

<b>Gatti v Dordevic Constr.</b>
2012 NY Slip Op 31538(U)
June 7, 2012
Sup Ct, New York
Docket Number: 101351/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. SALIANN SCARPULLA PART 19  
J.S.C.

GATTI, JOHN DELLI

Plaintiff,

- v -

INDEX NO. 101351/2009

MOTION DATE

MOTION Seq. No. 002

DORDEVIC CONSTRUCTION et al,

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

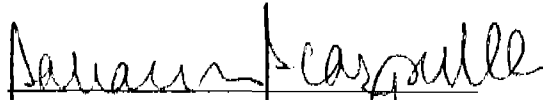
Notice of Motion/Petition/Order to Show Cause — Affidavits — Exhibits  
Answering Affidavits — Exhibits  
Replying Affidavits

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

motion and cross-motion are decided in accordance  
with accompanying memorandum decision.

Dated: June 7, 2012

  
Saliann Scarpulla J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.  SETTLE ORDER/JUDG.

**FILED**

JUN 12 2012

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
JOHN DELLI GATTI and KATINA DELLI GATTI,

Plaintiffs,

- against-

Index No.: 101351/2009  
Submission Date: 02/08/2012

DORDEVIC CONSTRUCTION CO., 767 FIFTH  
PARTNERS, LLC., and I.M.G. WORLDWIDE  
HOLDINGS, INC.,

Defendants.

----- X

For Plaintiffs:  
O'Dwyer & Bernstein  
52 Duane Street  
New York, NY 10007

For Defendants:  
Rubin, Fiorella & Friedman, LLP  
292 Madison Ave., 11<sup>th</sup> Floor  
New York, NY 10017

Papers considered in review of this motion for summary judgment:

Notice of Plaintiffs' Motion . . . . .	1
Aff in Opposition . . . . .	2
Reply Aff . . . . .	3
Notice of Defendants'	
Motion . . . . .	4
Mem of Law . . . . .	5
Aff in Opposition . . . . .	6
Reply Aff . . . . .	7

**FILED**

**JUN 12 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

HON. SALIANN SCARPULLA, J.:

In this Labor Law action plaintiffs John Delli Gatti ("Delli Gatti") and Katina Delli Gatti (collectively "plaintiffs") move for partial summary judgment against defendants Dordevic Construction Co. ("Dordevic Construction"), 767 Fifth Partners, LLC ("767"), and I.M.G. Worldwide Holdings, Inc. ("IMG") (collectively "defendants") on their Labor Law § 240(1) claim (motion sequence no. 2). Defendants move separately for summary

judgment dismissing the complaint (motion sequence no. 3). Motion sequence nos. 2 and 3 are consolidated for disposition.

This action arises from injuries Delli Gatti sustained on August 28, 2008 while working on a renovation project (the “project”) at a work site owned by 767 and located at 767 Fifth Avenue in Manhattan (the “premises”). The purpose of the project was to prepare a new corporate headquarters for IMG, the premises’ tenant. At the time, Delli Gatti was employed with Pro Max Carpentry Inc. (“Pro Max”). Dordevic Construction, the project’s general contractor, hired Pro Max to perform carpentry, drywall and finishing work on the project.

At his deposition, Delli Gatti testified that the accident occurred at approximately 10:30 A.M., when he fell from the third rung of a six-foot ladder. According to Delli Gatti, he fell because the ladder gave way under him. Delli Gatti testified that he had inspected the ladder before the accident but did not see anything wrong with it, and that others used the ladder after his accident without incident. Oscar Esquivel (“Esquivel”), Delli Gatti’s former co-worker, attests that he worked with Delli Gatti the entire morning of the accident and did not see Delli Gatti fall, nor did he see a ladder tip over or break.

Dordevic Construction’s Vice President, Thomas Dordevic (“Dordevic”), testified that Dordevic Construction simply provided subcontractors with the desired end product and did not direct them in how to perform their work, nor did Dordevic

Construction personnel communicate directly with subcontractor employees. Dordevic further testified that IMG never directed him on how IMG wanted the work done, and that the subcontractors, not Dordevic Construction, were responsible for taking care of safety measures at the work site.

David Rooney (“Rooney”) of Pro Max testified that Pro Max was in charge of all safety issues at the work site. Rooney also testified that Dordevic did not assign a safety coordinator to the site. Instead, Rooney testified, Dordevic served as a “super senior coordinator,” and would sometimes generally instruct Rooney on what he wanted Pro Max’s employees to do. Rooney further testified that he never saw any IMG personnel at the premises inspecting the project’s work progress.

Delli Gatti commenced this action in January 2009, asserting causes of action for common law negligence and violations of Labor Law §§ 200, 240, 241, 241-a.<sup>1</sup> In his Verified Bill of Particulars and Supplemental Verified Bill of Particulars, Delli Gatti alleges violations of 12 NYCRR §§ 23-1.5©, 23-1.7(d), 23-1.7(e)(2), 23-1.7(f), 23-1.21(b), 23-1.21©, 23-1.21(e) stepladders, 23-2.3, 23-1.21(e)(2) and 23-1.21(e)(3), and OSHA regulations as the basis for his Labor Law § 241 claim.

Delli Gatti now moves for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action, arguing that Delli Gatti’s testimony that the ladder gave way establishes a *prima facie* violation of Labor Law § 240(1). Delli Gatti further

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<sup>1</sup>Katina Delli Gatti asserts a derivative claim as Delli Gatti’s spouse.

argues that, under Labor Law § 240(1), 767 is strictly liable as the premises' owner, Dordevic is strictly liable as the project's general contractor, and IMG is strictly liable as 767's agent.

In opposition, and in support of their summary judgment motion, defendants argue that Delli Gatti did not fall from the ladder, thus they are not liable under Labor Law § 240(1). Defendants further argue that they are not be liable for any injuries resulting from the alleged fall because Delli Gatti testified that the ladder was not defective. With respect to the Labor Law § 241(6) cause of action, defendants argue that none of the regulations Delli Gatti cites in support of his Labor Law § 241(6) claim are applicable here, nor are the sections specific enough to sustain a Labor Law § 241(6) cause of action. Lastly, defendants argue that none of the defendants controlled Delli Gatti's work site, thus they are not liable under Labor Law § 200.

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

### The Labor Law Claims

Initially, the Court holds that IMG is entitled to summary judgment dismissing the Labor Law claims against it. The Labor Law applies only to owners, general contractors and their agents, *ee Rodriguez v. New York City Hous. Auth.*, 194 A.D.2d 460, 461 (1<sup>st</sup> Dept. 1993). The parties do not dispute that 767 owns the premises and that Dordevic was the project's general contractor.

Delli Gatti maintains that IMG is liable as 767's agent. A party is liable as an agent under the Labor Law only where that party had the authority to control or supervise the plaintiff's work. *See Walls v. Turner Const. Co.*, 4 N.Y.3d 861(2005); *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981). Here, there is no evidence that IMG had any authority to control or supervise Delli Gatti's work. Further, Rooney testified that Dordevic was the only construction manager at the work site and that he never saw any IMG personnel there. As the uncontroverted evidence shows that IMG was not 767's agent, the Court grants summary judgment dismissing all Labor Law claims against IMG.

However, triable issues of fact preclude summary judgment for the remaining defendants on the Labor Law § 240(1) cause of action. Owners and general contractors are required under Labor Law § 240(1) to provide workers with protections against "elevation-related risks." *Jamil v. Concourse Enters.*, 293 A.D.2d 271, 273 (1<sup>st</sup> Dept. 2002). A fall from a ladder is an "elevation-related risk" and Delli Gatti testified that he was injured because the ladder gave way under him, which constitutes a *prima facie*

violation of § 240(1), *see McCarthy v. Turner Constr., Inc.*, 52 A.D.3d 333, 333-34 (1<sup>st</sup> Dept. 2008). In contrast, Delli Gatti's co-worker Esquivel attests that he was working with Delli Gatti at the time the accident allegedly occurred and he never saw Delli Gatti or the ladder fall.<sup>2</sup> Because there is conflicting evidence as to whether Delli Gatti's injuries resulted from an elevation-related hazard, neither plaintiffs nor Dordevic Construction and 767 are entitled to summary judgment on the Labor Law § 240(1) cause of action. *See Samsung Am. v. Yugoslav-Korean Consulting & Trading Co.*, 248 A.D.2d 290, 291 (1<sup>st</sup> Dept. 1998).

Triable issues of fact also preclude summary judgment on the Labor Law § 241(6) cause of action against Dordevic Construction and 767. Labor Law § 241(6) requires owners and general contractors to provide "reasonable and adequate protection and safety" to workers by complying with Industrial Code regulations. *See Ross v.*

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<sup>2</sup>In support of their motion, defendants submit an Accident Report Form, an Employer Report of Work-Related Accident/Occupational Disease, an Employee's Claim for Compensation forms, a Medical Report, and an Independent Medical Evaluation, none of which state that Delli Gatti fell because the ladder gave way. Defendants argue that they are entitled to dismissal of the § 240(1) claim because these documents show that Delli Gatti's injury did not result from an elevation-related hazard.

On this summary judgment motion the Court may not consider the contents of these hearsay documents. Defendants have not laid the foundation for their admissibility under the business records exception to the hearsay rule. *See CPLR § 4518(a); Whitfield v. City of New York*, 48 A.D.3d 798, 799 (2d Dept. 2008); *Gunn v. New York*, 104 A.D.2d 848, 849-50 (2d Dept. 1984). In any event, Delli Gatti testified at his deposition that he fell from a ladder, thus any purported inconsistency as to the cause of his injuries is a credibility issue for a jury to decide. *See Barber v. Roger P. Kennedy Gen. Contrs., Inc.*, 302 A.D.2d 718, 719-20 (3d Dept. 2003).



*Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-02 (1993). Although he asserted numerous Industrial Code violations in his bill of particulars, Delli Gatti does not contest that 12 NYCRR §§ 23-1.5, 23.17, 23-2.23 and 23-1.21 do not apply here. However, Delli Gatti maintains that “Rule 23-1.21 requires strength to withstand the framing weight, a firm footing,” and that defendants violated this rule.

Although it is unclear from the papers submitted, it appears that Delli Gatti is asserting violations of 12 NYCRR §§ 23-1.21(b)(1), 23-121(b)(4)(ii), 23-121(e)(2) and 23-121(e)(3), as the remaining subsections of § 23-1.21 are unrelated to framing weight or ladder footing. Because 12 NYCRR § 23-121(e)(2) may not serve as a predicate for § 241(6) liability, the Court dismisses the claim insofar as Delli Gatti asserts a violation of that subsection. *See Khan v. 1765 First Assoc. LLC*, 2011 N.Y. Misc. LEXIS 1667, at \*18 (Sup. Ct. N.Y. County 2011); *Spenard v. Gregware Gen. Contr.*, 248 A.D.2d 868, 871 (3d Dept. 1998).

The Court also dismisses plaintiffs’ Labor Law § 241(6) cause of action as it relates to 12 NYCRR § 23-1.21(b)(1), which requires that ladders “be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed” on the ladders. Delli Gatti testified that he inspected the ladder before the accident and there was nothing wrong with it. He also testified that there was nothing broken on the ladder after the fall, and that others used the ladder after his accident without incident. Delli Gatti has presented no evidence to create

an issue of fact as to whether defendants violated 12 NYCRR § 23-1.21(b)(1).

Accordingly, defendants are dismissed of any claims based on § 23-1.21(b)(1). *See Khan*, 2011 N.Y. Misc. LEXIS 1667, at \*19.

However, triable issues of fact preclude summary judgment as to 12 NYCRR §§ 21-121(b)(4)(ii) and 23-121(e)(3), as Delli Gatti testified that the ladder gave way under him, and those sections require that the footing of ladders be secure. *See Hart v. Turner Constr. Co.*, 30 A.D.3d 213, 214 (1<sup>st</sup> Dept. 2006).

Dordevic Construction and 767 are also entitled to summary judgment on the Labor Law § 200 cause of action. Because Delli Gatti alleges that this accident arose from the manner in which he performed his work, Dordevic Construction and 767 may only be held liable under Labor Law § 200 if they had the authority to supervise or control Delli Gatti's work. *See Slikas v. Cyclone Realty, LLC*, 78 A.D.3d 144, 147-48 (2d Dept. 2010); *Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). Here, Rooney testified that Pro Max was in charge of all safety issues at the work site, and there is not a scintilla of evidence that 767 supervised the work on the project. Further, Dordevic testified that Dordevic Construction did not control the work methods at Delli Gatti's work site.<sup>3</sup> Accordingly, the Court dismisses the Labor Law § 200 cause of action against 767 and Dordevic Construction.

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<sup>3</sup> Though Rooney testified that Dordevic was at the work site as a general coordinator, the "retention of the limited power of general supervision" is insufficient to impose liability under Labor Law § 200. *Decavallas v. Pappantoniou*, 300 A.D.2d 617, 618 (2d Dept. 2002).

Lastly, with respect to plaintiffs' Labor Law § 241-a cause of action, although they moved for summary judgment dismissing the entire complaint, defendants do not make any arguments to support dismissal of the Labor Law § 241-a cause of action. Thus, regardless of the ultimate merits of that cause of action, because defendants have failed to make out their burden of proof on the summary judgment motion, defendants are not entitled to dismissal of that cause of action.

### **The Common Law Claims**

All defendants are also entitled to summary judgment on the common law negligence cause of action. There is no evidence that any of the defendants played a part in Delli Gatti's alleged injuries or caused a defect in the ladder. *See Urbina v. 26 Court St. Assocs., LLC*, 12 A.D.3d 225, 226 (1<sup>st</sup> Dept. 2004). Indeed, Delli Gatti testified that he inspected and saw no problem with the ladder before his accident. Accordingly, the common law negligence cause of action is dismissed as to all defendants.

In accordance with the foregoing, it is hereby

ORDERED that the motion for partial summary judgment by plaintiffs John Delli Gatti and Katina Delli Gatti is denied; and it is further

ORDERED that the motion for summary judgement dismissing the complaint by defendants Dordevic Construction Co., 767 Fifth Partners, LLC, and I.M.G. Worldwide Holdings, Inc. is granted to the following extent: the common law negligence cause of action is dismissed as to all defendants; all Labor Law causes of action are dismissed as to

I.M.G. Worldwide Holdings, Inc. (thus, the entire complaint is dismissed as to I.M.G. Worldwide Holdings, Inc.); the Labor Law § 200 cause of action against Dordevic Construction Co and 767 Fifth Partners, LLC is dismissed; and the Labor Law § 241(6) cause of action against Dordevic Construction Co. and 767 Fifth Partners, LLC is dismissed insofar as plaintiffs assert violations of 12 NYCRR §§ 23-1.5(c), 23-1.7(d), 23-1.7(e)(2), 23-1.7(f), 23-1.21(b), 23-1.21(c), 23-2.3, 23-1.21(e)(2) and OSHA regulations. The motion is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to sever and enter judgment dismissing the complaint as against defendant I.M.G. Worldwide Holdings, Inc. and to sever and enter judgment dismissing the causes of action dismissed against defendants Dordevic Construction Co. and 767 Fifth Partners as set forth above.

This constitutes the decision and order of the Court.

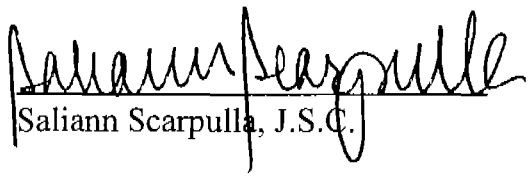
**FILED**

Dated: New York, New York  
June 7, 2012

JUN 12 2012

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
Saliann Scarpulla, J.S.C.