foot 6 inch Mr. Jacobsen to see over the approximately 6 foot tall dumpster. He and a laborer were on opposite sides of the dumpster and attempting to adjust the wooden plank that the drill rod was resting on. The rod was still connected to the drilling rig mast and hoist cable while Mr. Jacobsen and the laborer adjusted the plank. Once the plank was successfully moved, Mr. Jacobsen let go, and immediately felt a tremendous blow to his forehead. He did not see what struck him. The next thing Mr. Jacobsen remembers is picking himself up off the ground and his forehead bleeding.

2. EBT of John Fitzpatrick

Mr. Fitzpatrick testified that he was employed by Sciame as a job superintendent at the premises at the time of Mr. Jacobsen's accident. Mr. Fitzpatrick's testimony does not distinguish which Sciame entity was the general contractor at the premises. Mr. Fitzpatrick believed that Ziegenfuss was working for Connecticut Wells, but he was unsure whether Sciame had contracts with either company. He also was unsure who owned and operated the drilling rig on the premises, but Sciame leased the dumpster into which the discharge hose emptied. He told the

project manager of Connecticut Wells, Anthony Ganio, where to drill the holes, and instructed the drill operator to cease drilling when the dumpster was full. He said that Sciame gave no instruction to Ziegenfuss, and did not know whether Yarrow gave any instructions to either Connecticut Wells or Ziegenfuss. Mr. Fitzpatrick also stated that he is unfamiliar with the specific operation of the drilling rig.

The entire premises was a hard hat area, and he instructed workers who were not wearing one to put one on. During Sciame safety meetings they discussed that everyone on site was to wear hard hats. He had seen Mr. Jacobsen in the past sometimes with a hard hat and sometimes without. Mr. Fitzpatrick had the authority to shut down the entire job site, and had stopped subcontractor work in the past for nuisance to other trades. He did not witness the accident, but was alerted via radio. He never got closer than thirty feet to Mr. Jacobsen, and had no knowledge of the accident.

3. EBT of Douglas Stout

Mr. Stout testified that he was working for Ziegenfuss as a driller/operator at the premises on the day of the accident. Also on site with Mr. Stout was another Ziegenfuss employee, Jason Stowell, a helper. Mr. Stout said that he received initial instructions from Sciame as to the location of the wells to be drilled, and was told by Sciame multiple times to stop drilling because of a full dumpster. He also was given instructions by Connecticut Wells, via Mr. Ganio, about where to drill. He denied receiving instructions to work faster from Sciame. No Ziegenfuss supervisor ever visited the premises prior to the accident. Yarrow never gave him instructions.

There were two 20-foot sections of the discharge hose, six inches in diameter, and constructed of reinforced rubber. The couplings on the ends were either aluminum or an alloy,

and each section weighed between 300 and 400 pounds. Ziegenfuss owned the drilling rig, the discharge hose, the drill rods and bit, and the welding equipment used by Mr. Stout and plaintiff.

A hydraulic winch is attached to the drilling rig. It was Mr. Stout's job to operate the winch when removing the drill rods. The normal procedure was to lay the drill rods on the ground when they were removed, but at the premises, the drill rods were being placed on a board, supplied by Ziegenfuss. Mr. Stout instructed Mr. Jacobsen to place the rods atop the dumpster instead. According to Mr. Stout, as a rule of thumb, the discharge hose remains connected when removing the first drill rod because air is needed in the hole when the first drill rod is taken off. The discharge hose is unnecessary for removal of subsequent drill rods and is normally removed. At the time of Mr. Jacobsen's accident, the first drill rod was being removed. Mr. Jacobsen and Mr. Stowell were standing on opposite sides of the dumpster; Mr. Jacobsen was standing on top of some spare drills rods, wearing a baseball cap.

When the accident occurred, the bonnet holding the drill rod to the mast was approximately seven to eight feet off the ground. Mr. Stout used the words "mast" and "derrick" interchangeably. The other end of the flexible discharge hose was caught between the winch line and the opposite end of the attached drill rod. Mr. Stout stated that when he slacked the winch line, the hose "flopped" out, moving approximately seven feet horizontally, and falling approximately one foot, striking Mr. Jacobsen on the head. Mr. Stout stated that he had removed drill rods at previous holes with Mr. Jacobsen without incident, but that this was the first time that the dumpster had been utilized.

4. EBT of Jason Stowell

Mr. Stowell testified that he was employed by Ziegenfuss as a helper/mechanic at the

premises at the time of the accident. He stated that Ziegenfuss owned the knuckle boom truck used at the premises. It was his belief that Ziegenfuss was hired by Connecticut Wells to drill the starter holes for geothermal wells at the premises.

The winch line is normally used in lowering the drill rods to the ground. Mr. Jacobsen was injured when the discharge hose fell off the drill rod and winch line. In contrast to Mr. Stout, Mr. Stowell said that the section of the discharge hose connected to the bonnet served no purpose during the process of removing the drill rods. During drilling, the bonnet is bolted onto the top of the pipe, but while removing the drill rods, it is hung from the drill head. One end of the discharge hose was approximately 16 feet off the ground when the other end fell from approximately the same height and struck Mr. Jacobsen. Mr. Jacobsen was not wearing a hard hat at the time of the accident.

B. Other Proof

1. Expert Affidavit of Howard I. Edelson

Mr. Edelson affirms that he has more than 35 years of experience in the field of occupational safety, particularly in the field of construction safety. He has rendered opinions on more than 1400 matters and testified more than 150 times in court. He contends that Labor Law § 240(1) is inapplicable to Mr. Jacobsen's accident because he was not struck by an object that fell while being hoisted or secured because of the absence of a safety device specified by §240(1). He opines that the drilling rig is not a hoisting device, the removal of drill rods is not an activity protected by §240(1) because no hoisting is involved, and Mr. Jacobsen was struck by a hose which was not being hoisted. Furthermore, Mr. Edelson states that Mr. Jacobsen was at approximately the same height, six to seven feet off the ground, as the hose before he was struck,

and thus § 240(1) does not apply. He disagrees that the sections of the Industrial Code cited by plaintiffs are applicable or were violated.

2. Accident Reports

Plaintiffs submitted two accident reports, one filled out by Mr. Ganio, and the other by Mr. Pollock. Mr. Ganio's report describes the accident as follows: "6 [inch] discharge line got caught under winch line. When drill rod got to a certain point, it popped out from under winch line, striking Andy in forehead." Mr. Pollock's report is similar: "laying rod down with 20 [foot] lenght [sic] of discharge hose attached to bonnet, hose fouled up under winch line then poped [sic] out with force and struck said worker in the head."

3. Photographs

Plaintiffs submitted several photographs of a similar drilling rig as an attempt to assist the court in visualizing the machine.

II. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Upon this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*

A. Labor Law § 240(1)

Labor Law § 240(1) provides, in part:

[a]ll contractors and owners and their agents ... shall furnish or erect, or cause to

> be furnished ... 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 [construction workers employed on the premises].

The law must be liberally construed to effectuate its purpose of protecting workers by placing the burden on owners and general contractors, and thus it imposes absolute liability and a nondelegable duty on owners, general contractors and their agents, even when they exercised no supervision or control over an independent contractor. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991). Contributory negligence is not a defense to a claim under the statute. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 287 (2003). However, §240(1) has been limited to only apply to "specific gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501 (1993).

Defendants on *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259 (2001), which involved a worker on a ladder who was injured by falling glass during a building renovation. In *Narducci* the Court held that where a worker is injured by a falling object,"[a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute." *Id.* at 268. The Court dismissed the §240(1) claim on the ground that the glass "was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell." However, the case at bar is distinguishable from *Narducci* because the discharge hose which struck Mr. Jacobsen had been hoisted and was secured by the winch and hoisting cable until Mr. Stout slacked it, causing the hose to fall on plaintiff. This case closely resembles *Sherman v. Babylon Recycling Ctr.*, 218

A.D.2d 631 (1st Dept. 1995), where the plaintiff was injured by a ten feet long steel beam that was part of a hoisting apparatus and had been previously secured, but was unsecured when it fell on the plaintiff. The court held that "[s]uch a patent danger from an inadequately secured beam clearly falls within the contemplated hazards of the statute." *Id.* at 632. *See also, Jiron v. China Buddhist Ass'n*, 266 A.D.2d 347, 349 (2d Dept. 1999)("[t]he statutory requirement that workers be provided with proper protection extends not only to the hazards of building materials falling from the hoist as they are being conveyed to the top of the structure, but also to the hazard of a defective hoist, or portion of the hoist, falling from an elevated level to the ground."). In the case at bar, plaintiff was injured when the winch holding the discharge hold was slacked. The fact that the hose was only about a foot above Mr. Jacobsen's head does not bar recovery under §240(1). *Sharp v. Scandic Wall Ltd. Partnership*, 306 A.D.2d 39 (1st Dept. 2003) (allowing protection under §240(1) when load being hoisted was at the same level as the injured worker). Therefore, Mr. Jacobsen's accident is covered under §240(1).

