

**Roberts v Simon Prop. Group Inc.**

2012 NY Slip Op 32937(U)

December 7, 2012

Supreme Court, New York County

Docket Number: 111805/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

SEAN ROBERTS,  
Plaintiffs,

Index No.: 111805/09

- v -

Motion Date: 04/27/12

SIMON PROPERTY GROUP INC., J. CREW GROUP  
INC. and SHAMROCK DEVELOPMENT, INC.,  
Defendants.

Motion Seq. No.: 02

Motion Cal. No.: \_\_\_\_\_

THE RETAIL PROPERTY TRUST,  
Third-Party Plaintiff,

- v -

MADEWELL, INC. and BLACK HAWK, INC.,

Third-Party Defendants.

SHAMROCK DEVELOPMENT, INC.,  
Second Third-Party Plaintiff,

Third-Party  
Index No.: 590114/09

- v -

MADEWELL, INC., BLACK HAWK, INC., and  
INDIAN HARBOR INSURANCE,

Second Third-Party Defendants.

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2, 3	_____
4, 5	_____

**FILED**

Cross-Motion:  Yes  No

DEC 12 2012

Upon the foregoing papers,

NEW YORK  
COUNTY CLERK'S OFFICE

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action which arises out of an accident involving personal injuries, a motion and two cross motions are now before the court. In motion sequence number 002, defendant J. Crew Group, Inc. (J. Crew) and third-party and second third-party defendant Madewell, Inc. (Madewell) move for summary judgment: (1) in favor of J. Crew's, Madewell's, defendant Simon Property Group, Inc. (Simon)'s and third-party plaintiff The Retail Property Trust (RPT)'s favor on their common-law and contractual indemnification claims against defendant/second third-party plaintiff Shamrock Development, Inc. (Shamrock) and third-party and second third-party defendant Black Hawk, Inc. (Black Hawk); (2) dismissing plaintiff's Labor Law § 200 claim as against J. Crew, RPT, and Madewell; and (3) dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims. During oral argument, plaintiff discontinued his § 200 claim. Since Labor Law § 200 "codifies the common-law duty to maintain a safe work site" (Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043 [2d Dept 2012]), plaintiff's negligence claim is also dismissed.

Shamrock and Black Hawk cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims. Plaintiff cross-moves for summary judgment on the issue of defendants' liability under Labor Law § 240 (1).

On March 23, 2009, J. Crew and its subsidiary, Madewell, were engaged in preparing a space at the Walt Whitman Mall at 160

Walt Whitman Road in Huntington Station, New York for a Madewell store. Simon, which has changed its name to RPT, was the owner of the mall. RPT leased the retail space to Madewell. J. Crew hired Shamrock as the general contractor for the project, and Shamrock hired Black Hawk as the demolition subcontractor. Plaintiff was a demolition and cleanup laborer employed by Black Hawk.

It is alleged that on March 23, 2009, the same day on which the renovations began, while plaintiff was cleaning demolition debris from the ground, a wall behind him, which was being demolished, fell upon him and he sustained injuries. Plaintiff attests that a co-worker pulled the entire wall down, without cutting it into sections, by tying cables from a scissor lift to steel studs in the wall, and pulling the lift away. There are no eyewitness account in the record, and plaintiff himself did not see what caused the accident, but the direct and circumstantial evidence support plaintiff's version.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Shapiro v 350 E. 78th St. Tenants Corp., 85 AD3d 601, 608 [1st Dept 2011], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). "If this burden is not met, summary judgment must be denied, regardless of the

sufficiency of the opposition papers" (O'Halloran v City of New York, 78 AD3d 536, 537 [1st Dept 2010]). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (Melendez v Parkchester Med. Servs., P.C., 76 AD3d 927, 927 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp., 70 AD3d 508, 510-511 [1st Dept 2010]).

Labor Law § 240 (1) provides, in pertinent part:

All contractors and owners and their agents ... in the ... demolition ... 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) provides exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal quotation marks and citation omitted]" (Jamindar v Uniondale Union Free School Dist., 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to

workers employed on a construction site' proximately causes injury to a worker" (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011], quoting Misseritti v Mark IV Constr. Co., 86 NY2d 487, 490 [1995]).

However, not every hazard or danger encountered in a construction zone falls within the scope of Labor Law § 240 (1) as to render the owner or contractor liable for an injured worker's damages. We have expressly held that Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of ... [a] required safety device [internal quotation marks and citations omitted]

(Misseritti, 86 NY2d at 490). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]).

The parties dispute whether plaintiff's accident falls within section 240 (1), in part because plaintiff and the wall were at the same level, i.e., that there was no elevation differential between plaintiff and the wall that fell on him.

The Court of Appeals has specifically rejected a "same level rule" which would preclude coverage under Labor Law § 240 (1) if there were little difference in height between a worker and whatever caused his injuries (see e.g. Wilinski, 18 NY3d at 9).

However, the Court of Appeals has not established a bright line rule concerning what elevation is sufficient to constitute "a physically significant elevation differential" (Runner, 13 NY3d at 603). Rather, one must consider "the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (Runner, 13 NY3d at 605; see also Wilinski, 18 NY3d at 10, quoting Runner; Kempisty v 246 Spring St., LLC, 92 AD3d 474, 474 [1st Dept 2012]; McCallister v 200 Park, L.P., 92 AD3d 927, 928-929 [2d Dept 2012]; Kropp v Town of Shandaken, 91 AD3d 1087, 1090 [3d Dept 2012], and cases cited therein).

Under these principles, had the wall which struck plaintiff been just poorly braced or suffered from some other inadequacy of safety device which allowed it to fall, there is no question but that plaintiff's injuries would have fallen within the statute, as the accident would have been "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Runner, 13 NY3d at 603).

However, the statute does not apply in this case because the wall itself was being demolished, and "imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical" (Wilinski, 18 NY3d at 11; see also Salazar v

Novalex Contr. Corp., 18 NY3d 134, 139-140 [2011], quoting Wilinski).

Accordingly, the parts of J. Crew and Madewell's motion, and Shamrock and Black Hawk's cross motion which seek summary judgment dismissing plaintiff's Labor Law § 240 (1) claims are granted. Plaintiff's cross motion which seeks summary judgment on the issue of defendants' liability under section 240 (1) is denied.

Labor Law § 241 (6) provides:

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:

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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 ... shall comply therewith.

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23. "Labor Law § 241 (6) imposes a *nondelegable duty* ... upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers] [internal quotation marks and citations omitted]" (Forschner v Jucca Co., 63 AD3d 996, 998 [2d Dept 2009]). "To recover under



Labor Law § 241 (6), a plaintiff must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific applicable safety standards" (Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043 [2d Dept 2012]).

The only Industrial Code sections which plaintiff alleges were violated are found in 12 NYCRR 23-3.3 ("Demolition By Hand"), specifically:

(a) Application. The provisions of this section shall not apply to mechanical means of demolition.

(b) Demolition of walls and partitions.

(1) The demolition of walls and partitions shall proceed in a systematic manner and all demolition work above each tier of floor beams shall be completed before any demolition work is performed on the supports of such floor beams.

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(3) Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

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(6) Walls or partitions which are being demolished by hand shall not be left standing more than one story or 15 feet, whichever is less, above the uppermost floor on which persons are working. Such

walls or partitions shall be removed before the aggregate area of the openings in such floor exceeds 25 percent of the total floor area.

( c ) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

Inexplicably, neither in his bill of particulars nor anywhere in his opposition papers does plaintiff cite Industrial Code section 23-3.4 ("Mechanical Methods of Demolition"), which states, in pertinent part:

The use of a swinging weight attached to the line of a crane boom, clamshell bucket, power shovel, bulldozer or any other mechanical device or equipment for the purpose of demolishing a building or other structure or any remaining portion thereof shall be in accordance with the following requirements"

(a) Height limitation. The building or other structure or any remaining portion thereof shall be not more than 80 feet in height above the ground, grade or equivalent surface.

(b) Structural stability. Walls, chimneys and other parts of any building or other structure shall not be left unsupported or unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

( c ) Zone of demolition.

(1) Where a swinging weight is used in demolition operations, a zone of demolition with a radius of at least equal to one and one-half times the height of the building or other structure or any portion thereof being so demolished shall be maintained around the points of impact. Where a swinging weight is used, the supporting cables shall be of such length or shall be so restrained that it is not possible for the weight to swing against any other building or structure than the one being demolished.

(2) Where a clamshell bucket is being used in demolition operations, a zone of demolition shall be maintained within 25 feet on both sides of the line of travel of the bucket.

(3) Where other mechanical devices or equipment are being used in demolition operations, a zone of demolition shall be maintained in the area into which the building or other structure or any portion thereof may fall. Such zone of demolition shall equal at least one and one-half times the height of the building or other structure or any portion thereof above the ground, grade or equivalent level.

(4) Only persons essential to the operation of the demolition devices or equipment shall be suffered or permitted to enter any zone of demolition.

(5) Substantial barricades constructed and installed in compliance with this Part (rule) shall be erected wherever there is likelihood of any person entering a zone of demolition other than the persons essential for operation of the demolition devices or equipment.

(6) The controls of any mechanical device or equipment used in demolition operations shall be located and operated a safe and reasonable

distance from the point of demolition.

Plaintiff insists that section 23-3.3 applies to his accident and defendants disagree. The court concurs with defendants. Contrary to plaintiff's insistence, there is no scenario under which a scissor lift can be considered a hand tool. A review of Industrial Code section 23-3.3 and its corollary section 23-3.4 establishes that since 23-3.4 applies by its terms to "any other mechanical device or equipment", such section applies to the scissor lift in this case, and section 23-3.3, which explicitly excludes "mechanical means of demolition", is inapplicable. See Kempisty v 246 Spring St, LLC, 92 AD3d 474, 475 (1<sup>st</sup> Dept 2012) ("section 241[6] claims premised on section 23-3.3, which pertains to demolition by hand, ..., section 23-6.1, which, by its terms, does not apply to cranes, are inapplicable under the circumstances presented").

Accordingly, as plaintiff raises no issue of fact with respect to a violation of the Industrial Code, the parts of J. Crew and Madewell's motion and Shamrock and Black Hawk's cross motion which seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim are granted.

As a result of these holdings, summary judgment dismissing the entire complaint is granted.

When a complaint against a party is dismissed, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety"

(Turchioe v AT & T Communications, 256 AD2d 245, 246 [1st Dept 1998]). Accordingly, the part of J. Crew and Madewell's motion which seeks common-law and contractual indemnification from Shamrock and Black Hawk is denied as moot.

Accordingly, it is

ORDERED that the part of J. Crew Group Inc. and Madewell, Inc.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 claim is granted, as this claim has been discontinued, and plaintiff's negligence claim is also dismissed; and it is further

ORDERED that the part of J. Crew Group Inc. and Madewell, Inc.'s motion which seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims is granted; and it is further

ORDERED that Shamrock Development, Inc. and Black Hawk, Inc.'s cross motion is granted; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to J. Crew Group Inc., Madewell, Inc., The Retail Property Trust, Shamrock Development, Inc. and Black Hawk, Inc.

as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

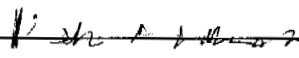
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the part of J. Crew Group Inc. and Madewell, Inc.'s motion which seeks summary judgment on their indemnification claims is denied as moot; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: December 7, 2012

ENTER:



J.S.C.

**DEBRA A. JAMES**

**FILED**

**DEC 12 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**