| **Pereira v Derizzio** |
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| 2014 NY Slip Op 32874(U) |
| March 6, 2014 |
| Sup Ct, Westchester County |
| Docket Number: 51119/2011 |
| Judge: Mary H. Smith |
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# DECISION AND ORDER

**FILED & ENTERED**
3 / 6 /14

**To commence the statutory period of 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**
**IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH**
**Supreme Court Justice**

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**AROLDO AURENIO PEREIRA,**

Plaintiff,

-against-

**MOTION DATE:2/28/14**
**INDEX NO.: 51119/11**

**CARLISLE DERIZZIO, ALEXIA CLARKE, E. EVANS, EDDIE GROOMS, REHAB ASSOCIATES, INC., HENRY CORTS, ROBERT BRAUNER, PAYLESS HOME IMPROVEMENTS, INC., NEW STYLE HOME IMPROVMENT, INC. and PRIME HOME IMPROVEMENTS, INC.,**

Defendants.

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**REHAB ASSOCIATES, INC.,**

Third-Party Plaintiff,

-against-

**PAYLESS HOME IMPROVEMENTS, INC.,**

Third-Party Defendant.

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The following papers numbered 1 to 14 were read on this motion by defendant

Rehab Associates, Inc. for summary judgment dismissing the complaint, and on this cross-motion by plaintiff for partial summary judgment on the issue of liability under Labor Law section 240 as against defendant Rehab Associates, Inc.

**Papers Numbered**

Notice of Motion - Affirmation (Epstein) - Exhs. (1-14) - Memorandum of Law .......... 1-4
Answering Affirmation (Bernstein) - Exhs, (1,2,4,A-C) .......... 5-6
Replying Affirmation (Epstein) .......... 7
Notice of Cross-Motion - Affirmation (Bernstein) - Exhs. (A-H) .......... 8-11
Answering Affirmation (Epstein) - Exhs. (Collectively) .......... 12-13
Replying Affirmation (Epstein) .......... 14

Upon the foregoing papers, it is Ordered and adjudged that this motion and cross-motion are disposed of as follows[1]:

Plaintiff seeks to recover under various sections of Labor Law sections 200, 240, subdivision 1 and 241, subdivision 6, for personal injuries he allegedly had sustained, on June 1, 2008, while he had been employed by defendant Payless Home Improvements, Inc. ("Payless"), a subcontractor of defendant Rehab Associates, Inc. ("Rehab"), which is a roofing company and had been the general contractor which had contracted with defendant Derizzio to perform certain roofing and home improvement work for the sum of $6,000.00. at the private single family home owned by defendant Derizzio.

Presently, defendant Rehab is moving for summary judgment dismissing the complaint, arguing that it is not liable to plaintiff because it had owed him no duty of care, and that it is undisputed that Rehab had not been present at the job site and that it had not supervised, controlled and/or directed any of the employees or the work that had been performed at the subject premises, including the work that had been performed by plaintiff,

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[1]Defendant Rehab Associates, Inc. is the last remaining defendant in this action, the other defendants either having been granted summary judgment, or stipulated out of the action, or never having been served.

which exclusively had been supervised by plaintiff's employee. Additionally, defendant Rehab argues that it has no liability to plaintiff under theories of negligence or Labor Law sections 200, 240 and/or 241 because a general contractor, like itself, which did not actually exercise supervisory control over a subcontractor's work and indeed had not been present at the work site, is not obligated to protect plaintiff against the negligence of his co-workers. Defendant notes that plaintiff is claiming, albeit only more recently, that plaintiff had sustained his injury while working on the roof of the premises, removing shingles, and that he had been struck by a piece of plywood that either had dislodged, fell off of hoisting equipment or had been dropped by a co-worker from a higher elevation, causing him to fall approximately 15 feet to the ground. Assuming that plaintiff's injury had happened in any one of these ways, which defendant Rehab does not concede,[2] defendant Rehab claims that it nevertheless has no liability to plaintiff.

Plaintiff opposes defendant Rehab's motion, and is cross-moving for summary judgment on his claim alleging a Labor Law section 240 violation. According to plaintiff, at bar is presented a "classic" Labor Law 240 action. Plaintiff maintains that Rehab, the general contractor, in fact twice had violated Labor Law section 240, subdivision (1), in that it had failed to prevent plaintiff from being struck by an unsecured falling object and it had failed to provide plaintiff with proper protection from the elevated risk that his work entailed.

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[2]According to defendant Rehab, plaintiff's latest version of how his accident happened is entirely inconsistent with the accident version he allegedly had given to the emergency room personnel immediately post-accident, and which had been transcribed into plaintiff's medical chart, to wit, that plaintiff had lost his balance and fell from the roof of the structure where he had been working, striking his head on plywood during his fall. The Court notes however that the medical records containing this version of the accident also state that plaintiff speaks Portuguese only. No further explanation is provided.

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Moreover, plaintiff argues that defendant Rehab had violated Labor Law section 241, subdivision (6), by its failing to have complied with Administrative Code sections 23-1.7, 1.8 and 1.24. Accordingly, plaintiff submits that defendant Rehab is not entitled to dismissal of plaintiff's section 241 cause of action.

Initially, the Court grants defendant Rehab's motion seeking summary judgment dismissing plaintiff's claims for negligence and Labor Law section 200, the later of which is a codification of common law duty to furnish workers with a safe place to work. See McLean v. 405 Webster Ave. Associates, 98 A.D.3d 1090, 1093 (2nd Dept. 2012). In order to sustain liability thereunder for unsafe conditions of the work site caused by the methods used by the contractor in performing the work, it must be established that the owner or contractor had supervisory control over the performance of the work and either had created the dangerous condition or had notice of it. See Sotomayer v. Metropolitan Transp. Authority, 92 A.D.3d 862, 864 (2nd Dept. 2012); Griffin v. NYC Transit Auth., 16 AD3d 202 (1st Dept. 2005). Defendant Rehab has presented sufficient unrebutted evidence to show that it did not supervise or control plaintiff's work, thus establishing its prima facie entitlement to summary judgment dismissing these causes of action. Moreover, plaintiff's failure herein to have addressed this aspect of defendant Rehab's motion must be deemed a concession as to the correctness of defendant's presentation of the facts and legal arguments supporting its entitlement to summary judgment dismissing these causes of action. See Kuehne & Nagel, Inc. v. F. W. Baiden, 36 N.Y.2d 539, 544 (1975); Manculich v. Dependable Auto Sales and Service, Inc., 39 A.D.3d 1070, 1071 (3rd Dept. 2007); Springer v. Keith Clark Pub. Co., 191 A.D.2d 922 (3rd Dept. 1993), lv. to app. dsmd. 82 N.Y.2d 706 (1993); John William Costello Associates, Inc. v. Standard Metals Corp., 99

A.D.2d 227, 228 (1st Dept. 1984), app. dsmd. 62 N.Y.2d 942 (1984).

Addressing next plaintiff's Labor Law Section 241, subdivision (6), cause of action, said claim "'imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers,' (citation omitted)," Brasch v. Yonkers Construction Company, 306 A.D.3d 508 (2nd Dept. 2004), and to comply with the Rules and Regulations established by the Department of Labor. See Norero v. Third Avenue Realty, LLC, supra. To support a viable Section 241 claim, a plaintiff must prove that an alleged regulation in the Industrial Code is applicable, that a violation occurred of a specific standard set forth in the Industrial Code and that the violation was the proximate cause of the plaintiff's injury. See Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343 (1998); Norero v. Third Avenue Realty, LLC, supra; Zimmer v. Chemung County Performing Arts, Inc., 102 A.D.2d 993 (3rd Dept. 1984), revd. on other grnds. 65 N.Y.2d 513 (1985). Contrary to defendant Rehab's argument at bar, a plaintiff need not establish under section 241 that the owner and/or contractor had exercised supervision or control over the work site in order to establish liability thereunder. See Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502 (1993).

12 N.Y.C.R.R. § 23-1.7 provides:

(a) Overhead hazards.

(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

12 N.Y.C.R.R. § 23-1.8 provides in relevant part that "every 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 helmet."

12 N.Y.C.R.R. § 23-1.24 provides:

(a) General requirements.

(1) Roofing brackets.

(i) Required use. Roofing brackets shall be used whenever work is to be performed on any roof having a slope steeper than one in four inches unless crawling boards or approved safety belts are used in compliance with this Part (rule).

(ii) Roofing bracket construction. Roofing brackets shall be constructed and installed to fit the pitch of the roof and when in use shall provide a level working platform.

(iii) Roofing bracket installation. Roofing brackets shall be secured in place by nailing, by securely driving into the roof the pointed metal projections which are attached to the undersides of roofing brackets or by means of first grade manila rope or synthetic fibre rope at least three-quarters inch in diameter which is passed over the ridge poles and tied.

(2) Crawling boards.

(i) Crawling board construction. Crawling boards shall be at least 10 inches in width and one inch in thickness. Each crawling board shall be provided with cleats which are at least one and one-half inches in width by one inch in thickness. Such cleats shall be spaced at equal intervals across the full width of the board and shall be firmly nailed. Cleat nails shall be driven through and clinched or shall be of the screw type. Crawling boards shall extend from the ridge poles to the eaves when used in connection with roof construction, repair or maintenance.

(ii) Crawling board installation. Crawling boards shall be secured to a roof by ridge hooks or equally effective means.

* * *

(c) Protection of persons using roofing machines. Where persons are using roofing machines on any roof which does not have a parapet at least three feet in height installed around the perimeter of such roof, protection from falling shall be provided for such persons as follows:

(1) If the work area extends to any edge of the roof, such edge shall be provided with a safety railing constructed and installed in compliance with this Part (rule) or

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a ground-supported scaffold in compliance with this Part (rule) shall be provided. Such scaffold shall be installed the length of the work area with the scaffold platform level with the roof edge elevation. Such scaffold shall be of sufficient width to extend outward from the roof at least two feet. The scaffold platform shall be provided with a safety railing constructed and installed in compliance with this Part (rule) and the space between the scaffold platform and the roof shall not be more than six inches.

The Court denies defendant Rehab's motion seeking summary judgment dismissing plaintiff's Labor Law section 241 cause of action. Defendant fatally has failed to analyze each of the Regulations upon which plaintiff relies to support his section 241 cause of action and it had failed to establish either that they are not applicable to the facts at bar or that any such violation had not been the proximate cause of plaintiff's injury. See Treu v. Cappelletti, 71 A.D.3d 994, 998 (2nd Dept. 2010).

To the extent that plaintiff's section 241 cause of action is predicated upon 22 N.Y.C.R.R. §23-1.7, defendant Rehab has failed to establish the absence of issues of fact that the roof area upon which plaintiff had been standing when he allegedly was struck was not "normally exposed to falling material or objects," rendering 12 NYCRR 23–1.7(a)(1) inapplicable, and/or that plaintiff's accident had occurred in an open working area, see DePaul v. N.Y. Brush LLC, _ A.D.3d _, 2014 WL 747598 (1st Dept. 2014), and/or that his accident had occurred in a location not "normally exposed to falling material or objects." See Gonzalez v. TJM Const. Corp., 87 A.D.3d 610, 611 (2nd Dept. 2011); Marin v. AP-Amsterdam 1661 Park LLC, 60 A.D.3d 824, 826 (2nd Dept. 2009).

The Court also finds that there clearly is presented a triable issue of fact as to whether plaintiff had been exposed to the hazards of a falling object or head bumping which Regulation 12 NYCRR 23–1.8(c)(1) is designed to protect. See Prince v. Merit Oil of N.Y., 238 A.D.2d 561, 562 (2nd Dept. 1997). The Court notes that defendant Rehab, for

purposes of its instant motion and analyses, seemingly has accepted, as this Court must given the record at bar, plaintiff's accident version that he had fallen off of the roof after his being struck in his head by a falling piece of plywood. Yet, defendant Rehab notably and fatally failed to submit proof that this regulation is inapplicable because the job plaintiff had been performing at the time of his accident was not a "hard hat" job, cf. Spiegler v. Gerken Bldg. Corp., 57 A.D.3d 514, 517 (2nd Dept. 2008), and/or that the plaintiff's failure to have worn a hard hat was not the proximate cause of his injury. See McLean v. 405 Webster Ave. Associates, 98 A.D.3d 1090 (2nd Dept. 2012), cf. Modeste v. Mega Contr., Inc., 40 A.D.3d 255, 255–256 (1st Dept. 2007). Accordingly, defendant Rehab has failed to establish its entitlement to judgment dismissing plaintiff's Labor Law section 241, subdivision (6), violation predicated upon this Regulation.

Finally with respect to plaintiff's section 241 Labor Law cause of action, defendant Rehab completely has failed to address Regulation 23-1.24 and its application to the facts at bar. Indeed, defendant Rehab makes no showing either that roofing brackets had been properly installed or that same were not required because the subject roof's slope had not been steeper than one in four inches, nor had Rehab established that roofing machines were not being used at the time of plaintiff's injury, or that a proper safety railing, scaffold or net had been installed, and/or that a safety belt had been furnished plaintiff, or that same were not required because the subject roof had a parapet at least three feet in height installed around the perimeter of the roof.

Accordingly, defendant Rehab's motion seeking dismissal of plaintiff's Labor Law section 241 claim is denied in all respects.

Lastly with respect to defendant Rehab's summary judgment motion, the Court

denies defendant Rehab dismissal of plaintiff's Labor Law section 240 cause of action and further grants plaintiff's motion for partial summary judgment on said cause of action.

Labor Law § 240, subdivision (1), imposes a nondelegable duty upon owners and contractors to provide or cause to be furnished certain safety devices for workers at an elevated work site; the absence of appropriate safety devices constitutes a violation of the statute as a matter of law. See Treu v. Cappelletti, supra, 71 A.D.3d 994, 997; Andino v. BFC Partners, 303 A.D.2d 338, 339 (2nd Dept. 2003). The statute addresses the special hazards that arise when the work site either is itself elevated, as here, or it is positioned below the level where materials or loads are being hoisted or secured. See Oakes v. Wal–Mart Real Estate Bus. Trust, 99 A.D.3d 31, 34 (2nd Dept. 2012). To establish a viable section 240 claim, a plaintiff must show that a defendant owner/contractor had failed to provide a safety device or that the provided device was inadequate, and that this violation was a proximate cause of his gravity-related injuries. See Schwarz v. Valente, 112 A.D.3d 809 (2nd Dept. 2013).

Plaintiff has made a prima facie showing of his entitlement to judgment as a matter of law on his Labor Law section 240, subdivision 1, cause of action by demonstrating that he had sustained a gravity-related fall from a height that proximately had been caused by Rehab's failure to have satisfied its nondelegable obligation of providing any safety railing, scaffolding or safety belts for plaintiff's elevation-related work. See Probst v. 11 West 42 Realty Investors, LLC, 106 A.D.3d 711 (2nd Dept. 2013); Vetrano v. J. Kokolakis Contracting, Inc., 100 A.D.3d 984, 985 (2nd Dept. 2012).

Defendant not only has failed to raise a triable issue of fact with respect thereto, it completely has failed to address this aspect of section 240 liability, Rehab instead

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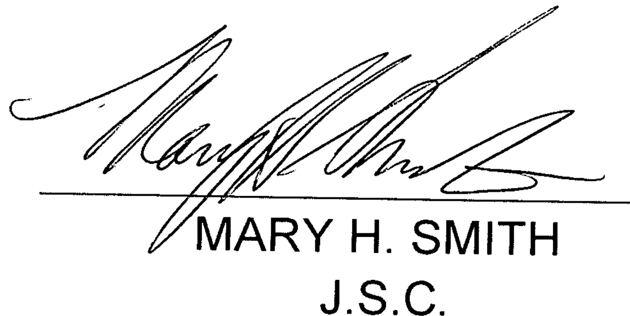
exclusively having focused upon the disputed issue of whether plaintiff's fall had resulted from his being struck in the head with a falling piece of plywood. Contrary to Rehab's apparent understanding, liability under Labor Law § 240, subdivision 1, is not limited to situations in which a falling object directly hits the worker; rather, the elevation hazards addressed by 240 are those related to the effects of gravity where protective devices are called for either because of a differential between the elevation level of the required work and a lower level, or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. See Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 (1991).

Plaintiff's damages trial shall be held at the time of his trial on his claim alleging a section 241 Labor Law violation.

The parties shall appear in the Settlement Conference Part, room 1600, at 9:30 a.m., on April 9 , 2014.

Dated: March 6 , 2014
White Plains, New York



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