Plaintiffs are entitled to summary judgment under §240(1) against Yarrow, the owner of the premises, and Ziegenfuss, the operator of the rig. Defendants incorrectly argue that §240(1) only applies to general contractors and owners. It also applies to agents of the owner and general contractor, which in this case includes Ziegenfuss, which supervised and controlled the activity that injured plaintiff. *See, Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981)(subcontractor is agent for a general contractor or owner for job site injuries within scope of work delegated). *Accord* Morales *v. Spring Scaffolding, Inc.*, 24 A.D.3d 42 (1st Dept. 2005)(subcontractor's liability depends upon whether it supervises or controls workplace). Ziegenfuss is liable under §240(1) because it is uncontradicted that it supervised and controlled

the operation of the drill rig and winch. Mr. Stout, a Ziegenfuss employee, admitted that he was in charge of operating the rig and the winch, and that he instructed plaintiff to put the drill rods in the dumpster. With respect to the Sciame entities, the evidence before the court is insufficient to determine which Sciame entity was the general contractor. The written contracts governing the relationship of the Sciame entities are not in the record and, therefore, summary judgment under Labor Law §240(1) is denied with respect to Sciame.

In sum, defendants have not met their burden for dismissal of plaintiffs' §240(1) claim against F.J. Sciame and Sciame Development because there is no proof as to which entity was the general contractor and neither entity was supervising and controlling the work at the time of the accident. Plaintiffs are entitled to a judgment on liability under §240(1) against Yarrow and Ziegenfuss.

B. Labor Law § 241(6)

Labor Law § 241(6) provides, in part: "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [construction workers employed on the premises]. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents ... shall comply" with the rules. In a cause of action under § 241(6), a plaintiff "must allege a violation of a concrete specification of the Industrial Code ." *Noetzell v. Park Avenue Hall Housing Development Fund Corp.*, 271 A.D.2d 231, 232 (1st Dept. 2000). Plaintiffs have alleged violations of Industrial Code §§ 19.31, 23-1.7, 23-1.9, 23-6.1, 23-6.3, 23-8.1, 23-8.2, and

23-8.5.[2] The alleged violations of applicable OSHA regulations do not give rise to a §241(6) cause of action. *Khan v. Bangla Motor & Body Shop,* 27 A.D.3d 526 (2d Dept. 2006).

Section 23-8.1 applies to derricks, but the parties dispute whether the drill rig is a derrick. Defendants' expert contends that the drilling rig is not covered by this section, but Mr. Stout's used the term derrick when describing the mast of the rig. A dictionary definition of derrick is "a framework or tower over a deep drill hole (as of an oil well) for supporting boring tackle or for hoisting and lowering." Merriam-Webster's Collegiate Dictionary (10th ed 1997). Thus, whether the rig is a derrick is a question of fact.

Section 23-8.1 arguably is applicable because it regulates the securing of moving parts of a derrick, and prohibits moving the load with a slack rope and sudden deceleration of the load absent emergency conditions. The pertinent parts of section 23-8.1 provide as follows:

> (f) Hoisting the load. (1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made: ...
>
> > (v) If there is a slack rope condition, it shall be determined that the hosting rope is properly seated on the drum and in the sheaves.
>
> (2) During the hoisting operation the following conditions shall be met:
>
> > (I) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions....
>
> (I) Guarding moving parts. Exposed moving components or parts of mobile cranes, tower cranes and derricks such as gears, set screws, projection keys, chains, chain sprockets and reciprocating parts which might constitute a hazard under normal operating conditions shall be guarded and such guards shall be securely fastened in place.

