

Amigon v Maxwin USA, Inc.

2008 NY Slip Op 32035(U)

July 14, 2008

Supreme Court, Queens County

Docket Number: 0007858/2006

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
JULIAN ADRIEN AMIGON,

Plaintiff,

-against-

Index No: 7858/2006
Motion Date: 4/30/08
Motion Cal. No: 1
Motion Seq. No: 3

MAXWIN USA, INC., MAXWIN BIOTECH, INC.,
MAXWIN BIOTECH-USA, INC., SHEA ECUADOR
AUTO REPAIR, STADIUM STORAGE, LLC. and
BEST FUTURE LAND, LLC.,

Defendants.

-----X

The following papers numbered 1 to 19 read on this motion for an order, pursuant to CPLR 3212, dismissing plaintiff’s complaint Labor Law claims against defendant Best Future Land, LLC; and upon this cross-motion by plaintiff for partial summary judgment against defendant Best Future Land, LLC, and setting this matter down for a trial on damages.

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Notice of Motion-Affidavits-Exhibits.....	1 - 5
Notice of Cross-Motion-Affidavits-Exhibits.....	6 - 10
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Upon the foregoing papers, it is ordered that the motion and cross-motion are resolved as follows:

¹By letter dated June 2, 2008, defendant Best submits a sur-reply with a cover letter indicating that plaintiff inappropriately submits in his reply, case law that was not relied upon in the cross-moving papers. In response, by letter dated June 17, 2008, plaintiff, does not deny this assertion but simply asks this Court to reject the unauthorized sur-reply. As such, this Court will consider the unauthorized sur-reply as well as the portions of plaintiff’s reply which belatedly injects new evidence into the record by way of the reply.

This is a Labor Law action to recover damages for injuries allegedly sustained by plaintiff Julian Adrien Amigon, when he fell from the roof of the premises located at 37-11 126th Street, Astoria, New York, on August 25, 2005, during the course of his employment as a laborer with non-party Miguel and Sons. The location where the accident occurred is a group of buildings upon which plaintiff was hired to put a roof on the newly constructed stores, in which defendants allegedly had an interest. Plaintiff alleges violations of sections 200, 240 and 241 of the Labor Law. Defendant Best Future Land, LLC (“Best”), the owner of the land upon which the structures were built, moves for summary judgment dismissing the complaint as to it on the ground that it neither owns, operates or otherwise controls the premises located at 37-11 126th Street, Astoria, New York. Plaintiff cross-moves for partial summary judgment against Best, and setting this matter down for a trial on damages.

From the outset, it is noted that CPLR 3212(a) provides that motions and cross-motions for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court on “good cause” shown. Under the standard announced in Brill v. City of New York, 2 N.Y.3d 648 (2004), leave to file a late motion for summary judgment under CPLR 3212(a) requires a showing of a satisfactory explanation for the delay in filing the motion. “Where, as here, no deadline is set by the court for the making of summary judgment motions, no such motion may be made more than 120 days after the filing of the note of issue except with leave of court on good cause shown.” Tower Insurance Company of New York v Razy Associates, 37 A.D.3d 702 (2nd Dept. 2007)[citations omitted]; Paterno v. CYC, LLC, 46 A.D.3d 788 (2nd Dept. 2007). “Good cause” requires a satisfactory explanation for the untimeliness of the motion rather than permitting a late motion simply because it has merit and the adversary is not prejudiced. See, Brill v City of New York, *supra*; Miceli v State Farm Mut. Auto Ins. Co., 3 N.Y.3d 725, 726-727(2004); Soltes v 260 Waverly Owners, 42 A.D.3d 565 (2nd Dept. 2007).

Here, although the note of issue was filed on November 12, 2007, plaintiff’s cross-motion for summary judgment was not filed until April 4, 2008. Inasmuch as plaintiff did not seek leave of court to make a late cross-motion for summary judgment or provide any showing of good cause for the delay in his cross-moving papers, denial of the cross-motion is generally mandated. See, Miceli v State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725 (2004); Brill v City of New York, 2 N.Y.3d 648 (2004); Soltes v 260 Waverly Owners, 42 A.D.3d 565 (2nd Dept. 2007). Nevertheless, although plaintiff’s cross-motion for summary judgment is untimely, “[] an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (citations omitted). In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause [see, CPLR 3212(a)] to review the untimely motion or cross motion on the merits.” Grande v. Peteroy, 39 A.D.3d 590, 592 (2nd Dept. 2007); see, Ellman v. Village of Rhinebeck, 41 A.D.3d 635 (2nd Dept. 2007); Justice v. City of New York, 8 A.D.3d 237 (2nd Dept. 2004); Kaufman v. Kehler, 5 A.D.3d 564 (2nd Dept. 2004); Boehme v. A.P.P.L.E., 298 A.D.2d 540 (2nd Dept. 2002); compare, Bickelman v. Herrill Bowling Corp., 49 A.D.3d 578, 853 N.Y.S.2d 383 (2nd Dept. 2008) [holding that the Supreme Court should not have entertained Herrill’s separate motion for summary judgment, which

