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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

**JUDSTON JONES,**

Plaintiff,

-vs-

*Index No. 63115*

2008

**ALAN I. DEFISHER, MARVIN DEFISHER, SR., MARVIN DEFISHER JR., DAVID W. DEFISHER, DEFISHER ENTERPRISES, LLC, and DEFISHER FRUIT FARMS, LLC.**

Defendants,

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APPEARANCES: FARACI LANGE, LLP
(Carol A. McKenna, Esq., of counsel)
*Attorneys for Plaintiff*

EPSTEIN & HARTFORD
(Robert L. Hartford, Esq., of counsel)
*Attorneys for Defendants*



***MEMORANDUM - DECISION***

John B. Nesbitt, J.

## I. BACKGROUND

On October 2, 2004, plaintiff Judston Jones slid off a barn roof and fell approximately thirty (30) feet to the ground. This incident occurred at the DeFisher Farm, located on Quigley Road in the Town of Marion, County of Wayne.[1] Just how and why plaintiff was on that roof bears substantially upon the issues now before this Court. Plaintiff at that time was 24 years old and employed by Doug Sawyer, proprietor of Sawyer's Country Stove Depot. Plaintiff picked up that job because he knew Sawyer and his daughter, and had done some welding for him in the past. (Jones Tr. at 22). Working for Sawyer, plaintiff was a veritable "jack of all trades," installing and servicing wood and gas

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[1] Defendants David W. DeFisher, DeFisher Enterprises, and DeFisher Fruit Farms, LLC, apparently are unrelated to and not involved with defendants Alan DeFisher, Marvin DeFisher, Sr., and Marvin DeFisher, Jr., who are connected with the Quigley Road Farm (Alan DeFisher Tr. at 7-8).

stoves, cleaning and repairing chimneys,[2] and even working in Sawyer's green house, growing and selling plants. Ever Sawyer's man Friday, during the summer months, when the home heating business was slow, plaintiff was the main grunt for Sawyer's niche barn demolition business. Plaintiff had no formal training in barn demolition, but as a teenager had seen it done at his parents' property, and, in fact, assisted the individual doing the work, who apparently had some experience in the field. Prior to plaintiff's fall, he had taken down approximately five barns while working for Sawyer (Jones Tr. At 33). It was in this line of work that plaintiff came to be standing on the roof of the DeFisher barn, located on Quigley Road in the Town of Marion, on October 2, 2004.

Marvin DeFisher, Sr., and his two sons, Alan and Marvin, Jr., are potato farmers living on East Williamson Road in the Town of Marion.[3] In 2004, they were cultivating three separate parcels in Marion, one on Quigley Road, and the other two adjacent Sderry's Road and Owls Nest Road. The Quigley Road property hosted the barn from which plaintiff fell. Alan DeFisher owned the 25 acres consisting of the Quigley Road property (Alan DeFisher Dep. Tr. 9). So far as the record reveals, this barn was of unremarkable construction, except that it had an addition attached. The barn was not used for farming or other commercial purposes, but for storage of Alan's personal "stuff," such as his boat, camper, four wheelers, snow mobiles, snow blowers, a garden tractor, kid's toys, and brooms and rakes (Id. at 16).

The barn roof had fallen into serious disrepair by 2004, with decayed shingles and holes big enough for the birds to fly through (Alan DeFisher Depo Tr 12, Marvin Sr. Depo Tr ). In late summer of that year, Alan and his father discussed the need for repairs, and given the state of disrepair of the existing roof, it was decided that more than reshingling was necessary. Given that the DeFishers' were then busy with their farming operation, they decided to hire a third party to tear off the existing roof (Marvin Sr. Dep Tr at 47). As it happened, Doug Sawyer was doing a barn job at the Bliek farm on Marion-East Williamson Road, and learned that the DeFishers needed someone with his experience and wherewithal to do the roof removal. Mr. Sawyer met with Marvin, Sr., at the site and

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[2] Sawyer paid for plaintiff to go to Indiana for a couple of days of schooling to become a "certified" chimney sweep (Jones Tr. at 26).

[3] They also grow vegetables (Marvin DeFisher Sr. Depo Tr at 7)

discussed with him the scope of the proposed roof removal. The project would entail removal of the entire roof and its supporting structure. (Jones Depo at 42-43). Mr. Sawyer offered to do the job for $2,273.25 and Mr. DeFisher agreed with that proposal. Regarding the particulars of how the job was to proceed, Mr. Sawyer explained that all elevated work was done out of a hydraulically lifted basket controlled by the person in the basket and that adequate safety was maintained by that person remaining in the basket. (Id at 55-56, 59). As such, no other safety equipment or procedures were discussed.

