

**Gutterrez v PREFCO XXIV Ltd. Partnership**

2009 NY Slip Op 30844(U)

April 13, 2009

Supreme Court, New York County

Docket Number: 112956/05

Judge: Marcy S. Friedman

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

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 112956/2005

**GUITTERREZ, FABIAN**

VS.

**PREFCO XXIV**

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

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

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

MOTION SEQ. NO. 004

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

this motion is for summary judgment

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

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

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

PAPERS NUMBERED

1  
2-5  
6, 7

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion is

APR 16 2009

**DECIDED IN ACCORDANCE WITH COUNTY CLERK'S OFFICE  
ACCOMPANYING DECISION/ORDER. NEW YORK**

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

Dated: 4/13/09

Marcy S. Friedman  
**MARCY S. FRIEDMAN**

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
FABIAN GUITTERREZ and JOANNE  
GUITTERREZ,

*Plaintiffs,*

- against -

PREFCO XXIV LIMITED PARTNERSHIP,  
STEELECASE, INC. and R&R SCAFFOLDING  
LTD.,

*Defendants.*

Index No.: 112956/05

DECISION/ORDER

**FILED**  
APR 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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x

In this Labor Law action, plaintiff sues for injuries sustained while he was working on the roof of 4 Columbus Circle in Manhattan on October 8, 2002. Defendant R&R Scaffolding Ltd. (“R&R”) moves for summary judgment dismissing the complaint and all cross-claims against it. By separate motions, defendant PREFCO XXIV Limited Partnership (“Prefco”) and defendant Steelcase Inc. (“Steelcase”) move for the same relief.

At the time of the accident, Prefco owned the building, non-party Columbus Circle Realty Corp. (“CCRC”) was the net lessee, and Steelcase was a tenant in the building.<sup>1</sup> Plaintiff was employed by third-party defendant Temco Service Industries, Inc. (“Temco”). Temco, the managing agent of the building, hired R&R to conduct quarterly inspections and maintenance of the scaffold equipment used at the building. Finally, TREMCO, LP (“Tremco”) was the agent

<sup>1</sup> While plaintiff contends that a triable issue of fact exists as to whether CCRC was the alter ego of Steelcase, this issue is immaterial because, as held below, plaintiff otherwise fails to raise a triable issue of fact as to Steelcase’s liability.

of the owner of the building.

It is undisputed that at the time of the accident, plaintiff was on the roof, installing a scaffold rig system for window washing. In particular, plaintiff was installing a “davit arm” which is a structure that extends over the outer wall of a building and supports a motor driven scaffold used on the outside of the building by window washers. (P.’s Aff. in Opp. to R&R’s Motion, ¶6.) A davit arm is, in turn, secured to the building by insertion into sockets that are mounted onto the roof of the building. Plaintiff’s job was the installation or “rigging” of the scaffold (see P.’s Dep. at 111), not performance of window washing while riding the scaffold. (Id. at 109-111.)

According to plaintiff’s testimony, the accident occurred as follows: Plaintiff and a co-worker were attempting to place the davit arm into its socket and raise it into place. As plaintiff was raising the davit arm, the arm swung and hit him, knocking him to the ground. (Id. at 202-208.) Plaintiff further testified that “[t]he whole thing came down because it slipped from my hands and from my co-worker’s hands.” (Id. at 248.)

Plaintiff’s complaint alleges claims under Labor Law §§202, 240, and 241(6) and for common law negligence. In opposition to defendants’ motion, plaintiff withdraws his section 240(1) claim. (See P.’s Opp. to Prefco’s and Steelcase’s Motions, ¶11.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853

[1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).”

(Zuckerman, 49 NY2d at 562.)

Labor Law § 241(6) Claim

Labor Law §241(6) provides:

All contractors and owners and their agents \* \* \* 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, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners, contractors, and their agents “to provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law §241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with “concrete specifications,” as opposed to a provision that “establish[es] general safety standards.” (Id. at 505.) “The former give rise to a nondelegable duty, while the latter do not.” (Id.)

Here, while plaintiff alleges numerous violations of certain Industrial Code Regulations and the Occupational Safety and Health Administration Standards (“OSHA”) in his complaint, he opposes the branch of defendants’ motion seeking to dismiss his §241(6) claims only based on Industrial Code §§ 21.9(b)(1)-(3) and 23-5.1(f) (12 NYCRR),<sup>2</sup> and OSHA Regulations

<sup>2</sup> In his complaint, plaintiff alleges that defendants violated Industrial Code §§ 21.1-16, 21.3(b)(1), 21.3(b)(1)(2), 21.3(d), 21.3(e)(1), 21.3(f)(1), 21.3(g), 21.5(b), 21.6, 21.9(a)(b), 21.9(2),

1910.66(e)(1)(iii)(E)(1)-(2) (29 CFR).

Section 23-5.1(f) “sets forth a general rather than a specific safety standard” which does not support plaintiff’s Labor Law §241(6) cause of action. (See Sopha v Combustion Eng’g Inc., 261 AD2d 911, 912 [4<sup>th</sup> Dept 1999]; Moutray v Baron, 244 AD2d 618 [3<sup>rd</sup> Dept 1997], lv denied 91 NY2d 808 [1998].) Section 21.9(b) only applies to Labor Law §202. (See 12 NYCRR 21.1[a].) Alleged violations of OSHA standards “do not provide a basis for liability under Labor Law § 241(6).” (Schiulaz v. Arnell Const. Corp., 261 AD2d 247, 248 [1<sup>st</sup> Dept 1999].) Thus, plaintiff’s Labor Law §241(6) claim should be dismissed.

#### Labor Law §202

Defendants move to dismiss plaintiff’s claim under Labor Law section 202<sup>3</sup> on the ground that plaintiff was not a window washer and that plaintiff fails to allege defendants’ violation of a concrete Industrial Code provision under that section. In opposition, plaintiff

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21.9(3)(c)(d)(1)(2), 23-5.1, 23-5.2, 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.7, 23-5.8, 23-5.9, 23-5.10, 23-5.11, 23-5.12, 23-5.13, 23-5.14, 23-5.15, 23-5.16, 23-5.17, 23-5.18, 23-5.19.

<sup>3</sup> Labor Law §202 provides:

The owner, lessee, agent and manager of every public building and every contractor involved shall provide such safe means for the cleaning of the windows and of exterior surfaces of such building as may be required and approved by the board of standards and appeals. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved shall not require, permit, suffer or allow any window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter and the rules of the board of standards and appeals. A person engaged at cleaning windows or exterior surfaces of a public building shall use the safety devices provided for his protection. Every employer and contractor involved shall comply with this section and the rules of the board and shall require his employee, while engaged in cleaning any window or exterior surface of a public building, to use the equipment and safety devices required by this chapter and rules of the board of standards and appeals.

argues that he is protected by the statute because he was assembling the scaffolding for window cleaning at the time of the accident, and that defendants violated Industrial Code section 21.9(b)(1)-(3).

In order to prevail on a section 202 claim, plaintiff must demonstrate a violation of the Industrial Code, which then constitutes “some evidence of negligence.” (Brown v Christopher St. Owners Corp., 2 AD3d 172, 173 [1<sup>st</sup> Dept 2003] [quotation marks and internal citation omitted], lv dismissed 1 NY3d 622 [2004].) Moreover, section 202 “by its terms protects the cleaning of only windows and exterior surfaces.” (Bataraga v Burdick, 261 AD2d 106, 107 [1<sup>st</sup> Dept 1999] [holding that plaintiff did not have a cause of action under §202 where he “was injured as he descended the building’s fire escape after a cleaning of the restaurant’s roof-top exhaust system”].)

Here, plaintiff fails to raise a triable issue of fact in opposition to defendants’ prima facie showing that he is not entitled to the protections of §202. It is undisputed that plaintiff was not cleaning the windows at the time of his accident. Plaintiff testified, rather, that he was “rigging” the scaffold, – i.e., that he was one of two men who “stay on the roof at all times and rig the scaffold” and not one who was riding the scaffold and washing the windows. (P.’s Dep. at 109-110.) Plaintiff fails to submit authority in support of his implicit contention that §202 protects workers who are injured while erecting scaffolding to be used by other workers to clean windows. The cases cited by plaintiff involve workers who were engaged in window washing at the time of the accident. (See e.g. France v Abstract Tit. Div. of Tit. Guar. Co., 50 AD2d 711, 712 [4<sup>th</sup> Dept 1975] [defendants liable under §202 where plaintiff “fell while trying to clean windows” and where the window from which plaintiff fell “was sealed and obstructed by an air

conditioner”]; Durham v Metropolitan Elec. Protective Assn., 18 NY2d 433, 436 [1966] [triable issue of fact as to defendants’ liability found under §202 where window washer had to contort himself to reach an anchor outside the window in order to attach his safety belt]; Lowenhar v Commercial Outfitting Co, Inc., 260 AD 211, 212-213 [2<sup>nd</sup> Dept 1940] lv granted and rearg denied 260 AD 809 affd 285 NY 671 [1941] [defendants liable under §202 where plaintiff was “washing the outside of the window” and because defendants “permitt[ed] a window to be cleaned from the outside in the absence of [a safety] device”). Accordingly, plaintiff’s Labor Law §202 cause of action should be dismissed.<sup>4</sup>

#### Labor Law § 200 and Common Law Negligence

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993].) An implicit precondition to this duty “is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” (Russin v Louis N. Picciano & Son, 54 NY2d 317 [1981].) Thus, “[w]here 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.” (Comes, 82 NY2d at 877. See also Ross, 81 NY2d at 505 [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1<sup>st</sup> Dept 2003], lv denied 100 NY2d 508.) Moreover, “[l]iability under

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<sup>4</sup> In contrast, the protections of Labor Law §240(1) extend to “those situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed,” provided that an elevation-related hazard is involved. (Kyle v City of New York, 268 AD2d 192, 197 [1<sup>st</sup> Dept 2000], lv denied 97 NY2d 608 [2002]; Metus v Ladies Mile, Inc., 51 AD3d 537 [1<sup>st</sup> Dept 2008].) Plaintiff does not submit, and the court’s research did not locate, any authority for §202 to be similarly applied.

this section requires not only direct supervision or control over the injury-producing work, but also actual or constructive notice of the dangerous condition that caused plaintiff's injury.”

(Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347, 350-351 [1<sup>st</sup> Dept 2006]; Gallelo, 50 AD3d at 736.)

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As to Prefco, it is undisputed that it is an out-of-possession landlord of the premises. “It is well settled that an out-of-possession landlord . . . is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.” (Reyes v Morton Williams Associated Supermarkets, Inc., 50 AD3d 496, 497 [1<sup>st</sup> Dept 2008] [internal quotation marks and citation omitted]; Johnson v Urena Serv. Ctr., 227 AD2d 325 [1<sup>st</sup> Dept 1996], lv denied 88 NY2d 814 [1996].)

Plaintiff appears to contend that the decorative wall on the roof constituted a structural defect as it was placed so close to the davit socket as to make it impossible to wheel the davit arm directly into the socket. As a result, plaintiff argues that he and his co-worker had to lift the davit arm manually, and that while he was doing so, it slipped and struck him, causing his injuries. (See P.’s Dep. at 206-212.)

Plaintiff fails to raise a triable issue of fact as to Prefco’s liability for installation of the wall. Plaintiff’s expert, Vincent Ettari, a professional engineer, attests that a “decorative lattice” or wall was installed on the roof at the same time as the roof was fitted with a row of davit arm bases or sockets which were to be used to support a window washing system for the building. (See Ettari Aff. in Opp., ¶¶ 11.) He further testified that this alteration was made by Steelcase.

(Id. at ¶ 12.) Plaintiff, however, makes no showing that the wall was a structural alteration that required the approval of Prefco, or that the installation of the wall violated a specific statutory safety provision. Moreover, plaintiff does not claim that Prefco supervised or controlled his work. (See Comes, 82 NY2d at 877.)

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Plaintiff also fails to raise a triable issue of fact as to Steelcase's liability. Plaintiff does not claim that Steelcase supervised his work. Nor does plaintiff claim that he gave Steelcase notice of the missing wheels on the davit arm or that the decorative wall prevented him from rolling the davit arm into its socket. Rather, plaintiff testified that, prior to the date of the accident, he notified his Temco supervisor, Tom Eitner, and R&R that the wheels were missing from the davit arm. (See P.'s Dep. at 123, 126.)<sup>5</sup> Significantly, the record is wholly lacking in any evidence that Steelcase was ever notified that the wall posed an obstruction that impeded placement of the davit arm in the socket in question. On the contrary, plaintiff and Eitner both testified that they had repeatedly used the socket near the wall, and neither indicated that the wall prevented them from installing the davit arm. (P.'s Dep. at 202-203; Eitner Dep. at 125-126.) Thus, even assuming arguendo that Steelcase, rather than Prefco or CCSC, installed the decorative wall, plaintiff fails to raise a triable issue of fact as to Steelcase's notice of the alleged defect. Plaintiff's claims under Labor Law §200 and for common law negligence should accordingly be dismissed against Steelcase.

Turning to R&R's motion, it is settled that even in circumstances where a subcontractor

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<sup>5</sup> While plaintiff also testified that he thought that Steelcase's managing agent, Diane Ribel Piper, was notified of the missing wheels, this testimony was based on hearsay (see P.'s Dep. at 124-125), and is therefore incompetent to raise a triable issue of fact as to whether Steelcase had notice of the condition.

does not supervise or control the work of plaintiff, a subcontractor may be found liable under section 200 where it caused or created the condition that gives rise to plaintiff's injury. (See Schiulaz, 261 AD2d at 248; Stevenson v Alfredo, 277 AD2d 218 [2d Dept 2000]. See also Andrade v Triborough Bridge & Tunnel Auth., 35 AD3d 256 [1<sup>st</sup> Dept 2006].)

Here, plaintiff claims that there are two distinct, concurrent causes of his accident. First, plaintiff contends that because the wall was installed so close to the subject socket, plaintiff and his co-worker could not wheel the davit arm directly into the socket. Second, he contends that the davit arm that plaintiff was installing was missing wheels, and that plaintiff and his co-worker therefore had to lift the davit arm manually in order to place it in the socket. More particularly, plaintiff testified that, ordinarily, when the davit arm "has the wheels, it rolls right into place [in the socket] and the holes line up" to lock it in the socket. He also explained that "once you get the wheel in, then you can lift this side and move it over a little bit, and then put the pin in and then raise it up. That's the way we always do it." (P.'s Dep. at 202, 207.)

Plaintiff testified that, on the date of the accident, in contrast, because the wheels were missing from the davit arm, "[w]e are trying to line the davit up into the hole. We had to keep lifting the davit arm up and down, up and down to adjust it, to try and find the hole. When it doesn't have the wheels on it, you have to . . . keep adjusting, keep adjusting until we can get the bracket that holds it up. . . We put it in, and for some reason, it just fell on me while we were pushing it up." (P.'s Dep. at 202.)

While plaintiff claims that missing wheels were a concurrent cause of the accident, plaintiff's experts take the position that because the decorative wall was installed so close to the davit socket, the davit arm that injured plaintiff could not have been wheeled into place.

Specifically, Mr. Ettari attests that “the decorative fence was installed directly in front of the adjacent base, thereby preventing the davit arm system to be erected in the adjacent base as it was designed to be.” (Ettari Aff. in Opp., ¶ 13.) Howard Edelson, plaintiff’s safety expert, also attests that “[t]he davit arm is designed to be wheeled into the raised socket base so that it can be vertically raised with the support of the bottom and side walls of the roof socket. Herein, the roof socket was obstructed by the large metal grid.” (Edelson Aff. In Opp., ¶8.)<sup>6</sup> In short, this case was presented on the experts’ theory that the davit arm could not have been wheeled into place due to the installation of the decorative wall. Thus, even assuming arguendo that the wheels were missing on the davit arm and that R&R was notified of the missing wheels, the absence of the wheels could not have been a cause of plaintiff’s accident.

Plaintiff also appears to argue that the davit arm should have been taken out of service because defendants failed to install an “offset socket,” – that is, a socket installed at an angle so that the davit arm could be wheeled into the socket even with the decorative wall in place. Mr. Edelson attests that the “roof socket should have been taken out of operation until the defects therein had been corrected.” (Edelson Aff. in Opp., ¶12.) To the extent plaintiff argues that it was R&R’s responsibility to have taken the scaffold out of service due to the lack of an offset socket, plaintiff fails to address Temco’s contract with R&R. Section 12 of the contract states

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<sup>6</sup> The court notes that plaintiff’s experts appear to base their opinions on facts other than those to which plaintiff testified. Specifically, in claiming that the wall prevented the davit arm from being wheeled into the socket, plaintiff’s experts rely upon photographs of the socket showing its proximity to the wall. (See Edelson Aff. in Opp., ¶¶ 7, 11; Ettari Aff. in Opp., ¶ 13.) But plaintiff himself does not testify that the placement of the wall entirely prevented him from wheeling the davit arm into place. When asked whether the “wall or divider obstruct[ed] the wheeling of the davit into the base in any way?,” plaintiff answered that it did not “go straight like all the other ones without the wheel, but if it had the wheel, it would go in, but you’d just to [sic] move it a little bit.” (P.’s Dep. at 208.) Plaintiff’s counsel does not cite or rely upon this testimony which is contrary to the theory of causation upon which plaintiff’s counsel and his experts rely on the instant motion.

that “the Company [R&R] has not made and does not make . . . any representation, warranty or covenant, expressed or implied, with respect to the equipment, nor with respect to the equipment’s manufacture, design, condition, durability, suitability, fitness for use, or merchantability, and the Company shall not be responsible for any patent or patent defects therein. . . .” (Temco Opp. to R&R, Ex. A.) In view of this provision, plaintiff fails to show that R&R would have had an obligation to take the system out of service due to the failure to install an offset socket. Finally, to the extent plaintiff claims the scaffold should have been taken out of service due to the missing wheels on the davit arm, as held above, plaintiff fails to show that the missing wheels were a concurrent cause of the accident. Accordingly, plaintiff’s claims against R&R under Labor Law § 200 and for common law negligence should be dismissed.

Cross-Claims

In light of the dismissal of plaintiff’s complaint, the branch of the parties’ motions for dismissal of the cross-claims will be dismissed as moot. In so holding, the court notes that none of the parties claims indemnification from any other party for defense costs to date.

Accordingly, it is hereby

ORDERED that plaintiff’s claims under Labor Law 240(1) are withdrawn; and it is further

ORDERED that the motions of R&R Scaffolding Ltd., PREFCO XXIV Limited Partnership and Steelecase Inc. for summary judgment are granted to the extent of dismissing plaintiff’s complaint and all cross-claims, and the Clerk is directed to enter judgment accordingly

This constitutes the decision and order of the court.

Dated: New York, New York  
April 13, 2009

**FILED**  
APR 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
*Marcy Friedman*  
MARCY FRIEDMAN, J.S.C.