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[2]The following sections clearly do not apply: 19.31 (repealed); 23-1.7 (protection from falling overhead objects, drowning, slipping, tripping, air contamination, oxygen deficiency, corrosive substances); 23-1.9 (drinking water, bathroom facilities); 23-6.1 (exludes derricks); 23-6.3 (material and bucket hoists); 23-8.2 (mobile cranes) and 23-8.5 (mobile cranes).

Summary judgment dismissing plaintiffs' claim under §241(6) is denied because plaintiff was injured by the discharge hose, which was attached to the moving hydraulic motor on the rig. There are issues of fact as to whether the rig was a derrick, whether the discharge hose was a component part of the derrick that should have been secured, whether the load was decelerated suddenly as Mr. Stout testified that he slacked the winch, and whether there was a slack rope condition within the meaning of §23-8.1.

C. Labor Law § 200 and Common Law Negligence

Labor Law § 200(1) provides, in part:

> [a]ll places ... shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of [construction workers employed on the premises]. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

The statute codifies the common law duty of a landowner to provide workers a reasonably safe workplace. *Lombardi v. Stout*, 80 N.Y.2d 290, 294 (1992). Causes of action under Labor Law § 200 and common law negligence should be analyzed simultaneously. *Comes v. New York State Elec. and Gas Corp.*, 189 A.D.2d 945 (3rd Dept. 1993), *affirmed,* 82 N.Y.2d 876 (1993). Liability under §200 and the common law "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury." *Sprague v. Peckham Materials Corp.*, 240 A.D.2d 392, 394 (2d Dept. 1997).

It is clear from the defendants' evidence that neither Yarrow nor Sciame exercised control over the work nor had notice of the dangerous condition. Sciame merely instructed Connecticut Wells where to drill or when to empty the dumpster, but it exercised no supervision over the

operation of the drill rig. Sciame and Yarrow are entitled to summary judgment dismissing plaintiffs' §200 and common law negligence claims because "[a]bsent any evidence that [defendant] gave anything more than general instructions as to what needed to be done, as opposed to how to do it, [defendant] cannot be held liable under Labor Law § 200 or for common-law negligence." *O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dept. 2006).

However, summary judgment is denied with respect to Ziegenfuss, which had control over the operation of the drill rig. There is no doubt that Mr. Stout, a Ziegenfuss employee, was the drill rig operator at the time of the accident and his slacking of the winch admittedly caused the discharge hose to strike Mr. Jacobsen. There is a question of fact as to whether the discharge hose was required for the removal of the first drill rod, due to the conflicting testimony of Messrs. Stout and Stowell, and there is no evidence in the record as to whether there is a way to secure the discharge hose when it is being used. Therefore, it cannot be determined as a matter of law that the failure to secure the discharge hose was negligent. Accordingly, it is

ORDERED that the motion of plaintiffs for partial summary judgment on their claim under Labor Law § 240(1) is granted as to liability against defendants Yarrow, LLC, and Ziegenfuss Drilling, Inc., and is denied in all respects as to defendants Sciame Development, Inc. and F.J. Sciame Construction Co., Inc ; and it is further

ORDERED that the motion by defendants Yarrow, LLC, Sciame Development, Inc., F.J. Sciame Construction Co., Inc. and Ziegenfuss Drilling, Inc., for summary judgment dismissing plaintiffs' claims under Labor Law §§ 200, 213, 240(1) and 241(6), and the common law, is granted solely to the extent that plaintiffs' claims against Yarrow, LLC, Sciame Development,

Inc., and F.J. Sciame Construction Co., Inc., under Labor Law §200 and for common law negligence are dismissed and plaintiffs' claims against all defendants under Labor Law §213 are dismissed as moot, and in all other respects the motion is denied.

Dated: August 7, 2007

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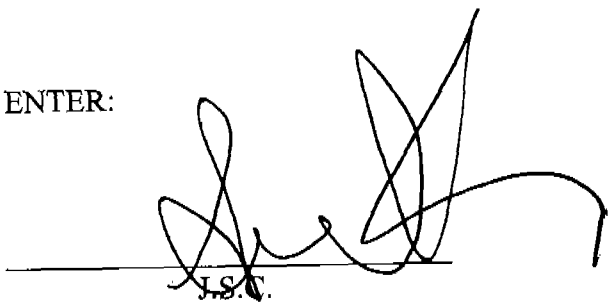

J.S.C.