

Lazo v GSK Bldrs. Group Inc.
2019 NY Slip Op 34730(U)
May 28, 2019
Supreme Court, Westchester County
Docket Number: Index No. 58796/2016
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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DARWIN LAZO,

Plaintiff,

**DECISION & ORDER
Index No.:58796/2016**

-against-

Sequence Nos. 2,3,4,5

**GSK BUILDERS GROUP INC., JOSEPH GIAIMO, JOSE M.
RIBEIRO AND FELIPE RIBEIRO d/b/a F&J RIBEIROS
CONSTRUCTION,**

Defendants,

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GSK BUILDERS GROUP, INC.,

Third-Party Plaintiff,

-against-

**COSTA ELECTRICAL CONTRACTORS CORP. d/b/a COSTA
ELECTRICAL CORP.,**

Third-Party Defendant,

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**COSTA ELECTRICAL CONTRACTORS CORP. s/h/a COSTA
ELECTRICAL CONTRACTORS CORP. d/b/a
COSTA ELECTRICAL CORP.,**

Fourth-Party Plaintiff,

-against-

RIBEIRO CONSTRUCTION,

Fourth-Party Defendant,

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GSK BUILDERS GROUP, INC.,

Fifth-Party Plaintiff,

-against-

**F&J RIBEIROS CONSTRUCTION and JOSE MANUEL RIBEIRO
d/b/a F&J RIBEIROS CONSTRUCTION,**

Fifth-Party Defendant.

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**JOSE M. RIBEIRO AND FILIPE RIBEIRO d/b/a F&J
RIBEIROS CONSTRUCTION,
Sixth-Party Plaintiff,**

-against-

**ROGER POEHLSEN CONSTRUCTION, L.L.C.,
ALLWOOD STILLWELL STAIRS & RAILINGS, INC.M
JMI SERVICES, INC., and CRAFTS & HOME, LLC,**

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WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 106 through 287, were read in connection with separate motions for summary judgment: Seq 2-Joseph Giaimo (“ the Homeowner”); Seq 3-Motion for Summary Judgment by Jose M. Ribeiro and Filipe Ribeiro d/b/a F&J Ribeiros Construction s/h/a Ribeiro Construction, F&J Ribeiros Construction and Jose Manuel Ribeiro d/b/a F&J Ribeiros Construction (“F&J), seeking dismissal of the complaint, Fourth Party Complaint, Fifth Party Complaint and all cross-claims asserted against F&J; Seq 4-GSK Builders Group, Inc (“GSK”) dismissing plaintiffs causes of action, declaring Costa to hold GSK harmless, pursuant to Contract from plaintiff’s claims; declaring F&J to hold GSK both contractually and in common law and responsible for plaintiff’s claims; dismissing all cross-claims and counterclaims against GSK; Seq 5- plaintiff to grant partial summary judgment on the issue of liability against all defendants under Labor Law §§§ 240(1), 241(6) and 200.

Plaintiff brings this action to recover damages pursuant to common law negligence theories and Labor Law §§§200, 240(1) and 241(6), arising from when he was struck by an overhead piece of wood while on a ladder, caused plaintiff and ladder to fall, sustaining injuries.

Now based upon the foregoing, the motions are decided as follows:

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It is well settled that “a 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 demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert’s affidavit, and eyewitness testimony (Marconi v. Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented “in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is “even arguably any doubt as to the existence of a triable issue” (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Here, according to the complaint, and as amplified by the Verified Bill of Particulars, on May 6, 2016, while working in the basement of 1 Stone Bridge Road in Purchase (“the property”), plaintiff was struck in the head, neck and back by a large wooden beam that had fallen from the basement ceiling, that fostered the unsecured ladder on which he was standing to move, causing plaintiff and the ladder to the fall to the ground on the concrete basement floor. On the day of the accident, plaintiff was a helper under the supervision of Wilson Rivera, who directed plaintiff to install electrical boxes/wiring for light switches in the basement area on the premises.

The Homeowner testified that at the time of the accident, he was the owner of the property, and in the midst of constructing an estate, which consisted of a house, a pool, a carriage house, and a pavilion. He has been in the real estate business for over 30 years, and he and his father are partners in Giamo & Giamo, a real estate company that owns and manages approximately 20 properties in Manhattan.

The Homeowner further testified GSK’s role was to manage the project, as memorialized by a Standard Form Agreement, naming GSK as construction manager of the project. GSK drafted the Agreement, but the Homeowner drafted the rider to the Agreement. The Homeowner visited the site every day, usually later in the day after the contractors had left. No onsite meetings with any of the subcontractors were held except for GSK. The Homeowner testified that GSK had the right to stop the job if observed any unsafe conditions. GSK was not named as the General Contractor, but did coordinate the subcontractors/ trades; had no authority to enter into contracts; recommended some subcontractors but the Homeowner had final approval of whether to use a specific contractor; and was in charge of coordinating different trades.

The record shows that Greg Krywosa, the president and sole member of GSK sent the Homeowner the subcontracts, the Homeowner signed these contracts directly with the subcontractor/trade. Krywosa testified that he received invoices from subcontractors and made sure the work was done, then he would pass along the invoices to the Homeowner for payment.

Jose M. Ribeiro of F&J testified that he framed the first floor of the subject home, but there was a change in plans, and F&J closed up the original staircase opening by placing wood beams across the span. He learned that the location of the staircase was being changed from the first floor to the basement from Krywosa. Krywosa gave F&J the material to do the work. Ribeiro never had direct communication with the Homeowner, even though the Homeowner entered into a written contract directly with F&J. F&J would give Krywosa a list of certain materials and he would arrange for delivery of those materials. He did not pay F&J directly the Homeowner did. Krywosa made sure that F&J were using materials pursuant to the plans, and in the general locations of where they were and were suppose to be.

Victor Costa testified that he is the owner and president of Costa, which was hired to do electrical work at the property. His employees, including plaintiff, do go through OSHA training. Krywosa never provided any equipment for the job. He obtained general liability insurance for the protection of GSK. Victor Costa also testified that the Homeowner never directed employees on how to do the job. All of plaintiff's tools, equipment, safety equipment were provided by Costa for the work he performed at the job site.

Wilson Rivera, an employee with Costa, testified that throughout the entire morning of the accident, he observed F&J carpenters working on the main/first floor around the stairs, which was above where he and plaintiff were working. For the two days prior to, and including the date

of the accident, plaintiff had been working in the basement and carpenters from F&J were working above him on the main/first floor making the opening for the basement staircase, and then installing the prefabricated staircase. Just prior to the accident, plaintiff was attaching wires to the ceiling above him. He was using an A-frame ladder, approximately 6-8 feet high, which was given to him by his employer Costa. Plaintiff was not wearing a hard hat, safety belt/harness nor any other type of safety equipment. No one was holding or securing the ladder for plaintiff.

Plaintiff testified that no one had ever told him to wear a hardhat; a hardhat was not available to him on the date of the accident; he did have an OSHA certification, but he did not wear personal protective equipment as required.

Notably, the issues to be examined here, center around the structure of this construction project, which begs the question as to who or which entity bore responsibility for the accident. No party seems to be coming to the plate conceding that it directed, supervised or had control over the work at the property. The Homeowner claims that he can't be responsible because he is exempt pursuant to the Homeowner's Exemption, Labor Law §§ 240(1) and 241(6), even though the Homeowner was a sophisticated real estate developer, and appeared to reserve some control over the project, by not naming a general contractor, and entering into the subcontracts, and paying the subcontractors directly; GSK, under the cloak of being labeled a "Construction Manager" claims it is not responsible as it did not enter into Contracts with the other subcontractors, and did not pay the subcontractors/trades directly; F&J, which performed the framing of the premises, claims that it is an independent contractor under its agreement with the Homeowner. In Costa's submissions, it raises that evidence of negligence is not enough by itself to establish liability and that it must be proven that any negligence was a proximate cause of the

event that produced the harm sustained by plaintiff, and what effect an intervening act would have on proximate cause. At least one party likened the no liability structure of the project to the Wild West, which is not so far off. To try to wade through the voluminous submissions in this action, the court will first examine the Homeowner's responsibility for plaintiff's accident at the property.

Homeowner's Exemption

"Labor Law §§ 240 (1) and 241(6) provide an exemption for owners of single and two-family houses used as a residence, unless they directed or controlled the work being performed (Chowdhury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]). The homeowner's exemption was enacted to protect owners of one- and two-family dwellings who are not in a position to realize, understand, and insure against the responsibilities of strict liability imposed by Labor Law §§ 240(1) and 241(6) (Lenda v Breeze Concrete Corp., 73 AD3d 987, 989 [2d Dept 2010]).

Upon completion of the construction of the property, it was and has been used solely as a single family home which the Homeowner and his family currently reside. The record shows that he certainly was involved in the aesthetics in the home (including his request to change the staircase), and making sure that it was done timely through GSK. In addition, plaintiff testified that he only took directions from Wilson of Costa and he never even met the Homeowner. Of significance, only Wilson provided instruction to plaintiff.

In opposition, plaintiff claims that as a real estate professional, the Homeowner negotiated the contract with GSK, as well as the multiple contracts with all of the subcontractor/trades, and is knowledgeable about insurance and the law. Moreover, an

unsophisticated homeowner would not have entered into contract directly with all the various trades and subcontractors, and paid them directly which the Homeowner did. Nor would an unsophisticated homeowner reserve his right to have the last word on which subcontractor would be ultimately hired, which the Homeowner did. He was also on site every day participating hands on in the day to day operation of the project, directing and controlling the work being performed. The Homeowner ordered a significant structural change on the project (the staircase). The Homeowner hired GSK with a contract that referred to GSK as a Construction Manager, rather than as a General Contractor. Plaintiff asserts that the Homeowner intentionally retained for himself a substantial portion of the direction and control over the subcontractors and construction work being performed on the project.

It is undisputed that the Homeowner's house was a one-family dwelling. This homeowner's exemption "was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability" (Pavon v Koral, 113 A.D.3d 830 [2d Dept 2014]). While the Homeowner works at a company that manages apartment buildings in Manhattan, there is a question whether he had any business acumen/knowledge regarding the construction of his home. Thus, there are remaining triable issues of fact as to whether the Homeowner, who owned real estate development businesses, exercised the requisite degree of direction and control over the renovation of his home to impose liability under Labor Law §§ 240 (1) and 241 (6).

Further, there are triable issues of fact as to whether the Homeowner directed or controlled the work being performed (Parise v Green Chimneys Children's Servs., Inc., 106 AD3d 970, 971 [2d Dept 2013]). Under these circumstances, it is a question whether the

Homeowner and GSK intentionally shared the responsibility for coordinating and executing the construction work. There is a question whether the Homeowner was actually the general contractor. While the Homeowner directly contracted with subcontractors, its not clear whether he directed, controlled or supervised any of the work performed. It was actually GSK which recommended other subcontractors, hired the subcontractors, and had to approve work done before payment could be made to the subcontractors. The evidence shows that the Homeowner came to check on the progress of the construction of his home as any homeowner would do, which in and of itself does not rise to the level of supervision, direction or control. The Homeowner never employed plaintiff prior to the accident. While the court recognizes that the Homeowner entered into agreements with the subcontractors, and paid them directly at GSK's say so, and that the Homeowner may have retained some financial control over the project, does not translate to the Homeowner having any supervisory role and control over the actual work. In light of the foregoing, the Homeowner's motion for summary judgment is denied, as there are triable issues of act as to whether the Homeowner was entitled to the Homeowner's Exemption under Labor Law §§ 240(1) and 241(6) .

Labor Law §200 and Common Law Negligence

Unlike Labor Law §§ 240 and 241, § 200 does not contain any single- and two-family homeowners' exemption (Ortega v Puccia, 57 AD3d 54, 61 [2008]). It is well settled that “cases involving Labor Law §200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed” (Ortega v Puccia, 57 AD3d at 61. Labor

Law §200 codifies the common-law duty of an owner or employer to provide workers with a reasonably safe place to work.

“To be held liable under Labor Law §200 for injuries arising from the manner in which work is performed, a defendant must have ‘authority to exercise supervision and control over the work’” (Rojas v Schwartz, 74 AD3d 1046 [2d Dept 2010]). If dangerous or defective equipment was provided to the worker, and the worker was injured by it, the property owner will only be liable under Labor Law §200 if it was possessed of the authority to supervise or control the means and methods of the work (Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 51 [2d Dept 2011]); Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]; Giovanniello v E.W. Howell, Co., LLC, 104 AD3d 812, 813-14 [2d Dept 2013]).

For the dangerous premises theory, a property owner or general contractor may be held liable in common-law negligence and under Labor Law §200, when the owner or general contractor has control over the work site, and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it (Abelleira v City of New York, 120 AD3d 1163, 1164, [2d Dept 2014]).

As is the case here, “the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law §200 is obligated to address the proof applicable to both liability standards” (Reyes v Arco Wentworth Mgt. Corp., 83 AD3d at 52. The property owner is entitled to summary judgment only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard (Reyes v Arco Wentworth Mgmt. Corp., 83 AD3d 47, 52 [2d Dept 2011])).

Plaintiff's counsel explains that both liability standards should be applied here because plaintiff was injured because the beam was improperly secured such that it fell on plaintiff (the dangerous premises standard) AND for the unsecured ladder which then moved causing plaintiff and the ladder to fall to the ground (method and means standard).

Similar to the arguments raised for the homeowner's exemption, plaintiff argues that the Homeowner intentionally retained a significant portion of the authority to supervise and control the construction work by hiring GSK under the label of Construction Manager; plaintiff had thirty years of real estate business experience, and owned and managed numerous property; plaintiff contracted directly with each of the trades/subcontractors, and also paid them directly; plaintiff was onsite on a daily basis and interacted with each of the trades; and the Homeowner made a major structural change. Plaintiff argues that if the Homeowner observed any unsafe work given his experience and his hands on approach, the Homeowner surely had the authority to stop it.

Generally, “ ‘[t]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence” (Sanchez v Metro Builders Corp., 136 AD3d 783, 787, [2d Dept 2016]).

There is a triable issue of fact whether the Homeowner has more knowledge of a construction of a home than the average homeowner; the agreements with the subcontractors were first approved by GSK; GSK recommended the subcontractors; and F&J acted as independent contractors pursuant to the Standard Form of Agreement between Owner and Trade Contractor, where the Construction Manager is the owner's agent (AGC 520).

Further, the record is unclear whether the Homeowner merely exercised general supervisory authority at the premises for the purpose of overseeing the progress of the work and inspecting the work product, which is insufficient to impose liability under Labor Law §200 (Ortega v Puccia, 57 AD3d 54, 62 [2d Dept 2008]). Under these circumstances, there are triable issue of fact as to the Homeowner's negligence to preclude summary judgment in the Means and Manner Test.

Likewise, plaintiff has raised a triable issue of fact regarding the dangerous premises (the alleged improperly installed beam that fell), insofar as the Homeowner failed to establish that he did not have actual or constructive notice of the alleged dangerous condition which caused plaintiff's injury (Wadlowski v Cohen, 150 AD3d 930, 932, [2d Dept 2017]). It is fair to say that the Homeowner certainly knew that the stairs were being redone. While the Homeowner was not present during the subject accident, nor was he present while work was being done, he did visit the work site after hours. For the same reasons, the claim as against the Homeowner under common negligence is also dismissed.

Turning to F&J motion for summary judgment pursuant to Labor Law §200, it argues that it is not liable in that it was not working in the main house on the day of the accident, and thus, did not have control over the area where the accident occurred. This flies in the face that both plaintiff, and his supervisor, Wilson Rivera testified that F&J contractors were actively working on the main floor directly over the area where plaintiff was working in the basement at the time of the accident. After learning that plaintiff was struck by a fallen wooden beam, Wilson Rivera immediately went to where F&J carpenters were working above on the main/first floor and advised them of what they had (allegedly) caused.

GSK submits that it did not provide instructions to plaintiff or F&J carpenters on how to frame the house or provide them with any tools or equipment. The relevant inquiry here is not whether GSK actually exercised its authority, but if it possessed the authority to supervise and control the means and methods of both plaintiffs and F&J's work.

To be held liable pursuant to Labor Law §200 in a case such as this, where the claim arises out of the methods or means of the work, a defendant must have authority to supervise or control the work (Gallagher v Resnick, 107 AD3d 942, 945 (2013)). Based upon the record, with respect to the common-law negligence and Labor Law §200 causes of action, neither F&J nor GSK was entitled to summary judgment since, the accident, at least in part, arose from the means and methods of the work, and there are issues of fact as to whether these defendants had authority to supervise or control the work (Tomyuk v Junefield Ass'n, 57 AD3d 518, 521 [2d Dept, 2008])

Further, where, as here, a plaintiffs injuries are also claimed to have arisen from a dangerous condition on the premises a contractor may be liable under Labor Law § 200 and common-law negligence if it has control over the work site and actual or constructive notice of the dangerous condition (Settimo v City of New York, 61 AD3d 840 [2d Dept 2009]). As for F&J, “[a] subcontractor may be held liable for [common-law] negligence [or under Labor Law § 200] where the work it performed created the condition that caused the plaintiff's injury, even if it did not possess any authority to supervise or control the plaintiff's work or work area” (Van Nostrand v Race & Rally Constr. Co., Inc., 114 AD3d 664, 666 [2d Dept, 2014]). Based upon the record, GSK, and F&J each have failed to establish entitlement to judgment as a matter of law dismissing plaintiff's causes of action against it under Labor Law §200 and/or for common-law negligence which, having control over the work site which is key, and which entity created the

condition which caused the injury or had actual or constructive notice of the hazardous condition (Murphy v Columbia University, 4 AD3d 200, 201-202), are questions of fact. A question arises if F&J and/or GSK had knowledge that plaintiff was working on electric right below where F&J was working, was it F&J's and/or GSK responsibility to ensure that plaintiff was provided with a safe work place. Accordingly, F&J and GSK's respective motions for summary judgment under Labor Law §200 and/or for common-law negligence are Denied.

For the same reasons, as there are triable issues of fact, including triable issues of fact regarding Costa's negligence in the accident, plaintiff's motion for summary judgment pursuant to Labor Law §200 and/or for common-law negligence is Denied as against all defendants.

Labor Law §240 (1)

Labor Law §240 (1), commonly known as the Scaffold Law, creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work performed (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). This section requires owner and contractors to provide workers with appropriate safety devices to protect against gravity related accidents such as falling from heights or being struck by an improperly hoisted or secured object (Novak v Del Savio, 64 AD3d 636 [2d Dept 2009]). To demonstrate entitlement to summary judgment on an alleged violation of Labor Law §240(1), a plaintiff must establish that there was a violation of the statute, and that it was the proximate cause of his or her injuries (Blake v Neighborhood Hous. Servs. of N. Y. City, 1 NY3d 280, 289 [2003]).

The statute is not limited to protecting workers who are working at an elevated workplace, it applies to any difference in height (Groves v Land's End Housing Co, 80NY2d 978

[1992]). Falling object liability under Labor Law § 240(1) 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” (Carlton v City of New York, 161 AD3d 930, 932, [2d Dept 2018]).

Plaintiff maintains that by failing to properly brace and secure the subject wooden beam, and by failing to provide plaintiff with a hard hat or any other safety equipment which would have prevented the accident, GSK and F&J each violated Labor Law § 240(1).

As a general rule, a separate prime contractor is not liable under Labor Law §240 or §241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker (Barrios v City of New York, 75 AD3d 517, 518 [2d Dept 2010]). A construction manager without authority to control the activity which brought about the plaintiff's injury is not considered an agent of the owner under Labor Law §§240 (1) and 241(6) (Myles v Claxton, 115 AD3d 654, 655 [2d Dept 2014]). The core inquiry is whether the defendant had the “authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition” (Myles v Claxton, 115 AD3d at 655).

The contract between the Homeowner and GSK (naming GSK as the Construction Manager for the project), is not determinative in Labor Law cases as it is not a defendant's title that is determinative, but the amount of control or supervision exercised (Temperino v DRA, Inc., 75 AD3d 543, 545 [2d Dept 2010]). There is evidence in the record that GSK did exercise its authority to supervise and control the construction work by recommending specific subcontractors to the owner to hire; in coordinating and scheduling all of their work and in

reviewing all of the invoices to make sure that they reflected the work that actually been done. Several of the subcontractors believed that GSK was the general contractor/agent and that Greg Krywosa was the “big boss” of the project who instructed them on what to do, also ordered and obtained the building materials for F&J carpenters.

In support of its motion for summary judgment, GSK offers an affidavit of Joseph M. Danatzko, P.E. who has reviewed the relevant documents in this matter. The engineer opines that Costa failed to comply with the requirements of the Occupational Safety and Health Administration (OSHA). He opines that OSHA regulations were violated in that plaintiff was not instructed to wear a hard hat to reduce the hazards to him.

F&J argues that it cannot be held liable pursuant to Labor Law §240(1) on the grounds that it is not an owner, general contractor or an agent of the owner or general contractor. It was however, the only framing contractor on the site and they performed all the work to construct the first floor deck and the substructure including all beams. F&J acknowledge that when the location of the staircase was moved, it cut an opening in the first floor deck and then constructed a box in the floor where the staircase was to be located.

For both GSK and F&J, there are questions of fact if they had the authority to supervise and control the particular work in which the injured plaintiff was engaged at the time of his injury (Gallagher v Resnick, 107 AD3d 942, 945 [2013]). A party with “the ability to control the activity which brought about the injury” may be vicariously liable as an owner's agent or a contractor under that provision of the Labor Law (Chimborazo v WCL Assocs., Inc., 37 AD3d 394, 396 [2d Dept 2007]).

Plaintiff's causes of action are apparently based upon both falling object and falling worker theories of liability. From this record, neither plaintiff nor defendants established their prima facie entitlement to judgment as a matter of law with respect to the Labor Law §240(1) cause of action. The parties' submissions raised triable issues of fact as to whether GSK and/or F&J were obligated to provide appropriate safety devices of the kind enumerated in Labor Law §240(1) to secure the subject falling beam or wood, and whether it fell due to the absence or inadequacy of an enumerated safety device. There is also a question of fact, as to whether the height differential was sufficient to implicate the special protections afforded by Labor Law §240(1). There are triable issues of fact as to the location where plaintiff was working where F&J was working, where the wood in question came from and how the accident happened which must be resolved by a trier of fact. Since F&J was the only company working within lumber at the site, it cannot be ruled out that they were not responsible for all such lumber. In addition, plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide plaintiff with proper protection proximately caused his injuries (Yao Zong Wu v. Zhen Jia Yang, 161 AD3d 813, 814 [2d Dept 2018]). The deposition testimony of the parties and GSK's expert raises OSHA concerns, and demonstrates that no safety devices were present on the site for the work being performed, and that this failure may have been a proximate cause of the injured plaintiff's injuries (Gallagher v Resnick, 107 AD3d 942, 945 [2d Dept 2013]).

Of significance, in the Agreement between the Owner and GSK, section 3.2.7 Review of Trade Contractors' Work, Section 3 is crossed out and initialed by both parties. This Section originally stated that the Construction Manager shall not have control over the acts of omissions

of the Trade Contractors or their subcontractors not directly employed by the Construction Manager. The fact that this section is crossed out has been the subject of conjecture among some of the parties. In any event, it begs the question which entity had control over this project.

GSA, and F&J failed to eliminate all triable issues of fact as to whether they had notice of the alleged dangerous condition which plaintiff alleges caused his injuries and which entity created the condition. Accordingly, the motions for summary judgment for GSK, F&J and plaintiff pursuant to Labor Law §240(1) are Denied.

Labor Law §241(6)

Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (“the Code”) (Ross v Curtis Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). Liability may be imposed under Labor Law §241(6) even where the owner or contractor did not supervise or control the work site. The causes of action must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 53 [2d Dept 2011]). To state a cause of action pursuant to §241(6), a plaintiff must allege that the property owners violated a regulation that sets forth a specific standard of conduct and not simply a recitation of common-law safety principles (Gonzalez v Perkan Concrete Corp., 110 AD3d 955 [2d Dept 2013]). Thus, a distinction has been drawn between general and specific commands found in the Code, *inter alia*, the violation of a general safety provision does not give rise to liability under Labor Law §241(6) (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). In this

regard, once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury (Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 350 [1998]). If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault (Monroe v City of New York, 67 AD2d 89, 104 [2d Dept 1979]). The Second Department in Seaman v Bellmore Fire District (59 AD3d 515 [2d Dept 2009]), held "where such a violation [of a specific Industrial Code rule or regulation] is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserves, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances". Therefore, this issue must go to the jury for determination as to whether any negligence of some party to, or participant in, the construction project caused plaintiff's injury, and if proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault. "Contributory and comparative negligence are valid defenses to a § 241(6) claim, moreover, breach of a duty imposed by a rule in the Code is merely some evidence for the fact finder to consider on the question of defendant's negligence" (Misicki v Caradonna 12 NY3d 511, 515 [2009]).

As a threshold matter, it is noted that, in opposing the branch of GSK, and F&J's motions for summary judgment dismissing the Labor Law §241(6) claim asserted against it, plaintiff has abandoned all Industrial Code provisions except 12 NYCRR Section 23-1.8(c)(1). Therefore, that branch of the motion by GSK and F&J for summary judgment seeking dismissal of plaintiff's claim under Labor Law § 241(6) predicated on those violations of 12 NYCRR is granted.

F&J argues that this remaining section is inapplicable because the subject job was not a hard hat job.

Violation of 12 NYCRR 23-1.8(c)(1), provides:

“[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat.”

In order to prevail on a Labor Law §241(6) cause of action premised upon a violation of 12 NYCRR 23-1.8(c)(1), the plaintiff must establish “that the job was a ‘hard hat’ job and that the plaintiff’s failure to wear a hard hat was a proximate cause of his injury” (McLean v 405 Webster Ave. Assoc., 98 AD3d 1090, 1095 [citations and internal quotation marks omitted]).

Plaintiff’s supervisor Wilson Rivera testified that hard hats were required to be worn at this job. There was a real danger that plaintiff working in the basement at the time that F&J was performing work above, could be struck by a falling beam. By failing to provide plaintiff with a hard hat and/or failing to instruct him to wear a hard hat, defendants violated the Industrial Code.

Here, GSK and F&J failed to eliminate triable issues of fact as to whether work on the site had progressed to the point that there was no longer a danger of being struck by falling objects or materials (Seales v Trident Structural Corp., 142 AD3d 1153, 1157 [2d Dept 2016]).

For the same reasons set forth above as to the questions of fact as to the liability of GSK and F&J under Labor Law §240(1), those issues are pertinent here. There is a triable issue of fact if by failing to provide plaintiff with a hard hat, and/or by failing to instruct him to wear a hard hat, F&J and GSK violated Industrial Code Section 23-1.8(c)(1).

Turning to plaintiff's application regarding the Res Ipsa Loquitur theory. For the doctrine of res ipsa loquitur to apply, a plaintiff must establish the following: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (Barril v McClure, 163 AD3d 752, 753 [2d Dept 2018], leave to appeal denied, 32 NY3d 916 [2019]).

Plaintiff asserts that the heavy wood support beam falling from the basement ceiling onto plaintiff is clearly an event which ordinarily does not occur in the absence of someone's negligence. F&J as the only carpentry and framing subcontractor for the property, had exclusive control over the heavy wood support beam, which fell and caused injury to plaintiff.

The Court of Appeals has held :

"We stand by those principles, and in the context of this appeal, reaffirm that only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable"

(Morejon v Rais Const. Co., 7 NY3d 203, 209 [2006]).

"Only in the rarest cases will a plaintiff be awarded summary judgment, or judgment as a matter of law in the course of a trial, by relying upon the doctrine of res ipsa loquitur" (Barril v. McClure, 163 A.D.3d 752, 753 [2d Dept 2018], leave to appeal denied, 32 NY3d 916 [2019]).

Res ipsa loquitur is an evidentiary rule and does not constitute a separate cause of action or a separate theory of liability (Frew v Hospital of Albert Einstein Coll. of Med. Div. Of Montefiore Hosp. & Med. Ctr., 76 AD2d 826 [2d Dept, 1980]).

Common sense dictates that a piece of lumber should not fall upon a worker in the

ordinary course of construction. Although plaintiff has made a *prima facie* showing that the doctrine of *res ipsa loquitur* is applicable so as to permit a jury to infer negligence, plaintiff has not established his entitlement to partial summary judgment based on the doctrine of *res ipsa loquitur* as the plaintiff's circumstantial proof is not so convincing and the defendants' response is not so weak that the inference of defendants' negligence is inescapable. Thus, neither plaintiff nor defendants have established their entitlement to summary judgment and the issue of defendants' liability under the doctrine of *res ipsa loquitur* should be determined by the jury.

F&J brings a motion seeking dismissal of GSK's cause of action for failure to procure insurance. F&J has not demonstrated entitlement to summary judgment and dismissal of the complaint and all third party claims, cross-claims and counter claims.

Turning to Indemnification claims, GSK argues that it is entitled to contractual indemnification from Costa pursuant to a hold harmless provision in their agreement "Costa Electrical Contractors Corp. (Hereby known as Contractor) agrees to indemnify and hold harmless the following entities: GSk Builders Group Inc., Joseph Giamo.... related to personal injury brought or assumed against the Contractor....arising out of or in connection with the work performed by the Contractor under this agreement...(see Giamo-Costa Electrical Contract, Ex. W. At 33). This indemnity provision is triggered when plaintiff was injured in connection with the work performed by Costa.

Costa must also hold GSK harmless pursuant to 10.1.1 Trade Contractor's Indemnity, that provides "...the Trade Contractor shall indemnify and hold the Owner, the Construction Manager and others harmless for all claims for property damage other than to Trade Contract Work that arises from the performance of the trade Contract Work, but only to the extent caused

by the negligence acts or commissions of the Trade Contractor, Subcontractor or by anyone for whose acts or omission any of them may be held liable.

In opposition, Costa argues that the indemnity clauses do not create an indemnification obligation where the injury complained of was not caused by any such negligence on the part of Costa and did not arise out of their work. Thus, Costa argues that GSK's contractual indemnification should be denied because the indemnification provision was not triggered.

Since the issue of any negligent act or omission on the part of any party remains unresolved, the claim for contractual indemnification is premature (D'Angelo v Builders Group, 45 AD3d 522, 524-525 [2d Dept 2007]).

This premise also holds true with the other parties' claims of contractual indemnification.

Further, since a claim for common-law indemnification is dependent upon a showing that the party seeking indemnity was not guilty of any negligence and also a showing that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident or had authority to direct, supervise, and control the work giving rise to the plaintiffs injury, this claim is also premature (Spinelli v Vornado Burnside Plaza, LLC, 85 AD3d 897 [2d Dept 2011]).

Accordingly, it is hereby

ORDERED, that the Homeowner's motion for summary judgment is denied (Seq 2) except regarding claims for Labor Law 241(6), the Industrial Codes are dismissed only remaining code is 12 NYCRR 23-1.8(c)(1) ;

ORDERED, that F&J's motion for summary judgment (Seq 3) is denied, except regarding claims for Labor Law 241(6), the Industrial Codes are dismissed and the only remaining code is 12 NYCRR 23-1.8(c)(1) ; and it is further

ORDERED, that GSK's motion for summary judgment (Seq 4) is denied except regarding claims for Labor Law 241(6), the Industrial Codes are dismissed except the only remaining code is 12 NYCRR 23-1.8(c)(1); and it is further

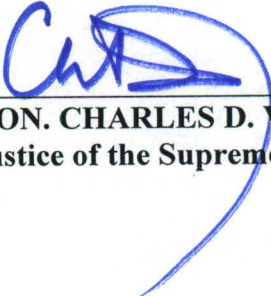
ORDERED, that plaintiffs' motion for summary judgment (Seq 5) is denied; and it is further

ORDERED, that the remaining parties are directed to appear at a settlement conference on **June 18th, 2019** at **9:15** a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

All matters not herein decided are denied.

This constitutes the decision and order of the court.

Dated: May 28, 2019
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF