

**Maxner v William Floyd School Dist.**

2007 NY Slip Op 33415(U)

October 17, 2007

Supreme Court, Suffolk County

Docket Number: 0002426/2004

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 5-30-07  
ADJ. DATE 8-29-07  
Mot. Seq. # 002 - MotD  
003 - XMotD  
004 - XMG

-----X  
FRANK MAXNER and DEBORAH MAXNER, :  
 :  
 : Plaintiffs, :  
 :  
 - against - :  
 :  
 WILLIAM FLOYD SCHOOL DISTRICT, :  
 WILLIAM FLOYD MIDDLE SCHOOL and :  
 AURORA CONSTRUCTION, :  
 :  
 : Defendants. :  
-----X

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AURORA CONTRACTORS, INC. s/h/a :  
AURORA CONSTRUCTION, :  
 :  
 : Third-Party Plaintiff, :  
 :  
 - against - :  
 :  
 PREMIUM SUPPLY COMPANY and DEE'S :  
 ASSOCIATED, INC., :  
 :  
 : Third-Party Defendants. :  
-----X

CURTIS, VASILE, DEVINE & McELHENNY  
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Upon the following papers numbered 1 to 47 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 16 - 24; 25 - 32 ; Answering Affidavits and supporting papers 33 - 35; 36 - 37; 38 - 39; 40 - 41 ; Replying Affidavits and supporting papers 42- 43; 44- 45; 46 - 47 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#002) by defendants William Floyd School District and William Floyd Middle School for an Order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiffs' complaint, as well as all cross claims against them, or alternatively, summary judgment on their cross claim for contractual indemnification, is granted to the extent that plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed, and is otherwise denied; and it is further

**ORDERED** that cross motion (#003) by defendant/third-party plaintiff Aurora Construction/Aurora Contractors, Inc., for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and summary judgment on its third party claims for contribution, indemnification and legal expenses over and against Premium Supply Company, is granted to the extent that plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed, and is otherwise denied; and it is further

**ORDERED** that the cross motion (#004) by plaintiffs for an Order pursuant to CPLR 3212 granting them summary judgment as to defendants' liability pursuant to Labor Law § 240(1) is granted.

Injured plaintiff, Frank Maxner, commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and common-law negligence for injuries he allegedly sustained in a fall from a ladder at a construction site. His wife sues derivatively. Plaintiff, a union mechanic/steam fitter, was employed by third-party defendant Dee's Associated, Inc. (hereafter Dee's). Defendant Aurora Construction (hereafter Aurora) was the general contractor hired by defendant William Floyd School District (hereafter the school district) for construction of a new middle school building. Aurora engaged third-party defendant Premium Supply Company (hereafter Premium) to supply the kitchen equipment and Premium hired Dee's to install the mechanicals for the walk-in refrigerators.

Plaintiff testified at his deposition that on the day of his accident he and his helper, Mr. DeSpagna, were running the pipes from the condensing units, located on the roof, to the walk-in refrigerators in the kitchen. Although there was an inside ladder to access the roof, the area around it was being tiled and Aurora told plaintiff that it was unavailable for his use. Plaintiff and his helper set up an extension ladder, supplied by Dee's, near to the roof area containing the condensers. Plaintiff testified that the ladder was extended and that he checked it to make sure the locking clips were engaged and it was steady. The ladder's feet were placed on concrete and, since there was no way to secure the ladder to the roof, plaintiff had Mr. DeSpagna spot it or hold it while he climbed to the roof, without incident.

Plaintiff stated that when he needed to get off the roof he saw that the ladder had fallen, he believed from a gust of wind. He called to Mr. DeSpagna to reposition the ladder and, after it was placed back up against the wall, plaintiff checked to make sure it was stable and set. Mr. DeSpagna told him the ladder was ready and, as Mr. DeSpagna held the ladder, plaintiff placed one foot on the ladder. However, the moment he put his full weight on the ladder the top part of the extension slid into the bottom part, and plaintiff fell to the ground sustaining the injuries alleged of herein. Plaintiff did not see the ladder after his fall. He asserts that Mr. DeSpagna failed to engage the locking clips when he replaced the ladder.

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 it had actually exercised any supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so “constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). 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 (*see, Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). 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]). Conversely, 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 (*Blake v Neighborhood Hous. Serv. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

Where, as here, a ladder collapses, slips or otherwise fails to perform its function of safely supporting the worker, a statutory violation, and thus prima facie entitlement to summary judgment, has been established (*Morin v Machnick Bldrs.*, 4 AD3d 668, 669-670, 772 NYS2d 388 [2004]; *O’Connor v Enright Marble & Tile Corp.*, 22 AD3d 548, 802 NYS2d 506 [2005]). “Once the plaintiff makes a prima facie showing, the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra* at 289; *Squires v Robert Marini Bldrs.*, 293 AD2d 808, 809, 739 NYS2d 777 [2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

The thrust of defendants’ opposition is twofold. First, they argue that there are questions of fact as to how the accident happened; and, second, that plaintiff’s own action, in either failing to make sure that Mr. DeSpagna locked the clips or failing to secure the ladder to the roof, was the sole proximate cause of the accident. Mr. DeSpagna testified that he did, in fact, lock the extension clips, that the ladder slipped sideways, not down into itself, and that there was nothing wrong with the ladder. Therefore, defendants argue that there are questions of fact as to how the accident happened.

However, if, as plaintiff asserts, Mr. DeSpagna failed to lock the extension and it slid into itself, then the ladder was not defective but was improperly secured. Further, if, as Mr. DeSpagna testified, he did lock the extension and it did not slide into itself but slid sideways, then the ladder was not defective but improperly placed. Conversely, if Mr. DeSpagna did lock the extension and it slid down into itself, then the ladder was defective. Irrespective of whether the ladder was improperly secured or placed, or it was defective, the Court concludes that any one of the above scenarios establishes that the ladder failed to protect plaintiff from a specific gravity-related accident, the precise harm that Labor Law § 240(1) is intended to prevent (*Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Rocovich v Consolidated Edison*, 78 NY2d 509, 577 NYS2d 219 [1991]).

As to defendants’ argument that plaintiff’s own action was the sole proximate cause of his injury, the Court finds defendants’ speculation to be insufficient to withstand plaintiff’s motion for summary judgment. Contrary to the defendants’ arguments, plaintiff’s conduct was not the sole

proximate cause of his injuries,<sup>1</sup> because he neither engaged in unforeseeable, reckless activities nor misused a safety device that was provided to him (*Beharry v Public Storage*, 36 AD3d 574, 575, 828 NYS2d 458 [2007]; *cf.*, *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806, 795 NYS2d 490 [2005]). Accordingly, plaintiff is granted summary judgment as to defendants' liability pursuant to Labor Law § 240(1), and so much of defendants' motion and cross motion which seek to dismiss this cause of action is correspondingly denied.

Labor Law § 241(6) requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240(1), the duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (*see*, *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff has confined his argument to defendants' alleged violation of the Industrial Code found at 12 NYCRR §§ 23-1.21(b)(4), subsections (i) and (iv). Plaintiff does not oppose dismissal of the other alleged violations, and they do not appear to be applicable.

Sect. on 23-1.21(b) entitled "General requirements for ladders," provides at subsection (4) "Installation and use," in relevant part:

(i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.

\* \* \*

(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against a side slip by its position or by mechanical means.

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<sup>1</sup> Defendants' reliance on the holding in *Blake v Neighborhood Hous. Serv. of N.Y. City*, *supra*, is unavailing here. The jury in *Blake* found that the ladder was so constructed and operated as to give the plaintiff proper protection and that his own action was the sole cause of his injury. At first glance the circumstances in *Blake* are similar to those here, in that the extension ladder slid into itself and the plaintiff could not recall if he locked the extension clips on the ladder. However, in *Blake* the plaintiff was solely in control of placing and securing the ladder. Here, the plaintiff was on the roof when the ladder fell to the ground and plaintiff could not have replaced it himself. Therefore, his own negligence, if any, cannot be the sole proximate cause of the accident.

Here, subsection (iv) is inapplicable because plaintiff was not performing work from a rung of the ladder. Plaintiff was using the ladder for access between his two work areas, the kitchen and the roof, therefore subsection (i) is at least arguably applicable to plaintiff's fall. Accordingly, the only code violation remaining is that set forth at 12 NYCRR § 23-1.21 (b)(4)(i), and the other alleged violations are dismissed.

The Court of Appeals has held that a violation of the Industrial Code, while not conclusive on the question of negligence, would constitute some evidence of negligence which the jury may consider in deciding the issue of whether the operation or conduct at the worksite was reasonable and adequate under the particular circumstances and whether plaintiff's contributory negligence may be a factor (*see, Rizzuto v L. A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 [1997]). Plaintiffs must still establish that the Code was violated and that this violation was a proximate cause of his injuries (*see, Bland v Manocherian, supra; Sprague v Peckham Materials Corp., supra*). Therefore, so much of defendants' motion and cross motion which seeks to dismiss plaintiff's Labor Law § 241(6) cause of action is correspondingly denied.

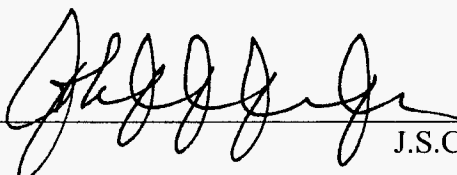
The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see, Russin v Louis N. Picciano & Sons*, 54 NYS2d 311, 318, 445 NYS2d 127 [1981]) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the owner and general contractor exercised no supervision or control over the injured plaintiff's work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Accordingly, defendants are granted summary judgment dismissing these causes of action.

The school district also seeks summary judgment over and against Aurora on its cross claim for contractual indemnification, including attorney's fees. While a party "who is held liable in the absence of negligence, pursuant to Labor Law § 240(1), may be entitled to contractual indemnification, it is elementary that the right to contractual indemnification depends upon the specific language of the contract" (*Moss v McDonald's Corp.*, 34 AD3d 656, 825 NYS2d 497 [2006]; *Kader v City of New York Hous. Preserv. & Dev.*, 16 AD3d 461, 463, 791 NYS2d 634 [2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588 [1995]). The contract between the school district and its general contractor, Aurora, provides for indemnification, including attorney's fees, for claims arising out of the performance of its work "but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them." Here, plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed and the Court finds that the school district failed to establish, as a matter of law, that plaintiff's accident was caused by the negligent act or omission of Aurora or its subcontractor (*Moss v McDonald's Corp.*, 34 AD3d 656, 825 NYS2d 497 [2006]; *Kader v City of New York Hous. Preserv. & Dev., supra*). Therefore, summary judgment is denied.

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The remaining summary judgment relief sought by Aurora must be denied because Aurora failed to annex copies of all the pleadings with its moving papers, specifically, a copy of the third-party complaint. Accordingly, such summary relief cannot be granted (CPLR 3212[b]; *Wider v Heller*, 24 AD3d 433, 805 NYS2d 130 [2005]; *Hamilton v City of New York*, 262 AD2d 283, 691 NYS2d 108 [1999]).

Dated: 17 Oct '07

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION