

<b>Vilorio v Taconic Inv. Partners, LLC</b>
2008 NY Slip Op 31714(U)
June 12, 2008
Supreme Court, New York County
Docket Number: 0106590/2005
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
*Justice*

PART 17

Index Number : 106590/2005  
VILORIO, FRANKLYN  
vs  
TACONIC INVESTMENT PARTNERS  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_  
Motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and cross motion  
are decided for*

*AT Delord*

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

**FILED**  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/13/08

*[Signature]*  
EMILY JANE GOODMAN

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 17**

-----X  
FRANKLIN VILORIO,

Index No.: 106590/05

Plaintiff,

-against-

TACONIC INVESTMENT PARTNERS, LLC, 111 CHELSEA  
COMMERCE LP, 111 CHELSEA LLC and LEHR  
CONSTRUCTION CORP.,

Defendants.  
-----X

**Emily Jane Goodman, J.S.C.:**

This is an action to recover damages sustained by a worker when he fell from a scaffold at a construction site located at 111 Eighth Avenue, New York, New York on April 28, 2005.

Defendants Taconic Investment Partners, LLC, 111 Chelsea Commerce LP and 111 Chelsea LLC (defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Franklin Vilorio's Labor Law § 200 claim, as well as granting them indemnification, together with attorneys' fees, interest, costs and disbursements, as against co-defendant Lehr Construction Corporation (Lehr). Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants.

It should be noted that, pursuant to a letter, dated December 18, 2007, defendants withdrew that portion of their summary judgment motion seeking indemnification, together with attorneys' fees, interest, costs and disbursements, as against co-defendant Lehr.

**BACKGROUND**

On the date of plaintiff's accident, defendants were the owners of the premises where

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plaintiff's accident occurred. Defendants leased a certain portion of the premises to tenant and non-party WEB M.D. WEB M.D. hired defendant Lehr to act as general contractor for a project to renovate the WEB M.D. space, which was located on the seventh floor of the premises. In its capacity as general contractor, Lehr hired plaintiff's employer, non-party Curtis Partition Corporation (Curtis), to perform certain dry wall and acoustical ceiling work for the project. Plaintiff stated that he received all of his instructions from his Curtis supervisor.

Plaintiff, a union taper, testified that, on the date of his accident, at the request of his supervisor, he was taping a hallway ceiling on the seventh floor of the premises. In order to perform his work, it was necessary for plaintiff to stand on a scaffold, which had four wheels and no guardrails. The scaffold, which had been provided by Curtis, had been placed by someone other than plaintiff approximately two feet away from the edge of a pit leading to a loading area approximately six feet below the floor (the pit). Plaintiff noted that, before he went up onto the scaffold, he did not inspect it or move it in any way from its position, which was set previously for him.

After plaintiff had been taping for approximately an hour, the scaffold upon which he was standing began to move for the first time. The scaffold then partially rolled into the pit, causing plaintiff to fall over into the pit and become injured. Plaintiff also testified that, during his time at the job site, he had never observed any blocks or other devices used to prevent scaffolding from moving, nor did he attend any safety meetings at the site.

James Boyle (Boyle), Lehr's project superintendent, testified that, although there were no barriers surrounding the pit, yellow caution tape was used to warn workers of the elevation change between the floor and the pit. In fact, Boyle stated that he was "adamant" about

maintaining the caution tape, that he would check to make sure the tape was in its place each day before work started, and that Lehr workers would replace the tape whenever it was removed (Defendants' Notice of Motion, Exhibit F, Boyle Deposition, at 49). Boyle also stated that, on the day of plaintiff's accident, the caution tape had been in place.

David Squatter (Squatter), Curtis's senior project manager, also testified that he had noticed caution tape and barricades around the pit during visits to the area before plaintiff's accident.

### 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 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]).

### PLAINTIFF'S LABOR LAW § 200 CLAIM

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

[\*5]  
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.”

