

**Sutter v York Ave. Assoc. of N.Y.**

2009 NY Slip Op 31078(U)

May 5, 2009

Supreme Court, New York County

Docket Number: 104987/07

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: \_\_\_\_\_

PART 35

Justice

Index Number : 104987/2007

SUTTER, ANTHONY

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

vs

YORK AVENUE ASSOCIATES

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

Sequence Number : 002

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

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

FILED

MAY 07 2009

COUNTY CLERK'S OFFICE NEW YORK

This 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

It is hereby

ORDERED that the branch of the motion by defendants York Avenue Associates of New York and M.D. Carlisle Construction Company for summary judgment, pursuant to CPLR §3212, dismissing the Labor Law §200 and common law negligence claims of plaintiffs Anthony Sutter and Jennifer Sutter is granted; and it is further

ORDERED that the branch of defendants' motion for summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' claims under Labor Law § 240(1), is granted; and it is further

ORDERED that the branch of defendants' motion for summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' claims under Labor Law 241(6) regarding 12 NYCRR §23-2.4 is granted; and it is further

ORDERED that the branch of defendants' motion for summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' claims under Labor Law 241(6) regarding 12 NYCRR §23-2.2 is denied ; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: That constitutes the decision and order of the Court.

5/5/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
ANTHONY SUTTER and JENNIFER SUTTER,

Plaintiffs,

Index # 104987/07

-against-

YORK AVENUE ASSOCIATES OF NEW YORK and  
M.D. CARLISLE CONSTRUCTION COMPANY,

Defendants.

-----x  
YORK AVENUE ASSOCIATES OF NEW YORK and  
M.D. CARLISLE CONSTRUCTION COMPANY,

Third-Party Plaintiffs,

-against-

Third-Party  
Index # 590938/07

SITE SAFETY, LLC,

Third-Party Defendant.

-----x  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This action arises out of an alleged construction site accident that occurred on April 1, 2005 at 438 East 83<sup>rd</sup> Street, New York, New York ( the “premises”). Plaintiff’s Anthony Sutter (“plaintiff”) and Jennifer Sutter (“Ms. Sutter”) (collectively, “plaintiffs”) claim that plaintiff was injured as a result of the negligence and violations of Labor Law §§200, 240(1) and 241(6) by defendants York Avenue Associates of New York (“York”) and M.D. Carlisle Construction Company (“M.D. Carlisle”) (collectively “defendants”). In turn, defendants seek indemnification against third-party defendant Site Safety, LLC (“Site Safety”) on the ground that Site Safety was obligated under contract to indemnify defendants.

Defendants now move for summary judgment, pursuant to CPLR §3212, dismissing all of plaintiffs' claims and cross-claims on the grounds that the undisputed facts establish that there is no basis in law by which defendants can be held liable for the injuries alleged by plaintiff, as plaintiff obtained his employment through the use of fraudulent documents.

*Factual Background<sup>1</sup>*

On the date of plaintiff's accident at the premises, York was the owner of the premises and M.D. Carlisle was the construction manager (O'Brien EBT, pp. 7-8.). M.D. Carlisle's duties and responsibilities included the "procurement of trade contractors to do the work [and] coordination of site activities" (O'Brien EBT, p. 8). Prior to plaintiff's accident, Century-Maxim Construction Corp. ("Century") was hired to construct the concrete superstructure at the premises pursuant to a contract with York.

On and prior to the date of his accident plaintiff was employed by Century as a laborer and was engaged in moving and stacking lumber (Sutter EBT, p. 21). Plaintiff testified that he "always checked in with his foreman in the morning" to get his job assignment/duties for that day. Plaintiff's foreman ("Leroy") was also an employee of Century (Sutter EBT, pp. 23, 27 and 38).

Some time prior to April 1, 2005, Century employees stripped the wooden forms on one of the floors at the subject premises (Sutter EBT, p. 39). On April 1, 2005, Leroy instructed plaintiff to go to the floor where the forms had been stripped to pick up, move and stack the

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<sup>1</sup> Information is taken from defendants' motion, accompanying exhibits, plaintiff's examination before trial on June 17, 2008 ("Sutter EBT"), and the deposition of Brett O'Brien ("Mr. O'Brien"), the Project Executive who works for M.D. Carlisle ("O'Brien EBT").

lumber so that it could eventually be removed (Sutter EBT, pp. 38-39). Immediately prior to his accident, plaintiff was carrying "a load of three maybe four" three-by-fours on his shoulder (Sutter EBT, p. 43). After placing the load of three-by-fours on a pile, plaintiff was struck on the back of his head by a "reshore" that tipped over (Sutter EBT, pp.43-44).

The reshore is described as a four-by-four piece of wood that extended from the floor, upon which plaintiff was standing, to the ceiling/bottom of the floor above (Sutter EBT, p. 50; O'Brien EBT, p. 21)<sup>2</sup>. Century installs the reshores after the wooden forms have been stripped; the reshores are generally left in place for 28 days to prevent sagging (Sutter EBT, p. 37; O'Brien EBT, p. 21). Plaintiff testified that he did not see the reshore fall since it was situated behind him immediately prior to his accident (Sutter EBT, pp. 44-45).

After the accident, Leroy instructed plaintiff to fill out an accident report (Sutter EBT, pp. 51). After the accident report was filled out (by another individual), plaintiff took a "little" break and then he returned to work the same day (Sutter EBT, p. 55). Plaintiff returned to work the following day and continued to work for approximately four months until August.

#### *Defendants' Motion*

First, defendants argue that plaintiffs' Labor Law §240(1) cause of action should be dismissed, as it undisputed that the plaintiff did not fall from a height or was struck by an object that fell from a height. The evidence establishes that both the plaintiff and the reshore that tipped over and struck him were on the same level.

Second, defendants argue that plaintiffs' Labor Law §241(6) cause of action should also

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<sup>2</sup>Defendants also cite O'Brien EBT, p.21. However, the O'Brien EBT contains only evenly numbered pages; the odd-numbered pages are missing.

be dismissed, as plaintiffs failed to allege the violation of any applicable provisions of the Industrial Code. Plaintiffs' reliance on 12NYCRR §23-2.4 (flooring requirements in building construction) fails, because there is no evidence that the project involved skeleton steel construction in tiered buildings as this section requires. Similarly unavailing is plaintiffs' reliance on 12 NYCRR §23-2.2 (concrete work), which speaks to the structural integrity and bracing of forms, shores and reshores, so as to maintain the position and shape of the forms during the placement of concrete. Plaintiff's testimony clearly establishes that the concrete had already been poured and partially dried, and significantly, that the forms had already been removed. In fact, plaintiff testified that at the time of his accident he was moving the wood that had previously been used to make the forms.

Finally, the plaintiffs' Labor Law §200 and common law negligence causes of action are also insufficient. The evidence establishes that no representatives of defendants were present at the time of the accident, and that defendants had no direct involvement in the performance of plaintiff's work or the means and methods employed by Century. The evidence also establishes that defendants did not have actual or constructive notice of the alleged dangerous condition.

### *Plaintiffs' Opposition<sup>3</sup>*

First, plaintiffs contend that injuries attributable to falling objects fall within the statutory ambit of Labor Law §240(1). A plaintiff must show that the object fell while being hoisted or secured, or because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Here, the significant risk posed by the falling reshore and injuring a worker obligated

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<sup>3</sup>Plaintiffs' opposition addressed defendants' arguments against plaintiffs' Labor Law §§240(1) and 241(6) claims only.

defendants to use an appropriate safety device, plaintiffs argue. It is undisputed that plaintiff was not provided with any of the safety devices enumerated in the statute. Thus, plaintiffs have demonstrated that the absence of a safety device set forth in Labor Law §240(1) proximately caused his accident.

Second, plaintiffs contest defendants' contention that 12 NYCRR §23-2.2 only applies during the placing of concrete. Plaintiff testified that workers were in the process of stripping the floor after concrete was poured when his accident occurred (Sutter EBT, p. 35-43). The fact that the reshore came loose and struck plaintiff is *prima facie* evidence that it had not been properly braced as specifically required by 23-2.2(a), plaintiffs argue. Further, the reshore was not properly affixed as required by 23-2.2(c). The requirements set forth within 23-2.2(a) and 23-2.2(c) are not limited to when concrete is being poured. Even the inspection requirements contained within 23-2.2(b), which apply when concrete is being poured, have been interpreted by the courts to encompass the time during which floors are being stripped after the concrete was poured, plaintiffs contend. Defendants' argument is further belied by 23-2.2(e), which clearly requires that reshoring be provided to support beams after stripping, plaintiffs argue. Since reshoring was necessary at the time plaintiff's accident occurred, it is only logical that the reshoring be properly braced together and secured as required in subsections (a) and (c). The mere fact that the reshore that struck plaintiff became dislodged without being struck is *prima facie* evidence that it was not properly braced and/or secured as required by the Code and as opined by plaintiffs' expert, Werner Laag ("Mr. Laag"), as set forth in his affidavit ("Laag aff.").

*Defendants' Reply*<sup>4</sup>

Defendants reiterate their arguments that Labor Law §240 does not apply to plaintiff's accident, because there was no height differential between the plaintiff and the reshore. Defendants go on to distinguish the caselaw plaintiffs cite in support of their Labor Law §241(6) claim. Defendants further argue that the Laag aff. should be disregarded because Mr. Laag incorrectly offers his opinion as to the applicability of 12 NYCRR §23-2.2 and, therefore, effectively usurped the function of the Court as the sole determiner of the law. In addition, Mr. Laag offers only vague, conclusory, and speculative opinions regarding the cause of the accident, defendants contend. As such, plaintiffs argue, the Laag aff. is insufficient to raise an issue of fact regarding defendants' alleged violation of 12 NYCRR §23-2.2.

Finally, defendants point out that plaintiffs have not opposed the branch of defendants' motion for summary judgment as to the alleged violation of Labor Law §200 and/or common law negligence.

*Analysis**Summary Judgment*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v. St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v. National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup

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<sup>4</sup>According to defendant's attorney, the last paragraph of the reply was included in error and is not be considered by the Court.

Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1<sup>st</sup> Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1<sup>st</sup> Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not

feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRY Technologies, Inc.*, 93 AD2d 772 [1<sup>st</sup> Dept 1983], *affid.* 62 NY2d 686.[1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1<sup>st</sup> Dept 1998]).

#### *Labor Law §200*

Labor Law §200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site (*Nevins v Essex Owners Corp.*, 276 AD2d 315 [1<sup>st</sup> Dept 2000], *citing Blessinger v Estee Lauder Companies, Inc.*, 271 AD2d 343 [2000]). In order to establish liability under Labor Law §200, the plaintiff must establish that the defendant in issue had “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Russin v Picciano & Son*, 54 NY2D 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002] ). The plaintiff also must show that the defendant had actual or constructive notice of the alleged unsafe condition that caused the accident (*see Dilena v The Irving Reisman Irrevocable Trust*, 263 AD2d 375 [1<sup>st</sup> Dept 1999]); *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 [2006]; *Gatto v Turano*, 6 AD3d 390, 391 [2d Dept 2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 AD3d 548 [2d Dept 2003]; *Duncan v Perry*, 307 AD2d 249 [2d Dept 2003]; *Giambalvo v Chemical Bank*, 260 AD2d 432 [2d Dept 1999]; *Cuartas v Kourkoumelis*,

265 AD2d 293 [2d Dept 1999]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392 [2d Dept 1997] ).

Here, defendants have met their burden under CPLR §3212 by making a *prima facie* showing of entitlement to judgment as a matter of law on the issue of liability under Labor Law §200 and common law negligence (*Zuckerman v City of New York* at 562).

First, defendants have established through the testimony of plaintiff and Mr. O'Brien, the Project Executive, that they neither exercised control, supervision or direction over the means and methods of plaintiff's work at the time of the alleged accident (*Russin v Picciano & Son*). At the time of the accident, plaintiff was employed by Century. Plaintiff testifies that he would report to the Century's foreman, Leroy, who would tell plaintiff what to do on a daily basis (Sutter EBT, pp. 22-25; 30-31). Plaintiff further testified that even if somebody outside Century asked him to do something, "I'd confirm it with my bosses first" (*id.*, p. 31). Further, Mr. O'Brien, the Project Executive working for M.D. Carlisle, testified that M.D. Carlisle neither directed nor supervised the work of Century's employees:

Q. Did M.D. Carlisle in anyway supervise the work that was being done by Century Maxim other than, well except for means and method?

A. We would coordinate their work, we wouldn't supervise their work.

Q. Can you describe what you mean by coordinate their work?

A. Coordinating their work, on a project of this size you have multiple trades and multiple coordination. Decks open to compensate work by other steel inserts, to compensate steel cast, those were all coordination efforts undertaken by M.D. Carlisle as construction manager.

(O'Brien EBT, p. 23, lines 3-22)

In addition, it is undisputed that York, as the owner, did not direct how plaintiff's work was to be performed or exercise the control necessary to support a violation of Labor Law §200 and/or common law negligence.

Second, defendants maintain that they had neither actual nor constructive notice of any defective condition that caused the accident.

Thus, the burden shifts to plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for their failure to do so. In their opposition, plaintiffs failed to even mention Labor Law §200 or common law negligence. Plaintiffs provided no evidence that would overcome defendants' motion for summary judgment regarding the Labor Law §200 or the negligence claim; nor did plaintiffs tender an acceptable excuse for their failure to do so. Accordingly, the branch of defendants' motion seeking the dismissal of plaintiffs' claim under Labor Law §200 and for common law negligence is granted.

*Labor Law §240*

To establish a cause of action under Labor Law §240, a plaintiff must show that the statute was violated and the violation was a proximate cause of his injury (*Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]). Labor Law §240(1), also known as the "Scaffold Law," 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.

"The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an

inadequate one” (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] (citations omitted))<sup>5</sup>. Labor Law §240(1) imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452 [1985]).

Specifically, “Labor Law § 240(1) applies to both falling worker and falling object cases” (*Simione v City of New York*, 16 Misc 3d 1111[A], 2007 NY Slip Op 51386 [U], \*2 [table; text at 2007 WL 2049715, \*2, (U)]). *Ross* elaborates on such elevation-related hazards. Citing *Rocovich*, the court in *Ross* explained:

The “special hazards” to which we referred in *Rocovich*, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the “special hazards” referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see, *DeHaen v Rockwood Sprinkler Co.*, 258 NY 350). In other words, Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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” (*Ross* at 500-501).

As stated above, the caselaw makes clear that Labor Law §240(1) does not cover the “tangential risks” related to construction work (see *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1<sup>st</sup> Dept 2007], citing *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490 [1995] [“In order for section 240(1) to apply, there must be a significant, inherent risk attributable to an elevation differential. The statute does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site”]). The Court in *Buckley* went on to find no Labor Law §240(1) liability in the case of an elevator worker testing an

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<sup>5</sup>In their opposition, plaintiffs mischaracterize the law regarding Labor Law §240(1) (opp., ¶ 2).

elevator car who was injured by a counterweight that fell out of the compartment housing it. The caselaw also makes clear that not every construction accident, even if related to elevation or gravity, falls within the scope of Labor Law §240(1) (*see Soles v Eastman Kodak Co.*, 162 Misc 2d 406, 408 [1994] [worker carrying a door frame up several flights of stairs injured his back when he reached out to keep the frame from falling]).

The issue here is whether, as a matter of law, plaintiff was exposed to an elevation-related risk when he was struck by the reshore (*Ross* at 500-501). As a threshold issue, the Court must determine whether plaintiff's injuries resulted from an object that fell *while it was being hoisted or being secured*. If so, then the court must determine whether the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Mulvihill v Brooklyn Law School*, 22 Misc 3d 1114 [A], 2009 NY Slip Op WL 189031 [U], \*4 [NY Sup 2009], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

Here, while it is clear from plaintiff's testimony that the object that struck him was not properly secured, the evidence demonstrates that plaintiff was not exposed to an elevation-related risk. Plaintiff was performing work on the superstructure of the premises, *i.e.* helping to establish the concrete ceilings and floors (*see O'Brien EBT*, pp. 20-21). According to plaintiff's testimony, plaintiff was carrying a load of three-by-fours, when the reshore hit him in the back of his head and neck (*Sutter EBT*, pp. 43-45, 48). Plaintiff described the reshore as "a four by four that has a screw bottom to it, that basically you put it on the floor with the *screw bottom towards the floor, and then the four by four connects to the ceiling*, and it supports the floor to the ceiling" (*Sutter EBT*, p. 36, lines 12-17) (*emphasis added*). Plaintiff's expert, Mr. Laag further attests that reshores "were used to support the concrete floor above while the new

concrete cured after the wooden forms were removed. The screw mechanism was intended to wedge this vertical support between the concrete floor below and the floor above” (Laag aff., ¶ 3). The reshore was supposed to be bolted to the floor (*id.*, p. 44). Plaintiff further testified that the reshore *fell forward* onto plaintiff. Therefore, it is clear from plaintiff’s testimony that the reshore that fell was on the same level as plaintiff. It did not fall from a height (*cf. Mulvihill v Brooklyn Law School* [holding that the construction worker plaintiff involved in superstructure work was entitled to summary judgment after he was struck by several pieces of wood that fell on him from a height above after the stringer supporting the wood broke]). The reshore was not being elevated or hoisted (*Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 491 [1995] [holding that the collapse of a completed fire wall was not the type of accident contemplated by 240(1)]; *Narducci v Manhasset Bay Associates* at 268 [“Applying these principles to the facts in *Narducci*, the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus Labor Law §240 (1) does not apply”]). The cases plaintiffs cite all involve objects that fell from a height; thus those cases are distinguishable (*see opp.*, ¶ 3). Further, plaintiff did not fall from an elevated height. Therefore, plaintiff’s accident was not the type contemplated by Labor Law §240(1), and the Court does not reach the issue of whether the reshore fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*Narducci v Manhasset Bay Associates* at 268). Accordingly, the branch of defendants’ motion seeking the dismissal of plaintiffs’ claim under Labor Law §240(1) is granted.

*Labor Law §241(6)*

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide

reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross* at 501-502). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor that sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross* at 502-504). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]).

In terms of the obligations statutorily imposed by Labor Law §241(6), it has been recognized that the statute is “a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner’s rule-making authority” (*Ross* at 503). In *Ross*, the Court of Appeals, in adherence with prior determinations, held that a plaintiff may not rely solely upon the “broad, nonspecific regulatory standard” contained in section 241(6) (*id.* at 504), but instead, must rely upon the violation of a specific administrative rule, *i.e.*, a corresponding Industrial Code violation that mandates compliance with “concrete specifications,” and not one which merely establishes “general safety standards” (*id.* at 505).

In the case at bar, defendants have made a *prima facie* showing that 12 NYCRR §23-2.4 cannot support plaintiffs’ Labor Law §241(6) claim, as a matter of law, and thus, plaintiffs’ claim based on 12 NYCRR §23-2.4 is dismissed.

12 NYCRR §23-2.4 concerns flooring requirements in building construction. Defendants clearly demonstrate that 12 NYCRR §23-2.4 does not apply to this case. The building on which

the plaintiff was working was being constructed by *pouring concrete* to create the floors and pillars of the structure (*see* O'Brien EBT, p. 20). The provisions of 12 NYCRR § 23-2.4(a) and (b) relate to temporary and permanent flooring in skeleton steel construction. Subdivision (c) of 23-2.4 relates to buildings with single wood flooring, double wood flooring, or bar joint construction. Accordingly, the cited code provision has no applicability to the poured-concrete construction on the site where the plaintiff was injured.

In opposition, plaintiffs provided no evidence to overcome defendants' motion regarding 12 NYCRR §23-2.4; nor did plaintiffs tender an acceptable excuse for their failure to do so. In fact, plaintiffs fail to even mention 12 NYCRR §23-2.4 in their opposition. Accordingly, the branch of defendants' motion seeking the dismissal of plaintiffs' Labor Law §241(6) claim regarding 12 NYCRR §23-2.4 is granted.

However, an issue of fact exists as to whether defendants violated 12 NYCRR §23-2.2, which regulates concrete work. Defendants argue that none of the provisions of 12 NYCRR §23-2.2 applies. 12 NYCRR §§23-2.2 provides in relevant part:

- (a) General requirements. *Forms, shores and reshores shall be structurally safe* and shall be properly braced or tied together so as to maintain position and shape.
- (b) Inspection. Designated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. *Any unsafe condition shall be remedied immediately.*
- (c) Beams, floors and roofs.
  - (1) Necessary horizontal and diagonal bracing shall be provided in both longitudinal and transverse directions to provide structural stability of beams, floors and roofs. *Shores and reshores shall be properly seated top and bottom and shall be secured in place.*
  - (2) Where shores or reshores rest upon the ground, mud sills or other bases shall be provided.
  - (3) Where the sum of the dead and live loads on the forms may exceed 150 pounds per square foot, the design of such forms, including shores, reshores and bracing, shall be as specified by a professional engineer licensed to practice in the State of New York. Such design plans and specifications shall be kept on the job site available for examination by

the commissioner. All forms, shores, reshores and bracing shall be constructed and installed in accordance with such design plans and specifications. . . .

(e) Reshoring. Reshoring shall be provided when necessary to safely support slabs and beams after stripping or where such members are subjected to superimposed loads due to construction on upper levels.

*(emphasis added)*

First, relying on the definition of “form” in Webster’s Third New International Dictionary

(Unabridged), defendant contends that 23.2.2(a) applies only where the forms have not been

stripped and the shores removed. Defendants state:

[T]he term “form” as used in section 23-2.2(a), constitutes the mold that holds, supports and gives or determines the shape of the concrete placed in those forms. This definition and use of the term “form” is consistent with the plain language of the provision which states that the purpose of bracing or tying forms, shores and reshores together is to “maintain [the] position and shape” of the forms that have been fully constructed. Therefore, the requirements of 12 NYCRR 23-2.2 – that forms shores and reshores be structurally safe and properly braced or tied together so as to maintain position and shape – has no application to the instant case because the forms had already been stripped and the shores removed. here because the forms had already been stripped and the shores removed.

(Motion, ¶¶ 62-63).

In opposition, plaintiffs argue that 23-2.2(a) is not so limited in its application. Plaintiffs rely on

*Mulvihill v Brooklyn Law School*, which, indeed, is dispositive in this case. The Court in

*Mulvihill* held:

The record before the court shows that the process of removing the concrete forms at the subject premises occurred gradually as the legs and other wood pieces were removed. *Clearly, the concrete forms should have remained structurally sound during the removal process until all of the wood pieces were stripped in order to protect workers that might be below.* Under such a broad view of the removal process, the forms should have been inspected not only during the pouring and setting of the concrete but also as sections of the forms were being removed. Hence, 23-2.2 applies herein and defendants indisputably failed to secure or brace the forms as prescribed.

*(id. at 8) (emphasis added)*

The Court in *Mulvihill* goes on to point that the violation of an Industrial Code is only “some

evidence of negligence” (*id.* at 9; *see also Long v Forest-Fehlhaber*). Such a violation is not dispositive of a motion for summary judgment. In addition, the Court in *Morris v Pavarini Const.* (9 NY3d 47, 51 [2007]) held that where there is a dispute regarding the meaning of “specialized terms,” such as the phrase in 12 NYCRR §23-2.2(a) that reshores “shall be properly braced or tied together so as to maintain position and shape definition,” summary judgment may be premature.

It was premature for the [First Department] Appellate Division to grant summary judgment on this record. The interpretation of the regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination (*see Millard v. City of Ogdensburg*, 274 A.D.2d 953, 954, 710 N.Y.S.2d 507 [4th Dept.2000]). Here, a more complete record is necessary, both as to the nature of the object that caused the injury and the opinions of those expert in the construction of concrete walls as to whether the words of the regulation can sensibly be applied to anything but completed forms. (*id.* at 51)

Accordingly, as plaintiffs raised an issue of fact as to the application of §23-2.2(a), defendants’ motion for summary judgment is denied.

Defendants’ argument that 12 NYCRR §23-2.2(b) does not apply, as this section “is expressly limited to the inspection of forms shores and reshores *during the placing of concrete*” (motion, ¶ 64), lacks merit. Again, caselaw disputes defendants’ contention: “Under such a broad view of the removal process, the forms should have been inspected *not only during the pouring and setting of the concrete but also as sections of the forms were being removed*. Hence, 23-2.2 applies herein and the record indicates that defendants failed “to secure or brace the forms as prescribed” (*see Mulvihill v Brooklyn Law School* at 8). Although the facts in *Mulvihill* are distinguishable (plaintiff in *Mulvihill* was injured after pieces of a load of wood fell on his head from above), the defendants in *Mulvihill* challenged the application 12 NYCRR §23-2.2(b) on

the same ground as defendants do here: that the section applies to safety conditions only during the pouring of concrete. Defendants in *Mulvihill* argued that “the accident allegedly occurred during the ‘removal of the already-used forms when the accident happened *and not when the forms were being constructed or even when the forms were used for the placement of wet concrete*’” (*Mulvihill* at 7) (*emphasis added*). The Court rejected defendants’ arguments, finding 12 NYCRR §23-2.2(b) applicable. Thus, plaintiffs herein raised an issue of fact as to the application of 12 NYCRR §23-2.2(b).

Defendants also argue that 12 NYCRR §23-2.2(c) does not apply. However, defendants have failed to demonstrate how the provision that “shores and reshores shall be properly scated top and bottom and shall be secured in place” does not apply. It is clear from plaintiff’s testimony that the reshore was not secured in place (Sutter EBT, p. 40).

Q. So the reshore that struck you came from behind?

A. From behind. Yes.

Q. And was that reshore bolted to the floor?

A. Yes. Had the screw bottom.

Q. Did you see the reshore falling before it struck you?

A. No, I did not. It hit me right in the back of the head.

(Sutter EBT, p. 44, lines 20-25, p. 45, lines 1-5)

Even Mr. O’Brien, who demonstrated his familiarity with reshores during his depositions (O’Brien EBT, pp. 30-31) conceded that reshores are to be secured to the floor.

Q. Do you know if, in general, whether or not reshores have a screw to the bottom that gets fixed to the ground the floor below it?

A. Some do.

(O’Brien EBT, p. 28, lines 4-8)

Here, plaintiffs have clearly demonstrated an issue of material fact as to whether defendants

violated 12 NYCRR §§23-2.2(c).<sup>6</sup>

Defendants concede that 12 NYCRR §§23-2.2(e), regarding reshoring, “is remotely relevant to the facts of this case” (motion, ¶ 70), and argue that “. . . this section does not address how, if at all the reshores should be secured.” However, that this code provision lacks any direction on securing reshores does not render it inapplicable or establish that it was not violated. As discussed above, plaintiffs have demonstrated that the reshore was not secure. Therefore, plaintiffs have raised an issue of fact as to whether defendants violated 12 NYCRR §§23-2.2(c).

Finally, defendants’ contentions that Mr. Laag’s opinions are vague, conclusory, and speculative, and improperly usurped the function of the Court as the sole determiner of the law, lack merit. A review of Mr. Laag’s affidavit indicates that he offered his expert opinion as safety engineer and that his opinion was based on his knowledge, experience and the moving papers in this case (Laag aff., ¶ 2). Mr. Laag states:

In conclusion, it is my opinion with a reasonable degree of safety engineering certainty, that the reshore which struck the Plaintiff could not have been properly installed, braced or tied together, seated or secured. The screw jacking mechanism should have provided enough comprehensive force between the two concrete floors to prevent the reshore from falling and striking the Plaintiff. The improperly secured reshore was the primary cause of this accident and a contributory cause of the resultant injuries to the Plaintiff.  
(Laag aff., ¶ 6)

This opinion was neither speculative nor conclusory (*see Carmona v Mathisson*, 54 AD3d 633 [1<sup>st</sup> Dept 2008] [holding that engineering expert offered a sound basis for his opinion]).

Therefore, dismissal of plaintiffs’ Labor Law §241(6) claim based upon the alleged violation of 12 NYCRR §§23-2.2 is unwarranted.

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<sup>6</sup> Defendants also argue, and plaintiffs do not dispute, that 12 NYCRR §23-2.2(d), requiring the proper stockpiling of stripping, does not apply.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants York Avenue Associates of New York and M.D. Carlisle Construction Company for summary judgment, pursuant to CPLR §3212, dismissing the Labor Law §200 and common law negligence claims of plaintiffs Anthony Sutter and Jennifer Sutter is granted; and it is further

ORDERED that the branch of defendants' motion for summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' claims under Labor Law § 240(1), is granted; and it is further

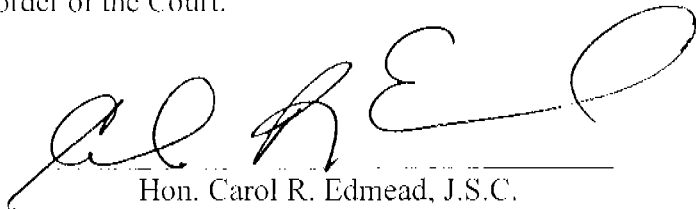
ORDERED that the branch of defendants' motion for summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' claims under Labor Law 241(6) regarding 12 NYCRR §23-2.4 is granted; and it is further

ORDERED that the branch of defendants' motion for summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' claims under Labor Law 241(6) regarding 12 NYCRR §23-2.2 is denied ; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: May 5, 2009



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

MAY 07 2009

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