

**Miller v Cooper Square Hotel**

2011 NY Slip Op 30037(U)

January 6, 2011

Sup Ct, New York County

Docket Number: 103913/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Index Number : 103913/2008

MILLER, PETER

VS.

COOPER SQUARE HOTEL

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 8/30/10

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-3  
4-6  
7-8, 9-10

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

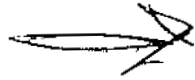
Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is denied by the attached*  
*Memorandum Decision and Order*

**FILED**

JAN 10 2011

NEW YORK  
COUNTY CLERK'S OFFICE



*Note:*  
*Pretrial scheduled for*  
*2/7/11 @ 2 pm*

Dated: 1/6/11

*[Signature]*  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
PETER MILLER,

Plaintiff,

-against-

COOPER SQUARE HOTEL AND F.J.  
SCIAME CONSTRUCTION CO.,

Defendants.  
-----X

Index No. 103913/2008  
DECISION & ORDER

**FILED**

**JAN 10 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff Peter Miller (Miller) sues defendants Cooper Square Hotel (Cooper Square) and F.J. Sciame Construction Co. (Sciame, collectively, Defendants), pursuant to Labor Law Sections 200, 240(1) and 241(6), and for common law negligence, for injuries incurred while working on a construction site. Defendants move for summary judgment dismissing the complaint and Miller cross moves for partial summary judgment as to liability under Section 240(1). The motions are decided as follows.

FACTS

Cooper Square hired Sciame as the "construction manager" on a construction project at Cooper Square's hotel. Miller was employed by non-party Donaldson Construction (Donaldson), which was hired by Sciame to do carpentry work. On March 15, 2008, Miller was installing sheetrock in a room on the 15<sup>th</sup> floor of the hotel. The room was being used as storage. It contained uninstalled doors, stacked vertically against one of the walls, and a stack of sheetrock, lying flat, in the middle of

the floor (Miller EBT, attached to Motion, Ex. K, p. 81-2). According to Donaldson's foreman, Gerald McEvoy (McEvoy), the doors and sheetrock were delivered to the construction site by Donaldson employees, and he instructed them on how and where to place them until needed, so that work on the room could be finished (McEvoy Affirmation, attached to Motion, Ex. G, ¶ 5). McEvoy instructed Miller to move the doors (Miller EBT, Ex. K, p. 96). When Miller attempted to move one of the doors, several others fell on him, pinning him to the sheetrock pile in the middle of the room.

#### DISCUSSION

##### **A. Section 200 and Common Law Negligence**

Section 200 of the Labor Law is a codification of the common-law duty to provide workers with a reasonably safe place to work. To be liable under this section, the parties sued must have exercised control over the work that brought about the injury (see, *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 352 [1998]).

Defendants argue that these claims should be dismissed because there is no issues of fact showing that they supervised, controlled or directed Miller's work or that there was notice of a dangerous condition. Miller contends that the stacked doors constitute a defective condition, akin to a patch of ice, such that the Defendants had actual or constructive knowledge.

Miller's argument is not persuasive. There is no

evidence that Defendants exerted anything more than the general supervisory authority, which is insufficient to establish supervision and control for the purpose of Section 200 (*Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 272, [2007]). Also, McEvoy testified that Donaldson alone was responsible for storing the doors, Miller testified that McEvoy issued the order to move the doors, and Sciame's project superintendent, Steve Schottmuller, stated that the doors were Donaldson's responsibility and Sciame never directed the means or methods of Donaldson's work (Schottmuller affidavit, attached to Motion, Ex. H). Similarly, there is no evidence that the doors, in and of themselves, constituted a dangerous or hazardous condition, and even if it were so considered, insufficient evidence has been presented to show that the Defendants had the requisite notice of the condition. Accordingly, Miller's common law negligence and Labor Law Section 200 claims are dismissed.

**B. Section 240(1)**

Labor Law Section 240 (1) provides:

"All contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 [construction workers employed on the premises]."

It protects against hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and

a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The duty imposed is nondelegable, and "an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 500 [1993]).

Defendants argue that Section 240(1) is inapplicable because both Miller and the door were at the same elevation, and the injury arose from a general workplace hazard not contemplated by the statute. Relying heavily on *Runner v. New York Stock Exchange, Inc.*, 13 NY3d 599 (2009), Miller argues that the fact of the doors falling on him sufficiently establishes Section 240(1) liability, even though they were at the same elevation, because the harm he suffered directly flowed from the force of gravity when the doors tipped over.

In *Runner*, the plaintiff was directed to act as a counterweight on an improvised pulley system which controlled the descent of an 800 pound reel of wire down a flight of stairs. As the reel descended, the pulley failed and the plaintiff was propelled forward, severely and permanently injuring his hands as they were pulled through the improvised setup (*Runner*, 13 NY3d at 602). The Court of Appeals focused its inquiry on "whether plaintiff's injuries were the direct consequence of a failure to

provide adequate protection against a risk arising from a *physically significant elevation differential*" (id., at 603 [emphasis added]). The Court, citing to *Rocovich, supra*, noted that "the purpose of [Section 240(1)] is to protect construction workers not from routine workplace risks, but from *the pronounced risks arising from construction work site elevation differentials*" (id. [emphasis added]). The Runner defendants argued that the accident was not elevation related because neither the plaintiff, nor the object that hit him (components of the pulley) traversed an elevation differential. The court rejected this argument, stating:

[T]he applicability of the statute in a falling object case such as the one before us does not . . . depend upon whether the object has hit the worker. The relevant inquiry—one which may be answered in the affirmative even in situations where the object does not fall on the worker—is rather whether the harm flows directly from the application of the force of gravity to the object.

\* \* \*

The elevation differential here involved cannot be viewed as *de minimis* . . . And, the causal connection between the object's inadequately regulated descent and plaintiff's injury was, as noted, unmediated . . . .  
(Id., 604-5).

Miller asks this court to ignore every reference *Runner* makes to elevation differentials and to focus solely on the application of the force of gravity. To do so would place nearly every workplace injury, regardless of elevation hazards, within the ambit of Section 240(1), and would obviate the Court of Appeals' own direct reference to *Rocovich*.

Miller's reliance on *Luongo v. City of New York*, 72

AD3d 609 (1<sup>st</sup> Dept., 2010) is likewise unpersuasive. In *Luongo*, the plaintiff was installing steel girders beneath an elevated train track. He placed the girders on an improperly secured hydraulic jack, which was located at the same elevation level as the plaintiff. When the jack began elevating the girder, it "jumped," causing the girder to fall a short distance, injuring the plaintiff. Neither the girder nor the jack were positioned significantly above his head; yet, the girder had been lifted entirely from the ground and was at an elevation, however small, before it fell. The same cannot be said in the instant matter. The doors were at the same elevation as Miller. They were not raised or lowered to a different elevation at any material time. Similarly, Miller's act of manually shifting a door from one location to another at the same elevation does not fall within the ambit of the statute. Accordingly, Section 240(1) is inapplicable to this matter, and the branch of Defendants' motion seeking summary judgment on this claim is granted.

**C. Section 241(6)**

Labor Law Section 241(6) provides, as relevant:

"All 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 places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502

[1993]).

In order to support a cause of action under this section, a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that sets forth a concrete standard of conduct (*Ross*, 81 NY2d at 502). In seeking to establish his claim, Miller relies upon 12 NYCRR 23-2.1(a)(1), which sets forth such a standard. It provides:

*Storage of material or equipment.* (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Defendants argue that there is no evidence that the doors and sheetrock were not stored in a safe, orderly manner, or that Miller's accident was caused by any materials obstructing a passageway or thoroughfare. Miller counters with two arguments. According to his expert witness, it was unsafe to store the doors in an upright position, rather than flat or horizontally (Expert affidavit attached to Cross-Motion, Ex. 4). In addition, the materials both created a constructive passageway and simultaneously obstructed it. Defendants reply that even if the area was construed as a passageway, the space between the sheetrock and the doors was an unobstructed 47 inches.

Defendants supply expert testimony that disagree about the safe way to stack doors for storage (Affidavit, attached to Motion, Ex. J), giving rise to a triable issue of fact. Further, Defendants' contention that the doors never fell until Miller

exerted force on them is not sufficient, as a matter of law, to establish that the doors were securely stored. Therefore, a material fact exists regarding the manner in which the doors were stored.

Miller's claim that the 20 foot by 20 foot room in which he worked was a constructive passageway is belied by pictorial evidence (attached to Motion, Ex. O) and testimony of the size of the room (EBT of Michael Gagliardi, Sciame's superintendent, attached to Motion, Ex. L) (see, generally, *Dacchille v. Metro Life Ins. Co.*, 262 AD2d 149 [1<sup>st</sup> Dept., 1999][storage room not a passageway as contemplated by Industrial Code]). Miller's characterization of the area as a "passageway" in his EBT does not refute this evidence (see, e.g., *Burkoski v. Structure Tone, Inc.*, 40 AD3d 378 [1st Dept., 2007]).

Accordingly, the branch of Defendants' motion seeking summary judgment on the Section 241(6) claim is denied, and that cause of action survives.

In light of the foregoing, it hereby is

ORDERED that Defendants motion for summary judgment is granted to the extent that the portions of the one-count complaint for common law negligence and violations of Labor Law Sections 200 and 240(1) are dismissed; and it further is

ORDERED that Plaintiff's cross-motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on February 7 at 2 PM.

Dated: January 6, 2011

ENTER:



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J.S.C.

**JANE S. SOLOMON**

**FILED**

**JAN 10 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**