

**Rast v Wachs Rome Dev., LLC**

2011 NY Slip Op 30999(U)

April 15, 2011

Supreme Court, Wyoming County

Docket Number: 42372

Judge: Mark H. Dadd

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At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw , New York, on the 15<sup>th</sup> day of April, 2011.

PRESENT: HONORABLE MARK H. DADD  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF WYOMING

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RUSSELL R. RAST and DEBORAH RAST,  
Individually and as Husband and Wife  
*Plaintiffs*

v.

WACHS ROME DEVELOPMENT, LLC,  
SCOTT QUICK d/b/a  
SCOTT QUICK CONSTRUCTION and  
SCOTT QUICK CONSTRUCTION, INC.  
*Defendants*

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ORDER

Index No. 42372

The plaintiffs having moved for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability, and the defendants Scott Quick and Scott Quick Construction, Inc., having cross-moved pursuant to CPLR 3212 for an order dismissing the plaintiffs' Labor Law §§ 240(1), 241(6) and 200 claims on the ground that they are without merit, and defendant Wachs Rome Development, LLC. having opposed both the motion and the cross-motion, and said motion and cross-motion having duly come on to be heard on December 9, 2010.

NOW, on hearing the arguments of the parties, and on reading the complaint and answers herein; and on reading and filing the notice of motion dated September 21, 2010, supported by the affidavit of Dennis P. Hamilton, Esq., attorney for the plaintiffs, sworn to on September 21, 2010, together with the annexed exhibits; the notice of cross-motion dated November 12, 2010, supported by the affidavit of William J. Hathaway, Esq., attorney for defendants Scott Quick and Scott Quick Construction, sworn to November 12, 2010, together with annexed exhibits; the affirmations in opposition of Troy S. Flascher, Esq., dated November 15 and 19, 2010, together with annexed exhibits, the affidavit of Scott Patrick Quick, sworn to on December 1, 2010, the reply affidavit of Dennis P. Hamilton, Esq., sworn to on

November 24, 2010, together with the annexed exhibit; the reply affidavit of William J. Hathaway, Esq., sworn to on December 6, 2010, the responding affidavit of Dennis Hamilton, Esq., sworn to on December 7, 2010; and the memoranda of law submitted by counsel to the parties; the following decision is rendered.

Plaintiff Russell Rast seeks damages for the serious injuries he suffered when, on October 27, 2008, he fell off the roof of a strip mall in Rome, New York, that was undergoing extensive renovation. His wife's claim derives from his. Mr. Rast was employed by National Structures, Inc., the general contractor for the renovation work at the strip mall. Defendant, Wachs Rome Development, the owner of the strip mall, hired National Structures to perform the renovation of the building. National Structures was not engaged to perform work on the roof of the building, however. After determining that the roof needed resurfacing, Wachs Rome Development separately hired the defendant, Scott Quick, and his company, Scott Quick Construction [hereinafter Scott Quick], to do the job.

No one from the Scott Quick company was present at the job site on October 27, 2008. Three days before, Scott Quick's workers had fastened a new roof membrane to all parts of the roof except the back edge. They did not fasten it to the back edge of the building because certain metal decking had to be replaced there first, and the replacement materials were not expected to arrive on the site until the following week. On October 24, 2008, Scott Quick's workers left the work site leaving the membrane "rolled over" the back edge, but otherwise unsecured in that area. They took their safety equipment with them. No other work was to be performed on the roof prior to their return. On October 27, 2008, Scott Quick and his construction crew were traveling back from Vermont after finishing a different job there.

Some time after October 24, 2008, strong winds had blown the unsecured portion of the roof membrane back up onto the roof, causing rainwater to collect and to drain into the interior of the building. To alleviate this condition, Mr. Rast took it upon himself to go onto the roof twice on October 27, 2008. In order to gain access to the roof, he took a scissors lift belonging to National Structures around to the rear of the building. Once on the roof the first time, Mr. Rast pushed the unsecured membrane back over the back edge and used a broom to steer the water off the roof. While on the roof, Mr. Rast contacted Scott Quick by telephone

to inform him of the situation. Later in the day, after the wind again blew the membrane onto the roof, Mr. Rast repeated the process of ascending to the roof in the lift, pushing the membrane back over the side and sweeping the water off. It was as he made his way back to the lift to descend from the roof the second time that he fell. In attempting to avoid stepping into some collected rainwater, he stepped on a section of the “rolled over” membrane that he thought was supported by the back edge of the roof, but was not.

In their complaint, the plaintiffs allege that the defendants were negligent, and that they violated Labor Law §§ 200, 240(1) and 241(6). In their motion, the plaintiffs seek summary judgment on liability on their Labor Law §240(1) claims, contending that the defendants are subject to strict liability pursuant to that section by virtue of their failure to furnish or erect the safety equipment necessary to prevent Mr. Rast’s fall.

Labor Law §240(1) requires that, “[a]ll contractors and owners and their agents [. . .] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” With the purpose of “placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves,” the section “imposes absolute liability on owners and contractors for any breach of the statutory duty that proximately causes injury” (Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46 [2004]). Contributory negligence on the part of the plaintiff is no defense to liability under this section (Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 521 [1985]).

Although there is some question as to whether Mr. Rast held the job title of construction superintendent or laborer on the day of the incident, even if it should be established that he was the construction superintendent, this fact would not remove him from the class of workers protected by Labor Law §240(1) (VanBuskirk v. New York State, 303 A.D.2d 970 [4<sup>th</sup> Dept., 2003]; Aiello v. Rockmor Elec. Enterprises, 255 A.D.2d 470 [2<sup>nd</sup> Dept., 1998]; Campisi v. Epos Contracting Corp., 299 A.D.2d 4, 6 [3<sup>rd</sup> Dept., 2002]). At the time that he fell, Mr. Rast was clearly exposed to an elevation risk while employed in “the erection, demolition,

repairing, altering, painting, cleaning or pointing of a building or structure” (see Nephew v. Barcomb, 260 A.D.2d 821 [3<sup>rd</sup> Dept., 1999]; Calaway v. Metro Roofing, 284 A.D.2d 285 [1<sup>st</sup> Dept., 2001]). He may not have been specifically directed by his employer to remove water from the roof, but he nonetheless continued to be protected by §240(1) because his task was ancillary to the work that he was employed to do (Destefano v. City of New York, 39 A.D.3d 581 [2<sup>nd</sup> Dept., 2007]; Calaway, supra).

The facts of Mr. Rast’s fall are sufficiently established by his uncontroverted account of the incident (Madigan v. United Parcel Service, 193 A.D.2d 1102 [4<sup>th</sup> Dept., 1993]). He fell because the membrane over the back edge of the roof gave way as he stepped upon it. Since the accident occurred due to a “collapse of the worksite itself,” the Court finds that the plaintiffs have established a prima facie violation of Labor Law 240(1) (Richardson v. Matarese, 206 A.D.2d 353 [2<sup>nd</sup> Dept., 1994]; Ewing v. Brunner International, 60 A.D.3d 1323 [4<sup>th</sup> Dept., 2009]). In response, the defendants have not raised a triable issue of fact. Even if it was negligent of Mr. Rast to choose to step on the membrane at the very back edge of the roof, such negligence, at most, was a contributory cause of his fall, not the sole proximate cause (see Gallagher v. New York Post, 14 N.Y.3d 83, 88 [2011]).

Labor Law §240(1) imposes liability on owners and general contractors. Also liable under the section are “agents” of the owner or general contractor to whom the power has been delegated to direct, supervise and control the work giving rise to the injury (Russin v. Picciano, 54 N.Y.2d 311, 318 [1981]). The plaintiffs here are entitled to judgement on the issue of liability under Labor Law §240(1) with respect to the defendant, Wachs Rome Development, because it is undisputed that Wachs Rome Development owned the strip mall. They are not entitled to judgment under Labor Law §240(1) against Scott Quick, however, because they have not shown that Scott Quick “had supervision and control over the activity which resulted in [the] injury,” (Magrath v. J. Migliore Construction, 139 A.D.2d 893 [4<sup>th</sup> Dept., 1988]; Filchuk v. Lehrer McGovern Bovis Construction, 232 A.D.2d 329 [4<sup>th</sup> Dept., 1996]; Wright v. Nichter Construction, 213 A.D.2d 995 [4<sup>th</sup> Dept., 1995]). Scott Quick’s team had left the worksite prior to the incident, and it is evident that they had no authority over Mr. Rast or his activity (Knipe v. K-19 Associates, 177 A.D.2d 750, 752 [3<sup>rd</sup> Dept., 1991]; Klerakos v. Massapaqua Water District,

38 A.D.3d 717, 718 [2<sup>nd</sup> Dept., 2007]).

With respect to Scott Quick's cross-motion for summary judgement, as noted, the submissions show that Scott Quick did not have authority to supervise Mr. Rast or his activity on the roof. The plaintiffs have not raised in opposition a triable issue of fact on this point. Since authority to control or supervise is a prerequisite for liability under both Labor Law §240(1) and §241(6), the Court will grant Scott Quick's motion to dismiss those claims (Russin v. Picciano, *supra*). The Court will not dismiss the plaintiffs' claim against Scott Quick under Labor Law §200, however, because the plaintiffs have raised a triable issue of fact with regard to whether Scott Quick created the dangerous condition which caused the plaintiffs' injuries (Bucklaew v. Walters, 75 A.D.3d 1140 [4<sup>th</sup> Dept., 2010]; Crandall v. Wright Wisner Distributing Corp., 66 A.D.3d 1515 [4<sup>th</sup> Dept., 2009]; Verel v. Ferguson Electric Construction, 41 A.D.3d 1154, 1156 [4<sup>th</sup> Dept., 2007]; Piazza v Shaw Contract Flooring Services, 39 A.D.3d 1218, 1219 [4<sup>th</sup> Dept., 2007]).

NOW, THEREFORE, it is hereby

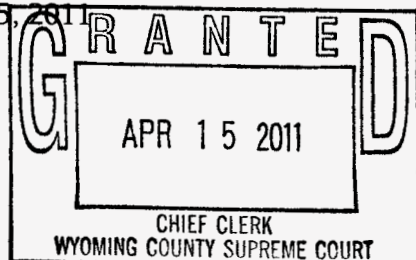
ORDERED that the plaintiffs' motion for partial summary judgment against defendant, Wachs Rome Development, LLC, on the issue of liability under Labor Law 240(1) is granted; and it is further

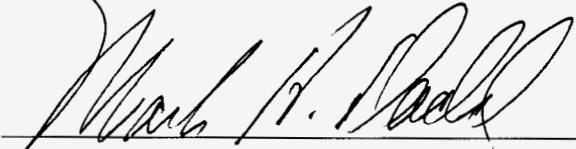
ORDERED that the plaintiffs' motion for partial summary judgment is in other respects denied; and it is further

ORDERED that the cross-motion for summary judgment seeking dismissal of the plaintiffs' claims against defendants, Scott Quick d/b/a Scott Quick Construction and Scott Quick Construction, Inc., is granted to the extent that the plaintiffs' claims under Labor Law 240(1) and Labor Law 241(6) against defendants, Scott Quick d/b/a Scott Quick Construction and Scott Quick Construction, Inc., are dismissed; and it is further

ORDERED that the cross-motion is in other respects denied.

Dated: April 15, 2011



  
Acting Supreme Court Justice