

**Chang Zhang Zou v 122 Dev. LLC**

2011 NY Slip Op 31510(U)

June 1, 2011

Supreme Court, New York County

Docket Number: 101309/2009

Judge: Saliann Scarpulla

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

PRESENT: *Saliann Scarpulla*

PART 19

Index Number : 101309/2009

ZOU, CHANG ZHANG

vs  
122 DEVELOPMENT

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits – Exhibits \_\_\_\_\_

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

PAPERS NUMBERED	
	_____
	_____
	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *and cross motion*  
*are determined in accordance with the*  
*accompanying decision/order.*

**FILED**

JUN 08 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: *6/8/11*

*Saliann Scarpulla*  
J.S.C.

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: CIVIL TERM: PART 19

----- X  
CHANG ZHANG ZOU,

Plaintiff,

- against-

Index No.: 101309/09

Submission Date: 3/16/11

122 DEVELOPMENT LLC, AND MATRIX  
CONSTRUCTION SERVICES, INC.,

**DECISION AND ORDER**

Defendants.

----- X

For Plaintiff:  
Morelli Ratner PC  
1133 Broadway, Suite 706  
New York, NY 10010

For Defendant 122 Development LLC:  
Tomao and Marangas  
1225 Franklin Avenue, Suite 325  
Garden City, NY 11530

**FILED**

**JUN 08 2011**

For Defendant Matrix Construction  
Services, Inc.:  
Faust Goetz Schenker & Blee  
Two Rector Street  
New York, NY 10006

**NEW YORK  
COUNTY CLERK'S OFFICE**

Papers considered in review of this motion and cross motion for summary judgment:

- Notice of Motion . . . . . 1, 2
- Notice of Cross Motion . . . . . 3
- Affs in Opp . . . . . 4, 5
- Reply . . . . . 6

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Matrix Construction Services, Inc. ("Matrix") moves for summary judgment dismissing the complaint and cross claims asserted against it. Plaintiff Chang Zhang Zou ("Zou") cross moves for summary judgment against Matrix on the issue of liability, and moves for

summary judgment against defendant 122 Development, LLC ("122") on the issue of liability.

122, a real estate development company, retained Matrix to build the foundation and shell of its premises located at 61-14 220<sup>th</sup> Street in Bayside ("subject premises") and for interior carpentry work. 122 retained Best Air Condition, Inc. ("Best Air") to provide air conditioning and heating to the premises, and retained other sub-contractors to perform plumbing and electrical work.

On November 20, 2008, Zou, employed by Best Air, was working on the construction project at the subject premises. Best Air had started working at the subject premises that month. Zou and two other workers were installing duct work on the flat concrete roof. Using a saw, he was planning to cut two openings on the roof, each two feet by five feet. He could make an approximately three and a half inch deep cut with the saw. He cut the slices for the first opening and then used a jackhammer to break up the concrete in the first opening and remove it. He covered the first opening with wooden boards while he went to make the second opening. There were no safety ropes or harnesses at the job site. He cut the slices for the second opening with the saw, and then reached for the jackhammer. While taking a few steps to reach for the jackhammer, the two by five second piece collapsed and Zou fell 20 feet through the opening and lost consciousness.

Thereafter, Zou commenced this action seeking to recover damages for the injuries he sustained as the result of his fall, alleging that 122 and Matrix were negligent and in violation of Labor Law §§200, 240(1) and 241(6).

122's president Jia Yuan Kuang ("Kuang") testified at an examination before trial that he hired Matrix as the contractor for the subject construction job pursuant to a contract. According to Kuang, 122 did not direct, control or supervise Matrix's work. Kuang visited the site approximately once every other week and no one reported to him. Before the accident, he did not even know that Best Air had started its work at the premises. He never informed Matrix about Best Air. The people from Best Air were not supposed to report to anyone about their work. Kuang did not tell Matrix to check up on Best Air's work, he did not tell Best Air that it had to follow any directions from Matrix, he did not remember ever telling Matrix that it had to supervise the safety issues at the construction site, and he did not know if Matrix had the authority to address safety issues regarding Best Air at the construction site. He testified:

Q. "Did you have a conversation with Best Air and Matrix about how they should address the work and the order of the work if they were going to work in the same area?"

A. "No"

Q. "Did you leave that up to Matrix to decide how that's done?"

A. "Yes."

Q. "Did you leave it up to Best Air to decide how that's done?"

A. "Yes."

He also explained that he hired Best Air as well as other sub-contractors to perform plumbing, and electrical work because it was cheaper than having Matrix hire its sub-contractors.

