

**Jones v New York City Hous. Auth.**

2010 NY Slip Op 31209(U)

May 10, 2010

Supreme Court, New York County

Docket Number: 115749/07

Judge: Marylin G. Diamond

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

LESTER JONES and DARLENE JONES,

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY,  
PMS CONSTRUCTION MANAGEMENT CORP.  
and HADIER ENGINEERING P.C.,

Defendants.

And Third-Party Action.

INDEX NO. 115749/07

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

**FILED**  
MAY 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** Motion sequence numbers 003 and 004 are consolidated herein for decision. This personal injury action involves an accident which occurred on August 30, 2006 while the plaintiff Lester Jones, an employee of the Minelli Construction Co., Inc., was working on a suspension scaffold at a building located on Third Avenue in Manhattan which was then under construction.

The scaffold, which was owned by Minelli, was equipped with safety railings, as well as safety harnesses which were worn by the worker and attached to the building. The scaffold was raised and lowered by two electric motors, one on each end. The motors were bolted to the scaffold's platform. They were each operated by up and down buttons which were pushed to start the scaffold moving and released to stop. In order to keep the scaffold level while moving vertically, it was necessary that two employees be present on the scaffold, each of whom would be operating one of the motors at the same time. If only one of the motors was operated, the scaffold would necessarily rotate like a seesaw at an angle to the ground, since only one side was being moved up or down. In addition to the up and down buttons, a third button was supposed to be available for stopping the scaffold in the event of an emergency. However, at the time of the accident, the emergency button for the motor on the right side of the scaffold was missing.

The day before the accident, the plaintiff had worked on the same scaffold and apparently had difficulty releasing the buttons on the right motor. On the day of the accident, the plaintiff and a co-worker, Albert Martin, attempted to operate the scaffold and had trouble releasing the buttons on both sides of the scaffold. They then alerted their foreman from Minelli, who cleaned the motors with a blower and some oil. The foreman then instructed the plaintiff and Martin to return to work. According to the plaintiff, after going back on the scaffold, he pushed the down button on one side and Martin pushed the down button on the other side, causing the scaffold to move in that direction. However, when they attempted to stop the scaffold from moving by releasing the two buttons at the same time, the side of the scaffold on which the plaintiff was standing suddenly dropped while the side on which Martin was standing came to a halt, thus causing the scaffold to rotate at such an angle that it became impossible to remain standing on the platform. As a result, the plaintiff fell off the scaffold. However, he remained tethered by his safety harness to the side of the building. The plaintiff claims that he was injured when he struck the building.

The plaintiff and his wife, Darlene Jones, have brought this action against the building owner (New York City Housing Authority ["NYCHA"]), the construction manager on the project (PMS Construction Management Corp.) and a safety consultant on the project (Haider Engineering P.C.). The complaint asserts causes of action under Labor Law §§ 240(1), 241(6) and 200, as well as common law negligence. In their answer, PMS and NYCHA have asserted cross claims against Haider for indemnification and breach of a contractual obligation to procure insurance on their behalf. In motion sequence number 003, Haider moves for summary judgment dismissing the complaint and all cross-claims asserted against it. In motion sequence number 004, NYCHA and PMS move for summary judgment dismissing the complaint as against them. Plaintiffs cross-move for partial summary judgment on their Labor Law § 240(1) claim and for leave to serve a supplemental bill of particulars.

### Discussion

**A. Haider** - - On its motion for summary judgment, Haider argues that it is not subject to Labor Law §§ 240(1) and 241(6) since it was neither an owner, contractor nor statutory agent of the contractor. Clearly, Haider was neither an owner nor contractor. As to whether it was a statutory agent, Haider contends that it cannot be so considered because it was merely a safety engineer and consultant which lacked authority to supervise, direct or control the plaintiff's work. *See Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 317 (1981); *Doherty v. City of New York*, 16 AD3d 124, 125 (1<sup>st</sup> Dept. 2005); *Ballthazar v. Full Circle Construction Corp.*, 268 AD2d 96, 97 (1<sup>st</sup> Dept. 2000); *Carter v. Vollmer Associates*, 196 AD2d 754 (1<sup>st</sup> Dept. 1993). For this same reason, Haider argues that it is also not subject to liability under Labor Law §200 since it did not supply any equipment to the site, did not direct, supervise or control the plaintiff or his coworkers in the performance of their duties, and did not act negligently or unreasonably in its role as the site safety consultant. *See Doherty v. City of New York*, 16 AD3d at 125. Finally, Haider contends that the cross claims asserted against it by PMS and NYCHA should also be dismissed.

The record before the court clearly indicates that the plaintiff's work, including his use of scaffolds, was supervised and controlled exclusively by his employer, Minelli. Indeed, plaintiff testified at his 50-h hearing that Minelli supervised his work and that he reported only to a Minelli supervisor. He also acknowledged that he never complained about the scaffold motors until the day of his accident and that his complaint was only directed to his foreman. These assertions were confirmed by the deposition testimony of supervisors from both Minelli and PMS Construction. Moreover, the PMS witness testified that Haider's role at the construction site was limited to twice a week visits to perform safety inspections and a general review of the safety conditions. Similarly, Minelli's witness confirmed that Haider never supervised or directed Minelli's employees. Although Haider inspected scaffolds at the site, there is no evidence that it had the authority to do anything more than report an unsafe condition to the appropriate party, as opposed to stopping the work. Indeed, the contract between Haider and PMS did not confer any authority on Haider to control or direct the work on the construction site, but merely required Haider to "take all reasonable precautions to protect the persons and property of NYCHA .... from damage, loss or injury resulting from [Haider's] operations under this contract." Since Haider lacked authority to supervise and control the plaintiff's work, it cannot be liable for negligence under Labor Law § 200 and the common law, and cannot be deemed an agent of the contractor so as to be liable under Labor Law §§ 240(1) and 241(6). *See Rizzuto v. L.A. Wenger Contracting*, 91 NY2d 343, 352 (1998); *Comes v. New York State Electric & Gas Corporation*, 82 NY2d 876, 877 (1993); *Ortega v. Puccia*, 57 AD3d 54, 61 (2<sup>nd</sup> Dept. 2008); *Doherty v. City of New York*, 16 AD3d at 125; *Carter v. Vollmer Assocs.*, 196 AD2d at 754.

In any event, as to Labor Law § 200, the plaintiff is also required to demonstrate that Haider had actual or constructive notice of the condition that caused the accident. As the First Department has stated, the "notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken." *Mitchell v. New York Univ.*, 12 AD3d 200, 201 (1<sup>st</sup> Dept.

2004). The alleged problems with the scaffold were a defective motor switch and a missing emergency stop button. Although Haider inspected the scaffold at issue two days before the plaintiff's accident, it did not find any such problems. However, there is no evidence that these problems were, in fact, present at the time of the inspection. On the contrary, Minelli's inspection reports indicated that the motors were fully functional. Indeed, the plaintiff used the scaffold until the day before his accident without complaint or incident. Since there is thus no evidence that Haider directed or controlled the plaintiff's work or that it performed its services negligently, the complaint and all cross claims asserted against it under the Labor Law must be dismissed.

Finally, as to the cross claim against it for failure to procure an insurance policy on behalf of PMS and NYCHA, Haider has submitted documents which establish that it did, in fact, obtain the requisite insurance. This cross claim for breach of contract must therefore also be dismissed.

**B. The Liability of NYCHA and PMS** - - As already noted, NYCHA and PMS have moved for summary judgment dismissing the complaint as against them. Plaintiff have cross-moved for partial summary judgment on their Labor Law § 240(1) claim and for leave to serve a supplemental bill of particulars. Although the defendants object to the plaintiff's cross-motion as untimely, it is well settled that an otherwise untimely cross-motion for summary judgment may nevertheless be considered by the court where, as here, a timely motion for summary judgment was made with respect to the same cause or causes of action which are the subject of the cross-motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 (1<sup>st</sup> Dept 2006); *Osario v. BRF Constr. Corp.*, 23 AD3d 202 (1<sup>st</sup> Dept 2005).

As to Labor Law § 240(1), known as the Scaffold Law, *see Ryan v Morse Diesel*, 98 AD2d 615, 615 (1<sup>st</sup> Dept 1983), it requires that all contractors and owners engaged in the renovation of a building or other structure "furnish 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 "was designed to prevent those types of accidents in which the scaffold ... 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" *John v Baharestani*, 281 AD2d 114, 118 (1<sup>st</sup> Dept 2001), quoting *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 (1993). To prevail on a section 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of his injuries. *See Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 (2003); *Felker v Corning Inc.*, 90 NY2d 219, 224-225 (1997); *Torres v Monroe College*, 12 AD3d 261, 262 (1<sup>st</sup> Dept 2004). "[W]here the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240 (1), and the burden shifts to the defendant." *Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 (3<sup>rd</sup> Dept 2007).

Here, the plaintiff maintains that the evidence, including accident reports and investigations, establishes beyond dispute that the scaffold malfunctioned and/or failed to adequately protect him from falling because of a defective motor switch that was stuck in the down position and a missing emergency stop button. He argues that since the scaffold was not so "constructed, placed and operated as to give proper protection," NYCHA and PMS are liable for his injuries under Labor Law § 240(1). *See Lopez v. Boston Properties Inc.*, 41 AD3d 259, 260 (1<sup>st</sup> Dept. 2007); *Hernandez v. 151 Sullivan Tenant Corp.*, 307 AD2d 207, 207-208 (1<sup>st</sup> Dept. 2003).

On their own motion and in opposition to the plaintiffs' cross-motion, NYCHA and PMS argue that they should not be held liable because the plaintiff's negligence constituted the sole proximate cause of his injuries. It is by now well established that where a plaintiff's own actions are the sole proximate

cause of the accident, liability under section 240(1) does not attach. See *Robinson v. East Med. Center, L.P.*, 6 NY3d 550, 554 (2006); *Cahill v. Triborough Bridge & Tunnel Auth*, 4 NY3d 35 (2004); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d at 280. If adequate safety devices are provided and the worker either misuses them or chooses not to use them, liability under section 240 does not attach. See *Robinson v. East Med. Center, L.P.*, 6 NY3d at 554; *Cahill v. Triborough Bridge & Tunnel Auth*, 4 NY3d at 35. In this respect, the defendants claim that the plaintiff had been repeatedly instructed to cover the motors on the scaffold with plastic to prevent dust and debris from entering and that it was his failure to do so which caused the malfunction. This claim is without merit. First, the plaintiff's foreman, Nara Schneider, testified at his deposition that he never instructed the plaintiff to cover the motors with plastic. Second, there is no evidence that the right motor malfunctioned because it was not covered with plastic. Third, even if there were any such evidence, the plaintiff's accident was caused not only by the motor's failure, but also by the absence of an emergency stop button which could have prevented or minimized the see-saw movement of the scaffold. As such, the plaintiff's alleged negligence would only have been contributory and not the sole cause of the accident. See *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 (1<sup>st</sup> Dept 2007); *Jamison v GSL Enterprises, Inc.*, 274 AD2d 356, 361 (1<sup>st</sup> Dept 2000). Thus, the plaintiffs are entitled to partial summary judgment against PMS and NYCHA on the issue of liability under Labor Law § 240(1).

As to the defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim, to prevail under this statute, a plaintiff is required to establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. See *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 504-05. In their opposition papers, the plaintiff rely on two Industrial Code provisions, 12 NYCRR § 23-5.1(f) and 12 NYCRR § 23-9.2(a). 12 NYCRR § 23-5.1(f), which requires that every scaffold be maintained in good repair and that every defective or unsafe condition be immediately corrected, does not impose a concrete or specific standard of conduct sufficient to support a Labor Law § 241(6) claim. See *Schiulaz v. Arnell Construction Corp.*, 261 AD2d 247, 248 (1<sup>st</sup> Dept. 1999). As to 12 NYCRR § 23-9.2(a), this provision requires adequate inspections, maintenance and repair of power operated equipment and the maintenance and repair by or under the supervision of designated persons. Since the provision was not cited in the plaintiffs' complaint or verified bill of particulars, they seek leave to serve a supplemental bill of particulars alleging a violation thereof. Leave must be denied because the plaintiffs have failed to establish that the provision is applicable to scaffolds, which are otherwise regulated in detail in a separate section of the Industrial Code. See 12 NYCRR § 23-5.1 *et seq.* Indeed, in finding that this provision is specific enough to support a claim under Labor Law § 241(6), the Court of Appeals noted that subpart 23-9 applies to "power-operated heavy equipment or machinery such as excavating machines, pile drivers and motor trucks." *Misicki v. Caradonna*, 12 NY3d 511, 518 (2009). The plaintiffs do not cite to, and the court has not found, any cases which applied this provision to scaffolds. In the absence of any such legal support, the court is disinclined to apply this provision herein. The plaintiffs' Labor Law § 241(6) claim must therefore be dismissed and their cross-motion seeking leave to serve a supplemental bill of particulars must be denied.

Finally, as to Labor Law § 200 and common law negligence, as indicated above, establishing liability under these provisions requires a showing that the owner or general contractor of the work site had the authority to control the activity bringing about the injury and had actual or constructive notice of the unsafe condition. See *Mitchell v. New York Univ.*, 12 AD3d at 201. In their opposition papers, the plaintiffs argue that both NYCHA and PMS had authority to control the activities that caused the accident and that there is an issue of fact as to whether they had notice of any defective condition in the scaffold's right motor. There is, however, no evidence which supports this argument. Not only was the plaintiff's employer, Minelli, the general contractor on the project, but it is undisputed that Minelli was the plaintiff's sole supervisor and that plaintiff only reported to Minelli's foreman. Indeed, plaintiff has indicated that he would not perform any scaffold work unless directed to do so by his foreman. Nor is there any evidence

that either of these defendants had actual or constructive notice of any problems with the scaffold's right motor or of the absence of an emergency stop button. The plaintiffs' Labor Law §200 and common law negligence claims must therefore be dismissed.

Accordingly, in motion sequence number 003, Haider's motion for summary judgment is granted and the complaint and all cross claims which have been asserted against this defendant are hereby dismissed. In motion sequence number 004, the motion for summary judgment by NYCHA and PMS is granted to the extent that the plaintiffs' Labor Law §§ 241(6) and 200 claims, as well as their common law negligence claims, are hereby dismissed. The motion is otherwise denied. The plaintiffs' cross-motion for partial summary judgment on their Labor Law §240(1) claim is granted, but leave to serve a supplemental bill of particulars is denied.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on June 7, 2010 at 10:30 am. for a status conference.

ENTER ORDER

Dated: 5/10/10



MARYLIN G. DIAMOND, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
MAY 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE