

**Davis v Vornado Eleven Penn Plaza Owner LLC**

2025 NY Slip Op 32753(U)

July 25, 2025

Supreme Court, New York County

Docket Number: Index No. 154353/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. PAUL A. GOETZ PART 47**

*Justice*

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AARON DAVIS,

Plaintiff,

- v -

VORNADO ELEVEN PENN PLAZA OWNER LLC, J.T.  
MAGEN & COMPANY INC.,

Defendants.

-----X

VORNADO ELEVEN PENN PLAZA OWNER LLC, J.T. MAGEN  
& COMPANY INC.

Plaintiffs,

-against-

CAMPBELL & DAWES LTD.

Defendant.

-----X

**INDEX NO.** 154353/2020

**MOTION DATE** 04/30/2025,  
04/30/2025,  
05/16/2025

**MOTION SEQ. NO.** 002 003 004

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595430/2022

The following e-filed documents, listed by NYSCEF document number (Motion 002) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 116, 117, 131, 132, 133, 134, 135, 136, 137, 138, 147 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 118, 139, 140, 141, 142, 143, 144, 145, 146, 149 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 148, 150, 151, 152, 153, 154 were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

ORDERED that plaintiff's motion (MS #4) to amend his Bill of Particulars to allege specific violations of sections of the Industrial Code with regard to his Labor Law § 241(6) cause

of action is granted as “the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant” (*Castano v Algonquin Gas Transmission, LLC*, 213 AD3d 905, 908 [2d Dept 2023]); and it is further

ORDERED that the portion of third-party defendant, Campbell & Dawes LTD’s (“Campbell”) motion (MS #2) and defendants, Vornado Eleven Penn Plaza Owner, LLC (“Vornado”) and J.T. Magen & Company Inc.’s (“J.T. Magen”) motion (MS #3) seeking summary judgment dismissing plaintiff’s Labor Law § 200 and common law negligence claims is granted because “[w]here the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is [only] liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]), and here it is undisputed that neither Vornado or J.T. Magen supervised plaintiff’s work; and it is further

ORDERED that the portion of defendants, Vornado and J.T. Magen’s motion (MS #3) seeking summary judgment dismissing plaintiff’s Labor Law § 240(1) claim is granted as “Labor Law § 240 (1) relates only to ‘special hazards’ presenting ‘elevation-related risk[s]’” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]), and here, while plaintiff alleges he fell to the ground while operating a jackhammer which got caught on a piece of rebar, it is undisputed that plaintiff was working at ground level, and fell on the same level that he was standing on (NYSCEF Doc No 106 at 123:8 – 126:20), and thus outside the realm of hazards contemplated in Labor Law § 240(1) (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]); and it is further

ORDERED that the portion of Campbell’s (MS #2) and Vornado and J.T. Magen’s (MS #3) motions seeking summary judgment dismissing plaintiff’s Labor Law § 241(6) claims as predicated on 12 NYCRR 23–1.5(c)(3), is denied because this section “is explicitly concerned

with the “condition of equipment and safeguards and prohibits the use of equipment which is not in good repair and in safe working condition” (*Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 559 [1st Dept 2015]),<sup>1</sup> and here plaintiff alleges that the jackhammer he was operating was not in safe working condition because it was missing a safety handle, and was not properly lubricated or maintained (NYSCEF Doc No 106 at 110:6 – 11:22), and thus there is a triable issue of fact as to whether the defendants violated the Industrial code, and whether that violation caused plaintiff’s injuries (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343 [1998])<sup>2</sup>; and it is further

ORDERED that the portion of Campbell’s (MS #2) and Vornado and J.T. Magen’s (MS #3) motions seeking summary judgment dismissing plaintiff’s Labor Law § 241(6) claims as predicated on 12 NYCRR 23–9.2(a) is granted because this provision only applies to “power-operated *heavy equipment or machinery* such as excavating machines, pile drivers and motor trucks” (*Misicki v Caradonna*, 12 NY3d 511, 518 [2009] [emphasis in original]) and does not apply to electrical and pneumatic hand tools, like the jackhammer at issue here; and it is further

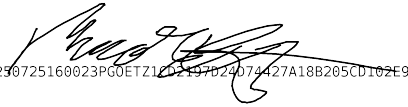
ORDERED that the unopposed portion of Vornado and J.T. Magen’s motion (MS #3) seeking summary judgment on their contractual indemnification claims as asserted against Campbell is granted as “the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of the statutory liability” (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]), and here Vornado and J.T.

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<sup>1</sup> While the movants argue that the provision cannot maintain a Labor Law § 241(6) cause of action because it does not set forth a specific standard of conduct, “[a]lthough 12 NYCRR § 23–1.5(c)(1) and (2) are too general to serve as Labor Law § 241(6) predicates, 12 NYCRR § 23–1.5(c)(3) is sufficiently specific to support a claim” (*Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]).

<sup>2</sup> “[O]nce it has been alleged that a concrete specification of the State Industrial 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” (*id.*).

Magen have established their lack of actual negligence as they did not control or supervise plaintiff's work.

  
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<u>7/25/2025</u> DATE					<hr/> PAUL A. GOETZ, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE