

**Shikhman v Plaza W. Assoc., LLC**

2012 NY Slip Op 30142(U)

January 13, 2012

Supreme Court, New York County

Docket Number: 103095/09

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C. Justice

PART 8

Yevgeny shikhman,

-v-

Plaza West Associates, LLC. et al.,

INDEX NO. 103095/09  
MOTION DATE 9/9/11  
MOTION SEQ. NO. 007

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). See

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). attached

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**FILED**

JAN 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: January 13, 2012

JMK, J.S.C.  
**JOAN M. KENNEY**

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X

YEVGENY SHIKHMAN,  
Plaintiff,

DECISION & ORDER  
Index No.: 103095/09

-against-

PLAZA WEST ASSOCIATES, LLC and ESM  
CONSTRUCTION CORP.,  
Defendants.

-----X

PLAZA WEST ASSOCIATES, LLC and ESM  
CONSTRUCTION CORP.,  
Defendants/Third-Party Plaintiffs,

Third-Party Index No.:  
590337/10

-against-

CONCEPTION BAY INC., KOENIG IRON WORKS  
INC. and STRUCTURE TONE GLOBAL SERVICES,  
INC.,  
Third-Party Defendants.

-----X

JOAN M. KENNEY, J.:

**FILED**

**JAN 20 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of these motions:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion & Aff. (007)	1-2
Exhibits	3-20
Aff. in Partial Opp.	21
Exhibits	22-23
Notice of Motion & Aff. (008)	24-25
Exhibits	26-32
Notice of Cross Motion & Aff.	33-34
Exhibits	35-38

Motion sequence numbers 007 and 008 are consolidated for disposition.

In motion sequence number 007, defendants Plaza West Associates, LLC (Plaza West) and ESM Construction Corp. (ESM) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and for an order granting summary judgment over third-

party defendant Koenig Iron Works Inc. (Koenig) for contractual indemnification.

In motion sequence number 008, Koenig moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims asserted as against it. Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment on his cause of action for violation of Labor Law § 240 (1).

Previously, by order dated October 26, 2010, this court granted judgment as against third-party defendant Conception Bay Inc. (Conception Bay) on default, and the third-party action asserted as against Structure Tone Inc. s/h/a Structure Tone Global Services (Structure Tone) was dismissed.

#### FACTUAL BACKGROUND

This is a personal injury action involving a construction accident that allegedly took place at a project located at 636 11<sup>th</sup> Avenue, New York, New York on June 21, 2008. At the time of the occurrence, plaintiff was employed by Conception Bay, and he alleges that an object was caused to fall and strike him during the course of his construction work. The complaint and bill of particulars allege violations of Labor Law §§ 200, 240 (1) and 241 (6), as well as violations of New York Industrial Code §§ 23-1.5 (a), 23-1.7 (e) (2), 23-5.1 (c) (2), 23-6.1 (b) and 23-6.1 (c) (1), and various OSHA violations.

According to the accident report prepared at the time of the

[\* 4]

occurrence, plaintiff was working between the 7<sup>th</sup> and 8<sup>th</sup> floors when a length of steel was being moved by plaintiff and two other workers using a "choker chain." The accident report states:

"The steel rolled inside the choker down onto Yevgeny's leg, sliding down from his right knee to his right ankle, exposing shin bone and skin. The steel also rolled over onto Yevgeny's left foot, causing four blackened toes and one fractured big toe."

Motion, Ex. H.

Plaza West is the owner of the premises where the accident took place, and ESM was the construction manager for the project. Motion, Ex. I. Koenig was engaged by ESM to perform all structural steel and metal work at the project. Motion, Ex. J. According to section 12.2 of the contract between Koenig and ESM, Koenig agreed, among other things, to indemnify and defend the construction manager and the owner against all claims arising out of any act or omission or breach of contract arising from Koenig's performance and the performance of Koenig's agents, subcontractors and employees, but not for those acts and/or omissions caused by the construction manager or owner. *Id.*

Plaintiff testified at his examination before trial (EBT) that he had performed the same work that he was performing at the time of the accident approximately 40 times before, and that the scope of the work entailed strengthening the area around the holes that were to be covered with steel decking. Plaintiff's EBT, at 91-93. Plaintiff said that the area around the holes would be supported by

steel beams that would be raised up from the floor below the area to be decked. *Id.*

The steel would be lifted by means of a pulley system and chain up to the ceiling of the floor below the floor for which it would be the floor, at which time it would be welded to the beams on the floor level. Before it would be welded, there would be a scaffold constructed beneath that area so that the workers below could weld the elevated steel beams. There would be cinder blocks forming a pyramid on each side of the hole where the beam would be welded. The cinder blocks were placed with three cinder blocks at the base, covered by two cinder blocks, then one cinder block. The steel beam would rest on top of this pyramid. *Id.* at 120-138. According to plaintiff, at the time of the occurrence, he and two other workers were standing on the cinder blocks around the hole trying to shift the steel hoist beam towards him; plaintiff was pulling the beam while the two other workers were pushing the beam. Plaintiff stated that he believed that the worker on the other side of the hole pushed too hard, causing the beam to fall off the cinder block and crush the cinder block below it, thereafter rolling on to his leg and foot. *Id.* at 139-149. Plaintiff further stated that, at the time of the accident, the beam did not rise more than one inch above the cinder block and that he was not elevated, his feet being flat on the seventh floor. Plaintiff's 2d EBT, at 7-11. Plaintiff also averred that the entire height of the

cinder block pyramid was about two feet. *Id.* at 86-87.

Plaintiff testified that Conception Bay constructed the cinder block pyramids upon which the beam was resting, that only Conception Bay workers were involved in shifting the beam, that the work only required using hands, and that no other equipment was used. *Id.* at 87-94.

According to defendants, plaintiff's testimony proves that the beam was not being hoisted at the time of the occurrence and that he was working on the same level as the beam during the time that it was being moved. Therefore, defendants assert that plaintiff's cause of action based on a violation of Labor Law § 240 (1) must be dismissed.

Alan Guthertz (Guthertz), Koenig's chief financial officer, was deposed in this matter and testified that Koenig's project manager would visit the site periodically while the job was in progress, and that the project manager would coordinate all safety aspects of the project. Guthertz EBT, at 22-26. According to Guthertz, Conception Bay, as Koenig's subcontractor, was responsible for its own safety protection and anything related to their subcontracting job. *Id.* at 27. Guthertz said that, pursuant to the contract between Koenig and Conception Bay, Conception Bay agreed to indemnify Koenig. *Id.* at 34. Further, pursuant to its contract with ESM and Plaza West, Koenig was to indemnify ESM and Plaza West. *Id.* at 36-37.

In opposition to this motion, Koenig argues that the motion is untimely and should therefore be denied.

According to this court's order of February 24, 2011, dispositive motions were to be filed no later than 60 days after filing the note of issue. The note of issue in the instant matter was filed on April 29, 2011, and defendants' motion was filed on June 28, 2011, which Koenig contends is more than 60 days after filing the note of issue.

In the alternative, Koenig argues that the motion is substantively premature with respect to Koenig's indemnification liability because it is not required to indemnify ESM and/or Plaza West for their own negligence, and the issue of ESM's and Plaza West's negligence has yet to be determined.

In motion sequence number 008, filed the day after defendants' motion, Koenig asserts that its only function for the project was to provide fabricated steel and that it did not perform any construction work at the site. All of the construction and erection of the steel was performed by plaintiff's employer, Conception Bay. Koenig states that its only possible liability rests in contractual indemnification and, therefore, seeks to dismiss the complaint asserted against defendants.

The thrust of Koenig's arguments concerns the reasons why defendants cannot be found liable for plaintiff's injuries.

Koenig contends that ESM and Plaza West cannot be held liable

to plaintiff for a violation of Labor Law § 200 because the accident arose out of the means and methods of operations and, as such, an owner or general contractor may only be found liable if it had the authority to supervise the work being performed, not just general supervisory authority. Koenig says that ESM and Plaza West had no such supervisory authority in the instant matter.

Koenig also maintains that plaintiff's cause of action based on a violation of Labor Law § 241 (6) must be dismissed because the Industrial Code sections alleged by plaintiff to have been violated are either too general or inapplicable to the facts of the case to support a Labor Law § 241 (6) claim.

Lastly, Koenig contends that plaintiff's cause of action based on a violation of Labor Law § 240 (1) must be dismissed because the accident did not involve a fall from a height or a falling object.

In his cross motion, plaintiff provides an affidavit in which he avers that the accident occurred because the hoist that was holding the beam was insufficient to support the beam, thereby causing the beam to fall when he and his co-workers were attempting to move the beam into place. Cross motion, Ex. 2. Therefore, asserts plaintiff, his accident is the result of the work site not being provided with adequate hoists, which is a clear violation of Labor Law § 240 (1).

Plaintiff has also provided an expert affidavit of Stuart Sokoloff, P.E., who opines that the accident was caused by a hoist

that did not constitute a proper safety device as enumerated by the Labor Law and Industrial Code §§ 23-6.1 (j) (2), 23-6.1 (c) (1), 23-6.1 (c) (2) and 23-6.1 (h). Cross Motion, Ex. 3.

Based on the foregoing, plaintiff seeks partial summary judgment on his Labor Law § 240 (1) cause of action.

In addition, plaintiff opposes defendants' and Koenig's motions with respect to his Labor Law § 241 (6) cause of action, asserting that those movants failed to provide an affidavit by an engineer to support their position, and that plaintiff is permitted to add additional Industrial Code violations in opposition to a motion for summary judgment.

Lastly, plaintiff argues that his Labor Law § 200 cause of action should not be dismissed because defendants had significant and close involvement with the work being performed.

**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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). 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); see *Zuckerman v City of New York*, 49

NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

At the outset, the court finds that the motions were made within the 60-day period following the filing of the note of issue, as mandated by this court's prior ruling. Therefore, the court will address the substantive issues presented by the instant motions.

Those portions of defendants' and Koenig's motions seeking to dismiss plaintiff's cause of action based on a violation of Labor Law § 200 are granted.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. See e.g. *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 (2d Dept 2007).

In the instant matter, the accident occurred because of the means and methods of operation, i.e., the way in which the steel beam was being placed in position to be welded. In such

circumstances, in order to hold the owner and general contractor liable under Labor Law § 200, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009).

"[T]here is no evidence in the record that [defendants] actually directed, controlled or supervised plaintiff's work or were responsible for doing so. ... Rather, the record shows that ... it was plaintiff's employer ... that actually directed [plaintiff's work] [internal citations omitted]."

*Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 403 (1<sup>st</sup> Dept 2005).

Defendants are entitled to "judgment as a matter of law by demonstrating that the plaintiff's accident arose from the means and methods of his work, that the plaintiff's work was directed and controlled exclusively by his employer, and that they had no authority to exercise supervisory control over his work." *Robinson v County of Nassau*, 84 AD3d 919, 920 (2d Dept 2011); *Persichilli v Triborough Bridge and Tunnel Authority*, 16 NY2d 136 (1965); *Cambizaca v New York City Transit Authority*, 57 AD3d 701 (2d Dept 2008).

Furthermore, the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability ... in the absence of proof of ... actual control." *Brown v New York City Economic Development*

Corp., 234 AD2d 33, 33 (1<sup>st</sup> Dept 1996).

Therefore, in the case at bar, no evidence has been submitted to indicate that ESM or Plaza West, as the general contractor and owner, exercised any supervision or control over plaintiff's work. Plaintiff's conclusory statement that defendants had significant and close involvement with the work being performed is insufficient to defeat this portion of defendants' motion. *Gilbert Frank Corp. v Federal Insurance Company*, 70 NY2d 966 (1988); *Gusinsky v Genger*, 74 AD3d 539 (1<sup>st</sup> Dept 2010). As a consequence, those portions of defendants' and Koenig's motions seeking to dismiss plaintiff's Labor Law § 200 claims are granted.

Those portions of defendants' and Koenig's motions, and plaintiff's cross motion, seeking summary judgment on plaintiff's cause of action based on an alleged violation of Labor Law § 240 (1) are denied.

Section 240 (1) of the New York Labor Law states, in pertinent part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

As stated by the Court in *Rocovich v Consolidated Edison*

Company (78 NY2d 509, 513 [1991]),

"It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

As the general contractor of the project, ESM may be held liable under the absolute liability provisions of Labor Law § 240 (1) (*Serpe v Eyriss Productions, Inc.*, 243 AD2d 375 [1<sup>st</sup> Dept 1997]), even if other prime contractors may share in that liability. *Russin v Louis N. Picciano & Son*, 54 NY2d 311 (1981).

Even though plaintiff was standing on the floor at the time of the occurrence, and the steel beam fell no more than two feet, such a height differential cannot be considered *de minimis* so as to avoid liability under Labor Law § 240 (1). The critical question is "whether the harm flows directly from the application of the force of gravity to the object." *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 604 (2009).

"While the plaintiff alleged that the [steel beam] at issue fell only [24] inches before landing on his leg, '[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, even over the course of a relatively short descent.' Therefore, that branch of the defendant[s]' ... motion which was for summary judgment dismissing so much of

the complaint as alleged a violation of Labor Law § 240 (1) should [be] denied. However, contrary to the plaintiff's contention, he [is] not entitled to summary judgment on the issue of liability with respect to so much of the complaint as alleged a violation of Labor Law § 240 (1). The plaintiff failed to establish his prima facie entitlement to judgment as a matter of law, since there remain issues of fact as to whether the [steel beam] 'fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute' [internal citations omitted]."

*Gutman v City of New York*, 78 AD3d 886, 887 (2d Dept 2010).

Consequently, since a question of fact exists as to whether the steel beam fell because it was improperly secured or because plaintiff's co-worker pushed the beam too forcefully, summary judgment on plaintiff's Labor Law § 240 (1) cannot be granted.

Those portions of defendants' and Koenig's motions seeking summary judgment dismissing plaintiff's cause of action based on a violation of Labor Law § 241 (6) are granted.

Labor Law § 241 (6) states:

"Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\*\*\*

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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work,

shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998). However, while proof of a violation of a specific Industrial Code is required to sustain an action under Labor Law § 241 (6), such proof does not establish liability, and is merely evidence of negligence. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, *supra*.

In his cross motion, plaintiff argues the application of three sections of the Industrial Code that did not appear in the complaint or the bill of particulars.

"[T]he failure to identify the specific [Industrial] Code provision allegedly violated in support of a Labor Law § 241 (6) cause of action either in the complaint or in the bill or supplemental bills of particulars is not necessarily fatal. A plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241 (6) claim for the first time in opposition to a motion for summary judgment if the allegation involve[s] no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants [internal quotation marks and citations omitted]."

*Kowalik v Lipschutz*, 81 AD3d 782, 783 (2d Dept 2011); *Kelleir v Supreme Industrial Park, LLC*, 293 AD2d 513 (2d Dept 2002).

Since plaintiff has not alleged any new facts, and defendants have failed to oppose the new allegations as prejudicial, the court will consider the Industrial Code sections specified by plaintiff in his cross motion, and deem the other Industrial Code violations,

and OSHA violations, originally alleged by plaintiff to be abandoned.

In his cross motion, plaintiff asserts that his cause of action based on a violation of Labor Law § 241 (6) is supported by Industrial Code §§ 23-6.1 (c) (2), 23-6.1 (h) and 23-6.1 (j) (2).

Sections 23-6.1 (c) and 23-6.1 (h) of the Industrial Code have been held insufficiently specific to support a cause of action based on a violation of Labor Law § 241 (6). *Morrison v City of New York*, 5 AD3d 642 (2d Dept 2004); *Sharrow v Dick Corporation*, 233 AD2d 858 (4<sup>th</sup> Dept 1996). Industrial Code § 23-6.1 (j) (2) is inapplicable to the case at bar, since that section of the Industrial Code refers to the stability of hoisting machine anchorage and there is no evidence or allegation that any hoisting equipment became dislodged, thereby causing plaintiff's injuries.

As a consequence of the foregoing, defendants are granted summary judgment dismissing plaintiff's claim based on a violation of Labor Law § 241 (6).

Lastly, that portion of defendants' motion seeking summary judgment as against Koenig on the issue of contractual indemnification is denied as premature, since no liability has yet been established. *Cook v Consolidated Edison Company of New York, Inc.*, 51 AD3d 447 (1<sup>st</sup> Dept 2008). Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion (motion sequence

number 007) seeking summary judgment dismissing plaintiff's causes of action based on violations of Labor Law §§ 200 and 241 (6) is granted and those causes of action are dismissed; and it is further

ORDERED that the branch of defendants' motion (motion sequence number 007) seeking summary judgment dismissing plaintiff's cause of action based on a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that the branch of defendants' motion (motion sequence number 007) seeking contractual indemnification from Koenig Iron Works Inc. is denied as premature; and it is further

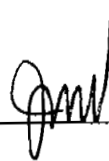
ORDERED that third-party defendant Koenig Iron Works Inc.'s motion (motion sequence number 008) is denied; and it is further

ORDERED that plaintiff's cross motion (motion sequence 008) seeking partial summary judgment on his cause of action based on a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: January 13, 2012

ENTER:



**FILED**

JAN 20 2012

Joan M. Kenney, J.S.C.

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