

<b>Smith v Old Acres Farms, Inc.</b>
2013 NY Slip Op 31262(U)
June 14, 2013
Supreme Court, Wyoming County
Docket Number: 42182
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 Court-house in Warsaw , New York, on the 14<sup>th</sup> day of June, 2013.

PRESENT: HONORABLE MARK H. DADD  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF WYOMING

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CHRISTOPHER SMITH  
*Plaintiff*

v.

OLD ACRES FARMS, INC. and  
LESTER ROBERTS CONSTRUCTION, INC.  
*Defendants*

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DECISION AND ORDER

Index No. 42182

DUSTIN GREEN and  
AMANDA GREEN  
*Plaintiffs*

v.

OLD ACRES FARMS, INC. and  
LESTER ROBERTS CONSTRUCTION, INC.  
*Defendants*

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The plaintiffs in these consolidated actions having moved for an order granting them summary judgment on the issue of the defendants' liability pursuant to Labor Law §240(1), and the defendants having cross-moved for an order granting them summary judgment and dismissing the plaintiffs' complaints in their entirety, and said motion and cross-motion having duly come on to be heard.

NOW, on reading the complaint and answers herein; and on reading and filing the notice of motion dated February 12, 2013, supported by the affirmation of Charles H. Cobb, Esq., dated February 12, 2013, together with the annexed exhibits; the notice of cross-motion dated March 11, 2013, supported by the affidavit of Matthew A. Lenhard, Esq, sworn to on March 11, 2013, together with the annexed exhibits and the accompanying memorandum of law; the responding affirmation of Charles H. Cobb, Esq., dated March 21, 2013; and the reply affidavit of Matthew A. Lenhard, Esq., sworn to on March 26, 2013; and after hearing Charles H. Cobb, Esq., attorney for the plaintiffs, and Matthew A. Lenhard, Esq, attorney for the defendants, and upon due deliberation, the following decision is rendered upon the motion and cross-motion.

Dustin Green and Christopher Smith seek damages for the injuries that they suffered when they fell from a raised platform on June 15, 2008. The remaining plaintiff, Amanda Green, is Dustin Green's wife. She brings a derivative action for loss of consortium, etc.

When the accident occurred, the two men were employed by Mooney Construction doing roofing work on a dairy barn being constructed for the defendant, Old Acres Farms, Inc. Old Acres Farms had hired the defendant, Lester Roberts, Inc., to build the barn, and Lester Roberts had brought in Mooney Construction as a subcontractor. The platform, set up a few feet below the level of the barn roof, consisted of a 24 foot walkway attached by ladder jacks to two extension ladders placed 20 feet apart. The ladders were leaned up against the bottom portion of the roof framing. In their deposition testimony, Dustin Green referred to the part of the structure upon which the ladders rested as a "gird," and Christopher Smith referred to it as the "fascia board." Because of the roof overhang, this "fascia board" or "gird" stood some feet out from the actual wall of the barn. While the jacks and the platform were tied off to the ladders by ropes, the ladders themselves were not secured to the "fascia board" or "gird." The men fell when one of the ladders moved down off the "fascia board" and fell inwards toward the outer wall of the barn. This movement caused the men to be pushed backwards off the platform,

resulting in their injuries.

With respect to the plaintiffs' motion for partial summary judgment on their Labor Law §240(1) claims, although the defendants argue that there are questions of fact yet to be determined with respect to what caused the ladder to move down off the "fascia board" and fall inwards, it does not appear to be disputed that the accident was precipitated by the ladder, in fact, doing so. Given that the ladder – which is not alleged to have been defective in any way – failed to perform its intended function to support the persons using it, the conclusion is inescapable that, contrary to the statute, it was not properly "placed, and operated as to give proper protection . ." (Labor Law §240[1]; Woods v. Design Center, LLC, 42 A.D.3d 876 [4<sup>th</sup> Dept., 2007]; Evans v Syracuse Model Neighborhood Corp., 53 A.D.3d 1135 [4<sup>th</sup> Dept., 2008]). Thus, with their submissions the plaintiffs have met their initial burden upon the motion to make a prima facie showing that they are entitled to partial summary judgment on the issue of the defendants' liability on the Labor Law §240(1) claims.

In their papers, the defendants counter the showing of the plaintiffs with respect to this issue by pointing out that Dustin Green and Christopher Smith, in setting up the ladders and platform on the morning of the accident, failed to tie off the ladders to the "gird" or "fascia board" – despite admittedly having been instructed in the course of their employment to always tie off ladders to structures if possible. On this evidence, the defendants argue that the plaintiffs' unreasonable and negligent failure to use available ropes to secure the ladders was the sole proximate cause of their injuries.

The defendants, however, ignore the fact that on the day of the accident neither Dustin Green nor Christopher Smith considered it possible to tie off the ladders under the circumstances. As Dustin Green testified when questioned about why he did not secure the ladders to the gird, ". . . I don't believe that I could have attached it to that . . . [b]ecause that's where our sheets were getting screwed down. We would have screwed the whatever you attached with down." Therefore, it cannot be said that the men acted as "recalcitrant workers"

who “chose for no good reason” to fail to use adequate available safety devices (Cahill v. Triborough Bridge and Tunnel Auth., 4 N.Y.3d 35, 40 [2004]; Gallagher v. New York Post, 14 N.Y.3d 83, 88 [2010]). And in view of the clear evidence that a violation of the statute – the failure to properly “place” the ladders – contributed directly to causing the accident, any negligence on the part of the plaintiffs could not have been the sole proximate cause (Blake v. Neighborhood Housing Services of N.Y. City, Inc., 1 NY3d 280 [2003]). Moreover, it must be noted that the foreman for Mooney Construction, Richard Smith, was present on the roof working with the plaintiffs at the time of the accident, and consequently the failure to secure the ladders was done with at least the “tacit approval” of the plaintiffs’ supervisor (Rico-Castro v. Do and Co New York Catering, Inc., 60 A.D.3d 749, 750 [2<sup>nd</sup> Dept., 2009]; see also Kuhn v. Camelot Association, Inc., 82 A.D.3d 1704, 1706 [4<sup>th</sup> Dept., 2011]; Pichardo v Aurora Contractors Inc., 29 A.D.3d 879, 881 [2<sup>nd</sup> Dept., 2006]). It is the Court’s conclusion that, with respect to the Labor Law §240(1) claims, the defendants have failed to show that they are entitled to judgment upon their cross-motion. In addition, they have failed to raise a triable issue of fact in opposition to the plaintiffs’ motion. Accordingly, the plaintiffs’ motion shall be granted and the defendants’ motion, to the extent that it relates to the plaintiffs’ claims pursuant to Labor Law §240(1), shall be denied.

Addressing, now, the remainder of the defendants’ cross-motion, the Court finds that the defendants have made a prima facie showing that they are entitled to the dismissal of the plaintiffs’ causes of action based upon Labor Law §§200, 240(2) and 241(6), as well as their common law negligence claims. In response, the plaintiffs have offered nothing to suggest that there remain triable issues of fact with respect to these causes of action. The Court notes that plaintiffs’ counsel asserted during oral argument that the Labor Law §241(6) claims should not be dismissed because some of the code violations alleged “are still alive,” but the Court finds no evidentiary support for this assertion in the plaintiffs’ motion papers. Accordingly, the Court will grant the defendants’ request to dismiss the plaintiffs’ claims founded upon common law

negligence, Labor Law §200, Labor Law §240(2) and Labor Law §241(6).

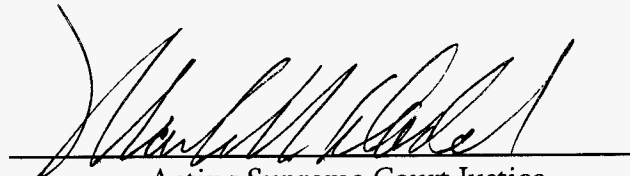
NOW, THEREFORE, it is hereby

ORDERED that the plaintiffs' motion for partial summary judgment upon the issue of the defendants' liability for violating Labor Law §240(1) is granted; and it is further

ORDERED that the defendants' cross-motion to dismiss the complaints is granted to the extent that those causes of action stated in the complaints which are founded upon common law negligence, Labor Law §200, Labor Law §240(2) and Labor Law §241(6) are hereby dismissed; and it is further

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

Dated: June 14, 2013

  
Acting Supreme Court Justice

