

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1242

CA 09-00730

PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, PINE, AND GORSKI, JJ.

GLEN MORGAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID JACOBS AND KIRST CONSTRUCTION, INC.,
DEFENDANTS-APPELLANTS.

KIRST CONSTRUCTION INC., THIRD-PARTY PLAINTIFF,

V

H & H ROOFING, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (DENNIS J. BISCHOF OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

LEWIS SCARIA & COTE, LLC, WHITE PLAINS (LORI B. LEWIS OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an order and judgment of the Supreme Court, Erie
County (Gerald J. Whalen, J.), entered February 24, 2009. The order
and judgment, insofar as appealed from, denied those parts of the
motions of defendants and third-party defendant seeking summary
judgment dismissing the Labor Law § 241 (6) claim.

It is hereby ORDERED that the order and judgment insofar as
appealed from is unanimously reversed on the law without costs, the
motions are granted in their entirety and the amended complaint is
dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law
negligence action seeking damages for injuries he sustained when he
attempted to start a roof-cutting machine while employed by third-
party defendant on a renovation project. Supreme Court erred in
denying that part of the motion of defendant David Jacobs and
defendant-third-party plaintiff (hereafter, defendants), as well as
that part of the motion of third-party defendant seeking summary
judgment dismissing the Labor Law § 241 (6) claim. That claim is
premised on the alleged violation by defendants of the obligation
imposed on them by 12 NYCRR 23-9.2 (a) to maintain power-operated

equipment "in proper operating condition." That portion of the regulation is "not specific enough to permit recovery under section 241 (6)" (*Misicki v Caradonna*, 12 NY3d 511, 520).