

**O'Keefe v Tishman Westside Constr. of N.Y.**

2007 NY Slip Op 34436(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 102449/04

Judge: Rolando T. Acosta

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

PRESENT: **HON. ROLANDO T. ACOSTA**

PART 61

Index Number : 102449/2004

O'KEEFE, PATRICK

vs

TISHMAN WESTSIDE CONSTRUCTION

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

*all attached*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

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

Dated: 6/4/07

SO ORDERED

*[Signature]*  
J.S.C.

ROLANDO T. ACOSTA

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

Patrick O’Keefe and Margaret O’Keefe,

Plaintiffs,

– against –

Tishman Westside Construction of New York,  
Tishman Realty & Construction Co., Inc.,  
Tishman Realty Corp., and Starwood Hotels &  
Resorts Worldwide, Inc.,

Defendants.

**DECISION/JUDGMENT**

Index No. 102449/04

Seq. Nos. 3 & 4

Present:

**Rolando T. Acosta**  
Supreme Court Justice

Tishman Westside Construction of New York,  
Tishman Realty & Construction Co., Inc.,  
Tishman Realty Corp., and Starwood Hotels &  
Resorts Worldwide, Inc.,

Third-Party Plaintiffs,

– against –

Permasteelisa Cladding Technologies,

Third-Party Defendants.

Third-Party  
Index No. 590511/05

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk’s Desk (Room  
418).

Motion Seq. Nos. 3 and 4 were consolidated for disposition.

The following documents were considered in reviewing defendants’ motion (Seq. No. 3) for on order pursuant to CPLR 3212 granting summary judgment dismissing the complaint or in the alternative granting summary judgment over and against third-party defendant for defense and indemnification; plaintiffs’ cross-motion for summary judgment on liability on their Labor Law §§ 240(1) & 241(6) claims; and, third-party defendant’s motion (Seq. No 4) for an order pursuant to CPLR 3212 dismissing the complaint:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion &amp; Affirmation (Seq. No. 3)</b>	<b>1 (Exhibits A-K)</b>
<b>Notice of Cross-Motion, Affirmation, Affidavit &amp; Memorandum of Law</b>	<b>2-3 (Exhibits 1-2)</b>
<b>Affirmation in Partial Opposition</b>	<b>4</b>
<b>Defendants' Reply Affirmation</b>	<b>5 (Exhibit A)</b>
<b>Plaintiffs' Reply</b>	<b>6</b>
<b>Notice of Motion &amp; Affirmation &amp; Memorandum of Law (Seq. No. 4)</b>	<b>1 (Exhibits A-D)</b>
<b>Affirmation in Opposition</b>	<b>2</b>

### Background

The Tishman defendants were the general contractors on the Westin New York Times Square Project and Dream Team Hotel Associates are the owners. Tishman contracted with third-party defendant Permasteelisa Cladding Technologies, Ltd. ("Permasteelisa") to install a curtain wall on the building. Permasteelisa in turn subcontracted with Tower Construction Company ("Tower") to install the curtain; plaintiff was an employee of Tower. Tower's job function included installing vertical decorative metal strips between glass panels. These metal strips, referred to as "bullnoses," were approximately 5 feet long by four to five inches wide, and weighed somewhere between five and twelve pounds.

By August 2003, the bulk of the project had been completed and all safety devices had been taken down, including all scaffolding; in fact, the hotel was in use at the time of the accident. A few Tower employees were going over a punch list, which included installing bullnoses that for what ever reason had not been installed earlier. On August 26, 2003, plaintiff used a latter to climb onto a metal awning and commenced installing bullnoses. Plaintiff was not using a hard hat because other than the punch list items, all the construction work had been completed. At approximately 9:00 am, as plaintiff was getting ready to go on a coffee break, an improperly secured bullnose from the fifth floor came off the side of the building (possibly because when someone opened a window, although this fact has not been established) and hit him on the head causing injuries.

Plaintiff commence this action against defendants alleging common law negligence, Labor Law §§ 200, 240(1), and 241(6) violations, and plaintiff's wife asserted a claim for her loss of society. With respect to his Labor Law 241(6) claim, plaintiff alleged violations, inter alia, of 12 NYCRR 23-1.7 and 23-1.8. Defendants moved to dismiss on the grounds that they did not control plaintiff's work (common law negligence and Labor Law 200 claim), that plaintiff was on his coffee break, and that what struck him was not an object that was being hoisted or being secured at the time (Labor Law 241(1)), and that plaintiff did not allege any specific industrial code violation (Labor Law 241(6)). In the alternative, they moved for defense and indemnification from Permasteelisa. Plaintiff cross-moved for liability on his Labor Law 240(1) and 241(6) claims. Permasteelisa separately moved to dismiss the complaint for essentially the same reasons proffered by defendants.

### Analysis

Defendants' motion to dismiss is granted solely to the extent of dismissing the common law negligence and Labor Law 200 claim inasmuch as there is no indication in the record that defendants' controlled or supervised plaintiff's work. Comes v New York State Electric & Gas Corp., 82 N.Y.2d 876 (1993), and plaintiff has failed to raise triable issues of fact with respect to this claim.