Matrix president Joe Chan ("Chan") testified at an examination before trial that he went to the job site about two or three times a week and project manager Tien Liang ("Liang") was at the site 90% of the time. Liang was responsible for supervising the job, coordinating the job, and making sure that the building was built according to plans and specifications. He was aware that Kuang was going to hire a separate company to install air conditioning and heating. His people did not supervise the Best Air work at all. He conducted safety meetings at the site approximately once a month but he did not remember if anyone from Matrix discussed safety with Best Air. Kuang never supervised Matrix's work and never gave any safety instructions, other than generally saying that safety is a main priority. Kuang came to the premises a few times a week to check on progress. The information about the duct work and where it was going to be placed was in the blueprints. If Matrix saw Best Air doing work in an unsafe manner it did not have authority to tell them to stop. He testified that Matrix was not the general contractor on the job.

Liang submitted an affidavit indicating that his duties included supervising the work of any sub-contractors hired by Matrix. His duties did not include supervising the work of sub-contractors hired by Kuang. He was never directed to supervise Best Air's work, no one told him that he had authority to stop the work of any contractor hired by Kuang for safety reasons, and he did not discuss safety procedures with any such contractors. Jimmy of Best Air informed him that he planned to open the roof and install ducts for air conditioning. Liang responded that if the plan was approved by Kuang, then it was fine with him. He did not direct Jimmy where to make the openings, only told him that they should not interfere with the structural I-beam. He was not involved with their work and did not check their tools or equipment. Chan told him that any mechanical work was between the building owner and mechanical contractors, including the air conditioning contractor. Chan also told him that supervision of any contractor hired by Kuang was not his job. Jimmy never asked him for permission or consent before doing any work at the site. On the date of the accident, Jimmy told him that he was going to mark the roof as to where holes were to be made. Liang told him that if it was approved by Kuang, then it was fine with him.

Best Air president Kam Wah Wong, also known as Jimmy Wong ("Jimmy") testified at an examination before trial that before Best Air began work, he went to the subject premises and met with the "supervisor of the general contractor."<sup>1</sup> They walked

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<sup>1</sup> Jimmy did not remember the name of the supervisor or the general contractor.

around the site and Jimmy asked where things were going to be set up, like walls and bathrooms, so that they would know where to place the air conditioning work. The supervisor showed Jimmy a blueprint. If he had any questions about the work, he would ask Kuang but if he had any questions on the jobsite, he would ask the supervisor. The supervisor would check his work from time to time. Both the supervisor and Kuang checked the duct work and the materials used. Sometimes the supervisor would give him an answer and other times he would have to first contact Kuang to get an answer. However, up to and including the date of the accident, Jimmy never told his workers to do something based on what the general contractor supervisor told him. He never thought that the workers needed ropes or harnesses because it was a flat roof and there were walls around it. Nobody told him to use safety equipment and he had never used safety equipment while doing such a job before.

Matrix now moves for summary judgment dismissing the complaint and any cross claims asserted against it. Matrix argues that it can not be held liable under Labor Law §§240 or 241 because Matrix was neither owner, general contractor or statutory agent of the owner. 122 did not delegate control or supervision to Matrix with respect to work performed by Best Air. Rather, Matrix and Best Air were separate contractors each hired by 122 to work at the subject premises at the same time.

Matrix further argues that it can not be held liable under Labor Law §200 or common law negligence because Matrix exercised no control over the activity that

brought about Zou's injury. Further, there is no evidence to support Zou's contention that Matrix had actual or constructive notice of any defective condition on the roof or caused or created any such condition, as the condition was created immediately before the fall occurred.

Zou cross moves for summary judgment against Matrix on the issue of liability, and moves for summary judgment against 122 on the issue of liability. Zou first maintains that the scope of work contained in the contract between Matrix and 122 is so broad, including responsibility for the project's "general condition," that Matrix was clearly retained to be the project's general contractor. Further, 122 did not supervise Best Air and it was Matrix's foreman with whom 122 dealt when inspecting the progress of the work at the premises. Zou further argues that according to Liang, Best Air understood itself to be under the supervisory authority of Matrix.

Zou next maintains that Matrix and 122 clearly violated Labor Law §240(1) because Zou fell due to lack of protection against a gravity-related risk. Finally, Zou argues that Matrix violated Labor Law §241(6) by failing to comply with Industrial Code §23-1.7(b)(1), which sets forth safety requirements to be implemented when working near hazardous openings.

In opposition, 122 argues that issues of fact exist as to Matrix's role in the supervision and control of Best Air. 122 maintains that Matrix was the general contractor on the project as evidenced by the fact that it had a construction manager on site on a

daily basis, it was informed by the owner that safety was a primary concern, it was advised by Best Air as to how and when it planned to do its work, and it had to approve Best Air's work before it was done.

### Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Labor Law §240(1) imposes absolute liability on building owners, construction contractors and their agents with regard to elevation-related risks to workers at construction sites. *See Rodriguez v. Forest City Jay St. Assocs.*, 234 A.D.2d 68 (1<sup>st</sup> Dept. 1996). The statute was designed to prevent those types of accidents in which the 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. *See Luongo v. City of New York*, 72 A.D.3d 609 (1<sup>st</sup> Dept. 2010). 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 N.Y.3d 280, 287 (2003).

A general contractor will be held liable under Labor Law §240 (1) if it was responsible for coordinating and supervising the entire construction project and was invested with the power to enforce safety standards and to hire responsible contractors. A contractor may be held vicariously liable as the agent of a property owner for injuries sustained under Labor Law § 240(1) where the contractor had the ability to supervise and control the activity which brought about the injury. *Aversano v. JWH Contr., LLC*, 37 A.D.3d 745, 747 (2<sup>nd</sup> Dept. 2007).

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 N.Y.2d at 501-502 (1993). 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. Here, Zou alleges that applicable Industrial Code provision is Industrial Code 12 NYCRR 23-1.7 (b) (1) (I), which provides:

- (b) Falling hazards
- (1) Hazardous openings.
  - (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

The testimony and documentary evidence presented do not establish that Matrix was a general contractor or statutory agent of the owner on the subject project. Matrix and Best Air each had separate contracts with 122 and Matrix's contract did not give it the authority to insist that proper safety practices be followed by other contractors. Matrix's contract did not give it authority to supervise and/or control the work of any other contractors at the work site. Further, careful review of the testimony presented reveals that while Matrix and Best Air had a cooperative relationship at the worksite, Matrix did not have the authority to supervise or control Best Air's actual work and did not actually supervise or control Best Air's work.

Even if 122 referred to Matrix as "general contractor," the mere designation of general contractor, does not establish liability. *See Krawiecki v Cerutti*, 218 A.D.2d 323 (3<sup>rd</sup> Dept. 1996). There is a distinction between a general contractor and a prime contractor for general construction. Generally speaking, the prime contractor for general construction has no authority over the other prime contractors, unless the prime contractor is delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work. *See Walsh v. Sweet Assoc., Inc.*, 172 A.D.2d 111 (3<sup>rd</sup> Dept. 1991). Here, no such authority was delegated and Matrix did not supervise or control Best Air's work. As such, the Labor Law §§240(1) and 241(6) causes of action asserted against Matrix are dismissed.

New York Labor Law §200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. *Comes v New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 (1993). It is well settled that in order to prevail on a claim based upon a failure to maintain a safe construction site, the plaintiff must demonstrate that the defendant had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. *Hughes v Tishman Constr. Corp.*, 40 A.D.3d 305, 306 (1<sup>st</sup> Dept 2007). Where a claim under Labor Law §200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work. *Hughes v Tishman Constr. Corp.*, 40 A.D.3d 305, 306. Further, general supervisory authority is insufficient to constitute supervisory control, rather, it must be demonstrated that the contractor or owner controlled the manner in which the plaintiff performed his or her work. *Id.*

Here, no testimony or documentary evidence was presented establishing that Matrix controlled the manner in which Zou performed his work. As such, the §200 and negligence claims are dismissed against Matrix.

Finally, the Court finds that Zou has not submitted sufficient evidence to meet his *prima facie* burden of establishing entitlement to judgment as a matter of law on his

claims asserted against 122 and therefore, his motion for summary judgment against 122 on the issue of liability is denied.

In accordance with the foregoing, it is hereby

ORDERED that defendant Matrix Construction Services, Inc.'s motion for summary judgment dismissing the complaint and cross claims asserted against it is granted, the complaint and cross claims asserted against it are dismissed, and the action is severed and shall continue as to the remaining defendant; and it is further

ORDERED that plaintiff Chang Zhang Zou's cross motion for summary judgment against defendant Matrix Construction Services, Inc. on the issue of liability is denied; and it is further

ORDERED that plaintiff Chang Zhang Zou's motion for summary judgment against defendant 122 Development, LLC on the issue of liability is denied.

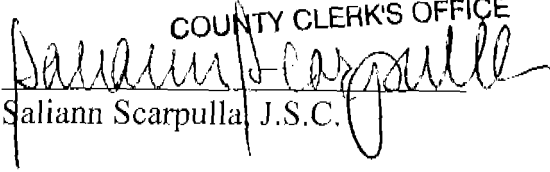
This constitutes the decision and order of the Court.

Dated: New York, NY  
June 1, 2011

**FILED**

JUN 08 2011

ENTER:

NEW YORK  
COUNTY CLERK'S OFFICE  
  
Saliann Scarpulla, J.S.C.