

**Bong Yeong Shim v Vornado Realty Trust**

2010 NY Slip Op 31484(U)

June 9, 2010

Sup Ct, Queens County

Docket Number: 12055/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

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BONG YEONG SHIM,  
  
Plaintiff,  
  
-against-  
  
VORNADO REALTY TRUST, et al.,  
Defendants.  
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Index No. 12055/08  
  
Motion  
Date April 13, 2010  
  
Motion  
Cal. No. 31 and 32  
  
Motion  
Sequence No. 1 and 2

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Upon the foregoing papers it is ordered that these motions are determined as follows:

Plaintiff moves for an order pursuant to CPLR 240(1) seeking partial summary judgment against defendants Vornado Realty Trust, Green Acres Mall, LLC, and Masterpiece Designer's Bags, Inc. individually and d/b/a M. Alpine Sports, on behalf of the plaintiff on the issue of liability. Defendants Vornado Realty Trust, Vornado Realty, L.P., Green Acres Mall, LLC, Masterpiece Designer's Bags, Inc. Individually and d/b/a M. Alpine Sports move and cross-move for an order dismissing plaintiff's Complaint in its entirety.

Plaintiff, Bong Yeong Shim, seeks to recover damages for serious personal injuries allegedly sustained on March 1, 2008 while he was performing work during the course of his employment with G.S. Sign & Awning, Corp. ("G.S. Sign"). On March 1, 2008, defendant Vornado Realty Trust ("Vornado") was the owner of the premises known as the Green Acres mall, located in the Village of

Valley Stream, County of Nassau, State of New York. Prior to that date, defendant, M. Alpine Sports had entered into a License Agreement with the defendant, Green Acres, to occupy a space situated on the first floor of the Green Acres Mall. Defendant, M. Alpine Sports hired G.S. Sign & Awning, Corp. ("G.S. Sign") to provide and install a sign which was to be placed above its storefront. Pursuant to plaintiff's Complaint, plaintiff was performing work on a ladder within the first floor of the building and the defendants "negligently allowed the aforementioned ladder . . . to exist in an unsafe, hazardous, broken and otherwise improper, negligent and dangerous condition." Additionally, plaintiff states in his Complaint that the ladder was caused to topple, causing plaintiff to fall approximately twelve (12) feet onto the floor, resulting in the plaintiff suffering serious personal injuries.

Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; see *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v. State of New York*, 59 AD3d 666 [2009]; *Rau v. Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see, *Gordon v. Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v. Puccia*, 57 AD3d 54 [2008]; *Riccio v. NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (see, *Chlebowski v. Esber*, 58 AD3d 662 [2009]; *Rakowicz v. Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v. Brogor Realty Corp.*, 45 AD3d 828 [2007]).

"Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured." (*Orner v. Port Authority*, 293 AD2d 517, [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (*Salinas v. Barney Skansa Construction Co.*, 2 AD3d 619 [2d Dept 2003]). Under Labor Law § 240(1), liability is absolute, regardless of whether the owner or

general contractor exercises direction or control over plaintiff's work (see, *Blake v. Neighborhood Housing Services of New York*, 1 NY3d 380 [2003]; *Ross v. Curtis-Palmer Hydro Elec. Co.*, 81 NY2d at 500.) Further, contributory negligence is not a defense to a claim predicated on Labor Law § 240(1).

The court finds that plaintiff has established his entitlement to judgment as a matter of law. By virtue of his deposition testimony, plaintiff has demonstrated that moving defendants failed to provide him with a secure ladder while he was working at an elevated height, and that this failure was a proximate cause of his injuries (see, *Inga v. EBS N. Hills, LLC*, 69 AD3d 568 [2010]; *Barr v. 157 5 Ave., LLC*, 60 AD3d 796 [2009]; *Crooks v. E. Peters, LLC*, 60 AD3d 717 [2009]). Plaintiff established that as he was in the process of installing the sign, he felt the bottom of the ladder slip in a manner that moved it away from the store, causing plaintiff to fall off the ladder to the ground. Plaintiff also established that he had warned his boss of the ladder's feet being worn out, but he was told to just continue working with it.

Defendants' claim that Section 240(1) of the New York State Labor Law is inapplicable to the instant matter is unavailing. Defendants claim that the activities of Mr. Shim, in installing new sign on the facade of the store "were more akin to cosmetic maintenance or decorative modification than to 'altering' for purposes of Labor Law 240(1)." The testimony established that plaintiff was installing a sign that was to be permanently affixed to the front of defendant, M. Alpine Sport's store.

Defendants failed to demonstrate that they provided plaintiff with proper protection.

Accordingly, plaintiff's motion for partial summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1) is granted.

Defendants move and cross-move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

This section imposes a non-delegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, *Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged

to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." (*Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards," but rather must establish "concrete specifications." (see, *Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996]).

Defendants maintain that the plaintiff was not performing any of the tasks enumerated in Rule 23 of the Industrial Code at the time of the accident. Plaintiff establishes that the accident was brought about by violations of the New York State Industrial Code Section 23-1.21, specifically, NYCRR 23-1.21(b)(4) subdivisions (ii) and (iv). The Courts have held that said section is sufficiently specific to support a Labor Law § 241(6) claim (*Ferrero v. Best Modular Homes, Inc.*, 33 AD3d 847 [2d Dept 2006]; *Montalvo v. J. Petrocelli Const., Inc.* 8 AD3d 173 [1st Dept 2004]). Plaintiff has presented proof establishing that a specific statutory violation caused his injury.

Accordingly, defendants' motion and cross motion are denied regarding Labor Law § 241(6).

Defendants move and cross move for summary judgment dismissing plaintiff's Labor Law § 200 claim.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." (*Damiani v. Federated Department Stores, Inc.*, 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (Id.)

Defendants established a prima facie case, through the submission of, inter alia, plaintiff's sworn deposition testimony, that defendants did not exercise the requisite amount of supervision or control over the work being performed by plaintiff that resulted in his injury (see, *Damiani, supra*; *Ross, supra*). Defendants established that they exercised no supervision or control over plaintiff. For example, plaintiff

testified that no one helped him put up the sign or told him how to do his job on the date of the accident.

In opposition, plaintiffs presented sufficient evidence to raise an issue of fact. In opposition, plaintiff presents, inter alia, the examination before trial transcript testimony of defendants' witness, Grace Yang-Paek, the mall manager on duty at the time of the accident. Ms. Paek testified that she had actual notice of the sign installation work taking place as she approached the store while work was ongoing. Notwithstanding her awareness of the work taking place at the store, she did not take any measures to prevent it from continuing. There are triable issues of fact as to whether the Green Acres Mall management had the authority to control the sign installation work as they were not notified of the work prior to its commencement.

Accordingly, defendants' motion and cross motion are denied regarding Labor Law § 241(6).

This constitutes the decision and order of the Court.

Dated: June 9, 2010

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**Howard G. Lane, J.S.C.**