

**Barbarino v Stop & Shop Supermarket Co.**

2007 NY Slip Op 33902(U)

December 3, 2007

Supreme Court, Richmond County

Docket Number: 0101317/2006

Judge: Joseph J. Maltese

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THOMAS BARBARINO & JENNIE BARBARINO,

*Plaintiffs*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**THE STOP & SHOP SUPERMARKET COMPANY &  
HEARTLAND BUILDING AND DEVELOPMENT CO.,**

*Defendants.*

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The following items were considered in the review of this motion

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Notice of Cross-Motion & Affirmation in Opposition	2
Memorandum of Law	2
Replying Papers & Affirmation in Opposition	3
Affirmation in Sur Reply	4
Sur Reply	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion for Summary Judgment is as follows:

Defendants, The Stop & Shop Supermarket Company (“Stop & Shop”) and Heartland Building and Development Co. (“Heartland”) seek a motion for summary judgment pursuant to CPLR § 3212 dismissing Plaintiffs’ Complaint against them in its entirety. Plaintiffs make a cross-motion for summary judgment. Defendants’ motion is granted in part and denied in part.

Plaintiff, Thomas Barbarino, allegedly was injured while working as a bricklayer for Terranova at the exterior rear wall fo the Stop & Shop building under construction in Staten Island. Plaintiff alleges that while working on a scaffold that ran the whole width of the rear of the building, a cement block fell from the roof and struck him on his hard hat and shoulder. Plaintiffs asserted claims pursuant to common law negligence, Labor Law §§ 200, 240(1) and 241(6) against defendant corporations, who hired Terranova for the construction project.

Both the parties' motion for summary judgment pursuant to Labor Law § 240(1) is denied. "[F]or section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. 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 . . . Absolute liability for falling objects under Labor Law § 240(1) arises only when there is a failure to use necessary and adequate hoisting or securing devices."<sup>1</sup>

Here, there is an issue of fact as to whether the cement block had been placed on the roof to secure the tarp. Defendants present the testimony of plaintiff's co-bricklayer, George Piper, that he placed the block on the edge of the roof for the purpose of preventing water from dripping on them while they worked. Thus, defendants argue that these facts are outside the ambit of § 240(1). Plaintiffs claim that the cement block that fell on plaintiff was one of the blocks that had been delivered to the construction project and was used to secure the tarp. Because of this outstanding issue of fact as to whether the object was being used to secure the tarp, the motion for summary judgment is denied.

Defendants' motion to dismiss pursuant to Labor Law § 241(6) is granted. Labor Law § 241(6) imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers.<sup>2</sup> To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation.<sup>3</sup> The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury. Plaintiff alleges violations of Industrial Code Sections 23-2.7(e), 23-1.15, 23-1.7(d) and 23-5. The court finds that those sections are not applicable here and that the claim pursuant to section 241 must be dismissed. The plaintiff's opposition papers failed to address the claim pursuant to Labor Law § 241(6) and are

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<sup>1</sup>*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-69 [2001]; *see also, Eberhard v Alexander Central School District*, 309 AD2d 1160 [App Div 2003].

<sup>2</sup>*Buckley v Columbia Grammar & Preparatory, et al.*, 44 AD3d 263 [App Div 2007], citing *Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 350 [1998].

<sup>3</sup>*Id.*, citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].

therefore, deemed to have abandoned their reliance on these regulations to support their claim.

Lastly, with respect to the summary judgment motion pursuant to Labor Law § 200 and common law negligence, the motion is denied. Labor Law § 200 is the codification of the common law negligence standard and imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work.<sup>4</sup> “An explicit precondition to this duty . . . is that the party charged with that responsibility have the authority to control the activity bringing about the injury.”<sup>5</sup> Furthermore, “[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common law negligence and under Labor Law 200.”<sup>6</sup>

Here, there is an issue of fact as to the level of defendants’ involvement in directing and controlling the work site where plaintiff was injured. Plaintiffs claim that the blue tarp had been on the roof for several days before the accident and that the cement block was on top of the blue tarp for approximately two and one half hours before it was blown off of the roof onto the plaintiff. Therefore, plaintiffs argue that the defendants had actual and constructive notice of the tarp and the cement blocks. The court concludes that the issue of whether defendants had actual and constructive notice over the conditions of the work site prevents the court from granting summary judgment. Therefore, both defendants and plaintiffs’ motion for summary judgment pursuant to Labor Law § 241(6), is denied.

Accordingly, it is hereby:

ORDERED that the defendants’ motion pursuant CPLR 3212 granting summary judgment in favor of defendants, The Stop & Shop Supermarket Company and Heartland Building and Development

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<sup>4</sup>*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993].

<sup>5</sup>*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981].

<sup>6</sup>*Dos Santos v STV Engineers*, 8 AD3d 223, 224 [2<sup>nd</sup> Dept 2004].

Co., is granted in part as to Labor Law § 241(6), and denied in part as to Labor Law § 240(1), Labor Law § 200 and the common law causes of action; and it is further

ORDERED that the plaintiffs' cross-motion pursuant to CPLR 3212 granting summary judgment in favor of plaintiffs, Thomas Barbarino and Jennie Barbarino, is denied.

ENTER,

DATED: Dec 3, 2007

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Joseph J. Maltese  
Justice of the Supreme Court