SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ANGELA G. IANNACCI,

Justice

TRIAL/IAS, PART 16
NASSAU COUNTY

JOHN MAIOLINI AND DONNA MAIOLINI,

Plaintiff(s),

MOTION DATE: August 18, 2011
MOTION SEQ.: 02, 10, 11, 12, 13, 14, 15, 16

-against-

INDEX NO. 203/06

G&S MOUNT VERNON, LLC, G&S MOUNT VERNON, INC., G&S INVESTORS CORP., G&S INVESTORS HR CONSTRUCTION & RENOVATIONS, INC., NEW ENTERPRISE STONE & LIME CO.,INC. AND NEWCRETE PRECAST SOLUTIONS,

Defendant(s),

G&S MOUNT VERNON, LLC, G&S MOUNT VERNON, INC., G&S INVESTORS CORP., G&S INVESTORS/ MILLER PLACE, L.P., G&S INVESTORS HR CONSTRUCTION & RENOVATIONS

Third-Party Plaintiff(s),

-against-

CORNELL & COMPANY, INC.

Third-Party Defendant(s),

NEW ENTERPRISE STONE & LIME CO., INC. AND NEWCRETE PRECAST SOLUTIONS,

Second Third-Party Plaintiff(s),

-against-

GLOBAL PRECAST, INC.

Second Third-Party Defendant(s).

NEW ENTERPRISE STONE & LIME CO., INC. AND NEWCRETE PRECAST SOLUTIONS,

Third-Third-Party Plaintiff(s),

-against-

A. & J. CIANCIULLI, INC. AND JOHN PUFF CONSTRUCTION CO., INC.,

Third-Third-Party Defendant(s).

Submitted for this Court's determination are the following motions and cross-motions in the above captioned action:

Motion brought by the Plaintiffs, for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment to the Plaintiffs on the issue of liability against the Defendants (motion sequence no. 2).

Cross-motion brought by the Third-Third-Party Defendant, A.&J. Cianciulli, Inc. for an order of this Court, pursuant to Rule 3212 of the CPLR, granting it summary judgment dismissing the Plaintiffs' Labor Law Section 240(1) cause of action (motion sequence no. 10).

Motion brought by the Third-Third-Party Defendant, A.&J. Cianciulli, Inc., for an order of this Court, pursuant to Rule 3212 of the CPLR, granting it summary judgment dismissing the Defendants Third-Third-Party Plaintiffs' Third-Third-Party Complaint (motion sequence no. 11).

Cross-motion brought by the Third-Third-Party Defendant, John Puff

Construction Co., Inc., for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment dismissing the Defendants Third-Third-Party Plaintiffs' Third-Third-Party Complaint and cross-claims and counterclaims asserted against it (motion sequence no. 12).

Cross-motion brought by the Defendant Second and Third-Party Plaintiff, New Enterprise Stone & Lime Co., Inc., also sued herein incorrectly as Newcrete Precast Solutions for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment dismissing the Plaintiffs' Labor Law Sections 200, 240(1) and 241(6) causes of action against it and for a conditional order of summary judgment in its favor over and against Second Third-Party Defendant Global Precast, Inc. on its contractual indemnity claims (motion sequence no. 13).[1]

Motion brought by the Defendants Third-Party Plaintiffs, G&S Mount Vernon, LLC, G&S Mount Vernon, Inc., G&S Investors Corp., G&S Investors/Miller Place, L.P., G&S Investors and HR Construction & Renovations, Inc., for an order of this Court, pursuant to Rule 3212 of the CPLR:

a) dismissing the Plaintiffs' common law negligence and New York Labor Law Sections 240(1) , 241(6) and 200 causes of action and all cross-claims against the G&S entities;

b) dismissing the Plaintiffs' common law negligence and New York Labor Law Sections 240(1) , 241(6) and 200 causes of action and all cross-claims against HR

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[1]The Court has been advised by counsel that New Enterprise Stone & Lime Co., Inc. has withdrawn that branch of its cross-motion which sought a conditional order of summary judgment against Global Precast, Inc.

Construction;

c) granting HR Construction & G&S Investors summary judgment on their claim for contractual indemnification as against New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions and Cornell & Company, Inc.;

d) granting the G& S entities and HR Construction common law indemnification as against New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions (motion sequence no. 14).

Motion brought by the Second Third-Party Defendant, Global Precast Inc., for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment dismissing the Second Third-Party action and all cross-claims and causes of action against it (motion sequence no. 15).[2]

Cross-motion brought by the Third-Party Defendant, Cornell and Company, Inc. for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment dismissing the Third-Party Complaint of the Third-Party Plaintiffs, G&S Mount Vernon, LLC, G&S Mount Vernon, Inc., G&S Investors Corp. and G&S Investors/Miller Place, L.P. (motion sequence no. 16).

The construction site accident which is the subject matter of the instant action occurred on May 13, 2004 at approximately 1:30 p.m.

The subject accident occurred on a development project site designated as 500 Sanford Blvd., in Mount Vernon, New York, where a new Target parking garage was

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[2]ItThe Court has been advised by counsel that Global Precast, Inc. has withdrawn that branch of its motion for summary judgment dismissal of the claims asserted against it by New Enterprise Stone & Lime Co., Inc.

being erected on the south side of Sanford Blvd.

Plaintiff, John Maiolini, who was employed as an ironworker by the Third-Party Defendant, Cornell & Company, Inc., and was a member of Union Local 40.

Plaintiff, Donna Maiolini, is the spouse of John Maiolini.

Defendant, Third-Party Plaintiff G&S Mount Vernon, LLC, was the original leasee/developer of the subject development project site.

Defendants, Third-Party Plaintiffs, G&S Mount Vernon, Inc., G&G Investors Corp., G&S Investors/Miller Place, L.P., G&S Investors, apparently had no ownership interest or affiliation with the subject development site.

Defendant Third-Party Plaintiff, HR Construction & Renovations, Inc., was the General Contractor for the subject project development site.

Defendants Second Third-Party Plaintiffs and Third-Third-Party Plaintiffs, New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions, were subcontractors at the subject project development site.

Third-Party Defendant, Cornell & Company, Inc., was a subcontractor at the subject project development site and the employer of the Plaintiff, John Maiolini at the time of the subject accident.

Second Third-Party Defendant, Global Precast, Inc., was a contract vendee of New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions.

Third-Third-Party Defendants, A.&J. Cianciulli, Inc. and John Puff Construction Co. Inc., were contract vendees of New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions.

Based upon all the papers submitted for this Court's consideration, the Court

makes the following finding of facts solely for the purpose of determining the instant motions and cross-motions.

The Sanford Blvd. Redevelopment Project included the construction of new commercial structures for a Target and Best Buy shopping center and two (2) associated parking garages on a twelve (12) acre site located on both the north and south sides of Sanford Boulevard in Mount Vernon, New York.

The redevelopment project site was acquired by a municipal corporation known as the City of Mount Vernon Industrial Development Agency.

As part of the redevelopment project, on January 18, 2000, G&S Mount Vernon, LLC entered into a Land Acquisition and Disposition Agreement with the City of Mount Vernon Industrial Development Agency for the purposes of constructing the Target and Best Buy shopping center and the two (2) associated parking garages.

Pursuant to the terms of the Land Acquisition and Disposition Agreement, the redevelopment project was developed in two (2) separate phases, the north side phase and the south side phase. Each separate phase was set foth in an individual "Lease Agreement" between the City of Mount Vernon Industrial Development Agency as "landlord" and G&S Mount Vernon, LLC as "developer/tenant." Specifically, the south side phase was for the construction of the Target shopping center and parking garage structure. This "Lease Agreement" was executed by Gregg Wasser, managing member on behalf of G&S Mount Vernon, LLC.

Article X of the subject Land Acquisition and Disposition Agreement provides in pertinent part:

ARTICLE X

PROHIBITION AGAINST ASSIGNMENT AND TRANSFER

Section 10.1 Representations as to Redevelopment. The Developer represents and agrees that its undertakings pursuant to this Agreement, are not for the purpose of development of the Project and not for speculation in land holding. The Developer further acknowledges and agrees, that in view of the importance of the development of the Project to the community, the qualifications and identity of the Developer and Gregg Wasser and Stanley R. Perelman as its principals, are essential to the community. The Developer further recognizes that the identity and qualifications of the Developer and its principals are the basis for the IDA entering into this Agreement, and in so doing, the IDA is relying upon the obligations of the Developer, and the expertise of its principals, for the faithful performance of all undertakings and covenants to be performed, without requiring in addition a surety bond or similar undertaking for such performance of all undertakings and covenants in this Agreement.

Section 10.2 Prohibition Against Transfers. In consideration of the provisions of Section 10.1, the Developer represents and agrees for itself, its members and managers respectively, that prior to the issuance of a Certificate of Completion for a particular Parcel, and without the prior written consent of the IDA, which consent may be granted or withheld in the sole discretion of the IDA:

(a) there shall be no transfer of the controlling interest in the Developer of Gregg Wasser or Stanley R. Perelman (collectively, the "Principals"); provided, however, upon written notice to the IDA, the Principals may transfer all or any portion of their respective interests in the Developer to an immediate family member or members, or to a family limited partnership either directly while living, or by will, through intestacy or by trust; provided in all such cases, there shall be no transfer of the conduct or control of the business and management of the Project by the Principals . . .

(b) there shall be no transfer of responsibility or authority for the conduct and control of the business and the management of the affairs of the Developer by the Principals of the Developer or the control over the construction and completion of the Project.

On or about March 7, 2003, G&S Mount Vernon, Inc. (Assignor) assigned its hereinabove described "Lease Agreement" to G&S Mount Vernon South, LLC (Assignee), a limited liability company formed by Gregg Wasser who executed the Assignment and Assumption Agreement on behalf of both parties as manager of each entity. G&S Mount Vernon South, LLC was a wholly owned subsidiary of G&S Mount Vernon. LLC.

The City of Mount Vernon Industrial Development Agency consented to the Assignment and Assumption Agreement.

The Assignment and Assumption Agreement specifically provided:

> "Nothing contained in this Agreement shall release Assignor from any duties, liabilities obligations under the Lease or any future amendments thereof."

HR Construction & Renovations, Inc. and G&S Mount Vernon, LLC entered into an agreement whereby HR Construction & Renovations, Inc. was retained by G&S Mount Vernon, LLC as a contractor for the construction of the Target parking garage.

On or about January 6, 2003, HR Construction & Renovations, Inc. entered into a written contract with Newcrete Precast Solutions titled Standard Form of Agreement Between Contractor (identified therein as HR Construction & Renovations, Inc.) and subcontractor (identified therein as Newcrete Precast Solutions) for Newcrete Precast Solutions to manufacture and install precast concrete panels for the Target parking garage.

Newcrete Precast Solutions is a division of New Enterprise Stone & Lime Co., Inc.

On or about March 4, 2003 Newcrete Precast Solutions entered into a written contract with Cornell & Company, Inc. for the erection and grouting of 913 pieces for the

Target parking structure by Cornell & Company, Inc.

On May 13, 2004 Cornell & Company, Inc. was the employer of John Maiolini at the subject redevelopment project construction site.

On or about February 13, 2004, Newcrete Precast Solutions entered into a written contract with Global Precast, Inc. to provide/supply 234 architectural concrete pieces. The contract provided that the scope of Global Precast, Inc. obligations under the contract included ". . . delivery to the site in Mount Vernon, New York (Target)" and excluded "jockeying of trailers on site."

Global Precast, Inc. shipped and delivered the contracted for concrete pieces on tractor trailers to an off-site location where the tractors and trailers were detached and the trailers were left at the off-site location with the concrete pieces remaining on the trailers. A separate trucking entity would then "jockey" the trailers from the off-site location to the construction site.

Neither Global Precast, Inc., nor any representative of Global Precast, Inc. ever appeared or were present at or upon the redevelopment project construction site.

On or about May 13, 2004, Newcrete Precast Solutions contracted with A.&J. Cianciulli, Inc. for the rental from A.&J. Cianciulli, Inc. of a tractor with a driver to "jockey" flatbed trailers loaded with precast concrete forms from an off-site staging area to the subject redevelopment project site identified as "Target Store, Sanford Boulevard and S. Fulton Ave., Mount Vernon, New York."

On May 13, 2004, John Puff Construction Co., Inc. was hired by Newcrete Precast Solutions to lease a tractor and a driver to Newcrete Precast Solutions for the pickup of trailers at an off-site staging area and transport the trailers to the subject

redevelopment project site.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company v Equitable Land Services, Inc.*, 207 AD2d 880, 881 (2nd Dept. 1994):

> "It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue *(State Bank v McAuliffe*, 97 AD2d 607 [3rd Dept. 1983]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alverez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York supra*, at p. 562)."
>
> Summary judgment, however, is a drastic remedy which should be granted only when there is no clear triable triable issue of fact presented. Even the color of a triable issue of fact should foreclose this remedy. Issue finding rather than issue determination is the key to the proper review of a summary judgment motion. *See Rudnitsky v Robbins*, 191 AD2d 488 (2nd Dept. 1993); *Triangle Fire Protection Corp. v Manufacturers Hanover Trust Co.*, 172 AD2d 658 (2nd Dept. 1991).
>
> On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement, in admissible form, to demonstrate the absence of any material issues of fact *(JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v Pomeroy*, 35 NY2d 361 [1974]).

The Plaintiffs in support of their motion for summary judgment proffer, *inter alia*, the oral deposition before trial of the Plaintiff, John Maiolini, wherein he describes the accident involving the offloading of concrete panels brought to the site on flatbed tractor

trailer trucks and offloaded by crane. John Maiolini's job was to connect the panels to the crane (Maiolini transcript pp. 19-21). The concrete panels were approximately 12 feet by 20 feet and one foot thick. Each truck came with two panels (*Id.* pp. 33-35). When transported, a metal chain was wrapped around the panel to secure it to the flatbed trailer. The chains were removed prior to attaching the concrete panels to the crane before the hoisting of the panels (*Id.* pp. 37-38, 43-44). To effect the attaching of the concrete panels to the crane, the Plaintiff climbed up a ladder provided by his employer to get to the top of the concrete panel (*Id.* pp. 47-48, 62).

After the Plaintiff climbed up the ladder and got on top of the concrete panel he was working at a height of approximately 20 feet above the ground (*Id.* pg. 79). Suddenly, the panel began to fall off of the trailer. As the panel was falling, the Plaintiff jumped off from the top of the concrete panel and fell to the ground below (*Id.* pg. 74).

At the time of the accident, the Plaintiff was not provided with any safety devices such as safety belts, safety harnesses, safety lines, safety cables, life lines or safety nets as none were available. The Plaintiff further testified that the concrete panel was not secured to the trailer immediately prior to his accident (*Id.* pp. 105, 229).

New York Labor Law Section 200(1) provides:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

New York Labor Law Section 240(1) provides in pertinent part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or 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."

New York Labor Law Section 241(6) provides:

> "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."

In addition to the above statutory protections, the Industrial Code of the State of New York provides:

> 22 NYCRR Section 23-1.7 Protection from General Hazards:
>
> (f) Vertical passage. Stairways, 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.
>
> 22 NYCRR Section 23-1.16 Safety Belts, harnesses, Tail Lines and Lifelines:
>
> (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer.

At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

22 NYCRR Section 23-1.21 Ladders and Ladderways:

General requirement for ladders.

(4) Installation and use.

(i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

(iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.

(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower

end is tied to a secure anchorage or safety feet are used.

v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.

In support of their motion, with respect to the Defendant, G&S Mount Vernon, LLC, the Plaintiffs have submitted the oral deposition before trial of Douglas Riley who identified the other members of G&S Mount Vernon, LLC as Greg Wasser, Lawrence Traub and Robert Weinberg (Riley transcript p. 14) and states that he believed that the sole purpose for the formation of G&S Mount Vernon, LLC was the development project at Sanford Blvd (*Id.* pp. 23-24).

Mr. Riley testified:

". . . the transaction between G&S Mount Vernon, LLC and the IDA ultimately became two separate transactions: one for the so-called north side and one for the so-called south side. The lessee of each lease with the IDA became wholly subsidiary to G&S Mount Vernon, and that was G&S Mount Vernon South , LLC and G&S Mount Vernon North, LLC." (*Id* p. 25).

In further support of their motion, the Plaintiffs have submitted the oral deposition before trial of Grey Wasser who identified himself as a majority principal of G&S Mount Vernon, LLC on May 13, 2004 (Wasser transcript p. 25). Mr. Wasser also identified himself as a fifth (50%) percent shareholder of HR Construction & Renovations, Inc. (*Id.* pg. 39). Mr. Wasser described the existence of a contract between G&S Mount Vernon, LLC & HR Construction & Renovations, Inc. wherein HR Construction &Renovations, Inc. was retained by G&S Mount Vernon, LLC as a contractor on the subject development project (*Id.* pp 40-42) and thereafter HR Construction & Renovations, Inc., as a contractor, entered into a subcontract agreement with "Newcrete

Products, as a division of New Enterprise Stone & Lime Co., Inc." for the manufacturing and erection of the "Target" parking garage on the south side parcel of the subject development project (*Id.* pp. 43-44).

Based upon the Court's findings of fact from the papers submitted for its consideration herein and the oral deposition of the Plaintiff, John Maiolini, the Court finds that the Plaintiffs have not proffered evidence of alleged violations of Sections 23-1.5, 23-1.15, 23-1.17, 23-1.25, 23-5, 23-6, 23-7 and 23-8 of the Industrial Code of the State of New York and Article 1926 of O.S.H.A. However, the Plaintiffs have met their burden of proof with respect to their motion for summary judgment with respect to their claims set forth in their Amended Verified Complaint of common law negligence and violation of Labor Law Sections 200, 240(1) & 241(6) against the Defendants G&S Mount Vernon, LLC, HR Construction & Renovations, Inc. and New Enterprise Stone & Lime Co., Inc., s/h/a/ Newcrete Precast Solutions (motion sequence no. 2).

Specifically, the Court finds that the Plaintiffs have *prima facie* demonstrated that the Plaintiff, John Maiolini, suffered a gravity-related injury and that the absence of a statutorily enumerated safety device proximately caused his injury and that the Defendants G&S Mount Vernon, LLC, HR Construction & Renovations, Inc. and New Enterprise Stone & Lime Co., Inc. were subject to the duties enumerated in 22 NYCRR Sections 23-1.7, 23-1.16 and 23-1.21 *(see Wilinski v 334 East 92nd Street Housing Development Fund Corp.*, ___ NY3d ___, 2011 WL 5040902 [2011]).

Furthermore, the Court finds that the Plaintiffs have failed to meet their burden of proof with respect to their motion for summary judgment against the Defendants G&S

Mount Vernon, Inc., G&S Investors Corp., G&S Investors/Miller Place, L.P. and G&S Investors (motion sequence no. 2).

Therefore, the burden of proof shifts to the Defendants, G&S Mount Vernon, LLC, HR Construction & Renovations, Inc. and New Enterprise Stone & Lime Co., Inc., s/h/a/ Newcrete Precast Solutions to proffer evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial herein.

In opposition to the Plaintiffs' motion and in support of their motion for summary judgment dismissing the Plaintiffs Complaint (motion sequence no. 14), the Defendants G&S Mount Vernon, LLC, G&S Mount Vernon, Inc., G&S Investors Corp., G&S Investors, and HR Construction & Renovations, Inc. proffer the Affidavits of Neil L. Sambursky, Esq., Craig H. Handler, Esq. and Douglas Riley and the oral depositions before trial of Daniel Bargas, Sr. and Larry Morris.

At his oral deposition before trial, Daniel Bargas, Sr. identified himself as the "general foreman" employed by Cornell and Company, Inc. at the date, time and place of the accident which is the subject matter of the instant action (Bargas transcript pg. 16).

At his oral deposition before trial, Larry Morris identified himself as a "Vice President" of Cornell and Company, Inc. (Morris transcript pp 9-10).

At his oral deposition before trial, Larry Morris testified that he was at the accident site on the date of the subject accident but not at the time of the accident (*Id.* pp. 68-69).

At his oral deposition before trial, Daniel Bargas, Sr. testified that he did not observe how the Plaintiff, John Maiolini, ascended to the top of the concrete precast panel (*Id.* p. 55), that he did observe that the concrete precast panel was not secured to the flatbed trailer (*Id* p. 56), that at the time of the subject accident there was a tractor

connected to the trailer (Id. p. 56) and that he did not see the accident itself, just the conclusion of the accident with the Plaintiff and the precast panel lying on the ground with a ladder under the panel (*Id.* pp. 57-58, 103, 134).

In his Affidavit, Neil L. Sambursky states:

> "G&S MOUNT VERNON, LLC ("G&S LLC") is the only named G&S party that had any relationship to the premises at issue; however, its role was limited to that of a temporary lessee."

In his Affidavit, Craig H. Handler states:

> ". . . the actual construction for the project was completed by various contractors retained by HR Construction."

In his Affidavit, Douglas Riley identifies himself as a "member" of G&S Mount Vernon, LLC.

In opposition to the motion of A.& J. Cianciulli, Inc., a Third-Third-Party Defendant to dismiss the Third-Third-Party Complaint (motion sequence no. 11) the Defendant, Second Third-Party Plaintiff New Enterprise Stone & Lime Co., Inc., also incorrectly sued herein as Newcrete Precast Solutions, submitted the Affidavit of Mark Hillard who stated the following uncontested facts:

> In May 2004, I was employed by new Enterprise Stone & Lime Co., Inc. (NESL) as its Field Coordinator with regard to a project taking place on Sanford Boulevard in Mt. Vernon, New York. That project involved the construction of a Target Store and precast concrete parking garage . . .
> I was the NESL representative at this project on a regular basis . . .
>
> NESL did not build or erect this parking garage. NESL subcontracted that work to a Certified Precast Institute erector named Cornell & Company.

Where, as here, the Plaintiffs' claim arises out of an alleged dangerous method of the work performed at a construction site, recovery against the owner or general

contractor cannot be had unless it is shown that the party to be charged had the authority to supervise or control the performance of the work being performed (*see Ortega v Puccia*, 57 AD3d 54 [2nd Dept. 2008]).

This Court finds and determines that the Defendant, G&S Mount Vernon, LLC, had a leasehold interest in the subject premises and that the Defendants, HR Construction & Renovations, Inc. and New Enterprise Stone & Lime Co., Inc., were general contractors with respect to the redevelopment project at the subject construction site.

While the said Defendants may be statutorily vicariously liable for the acts of others, the Court finds that they have met their burden of proof with respect to submitting evidentiary proof creating issues of fact whether the said Defendants had authority to supervise or control the performance of the work being performed by the Plaintiff, John Maiolini, at the time of his accident which is the subject matter of the instant action.

Accordingly, the Plaintiffs' motion for summary judgment (motion sequence no. 2) is denied in all respects.

In support of its cross-motion for summary judgment dismissal of the Plaintiffs' Labor Law Section 240(1) cause of action (motion sequence no. 10) the Third-Third-Party Defendant, A.&J. Cianciulli, Inc., submits that the Plaintiff, John Maiolini's "unloading of a flatbed truck is not a Labor Law Section 240(1) 'Protected Activity' " citing to, *inter alia, Berg v Albany Ladder Co., Inc.*, 10 NY3d 902 (2008).

In opposition to the aforesaid motion, the Plaintiffs submit and this Court concurs that the facts herein are substantially different and distinguishable with the facts in the movant's cited cases.

The Plaintiffs further submit the Affidavit of Nicholas Bellizzi, who the Court, *sua sponte*, finds to be an expert in the fields of construction, civil engineering and accident reconstruction.

In his Affidavit, Mr. Bellizzi states:

> "Mr. Maiolini was working at a height which posed an elevation-related risk when he fell at least 13-20 feet to the ground.
>
> * * *
>
> The means and methods utilized in the off loading of the precast concrete panels, without proper, adequate and safe fall protection was inherently unsafe, dangerous, and hazardous. Mr. Maiolini was not provided with any safety equipment to have prevented his fall from an elevated work surface.
>
> * * *
>
> Mr. Maiolini should not have been required to work in an elevated and unsafe position without any means of fall protection in that it was foreseeable that either he could fall or be caused to fall or the concrete panel itself, left unsecured, could fall."

Based on the Affidavit of Mr. Bellizzi, the Court finds that he Plaintiff has sufficiently established a causal nexus between the Plaintiff's injury and a lack or failure of a device prescribed by Labor Law Section 240(1) to defeat the cross-motion of the Third-Third-Party Defendant A.&J. Cianciulli, Inc. (motion sequence no. 10).

The motion of A.&J.Cianciulli, Inc. a Third-Third-Party Defendant (motion sequence no. 11), for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment in favor of the movant dismissing the Amended Complaint of the Defendants/Third-Third-Party Plaintiffs, New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions is premised upon:

> "(1) that A.&J. had absolutely no duty as concerns the activity which

> gave rise to Plaintiff, JOHN MAIOLINI'S injury . . .,
>
> (2) that A.&J. never agreed either orally or in writing to defend, indemnify, and/or procure a policy of insurance in favor of any party to this action; and
>
> (3) that A.&J. completely relinquished control over its single on-site employee, Edward Rice whose work was exclusively directed, supervised and controlled by Newcrete/New Enterprise."

In its opposition the Third-Third-Party Plaintiffs concede:

> ". . . that discovery has not adduced the existence of a factual agreement to support a contractual indemnity or breach of contract claim against A.&J. and that those causes of action in the Third-Third-Party Complaint arising out of contract should be dismissed."

Accordingly, the Third and Fourth Causes of Action set forth in the Amended Third-Third-Party Complaint are herewith dismissed.

In support of A.&J. Cianciulli, Inc.'s motion to dismiss the common law causes of action for indemnity and contribution set forth in the Amended Third-Third-Party Complaint, it proffers, *inter alia*, the examination-before-trial of A.&J. Owner/President Joseph Cianciulli and an Affidavit of Joseph Cianciulli, the examination-before-trial of non-party Edward Rice, the examination-before-trial of John Puff, the President of John Puff Construction Co., Inc., the examination-before-trial of Daniel Bargas, the General Foreman of Cornell & Company, Inc. and the examination-before-trial of Larry Morris, a Vice President and Risk Manager of Cornell & Company, Inc.

Based upon this Court's review of all of the evidentiary matter submitted in support of the aforesaid motion, the Court finds that the movant A.&J. Cianciulli, Inc. has not met its burden of proof to show, *prima facie*, its entitlement to summary judgment dismissal of the First and Second Causes of Action set forth in the Amended Third-

Third-Party Complaint.

Therefore, the Court must deny that aspect of the said motion regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276 [1st Dept. 2006]). Specifically, the Court finds that the movant has not *prima facie* demonstrated that its employee, Ed Rice, was a special employee of another entity at the construction site, i.e., that A.&J. Cianciulli, Inc. had completely relinquished control over Mr. Rice's work which was then performed for the benefit and under the express instruction and control of another entity (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]).

The cross-motion of John Puff Construction Co., Inc., a Third-Third-Party Defendant (motion sequence no. 12) for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment in favor of the said cross-movant dismissing the Amended Complaint of the Defendants/Third-Third-Party Plaintiffs, New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions and all cross-claims and counterclaims asserted against John Puff Construction Co., Inc. is premised upon:

> "Newcrete's claims sounding in contribution and common law indemnity should be dismissed as Puff Construction committed no negligent act or omission (emphasis omitted).
>
> * * *
>
> Newcrete's claims sounding in contribution and/or common law indemnity should be dismissed as Puff Construction cannot be liable in contribution or common law indemnity to Newcrete since the union driver became a 'special employee' of Newcrete (emphasis omitted).
>
> * * *
>
> Newcrete's Third-Party claims sounding in contractual indemnity over Puff Construction should be dismissed as there is no contract

between Newcrete and Puff Construction calling for indemnification (emphasis omitted).

* * *

Newcrete's Third-Party claim sounding in failure to procure insurance should be dismissed (emphasis omitted)."

In its opposition the Third-Third-Party Plaintiffs concede:

". . . that discovery has not adduced the existence of a factual agreement to support a contractual indemnity or breach of contract claim against Puff and that those causes of action in the Third-Third-Party Complaint arising out of contract should be dismissed."

Accordingly, the Seventh and Eighth Causes of Action set forth in the Amended Third-Third-Party Complaint are dismissed.

In support of John Puff Construction, Inc.'s cross-motion to dismiss the common law causes of action for indemnity and contribution set forth in the Amended Third-Third-Party Complaint and summary judgment dismissal of all cross-claims and counterclaims against John Puff Construction, Inc., it proffers, *inter alia*, the examination-before-trial of the Plaintiff, John Maiolini, the examination-before-trial of Dan Bargas, the foreman for Cornell & Company, Inc., the examination-before-trial of Shawn K. Hite, a project manager for New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions, the examination-before-trial of Renato Ostella, a shipping supervisor for Global Precast, Inc., John Puff, a principal of John Puff Construction Co., Inc., and the examinations-before-trial of non-parties Ed Rice and Joseph Anderek.

Based upon this Court's review of all of the evidentiary matter submitted in support of the cross-motion, the Court finds that the cross-movant, John Puff Construction Co., Inc., has not met its burden of proof to show, *prima facie*, its

entitlement to summary judgment dismissal of the Fifth and Sixth Causes of Action set forth in the Amended Third-Third-Party Complaint and all cross-claims and counterclaims asserted against John Puff Construction Co., Inc.

Therefore, the Court must deny that aspect of the said cross-motion regardless of the sufficiency of the opposing papers *(Liberty Tax. Mgt. Inc. v Gincherman, supra*). Specifically, the Court finds that the cross-movant has not *prima facie* demonstrated that its employee, Joseph Anderek was a special employee of another entity at the construction site, i.e., that John Puff Construction Co., Inc., had completely relinquished control over Mr. Anderek's work which was then performed for the benefit and under the express instruction and control of another entity (*Thompson v Grumman v Aerospace Corp., supra*).

The cross-motion of the Defendants and Second Third-Party Plaintiffs, and Third-Third-Party Plaintiffs, New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions (motion sequence no. 13) for an order of this Court, pursuant to Rule 3212 of the CPLR, granting these cross-movants summary judgment dismissal of the Plaintiff's Labor Law Sections 200, 240(1) and 241(6) claims asserted against it and for a conditional order of summary judgment in their favor over and against the Second Third-Party Defendant, Global Precast, Inc., is determined as set forth hereinbelow.

As previously noted, this Court has been advised by counsel for Defendants and Second Third-Party Plaintiffs and Third-Third-Party Plaintiffs, New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions, that their Second Third-Party claims against Global Precast, Inc. have been settled and that they thereby withdraw that

branch of their cross-motion (motion sequence no. 13) which seeks a conditional order of summary judgment in their favor over and against the Second Third-Party Defendant, Global Precast, Inc.

This Court determines that the work being performed by the Plaintiff, John Maiolini, at and immediately prior to the subject accident was inherently dangerous.

While it is well settled that the responsibility of an owner or general contractor does not include responsibility for injuries which arise as a result of the negligent performance of the work being done by a subcontractor as a detail of the work being undertaken (*see Scavone v State Univ. Constr. Fund*, 46 AD2d 895 [2nd Dept. 1974]), the exception to this rule of law is where work is inherently dangerous (*Chianani v Board of Educ. of City of New York*, 87 NY2d 663 [1995]).

Furthermore, this Court concludes that the risk of injury to the Plaintiff, John Maiolini, arose from a physically significant elevation differential. However, it cannot be determined whether the Plaintiff's injuries were a direct consequence of a failure to provide adequate protective devices to prevent the accident. Accordingly, neither the Plaintiffs nor the Defendants, G&S Mount Vernon, LLC, HR Construction & Renovations, Inc., New Enterprise Stone & Lime Co. and Newcrete Precast Solutions are entitled to summary judgment on the issue of liability *(Wilinski v 334 East 92nd Street Housing Development Fund Corp.*, __ NY3d __, WL 5040902 [2011]).

Accordingly, that branch of the cross-motion (motion sequence no. 13) which seeks summary judgment dismissal of the Plaintiff's Labor Law claims asserted against New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions is denied.

The motion of G&S Mount Vernon , LLC, G&S Mount Vernon, Inc., G&S Investors Corp., G&S Investors/Miller Place, L.P., G&S Investors and HR Construction & Renovations, Inc., Defendants and Third-Party Plaintiffs (motion sequence no. 14) for an order of this Court pursuant to Rule 3212 of the CPLR:

a) dismissing the Plaintiff's common law negligence and New York Labor Law Sections 200, 240(1) and 241(6) causes of action and all cross-claims against the G&S entities is determined as follows:

b) dismissing the Plaintiff's common law negligence and New York Labor Law Sections 200, 240(1) and 241(6) causes of action and all cross-claims against HR Construction & Renovations, Inc. is denied;

c) granting HR Construction & Renovations, Inc. and G&S Mount Vernon, LLC, G&S Mount Vernon, Inc., G&S Investors Corp., G&S Investors/Miller Place, L.P. and G&S Investors summary judgment on their claims for contractual indemnification as against New Enterprise Stone & Line Co., Inc. and Newcrete Precast Solutions and Cornell and Company, Inc. is denied; and

d) granting G&S Mount Vernon, LLC, G&S Mount Vernon, Inc., G&S Investors Corp., G&S Investors/Miller Place, L.P., G&S Investors, and HR Construction & Renovations, Inc. common law indemnification as against New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions is determined as follows:

Based upon all the papers submitted herein, the Court finds and determines that G&S Mount Vernon, LLC is the only named G&S entity that had any relationship to the redevelopment project construction site premises.

Therefore, this Court grants the instant motion (motion sequence no. 14) to the

extent that the Plaintiff's Amended Verified Complaint is herewith dismissed as to the Defendants, G&S Mount Vernon, Inc., G&S Investors Corp., G&S Investors/Miller Place, L.P. and G&S Investors.

All other arguments set forth in support of motion sequence no. 14 have been considered and are determined to be without merit.

The motion of the Second Third-Party Defendant, Global Precast, Inc. for an order of this Court pursuant to Rule 3212 of the CPLR, dismissing the Second Third-Party Complaint of New Enterprise Stone & Lime Company and Newcrete Precast Solutions and all cross-claims and causes of action against Global Precast, Inc. (motion sequence no. 15) is determined as follows:

In addition to all of the other depositions before trial, in support of the instant motion (motion sequence no. 15) the movant has submitted the oral deposition before trial of Renato Ostella, the movant's outside supervisor and shipping supervisor, an expert affidavit from Christopher W. Ferrove who opined: "The Global Precast trailer was properly loaded and secured with concrete panels; the concrete panels were properly secured in a safe and reasonable manner within acceptable standards" together with the contract between New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions and Global Precast, Inc., dated February 13, 2004.

Again, this Court has been advised by counsel for Defendants and Second Third-Party Plaintiffs and Third-Third-Party Plaintiffs, New Enterprise Stone & Lime Co., and Newcrete Precast Solutions that Global Precast, Inc., has withdrawn that branch of its motion for summary judgment dismissal of the claims asserted against it by the said defendants and Second Third-Party Plaintiffs and Third-Third-Party Plaintiffs.

Based upon all of the above, this Court finds and determines that the Second Third-Third-Party Defendant, Global Precast, Inc. has met its burden of proof and established its entitlement to summary judgment dismissal of all other cross-claims and causes of action against it.

Therefore, there being no opposition thereto, that branch of the hereinabove described motion (motion sequence no. 15) of the Second Third-Party Defendant, Global Precast, Inc., for summary judgment dismissal of all other cross-claims and causes of action against it is granted.

The cross-motion of the Third-Party Defendant, Cornell & Company, Inc. (motion sequence no. 16), for an order of this Court, pursuant to Rule 3212 of the CPLR, dismissing the Third-Party causes of action of G&S Mount Vernon, LLC, G&S Mount Vernon, Inc., G&S Investors Corp. and G&S Investors/Miller Place, L.P. on the grounds that with respect to the First Cause of Action, there is no contract which requires this cross-movant to indemnify these Third-Party Plaintiffs, with respect to the Second Cause of Action that the said Third-Party Plaintiffs are not entitled to attorney's fees because they rejected AIG/Cornell's tender of defense herein and with respect to the Third Cause of Action this cross-movant is only subject to a claim for contribution, is determined as follows:

In support of this cross-motion, the cross movant has submitted a copy of the March 4, 2003 contract between New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions ("Contractor") and Cornell & Company, Inc. ("Subcontractor") which provided for Cornell & Company, Inc. to:

". . . perform hereinafter specified portions of the work required under Contractor's Prime Contract dated January 28, 3003 with HR Construction & Renovation Inc. . . . ("Owner"), for the construction of Target Parking Deck, Mt. Vernon, New York ("Project").

Paragraph 4 of the contract provided in pertinent part:

Insurance and Indemnification

4.1 The Subcontractor shall provide insurance of the types and amounts required of Contractor in the Prime Contract, or set forth an Exhibit B to this Subcontract, whichever is greater. The insurance shall not be subject to material alteration, cancellation, or non-renewal without thirty days' advance written notice to the Contractor. The insurance shall remain in effect until the Subcontract Work is completed, or for such longer period as is specified in the Prime Contract or Exhibit B. Subcontractor shall provide the Contractor a certificate evidencing the required coverage, and reflecting the aforesaid requirement of thirty days' notice of alteration, cancellation or non-renewal, before commencing work under the Subcontract. If the Contractor so requests, it shall be allowed to examine the insurance policies and endorsements.

* * *

4.3 The Subcontractor agrees to defend, indemnify and hold harmless the Contractor and Owner, and their respective officers, agents and employees, from and against any and all claims, demands, injuries, losses, expenses (including attorneys' fees), damages and liabilities of every nature, including contractual liability, arising from or relating to work performed by the Subcontractor on the Project, whether or not the Contractor was negligent, unless the Contractor was solely negligent. Subcontractor's obligation to defend, indemnify and hold harmless shall extend, without limitation, to all claims alleging death or injury to persons or damage or loss to property as a result of the acts or omissions of the Subcontractor, its employees, subcontractors, or others for those actions Subcontractor may be held liable. Subcontractor's obligations under this Article shall be in addition to any independent liability imposed by the Prime Contract.

Pursuant to Exhibit B of the contract, Cornell & Company, Inc. was required to obtain a Commercial General Liability Insurance Policy insuring New Enterprise Stone &

Lime Co., Inc. and Newcrete Precast Solutions naming "HR Construction & Renovations, Inc. and G&S Investors" as "additional insureds."

There is no dispute that the "Prime Contract" referenced in the aforesaid March 4, 2003 contract was never signed.

There is also no dispute that Cornell & Company, Inc. procured the required insurance policy with New Enterprise Stone & Lime Co., Inc. as the named insured and HR Construction & Renovations, Inc. and G&S Investors names as "additional insureds."

The contract is clear and unequivocal. It expressly states Cornell & Company, Inc.'s defense and indemnification obligations are to New Enterprise Stone & Lime Co., Inc., G&S Investors and HR Construction & Renovations, Inc. There is no agreement between Cornell & Company, Inc. and any party to the instant action that requires Cornell & Co., Inc. to defend or indemnify any other G&S entity.

Therefore, the cross-motion of the Third-Party Defendant (motion sequence no. 16) is granted to the extent of dismissing the Three (3) Causes of Action set forth in the Third-Party Complaint with respect to Third-Party Plaintiffs G&S Investors Corp. and G&S Investors/Miller Place, L.P.

With respect to the Second Cause of Action set forth in the Third-Party Complaint, paragraph numbered 34 sets forth:

> "Wherefore, G&S and HR Construction hereby demands judgment declaring that Cornell is required to provide a defense to Seasons (sic) with respect to plaintiff's claims and to indemnify Seasons (sic) for any amount recovered by plaintiff (sic) from Seasons (sic), together with the costs of defense and attorney's fees and expenses incurred in the defense of this suit, with interest thereon."

Based upon all the papers submitted for this Court's consideration, this Court

finds and determines that there exists a triable issue of fact as to whether the Defendant Third-Party Plaintiff, HR Construction & Renovations, Inc. voluntarily assumed its defense of the above captioned action.

Accordingly, that branch of the cross-motion (motion sequence no. 16) which seeks summary judgment dismissal of the Second Cause of Action set forth in the Third-Party Complaint herein is denied with respect to the Defendant Third-Party Plaintiff, HR Construction & Renovations, Inc.

With respect to the Third Cause of Action set forth in the Third-Party Complaint:

> New York General Obligations Law Section 5-322.1, (effective May 21, 1993) provided in pertinent part:
>
> > 1. A convenant, promises agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction . . . of a building, structure, appurtenances and appliances . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable . . ."

Therefore, the hereinabove set forth indemnity provisions of the Contract between New Enterprise Stone & Lime Co., Inc. and Newcrete Precast Solutions and Cornell & Company, Inc. wherein HR Construction & Renovations, Inc. is identified as the "Owner" are not enforceable to the extent that any negligence of HR Construction & Renovations, Inc. contributed to the subject construction site accident and HR Construction & Renovations, Inc. cannot be indemnified therefor (*Armentano v Broadway Mall Properties, Inc.*, 70 AD3d 614 [2nd Dept. 2010]).

Accordingly, the cross-motion of the Third-Party Defendant for summary

judgment dismissal of the Third Cause of Action set forth in the Third-Party Complaint is granted to the extent that the Third-Party Plaintiff, HR Construction & Renovations, Inc., who is the beneficiary of the subject contractual indemnity cannot be indemnified for any negligence that it may be found to have contributed to the construction site accident that is the subject matter of the instant action.

All applications, not specifically addressed, are denied.

This constitutes the decision and order of the court.

Dated: 12/12/11

Angela G. Iannacci, J.S.C.