was untimely. Herrill failed to demonstrate good cause for its delay in making the motion []. Contrary to Herrill's contention, the issues raised on its motion were not nearly identical to the issues raised on Polito's motion []; Bressingham v. Jamaica Hosp. Medical Center, 17 A.D.3d 496 (2nd Dept. 2005) [holding that the branch of the cross motion of defendant Jamaica Hospital Medical Center which was for summary judgment dismissing the complaint insofar as asserted against it, made more than 120 days after the filing of the note of issue, was untimely (see CPLR 3212 [a]) and should not have been entertained without a showing of good cause for the delay []. There was no such showing here. While the pending motion of the codefendant, Pyrosignal & Suppression, Inc., for similar relief would have been a sufficient basis to consider the untimely motion had the motion and cross motion been nearly identical].

Here, as Best's timely motion and plaintiff's untimely cross-motion are for summary judgment, which requires this Court to make a determination as to whether the record before it is devoid of triable issues of fact, the nearly identical issues present a sufficient basis to consider the untimely cross motion. "Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (see CPLR 3212[b])." Grande v. Peteroy, 39 A.D.3d 590, 592 (2nd Dept. 2007); see, Ellman v. Village of Rhinebeck, 41 A.D.3d 635 (2nd Dept. 2007). Accordingly, this Court will consider both the motion and cross motion for summary judgment.

With respect to the motion by Best for dismissal of plaintiff's claims under sections 200, 240 and 241 of the Labor Law,² which was timely filed within the prescribed period, it is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See,

² Labor Law § 200 provides, in pertinent part that: "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..."

Labor Law § 240 provides, in pertinent part that: "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 § 241(6) provides, in pertinent part that: "All areas in which construction, excavation or demolition work is being performed shall be constructed, shored, equipped, guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to the persons employed therein..."

D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2d Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

“Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace [see, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993)]. To be held liable under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury... (citations omitted).” Mas v. Kohen, 283 A.D.2d 616 (2001); see, Kwang Ho Kim v. D & W Shin Realty Corp., 47 A.D.3d 616 (2nd Dept. 2008); Ragone v. Spring Scaffolding, Inc., 46 A.D.3d 652 (2nd Dept. 2007); Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 850 (2nd Dept. 2006); Cun-En Lin v. Holy Family Monuments, 18 A.D.3d 800 (2nd Dept. 2005); Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2003). Further, liability attaches where the owner or contractor created the hazard, or had actual or constructive notice of the unsafe condition, and exercised sufficient control over the work being performed to correct or avoid the unsafe condition. See, Leon v J & M Peppe Realty Corp., 190 A.D.2d 400 (1st Dept. 1993). Where the dangerous condition is the result of the contractor’s methods and the owner exercises no supervisory control over the construction, liability will not attach to the owner. See, Young Ju Kim v. Herbert Const. Co., Inc., 275 A.D.2d 709 (2nd Dept. 2000); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993). Likewise, “where the alleged defect or dangerous condition arises from the subcontractor’s methods and the owner or general contractor exercise no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200 (citations omitted).” Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 850 (2nd Dept. 2006).

A cause of action under section 240(1) of the Labor Law, imposes a nondelegable duty which applies when an injury is the result of one of the elevation-related risks contemplated by that section [see, Rose v. A. Servidone, Inc., 268 A.D.2d 516 (2000)], which prescribes safety precautions to protect laborers from unique gravity-related hazards such as falling from an elevated height or being struck by a falling object where the work site is positioned below the level where materials or loads are being hoisted or secured. See, Narducci v Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); Misseritti v Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995); Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993); Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Cambry v. Lincoln Gardens, 50 A.D.3d 1081 (2nd Dept. 2008); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). Thus, “[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity.” Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999); see, Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625 (2nd Dept. 2007); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). “[R]outine maintenance activities in a non-construction, non-renovation context are not protected

by Labor Law § 240 (citations omitted).” Paciente v. MGB Development, Inc., 276 A.D.2d 761 (2nd Dept. 2000); Garcia v. Piazza, 16 A.D.3d 547 (2nd Dept. 2005); see, Jani v. City of New York, 284 A.D.2d 304 (2nd Dept. 2001).

Moreover, Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors “to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed.” Reinoso v. Ornstein Layton Management, Inc., 19 A.D.3d 678 (2nd Dept. 2005); see, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 347 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993); Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625 (2nd Dept. 2007). It is well settled that to support a § 241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a “specific” standard of conduct, and that such violation was the proximate cause of his injuries. See, Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501-502 (1993); Cun-En Lin v. Holy Family Monuments, 18 A.D.3d 800 (2nd Dept. 2005); Vernieri v Empire Realty Co., 219 A.D.2d 593, 597 (1995).

In the case at bar, Best demonstrated its entitlement to dismissal of the common law and Labor Law § 200 claims by proffering the depositions of plaintiff and Heng Liu, on behalf of Best. Plaintiff testified that he worked and took direction from “his boss,” Miguel and Sons, and was unaware of who hired Miguel and Sons to engage in roofing work. Mr. Liu testified that he was not informed of any roofing work occurring on the structures, and was unaware of any roofs being replaced on the structures. He further testified that Best did not in any way control or supervise such work. Plaintiff, in response to Best’s prima facie showing, failed to present sufficient evidence to raise a triable issue of fact with regard to whether Best maintained the requisite supervision or control over the activity which caused the injury to plaintiff, in order to avoid its occurrence or correct an unsafe condition under Labor Law § 200. See, Locicero v. Princeton Restoration, Inc., 25 A.D.3d 664 (2nd Dept. 2006); Braun v. Fischbach and Moore, Inc., 280 A.D.2d 506 (2001). Consequently, the claims asserted under common-law negligence and section 200 of the Labor Law must be dismissed.

With respect to Labor Law §§ 240(1) and 241(6), Best contends that because it is not an “owner” within the meaning of the Labor Law, strict liability cannot be imposed upon it and that it thus is entitled to dismissal of those claims. Best contends that there are several structures, referred to as Q Huts, which are situated upon the land which it owns, but asserts that when it purchased the land on December 22, 2004, the structures were specifically excluded from the contract. In support of this contention, Best proffers, inter alia, the contract of sale with an annexed typewritten page enumerated as page eleven, entitled “Seller’s representation regarding Leases and Tenancies.” The document contains a handwritten provision number eight which states, “Q Huts are personal property and are not conveyed w/ k of sale.” Additionally, Best submits the affidavit of Javed Husseini, the President of the defaulting defendant Maxwin Bio-Tech-USA, Inc., who previously commenced an action in the Supreme Court entitled *Maxwin Bio-Tech-USA, Inc. and Javed Husseini v. Best Future Land, LLC*, to forestall a landlord/tenant action that Best commenced against them in 2006. In the affidavit submitted on the underlying Supreme Court action, Best alleges that Mr. Husseini admits

to being the owner of the Q Huts that plaintiff was repairing at the time of the accident, and that he built, installed and maintained the structures. Thus, Best asserts that as it owns the land and not the structures upon which plaintiff was allegedly injured, it cannot be held liable as it is not the “owner” for the purposes of the Labor Law.

“The meaning of ‘owners’ under Labor Law § 240(1) and § 241(6) has not been limited to titleholders but has ‘been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit’ (citations omitted).” Kwang Ho Kim v. D & W Shin Realty Corp., 47 A.D.3d 616, 618 (2nd Dept. 2008); see, Markey v. C.F.M.M. Owners Corp., 51 A.D.3d 734 (2nd Dept. 2008). “The key factor in determining whether a non-titleholder is an ‘owner’ is the ‘right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control’ (citations omitted).” Ryba v. Almeida, 27 A.D.3d 718, 719 (2nd Dept. 2006); see, Billman v. CLF Management, 19 A.D.3d 346 (2nd Dept. 2005). However, with the respect to titleholders and general contractors, the Labor Law imposes “a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, regardless of the absence of control, supervision or direction of the work, and that liability [] may not be escaped by delegation.” Celestine v. City of New York, 59 N.Y.2d 938, 940 (1983). More pointedly, “[l]iability rests upon the fact of ownership and whether [an owner] had contracted for the work or benefitted from it are legally irrelevant.” Coleman v. City of New York, 91 N.Y.2d 821, 822 (1997).

In the case at bar, although the “Seller’s representation regarding Leases and Tenancies” contains relevant information, such as the names of the parties, the subject premises, to wit, 37-11 126th Street, Flushing, NY 11368, and the month and year of December 2004, problematic to this Court is the fact that the aforementioned document has no initials or signatures, and was annexed to the contract as page eleven, after the execution of both the signature page and contract rider contained on pages nine and ten of the contract, respectively. Moreover, although the document makes reference to sections “4.03 and 6 of the Contract of Sale,” the handwritten provision at issue provides no context from which this Court may draw an inference, directly or indirectly, with respect to the “Q Huts” and their purported exclusion from the contract of sale. Indeed, based upon this Court’s reading of the contract, there appears to be no other references to the Q Huts in the contract of sale which would provide a nexus to the subject provision on page eleven. Moreover, the affidavit of Mr. Hussein, in which Best alleges that he admitted to being the owner of the Q Huts that plaintiff was repairing at the time of the accident, and that he built, installed and maintained the structures, is wholly devoid of any evidence which would remotely suggest that Mr. Hussein was the owner of the structures. In fact, Mr. Hussein stated that he was a tenant on the premises, and although he indicated that he built the four structures pursuant to a lease agreement with the former owner, that by no means is illustrative of any ownership interest vested in him. To the contrary, the affidavit does more to belie Best’s position that it owns the land and not the structures, and bolsters plaintiff’s contention that Best is indeed an “owner” under the Labor Law. From the submissions on this record, there are clearly issues of fact as to the ownership of the structures or Q Huts, and this Court cannot discern whether Best is an “owner” for the purposes of the Labor Law.

Moreover, there is an issue regarding the type of ownership interest that Best maintains, as out-of-possession owners are governed by similar standards, but appears to require a further inquiry. Although liability shall be strictly construed as against all owners, “common [] to all cases imposing [] liability on an out-of-possession owner is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest.” Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46, 51 (2004); see, Passante v. Peck & Sander Properties, LLC, 33 A.D.3d 980 (2nd Dept. 2006). The Court of Appeals recently considered the absolute liability of an out-of-possession owner in Sanatass v. Consolidated Investing Co., Inc., 10 N.Y.3d 333 (2008). In this matter, defendant Consolidated Investing Company owned a commercial building in which C2 Media, LLC occupied the 11th floor of the building under a lease assignment from the original tenant, Chroma Copy International. C2 Media agreed to abide by the terms of Chroma’s lease, including contract and rider provisions requiring it to obtain Consolidated’s prior written consent to make changes to the premises, including “renovations, decorations, additions, Nevertheless, C2 Media hired JM Haley Corporation to install a commercial air conditioning unit weighing approximately 1,500 to 2,500 pounds, without Consolidated’s knowledge or prior written approval. Plaintiff Christopher Sanatass, a mechanic employed by JM Haley was injured when he and a coworker hoisted the air conditioning over their heads, one of the manual material lifts failed, and the unit dropped and nearly crushed him. The Court of Appeals, while referencing its prior precedents, to wit, Celestine v. City of New York, 59 N.Y.2d 938 (1983), Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555 (1993) and Coleman v. City of New York, 91 N.Y.2d 821 (1997), stated the following [10 N.Y.3d at 339-340]:

In a trio of cases, we examined the liability of out-of-possession owners under the Labor Law. First, in Celestine v City of New York [], a worker who sustained injuries while building a subway line commenced a Labor Law action against the Long Island Rail Road (LIRR), the property owner. LIRR moved for summary judgment dismissing the claim, submitting that it should not be deemed an "owner" for purposes of Labor Law § 241 (6) because the property was subject to an easement in favor of the City of New York and the New York City Transit Authority. In declining to dismiss the section 241 (6) claim, the court rejected LIRR's argument, reasoning that the statute imposes a nondelegable duty on owners to furnish adequate protection to workers "regardless of the absence of control, supervision or direction of the work"[]. Next, in Gordon, an employee of Ebenezer Railcar Services brought a Labor Law § 240 (1) action against Eastern Railway Supply, the property owner, seeking damages for personal injuries occasioned when he fell from a ladder. On a motion for summary judgment, Eastern contended that it could not be liable as an owner under section 240 (1) because it had leased the property to Ebenezer, its wholly owned subsidiary, and "neither contracted to have the work performed nor was the work performed for its benefit" []. Relying on Celestine, we disagreed and

concluded that Eastern was responsible because liability "rests upon the fact of ownership and whether Eastern had contracted for the work or benefitted from it are legally irrelevant" []. Finally, in *Coleman v City of New York* [], an employee of the New York City Transit Authority suffered elevation-related injuries while performing repair work and pursued a Labor Law § 240 (1) claim against the City of New York as the property owner. The City claimed that it should not be strictly liable because it had leased the property to the Transit Authority and "lacked any ability" to protect Authority workers based on the statutory scheme creating the Authority and governing their relationship []. We rejected the City's position, finding that Celestine and Gordon articulated a "bright line rule" that section 240(1) applied to all owners regardless of whether the property was leased out and controlled by another entity or whether the owner had the means to protect the worker [].

Here, like the defendants in *Celestine*, *Gordon* and *Coleman*, Consolidated seeks to avoid liability under Labor Law § 240 (1) by contending that it is not an "owner" for the purposes underlying the statute. Relying on its lack of knowledge of plaintiff's work, undertaken at the behest of the tenant, Consolidated asks us to import a notice requirement into the Labor Law or, conversely, create a lack-of-notice exception to owner liability. But our precedents make clear that so long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive--this is precisely what is meant by absolute or strict liability in this context (see *Blake*, 1 NY3d at 289). We have made perfectly plain that even the lack of "any ability" on the owner's part to ensure compliance with the statute is legally irrelevant (see *Coleman*, 91 NY2d at 823). Hence, Consolidated may not escape strict liability as an owner based on its lack of notice or control over the work ordered by its tenant.

The Court, in juxtaposing its province with that of the Legislature, and Consolidated's request to cull out an exception to the statutory construct for owners, further stated [10 N.Y.3d at 342]:

At bottom, Consolidated asks us to hold that an owner may insulate itself from liability by contracting out of the Labor Law. We decline its invitation to engraft this new exception onto the statute. To allow owners to do so by the simple expedient of a lease provision, as suggested by the dissent, would eviscerate the strict liability protection afforded by the Labor Law. As we have repeatedly stated, section 240 (1) exists solely for the benefit of workers and operates

to place the ultimate responsibility for safety violations on owners and contractors, not the workers. Any modification to this strict liability statute must be made by the Legislature, not this Court.

In light of the foregoing, the issues presented cannot be resolved at this juncture. Consequently, despite Best's contentions to the contrary, there are issues of fact as to whether it is an owner within the meaning of the Labor Law, and whether it is an out-of-possession owner, which precludes summary dismissal of the Labor Law § 240(1) and § 241(6) claims. Arguendo, even if there were no issues of fact, the Appellate Division, Second Department, has previously addressed the issue of ownership of the land only, and not the structure upon which a plaintiff was injured. Unlike Mangiameli v. Dilenti, 171 A.D.2d 162 (3rd Dept. 1991), the Third Department case upon which Best premises his entitlement to dismissal, Cannino v. Locust Valley Fire District, 241 A.D.2d 534 (2nd Dept. 1997) and Mejia v. Moriello, 286 A.D.2d 667 (2nd Dept. 2001), which are binding and not persuasive, further undercut Best's argument. In Cannino, the Appellate Division, Second Department held that "liability under Labor Law § 241(6) also lies against the owner of the land on which the subject building is located, notwithstanding that the owner may not own the building itself (citations omitted)" [241 A.D.2d at 535], and further determined in Mejia that "liability under Labor Law § 240(1) may lie against the owner of land on which a building is located, even though the owner leased the land to another and did not own the building itself..." [286 A.D.2d at 668].³

Accordingly, the motion by defendant Best Future Land, LLC, for summary judgment dismissing the complaint on the ground that plaintiff's accident does not come under the purview of sections 200, 240(1) or 241(6) of the Labor Law, is granted to the extent that the complaint hereby is dismissed as to that defendant on the common law negligence and Labor Law § 200 claims. The balance of the motion is denied as there are triable issues of fact present. Likewise, for the same reasons as set forth above, the cross-motion by plaintiff for partial summary judgment on all the Labor Law claims are denied.

Dated: July 14, 2008

.....
J.S.C.

³ Although these case may be dispositive of the issues, particularly in view of the fact that the entire premise of Best's argument is that it owned the land and not the structures, the cases do not give guidance as to what set of circumstances would give rise to strict liability against the land owner. Indeed, Cannino indicates that "liability lies" against a land owner, whereas the more recent matter of Mejia, states that "liability may lie." Thus, this Court is constrained to find, as it has, that there are factual issues precluding summary judgment.