Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **LAWRENCE V. CULLEN** IA Part 6
Justice

JOSELITO DIAZ x

Plaintiff

- against -

333 EAST 66TH STREET CORPORATION, et al.

Defendant. x

Index Number 10864 2006

Motion Date October 7, 2008

Motion Cal. Number 6

Motion Seq. No. 2

The following papers numbered 1 to 17 read on this motion by plaintiff and cross motion by Helen Hamlin to reargue a prior order of this Court dated July 15, 2008, which, *inter alia*, granted the branch of the motion by 333 East and Lawrence (333 East/Lawrence) to dismiss the complaint and granted the branch of the motion which sought indemnification from Hamlin, denied plaintiff's cross motion for summary judgment on his Labor Law § 240(1) claim, and granted the cross motion by Hamlin for summary judgment in her favor as against Serene Construction Corp.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1- 4
Notice of Cross Motion-Affidavits-Exhibits	5- 7
Answering Affidavits-Exhibits	8-13
Reply Affidavits	14-17

Upon the foregoing papers it is ordered that the motion to reargue is granted, and upon reargument, the decision and order of this Court dated July 15, 2008, is recalled and vacated, and the following is substituted therefor:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained on March 1, 2006, when he fell from an elevated height while painting and plastering a ceiling and closet in connection with a renovation project to adjoin two apartments in a cooperative building at 333 East 66th Street, in New York City (premises). Defendant 333 East 66th Street owns the

residential building. Lawrence Properties, Inc., is the managing agent. Plaintiff was employed by Serene Construction Corp. (Serene), which was hired by Hamlin to perform the renovation work. Hamlin owns the two cooperative apartments which were being joined into one. Hamlin notified defendant 333 East 66th Street Corporation and obtained the requisite approval for the renovation.

Background

In support of the original motion, the movants submitted, *inter alia*, a certified transcript of plaintiff's examination before trial testimony wherein he testified to the following: plaintiff was employed by Serene to perform painting and plastering work at the premises. He was putting plaster up on a closet at the premises when he fell from an elevated height. Plaintiff testified that his employer directed him to stand on the inverted buckets, one placed on top of the other, to access the closet area where he was plastering; that he was elevated at least eight feet when he fell. Plaintiff further testified that he was supervised by his boss "Stanley" of Serene Construction, Corp., and he was told to use the buckets because someone else was using the ladders at the work site.

It is undisputed that plaintiff was under the supervision and direct control of his employer, Serene, and that 333 East/Lawrence were not involved in the supervision or control of the renovation project.

Hamlin, the proprietary lessee, testified that she was required to get the approval from the co-op board for the renovations at the premises; that she retained Serene to perform the work and that she submitted her architect's plans to the managing agent, Lawrence Properties, along with a letter indicating that she had retained Serene to perform the work. Hamlin further testified that there were no requirements placed by the building owner and agent, in hiring the contractor, except as to insurance; 333 East/Lawrence required that the contractor be licensed and required Hamlin to obtain insurance naming 333 East as an additional insured. Finally, Hamlin testified that no one from 333 East or Lawrence ever worked in the apartment during the renovation.

Labor Law § 240(1)

Section 240(1) of the Labor Law imposes absolute liability on owners, contractors, and their agents for injuries to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," which

result from the failure to provide "proper protection" against dangers associated with elevation differentials (Melo v. Consolidated Edison of New York, Inc., 92 NY2d 909 [1998]). To provide such protection, section 240 requires owners and contractors to furnish "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." The statute imposes a non-delegable duty on owners and contractors to provide adequate safety measures at the work site, and is to be construed liberally to accomplish its purpose of placing the ultimate responsibility on the owner and general contractor, rather than individual workers, for safety practices (Zimmer v. Chemung Council for Performing Arts, Inc., 65 NY2d 513 [1985]).

Upon their original motion, defendants 333 East/Lawrence argued that neither could be considered an "owner" properly held liable because they did not permit or suffer the plaintiff to work upon the property, and because the plaintiff was hired as a direct result of Hamlin's dealings with Serene. While some cases have employed such reasoning to absolve owners from liability under the Labor Law (see, e.g. Brown v. Christopher St. Owners Corp., 211 AD2d 441 [1995], affd on other grounds 87 NY2d 938 [1996]; Aviles v. Crystal Mgt., 233 AD2d 129 [1996]), in the Second Department, defendant(s) is an owner as a matter of law, strictly liable pursuant to Labor Law § 240(1) (see, Otero v. Cablevision of New York, 297 AD2d 632 [2002]). The term "owner," for purposes of the applicable sections of the Labor Law, "has not been limited to the titleholder ... [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" (citation omitted) (Bach v. Emery Air Freight Corp., 128 AD2d 490, 491 [1987]).

In Sanatass v. Consolidated Investing Co., Inc., (10 NY3d 333 [2008]), the Court of Appeals recently held that an owner can be held liable under Labor Law § 240(1) even though it had no notice of, or control over, the injury producing work. In reaching this conclusion, the Court relied on its earlier precedents which, "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." 10 NY3d at 340, quoting, Coleman v. City of New York, 91 NY2d 821, 822 (1997). Under this rule as reaffirmed in *Sanatass,* defendants 333 East is absolutely liable as an owner for the purposes of the Labor Law based on its ownership of the property where the accident occurred and its lack of involvement or control over the work performed is "legally irrelevant" (id.)

To establish liability under section 240, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries sustained (Bland v. Manocherian, 66 NY2d 452 [1985]). Proximate cause is demonstrated based on a showing that a "defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury'" (Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993)(citation omitted). It is not necessary for plaintiff to demonstrate that the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable (Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 [1996]; [and comparative negligence is not a defense]; see, Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 [2003]).

Thus, as the owner and general managing agent of the subject building undergoing physical alterations, 333 East and Lawrence may be liable pursuant to Labor Law § 240(1) and § 241(6) once the plaintiff establishes violations thereof that proximately caused his injuries (see, Otero v. Cablevision of N.Y., 297 AD2d 632 [2002]; Pineda v. 79 Barrow St. Owners Corp., 297 AD2d 634 [2002]). Summary judgment in plaintiff's favor is warranted as to liability on his Labor Law § 240(1) claim since the uncontroverted record shows that plaintiff fell while working at an elevated work site, and that the lack of safety devices required under the statute was a substantial factor in causing his injuries. The branch of defendants' motion which seeks to dismiss plaintiff's claims under section 240 is denied and the cross motion by plaintiff for summary judgment on his Labor Law § 240(1) claim is granted.

Labor Law Section 241(6)

That branch of defendant's motion which seeks summary judgment dismissing plaintiff's claim for a violation of Labor Law § 241(6) is granted. Labor Law § 241(6) imposes a nondelegable duty upon building owners and their agents "to provide reasonable and adequate protection and safety" to persons employed in or lawfully frequenting "[a]ll areas in which construction, excavation or demolition work is being performed." (Id. [emphasis added]; Rizzuto v. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; see Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]). The history of section 241 "clearly manifests the legislative intent to place the 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.'" (Id., quoting 1969 NY Legis Ann, at 407-408 [emphasis in original].)

The liability for injuries resulting from a violation of Labor Law § 241(6) is "absolute" (Allen v. Cloutier Constr. Corp., 44 NY2d 290, 300 [1978], rearg denied 45 NY2d 776 [1978]). In addition, property owners and their agents are vicariously liable under section 241(6) for injuries sustained by construction workers due to the negligence of a subcontractor in failing to maintain the work site in reasonably safe condition, even when the owner exercises no direct supervisory control over the subcontractor (id.; see, also Rizzuto v. Wenger Contr. Co., supra at 348-349).

In order to establish his Labor Law § 241(6) claim, however, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common-law standards of care (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 503-505 [date]; Ares v. State, 80 NY2d 959, 960 [1992]; Fair v. 431 Fifth Avenue Assocs., 249 AD2d 262, 263 [1998]; Vernieri v. Empire Realty Co., 219 AD2d 593, 597 [1995]; Adams v. Glass Fab, Inc., 212 AD2d 972, 973 [1995]). In the case at bar, in support of his claim under section 241(6), relies upon numerous provisions which are inapplicable to the facts at hand.

Sections 12 NYCRR 23-1.1 - 1.4 are inapplicable as these sections consists of introductory findings of fact, a general statement of the application of the rules and a list of definition of terms. 12 NYCRR 23-1.5 is not sufficiently specific to support a claim under Labor Law § 241(6) (see, Carty v. Port Authority of New York and New Jersey, 32 AD3d 732 [2006]; Sajid v. Tribeca North Assoc., 20 AD3d 301 [2005]). 12 NYCRR 23-1.7 requires that ladderways, stairways, work areas and passages be kept clear of accumulated debris and is inapplicable because this case doesn't involve accumulated debris or tripping hazzards. 12 NYCRR 23-1.16 and 1.17 involve the construction and inspection of safety belts and life nets, respectively. Since there are no allegations of a failure to properly construct or inspect safety belts or life net, these sections do not apply. 12 NYCRR 23-1.21 is inapplicable because it outlines the construction requirements for ladders and how the same are to be secured. No ladders were employed under the facts of this case. 12 NYCRR 23-1.22 involves ramps and runways, which were not used under the instant facts. 12 NYCRR 23-5.3, 5.10 and 5.18 all deal with scaffolds which also were not used herein. Finally, 12 NYCRR 23-9.6 involves aerial baskets, which are not relevant under the instant facts.

Labor Law Section 200

An owner's or general contractor's common-law duty to maintain a safe workplace is codified in Labor Law section 200 (see, Gasper v. Ford Motor Co., 13 NY2d 104 [1963]). To be charged with liability under this statute, an owner, general contractor, or construction manager must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition" (Russin v. Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). On the other hand, a showing that a defendant exercised control or supervision over the work causing injury is not necessary when a defendant had actual or constructive notice of the defect causing the injury or was responsible for creating the condition (Bonura v. KWK Associates, Inc., 2 AD3d 207 [2003]).

Here, there is no evidence and plaintiff does not claim that the defendants controlled or supervised the activity causing plaintiff's injuries, or that they had notice of any defect causing injury or caused or created the condition. Accordingly, the Labor Law section 200 claim is dismissed.

Indemnification

Defendants 333 East/Lawrence contend that Hamlin should reimburse them for any recovery made by plaintiff under common-law and contractual indemnification, and for contribution under CPLR Article 14. 333 East/Lawrence are not entitled to contractual indemnification against Hamlin as the anti-subrogation rule provides that an insurance company cannot recover from its own insured for the very risk for which the insured was covered (see, North Star Reins. Corp. v. Continental Ins. Co., 82 NY2d 281 [1993]; Small v. Yonkers Contracting, Inc., 242 AD2d 378 [1997]). Since the same insurance company covers 333 East/Lawrence and Hamlin for the same risk, the anti-subrogation rule applies, and indemnification is barred to the extent that any verdict in favor of the plaintiff is within the limits of the policy purchased by 333 East/Lawrence (see, Yong Ju Kim v. Herbert Construction Co., 275 AD2d 709 [2000]).

333 East/Lawrence however, is entitled to common-law indemnification against Serene. Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious (see, Taeschner v. M & M Restorations, 295 AD2d 598 [2002]; Charles v. Eisenberg, 250 AD2d 801 [1998]). It is well established that where an owner's liability is predicated solely on Labor Law § 240(1) and is not predicated on a

finding of negligence on its part, it has a common-law right to indemnification from a contractor if the contractor's own negligence contributed to the accident or the contractor directed, supervised and controlled the work giving rise to the injury (see Buccini v. 1568 Broadway Assocs., 250 AD2d 466 [1998]; Marek v. DePoalo & Son Bldg. Masonry Inc., 240 AD2d 1007 [1997]; Malecki v. Wal-Mart Stores, Inc., 222 AD2d 1010 [1995]). 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" (Correia v. Professional Data Mgt., 259 AD2d 60, 65 [1999]; accord Coque v. Wildflower Estates Developers, Inc., 31 AD3d 484 [2006]; Priestly v Montefiore Med. Ctr., Einstein Med. Ctr., 10 AD3d 493, 495 [2004]) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v. Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 [2003]). The record contains no evidence that 333 East/Lawrence maintained any direction or control over the safety aspects of the work or the manner in which the plaintiff carried out his tasks.

Similarly, under the circumstances, Hamlin is entitled to summary judgment on her contractual indemnity claims against Serene based on the contractual agreement requiring Serene to indemnify and hold her harmless.

Hamlin is not liable for plaintiff's injuries under Labor Law §§ 240(1) or 241(6) because she did not direct or control the subject work (Krukowski v. Steffensen, 194 AD2d 179 [1993]; Edwards v. Ackerman, 157 AD2d 770 [1990]), and because her status as the proprietary lessee entitles her to the so-called "homeowner's exemption" (see, e.g. Xirakis v. 1115 Fifth Ave. Corp., 226 AD2d 452 [1996]). There is no indication that the term "dwelling" was meant to be limited to a "house" (Id.) Furthermore, the purpose of the statutory exemption was to protect those owners "who are not in a position to know about, or provide for the responsibilities of absolute liability" (Cannon v. Putnam, 76 NY2d 644, 649 [1990], quoting Recommendation of NY Law Rev Commn, reprinted in 1980 McKinney's Session Laws of NY, at 1658). Given the purpose of the statutory exemption, the courts have held that "there is no reason why the term 'dwelling' should only apply to a 'house' and should not extend to a single-family apartment unit" (see, Xirakis v. 1115 Fifth Ave. Corp., supra).

Conclusion

The branch of the motion by 333 East/Lawrence to dismiss plaintiff's claims under Labor Law section 240 is denied. The branches of the motion for summary judgment in their favor dismissing plaintiff's claims under Labor Law sections 200 and 241(6), insofar as asserted against them, are granted. The branch of the motion which seeks indemnification from Hamlin is denied. The branch of the motion which seeks indemnification from Serene is granted.

The cross motion by plaintiff for summary judgment in his favor on his claims pursuant to Labor Law section 240(1), is granted.

The cross motion by Hamlin for contractual indemnification from Serene is granted.

Dated: February 11, 2009

LAWRENCE V. CULLEN, J.S.C.