

**Panico v General Elec. Co.**

2011 NY Slip Op 30379(U)

February 10, 2011

Supreme Court, New York County

Docket Number: 110466/07

Judge: Joan M. Kenney

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: JOAN M. KENNEY  
J.S.C Justice

PART 8

Dennis Panico,  
Plaintiff  
- v -  
General Electric Company et al.,

INDEX NO. 110466/07  
MOTION DATE 006  
MOTION SEQ. NO. 6/22/10  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 17 were read on this motion to/for ~~FILE~~ summary judgment

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

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

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

PAPERS NUMBERED

1-15

16

17

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

FEB 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

Dated: February 10, 2011

  
JOAN M. KENNEY J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8**

-----x  
DENNIS PANICO,

Plaintiff,

Index No.: 110466/07  
Motion Seq. 005 & 006

-against-

**FILED**

GENERAL ELECTRIC COMPANY, DELPHI  
PRODUCTION, INC., WILL-WORK, INC. and  
VIRGIN GALACTIC, LLC.,

Defendants.

**FEB 17 2011**

-----x NEW YORK  
**KENNEY, JOAN M., J.** COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affidavits & Exhibits (Motion Seq. 005)	1 -12
Answering Affidavits, Exhibits	13
Reply Papers	14
Notice of Motion, Affidavits & Exhibits (Motion Seq. 006)	15-16
Answering Affidavits, Exhibits	17
Reply Papers	18

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an electrician while working on a trade show at the Jacob K. Javits Convention Center (Javits Center) in Manhattan, New York on September 27, 2006.

In motion sequence number 005, defendant Delphi Production, Inc. (Delphi) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 006, defendant Will-Work, Inc. (Will-Work) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

The complaint and all cross claims against defendants General Electric Company and Virgin Galactic, LLC (Virgin Galactic) have been discontinued.

**FACTUAL BACKGROUND**

On the date of the accident, plaintiff was working as an electrician on NextFest 2006, a trade show (the show) about future technology. The show was being put on by non-party Wired Magazine (Wired), a publication owned by non-party Conde Nast. Wired hired defendant Delphi, a creative agency that designs media production for trade shows, pursuant to contract, to design and execute the show. Delphi designed the show in conjunction with Wired personnel. Wired invited the potential exhibitors to participate in the show, requiring that all booths be integrated into the overall design for the show.

In providing services to the exhibitors that it worked with, Delphi was required to utilize the services of union labor. Delphi hired defendant Will-Work, pursuant to an oral contract, to be its official labor contractor for the show. Will-Work had a contract with the Javits Center, wherein the Javits Center would supply various union teamsters, carpenters and electricians in its employ, and then Will-Work would then reimburse the Javits Center for their services.

Plaintiff testified that he was employed as a union electrician by the Convention Center Operating Corporation (CCOC) at the Javits Center. On the date of the accident, at the direction of electrical sub-foreman Tony Bamonte (Bamonte), plaintiff was engaged in installing audio visual equipment for the Virgin Galactic booth, which was located on the third floor of the Javits Center.

At the time of the accident, many of the exhibitors' booths were still in the process of being constructed by the carpenters. As a result, various crates and other materials, as well as many hi-lo machines, were present on the trade show floor. Plaintiff explained that, just prior to the accident, while he was walking between the Virgin Galactic booth and the Future of Exploration booth, an announcement was made directing everyone to quickly clear the floor area for a Virgin Galactic press

conference. While chaos ensued, the lid to a large wooden crate fell on plaintiff, causing him to sustain injuries to his right arm. Plaintiff does not know who owned this crate, and he does not remember observing anyone coming in contact with the crate, although he does remember observing people associated with the Future of Exploration booth pushing and shoving in the area located directly behind the crate.

Brian Gouldrup (Gouldrup) testified that, in 2006, he was employed by both the Javits Center and Will-Work as a production manager and lead man in charge of organizing labor. When he worked at the Javits Center, he was paid by the CCOC, and when he worked at other locations, he was paid by Will-Work. Gouldrup explained that Delphi would instruct him as to each day's manpower requirements for the show.

Gouldrup explained that it was the job of the union carpenters and teamsters to set up the booths for the show, which entailed building all of the structures and taking them down. Some of these laborers were also required to remain on site while the show was going on, in case repairs or maintenance became necessary. The union carpenters and teamsters were also in charge of taking the crates off the trucks and bringing them into the building. Gouldrup stated that, although the various exhibitors unpacked their own product, the union carpenters unloaded anything to do with the booth structure. He also maintained that the electricians on the project were "Javits Center people," who were organized by Delphi, and not Will-Work (Defendant Will-Work's Notice of Motion, Exhibit L, Gouldrup Deposition, at 22).

Various foremen for the teamsters and the carpenters reported to Gouldrup. These foremen walked around the trade show floor to make sure that the men were working safely. Gouldrup stated that the Javits Center also had safety representatives on site. In addition, Gouldrup noted that he

would personally walk the trade show floor, supervising the men and making sure that they were doing their assigned job. Gouldrup stated that he had the authority to instruct a teamster as to how to perform his work.

Gouldrup testified that, typically, when a crate is opened, the lid is placed to the side of the crate. If the crate is empty, and it looks like someone could knock the lid over, another crate is brought over to stand next to the lid to secure it. If he observed an empty crate with an unsecured lid leaning against it, he would ask some carpenters to move another crate next to the lid.

**ARGUMENTS & DISCUSSION**

“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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

**WHETHER PLAINTIFF’S CLAIMS AGAINST DEFENDANT WILL-WORK ARE BARRED BY WORKERS’ COMPENSATION LAW**

Initially, it should be noted that defendant Will-Work asserts that plaintiff may not maintain any claims against it, as such claims are barred by Workers’ Compensation Law Sections 10, 11 and

29. To that effect, Will-Work vaguely sets forth that, since Goudrup testified in 2006 that he was an employee of Will-Work, as well as of the Javits Center, and since plaintiff was also an employee of the Javits Center, plaintiff is somehow a special employee of Will-Works.

Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death ... or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

"A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (*Schramm v Cold Spring Harbor Laboratory*, 17 AD3d 661, 662 [2d Dept 2005]). "Where a defendant establishes that a plaintiff is its special employee, it may then claim the protection of workers' compensation exclusivity" (*Samuel v Fourth Avenue Associates, LLC*, 75 AD3d 594, 596 [2d Dept 2010]).

"A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 550 [1<sup>st</sup> Dept 2008], quoting *Thompson v Grumman Aerospace Corporation*, 78 NY2d 553, 557 [1991] [citations omitted]).

In deciding whether a special employment relationship exists, while not determinative, it is important to consider “who controls and directs the manner, details and ultimate result of the employee’s work” (*Thompson v Grumman Aerospace Corporation*, 78 NY2d at 558). “The question of whether a special relationship exists is fact-laden and generally presents an issue for the trier of fact” (*Bautista v David Frankel Realty, Inc.*, 54 AD3d at 550). However, “special employment status may be made as a matter of law where particular, undisputed facts compel that conclusion and present no triable issue of fact” (*Thompson v Grumman Aerospace Corporation*, 78 NY2d at 558; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 150 [2d Dept 2010]).

Here, defendant Will-Work failed to make a prima facie showing that it controlled plaintiff’s work or that the plaintiff was its special employee on another theory (*see Samuel v Fourth Avenue Associates, LLC*, 75 AD3d at 596; *Bellamy v Columbia University*, 50 AD3d 160, 162-163 [1<sup>st</sup> Dept 2008]). In fact, Gouldrup testified that the Javits Center electricians working on the project were organized through Delphi and not Will-Work. Thus, plaintiff’s claims are not barred by Workers’ Compensation Law.

#### **PLAINTIFF’S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS**

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1<sup>st</sup> Dept 1983]), provides, in relevant part:

All contractors and owners and their agents ... in the erection, demolition, repairing ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... 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) 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 the plaintiff’s injuries (*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]). “The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed (internal citations omitted)” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Defendants contend that, as the exhibits which comprise the trade show do not constitute a “structure” under Labor Law § 240 (1), plaintiff was not engaged in an enumerated activity of Labor Law § 240 (1) at the time of the accident. “While the reach of section 240 (1) is not limited to work performed on actual construction sites [citation omitted], the task in which an injured employee was engaged must have been performed during ‘the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure’” (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]).

In support of this notion, defendants put forth the case of *Kretzschmar v New York State Urban Development Corporation* (13 AD3d 270, 270 [1<sup>st</sup> Dept 2004]), wherein the Court held that the motion court correctly dismissed the plaintiff’s Labor Law § 240 (1) claim, because the electrician, who was injured while removing a sign from a temporary exhibit hanging from the

ceiling, was not working on a “structure” at the time of his accident. However, the Court in the *Kretzschmar* case failed to indicate the scope of the exhibit at issue. In addition, as the exhibit in that case was described as hanging from a ceiling, the Court’s focus was on whether or not the plaintiff’s work was “effecting a significant or permanent change to the structural integrity of the building.”

Here, a review of the deposition testimony, as well as illustrations of the various exhibits included in the record, reveals that the exhibits, which were substantial in size, which stood independently and which were composed of interlocking parts, clearly fall within the definition of “structure” as a “piece of work artificially built up or composed of parts joined together in some definite manner” (*Sinzieri v Expositions, Inc.*, 270 AD2d 332, 333 [2d Dept 2000], quoting *Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Lewis-Moors v Contel of New York, Inc.*, 78 NY2d 942, 943 [1991]).

With respect to so much of the complaint as is premised on violations of Labor Law §§ 240 (1) and 241 (6), it must also be determined as to whether Delphi and Will-Work are to be considered owners, general contractors or agents thereof for the purposes of the statute. As to defendant Delphi, a review of the record indicates that it was sufficiently “responsible for coordinating and supervising the entire construction project and ... invested with a concomitant power to enforce safety standards and to hire responsible contractors,” so as to be considered a contractor within the meaning of those statutes (*Reilly v Loreco Construction, Inc.*, 284 AD2d 384, 386 [2d Dept 2001], quoting *Kulaszewski v Clinton Disposal Services*, 272 AD2d 855, 856 [4<sup>th</sup> Dept 2000]).

To that effect, the contract between Wired and Delphi (the Wired/Delphi contract) identifies Delphi as the “Producer” of NextFest 2006 and states that Delphi “will provide all services,

personnel and equipment necessary for the production” (Delphi’s Notice of Motion, Exhibit G, Wired/Delphi Contract, at 1). In addition, the Wired/Delphi contract provides that, among other things, Delphi is responsible for “all staging, infrastructure, sets, lighting ... production staff, carpenters, electricians ... and any other labor necessary and/or required by any national or local union(s)” (*id.*). The Wired/Delphi contract further sets forth that Delphi is to “be responsible for hiring, supervising and paying all subcontractors” (*id.* at 4).

David Salinger (Salinger), Delphi’s project director and producer, testified that Delphi is a creative agency that designs fabrication and media production for exhibit trade shows, museums and retail environments.<sup>1</sup> Delphi was hired to “lay out the design of the show, work on the content of the show and fully execute the show” (Will-Work’s Notice of Motion, Salinger Deposition, Exhibit I, at 11). Salinger testified that, in order to execute the show:

We would communicate with all of the exhibitors ahead of time to establish schedules for bringing their exhibits in. We would hire appropriate labor and contractors to perform the work. We would ensure that all of the work was done per our expectations and the client’s expectations and get paid by all various parties to do so

(*id.* at 12).

In addition, Salinger explained that, once the show was set up, Delphi would “really just keep track of the schedule, make sure we had the appropriate personnel on site ... and generally oversee if an exhibitor needed something in the course of the day, and we would help facilitate that” (Will-

---

<sup>1</sup>It should be noted that plaintiff’s counsel asserts that defendant Delphi’s motion is procedurally defective because the transcripts of Salinger and Gouldrup, which were annexed to its motion, were not executed by the respective witnesses. However, “CPLR 3116 (a) allows a deposition transcript to be admitted as though it were signed, especially where ... the transcript was certified as accurate” (*Zabari v City of New York*, 242 AD2d 15, 17 [1<sup>st</sup> Dept 1998]). Here, said transcripts were certified as accurate by the respective court reporters, and therefore, the transcripts may be used by Delphi in support of its motion.

Work's Notice of Motion, Salinger Deposition, Exhibit I, at 12). Further, there were four Delphi project directors available to help supervise the installation phase of the show.

Salinger also stated that he walked the floor of the trade show "[m]ostly to make sure that everything looked the way that I wanted it to look and that the schedules were being met and so forth" (*id.* at 82). Although Salinger asserted that Delphi was not responsible for safety at the site, nor did he have any authority to stop work if an unsafe condition was detected, if he observed an unsafe condition, he would have brought such a condition to the attention of Will-Work's production manager or the Javits Center electrical supervisor.

With respect to the supervision of carpenters and teamsters, Gouldrup stated, in pertinent part:

Delphi would come to me, say they needed eight guys in one booth. I would tell eight guys to go to that booth, and then they [Wired and Delphi] had supervisors that would supervise those guys ... Wired would tell Delphi what to do, and Delphi would tell us what to do

(Defendant Will-Work's Notice of Motion, Exhibit L, Gouldrup Deposition, at 24-25). Thus, once the workers received their assignments, their actual work was overseen by Delphi and the exhibitors. He also noted that Delphi provided all the equipment, materials and "pretty much all of the direction" (*id.* at 45). Gouldrup maintained that "[w]hatever the Delphi guy would say to them, they would do it. That's how it works, whether they think it's right or wrong" (*id.* at 129).

Susan Newsam (Newsam), Virgin Galactic's head of marketing production, testified that Virgin Galactic was approached by Wired to be an exhibitor at NextFest. Newsam stated that, if she had any labor needs, she went directly to Delphi for help. She explained that Delphi was responsible for managing all of the crews for the show, including the crew from the Javits Center. It was also

her understanding that Delphi was responsible for looking after all of the safety issues associated with setting up the show.

Importantly, a review of Delphi's final invoice to Virgin Galactic for services performed at the trade show included \$22,875 for electrical and rigging work, \$22,850 for carpentry work and \$5,810 for teamster labor. Notably, Virgin Galactic was also charged \$4,776 for "on-site management staff" inclusive of \$3,360 for the "on-site supervisor" and \$1,416 for the on-site supervisor's expenses (Will-Work's Notice of Motion, Exhibit J., Newsam Deposition, at 67; Plaintiff's Affirmation in Opposition to Defendants' Motions, Exhibit 3, Delphi Invoice to Virgin Galactic). Thus, Delphi's level of involvement in the coordination and supervision of the overall project is sufficient to deem it a contractor within the meaning of Labor Law §§ 240 (1) and 241 (6).

Will-Work asserts that it is not liable for plaintiff's injuries under Labor Law § 240 (1) or 241 (6), as it was merely a labor broker for Delphi, and not a general contractor or agent for the purposes of the statute. When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains "the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor" (*Walls v Turner Construction Company*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, a review of the evidence in the record indicates that Will-Work possessed sufficient authority to supervise and control the work at issue, so as to be considered an agent of Delphi for the purposes of the statutes. It is undisputed that Will-Work was the exclusive provider of teamsters and carpenters for the exhibitors who retained Delphi's services. In addition, Salinger testified that the exhibits arrived at the show in crates, and that Will-Work was responsible for unpacking the crates

and erecting and assembling the displays and equipment for the show. Salinger also testified that it was the role of Will-Work and the Javits Center to make sure that the work was done safely during the hectic move-in and move-out times. Gouldrup testified that he would personally walk the show floor, supervising the men and making sure that they were doing their job. He also maintained that he had the authority to tell a teamster how to perform his work.

Thus, as Will-Work was invested with the power to hire contractors, enforce safety standards and supervise and control the unpacking of the crates, as well as the assembly of the exhibits, on behalf of Delphi, Will-Work is to be considered an agent for the purposes of Labor Law §§ 240 (1) and 241 (6).

In any event, however, defendants Delphi and Will-Work made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 240 (1) claim by demonstrating that plaintiff's injury, "while tangentially related to the effects of gravity, was not caused by the limited type of elevation-related hazards encompassed by the statute" (*Gasques v State of New York*, 59 AD3d 666, 667 [2d Dept 2009], *affd* 15 NY3d 869 [2010] [injuries of worker, whose hand was crushed between the motor control of a scaffold and the steel of a bridge when he stopped a scaffold while ascending a tower of the bridge, was not the direct consequence of the application of the force of gravity to an object or person, and thus, not considered the limited type of elevation-related hazard encompassed by Labor Law § 240 (1)]).

The Scaffold Law does not apply merely because work is performed at elevated heights, but rather, applies where the work itself involves risks related to differences in elevation (*Brennan v RCP Associates*, 257 AD2d 389, 390-391 [1<sup>st</sup> Dept 1999]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary

protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]; *Makarius v Port Authority of New York and New Jersey*, 76 AD3d 805, 807 [1<sup>st</sup> Dept 2010] [“a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace”]; *Hill v Stahl*, 49 AD3d 438, 442 [1<sup>st</sup> Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1<sup>st</sup> Dept 2007]; *Melo v Consolidated Edison Co. of N.Y.*, 246 AD2d 459, 460 [1<sup>st</sup> Dept], *affd* 92 NY2d 909 [1998]).

At the time of the accident, plaintiff, as well as the crate lid that fell on him, were both at ground level when plaintiff’s accident occurred, and it has been held that there can be no liability where the work is not being performed at an elevated level (*Makarius v Port Authority of New York and New Jersey*, 76 AD3d at 807). Thus, when an object that falls is positioned at the same level as the work site, as in the instant case, there is no fall from an elevated work site (*Misseritti v Mark IV Construction Company*, 86 NY2d 487, 490-491 [1995] [Labor Law § 240 (1) not triggered where unbraced concrete fire wall collapsed at ground level onto plaintiff]; *Groves v Land’s End Housing Company*, 80 NY2d 978, 980 [1992] [Labor Law § 240 (1) not available to worker injured by forklift that tipped over]; *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396, 398 [2d Dept 2005] [lumber resting on porch overhang was not an object that needed to be secured]; *Daley v City of New York Metropolitan Transportation Authority*, 277 AD2d 88, 89-90 [1<sup>st</sup> Dept 2000] [in order to implicate Labor Law § 240 (1), the site itself must be elevated above, or positioned below, the area where the object is being secured or hoisted]; *Jacome v State of New York*, 266 AD2d 345, 346 [2d Dept 1999]

[foreman not entitled to recover under scaffolding law, even though plate which slipped, injuring plaintiff as it was unloaded from truck, was elevated several inches above truck bed at time of accident]; *Carringi v International Paper Company*, 184 AD2d 137, 140 [3d Dept 1992] [while assisting in the assembly of the boom sections of a mobile truck crane, the crane cable at the top of the boom became dislodged and fell on plaintiff's head. Court held that, as crane was being assembled at ground level, creating no difference between the level of the required work and a lower level, there was no elevation-related risk requiring the provision of any of the devices listed in Labor Law § 240]).

It should also be noted that the recent case of *Runner v New York Stock Exchange, Inc.* (13 NY3d 599 [2009]) does not avail plaintiff. In *Runner*, the plaintiff's injuries, which involved amputation of several of his fingers, occurred when the plaintiff, while serving as a counterweight on a makeshift pulley being used to lower a heavy reel of wire down a small stairway, was drawn horizontally into a metal bar, injuring his hands as they jammed against it (*id.* at 602). In finding liability pursuant to Labor Law § 240 (1), the Court of Appeals held that the federal District Court for the Southern District of New York correctly found in favor of the plaintiff, as the applicability of the statute does not depend upon whether the object hit the worker, but on whether the harm to the plaintiff was the direct consequence of the application of the force of gravity to the reel (*id.* at 604).

However, as stated by the Court in *Makarius v Port Authority of New York and New Jersey* (76 AD3d at 808):

While the Court of Appeals in *Runner* stated that the relevant inquiry with respect to Labor Law § 240 (1) is 'whether the harm flows directly from the application of the force of gravity to the object,' the court first stated that 'the single dispositive

question is 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* and it later stated that '[t]he elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating [citations omitted]. Clearly a significant height differential between the work being performed and the object being hoisted or secured continues to be a required element of the statute

(see also *Higgins v Consolidated Edison Company of New York, Inc.*, 2010 NY Misc Lexis 4407, [Sup Ct, NY County 2010] [court noted that, while the Court in *Runner* has clarified that the "application of the force of gravity" to an object should be considered," *Runner* did not abrogate prior case law requiring that there be a significant height differential between the work being performed and the object being pulled or hoisted]).

Thus, as plaintiff's injury from the falling lid was not the result of an elevation-related risk subject to the safeguards prescribed by Labor Law § 240 (1), but instead was of the type of "ordinary and usual" peril a worker is commonly exposed to at a construction site, defendants Delphi and Will-Work are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them (*Runner v New York Stock Exchange*, 13 NY3d at 603; *Misseritti v Mark IV Construction Company*, 86 NY2d at 491).

#### **PLAINTIFF'S LABOR LAW § 241(6) CLAIM AGAINST DEFENDANTS**

Labor Law § 241 (6) provides, in pertinent part, as follows:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully

frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.7 and 2.1 (a), plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant’s summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants Delphi and Will-Work are entitled to summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim against them predicated on these provisions.

Defendants Delphi and Will-Work are also entitled to summary judgment dismissing the remaining alleged Industrial Code violations. Section 241 (6) affords protection only to the class of workers engaged in “constructing or demolishing buildings” in “areas in which construction, excavation or demolition work is being performed,” and plaintiff’s activity did not meet that test (*Maes v 408 West 39 LLC*, 24 AD3d 298, 301 [1<sup>st</sup> Dept 2005] [no Labor Law § 241 (6) liability

where plaintiff was injured while removing a temporary advertising banner from a building]; *Holler v City of New York*, 38 AD3d 606, 607 [2d Dept 2007] [no Labor Law § 241 (6) liability where plaintiff was injured when he was struck by a falling object while preparing a theatre for a new show]; *Kretzschmar v New York State Urban Development Corporation*, 13 AD3d at 271 [no Labor Law § 241 (6) liability where plaintiff electrician was injured in the process of removing a sign from a temporary exhibit suspended from a ceiling at the Javits Center]; *Acosta v Banco Popular*, 308 AD2d 48, 51 [1<sup>st</sup> Dept 2003] [Court noted that the protections of Labor Law § 241 (6) do not apply to structures outside of the construction context]).

#### **PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS**

Labor Law § 200 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” [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1<sup>st</sup> Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as

follows:

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.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, as in the instant case, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d

796, 797-798 [2d Dept 2007]).

Plaintiff's account of the accident establishes that there was no dangerous condition on the premises which caused the accident, but rather, it was caused by the manner in which the removal and placement of the crate lid was undertaken (*see Lombardi v Stout*, 80 NY2d at 295 [no dangerous condition, but rather, accident was caused by the manner in which the removal of the branch was conducted]). It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]; *Comes v New York State Electric & Gas Corporation*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

As to defendant Delphi, although it may have been charged with general supervisory control over the trade show, a review of the record reveals that it had no supervisory control or any input as to the methods involved in opening the crates (*see Lombardi v Stout*, 80 NY2d at 295). Salinger testified that, as all of the crates that arrived to the trade show were opened by teamsters and carpenters, Delphi did not move, open, load or unload any crates for anyone at the site, including those exhibitors who retained its services. In addition, while Salinger testified that he walked the floor of the trade show to make sure everything looked all right to him, and while Delphi told Will-Work employees and other laborers what needed to be done, it did not provide any equipment or exercise any supervisory control over the actual work involved in opening the crates.

“[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed” (*Hughes v Tishman Construction Corporation*, 40 AD3d 305, 311 [1<sup>st</sup> Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1<sup>st</sup> Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor’s work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]). Thus, defendant Delphi is entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims against it.

As to defendant Will-Work, a question of fact exists as to whether it exercised any supervisory control over the injury-producing work, so as to be held liable for plaintiff’s injuries under Labor Law § 200. To that effect, a review of the record indicates that the trade show exhibitors were permitted to opt out of Delphi’s services and hire independent installation and dismantling companies to unload and assemble their exhibits. Thus, while Will-Work may have been the exclusive provider of labor for those exhibitors who utilized Delphi’s services, it may not necessarily have provided labor for those exhibitors who did not.

For example, Delphi provided each of the show exhibitors with an “Exhibitor’s Service Kit” (the kit), which states that:

unpacking, erection, assembling, dismantling, and packing of displays and equipment must be done by Willwork, Inc. Delphi ... will have skilled craftsmen available to assist Exhibitors. Arrangement for labor would be made through [Delphi] in advance wherever possible. Official labor forms are included in the Exhibitor Service Manual. For Wired NextFest 2006 Willwork is the exclusive provider of carpenter and teamster labor. Exhibitors are permitted to bring in designated supervisors, but must provide this Exhibitor Appointed Contractor form

(Delphi’s Notice of Motion, Exhibit J, Exhibitor’s Service Kit, VG0005).

Notably, the kit also states that “[e]xceptions to the foregoing will be considered only in cases where permission has been requested in writing by the Exhibitor and received by [Delphi] no later than Monday, August 21, 2006,” and that

[a]n exception will not be granted if it is inconsistent with the commitments made and obligations assumed by Management in any contract with service contractors of its lease with the Javits Convention Center. For services such as electrical, internet, plumbing, telephone, drayage, rigging and booth cleaning, no exception will be made, and the contractor designated by Management will be used  
(*id.*).

The kit also provided that “[e]xhibitors wishing to use a contractor other than [Delphi] to set up and dismantle their exhibits must fill out this form and return to us no later than the date shown above” (*id.*). In the event the deadline date was missed, the kit stated that “your non-official contractor be allowed to supervise only” and that “all labor must then be hired from Delphi for installation and dismantling of the exhibit” (*id.*).

In addition, Salinger testified that Will-Work was the exclusive provider of teamsters and carpenters for the exhibitors who retained Delphi’s services, although exhibitors who did not want to utilize Delphi services were allowed to submit a form opting out of the use of said services. Those exhibitors were then permitted to work directly with Will-Work or hire an independent installation and dismantling company to unload and assemble their exhibits. For example, the National Aeronautics and Space Administration (NASA), as evidenced by its letter to Wired, dated September 14, 2006, noted that it “would be handling our client’s set up and dismantling needs at this show” (Delphi’s Notice of Motion, Exhibit L, September 14, 2006 NASA Letter). It should be noted that Salinger maintained that Virgin Galactic was the only exhibitor utilizing Delphi’s services in the area where the accident occurred, and Virgin Galactic did not utilize any large crates.

Gouldrup also testified that there were other independent installation and dismantling companies, like Will-Work, setting up booths for the show, though he did not know which entities did which jobs. Gouldrup maintained that these independent companies were responsible for organizing their own labor. For example, Gouldrup explained that a company like General Electric “could have hired anybody. They could have hired Expo or Spectrum ... but I don’t know who actually set their exhibit up” (*id.* at 110). Gouldrup could not state whether the exhibitors in charge of the Future of Exploration booth used Delphi and/or Will-Work or an independent installation and dismantling company.

Here, not only has the ownership of the crate at issue not been established, no evidence has been submitted to demonstrate that the exhibitor associated with said crate utilized the services of Delphi and/or Will-Work, and not an independent installation and dismantling company. It is also unclear from the record whether Will-Work was responsible for supervising the overall safety on the trade show floor during unloading times, regardless of whether or not an independent installation and dismantling company had been hired. Thus, as a question of fact exists as to whether Will-Work exercised some supervisory control over the injury-producing work, Will-Work is not entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims against it.

Finally, it should be noted that defendants Delphi and Will-Work also ask this court to dismiss any and all cross claims asserted against them. However, none of these cross claims has been addressed in any way by either of these parties. In any event, with the exception of plaintiff’s common-law negligence and Labor Law § 200 claims against defendant Will-Work, all plaintiff’s claims have been dismissed as against all the other defendants. As such, said cross claims are now

moot.

For the foregoing reasons, it is hereby

ORDERED that defendant Delphi Production, Inc.'s motion (motion sequence number 005), pursuant to CPLR 3212, is granted; and it is further

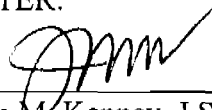
ORDERED that the Clerk of the Court shall enter judgment in favor of Delphi Production, Inc., and against plaintiff, Dennis Panico, dismissing the complaint and all cross claims as against Delphi Production, Inc., and the complaint and cross claims are dismissed as to this defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the part of defendant Will-Work, Inc.'s motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, as well as any and all cross claims against Will-Work, Inc., is granted, and these claims are severed and dismissed as against Will-Work, Inc., and the remainder of the relief sought by this motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue and the parties are to appear for their scheduled Mediation on February 22, 2011.

Dated February 10, 2011

ENTER:

  
\_\_\_\_\_  
Joan M. Kenney, J.S.C.

**FILED**

**FEB 17 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**