

<b>Ramos v 346 W. 17th St., LLC</b>
2010 NY Slip Op 33734(U)
August 30, 2010
Sup Ct, NY County
Docket Number: 116851/07
Judge: Marylin G. Diamond
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

CARLOS YOVANI RAMOS,

Plaintiff,

-against-

346 WEST 17<sup>TH</sup> STREET, LLC and MCGOWAN BUILDERS, INC.,

Defendants.

And Third-Party Action.

INDEX NO. 116851/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

**FILED**  
SEP 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** This personal injury action involves an accident which occurred on November 27, 2007 while the plaintiff Carlos Yovani Ramos, an employee of Milestone Environmental Corporation ("Milestone"), was removing asbestos in the interior of a building located on West 17<sup>th</sup> Street in Manhattan. The plaintiff claims that he and a co-worker, Jose Ordonez, were in an elevated aerial basket attached to a manlift when the manlift unexpectedly rolled down a steep incline and the basket overturned, ejecting both men to the ground approximately 20 feet below. Mr. Ramos brought this action against the building owner (346 West 17<sup>th</sup> Street, LLC) and the construction manager on the project (McGowan Builders, Inc.) In turn, McGowan impleaded Topflite Contracting, LLC, the demolition and asbestos removal subcontractor. Topflite then brought a second-third party action against Milestone. Mr. Ordonez, who was also injured, brought a separate action in this court against 346 West 17<sup>th</sup> Street and McGowan. *See Ordonez v. 346 West 17<sup>th</sup> Street, LLC et al*, NY County Index No. 104175/08. Both of these defendants then brought a third-party action against Topflite, which brought a second-third party action against Milestone. By decision and order dated February 25, 2009, this court consolidated the two actions only for the purpose of joint discovery and trial.

The complaint herein asserts causes of action under Labor Law §§ 240(1), 241(6) and 200, as well as common law negligence. In its third-party complaint, McGowan has asserted claims against Topflite for common law and contractual indemnification. In its second third-party action against Milestone, Topflite similarly seeks indemnification.

The plaintiff now moves for partial summary judgment on his Labor Law § 240(1) claim. The defendants cross-move for summary judgment dismissing the plaintiff's claims under Labor Law §§ 241(6), 200 and common law negligence. Although only Topflite has asserted a third-party claim against Milestone, the defendants, as well as Topflite, also seek summary judgment against Milestone for contractual indemnification. The court notes that despite the fact that this action and the *Ordonez* action were only consolidated for joint discovery and trial and thus continue as discrete actions having separate index numbers, the motion by 346 West 17<sup>th</sup> Street, McGowan and Topflite has nevertheless conflated the two proceedings, seeking relief in both. Consequently, the court will not address the merits of any of the claims asserted as part of the *Ordonez* action. Any party which wishes to bring a summary judgment motion involving claims asserted in the *Ordonez* action must therefore move under the index number which has been assigned to that action.

## Discussion

**A. Labor Law § 240(1)** - - Labor Law § 240(1), known as the Scaffold Law, *see Ryan v Morse Diesel*, 98 AD2d 615, 615 (1<sup>st</sup> Dept 1983), 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). The Scaffold Law applies where the work involves risks related to differences in elevation. *See Binetti v MK West Street Company*, 239 AD2d 214, 214-215 (1<sup>st</sup> Dept 1997). *See also Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 500-501. 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 the plaintiff's 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 has established, through the submission of evidence including accident reports and deposition testimony, that the manlift malfunctioned and/or failed to adequately protect him from falling and that 346 West 17<sup>th</sup> Street, LLC and McGowan are therefore liable for his injuries under Labor Law § 240(1). *See Garcia v. 1122 East 180<sup>th</sup> Street Corp.*, 250 AD2d 550, 551 (1<sup>st</sup> Dept. 1998); *Dankulich v. Felchar Mfg. Corp.*, 247 AD2d 660, 661 (3<sup>rd</sup> Dept. 1998). The plaintiff testified at his deposition that he was working in the basket of the manlift at a height of approximately twenty feet when the machine began to unexpectedly move forward towards the end of the ramp where he was working. The plaintiff further testified that the manlift moved towards an overhanging portion of the work area and that he felt an impact. Although the plaintiff does not remember anything after the impact of the basket, the accident reports and the testimony of Sal DePaola, his supervisor who investigated the scene right after the accident, corroborate the plaintiff's claim that he was ejected from the basket when it overturned. Mr. DePaola also testified that the plaintiff should have been provided with a harness which he could have tied off to the ceiling and which would have prevented him from falling out of the manlift when the basket overturned.

In opposition to the motion, the defendants argue that the mere fact that the manlift rolled is not sufficient evidence of a Labor Law § 240(1) violation absent indisputable evidence that the basket actually overturned and/or that the plaintiff was ejected from the basket as a result of the manlift's sudden, unexpected movement. The defendants also speculate that the plaintiff may have been the sole proximate cause of the accident by somehow failing to properly secure the manlift to the ramp. These arguments are without merit since even if the plaintiff never actually fell from the basket, the failure of the defendants to ensure that the manlift operated by the plaintiff was properly constructed, placed and/or secured, exposed the plaintiff to an elevation-related risk of injury well within the purview of Labor Law § 240(1) as it involved harm that directly flowed from the application of the force of gravity. *See Cordero v. Kasier Organization*, 288 AD2d 424, 425 (2<sup>nd</sup> Dept. 2001); *Lacy v. Turner Constr. Co.*, 275 AD2d 734, 735 (2<sup>nd</sup> Dept. 2000); *Dankulich v. Felchar Mfg. Corp.*, 247 AD2d at 661. In any event, despite the fact that the accident was essentially unwitnessed, there is ample evidence that both the plaintiff and Mr. Ordenez were ejected from the basket. The defendants have failed to submit any evidence which casts doubt on the plaintiff's credibility. *See Mannino v. J.A. Jones Construction Group, LLC*, 16 AD3d 225 (1<sup>st</sup> Dept. 2005).

Nor is there any evidence which even suggests that the plaintiff's own actions were the sole proximate cause of his injuries. The plaintiff is therefore entitled to partial summary judgment on his Labor Law § 240(1) claim.

**B. Labor Law § 241(6)** - - To prevail under this statute, the 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 his bill of particulars, the plaintiff alleges violations of five Industrial Code provisions, 12 NYCRR §§ 23-1.5, 23-5.1(c)(2), 23-5.1(f), 23-5.18(e), and 23-9.6. As to section 23-1.5, since this provision only requires reasonable and adequate protection for workers engaged in construction operations, it is too general to support a Labor Law § 241(6) claim. *See Meslin v. New York Post*, 30 AD3d 309, 310 (1<sup>st</sup> Dept. 2006). As to sections 23-5.1(c)(2), 5.1(f) and 5.18(e), these provisions are inapplicable since they apply to mobile scaffolds and/or manually propelled scaffolds, neither of which was involved in the plaintiff's accident. Finally, as to 12 NYCRR § 23-9.6, this provision is sufficiently specific and applicable to the plaintiff's accident since it applies to power-operated aerial baskets attached to a vehicle. The defendants' motion for summary judgment dismissing plaintiff's section 241(6) claim must therefore be denied insofar as the claim is based on 12 NYCRR § 23-9.6.

**C. Labor Law § 200 and Common Law Negligence** - - As to the plaintiff's Labor Law § 200 claim, it is well settled that this section is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *See Singh v. Black Diamonds LLC*, 24 AD3d 138, 139-40 (1<sup>st</sup> Dept. 2005). In this respect, liability under this section can only be imposed if it is shown that the owner or the general contractor had the authority to control the activity bringing about the injury and had actual or constructive notice of the allegedly unsafe condition that caused the plaintiff's accident. *See Mitchell v. New York University*, 12 AD3d 200, 201 (1<sup>st</sup> Dept. 2004). Although the plaintiff now concedes that he does not have a valid claim under Labor Law § 200 as against the owner, 346 West 17<sup>th</sup> Street, he nevertheless argues that the claim should go forward as against the general contractor, McGowan, since there is evidence that McGowan knew of and/or approved the use of the manlift on the ramp. However, the mere fact that the manlift was placed on the ramp is not by itself evidence that McGowan or anyone else was negligent. There is no indication that a properly-secured manlift, braced or placed in a manner that would have prevented it from rolling or moving unexpectedly, could not have been safely operated on the ramp. The plaintiff does not allege or offer any evidence which suggests that McGowan knew that the manlift was not properly secured. In any event, McGowan has amply demonstrated that the area where the accident occurred was under the strict control of Milestone, the plaintiff's employer, and that it was Milestone which directed and supervised all of the asbestos removal work, including the operation of the manlift. Since McGowan did not exercise supervisory control over the work of the plaintiff where the accident occurred and since it is undisputed that the plaintiff only took direction from his employer Milestone, the fact that McGowan may have retained general supervisory or inspection privileges over the work does not constitute the necessary degree of supervision or control to render it liable under Labor Law § 200 or under the principles of common law negligence. *See Hughes v. Tishman Construction Corp.*, 40 AD3d 305, 306 (1<sup>st</sup> Dept. 2007). The plaintiff's Labor Law § 200 and common law negligence claims must therefore be dismissed.

**D. Indemnification against Milestone** - - As already noted, in its third-party complaint, McGowan has asserted claims against Topflite for common law and contractual indemnification. Topflite, in turn, has brought its own second third-party action against Milestone for contractual indemnification. Topflite's claim is based on its written contract with Milestone in which Milestone agreed to defend, indemnify and hold harmless Topflite, McGowan and 346 West 17<sup>th</sup> Street from any and all claims arising out of Milestone's work as an asbestos remover and/or the work of its contractors, agents, subcontractors or employees. Milestone also agreed to purchase commercial general liability insurance naming these three

parties as additional insureds.

In its opposition papers, Milestone does not suggest that plaintiff's accident did not arise out of Milestone's work. Rather, it argues that the contractual indemnification clause of its written agreement with Topflite is unenforceable under GOL §5-322.1 because it requires that Topflite be indemnified for its own negligence. This argument is without merit since an indemnification clause which purports to indemnify a party for its own negligence may be enforced where the party to be indemnified has been found to be free of negligence. See *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 179 (1990); *Lesisz v. Salvation Army*, 40 AD3d 1050, 1051 (2nd Dept. 2007). As the court already found in dismissing plaintiff's Labor Law § 200 and common law negligence claims against McGowan and 346 West 17th Street, the area where the accident occurred was under the strict control of Milestone, which directed and supervised all of the asbestos removal work, including the operation of the manlift. Neither Milestone nor any other party has submitted any evidence that Topflite exercised supervisory control over the plaintiff's work or was contractually obligated to do so. Since there is no evidence that Topflite was negligent, it is entitled to indemnification from Topflite. See *Casabianca v. Port Auth. of N.Y. & N.J.*, 237 AD2d 112 (1st Dept. 1997).

Finally, there is no merit to Milestone's argument that, under the terms of its contract with Topflite, it is entitled to indemnification. The section which Milestone refers to only deals with claims arising out of hazardous materials and the obligation to render those materials harmless. Since the plaintiff's accident does not involve a claim for injuries sustained as a result of exposure to hazardous materials, the clause cited by Milestone is inapplicable.

Accordingly, the plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim is hereby granted. The defendants' cross-motion for summary judgment is granted to the extent that the plaintiff's Labor Law § 200 and common law negligence claims are hereby dismissed. The motion is otherwise denied. As to Topflite, its cross-motion for summary judgment on its third-party claim against Milestone for contractual indemnification is hereby granted.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on <sup>October 12th 2010</sup> 11:00 a.m. for a settlement conference and to pick a trial date.

ENTER ORDER

MGD

Dated: 8/30/10

MARYLIN G. DIAMOND, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
SEP 16 2010  
NEW YORK  
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