2016 WL 355507 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
New York County

Daniel **PAGAN**., Plaintiff,
v.
MORGANTI NATIONAL, INC., Petrocelli Electric Co., Inc., JPC Contracting, Inc., And J. Petrocelli Contracting, Inc., Defendants.

No. 158562/12.
January 28, 2016.

Decision/Order

Hon. Cynthia S. Kern, J.S.C.

***1** Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	*1,2*
Cross-Motion and Affidavits Annexed	*3, 4*
Reply Affidavits	*5,6*
Exhibits	*7*

Plaintiff Daniel **Pagan** commenced the instant action to recover for injuries he allegedly sustained when he was working on a construction project in a building located at 120 Schermerhorn Street, Brooklyn, New York (hereinafter referred to as the "subject premises" or the "building") on June 2, 2010. In or around March 2013, defendant JPC Contracting, Inc. ("JPC") moved for summary judgment dismissing the complaint and any cross-claims asserted against it, which was granted by this court in May 2013. Thereafter, defendant Petrocelli Electric Co., Inc. ("Petrocelli Electric") moved for summary judgment dismissing the complaint and any cross-claims or counterclaims asserted against it, which was also granted by this court in August 2013. Defendant **Morganti** National, Inc. ("**Morganti**") now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's causes of action for violations of Labor Law §§ 240(1), 241(6), 200 and common law negligence. Defendant J. Petrocelli Contracting, Inc. ("J. Petrocelli") separately moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiffs complaint and all cross-claims asserted against it. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. On or about June 2, 2010, plaintiff was employed by Axon Electrical ("Axon") and was working at the subject premises, the New York City Criminal Court building, on a project which included the construction of new holding cells in the building's cellar level, some mechanical/electrical work and renovations of the first floor and lobby

(the "Project"). J. Petrocelli was hired as the general contractor on the Project and Morganti was hired as the construction manager on the Project by the City of New York, Department of Design and Construction. Axon, plaintiff's employer, was hired by Morganti to perform the electrical work on the Project.

Plaintiff alleges that on the above date, he was directed by Axon's general foreman and president, Anthony Marotta, to move materials and equipment being stored in one area of the cellar to another area of the cellar. Thereafter, plaintiff and his coworker, Canella Gomez, used a metal cabinet on wheels, also referred to as a "foreman's helper," or a "gang box," to move the equipment. Plaintiff and Gomez moved the gang box, which was on wheels, about fifty to one hundred feet at which point they attempted to push the gang box up a ramp to get to the other side of the cellar. Specifically, the ramp, which was made of cement with plywood placed on top, was built in order to maneuver in the cellar over pipes in the floor. Plaintiff testified that as they pushed the gang box over the ramp, it got stuck on the lip of the plywood at which point plaintiff attempted to lift the gang box over the lip while Gomez pushed from the other end and that it was at that moment that he felt severe pain in his back and became injured.

***2** Thereafter, plaintiff commenced the instant lawsuit asserting causes of action for violations of Labor Law §§ 240(1), 241(6) and 200 and common law negligence. Defendants Morganti and J. Petrocelli now move for summary judgment dismissing plaintiff's complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id*.

The court first turns to Morganti's and J. Petrocelli's motions for summary judgment dismissing plaintiff's cause of action for a violation of Labor Law § 240(1). Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference 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 materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006).

In the instant action, the court finds that both Morganti and J. Petfocelli have established their *prima facie* right to summary judgment dismissing plaintiff's Labor Law § 240(1) claim on the ground that plaintiffs accident did not occur due to an elevation- and gravity-related hazard of the type contemplated by the statute. Based on plaintiff's own testimony, his accident occurred when he attempted to lift the gang box up and over the half-inch lip of the plywood placed over the cement ramp and hurt his back in doing so. Indeed, plaintiff testified as follows:

> ***3** I remember saying on three; one, two, three, I lifted up, [Gomez] pushed, I remember feeling - hearing a little crack, hearing a crack and as we were able to get the wheel over as I lifted, I immediately felt pain in my lower back down to my toes, my buttocks and I fell to the floor.

Further, plaintiff's opposition papers assert that plaintiff's accident occurred when he was "forced to lift a heavy gang box over a lip" and that "[t]he law of physics dictates that there would be a gravitational pull on the gang box when it was lifted." However, merely citing to an alleged gravitational pull on the gang box when plaintiff lifted it is insufficient to establish liability under 240(1) as such an injury is only tangentially related to gravity and not caused by the kind of gravity-related risks that the statute was intended to cover. Indeed, the Court of Appeals has held that

> The "special hazards" [referred to in Labor Law § 240 (1)] ... do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.

Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993). Although the Court of Appeals has expanded liability under 240(1) since *Ross* to include falling objects that are located on the same level as a plaintiff, there is no claim in this case that the gang box fell on the plaintiff or that plaintiff's injury occurred as a result of being hit by the gang box. Indeed, as noted by the First Department,

> In *Ross*, the injury had nothing to do with gravity-related risks such as falling from a height or being struck by a falling object. The plaintiff, while working in an elevated shaft, injured his back because of the contorted position in which he was working. There was no loss of balance nor any spilling or falling of materials.

Suwareh v. State of New York, 24 A.D.3d 380, 381-382 (1st Dept 2005). Here, like the plaintiff in *Ross*, the testimony establishes that at the time of the accident plaintiff was not subjected to a gravity-related risk requiring a safety device, such as falling, nor was he in danger of being struck by a falling object in need of securing. Instead, plaintiff's injury was merely the result of a general hazard associated with construction work for which 240(1) does not apply. As plaintiff has failed to raise an issue of fact to defeat Morganti's and J. Petrocelli's motions, said defendants are entitled to summary judgment dismissing plaintiff's 240(1) claim.

The court next turns to Morganti's and J. Petrocelli's motions for summary judgment dismissing plaintiff's cause of action for a violation of Labor Law § 241(6). Pursuant to Labor Law § 241(6),
All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

***4** In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993); *see also Rakowicz v. Fashion Institute of Technology*, 56 A.D.3d 747 (2nd Dept 2008).

In the instant action, Morganti's and J. Petrocelli's motions for summary judgment dismissing plaintiff's § 241(6) claim predicated on Industrial Code § 23-1.7 is granted on the ground that said provision does not apply to the instant action. As an initial matter, 12 N YCRR § 23-1.7 contains numerous provisions involving general hazards, including, *inter alia*, overhead hazards from falling materials and falling hazards with respect to openings and bridge and overpass construction. However, plaintiff has failed to identify which specific provision of § 23-1.7 was violated. In any event, none of the provisions of § 23-1.7 apply to this case as plaintiff does not claim that his accident occurred in any way relevant to the issues covered by that section. Even if plaintiff meant to assert a violation of 12 NYCRR § 23-1.7(f), the only provision that explicitly refers to ramps, such provision does not apply here. Specifically, § 23-1.7(f), which applies to vertical passage ways, provides that

"[s]tairways. ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." However, such provision does not apply to the instant action as it is undisputed that plaintiff was only working in the cellar of the subject premises and was not going from one level of the building to another level of the building when the accident occurred.

Additionally, Morganti's and J. Petrocelli's motions for summary judgment dismissing plaintiff's § 241(6) claim predicated on Industrial Code § 23-1.28 is granted on the ground that said provision does not apply to the instant action. 12 NYCRR § 23-1.28 provides requirements for the maintenance and proper use of hand-propelled vehicles, specifically, that they should be maintained in good repair, that the wheels and handles of said vehicles shall be well-secured to their frames and that they should be stored in locations away from passageways and work areas. However, said provision is inapplicable here. Although plaintiff's complaint asserts that the wheel of the gang box came off when the gang box was being lifted, at his deposition, plaintiff testified that his injury occurred when he lifted the gang box and not that the wheel of the gang box broke or that his injury occurred because the gang box was otherwise damaged or failed in any way. Additionally, plaintiff has not alleged that there were issues with the handles on the gang box or that the gang box was improperly maintained or stored. As plaintiff has failed to raise an issue of fact to defeat Morganti's and J. Petrocelli's motions, said defendants are entitled to summary judgment dismissing plaintiff's 241(6) claim.

The court next turns to Morganti's and J. Petrocelli's motions for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury.' " *Id.*, citing *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). "[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 504 (1993). "This rule is an outgrowth of the basic common-law principle that 'an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.' " *Id.*, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299 (1978).

***5** In the instant action, Morganti and J. Petrocelli have established *their prima facie* right to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as they have demonstrated that they did not supervise, direct or control plaintiff's activities. Jack Rossman, Morganti's Superintendent, testified that Morganti only monitored the subcontractors to ensure that they stayed on schedule, met quality control standards and maintained safety standards but that it did not instruct the subcontractors, like Axon, plaintiff's employer, on how their work was to be performed and that such task would be left to the individual subcontractor's foreman. Further, Blaise Swiatkowski, J. Petrocelli's Superintendent, testified that it did not providelany of the equipment used by Axon nor did it supervise or instruct Axon's employees on how to perform their work. Additionally, plaintiff testified that on the date of his accident, he did not receive any instruction or supervision from an employee of Morganti or J. Petrocelli but rather that he was instructed on the date of his accident by Axon's foreman, Anthony Marotta.

In response, plaintiff has failed to raise an issue of fact sufficient to defeat Morganti's and J. Petrocelli's motions. Initially, plaintiff's assertion that Morganti, as the construction manager, did supervise and control plaintiff's work based on the fact that they oversaw safety issues and had weekly safety meetings with the foremen of the various onsite subcontractors is without merit as it is well-settled that "while [a] general contractor's on-site safety manager may have had overall responsibility for the safety of the work done by the subcontractors, such duty to supervise and enforce general safety standards at the work site [is] insufficient to raise a question of fact as to negligence." *O'Sullivan v. IDI Construction Co., Inc.*, 28 A.D.3d 225, 226 (1st Dept 2006). Even if such entity has the authority to stop and correct unsafe work practices, such evidence is insufficient to establish the requisite supervision or control to confer liability under Labor Law § 200 and common law negligence. *See Martinez v. 342 Property LLC*, 89 A.D.3d 468 (1st Dept 2011).

Additionally, to the extent plaintiff asserts that the plywood ramp itself was a dangerous condition, and that therefore, the dismissal of his Labor Law § 200 and common law negligence claims must be analyzed based on whether defendants Morganti and J. Petrocelli created the condition or had actual or constructive notice of the condition, such assertion is without

merit. Plaintiff's accident did not occur because the plywood ramp was itself dangerous; rather, plaintiff's accident occurred because he lifted the gang box over the plywood ramp and hurt his back in doing so, which this court finds is clearly an injury arising from plaintiff's means and methods on the Project.

Accordingly, both Morganti's and J. Petrocelli's motions for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint and any cross-claims asserted against them is granted. This constitutes the decision and order of the court. Dated: 1/28/16

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J.S.C.

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