

**Degen v Unionsale Union Free School Dist.**

2012 NY Slip Op 30377(U)

February 3, 2012

Sup Ct, Nassau County

Docket Number: 7515/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 11 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy  
Justice of the Supreme Court**

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**THOMAS DEGEN and KAROL DEGEN,**

**Plaintiff(s),**

**-against-**

**UNIONDALE UNION FREE SCHOOL DISTRICT,  
CONOR CONSTRUCTION CONSULTANTS, INC.,  
IRWIN CONTRACTING OF LONG ISLAND, INC.  
and IRWIN CONTRACTING, INC.,**

**Defendant(s).**

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**UNIONDALE UNION FREE SCHOOL DISTRICT,**

**Third-Party Plaintiff(s),**

**-against-**

**HERRICKS MECHANICAL CORP.,**

**Third-Party Defendant(s).**

\_\_\_\_\_ X

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XXX
Answering Papers.....	XXXXXX
Reply.....	XXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Index No. 7515/09

Motion Submitted: 11/21/11  
Motion Sequence: 004, 005, 006

Motion by plaintiffs for an order pursuant to CPLR § 3212 granting them partial summary judgment on the issue of liability with respect to plaintiffs' claims pursuant to Labor Law § 240(1) is denied without prejudice to renewal upon completion of discovery. Motion by defendant Irwin Contracting of Long Island, Inc. and Irwin Contracting, Inc. ("Irwin") for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiffs' complaint and any and all cross-claims and counterclaims asserted against it is denied without prejudice to renewal upon completion of discovery. Motion by third-party defendant Herrick's Mechanical Corporation ("Herrick's") for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiffs' complaint is denied without prejudice to renewal upon completion of discovery.

On January 28, 2008, plaintiff Thomas Degen allegedly sustained personal injuries while he was engaged in construction work at 933 Goodrich Street, Uniondale, New York. At the time of the accident, plaintiff was an employee of Herrick's and working as an HVAC welder at Uniondale High School. The accident occurred while plaintiff was descending a ladder from one level of the roof to another level.

The complaint and Bill of Particulars allege violations of Labor Law §§ 240, 241(6) and 200 as well as common law negligence against all defendants.

In support of their motion for partial summary judgment on the issue of liability, plaintiffs submit, *inter alia*, that: a) as the building owner, defendant Uniondale Union Free School District ("Uniondale") had a duty to plaintiff under Labor Law § 240(1); b) plaintiff was involved in the construction and material alteration of a building or structure, a protected activity under Labor Law § 240(1); c) plaintiff is entitled to the exceptional protection of Labor Law § 240(1) as his injuries were directly related to the dangers of working at an elevated height; d) Uniondale breached its absolute duty and the question of comparative negligence and/or circumstantial reasonableness is irrelevant under Labor Law § 240(1); and e) the ladder was not a "safety device" but rather a means of ingress and egress while plaintiff was located on the roof.

In support thereof, plaintiff relies upon his own deposition testimony taken at the General Municipal Law 50-h hearing.

In opposition to plaintiff's motion, Uniondale asserts that plaintiff has not established that the claimed deficiencies in the ladder had anything to do with his fall. Since Degen has no recollection whether he actually fell from the ladder or fell for reasons completely unconnected with the ladder, Degen has failed to establish that the ladder was the proximate cause of this incident. Moreover, his employer Mr. Duane Marcy has submitted an affidavit

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in opposition to his motion contradicting each of his claims regarding the ladder, thereby raising issues of fact sufficient to defeat this motion.

Alternatively, Uniondale argues that Degen's motion should be denied as premature, since hardly any discovery has been conducted, and Uniondale has had no opportunity to take the depositions of at least three potential witnesses (shop steward, helper and foreman). These witnesses are not Uniondale employees and might be able to contradict or clarify Degen's account regarding the height and positioning of the ladder.

Herrick's moves for summary judgment claiming the evidence presented demonstrates as follows: the ladder provided by Herrick's was the appropriate ladder to perform plaintiff's work; the ladder was properly positioned and in good condition; the ladder was tied off so it would not move when a worker climbed either up or down the ladder; the ladder extended 3-4 feet beyond the edge of the auditorium roof and that after the accident, the ladder was still tied off and had not fallen or failed and remained stable. Herrick's admits that it had the sole authority to control plaintiff's activities on the job site and to correct any unsafe conditions. In support thereof, Herrick's relies upon the affidavit of its President, Mr. Marcy.

As to plaintiff's claims under Labor Law § 241(6), Herrick's asserts that none of the Industrial Code violations claimed are relevant to the case.

Defendant Irwin seeks summary judgment and dismissal of plaintiffs' complaint and all cross-claims asserted against it as it was not an owner or contractor or agent of the owner or contractor.

Irwin notes that as a school district, the construction project was performed pursuant to the Wicks Law. Under this multiple contract system, the government entity must award separate prime contracts for at least three major components of the work: electrical, plumbing and HVAC. A fourth contract is awarded to a general contractor for the remainder of the project scope.

Pursuant to a Wick's contract, Irwin was a prime contractor for general construction pursuant to the contract between Irwin and Uniondale.

Third-party defendant Herrick's was a prime contractor pursuant to a Wick's contract between Herrick's and Uniondale.

Based upon the foregoing, John Irwin, the President of Irwin submits that it did not have the authority to direct, control, supervise or manage the means and methods of the work done by Herrick's and its employees and Irwin was never responsible for the safety of the

employees of Herrick's. (¶¶ 6 and 9 of Mr. Irwin's Affidavit). In opposition, Uniondale argues that Irwin's motion should be denied as premature since it has not had an opportunity to conduct discovery into what duties and responsibilities Irwin had and/or undertook during the job. Further, it is well settled that a contractor's actions are controlling, not their title.

Conor Construction Consultants, Inc. ("Conor") has submitted an affirmation in opposition to the motions made by plaintiffs and Irwin. Conor adopts the arguments set forth by counsel for Herrick's. Conor asserts that issues of fact exist as to how and why this accident occurred; and the motions are premature and should be denied with leave to renew once depositions have been conducted. Specifically, Conor argues that there is conflicting evidence between the allegations set forth by plaintiff's counsel as to a non-secured, inadequate ladder being the only means supplied to Mr. Degen to go from one roof to the other as compared to the representation by Mr. Marcy, the President of Herrick's. Mr. Marcy describes the ladder as being properly positioned and tied off so as to provide adequate protection to the plaintiff, as well as means to safely travel from one roof to another.

As to Irwin, Conor asserts that "[w]hile an affidavit is offered from Mr. John Irwin, President of the Irwin defendants, same offers no insight as to what happened that day. Mr. Irwin offers no insight as to whether his employees were working at or near the area where the accident occurred. \* \* \* Thus far, all that is known is that somehow Mr. Degan fell from one roof to another as he was approaching the ladder in question. Whether he may have tripped on debris or some foreign substance left behind by an employee of Irwin or some other contractor is not known" at this juncture. (¶ 5 of Kevin Bryant's Affirmation in Opposition).

Conor also opposes the motion by Herrick's which seeks to dismiss plaintiffs' complaint in that discovery has not yet taken place.

Plaintiff opposes the motion by Herrick's on the grounds that: Herrick's has failed to produce evidence in admissible form demonstrating its entitlement to judgment as a matter of law; the abject lack of probative value of the affidavit of Duane Marcy, the President of Herrick's renders it useless as a means to refute the numerous defects in the operation and placement of the subject ladder raised by plaintiff in his own motion for summary judgment.

As to Uniondale's motion, plaintiff asserts that his sworn deposition testimony raises triable issues of fact as to Uniondale's violation of Labor Law § 240(1) and § 241(b) in their role as owner of the subject premises, which preclude summary judgment to Uniondale.

As to Irwin, plaintiff asserts that its motion is premature as a question of fact exists as to Irwin's role, which is not resolved merely by a recitation of the terms of its contract and

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a self-serving affidavit from its principal. Specifically, plaintiff asserts that: it is impossible to tell at this juncture without having the opportunity to examine witnesses from the various defendants who worked on the site and was familiar with the site's operations and management. This information is in the exclusive control of the defendants, and plaintiff should be permitted the opportunity for a full and fair examination of these issues prior to defending a motion for summary judgment from this defendant.

Labor Law § 240(1) imposes liability upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation-related hazards, where such failure is a proximate cause of the accident (*see Silvas v. Bridgeview Invs., LLC*, 79 A.D.3d 727, 912 N.Y.S.2d 618 (2d Dept., 2010); *Balzer v. City of New York*, 61 A.D.3d 796, 877 N.Y.S.2d 435 [2d Dept., 2009]). Labor Law § 240(1) was specifically “designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). Labor Law § 240(1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed” (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 583 N.E.2d 932, 577 N.Y.S.2d 219 (1991) [internal quotation marks omitted]). To establish a *prima facie* violation of Labor Law § 240(1), a plaintiff must demonstrate that the defendants violated the statute and that the violation was the proximate cause of his or her injuries (*see Andro v. City of New York*, 62 A.D.3d 919, 880 N.Y.S.2d 111 (2d Dept., 2009); *Reaber v. Connequot Cent. School Dist. No. 7*, 57 A.D.3d 640, 641, 870 N.Y.S.2d 72 (2d Dept., 2008); *see Canosa v. Holy Name of Mary R.C. Church*, 83 A.D.3d 635, 920 N.Y.S.2d 390 (2d Dept., 2011); *Henry v. Eleventh Avenue*, 87 A.D.3d 523, 928 N.Y.S.2d 72 [2d Dept., 2011]).

While plaintiff has offered his 50-h testimony, there are differing and/or inconsistent factual assertions as to how the accident occurred, creating a need for further discovery (*cf. Nascimento v. Bridgehampton Construction Corp.*, 86 A.D.3d 189, 924 N.Y.S.2d 353 [1<sup>st</sup> Dept., 2011]).

Furthermore, the evidence submitted in opposition to the motion is sufficient to raise triable issues of fact as to whether the injured plaintiff was provided with adequate safety devices and if not, whether the absence of certain safety devices was a proximate cause of the accident. (*See, Canosa v. Holy Name of Mary R.C. Church, supra*). Accordingly, plaintiffs' motion for summary judgment is denied without prejudice to renewal upon completion of discovery.

CPLR § 3212(f) permits a party opposing a motion for summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated (*Lettieri v. Cushing*, 80 A.D.3d 574, 914 N.Y.S.2d 312 (2d Dept., 2011); *Botros v. Flamm*, 77 A.D.3d 602, 908 N.Y.S.2d 358 (2d Dept., 2010); see *Family-Friendly Media, Inc. v. Recorder Tel. Network*, 74 A.D.3d 738, 903 N.Y.S.2d 80 (2d Dept., 2010); *Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 A.D.3d 578, 872 N.Y.S.2d 724 (2d Dept., 2009); *Juseinoski v. New York Hosp. Med. Ctr., of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2d Dept., 2006]).

Although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (see *CPLR § 3212[ff]*), “[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*Anne Koplick Designs, Inc. v. Lite*, 76 A.D.3d 535, 536, 906 N.Y.S.2d 331 (2d Dept., 2010); *Williams v. D&J School Bus, Inc.*, 69 A.D.3d 617, 893 N.Y.S.2d 133 (2d Dept., 2010); see also *Nascimento v. Bridgehampton Construction Corp.*, 86 A.D.3d 189, 924 N.Y.S.2d 353 (1<sup>st</sup> Dept., 2011); *Lambert v. Bracco*, 18 A.D.3d 619, 795 N.Y.S.2d 662 [2d Dept., 2005]).

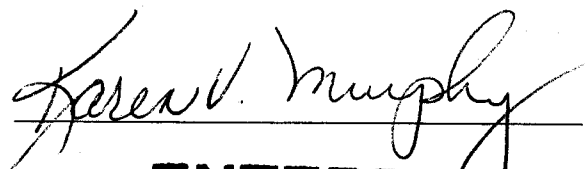
Based upon the record submitted, all parties have demonstrated that further discovery may lead to relevant evidence (*Lettieri v. Cushing, supra*; *Botros v. Flamm, supra*).

Discovery and depositions in this action have not been conducted and such devices are necessary to determine the rules and responsibilities of the respective parties in their ability to direct and control work at the job site at the time of plaintiff’s accident, and this information is in the exclusive control of defendants. Counsel are directed to schedule depositions forthwith, to be completed on/or before April 6, 2012. A compliance conference will be held on March 2, 2012 at 9:30 a.m.

Accordingly, all of the motions for summary judgment should be denied without prejudice to renewal upon completion of discovery.

The foregoing constitutes the Order of this Court.

Dated: February 3, 2012  
Mineola, N.Y.



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**ENTERED**  
FEB 07 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE