

**Portillo v Centereach Realty, LLC**

2007 NY Slip Op 34227(U)

December 21, 2007

Supreme Court, Suffolk County

Docket Number: 0027513/2001

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 10/17/07  
ADJ. DATE 11/07/07  
Mot. Seq. # 003 - MotD  
# 004 - MD

-----X  
MIGUEL PORTILLO, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 CENTEREACH REALTY, LLC, CMT :  
 MANAGEMENT CO., LLC d/b/a INTERCITY :  
 DEVELOPMENT and INTERCITY :  
 DEVELOPMENT, :  
 :  
 Defendants. :

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-----X  
CENTEREACH REALTY, LLC, CMT :  
 MANAGEMENT CO., LLC d/b/a INTERCITY :  
 DEVELOPMENT and INTERCITY :  
 DEVELOPMENT, :  
 Third-Party Plaintiffs, :  
 :  
 - against - :  
 :  
 GRANDVIEW CONTRACTING CORP. and :  
 GRANDVIEW DIVERSIFIED CONSTRUCTION :  
 CORP., :  
 Third-Party Defendants. :  
-----X

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Upon the following papers numbered 1 to 48 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Motion and supporting papers 17-31; Answering Affidavits and supporting papers 32-41; 42-43; Replying Affidavits and supporting papers 44-45; 46-48; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

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**ORDERED** that these motions are consolidated for the purpose of this determination; and it is further

**ORDERED** that the motion (#003) by defendants/third-party plaintiffs for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), 241(6), and common-law negligence causes of action, and summary judgment in their favor on their claim for common-law indemnification against third-party defendants, is granted to the extent that plaintiff's Labor Law §§ 200 and 240(1) claims, and plaintiff's Labor Law § 241(6) claim based upon the alleged violation of the Industrial Code found at 12 NYCRR §§ 23-6.1 (i); 23-9.4 (h) and 23-9.5 (c), are dismissed, and is otherwise denied; and it is further

**ORDERED** that the motion (#004) by the third-party defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), 241(6), and 200 common-law negligence causes of action as against them, as well as the third-party claim for common-law indemnification, is 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 suffered when he fell from the bucket of a Bobcat and it ran over him. Plaintiff's employer, Grandview Contracting Corp., (hereafter Grandview) had contracted with Intercity Development (hereafter Intercity) to remove the oil burner tanks and hot water heaters from apartment buildings which defendants assert were owned and managed by Centereach Realty, LLC (hereafter Centereach).

Plaintiff testified at his deposition that he was employed by Grandview as a laborer "B," which included operating Bobcats (a skid loader with a bucket attached by four arms or fingers) and other demolition machines. On the day of his accident he and his coworkers were dismantling boilers and hot water heaters and removing them from the apartment buildings. He had operated the Bobcat in the morning and his coworker, Dennis, was going to operate it in the afternoon. When he returned to work after their lunch break, both he and Dennis got to the Bobcat at the same time, Dennis got into the cab and plaintiff was going to ride in the bucket to the next apartment building. However, after he got one foot into the bucket the machine started up and began to move, and plaintiff lost his balance and fell. The Bobcat ran over him and he suffered grave injuries, including amputation of his lower leg.

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 actually exercised supervision or control over the work (*see, 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]). However, the special protection afforded by § 240(1) does not encompass any and all perils that may be connected in some tangential way with the effects of gravity (*Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*,

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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]).

Here, the facts do not support the absolute liability imposed by Labor Law § 240(1). In *Modeste v Mega Contr.* (40 AD3d 255, 835 NYS2d 156 [2007]), a case similar to plaintiff's, the worker was thrown from the roof of a Bobcat he was riding on when the machine lurched. In *Modeste*, as here, the Bobcat was not being used to facilitate access to a different elevation level for the plaintiff or his materials but was being used for transportation. Plaintiff herein was attempting to stand in the bucket of the Bobcat and ride it to the next work location when he fell. Accordingly, the Court concludes that the accident did not entail the kind of elevation-related hazard contemplated by § 240(1) (*see also, Toefer v Long Is. R.R.*, 4 NY3d 399, 408-409, 795 NYS2d 511 [2005]; *Dilluvio v City of New York*, 264 AD2d 115, 118-119, 704 NYS2d 550, *aff'd* 95 NY2d 928, 721 NYS2d 603 [2000]), and plaintiff's Labor Law § 240(1) cause of action is dismissed.

Labor Law § 241(6) requires owners and their agents 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 (*Ross v Curtiss-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 Curtiss-Palmer Hydro-Elec. Co.*, *supra*; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff's opposition is confined to defendants' alleged violations of 12 NYCRR §§ 23-6.1 (i); 23-9.2 (i); 23-9.4 (h) and 23-9.5 (c). Plaintiff did not address the remaining Code violations as listed in the bill of particulars and, in any event, they are either not applicable to the instant scenario or are too general. It is obvious from plaintiff's deposition that he is alleging that he, and his coworkers, were routinely permitted to ride in the bucket area of the Bobcat. Therefore, section 23-6.1 (i), which prohibits riding in the buckets of hoisting equipment, but specifically excludes fork lift trucks, and section 23-9.4 (h) (4), which prohibits unauthorized persons from being in the cab or immediately adjacent to the cab of a power shovel or backhoe, are not applicable to plaintiff's accident. However, section 23-9.2 (i) prohibits persons from riding on the buckets of power-operated equipment or machines, and therefore is arguably specific enough to form a predicate for plaintiff's § 241(6) claim. Therefore, defendants have not established that this section is insufficient, as a matter of law, to support plaintiff's § 241(6) claim (*Modeste v Mega Contr.*, *supra* at 256).

The Court of Appeals has held that a violation of the Industrial Code, while not conclusive as to the question of negligence, would constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and

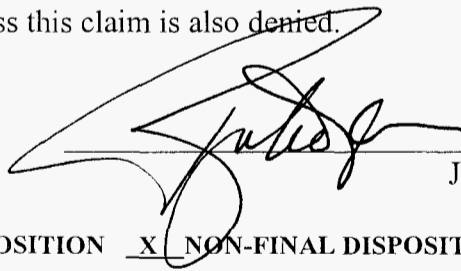
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adequate under the particular circumstances (*Rizzuto v L. A. Wenger Contr. Co.*, *supra*; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 [1997]). Plaintiff must still establish that the Code was violated and that this violation was a proximate cause of his injuries (*Bland v Manocherian*, *surpa*; *Sprague v Peckham Materials Corp.*, *supra*), subject to defendants' claims of plaintiff's contributory or comparative negligence (*Bauer v Female Academy of the Scared Heart*, 97 NY2d 445, 452, 741 NYS2d 491 [2002]; *Rizzuto v L. A. Wenger Contr. Co.*, *supra* at 350). Accordingly, summary judgment dismissing plaintiff's claim that defendants' violated § 241(6) is denied, to the extent that it is based upon the alleged violation of section 23-9.2 (i).

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or agent to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, general contractors, or their agents (*see, Russin v Louis N. Picciano & Sons*, *supra*) who exercised control or supervision over the work and either created an alleged 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 contractor and the owner or agent exercised no supervision or control over the injured employee'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, the defendants are granted summary judgment dismissing these causes of action. To the extent that the third-party defendants have sought summary judgment dismissing plaintiff's claims as against them, it does not appear that plaintiff asserted any claims against the third-party defendants, and therefore such relief is denied.

As a general rule, an owner held vicariously liable for a plaintiff's injuries pursuant to Labor Law § 241(6) 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 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, defendants have not been found vicariously liable to plaintiff nor have they established, as a matter of law, that some negligence on the part of the third-party defendants 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 motion for summary judgment on their claim for common-law indemnification is denied to the third-party defendants and the third-party defendants' motion to dismiss this claim is also denied.

Dated: DEC 21 2007



J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION