

<b>Henry v P. Deblasio, Inc.</b>
2010 NY Slip Op 33227(U)
November 15, 2010
Supreme Court, Suffolk County
Docket Number: 08-7541
Judge: Joseph Farneti
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**ORDERED** that this cross-motion (#006) by the defendant/third-party plaintiff, P. DeBlasio, Inc., for an order, pursuant to CPLR 3212, for summary judgment is denied, and it is further

**ORDERED** that this cross-motion (#007) by the defendant/third-party defendant, SMR Construction, Inc., for an order, pursuant to CPLR 3212, for summary judgment dismissing all claims alleged against it is denied.

The complaint of this action arises out of an incident wherein the plaintiff was caused to fall down an open elevator shaft on November 14, 2007 at One King Arthurs Court, East Setauket, County of Suffolk, State of New York, where a two-story addition was being constructed. Causes of action sounding in negligence, and violation of Labor Law §§ 200, 240, 241 (6) and 241 (8), and Industrial Code of the State of New York 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-2, 23-2.4, 23-2.5, and 23-5 have been asserted along with a derivative claim on behalf of the plaintiff's spouse, Julie Henry.

The third-party complaint sets forth causes of action for common law indemnification, contractual indemnification, breach of agreement, and judgment over for an apportionment of liability as against defendants True Mechanical and SMR Construction, Inc.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2d Dept 1979]).

### **Negligence**

In New York, to establish a *prima facie* case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to plaintiff; (2) a breach thereof; (3) injury proximately resulting therefrom; and (4) damages. If a defendant's negligence was a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc LEXIS 2549, 236 NYLJ 51 [Sup Ct, Nassau County 2006]). In order to establish the third element, proximate cause, the plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343,

728 NYS2d 731 [2001]. Summary judgment is rarely appropriate in a negligence action because the issue of whether a plaintiff or defendant acted reasonably under the circumstance could rarely be resolved as a matter of law (*Davis et al v Federated Department Stores, Inc.*, 227 AD2d 514, 642 NYS2d 707 [2d Dept 1996]).

### **Labor Law § 200**

Labor Law § 200 provides in pertinent part that “[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places” (*Trbaci v AJS Construction Project Management, Inc, et al*, 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Sup Ct, Kings County 2009]). “New York State Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 880 NYS2d 227 [2d Dept 2000]). Liability for causes of action sounding in common law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff’s work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315, 772 NYS2d 70 [2d Dept 2004],” (*Marin v The City of New York, et al*, 15 Misc3d 1003A [Sup Ct, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (*Ramos v HSBC Bank et al*, 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail on a claim under Labor Law § 200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (*Mendoza v Cornwall Hill Estates, Inc.*, 199 AD2d 368, 605 NYS2d 308 [2d Dept 1993]). Labor Law § 200 governs general safety in the workplace, imposes upon employers, owners, and contractors the affirmative duty to exercise reasonable care to provide and maintain a safe place to work and is a reiteration of common-law negligence standards. Therefore, a party charged with liability must be shown to have notice, actual or constructive, of the unsafe condition and to exercise sufficient control over the work being performed to correct or avoid the unsafe condition (*Leon v J&M Pepe Realty Corp. et al*, 190 Ad2d 400, 596 NYS2d 380 [1st Dept 1993]).

### **Labor Law § 240 (1)**

Labor Law § 240, entitled “[s]caffolding and other devices for use of employees” at section (1) provides, “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.”

“Labor Law § 240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation” (*see Plotnick et al v Wok’s Kitchen Incorporated, et al*, 21 AD3d 358, 800 NYS2d 37 [2d Dept 2005]; *Handlovic v Bedford Park Development, Inc.*, 25 AD3d 653, 811 NYS2d 677 [2d Dept 2006]). Labor Law § 240 (1) was enacted 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 (*Cruz v The Seven Park Avenue Corporation et al*, 5 Misc3d 1018A, 799 NYS2d 159 [Sup Ct, Kings County 2004]). As set forth in *Ortega et al v Puccia et al*, 57 AD3d 54, 886 NYS2d 323 [2d Dept 2008], Labor Law § 240 is intended to protect workers

from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in § 240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

Labor Law § 240 (1) imposes absolute liability to encompass injuries to workers sustained either in a fall from scaffolding or some other elevated platform or when struck by objects that fall from such a platform (*Allen et al v City of Buffalo et al*, 161 AD2d 1134, 555 NYS2d 944 [4th Dept 1990]). It is well-settled that not every hazard or danger encountered in a construction zone falls within the scope of Labor Law § 240 (1) as to render the owner or contractor liable for an injured worker's damages. Rather, Labor Law § 240 (1) is aimed at only elevation-related hazards, and accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of a required safety device (see *Natale v City of New York et al*, 33 AD3d 772 [2d Dept 2006]).

#### **Labor Law § 241 (6)**

Labor Law § 241 (6) provides in pertinent part that “[a]ll 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 persons employed therein or lawfully frequenting such places.” It is axiomatic that the statutory duties imposed by Labor Law § 241 (6) place ultimate responsibility for safety practices on owners of the worksite and general contractors (*Bopp v A.M. Rizzo Electrical Contractors, Inc. et al*, 19 AD3d 348, 796 NYS2d 153 [2d Dept 2005]). Labor Law § 241 (6) imposes liability upon all contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith (see *Dipalma et al v Metropolitan Transportation Authority et al*, 2008 NY Slip Op 51654U, 20 Misc3d 1128A [Sup Ct, Bronx County]).

“Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code” (citing *Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). As the Court of Appeals explained in *Rizzuto v L.A. Wegner Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998], “[t]hus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault” (*McDevitt et al v Cappelli Enterprises, Inc. et al*, 16 Misc3d 1133A [Sup Ct, New York County 2007]). In order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross, supra*, at 502; *Ares v State*, 80 NY2d 959, 590 NYS2d 874 [1992]; see also *Adams v Glass Fab.*, 212 AD2d 972, 624 NYS2d 705 [4th Dept 1995]) (*Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Sup Ct, Kings County 2004]; see *Mahoney v Madeira Associates et al*, 32 AD3d 1303, 822 NYS2d 190 [4th Dept 2006]).

#### **Labor Law § 241 (8)**

Labor Law § 241 (8) provides that the “Commissioner, as deemed necessary, shall promulgate rules designed for the purpose of providing for the reasonable and adequate protection and safety of persons passing by all areas, buildings or structures in which construction, excavation or demolition work is being performed,

and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith. The provisions of this subdivision shall not apply to cities having a population of one million or more.”

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In support of motion (#004), the plaintiff has submitted an attorney's affirmation; the affirmation of Christopher Moshera dated November 19, 2007; copies of the summons and complaint; answer of DeBlasio, Inc., with cross-claims asserted against SMR Construction, Inc.; third-party summons and complaint; verified third-party answer of True Mechanical Corp.; copy of a contract, dated June 26, 2007, between Dan Morris for the Gjurkaj residence; unsigned transcripts of the continued deposition of P. DeBlasio dated March 11, 2010, Robert R. Moore dated September 9, 2009, George Henry dated December 16, 2008, Jose Matias dated March 11, 2010; proposal by SMR Construction, Inc. dated 10/14/07; specifications and estimates dated October 24, 2009 by True Mechanical Corporation; and a copy of the form submitted to the Worker's Compensation Board by True Air Conditioning. The unsigned deposition transcripts are not in admissible form as required pursuant to CPRL 3212 and are not accompanied by an affidavit pursuant to CPLR 3116 and are therefore not considered on this motion.

Although the affidavit of Christopher Moshera, dated November 19, 2007, is in admissible form and establishes that there was an open and unguarded elevator shaft and stairwell to the second floor, the facts surrounding the incident cannot be determined from the admissible evidence, such as who the plaintiff was actually employed by, and who the general contractor was. Also, there is no supporting affidavit or signed copy of the transcript of the examination before trial of the plaintiff, and, therefore, this motion fails to comport with CPLR 3212. As such, the plaintiff has not demonstrated *prima facie* entitlement to summary judgment on the cause of action premised upon the defendants' alleged violation of Labor Law § 240 (1). Accordingly, motion (#004) is denied.

Motion (#005) is supported by, among other things, an attorney's affirmation; the affidavit of Philip DeBlasio; copies of the summons and complaint; answers of DeBlasio and SMR Construction; third-party summons and complaint; answers of True Mechanical; amended third-party answer of SMR Construction; plaintiff's verified bill of particulars; a Hold Harmless agreement between True Mechanical and P. DeBlasio, Inc.; Notices to Admit and Responses; unsigned copies of the transcripts of George Henry dated December 16, 2008, Robert Moore dated September 9, 2009 and Peter DeBlasio dated August 28, 2009; signed copies of the transcripts of the examinations before trial of Jose Matias dated March 11, 2010, and Louis J. DeSantis dated September 9, 2009; and a copy of the Stipulation of Discontinuance dated March 5, 2008 between P. DeBlasio Inc. and George and Julie Henry. The unsigned copies of the transcripts of the examinations before trial of George Henry, Robert Moore and Peter DeBlasio are not in admissible form pursuant to CPLR 3212 and are not supported by an affidavit pursuant to CPLR 3116, and are therefore not considered on this motion for summary judgment. The Stipulation of Discontinuance between the plaintiffs and defendant DeBlasio is not signed by all parties.

In his supporting affidavit, Philip DeBlasio sets forth that he is the president of P. DeBlasio, Inc. SMR Construction, Inc. was hired to do framing work, including the framing of the elevator shaft at the project located at 1 King Arthur Court, East Setauket, New York, and True Mechanical was hired to do heating, ventilation, and air conditioning work. He states that SMR and True Mechanical entered into a hold harmless/indemnification agreement with P. DeBlasio.

An incomplete copy of the transcript of the examination before trial of Jose Matias has been provided wherein Matias testified to the extent that on November 13, 2007 he was employed as a mechanic by True Mechanical for eight years. Louis DeSantis is the owner of True Mechanical and George Henry is the manager and was his boss. He was present at the job site with his helper for one day before George Henry was injured. An extension with a second floor was being constructed on an existing house. The first day at the job, George Henry met him there and gave him a drawing of the plan. He went up to the second floor with George Henry via a wooden stairway consisting of about fifteen steps and was given instructions by Henry. Framing was up for a couple of rooms upstairs, there was a sub-floor, stairway, and an opening for an elevator shaft. Matias worked the job for about two and one-half days and the HVAC work was almost finished when Henry came back to check the job. Henry went upstairs. Matias was on the first floor when he saw Henry in the air falling down the elevator shaft from upstairs. Later that day, Matias went upstairs to do some more work and saw that the elevator shaft was open without any barricades. He did not put anything in front of the shaft because "it's not my job" and stated it was not True Mechanical's job.

Louis DeSantis testified at his examination before trial to the effect that he is the president of True Mechanical and is the only officer. True Mechanical entered into a contract with DeBlasio for the Morris residence. George Henry did the estimate and the contract was in effect on the date of Mr. Henry's accident on November 14, 2007. DeSantis also entered into a Hold Harmless agreement with DeBlasio. The agreement had True Mechanical written in as a party to the agreement, but the name was crossed out and True Air Conditioning was inserted in its place. DeSantis testified that he did not know if Henry was employed by True Mechanical or by True Air Conditioning for this particular job and did not know which company paid him for the job. True Air Conditioning was also owned by DeSantis. There were two separate corporations formed to separate the retrofit service operations from the new construction business. As a project manager, part of Henry's job was to check on safety at the job site and check to see if his workers had whatever tools or equipment they needed. Henry only had the authority to take his men off the job, but could not direct True Mechanical laborers to cover an unprotected opening if one were observed. He could also call whomever was responsible to notify them of the condition. He never discussed the accident with Henry and did not think Henry filled out a report for True Mechanical for the job.

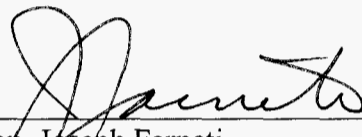
Based upon the foregoing, it is determined that P. DeBlasio, Inc. has not established *prima facie* entitlement to summary judgment dismissing the plaintiff's causes of action premised upon the alleged violation of Labor Law §§ 240 (1) and 241 (8), common law negligence, and for summary judgment against SMR Construction, Inc and True Mechanical Corp. on the issue of contractual indemnification and common law indemnification. Here, the evidentiary submissions have not established, among other things, who the owner of the property is, who the general contractor is, who the plaintiff was employed by, actual or constructive notice of the condition, or the liabilities of any of the parties. Thus, these factual issues preclude summary judgment. Accordingly, motion (#005) is denied.

Motion (#006) is supported by, among other things, an attorney's affirmation; a copy of the summons and complaint, answers served by DeBlasio and SMR Construction with cross claims, third-party summons and complaint; third-party answers with cross claims served by True Mechanical and SMR Construction; plaintiff's verified bill of particulars; a contract dated June 26, 2007 between P. DeBlasio, Inc. and Mr. Morris and Mr. and Mrs. Gjurkaj; specifications and estimates and by True Mechanical dated October 24, 2007 and the Hold Harmless agreement between True Mechanical and P. DeBlasio; a proposal by SMR Construction dated October 14, 2007; unsigned copies of the transcripts of the examinations before trial of George Henry dated December 16, 2008, Peter DeBlasio dated August 28, 2009 and March 11, 2010, Jose Matias, dated March 11,

2010, Louis DeSantis dated September 9, 2009 and Robert Moore dated September 9, 2009; and a copy of the Employer's Report of Work Related Accident/Occupational Disease dated November 13, 2007 by True Air Conditioning. The unsigned transcripts of the examinations before trial are not in admissible form pursuant to CPLR 3212, and are not accompanied by an affidavit pursuant to CPLR 3116. The motion is therefore not supported with an affidavit or signed deposition transcript of the moving party as required by CPLR 3212. Accordingly, motion (#006) is denied.

Motion (#007) is supported by, among other things, an attorney's affirmation; copies of the summons and complaint; answers with cross claims served by P. DeBlasio and SMR; third-party summons and complaint; verified third-party answers with cross claims served by True Mechanical and SMR; the contract dated June 26, 2007 between P. DeBlasio, Inc. and Mr. Morris and Mr. and Mrs. Gjurkaj; the proposal by SMR Construction dated October 14, 2007; unsigned copies of the transcripts of the examinations before trial of Robert Moore dated September 9, 2009, Peter DeBlasio dated August 28, 2009; and a copy of the cross-motion. The motion is not supported by an affidavit of a party with knowledge or a signed copy of a deposition transcript or an affidavit pursuant to CPLR 3116 and therefore fails to comport with CPLR 3212. Accordingly, motion (#007) is denied.

Dated: November 15, 2010

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION