

<b>Urbano v Bretton Woods Home Owners Association</b>
2007 NY Slip Op 33414(U)
October 17, 2007
Supreme Court, Suffolk County
Docket Number: 0000838/2005
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 7-31-07 (003)  
8-31-07 (004)  
ADJ. DATE 9-21-07  
Mot. Seq. # 003 - MD  
004 - XMD

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OMAR URBANO,	:	CANNON & ACOSTA, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1923 New York Avenue
- against -	:	Huntington Station, New York 11746
	:	
BRETTON WOODS HOME OWNERS	:	
ASSOCIATION, BRETTON WOODS	:	THOMAS M. BONA, ESQ.
CONDOMINIUM I and A-1 ROOFING,	:	Attorneys for Deft Bretton Woods Condo.
	:	123 Main Street
Defendants.	:	White Plains, New York 10601
-----X		
A-1 ROOFING & SIDING OF L.I., INC.,	:	ERIC A. SACKSTEIN, ESQ.
	:	Atty for Deft/3rd Pty Pltf A-1 Roofing
Third-Party Plaintiff,	:	P.O. Box 436
- against -	:	Port Jefferson, New York 11777
	:	
SOUTHPORT CONSTRUCTION and	:	MAZZARA & SMALL, P.C.
ANTHONY MASSIMINO d/b/a SOUTHPORT	:	Attys for 3rd Pty Defts Southport Constr. &
CONSTRUCTION,	:	Massimino
Third-Party Defendants.:	:	88 Veterans Memorial Highway, Suite LL5
	:	Hauppauge, New York 11788
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Upon the following papers numbered 1 to 39 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motions and supporting papers 11 - 20 ; Answering Affidavits and supporting papers 21 - 22; 23 - 25; 26 - 27; 28 - 29 ; Replying Affidavits and supporting papers 30 - 32; 33 - 35; 36 - 37; 38 - 39 ; Other \_\_\_\_\_ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#003) by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment as to defendants' liability pursuant to Labor Law § 240(1) is denied; and it is further

**ORDERED** that the cross motion (#004) by defendant, Bretton Woods Condominium I, for an order pursuant to CPLR 3212 granting it summary judgment on its cross claim for common-law indemnification over and against defendant A-1 Roofing is also denied.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he allegedly suffered in a fall through an opening for a skylight in defendant's roof. The condominium complex, known as Bretton Woods, had contracted with defendant A-1 Roofing to replace the roof on several of its buildings. A-1 Roofing, in turn, subcontracted the work to Southport Construction (hereafter Southport), plaintiff's employer.

Plaintiff testified at his deposition that he and three coworkers, as well as his boss Anthony, were taking off the old roofing material. It was a flat roof and contained several skylights, one of which had to be removed. Although plaintiff did not assist in removal of the skylight, the other workers removed it and placed insulation board over the opening. Plaintiff stated that he was aware of the opening and that the temporary cover was placed, but not secured, so that dirt could not fall into the apartment below. Plaintiff testified that about three hours later, as he was walking along the roof removing the residue of the old roof with a blower which he carried on his back, he stepped onto the temporary covering and fell through the hole to the apartment stairs below, sustaining the injuries alleged herein.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised any supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). The legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accidents" (*Rocovich v Consolidated Edison Co.*, *supra*). Nevertheless, the "special hazards" afforded by § 240(1) "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*see, Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). While an injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240(1) (*see, Raquet v Braun*, 90 NY2d 177, 184, 659 NYS2d 237 [1997]), a defendant is not liable under § 240(1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (*Robinson v East Med. Ctr.*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291, 771

NYS2d 484 [2003]).

In opposition to plaintiff's motion for summary judgment defendants argue that plaintiff's own actions were the sole proximate cause of his accident. Bretton Woods offers, *inter alia*, the deposition transcript of plaintiff's boss and the owner of Southport, Anthony Massimino. Mr. Massimino testified that it was he and plaintiff who removed the subject skylight, shortly before plaintiff fell. The insulation board goes underneath the top roofing material, it is about one-half inch deep and is cut with a utility knife. It appears that this particular skylight was leaking and it was removed so that the insulation board could be placed underneath it. Therefore, Mr. Massimino directed plaintiff to lay the insulation board across the area and to use the skylight opening as a template to cut the board around the opening.<sup>1</sup> He then went to a different part of the roof and it was just minutes later that he turned back and discovered that plaintiff had fallen through the opening. Defendants argue that plaintiff helped remove the skylight and was well aware of the opening,<sup>2</sup> that his task of cutting the insulation board around the opening required that he work near it, and that it was his own negligence in stepping on the thin insulation board which caused the accident (*see, Berenson v Jericho Water Dist.*, 33 AD3d 574, 822 NYS2d 145, 147 [2006]; *Storms v Dominican Coll. of Blauveit*, 308 AD2d 575, 576, 765 NYS2d 882 [2003]).

It is not the Court's function to resolve issues of credibility on motions for summary judgment (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631, 665 NYS2d 25 [1997]). In situations like the present scenario, where the conflicting depositions offered raise questions as to whether there was any violation of § 240(1), whether any alleged violation was the proximate cause of the accident (*Woszczyna v BJW Assoc.*, 31 AD3d 754, 820 NYS2d 289 [2006]; *Latino v Nolan & Taylor-Howe Funeral Home*, 300 AD2d 631, 754 NYS2d 289 [2002]) and whether plaintiff's own actions were the sole proximate cause of his accident (*Robinson v East Med. Ctr.*, *supra*; *Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra*), summary judgment is inappropriate. Accordingly, plaintiff's motion is denied.

The cross motion by Bretton Woods Condominium I is for summary judgment on its claim for common-law indemnification, including attorney's fees, from defendant/ third-party plaintiff A-1 Roofing (& Siding of L.I., Inc.). As a general rule, an owner held vicariously liable for a plaintiff's injuries pursuant to Labor Law § 240(1) is entitled to full common-law indemnification from the "actor who caused the accident" (*Chapel v Mitchell*, 84 NY2d 345, 618 NYS2d 626 [1994]; *Rivera v D'Alessandro*, 248 AD2d 522, 669 NYS2d 877 [1998]). However, to establish a claim for common-law indemnification "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some

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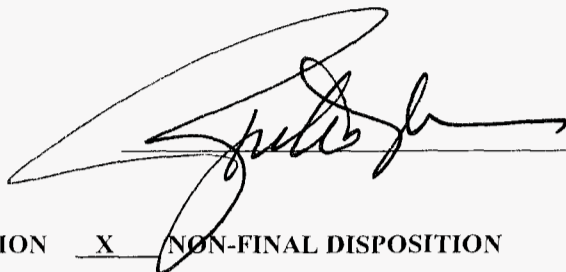
<sup>1</sup> Mr Massimino stated that plaintiff's English language skills are limited, therefore, he demonstrated what to do, and that plaintiff's cousin Elroy, whose English skills were better, was also assisting and conveying directions.

<sup>2</sup> Compare, *Greca v Best Roofing of New Jersey*, (15 Misc3d 1120A, 839 NYS2d 433 [2007]), wherein the plaintiff was granted summary judgment as to his Labor Law § 240(1) claim based upon his fall through a skylight opening. There, however, the plaintiff had not been warned about the unmarked opening,, his work did not involve removing the skylight, and the defendant produced only hearsay evidence to rebut plaintiff's version of the accident.

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negligence that contributed to the causation of the accident” (*Perri v Gilbert Johnson Enter.*, 14 AD3d 681, 685, 790 NYS2d 25 [2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [2004]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999]). Here, Bretton Woods has not been found vicariously liable to plaintiff nor has it established that some negligence on the part of A-1 Roofing contributed to causing plaintiff’s accident (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 822 NYS2d 542 [2006]; *Coque v Wildflower Estates Dev.*, 31 AD3d 484, 818 NYS2d 546 [2006]). Accordingly, the cross motion is denied.

Dated:     OCT 17 2007    



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J.S.C.

\_\_\_\_ FINAL DISPOSITION      X      NON-FINAL DISPOSITION