Initially, it should be noted that, in his cross motion for summary judgment, plaintiff opposes defendants’ motion for summary judgment dismissing plaintiff’s Labor Law § 200 claim solely on the ground that plaintiff’s Labor Law § 200 claim was “rendered irrelevant by their clear liability under Labor Law section 240 (1).”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796 [2d Dept 2007]). When the methods and means of work is involved, an implicit precondition to imposing liability is that

the party charged with [the responsibility to provide workers with a safe place to work] have the authority to control the activity bringing about the injury. Where the alleged defect or dangerous condition arises from the contractor’s methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 [internal quotation marks and citations omitted]

(Smith v 499 Fashion Tower, LLC, 38 AD3d 523, 524-525 [2d Dept 2007]). Moreover, “general supervisory control is insufficient to impute liability pursuant to Labor Law § 200,

which liability requires actual supervisory control or input into how the work is performed” (Hughes v Tishman Construction Corp., 40 AD3d 305, 311 [1st Dept 2007]). When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and, plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (see Murphy v Columbia University, 4 AD3d 200, 202 [1<sup>st</sup> Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over plaintiff’s work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]; but see Buckley v Columbia Grammar and Preparatory, 841 NYS2d 249 [1st Dept 2007] [finding that the accident, caused by a five-inch spike protruding from an elevator shaft, resulted from the methods and means of the subcontractor’s work, and not from a defective condition on the property, court stated in dicta that “in any event, while notice of the injury-causing condition is not enough, supervisory control still being necessary to make an owner or general contractor liable . . . there is no evidence that either defendant had actual or constructive notice of any inherent defect in the elevator shaft”]).

Here, it appears that the accident resulted from both an allegedly dangerous condition on the property (an open pit) and the methods and means of the work (the failure to lock the scaffold wheels). However, whether the accident resulted from a dangerous condition on the property or from the methods and means of work, defendants are entitled to summary judgment on the Labor Law §200 claim. There is no indication in the record to support a finding that defendants created the unsafe condition at issue, or had actual or constructive notice of it or that defendants

[\* 7 ]

exercised supervisory control over the means and methods of the work. Squatter testified that, at the beginning of each workday, it was Curtis's employees who would set up the scaffolds as they needed them. At the end of the workday, the scaffolds were generally stored in one of the three or four locations on the premises. In addition, Boyle testified that no owner or manager of the building had any involvement with directing the work at the job site, and that Lehr was the only entity that hired contractors to work at the site. Boyle also noted that Curtis provided its own safety equipment and scaffolding.

Further, Jennifer Brennan (Brennan), the property manager for the premises, testified that, during the course of the construction on the seventh floor of the premises, neither she or any of the owners had any general oversight of the work being done on the project. Moreover, plaintiff testified that his supervisor set up and placed the scaffold in its position on the day of his accident, and that he never made any complaints concerning safety at the job site prior to his accident. Thus, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim as against them.

#### PLAINTIFF'S LABOR LAW § 240 (1) CLAIM

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 ... shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists ... 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

[\*8]

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]). 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]).

However, as defendant correctly notes, plaintiff’s motion for summary judgment under Labor Law § 240 (1) is untimely under this part’s 45 day rule. It is true that some confusion was created by the court’s preliminary conference order, which provided that dispositive motions should be “within 45 days of 12/1” (12/1 was both the end date for disclosure and for filing of the note of issue), as opposed to within 45 days of filing of the note of issue, as is normally done. Plaintiff maintains that the cross motion is timely because it was made within 45 days of the end date of “disclosure” provided in the March 1, 2007 conference order. However, that order provided that the “time to file the Note of Issue is extended to 5/31/07” and does not mention an end date for disclosure at all. As the note of issue was filed by plaintiff on April 18, 2007, the cross motion should have been made within 45 days thereof, and was actually 15 days late based on the date stamp. Plaintiff should have, but did not, seek to clarify any ambiguity or confusion with the court, and therefore no good cause exists to deviate from the court rules. Moreover, the court cannot consider the cross motion along with the still timely pending motions, as they are on different issues (Filannino v Triborough Bridge and Tunnel Auth., 34 AD3d 280 [1st Dept 2006]).

Thus, plaintiff's cross motion for summary judgment on liability on his Labor Law § 240 (1) claim as against defendants is denied as untimely filed.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that defendants Taconic Investment Partners, LLC, 111 Chelsea Commerce LP and 111 Chelsea LLC's (defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Franklin Vilorio's Labor Law § 200 claim as against them is granted; and it is further

**ORDERED** that plaintiff's cross motion, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants is denied as untimely filed; and it is further

**ORDERED** that plaintiff's Labor Law § 240 (1) claim will be tried with plaintiff's still pending Labor Law § 241 (6) claim on October 27, 2008.

**This Constitutes the Decision and Order of the Court.**

DATE: June 12, 2008

ENTER:



J.S.C.

**EMILY JANE GOODMAN**

**FILED**

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