

<b>Pintado v Shore Towers Condominium</b>
2018 NY Slip Op 31763(U)
June 28, 2018
Supreme Court, Queens County
Docket Number: 701673/15
Judge: Darrell L. Gavrin
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## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

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LUIS DANIEL AUCAPINA PINTADO,

Index No. 701673/15

Plaintiff,

Motion

Date January 29, 2018

- against-

SHORE TOWERS CONDOMINIUM, BOARD OF  
MANAGERS OF SHORE TOWERS CONDOMINIUM  
and DJM RESTORATION INC.,

Motion

Cal. No. 32, 33 &amp; 34

Motion

Seq. No. 3, 4 &amp; 5

Defendants.

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DJM RESTORATION ONYC INC. i/s/h/a DJM  
RESTORATION INC.,

Third-Party Plaintiff,

- against -

GRT CONSTRUCTION OF NY CORP.,

Third-Party Defendant.

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The following numbered papers read on the motion by the plaintiff, for summary judgment, pursuant to CPLR 3212, on liability against the defendants on his claim based on Labor Law § 240(1), and the separate motion for summary judgment by the defendant/third-party plaintiff, DJM Restoration ONYC Inc., (DJM), seeking dismissal of the plaintiff's claim under Labor Law § 200 and common-law negligence as against it, and granting contractual indemnification from the third-party defendant, GRT Construction of NY Corp., (GRT), and the separate motion by Shore Towers Condominium and Board of Managers of Shore Towers Condominium (Shore Towers), for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them, and granting contractual indemnification from the third-party defendant, GRT.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 65-116
Affirmation in Opposition - Exhibits.....	EF 116-133
Reply Affirmation.....	EF 134-141

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This action arises from the personal injuries sustained by the plaintiff, an employee of the third-party defendant subcontractor, GRT. GRT was hired by the defendant and third-party plaintiff and general contractor, DJM, which in turn, was hired by the defendant owner, Shore Towers. The plaintiff alleges that as he was assisting with the dismantling of a scaffold by lowering its platform by rope, the rung that was holding the rope, broke, causing the platform to fall against plaintiff, injuring him.

At the outset, contrary to defendants' assertions, the plaintiff's summary judgment motion was timely in that he complied with the terms of the July 19, 2017 order as it was e-filed on November 20, 2017 and properly noticed for November 28, 2017.

With respect to plaintiff's motion, Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder, ropes or other protective device proved inadequate to protect a worker from harm directly flowing from the application of the force of gravity to an object or person. (*See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993].) This statute creates a duty that is non-delegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work. (*Id.*) Liability under this statute is not limited to cases in which the falling object is in the process of being hoisted or secured, but also where the plaintiff demonstrates that at the time the object fell, it required securing for the purposes of the undertaking. (*See Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658 [2014]; *Escobar*, 150 AD3d 1081.) It is immaterial if the base of the object is at the same level as the plaintiff as long as the force of gravity acted upon the object causing even a part of it to fall on plaintiff from a height differential causing his injuries. (*See Wilinski v 334 East 92<sup>nd</sup> Hous Dev.*, 18 NY3d 1 [2011].) The plaintiff must also show that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute, (*Fabrizi*, 22 NY3d 658; *Escobar*, 150 AD3d 1081), and that the violation of the statute was a proximate cause of his injuries. (*See Escobar v Safi*, 150 AD3d 1081 [2d Dept 2017].)

In support of his motion, the plaintiff submits, among other things, the pleadings, his deposition, the deposition of Ramirez, the foreman on the project employed by GRT, the deposition of Williams, president of DJM, the deposition of Baxter, property agent of Shore Towers, the deposition of Lopez, a coworker who was an eyewitness to the accident, his attorney's affirmation and the expert affidavit of Herbert Heller, Jr., P.E., civil engineer.

The plaintiff testified in his deposition that after receiving instructions from his foreman Ramirez, he and his coworker Lopez, working with approximately six other individuals were poised at the lower level to assist with the dismantling and lowering of the scaffold from above. Plaintiff's coworkers attached ropes to each end of the scaffold and attached the ropes to rungs to secure the platform while it was being lowered. After the right side of the platform was lowered and touching the ground, the rung that was holding the left side, broke, causing that side of the platform to fall and swing over to where the plaintiff was standing, hitting him and causing his injuries. Lopez's testimony supported plaintiff's description of events. The expert witness, after having reviewed the discovery materials, the depositions, and observing the accident location, opined that the method utilized for lowering the heavy platform was unsafe, and that it should have been lowered with the use of protective devices enumerated in the statute, such as a motorized hoist and slings to secure the platform as it was lowered. The plaintiff has met his *prima facie* burden by showing that he suffered harm that flowed directly from the application of the force of gravity to the platform that struck him as a result of a defective safety device. (*See Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]; *Escobar*, 150 AD3d 1081.)

In opposition, the defendants primarily rely upon the deposition of Ramirez, and the affidavit of DJM's expert witness Daniel M. Paine, C.S.E., (Certified Safety Executive). While Ramirez testified that the plaintiff was instructed not to be under the scaffold when it was being lowered, he also stated that the group of eight co-workers decided amongst themselves how to lower the scaffold, and where to position themselves. He acknowledged that some of the workers were to be on the ground to receive the lowered platform. However, Ramirez was not an eyewitness to the accident. DJM's expert stated that the method utilized to lower the platform was standard practice and that it was the plaintiff's sole fault in placing himself in harm's way underneath the scaffold, while it was being lowered. Defendant's expert avers that plaintiff was solely to blame for standing in a dangerous location, but does not explain how the rung holding the safety rope broke, causing the platform to fall and strike the plaintiff, nor its role in the accident. Furthermore, he does not address the opinion of plaintiff's expert that other safety devices, such as a motorized hoist and slings, were the safe alternative.

Even assuming that the plaintiff was in the wrong place contrary to instructions of Ramirez, the fact that the safety device was defective and inadequate to secure the platform, at best, merely showed the plaintiff's actions to be contributory. (*Stolt v General Foods Corp.*, 81 NY2d 918 [1993].) Labor Law §240 (1) does not recognize comparative fault to offset absolute liability, nor can the plaintiff be the sole proximate cause of his injuries when the absence or failure of a safety device was a proximate cause of the plaintiff's injuries. (*See Gabrus v New York City Hous. Auth.*, 105 Ad3d 699 [2d Dept 2013]; *Melchor v Singh*, 90 AD3d 866 [2d Dept 2011].) The defendants have not raised a triable issue of fact. (*See Escobar*, 150 AD3d 1081; *Raia v Berkeley Co-op Towers Section II, Corp.*, 147 AD3d 989 [2d Dept 2017]; *Gabrus*, 105 Ad3d 699.)

On the separate motions for summary judgment by defendants Shore Towers and DJM, seeking dismissal of plaintiff's Labor Law § 200, and common-law negligence claims against

them, the court must view the evidence in the light most favorable to the non-moving party. (*See Vega v Restani Const. Corp.*, 18 NY3d 499 [2012].) In so doing, the evidence submitted by the defendants must eliminate all material issues of fact. (*Id.*) Generally, construction worksite cases fall into two categories, those where the injuries sustained are as a result of dangerous or defective conditions at the worksite, and those cases involving the manner in which the work is performed. (*See Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008].) This matter involves the latter, and in such a case, to make a *prima facie* showing the defendants must show that they did not have sufficient authority to exercise supervision or control over the injury-producing work. (*See Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848 [2d Dept 2017]; *Marquez v L&M Development Partners, Inc.*, 141 AD3d 694 [2d Dept 2016].)

The co-defendants submit in support of their motions - their attorney's affirmations, the pleadings, the deposition of the plaintiff, the deposition of Ramirez, the deposition of Williams, the deposition of Baxter, and the contract between Shore Towers and DJM, and the separate contract between DJM and GRT.

In his deposition, Williams states that DJM, as the general or prime contractor, hired GRT as the subcontractor to do the exterior work, and that GRT used its own scaffolds, hired their own employees who had their own respective licenses, and more specifically, employed Ramirez as its foreman who was in charge of the erection, maintenance, and utilization of the scaffold. However, Williams states that he maintains a special riggers license which demonstrates his expertise in certain scaffold erection and removal, and which he used to obtain the building permits necessary to perform the work. He stated that no one in GRT had this equivalent license, although DJM designated Ramirez as his rigging foreman for the purposes of the permit that Williams obtained for the project. Williams testified that Ramirez was "his" foreman, and that Ramirez was "his arm" on the project. All of the workers had "DJM" identity badges. The sign-in sheets were on DJM forms. Williams attended many of the weekly meetings where the plans for the work would be discussed. This testimony raises triable issues of fact regarding the nature of the relationship between Ramirez and Williams and the nature of the contract between DJM and GRT, as to whether DJM had the authority to supervise and control the work of Ramirez and those working on this project. (*See Shaughnessy v Huntington Hosp. Ass'n.*, 147 AD3d 944 [2d Dept 2017].) The contractual provisions between DJM and Shore Towers, together with Baxter's testimony raise triable issues of fact as to DJM's responsibility to supervise the breakdown and moving of the scaffold, and to provide the proper safety equipment to perform this task according to statute. (*See Torres v Perry Street De Corp.*, 104 AD3d 672 [2d Dept 2013].) Since DJM has not met its *prima facie* burden, plaintiff's opposition papers need not be addressed. (*See Caban v Plaza Const. Corp.*, 153 AD3d 488 [2d Dept 2017].)

However, the evidence demonstrates that defendant, Shore Towers, as owner, did not have sufficient authority or control to exercise supervision or control over DJM or GRT's work. (*See Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848 [2d Dept 2017].) In opposition to defendant's *prima facie* showing, the plaintiff has not raised a triable issue of fact. (*See Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].)

As to the claims by DJM and Shore Towers for contractual indemnification against GRT, the contract between the parties provides that GRT will indemnify DJM and the owner Shore Towers for its own negligence. DJM has not shown itself to be free of negligence, nor has it shown that it was not the party responsible to supervise and control the manner of work, nor the party responsible to supply the proper safety equipment according to the contract, and pursuant to statute. (See General Obligations Law 5-322.1; *Mikelatos v Theofilaktidis*, 105 AD3d 822 [2d Dept 2013]; *Hirsch v Blake Housing, LLC*, 65 AD3d 570 [2d Dept 2009].) Since the issues remain unresolved with respect to the responsibilities between DJM and GRT, it can not yet be determined whether GRT bears any responsibility for indemnification to either DJM or Shore Towers. (See *Lesisz v Salvation Army*, 40 AD3d 1050 [2d Dept 2007].) As DJM and Shore Towers have not met their *prima facie* burdens, GRT's opposition papers need not be addressed. (See *Caban v Plaza Const. Corp.*, 153 AD3d 488 [2d Dept 2017].)

Accordingly, the motion for summary judgment by the plaintiff on its claim based on Labor Law §240 (1) is granted as against both DJM and Shore Towers. The motion for summary judgment by Shore Towers seeking to dismiss plaintiff's claims based on Labor Law § 200 and common-law negligence is granted, however that portion of its motion seeking contractual indemnification against third party defendant, GRT, is denied. The motion for summary judgment by DJM is denied in all respects.

Dated: June 28, 2018

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DARRELL L. GAVRIN, J.S.C.