

<b>Giordano v Tishman Constr. Corp.</b>
2015 NY Slip Op 30584(U)
March 27, 2015
Sup Ct, Bronx County
Docket Number: 305060/2010
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X  
PAUL GIORDANO and RACHEL GIORDANO,

Index No: 305060/2010

Plaintiffs,

**DECISION AND ORDER**

-against-

**Present:**

TISHMAN CONSTRUCTION CORPORATION,

**HON. KENNETH L. THOMPSON, JR.**

Defendants. X

The following papers numbered 1 to 6 read on this motion for summary judgment

No	On Calendar of <b>December 22, 2014</b>	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1, 3, 3a</u>
	Answering Affidavit and Exhibits-----	<u>5</u>
	Replying Affidavit and Exhibits-----	<u>6</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	<u>2, 4</u>
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Tishman Construction Corporation, (Tishman), moves for summary judgment dismissing plaintiff's Labor Law 200, 240(1) and 241(6) and common law negligence causes of action and moves to dismiss the derivative claim of plaintiff, Rachel Giordano. Plaintiffs cross-move pursuant to CPLR 3212 for partial summary judgment for liability on their labor Law 240(1) and 241(6) claims.

This action arose as a result of personal injuries sustained by plaintiff, Paul Giordano, when he fell 30 feet from scaffolding or shoring that he was working upon, on June 1, 2010. Plaintiff testified that he fell when he stepped on piping and the knuckle popped he lost the support for his foot. Plaintiff had been directed to move scaffolding/shoring next to another scaffolding/shoring unit and join them at the World Trade Center construction site.

Plaintiff was employed by non-party, Collavino Construction Co. Plaintiff was a union carpenter.

### LABOR LAW 240(1)

Labor Law 240(1) provides:

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.

It is undisputed that plaintiff is an employee who fell from a height while engaged in covered construction activity. However, Tishman argues that plaintiff was the sole proximate cause of his injuries and therefore is ineligible for Labor Law 240(1) protection. Tishman asserts that plaintiff failed to properly use the double lanyards with which he was provided by failing to keep at least one of the lanyards tied off to the scaffold/shoring plaintiff was climbing on. Tishman further argues that plaintiff stepped on a pipe whose purpose was to connect an adjoining scaffold/shoring, without first properly insuring that the pipe was secure. The uncontroverted testimony of plaintiff is that the knuckle popped when plaintiff stepped on the connecting pipe. Furthermore, defendant asserts that the connection that plaintiff stepped on and failed to give him support was a connection he was to assemble.

Labor Law §240 (1) applies even in those situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed (*see, e.g., Reed v State of New York*, 249 AD2d 719 [partially dismantled scaffold tipped, causing plaintiff to fall]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012 [plaintiff fell to his death through floor of scaffold he was in the process of dismantling]; *Engel v Nedwidek*, 91 AD2d 794 [plaintiff injured while dismantled scaffold]).

*Kyle v City of NY*, 268 AD 2d 192, 197-198 (1<sup>st</sup> Dept 2000).

Defendant argues that plaintiff was not erecting the scaffolding/shoring, rather he was

just moving it. However, plaintiff had already moved the scaffold/shoring and was engaged in connecting the two scaffolding/shoring units together. Furthermore, defendant's own expert, John Coniglio, avers that plaintiff was erecting a shoring system. (Aff. par. 16, 19, 22) when plaintiff fell.

Anthony Feder, (Feder), was the director of safety for Tishman at the World Trade Center construction site during the time of plaintiff's fall. He testified that he would not connect himself to a scaffold that is under construction because if the scaffold collapses, the workman would fall with the scaffold. When constructing a scaffold, Feder testified one could use a self-retractable life line or an independent rope with a rope grab. When shown a photograph of the work site, Feder could not identify any place where a worker could properly tie into. Feder reported that a place to tie off would have to be drill a hole and set an anchor for a worker to tie off.

Edwin Garcia, (Garcia), was the site safety manager for Tishman at the time of plaintiff's fall. While the Tishman accident report prepared by Garcia is missing and not exchanged by Tishman, Garcia testified that he did not issue of safety violation to plaintiff nor on his company, Collavino. (Transcript, p. 196).

Garcia reported that under OSHA standards whatever one is tying off to must be able to withstand 5,000 pounds. The anchorage points should be "embedded into the concrete, or welded to steel, or wrapped around steel, or drilled in I mean." (Transcript, p. 49). Garcia agreed that a worker should not tie into whatever is being constructed. Furthermore, Garcia testified that it would be improper to drag a scaffold from one area to another rather than dismantle it and move it. Garcia admitted that when he was in the area where plaintiff worked he did not see any stanchions that could hold 5,000 pounds, nor any independent safety lines.

“[I]n none of the affidavits did defendants' witnesses indicate that there was an adequate 5,000 pound anchorage point available to plaintiff while he was performing the work in question. This is information that is available to defendants, if it exists, and that they would be expected to provide in response to a motion for summary judgment.” (*Miglionico v Bovis Lend Lease, Inc.*, 47 A.D.3d 561, 565 [1<sup>st</sup> Dept 2008]).

Defendant's expert's affidavits are conclusory, do not rely on admissible evidence and fail to address the admissible evidence provided by the trial transcripts.

It is axiomatic that “[o]pinion evidence must be based on facts in the record or personally known to the witness” (*Samuel v Aroneau*, 270 AD2d 474, 475 [2000], lv denied 95 NY2d 761 [2000], citing *Cassano v Hagstrom*, 5 NY2d 643 [1959]). Indeed, “[i]f the expert's conclusions lack foundation in the record and are speculative, the affidavit will not raise questions of fact sufficient to preclude summary judgment” (Id.; see also, accord *Saborido-Calvo v New York City Tr. Auth.*, 11 AD3d 216 [2004]).

(*Santoni v Bertelsmann Prop., Inc.*, 21 A.D.3d 712, 800 N.Y.S.2d 676

NY, 2005.

Accordingly, plaintiff's cross-motion for partial summary judgment on liability on grounds of violating Labor Law 240(1) is granted.

#### LABOR LAW 241(6)

Plaintiff failed to oppose the dismissal of any industrial code violation except (12 NYCRR 23-1.16. With respect to (12 NYCRR 23-1.16, “the record demonstrates that the regulation was violated, as the “approved safety belt or harness” was not “properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline” (12 NYCRR 23-1.16[b]). “ (*Jerez v. Tishman Const. Corp. of New York*, 118 A.D.3d 617, 618 [1st Dept 2014]).

Accordingly, plaintiff's cross-motion for partial summary judgment on liability on

grounds of violating Labor Law 241(6) and 12NYCRR23-1.16, is granted. That branch of defendant's motion that seeks to dismiss plaintiff's Labor Law 241(6), cause of action is granted to the extent of dismissing the claims of violation of the underlying Industrial code provisions, except 12 NYCRR 23-1.16.

#### LABOR LAW 200 AND COMMON LAW NEGLIGENCE

Section 200 of the Labor Law 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. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury.

*(Comes v. New York State Electric and Gas Corp., 82 N.Y.2d 876, 877 [1993])* (citations omitted).

[M]ere oversight of the timing and quality of the work performed is not equivalent to direct supervision and control and is thus insufficient to support the imposition of liability under Labor Law 200. *(See Gonzalez v United Parcel Serv., 249 AD2d 210, 210-211 [1998]; Pacheco v South Bronx Mental Health Council, 179 AD2d 550, 551 [1992], lv denied 80 NY2d 754 [1992]; see also Brezinski v Olympia & York Water St. Co., 218 AD2d 633, 634-635 [1995]).*

*(Artiga v Century Management Co., 303 AD2d 280 [1<sup>st</sup> Dept 2003]).*

All of the evidence indicates that Tishman did not have the authority to control the work that caused injury to plaintiff.

Accordingly, defendant's motion is granted to the extent that plaintiff's Labor Law 200 and common law negligence claims are dismissed.

#### DERIVATIVE ACTION

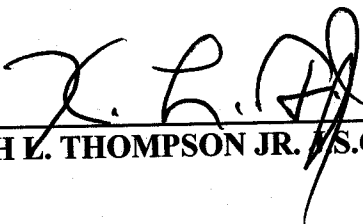
It is undisputed that at the time of Paul Giordano's injuries, he was separated from his wife and co-plaintiff, Rachel Giordano. Accordingly, the derivative claims of Rachel Giordano are dismissed without opposition. *(Dooley v Skodnek, 138 A.D.2d 102 [2<sup>nd</sup> Dept 1988]).*

CONCLUSION

Plaintiff's cross-motion for partial summary judgment on liability is granted under Labor Law 240(1) and under Labor Law 241(6). Defendant's motion is granted to the extent that plaintiff's Labor Law 200 and common law negligence claims are dismissed and the claims of Rachel Giordano are dismissed in their entirety. That branch of defendant's motion that seeks to dismiss plaintiff's Labor Law 241(6), cause of action is granted to the extent of dismissing the claims of violation of the underlying Industrial code provisions, except 12 NYCRR 23-1.16. The branch of defendant's motion that seeks dismissal of the plaintiff's Labor Law 240(1) is denied.

The foregoing shall constitute the decision, and order of the Court.

Dated: MAR 27 2015

  
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KENNETH L. THOMPSON JR. J.S.C.