

**Parente v 277 Park Ave., LLC**

2008 NY Slip Op 31457(U)

May 28, 2008

Supreme Court, New York County

Docket Number: 0101656/2006

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 101656/2006  
**PARENTE, DENNIS**  
vs.  
**277 PARK AVENUE**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
MAY 30 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion  
Motion Sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

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

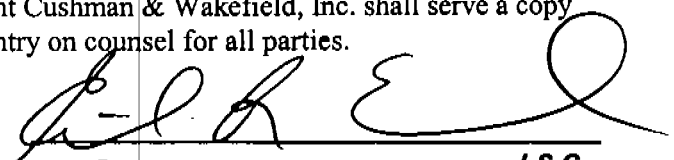
**ORDERED** that third-party defendant Cushman & Wakefield, Inc.'s (Cushman) motion, pursuant to CPLR 3212, for summary judgment dismissing defendant and third-party plaintiff JP Morgan Chase's (Chase) third-party claim against it is granted, and the third-party complaint is dismissed, and the Clerk is directed to enter judgment in favor of third-party defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that plaintiffs Dennis Parente and Mary Ann Parente's (together, plaintiffs) motion, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants 277 Park Avenue, LLC, 277 Park Avenue Condominiums and Chase (together, defendants) is denied; and it is further

**ORDERED** that defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint in its entirety against them is granted; and the complaint is dismissed as against defendants, and the Clerk is directed to enter judgment in favor of defendants, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that counsel for third-party defendant Cushman & Wakefield, Inc. shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

Dated: 5/28/08

  
HON. CAROL EDMEAD J.S.C.

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 35**

----- X  
DENNIS PARENTE and MARY ANN PARENTE,

Index No.: 101656/06

Plaintiffs,

-against-

277 PARK AVENUE, LLC, 277 PARK AVENUE  
CONDOMINIUM and JP MORGAN CHASE,

Defendants.

----- X  
JP MORGAN CHASE,

Third-Party Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendant.

----- X  
**Edmead, J.:**

Third-Party Index No.  
590634/06

**FILED**  
MAY 30 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages sustained by a worker when he fell from a ladder while attempting to replace a fan motor on the ninth floor of a building located at 277 Park Avenue, New York, New York on December 17, 2005. In motion sequence number 001, third-party defendant Cushman & Wakefield, Inc. (Cushman) moves, pursuant to CPLR 3212, for summary judgment dismissing third-party plaintiff JP Morgan Chase's (Chase) third-party claim against it. In motion sequence number 002, plaintiffs Dennis Parente (plaintiff) and Mary Ann Parente move, pursuant to CPLR 3212, for summary judgment in their favor on their Labor Law § 240 (1) claim against defendants 277 Park Avenue, LLC, 277 Park Avenue Condominium (together, Park) and Chase (all defendants together, defendants). In addition, defendants cross-

move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint in its entirety against them.

### BACKGROUND

On the day of the incident, the building where plaintiff's accident took place was owned by defendant Park. Pursuant to a lease agreement with Park, defendant and third-party plaintiff Chase occupied the ninth floor of the building, which it used as an operational trading area. Chase retained plaintiff's employer, third-party defendant Cushman, to perform engineering services at the premises.

Plaintiff testified that, upon arriving to work on the day of his accident, he reported to his supervisor, John Alvarez, who instructed him to go to the ninth floor to look at a booster fan that wasn't working. Plaintiff stated that Alvarez told him that he thought that "the fan motor was bad" (Cushman Notice of Motion, Exhibit H, Parente Deposition, at 67). Plaintiff maintained that it was his job to service the fans on the ninth floor, and that the fan power boxes were located in the ceiling. Accompanied by his supervisor and a helper, plaintiff took two fiberglass A-frame ladders, one of which was three feet tall and the other which was six feet tall, as well as a cart containing assorted tools, to the ninth floor.

Upon arriving on the ninth floor, plaintiff and his co-workers removed various items from a trading desk, including screens, papers and keyboards. Plaintiff maintained that he then placed the three-foot ladder on the desk, and the six-foot ladder on the floor next to the desk. Plaintiff noted that he inspected the ladders, and he was satisfied that they were "working properly" (*id.* at 71). Both ladders had rubber feet and locking mechanisms.

Plaintiff testified that he first climbed up the six-foot ladder to get onto the desk, and then

he climbed up the three-foot ladder to reach the ceiling area where the fan power box was located. Plaintiff noted that the ladders he utilized were not held in place by his co-workers. It should be noted that plaintiff stated that he had positioned the ladder on the desk in the same way on at least a half-dozen occasions prior to the day of his accident, and during those times, he had asked co-workers to hold the ladder as he worked on it, as the ladder had a tendency to shift when he stretched to reach the fan power box.

After lowering a hinged piece of the ceiling, plaintiff then climbed back down the three-foot ladder in order to reposition it approximately six inches. He then climbed back up the ladder to check the fuse on the fan. Plaintiff explained that it was necessary to check the fan's fuse, because the fuse is connected to the fan motor, and the fan motor was not working.

After establishing that the fan motor was not working, plaintiff shut the power switch off. As plaintiff was reaching for the fuse, "the ladder shifted," causing plaintiff to fall and sustain injuries (*id.* at 32). Plaintiff explained that it had been necessary for him to stretch to reach the fan power box, because several desk items contained wires which had made it difficult for him to place the ladder directly under the fan power box.

Alvarez testified that, on the day of the accident, the building engineers responded to a complaint, which came in through a work order that there was a problem with the fan on the ninth floor. He then accompanied plaintiff to the ninth floor with ladders and some tools to find out what the problem was. Alvarez considered this an "emergency repair," as the fan failure could potentially cause computer problems on the trading floor, as the air can get "really hot" on the floor (Cushman Notice of Motion, Exhibit I, Alvarez Deposition, at 53). Alvarez maintained that there was no construction, renovation or demolition work being done on the

ninth floor.

## DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (Santiago v Filstein, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

### LABOR LAW 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1<sup>st</sup> Dept 1983]), provides, in relevant part:

All 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.

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm

directly flowing from the application of the force of gravity to an object or person” (John v Baharestani, 281 AD2d 114, 118 [1<sup>st</sup> Dept 2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but also applies where the work itself involves risks related to differences in elevation (Binetti v MK West Street Company, 239 AD2d 214, 214-215 [1<sup>st</sup> Dept 1997]; see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 500-501]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff’s injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1<sup>st</sup> Dept 2004]).

Although section 240 (1) applies where an employee is engaged “in the erection, demolition, repairing ... of a building or structure,” the enumerated activity “repairing” has been distinguished from work that is considered “routine maintenance” (Esposito v New York City Industrial Development Agency, 1 NY3d 526, 528 [2003]; Smith v Shell Oil Company, 85 NY2d 1000, 1002 [1995]; Gleason v Gottlieb, 35 AD3d 355, 356 [2d Dept 2006] [where plaintiff fell from a ladder as he was attempting to replace a coil that had worn out in an air-conditioning unit, court held that work performed by plaintiff did not constitute “erection, demolition, repairing, altering ...” within the meaning of Labor Law § 240 (1)]).

“Work that involves only component replacement in the course of normal wear and tear is considered routine maintenance and not ‘repairing’ within the meaning of the statute” (Arevalo v Nasdaq Stock Market, Inc., 28 AD3d 242, 243 [1<sup>st</sup> Dept 2006]; Esposito v New York City Industrial Development Agency, 1 NY3d at 528 [replacing worn out components of air

conditioning unit that require replacement in the course of normal wear and tear constituted routine maintenance]; Cordero v SL Green Realty Corporation, 38 AD3d 202, 202 [1<sup>st</sup> Dept 2007] [plaintiff's work replacing worn-out slats in a roll-down motorized security gate that had been fully installed and operational for years deemed component replacement in the course of routine maintenance and not repair]; Anderson v Olympia & York Tower B Company, 14 AD3d 520, 521 [2d Dept 2005]).

Here, as plaintiff's work at the time of his accident constituted routine maintenance and not repair, his injuries do not fall within the purview of Labor Law § 240 (1). Plaintiff testified that, on the day of his accident, along with his superior and a helper, he went to inspect a fan that had burnt out. Plaintiff testified that the building kept a supply of fan motors and controls in inventory on the premises, and, as such, these parts did not have to be ordered. Plaintiff explained that the replacement of the fan motor was a fairly simple job, which required only "removing some screws and some nuts, and that's it, some wires" (Cushman Notice of Motion, Exhibit H, Parente Deposition, at 86). Notably, plaintiff explained that the fan motors, which are approximately six inches by six inches and weigh approximately five pounds, fail "from the fact that they run almost 24/7," and he agreed that replacing the fan motors is a "wear and tear" issue (*id.* at 87). Thus, as plaintiff's injuries do not fall within the purview of Labor Law § 240 (1), defendants are entitled to summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim against them. Accordingly, plaintiffs' motion for summary judgment in their favor on their Labor Law § 240 (1) claim against defendants is denied.

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Here, defendants are entitled to summary judgment dismissing plaintiffs’ Labor Law § 241 (6) claims against them, as a review of the deposition testimony in the record reveals that there was no construction, demolition or excavation work being done on the ninth floor where plaintiff’s accident occurred, and the trading floor was operational at the time of plaintiff’s accident (Esposito v New York City Industrial Development Agency, 1 NY3d at 528; Cordero v SL Green Realty Corporation, 38 AD3d at 202; Gleason v Gottlieb, 35 AD3d at 356; Anderson v Olympia & York Tower B Company, 14 AD3d at 521).

## COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work’ [citation omitted]” (Cruz v Toscano, 269 AD2d 122, 122 [1<sup>st</sup> Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor’s methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Comes v New York State Electric & Gas Corporation, 82 NY2d 876, 877 [1993]; Fresco v 157 East 72<sup>nd</sup> Street Condominium, 2 AD3d 326, 328 [1<sup>st</sup> Dept 2003] [plaintiff submitted no evidence that defendant had the right to control his work, or in fact controlled the injury-producing activity]).

Here, as there is no evidence in the record to indicate that any of the defendants in this case exercised any supervisory control over the manner in which plaintiff performed his work, defendants are entitled to summary judgment dismissing plaintiffs’ common-law negligence and Labor Law § 200 claims against them.

The third-party action is dismissed as a necessary consequence of dismissing plaintiffs’ complaint in its entirety (see Turchioe v AT&T Communications, Inc., 256 AD2d 245, 246 [1<sup>st</sup> Dept 1998]).

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that third-party defendant Cushman & Wakefield, Inc.'s (Cushman) motion, pursuant to CPLR 3212, for summary judgment dismissing defendant and third-party plaintiff JP Morgan Chase's (Chase) third-party claim against it is granted, and the third-party complaint is dismissed, and the Clerk is directed to enter judgment in favor of third-party defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that plaintiffs Dennis Parente and Mary Ann Parente's (together, plaintiffs) motion, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants 277 Park Avenue, LLC, 277 Park Avenue Condominiums and Chase (together, defendants) is denied; and it is further

**ORDERED** that defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint in its entirety against them is granted; and the complaint is dismissed as against defendants, and the Clerk is directed to enter judgment in favor of defendants, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that counsel for third-party defendant Cushman & Wakefield, Inc. shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

DATED: May 28, 2008

ENTER:

**FILED**

Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

MAY 30 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**