The agreement made, Mr. Sawyer deputed and deployed plaintiff Judston Jones to the job site to do the work, which commenced in late September 2004. On the first day, Jones met with Marvin DeFisher to confirm what was expected. In doing these types of projects, Jones "always used a lift" and "never [was] on the roof." (Jones Depo at 34). Jones followed this practice for the first three days of the project, although on the fourth day he did get on the roof of the attached barn addition, which was not being removed. (Id. at 40). On this fourth day, with the roof dismantling nearly done, Jones tackled the removal of the last remaining roof support, consisting of an arch about ten to fifteen feet tall held in place by a couple of joists sitting upon the rear wall of the barn. (Id at 95-96). The hydraulic bucket lift was unable to reach this area, so Jones used a ladder to get upon the roof covering the attached addition, taking with him his chain saw and sledge hammer. (Id at 99). From this location Jones was able to reach the arch, but there were no "harnesses or ropes or anything to secure" Jones while he worked. (Id at 103). The addition roof was pitched and Jones was wearing boots (Id.) Cutting the last few joists holding up the arch, Jones anticipated that the last joist and arch would fall away from him and into the interior of the barn (Id at 104), and indeed, each cut made the joist lean further and further away from him (Id at 105). However, without warning, the joist and arch started falling back towards Jones, prompting him to move out of the way by scrambling down the addition roof, which turned into a standing slide that he was unable to arrest as he reached the edge of the roof. Jones was launched off the roof, falling approximately thirty (30) feet to the ground. (Id at 106-111).[4] Jones landed feet first in a standing position and his body crumbled to the ground because of the force of the fall. He suffered severe injuries as a result, which

[4] Luckily, the arch got hung up in someway and did not follow and fall with Jones. (Id at 110)

are detailed in his bill of particulars, including fractured heels, ankle and feet injuries, and back and spine trauma.

## II. THEORIES OF LIABILITY

In September of 2007, almost three years after his fall, Jones commenced this litigation against Marvin DeFisher, Sr., and his two sons. The complaint seeks recovery from the DeFishers for the injuries sustained by Jones based upon theories of negligence and violations of the State Labor Law. For present purposes, the Labor Law causes of action command our attention. Labor Law §240(1) predicates the first cause of action and reads:

> **§240. Scaffolding and other devices for use of employees**
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> 1. 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 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 that shall be so constructed, placed, and operated as to give proper protection to a person so employed.

Labor Law §§ 200 and 241(6) predicate the second cause of action and read in pertinent part:

> **§200. General duty to protect health and safety of employees**
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> 1. All 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. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons.
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> **§241. Construction, excavation and demolition work**
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> 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, shall conply with the following requirements:
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> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, 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 first cause of action based upon Labor Law §240(1), which imposes a strict, nondelegable duty upon (1) specific groups of individuals or entities to provide, (2) workers engaged in certain activities, (3) the necessary devices to protect those workers. First, as regards the circumstances of this case, the group or class of individuals upon which this duty devolves are contractors, owners, and their agents engaging services to demolish, alter, repair buildings or structures. It is undisputed that at least one of the defendants falls into that class unless the statutory exception for one or two-family dwellings apply. Second, it is also undisputed that plaintiff is among the class of workers protected by the statute - those engaged in certain activities entailing significant inherent risks, instantiated in this case by the exposed elevation at which the activity must be performed. (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991)[5] Third, the gravaman of plaintiff's Labor Law 240(1) claim falls squarely within the statute's ambit; that is, proper devices, it is alleged, were not available to the plaintiff to protect him from a fall. As plaintiff argues in his Attorney's Reply Memorandum:

> "The uncontroverted testimony of the plaintiff is that his employer rented a large bucket lift, from which he worked on his first two days on the job, but he had to work from a smaller lift after that because the larger lift was no longer available for rental. It is uncontroverted that the bucket lift was the only safety device provided. The plaintiff was not given a safety belt, harness, ropes, safety nets, kick boards, or any anything else to secure himself and/or prevent him from falling off the roof. On day four, the day he was injured, the plaintiff was working from the roof of an addition to the barn. Although the smaller bucket lift was on the site, he did not use it because it could not reach the area in which he was working. ... In this case, the only safety device available, the small bucket lift, was not an "adequate safety device' because it was incapable of doing the job from inside the bucket lift, since it was too short to reach the area in which he was working. Where, as here, the only safety device provided is not sufficient to provide safety, the owner cannot escape liability under Labor Law §240(1) on the ground that the plaintiff failed to use it."

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[5] "The contemplated hazards are those related to the effects of gravity where protective devices are called for ... because of a difference between the elevation level of the required work and a lower level ... It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the exceptional protection that section 240(1) provides" (Id).

The second cause of action asserted by the plaintiff relies upon Labor Law §200, which codifies

> "the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury.' Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200" (*Comes v New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993])(internal citations omitted).

Here plaintiff alleges that defendants were negligent in "their inspection, maintenance and control of the demolition/construction work being performed and the defendants failed to provide reasonable and adequate protection to this plaintiff, all in violation of the New York State Labor Law, Sections 200 and 241 (6)." (Plaintiff's Complaint at ¶6). Labor Law §241(6) expands an owner's common law liability as reflected in Labor Law §200 as follows:

> "Under Labor Law §241(6), the owner of an area where construction, excavation or demolition is taking place is liable for injury to a worker in that area caused by the failure of a general contractor or a subcontractor to use reasonable care in constructing, shoring, equipping, or guarding the site or in arranging, operating or conducting the work in that area. The owner is liable for an injury due to the failure of a general contractor or subcontractor to use reasonable care even though the owner did not control or supervise the area or the work being done there and did not or could not know of any danger to plaintiff" (1B Pattern Jury Instructions 2:216(A) at p. 1101).

## III. MOTIONS NOW BEFORE THE COURT

Both plaintiff and defendants move this Court for summary judgment relief pursuant to CPLR §3212. At the outset, the Court grants defendants' motion to dismiss plaintiff's cause of action asserted under Labor Law §200 and common-law negligence theories, because there is no evidence that could be fairly viewed as directly or inferentially supporting the claim that any of the defendants exercised supervisory control over the plaintiff's work methods or had a duty to do so.

Second, defendants move for summary judgment dismissing plaintiff's causes of action under Labor Law §§ 240(1) and 241(6) based upon application of the homeowner exemption. These sections exempt from liability "owners of one and two-family dwellings who contract for but do not

direct or control the [demolition] work ..." Obviously, a barn generally, including that involved in the present case, is not a dwelling. However,

> "that fact does not by itself bar application of the homeowner exemption. The courts have not limited the application of the homeowner exemption solely to work performed upon a residential structure itself. Indeed, a barn, a garage, or other ancillary structure located on property that also contains a residence clearly falls within the definition of a 'dwelling' as interpreted by the courts so long as the structure serves a residential purpose" (*Dineen v Rechichi*, 70 AD3d 81, 84-85 [4th Dept 2009], mot lv app den 14 NY3d 703 [2010]).

The problem with applying this reasoning here is that the barn is not an ancillary structure, much less located upon the same property as a dwelling. It proves too much to say that if a barn is used for personal storage purposes, as here, then it must be ancillary to a dwelling, because the owner of the stored items lives somewhere in a one or two-family dwelling. Accordingly, the motion to dismiss on this ground is denied.

Third, plaintiff moves for summary judgment upon the issue of defendants' liability under his Labor Law §§ 240(1) and 241(6) claims, arguing that, under the undisputed facts of this case, defendants are strictly liable as a matter of law. However, while it is well-settled that owners, contractors, and their agents are strictly liable under these sections, it remains an issue of fact in this case whether these sections were violated. According to deposition testimony in the record, plaintiff's employer explained to defendant Marvin, Sr., that all elevated work would be done out of a hydraulically lifted bucket with appropriate safety equipment available for that work method. Plaintiff confirmed as well that such was the work method. Plaintiff deviated from this plan by abandoning the bucket lift and using a ladder to ascend to the roof adjacent to the area he needed to access. Crediting the plaintiff that the bucket lift could not position him to complete this final portion of the roof removal, there is nevertheless still an issue of fact whether the parameters of his employment as made known to or understood by plaintiff allowed for any elevated work outside a bucket. That is, when plaintiff realized that the bucket was inadequate to complete the job, was he contravening the instructions and expectations of his employer by proceeding without either a replacement bucket lift adequate to continue or other safety equipment appropriate to perform elevated work without a bucket lift (*see e.g. Robinson v East Medical Center, LP*, 6 NY3d 550,

[2006]); *Montgomery v Federal Express Corporation*, 4 NY3d 805 [2005]; *see generally* 1B Pattern Jury Instructions, Commentary to PJI 2:217 at p.1227); . Accordingly, plaintiff's motion for summary judgment is denied.

Fourth, defendants move for dismissal of plaintiff's Labor Law §241(6) claim because the plaintiff cannot identify any specific safety rule or regulation of the Commissioner of Labor that defendants allegedly violated. Of course, it is well-settled that an action may be maintained under Labor Law §241(6) only where the regulation plaintiff claims was violated mandates compliance with "concrete specifications" as opposed to only "general safety standards (*Ross v Curtis v Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). Plaintiff relies upon 12 NYCRR 23-1.24 (Work on roofs), which requires, among other things, that roofing brackets, crawl boards, and /or safety belts "shall be used whenever work is to be performed on any roof having a slope steeper than one in four inches." Cognate with the Labor Law §200(1) claim, a threshold issue is whether plaintiff was assigned work "to be performed" while standing on a pitched roof, and if so, was this regulation violated. At a minimum, this threshold issue creates an issue to be determined by the finder of fact warranting denial of defendants' motion

Fifth, defendant's motion for summary judgment to dismiss the action as regards Marvin DeFisher, Jr., is granted and as regards Marvin DeFisher, Sr., is denied.

All other motions not specifically granted herein are denied.

Counsel for defendants shall submit an Order in accordance with the Court's Decision.

Dated: December 15, 2010
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice