Chavarria v 2709-11 Coney Is. Ave., LLC
2009 NY Slip Op 33236(U)
December 23, 2009
Sup Ct, Queens County
Docket Number: 10669/07
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19
Justice

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FREDDY CHAVARRIA and CARMEN CHAVARRIA, Plaintiffs, - against - 2709-11 CONEY ISLAND AVENUE, LLC, SIMON LINETSKY, K & L CONSTRUCTION MANAGEMENT OF NEW YORK, INC., LEON MIKHLIN, MIKHLIN HOLDINGS, INC., Defendants.	Index No.: 10669/07 Motion Date: 9/9/09 Motion Cal. Nos.: 9 & 10 Motion Seq. No.: 2 & 3

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2709-11 CONEY ISLAND AVENUE, LLC, SIMON LINETSKY, K & L CONSTRUCTION MANAGEMENT OF NEW YORK, INC., MIKHLIN HOLDINGS, INC., and LEON MIKHLIN, Third-Party Plaintiffs, - against- J & S NY DEVELOPMENT, INC., Third-Party Defendant.	Third Party Index No.: 350116/09

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The following papers numbered 1 to 17 read on this motion by defendants/third party plaintiffs for an order, pursuant to CPLR § 3212(a), granting them leave to file the within motion six days beyond the 120-day deadline, and for summary judgment and dismissal of all of plaintiff's causes of action against each and every defendant, pursuant to CPLR §3212, as well as the time to conduct discovery in the third-party action [Motion No. 9]; on this cross motion by plaintiff for summary judgment on the issue of liability and an immediate trial on the issue of damages; and the following papers numbered 1 to 9 read on this motion by third-party defendant J&S NY Development, Inc., for and order: (1) pursuant to CPLR §§ 407 and 603, severing the third party action from the main action as the third party defendant was only recently brought into this lawsuit and no discovery with respect to the third party action has been completed, or in the alternative; (2)

pursuant to §2201, staying the trial of this matter currently scheduled for September 21, 2009, to allow the third party defendant to obtain all necessary discovery; and (3) pursuant to CPLR §2004, extending its time to file dispositive motions after completion of discovery.

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Upon the foregoing papers, it hereby is ordered that the motions and cross-motion are determined as follows:

This is a Labor Law action, commenced on April 24, 2007 and July 14, 2007,[1] pursuant to sections 200, 240(1) and 242(6), to recover damages for personal injuries arising out of an accident involving a motor vehicle that occurred on November 9, 2006,during the course of the employment of plaintiff Freddie Chavarria ("plaintiff") by third-party defendant J&S NY Development, Inc., the concrete and block subcontractor at a construction site located at 2709-11 Coney Island Avenue, Brooklyn, New York, that was owned by defendant/third-party plaintiff 2709-11 Coney Island Avenue, LLC ("2709-11 Coney Island Avenue"), and for which defendants/third-party plaintiffs K & L Construction Management of New York, Inc. ("K & L Construction Management") and Mikhlin Holdings, Inc. ("Mikhlin Holdings") were contracted to construct a building; defendant/third-party plaintiff Simon Linetsky ("Linetsky") is the president of K & L Construction Management and defendant/third-party plaintiff Leon Mikhlin ("Mikhlin") is the president of Mikhlin Holdings, both of whom were signatories to the contract. In February 2009, defendants/third-party plaintiffs (collectively "defendants") commenced a third party action against plaintiff's employer, J&S NY Development, Inc. It is upon the foregoing that defendants now move for an order granting them leave to file the within motion six days beyond the 120-day deadline, and for summary judgment and

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[1]By order dated January 9, 2008, this Court consolidated the actions of *Freddy Chavarria and Carmen Chavarria v. 2709-11 Coney Island Avenue, LLC, Simon Linetsky, K & L Construction Management Of New York, Inc.*, which was commenced on April 24, 2007, and *Freddy Chavarria and Carmen Chavarria v. Leon Mikhlin and Mikhlin Holdings, Inc.*, which was commenced on July 14, 2007.

dismissal of all of plaintiff's causes of action against each and every defendant, as well as the time to conduct discovery in the third-party action. Plaintiff cross moves for summary judgment on the issue of liability and an immediate trial on the issue of damages. J&S NY Development, Inc., moves for an order severing the third party action from the main action, on the ground that it was only recently brought into this lawsuit and no discovery with respect to the third party action has been completed, or in the alternative, for an order staying the trial of this action to allow the it to obtain all necessary discovery, and extending its time to file dispositive motions after completion of discovery.

Relevant Facts

On or about June 27, 2006, Mikhlin Holdings, as "owner," and K & L Construction Management, as "contractor," entered into a written "Subcontractor Agreement" with J & S NY Development, as "subcontractor," pursuant to which J & S NY Development was to perform specified concrete work in connection with the erection of a foundation for two buildings at the construction site located at 2709-11 Coney Island Avenue, Brooklyn, New York. According to his deposition testimony, plaintiff, as an employee of J & S NY Development, drove a truck, placed rebar and concrete, and worked as general laborer, under the supervision of the foreman, Mr. Ho, who was also an employee of J & S NY Development. As a driver, plaintiff drove a company van from his home, picked up other workers and took them to the job site; the van also was used to transport materials or equipment to and from job sites. On the day of the accident, plaintiff was instructed by Mr. Ho to get the van, which was parked two blocks away from the job site, drive the van to the sidewalk location where the disassembled scaffold had been placed, and to load the scaffold into the van for transport to another job site, as the work requiring a scaffold at the 2709-11 Coney Island Avenue project had been completed. Plaintiff, who together with Mr. Ho loaded the scaffold into the van, sustained injury when Mr. Ho entered the van and backed it up, pinning plaintiff between the rear bumper of the van and the front of the SUV parked behind the van.

Mikhlin, president of Mikhlin Holdings and a member of K & L Construction, testified at his deposition that Mikhlin Holdings performed financial supervision over the 2709-11 Coney Island Avenue project, and K & L provided construction supervision, and that J & S NY Development was contracted to install a foundation and structural steel for which the scaffold was delivered, installed and removed by employees of J & S Development. Linetsky, the president of K & L Construction, testified that his company hired the subcontractors, provided supervision, and that he visited the job site once or twice per week to observe the progression of the job, as did Mikhlin.

Motion of Defendants

1. Extend Time to File Summary Judgment Motion

Defendants move to extend their time to file a summary judgment motion, which was filed six days after the 120-day window for the filing of such motions. 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); Tower Ins. Co. of New York v. Razy Associates, supra; Soltes v 260 Waverly Owners, 42 A.D.3d 565 (2nd Dept. 2007). Although the trial court has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue [(Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 129 (2000)], in the absence of a "good cause" showing, a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary.

The Note of Issue in the instant case was filed January 14, 2009, prior to the completion of discovery; May 14, 2009, which was 120 days from the date of filing of the Note of Issue, was the deadline date for the filing of summary judgment motions. However, following the filing of the Note of Issue, several dispositions were held, including the March 9, 2009 deposition of Mikhlin and the May 1, 2009 deposition of Linetsky. Defendants allege that the six day delay of their filing of the summary judgment motion was due to their inability to timely obtain from plaintiff the deposition testimonies of Mikhlin and Linetsky, which were needed for the summary judgment motion, notwithstanding the diligent efforts of their attorneys.

This Court finds that defendants have demonstrated "good cause" for failing to move for summary judgment within 120 days of the filing of the note of issue since discovery issues relevant to the motion were outstanding at the time of the filing of the note of issue and were not resolved in time to enable them to timely file the motion for summary judgment. See, Abdalla v. Mazl Taxi, Inc., 66 A.D.3d 803 (2nd Dept. 2009)[defendants established good cause in support of that branch of their motion which was for leave to extend their time to move for summary judgment until 120 days after receipt of all outstanding discovery, since there was significant discovery outstanding at the time the note of issue was filed]; Jones v. Grand Opal Const. Corp., 64 A.D.3d 543 (2nd Dept. 2009)[Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was for leave to extend their time to move for summary judgment to the extent of permitting such motion no later than 45 days after the completion of physical examinations, since there was significant discovery outstanding at the time the note of issue was filed]; Alvarez v. Eviles, 56 A.D.3d 500 (2nd Dept. 2008)[Honeywell demonstrated "good cause" for the delay in making the renewed motion (see generally Brill v. City of New York, 2 N.Y.3d 648, 651, 781 N.Y.S.2d 261, 814 N.E.2d 431), since significant discovery was still outstanding after the deposition was taken and Honeywell's expert witnesses needed to consider the additional discovery in preparing the affidavits submitted on the motion]; Tower Ins. Co. of New York v. Razy Associates, 37 A.D.3d 702 (2nd Dept. 2007)[significant outstanding discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment]; Sclafani v. Washington Mut.. 36 A.D.3d

682 (2nd Dept.2007)[defendants demonstrated "good cause" for the delay in filing their motions for summary judgment, since the note of issue was filed while there was significant discovery outstanding]. Here, the filing was delayed due to plaintiff's untimely delivery of the transcripts of depositions taken by plaintiff. Inasmuch as these transcripts were necessary to enable defendants to make their summary judgment motion, "good cause" for the delay in making the summary judgment motion is demonstrated and this Court will consider their belated summary judgment motion.

2. Summary Judgment

Defendants seek summary judgment dismissing plaintiff's claims under sections 200, 240 and 241 of the Labor Law. 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, 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. MBG 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).

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). 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, defendants argue, in general, that the Labor Law is wholly inapplicable to this case, in that it involves a motor vehicle accident, not any violation of a Labor Law provision. They contend that the deposition testimony "makes clear that the accident is not within the scope of the Labor Law, nor the Industrial Code provision related to providing supervision for the erection or removal of scaffolding." They further contend that "the negligence of the driver is a supervening or intervening cause which was not reasonably foreseeable and therefore severs the causal connection between the alleged Industrial Code violation and the injury." Pointing to the deposition testimony of plaintiff, as well as that of Linetsky and Mikhlin, defendants demonstrated that they neither supervised nor exercised the control over the method and manner of plaintiff's work that would invoke section 200 of the Labor Law, since the accident occurred on the street, not at the workplace to which the safe workplace proscription applied. They further demonstrated, again through reference to the deposition testimonies, the inapplicability of section 240(1) of the Labor

Law, stating:

> It is clear that Labor Law § 240(1) does not apply herein. Notably, plaintiff does not even mention 240(1) in the Bill of Particulars. Plaintiff was standing on the street, was struck by a van also on the street. The incident did not involve a height or gravity-related risk. None of the protections contemplated in the statute would have been effective at preventing the accident, and plaintiff's activities certainly were not gravity-related, nor was he exposed to a gravity-related hazard when the auto accident occurred.

Finally, defendants made a prima facie showing that the facts of this case do not fall within the ambit of section 241(6) of the Labor Law or section 23-1.5(h) of the Industrial Code [12 NYCRR], which governs scaffold erection and removal. They argue that their duty under 23-1.5(h) is limited to the "removal of the scaffold, and does not encompass the operation of the vehicle used to transport the scaffold to another job site," and refer in support to, inter alia, Lavore v. Kir Munsey Park 020, LLC, 40 A.D.3d 711 (2nd Dept. 2007). In Lavore v. Kir Munsey Park 020, LLC, the Appellate Division, Second Department, in dismissing a personal injury claim based upon violations of the Labor Law, stated, in relevant part [40 A.D.3d at 711]:

> the plaintiff's cause of action pursuant to Labor Law § 241(6) should have been dismissed, as the specific Industrial Code provisions he relies upon have no application under the facts presented. . . Likewise, subsection 23-5.1(h) of the Industrial Code, which provides that "[e]very scaffold shall be erected and removed under the supervision or a designated person" (12 NYCRR § 23-5.1 [h]), has no relevance here, since the plaintiff's use of the truck as the functional equivalent of a "scaffold" (cf. Watson v. Hudson Val. Farms, 276 A.D.2d 1004, 714 N.Y.S.2d 810) had already ceased, and the planks placed across the sides of the truck had already been safely removed, before the accident occurred. Thus, any violation of that section would be causally unrelated to the plaintiff's subsequent fall from the side of the truck.

Here, the scaffold is involved, not because it was being used, but solely because the van that caused injury to plaintiff was being used to transport it to another location.

As set forth above, Labor Law § 240(1) requires owners and contractors to provide protective devices when there is a significant risk inherent in a particular task because of the relative elevation at which the task must be performed, or at which materials or loads must be positioned or secured. See, Abreo v. URS Greiner Woodward Clyde, 60 A.D.3d 878 (2nd Dept.2009); Toefer v. Long Is. R.R., 4 N.Y.3d 399 (2nd Dept. 20); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82; Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932). Here, defendants not only clearly demonstrated, prima facie, that "falling

worker" liability under Labor Law § 240(1) is inapplicable (see, Abreo v. URS Greiner Woodward Clyde, supra),[2] but that the Industrial Code provision relied upon was inapplicable to the facts and that any alleged violation of that provision was not a proximate cause of the accident. See, Abreo v. URS Greiner Woodward Clyde, supra. Finally, where, as here, the alleged dangerous condition arises from the subcontractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or section 200 of the Labor Law. See, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505 (1993). Retention of the general right to supervise the work or contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim, particularly where, as here, plaintiff's accident was the result of his co-employee's negligent operation of their employer's motor vehicle on a public street.

Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). Plaintiff did not meet his burden.

In opposition, plaintiff refers to deposition testimony in which both Mikhlin and Linetsky described their supervisory roles, and argues:

> The cause of the accident was the failure to supervise the removing of the scaffolding from one of the defendant's job site to the other job site. A supervisory watching the removing of the scaffolding would have notified the driver of Chavarria's presence behind the van when the driver went to move it. There was no negligence in merely moving the van. The van was supposed to be moved. As plaintiff testified, the van was parked in front of the job site. Plaintiff was removing the scaffolding from the job site into the van. The scaffold is made of large pieces of metal and long planks of wood. The co-worker moved the van and backed into Plaintiff pinning him against the vehicle behind him.

The thrust of plaintiff's section 241(6) claim is that the Industrial Code required that defendants should have designated someone to supervise the loading of the scaffolding into the van operated by plaintiff's foreman and owned by plaintiff's employer because "the scaffold related activity was continuing" at the work site. In support of his position, plaintiff cites Brogan v. International Business Machines Corp., 157 A.D.2d 76 (3rd Dept. 1990). That case, however, is clearly

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[2]In his opposition papers, plaintiff withdraws his claim under Labor Law § 241(6).

distinguishable. There, the Appellate Division, Third Department, in finding the Labor Law applicable, stated:

> IBM urges that all of plaintiff's causes of action under the Labor Law should have been dismissed because he was not injured at the work site where the construction, if any, was to take place, i.e., the actual point of installation of the tanks in building 322; instead, the accident occurred on a roadway some distance from the work site during the course of delivery of materials. But, as is now fully established, the lack of proximity between the place of accident and the precise location of construction is not dispositive against Labor Law liability for injuries to workers handling construction materials and equipment (citation omitted). In the instant case, the accident occurred on IBM's property, the tanks were being moved only from one point to another in the building where the construction was taking place after delivery by the supplier, the circuitous route taken was only for logistical reasons and the activity out of which the accident arose was an expressly integral part of the construction contract. Under these circumstances, liability under Labor Laws §§ 200, 240(1) and § 241(6) is not excluded. The particular work being performed at the time of the accident was part of the construction in that it was on IBM's property, necessitated by and incidental to the construction, and involved materials being readied for use in connection therewith (citations omitted).

In the instant case, unlike in Brogan, the accident did not occur on defendants' property, the activity out of which the accident arose was not an "expressly integral part of the construction contract," and the scaffolding was not being "readied for use in connection" with the construction project. Instead, the scaffolding was being relocated by plaintiff and his co-worker to another project of his employer in his employer's van.

Similarly, that portion of the Brogan decision rejecting the argument that IBM's "obligation to furnish plaintiff a safe place to work (see, Labor Law § 200) was obviated because the accident occurred through the negligent acts of plaintiff's employer, Strain, in failing to secure the load," is inapplicable. There, the Court reasoned:

> Plaintiff submitted evidentiary proof in admissible form that several of IBM's representatives were present as the tanks were being loaded, including IBM's project coordinator, who testified at a deposition that he was there to "make sure the hard hats were being worn, the types of straps being utilized, and their procedure on lifting the piece of equipment to the truck". Additionally, IBM's safety technician testified that he had the authority to stop the work if, in his opinion, it was not being carried on in a safe manner. This evidence was

> sufficient to create an issue of fact as to whether IBM had assumed control over the safety conditions affecting Strain's employees, thus giving rise to liability under Labor Law § 200 (citations omitted).

Here, it is undisputed that defendants under took no supervision of the loading of the scaffolding into the van; hence, it cannot be argued that any issue of fact is raised with respect to their assuming "control over the safety conditions affecting [J & S NY Development] employees."

Based upon the foregoing, as plaintiff failed to raise a material issue of fact, defendants/third party plaintiffs' motion for summary judgment dismissing the complaint is granted, and the complaint hereby is dismissed. Plaintiff's cross motion for summary judgment and third party defendant's motion for, inter alia, severance are denied as moot.

Dated: December 23, 2009

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J.S.C.