

<b>Stewart v 301-303 W. 125 LLC</b>
2015 NY Slip Op 32177(U)
October 16, 2015
Supreme Court, Bronx County
Docket Number: 310392/2011
Judge: Julia I. Rodriguez
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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM- PART 27**

**INDEX #: 310392/2011**

**TITUS STEWART and PURNESHA STEWART,**  
Plaintiffs,

-against-

**301-303 West 125 LLC, HARCO CONSTRUCTION  
LLC, HARCO CONSULTANTS CORP. and LMW  
ENGINEERING GROUP, LLC,**  
Defendants.

**DECISION and ORDER  
DECIDING THE PARTIES'  
SUMMARY JUDGMENT  
MOTIONS**

**301-303 West 125<sup>th</sup> LLC,**  
Third-Party Plaintiff,

-against-

**DISANO DEMOLITION CO., INC.,**  
Third-Party Defendant.

Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of the Parties' Motions/Cross-motion for summary judgment dismissing Plaintiff's Labor Law claims and Plaintiff's Cross-motions for summary judgment in his favor:

<u>Papers Submitted</u>	<u>Numbered</u>
Plaintiff's Notice of Motion against 301-303 & HARCO,, Affirmation & Exhibits	1
HARCO's Affirmation in Opposition dated 9/30/14	2
301-303's Affirmation in Opposition, Kravitz Affidavit & Memorandum of Law	3, 4, 5
HARCO's Notice of Cross-Motion against Plaintiff, DISANO & LMW, Affirmation & Exhibits	6
Plaintiff's Affirmation in Further Support of Summary Judgment dated Nov. 14, 2014 & Exhibits	7
301-303's Notice of Motion dated 11/14/14, Affirmation, Exhibits & Memorandum of Law	8, 9
Plaintiff's Affirmation in Opposition to 301-303's motion, Affirmation & Exhibits	10
LMW's Affirmation in Opposition to HARCO's cross-motion	11
LMW's Affirmation in Opposition to 301-303's motion	12
HARCO's Affirmation in opposition to 301-303's motion	13
HARCO's Reply Affirmation to LMW's opposition	14
Plaintiff's Reply Affirmation to opposition by 301-303	15
HARCO's Reply Affirmation to Plaintiff's opposition	16
LMW's Affirmation in Opposition to Plaintiff's motion	17
Plaintiff's cross-motion pursuant to 241(6)	18
HARCO's opposition to Plaintiff's motion under 241(6)	19
301-303's Reply Affirmation & Opposition to Plaintiff's cross-motion	20
HARCO's Supl. Affirm. post-discovery of Oppedisano depositions in further support of its motion	21
LMW's Opposition to HARCO Supplemental Affirmation	22
Plaintiff's Opposition to HARCO's Supplemental Affirmation	23

Plaintiff commenced this action alleging he sustained injuries on September 20, 2011 "when he fell from a three-story scaffold, which collapsed along with an elevator shaft to which it had been attached during the demolition of a building" ¶4 of November affirmation

dated 8/14/2014]. The building being demolished was owned by Defendant and Third-Party Plaintiff **301-303 WEST 125<sup>th</sup> LLC**; the general contractor at the site was Defendant **HARCO CONSTRUCTION LLC** and **HARCO CONSULTANTS CORP.**; Third-Party Defendant **DISANO DEMOLITION CO., INC.** was the demolition subcontractor who was also Plaintiff's employer; and Defendant **LMW ENGINEERING GROUP, LLC** was the engineering company hired by HARCO to develop the demolition plan for filing with the Department of Buildings.

All Defendants interposed their respective Answers asserting affirmative defenses and cross-claims, and all denied liability in their Answers.

In his Verified Bill of Particulars dated February 2012 Plaintiff alleged, *inter alia*, that Defendants violated sections 200, 240(1) and 241(6) of the New York State Labor Law, in addition to various sections of the Industrial Code of the State of New York. In paragraph 4 of the BOP Plaintiff alleged, *inter alia*, that Defendants were:

negligent in their ownership, operation, maintenance, management and control of the premises and demolition site . . . in failing to provide TITUS STEWART with a safe and proper place to work; in failing to adequately and properly coordinate the work being performed . . . in failing to provide adequately secured safety devices necessary to protect Plaintiff from harm caused by elevated-risk and hazards . . . in causing, permitting or allowing a partial building to collapse . . . in failing to take such steps and other precautionary measures to prevent a partial building collapse . . .

After discovery, the parties submit motions as follows:

(1) Plaintiff moves pursuant to CPLR 3212 and §§200, 240(1) and 241(6) of the N.Y. Labor Law seeking partial summary judgment on liability against Defendants 301-303 WEST 125<sup>th</sup> LLC, HARCO CONSTRUCTION LLC and HARCO CONSULTANTS CORP.;

(2) Defendants HARCO cross-move for summary judgment seeking dismissal of the complaint including common law negligence claims and Labor Law claims pursuant to §§200,

240(1) and 241(6) and all cross-claims. HARCO also seeks summary judgment based on contractual indemnification against Third-Party Defendant DISANO DEMOLITION, in addition to common law and contractual indemnification against Defendant/Third Party Defendant LMW ENGINEERING; and

(3) Defendant 301-303 cross-moves for summary judgment seeking dismissal of the complaint including common law negligence claims and Labor Law claims pursuant to §§200, 240(1) and 241(6) and all cross-claims. 301-303 also seeks summary judgment on its cross-claim for contractual indemnification against HARCO, in addition to contractual indemnification and common law indemnification against DISANO *and* common law indemnification against LMW ENGINEERING.

#### **I. LABOR LAW §240:**

Labor Law §240 (1) requires, *in pertinent part*, that: “all contractors and owners and their agents . . . shall furnish . . . ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed.” Section 240(1) provides for extra safety protection to the laborer engaged in certain contemplated occupational hazards that involve elevation risk and are related to the effects of gravity. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). The occupational hazards entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *Toeffler v. Long Island Rail Road*, 4 N.Y.3d 399 (2005). Specifically, the statute imposes liability in situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated work site. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). “The extraordinary protections of the statute extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.” *Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914 (1999). Where a Plaintiff’s actions are the sole proximate cause of his injuries, liability will not attach. *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958 (1998). Finally, ‘not every worker who falls at a construction site . . . gives rise to

the extraordinary protections of Labor Law 240(1). . . rather liability is contingent upon the existence of a hazard contemplated in 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v. Manhasset Bay Associates, et al.*, 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 41 (2001).

It is undisputed that DISANO was demolishing an L-shaped building, and the site was surrounded by a sidewalk bridge topped by wooden planks and perimeter fence. When Plaintiff arrived at the site there was a scaffold erected atop the sidewalk bridge; the scaffold had built-in stairs which Plaintiff would use several times a day to climb up and down the building. Plaintiff fell from the scaffold when it collapsed along with the wall/elevator shaft which it had been attached to during the demolition process. Plaintiff contends he fell off the scaffold on which he was standing when it collapsed as a result of Defendants’ failure to provide him with adequate and secure safety equipment.

Defendants 301-303 and HARCO contend that Plaintiff was not working on the scaffold or the wall at the time of collapse, but was merely using the scaffold to gain access to the second floor. Defendants further contend that Plaintiff was not working at an elevation so as to require a protective device, and that the collapse of the wall was the type of peril a construction worker may encounter at a job site, rendering §240(1) inapplicable in this case.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Propect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant or his or her day in court; the party opposing a motion for summary judgment is entitled to all favor inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dep’t 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

After consideration of the parties' arguments, the court finds that Plaintiff established entitlement to summary judgment as a matter of law with respect to his claim pursuant to §240(1) of the Labor Law. The Court further finds that HARCO and 301-303 failed to establish entitlement to summary judgment dismissing Plaintiff's 240(1) claim as a matter of law, and that both HARCO and 301-303 failed in their burden of rebuttal with respect to Plaintiff's entitlement to summary judgment under 240(1). The moving defendants' interpretation on why §240(1) is inapplicable is that: (1) the scaffold was affixed to the building wall on top of a sidewalk bridge and the scaffold was not defective; (2) Plaintiff destabilized the wall when he drilled a hole in the side of the wall; (3) Plaintiff was using the scaffold as a means of access up and down the first and second floors, rather than working on it, and therefore the scaffold was fine for the purpose that Plaintiff was using it for; (4) the wall collapsed taking the scaffold with it up and over a cantilever over the sidewalk onto a bus; and (5) no protective device enumerated in §240(1) would have protected Plaintiff on the scaffold because the scaffold came down together with the wall when the wall collapsed [See pages 18 - 27 of court transcript on 6/5/2015].

While these arguments are creative, they are unavailing because the applicability of §240(1) is not considered in hindsight after a worker is injured. Rather, 240(1) provides for "extra safety protection to the laborer engaged in certain contemplated occupational hazards that involve elevation risk and are related to the effects of gravity." *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). Here Plaintiff was working on a scaffold and he was not provided with any railing, ropes, devices, pulleys or tethering whatsoever to protect him from falling or other gravity-related foreseeable hazards. Where such a clear violation of §240(1) exists, it is of no moment whether Plaintiff was "traveling on" or traversing up and down the scaffold prior to the accident; the argument that no device could have protected Plaintiff from injury is speculative, and in any event, does not exonerate the defendants from their failure to have complied with the statute in the first place.

The court finds that *Misseritti v. Mark IV Construction Co., Inc.* is not on point (86 N.Y.2d 487, 657 N.E.2d 1318, 634 N.Y.S.2d 35 (1995)). In *Misseritti* the plaintiff was *not*

working at an elevated level and was injured when a *completed* concrete-block fire wall collapsed on him. Here, Plaintiff was clearly at an elevated level since he was *on* a scaffold and fell many feet from a gravity-related height.

HARCO also argues that the wall's collapse was not foreseeable because it was a permanent structure, and consequently, liability under §240(1) turns on whether "the risk of injury from an elevation-related hazard is foreseeable," citing *Vasquez v. Urbahn Assoc. Inc.*, 79 A.D.3d 493, 918 N.Y.S.2d 1 (1<sup>st</sup> Dep't 2010) [¶56 of Lombardo Affirmation dated 9/30/14]. Defendants also cite *Kaminski v. 53<sup>rd</sup> Street and Madison Tower Development, LCC* in support of their claim that the "collapse of a wall is not the 'type of elevation-related accident that 240(1) is intended to guard against.'" 70 A.D.3d 530, 531, 895 N.Y.S.2d 76, 77 (1<sup>st</sup> Dept. 2010). However, neither *Vasquez* or *Kaminski* are persuasive in Defendants' favor. In *Vasquez* Plaintiff was working at ground level, was clearing debris on the landing of a staircase *inside* of a building which was being demolished and where a piece of the concrete floor was still remaining; here, Plaintiff was *outside* of the building on a scaffold, *not at ground level*, engaged in a whole different activity than the plaintiff in *Vasquez*.

In *Kaminsky* plaintiff was injured when a stairway of a building being demolished collapsed; *Kaminsky* stands for the proposition that "only if a defendant has reason to foresee that the permanent structure is likely to collapse, does the defendant then have to comply with the mandates of the scaffold law". Id., 70 A.D.3d 530, 895 N.Y.S.2d 76. Here, the wall collapsed during the last stage of the demolition; *assuming arguendo* that the wall may deemed permanent at the time of collapse, §240(1) applies because Plaintiff was working on a scaffold which is "elevation -related" *and* the Defendants were on notice that the building's interior had already collapsed and was in poor condition, rendering further collapse of the structure foreseeable; see affidavit of **Charles Walsh** stating that defendants were on notice that building was in a dangerous unstable condition [¶10 of Walsh Affidavit sworn to 10/27/2014].

**II. LABOR LAW §241(6):**

Labor Law §241 states in relevant 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, when constructing or demolishing buildings . . . shall comply with following requirements:

. . . (6) All areas in which construction, excavation or demolition work is being performed shall be so construed, 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. . . .

Labor Law 241(6) imposes a non-delegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety for construction workers. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494(1993) As the duty to comply with the regulation is non-delegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the work-site in order to establish a Labor Law §241(6) claim. *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). However, Plaintiff must establish that a violation existed and that the violation was a proximate cause of injury. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 (2003).

At oral argument Plaintiff’s counsel withdrew all claims of Industrial Code violations *except* for section §23-3.3(c), which reads:

§23-3.3(c) **Inspection.** During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protections has been provided by shoring, bracing or other effective means.

As an initial matter HARCO contends that there’s a question of fact whether Plaintiff was engaged in a hand demolition project and whether §23-3.3(c) is even applicable. The

court disagrees based upon the work as described in the depositions' testimony, and the ultimate outrageous collapse. The responsibility imposed by Labor Law 241(6) is a non-delegable duty that could not be deferred to DISANO and its employees. It is clear by their testimony that HARCO's witnesses, **Elzbieta Obara** and **Kenneth Hart**, did not take affirmative steps to assure that DISANO was in compliance with the demolition plans filed by LMW. Indeed, Ms. Obara, an engineer, did not read the demolition plans. The facts indicate that neither 301-303 or HARCO provided oversight over DISANO or monitored the sequence of the demolition before the accident; this was a consequence of 301-303 and HARCO's failure to make timely inspections for any hazardous developments, which concomitantly, is prima facie evidence that Industrial Code §23-3.3(c) was violated.

### III. LABOR LAW §200

Labor Law §200 is a codification of the common law duty of an owner or employer to provide employees with a safe place to work. *Comes v. New York State Electric and Gas Company*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993). Where the claim stems from the alleged defects or dangers arising from a subcontractor's methods or materials, liability under the common law or statute cannot be imposed unless the party to be charged exercised some supervisory control over the operation or had notice of a dangerous condition. *Comes v. New York State Electric*, *Id.*; *Murray v. South End Improvement Corp.*, 263 A.D.2d 577, 693 N.Y.S.2d 264 (3<sup>rd</sup> Dept. 1999). This rule arises from the basic common law principle that an owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or contractor had no direction or control. *Ross v. Curtis Palmer Hydro Electric Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). An implicit precondition for liability is that the party charged with that responsibility have the authority to control the activity which brought about the injury. *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981). 301-303 and HARCO contend that Plaintiff's sole employer was DISANO and that they did not direct, supervise or otherwise instruct Plaintiff in his work. Plaintiff did not oppose the moving defendants' motions for dismissal of

Plaintiff's common law negligence and Labor Law §200 claims.

For the foregoing reasons and after oral argument on June 5, 2015:

(1) Plaintiff's motions pursuant to CPLR 3212 seeking summary judgment on liability against Defendants 301-303 WEST 125<sup>th</sup> LLC, HARCO CONSTRUCTION LLC and HARCO CONSULTANTS CORP. pursuant to common law negligence and N.Y. Labor Law §§200, 240(1) and 241(6) is **granted** solely as to sections 240(1) and (241(6));

(2) That branch of cross-motion by Defendants HARCO CONSTRUCTION LLC and HARCO CONSULTANTS CORP. for:

(A) summary judgment seeking dismissal of the complaint including common law negligence claims and Labor Law claims is **denied** as to Plaintiff's claims pursuant to §§240(1) and 241(6) but is **granted** as to Plaintiff's claims pursuant §200 and sounding in common law negligence;

(B) for summary judgment on its cross-claim for contractual indemnification against Third-Party Defendant DISANO DEMOLITION is **granted**; however, that branch of cross-motion for summary judgment on cross-claim for common law and contractual indemnification against Defendant/Third Party Defendant LMW ENGINEERING GROUP is **denied**; and

(3) That branch of cross-motion by Defendant 301-303 WEST 125<sup>th</sup> LLC for:

(A) summary judgment seeking dismissal of the complaint and Plaintiff's Labor Law claims is **denied** as to Plaintiff's claims pursuant to §§240(1) and 241(6) but is **granted** as to Plaintiff's claims pursuant §200 and sounding in common law negligence;

(B) summary judgment on its cross-claim for contractual indemnification against Defendant HARCO, in addition to contractual indemnification and common law indemnification against DISANO is **granted**;

(C) summary judgment on its cross-claim for common law indemnification against Defendant LMW ENGINEERING GROUP is **denied as moot** (counsel withdrew that branch of motion at oral argument).

Finally, the request by LMW<sup>1</sup>, a non-movant, for the court to search the record and release it from this action is **granted** solely to the extent that Plaintiff's claims sounding in common law negligence and Labor Law sections 200, 240(1) and 241(6) are dismissed as to LMW ENGINEERING GROUP LLC.

A court's power to search the record is limited to those causes of action or issues that were the subject of the motion(s). CPLR 3212(b); *New Hampshire Insurance Company v. MF Global, Inc.*, 108 A.D.3d 463, 467, 970 N.Y.S.2d 16, 20 (1<sup>st</sup> Dept. 2013). A "search of the record" serves judicial economy and is particularly useful in granting relief to parties united in interest. *Barca v. City of New York*, 13 Misc.3d 464, 467, 819 N.Y.S.2d 631, 635 (Sup. Ct. Bx. Co. 2006). Here, however, LMW is not united in interest with its co-defendants as cross-claims abound, and therefore, the Court declines to make any further ruling as a matter of law regarding LMW.

Dated: Bronx, New York

October 16, 2015

  
Hon. Julia I. Rodriguez

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<sup>1</sup> See request by Mr. Krieg in court transcript pg. 38.