Defendants, however, have failed to establish their prima facie entitlement to summary judgment dismissing plaintiff' Labor Law 241(1) and 241(6) claims. First, with respect to plaintiff' Labor Law 240(1) claim, the fact that plaintiff was injured just before he went on his coffee break does not take the case out of the protected activity contemplated by the legislature. See Beharry v. Public Storage, Inc., 36 A.D.3d 574 (2<sup>nd</sup> Dept. 2007).

Second, as the Court of Appeals held in Ross v Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501 (1993), Labor Law 240(1)<sup>1</sup> is designed to protect workers from "gravity-related accidents [such] as . . . being struck by a falling object that was . . . inadequately secured." See also Qutar v The City of New York, 5 N.Y.3d 731 (2005). "[N]ot every object that falls on a worker," however, "gives rise to the extraordinary protection of Labor Law 240(1)." Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259, 267 (2001). "Rather,

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1. Labor Law 240(1) states, "[a]ll contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Id.* In *Narducci* the plaintiff was sawing off a window frame while standing on a ladder when a large piece of glass from an adjacent window fell on him. *Id.* at 265-66. In holding that Labor Law 240 did not apply to the facts of that case, the Court held that “for 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* (see, e.g., *Pope v Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523; *Baker v Barron's Educ. Serv. Corp.*, 248 AD2d 655).” *Id.* at 268.

In addition, the Court held that “the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus Labor Law § 240 (1) does not apply. No one was working on the window from which the glass fell, nor was there evidence that anyone worked on that window during the renovation. The glass that fell was part of the pre-existing building structure as it appeared before work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected.” *Id.* (emphasis added). Rather, it was “a general hazard of the workplace, not one contemplated to be subject to Labor Law § 240 (1) (see, *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487).” *Id.* at 269.

Whether coverage under Labor Law 240(1) is dependent on the object falling at the time it was being secured was addressed by the Appellate Division, First Department in *Boyle v. 42<sup>nd</sup> Street Development Project, Inc.*, 38 A.D.3d 404 (1<sup>st</sup> Dept. 2007). In *Boyle*, plaintiff was engaged in the unloading, hoisting and installation of stringers (steel components that form the sides of metal stairs) during the assembly of a steel stair case. The stringers were being hoisted from the ground level to the building's upper floors through an open elevator shaft. Plaintiff was on the sixth floor operating the hoisting mechanism. The assembly of the stairs further required threaded rods, “which were hung from the building's structural steel and the stringers were then hung from the rods before the stair treads and risers were placed between the stringers to form the staircase. The threaded rods were placed into clips that were attached to the structural steel and secured on both the top and bottom with washers and nuts. When installing the staircase, the nuts that secured the threaded rods were left loose so that the rods could be adjusted as the stairs were installed. The nuts were not tightened until final height adjustments were made and the stringers were plumb.” *Id.* at 405-406. Plaintiff was injured when one of the rods became loose and struck him in the back. *Id.* at 406.

In holding that Labor Law 240(1) applied, the Court stated that the “accident clearly [fell] within the purview of the statute inasmuch as plaintiff was struck by a falling object that had been inadequately secured.” *Id.* at 406 (citing Outar v The City of New York, 5 N.Y.3d 731 (2005)). In rejecting defendant’s argument that the holding in Narducci required dismissal of the 240(1) claim, the Court noted that the “glass [in Narducci] did not qualify as the type of falling object contemplated by the statute because it was not an integral part of the renovation/construction work undertaken by plaintiff that involved the hoisting or securing of objects.” *Id.* at 407. The Court went on to note that “Narducci nor Roberts<sup>2</sup> stands for the proposition that an object must fall at the precise moment of being secured during the work process in order for the statute to apply.” *Id.* It also noted that “rods were part of the installation of a staircase. This was an integral part of the construction work in progress.” *Id.* at 408. Thus, it concluded, “[i]t could not be stated more plainly that, if the nuts were not finally tightened, then the rods which the nuts were securing were not completely “secured” within the meaning of section 240(1).” “Pursuant to the provision of section 240(1), they should have been completely “secured” or some safety device should have been used in the meantime to prevent the “special hazard” of a gravity-related accident such as “being struck by a falling object that was improperly hoisted or inadequately secured.” *Id.* (citing Ross v Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501 (1993)).

Here, unlike the glass that fell in Narducci, the installation of the bullnoses was an integral part of the construction project in progress, as were the rods in Boyle. While plaintiff was installing bullnoses, he was struck by a bullnose that had been inadequately secured. Indeed, according to Michael Desantis, Tower’s foreman, the bullnose that struck plaintiff was missing an allen key screw. Desantis Affidavit, Plaintiff’s Exhibit 1. The fact that the bulk of the construction project had been completed is of no moment. Plaintiff was engaged in work protected by section 240(1) and the statute does not limit coverage to when the project is in full swing. That the scaffolding had already been removed and plaintiff was installing bullnoses as part of a punch list cannot not be used to deny plaintiff the proper protection that he required to perform his work.

Moreover, defendants’ assertions to the contrary, 240(1) applies even though the bullnose that struck plaintiff may have been secured at an earlier time. Indeed, as the Court in Boyle specifically held, an object does not have to fall at the precise moment of being

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2. In Roberts v. General Elec. Co., 97 N.Y.2d 737, 738 (2002), the Court held that a an injury caused by a piece of asbestos deliberately dropped from a higher floor was not cover by section 240(1) because it “was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell.”

secured during the work process in order for the statute to apply. Boyle v. 42<sup>nd</sup> Street Development Project, Inc., supra, 38 A.D.3d 408.

With respect to plaintiffs' Labor Law 241(6) claim, he properly alleged a 12 NYCRR 23-1.8 violation. Specifically, 12 NYCRR 23-1.8(c)(1) states:

Head protection. Every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat. Such safety hats shall be provided with liners during work in areas or at such times where the temperature is below 55 degrees Fahrenheit.

Here, it is undisputed that plaintiff was not provided with a hard hat nor required to wear one while installing the bullnoses, and, although the bulk of the construction had been completed, there was still a danger that plaintiff would bump his head. See Bornschein v. Shuman, 7 A.D.3d 476 (2<sup>nd</sup> Dept. 2004); Singh v. 106-108 Bayard Street Corp., 300 A.D.2d 31 (1<sup>st</sup> Dept. 2002).

He also properly alleged a violation of 12 NYCRR 23-1.7(a)(1), which requires overhead protection in an area normally exposed to falling material or objects. Here, the facts that bullnoses were being secured on the outside of the building, raises issues of fact as to whether 12 NYCRR 23-1.7(a)(1) was violated. See, e.g., Bush v. Gregory Madison Avenue, LLC, 308 A.D.2d 360 (1<sup>st</sup> Dept. 2003); Belcastro v. Hewlett Woodmere Union Free School District No. 14, 286 A.D.2d 744 (2<sup>nd</sup> Dept. 2001).

Plaintiff, however, has failed to state a claim with respect to 12 NYCRR 23-1.5, 23-1.15, 23-1.16; 23-1.17, 23-1.18, 23-1.19, 23-5, and 23-6. In fact, plaintiff does not even oppose that portion of the motion. Accordingly, defendants have established their prima facie entitlement to summary judgment dismissing only that portion of plaintiff's Labor Law 241(6) claim that relies on 12 NYCRR 23-1.5, 23-1.15, 23-1.16; 23-1.17, 23-1.18, 23-1.19, 23-5, and 23-6. That portion which seeks to dismiss the claimed violations of 12 NYCRR 23-1.7(a)(1) & 23-1.8, however, is denied.

Turning to plaintiff's cross-motion, plaintiff has established his prima facie entitlement to summary judgment on his Labor Law 240(1) claim for the reasons stated above, and defendants have failed to raise triable issues of fact. That portion of his motion for liability on Labor Law 241(6) claim, however, is denied, inasmuch as there are triable issues of fact as to whether whatever safety measures employed were reasonable and

adequate under the circumstances. Nagel v. D & R Realty Corp., 99 N.Y.2d 98 (2002).

Defendants' alternative relief for defense and indemnification is granted. Their entitlement to this relief is not disputed by third-party defendants, who merely argue that plaintiff's complaint should be dismissed. Accordingly, third-party defendant's motion is also denied. Thus, based on the foregoing, it is

ORDERED that defendants/third-party plaintiffs' motion (Seq. No. 3) for on order pursuant to CPLR 3212 granting summary judgment dismissing the complaint or in the alternative granting summary judgment over and against third-party defendants for defense and indemnification is GRANTED to the extent of dismissing plaintiffs' common law negligence and Labor Law 200 causes of action, and that portion of plaintiff's Labor Law 241(6) claim regarding violations of 12 NYCRR 23-1.5, 23-1.15, 23-1.16; 23-1.17, 23-1.18, 23-1.19, 23-5, and 23-6 (their motion is denied with respect to plaintiff's Labor Law 241(6) claim regarding violations of 12 NYCRR 23-1.7 & 23-1.8); and it is further

ADJUDGED and DECLARED that third-party defendant defend and indemnify defendants/third-party plaintiffs; and it is further

ADJUDGED that plaintiffs' cross-motion is GRANTED to the extent they have judgment against defendants/third-party plaintiffs on liability pursuant to Labor Law 240(1) only; and it is further

ORDERED that the action continue with plaintiffs' remaining claims; and it is further

ORDERED that third-party defendant's motion is DENIED.

This constitutes the Decision and Order of the Court.

Dated: June 4, 2007

ENTER

**SO ORDERED**



Rolando T. Acosta, J.S.C.  
**ROLANDO T. ACOSTA**  
J.S.C.

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