

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARTIN J. SCHULMAN IA PART 7  
Justice

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STANISLAW HARASIM, et al. Index  
Number 25379 2002

- against - Motion  
Date December 7, 2004

CORD MEYER DEVELOPMENT COMPANY, Motion  
et al. Cal. Number 21

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CORD MEYER DEVELOPMENT COMPANY

- against -

CAMILLO CONTRACTING, INC.

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The following papers numbered 1 to 15 read on this motion by plaintiffs Stanislaw Harasim and Zuzanna Harasim for partial summary judgment against defendant Cord Meyer Development Company (Cord Meyer) on the issue of liability pursuant to Labor Law § 240(1); and on this cross motion by defendant Cord Meyer for summary judgment dismissing plaintiffs' complaint and all cross claims asserted against it on the ground that Labor Law § 240(1) liability does not attach because plaintiff Stanislaw Harasim's actions were the sole proximate cause of his injuries; and on this cross motion by defendant Demolition Specialists, Inc. (Demolition) for summary judgment dismissing the complaint and cross claims on the same ground.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits .....	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-11
Answering Affidavits - Exhibits .....	12-13
Reply Affidavits .....	14-15

Upon the foregoing papers it is ordered that the motion and cross motion are determined as set forth herein.

On January 16, 2002, plaintiff Stanislaw Harasim (plaintiff), who was employed as a bricklayer by third-party defendant Camillo Contracting, Inc. (Camillo), was leveling excess stones with a shovel from the top of a retaining wall while standing on top of the retaining wall when he fell approximately 10 feet to the cement ground below, sustaining personal injuries. The retaining wall was located at a construction site located at the Bay Terrace Shopping Center on 26th Avenue between 210th Road and 211th Street in Queens, New York, which is owned by defendant Cord Meyer. It is undisputed that, at the time of the accident, plaintiff's foreman, Sal Baretta, was operating a Bobcat front loader at the bottom of the wall to pick up and deposit the stones on the other side of the wall while plaintiff stood on the wall using a shovel to level excess stones from the top of the wall to the other side of the wall, where the stones were being used to fill in the open space. Water and ice, which had accumulated in the pile of stones which Mr. Baretta was picking up with the Bobcat, were also deposited on the top of the wall along with the excess stones which plaintiff was leveling to the other side of the wall. It is uncontested that defendant Cord Meyer did not provide plaintiff with any safety devices, such as a safety belt or harness or safety net, to use for his protection while working on the top of the retaining wall.

Labor Law § 240 (1) provides that: "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."

It is now well settled that, when it is shown "that a violation of Section 240 was a contributing cause of [an accident and injury to a plaintiff]," absolute liability is vicariously imposed on all "contractors and owners and their agents." (Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 524 [1985]; Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998].) It is equally "well settled that the injured's contributory negligence is not a defense to a claim based on Labor Law § 240(1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices." (Stolt v General Foods Corp.,

81 NY2d 918, 920 [1993].) The core objective of Section 240 is proper protection. Therefore, a non-delegable duty is imposed upon all responsible entities to protect construction workers, not just with scaffolds, but with such "ladders...ropes, and other devices...as to give proper protection to a person so employed." When a construction worker is not provided with "proper protection" and is injured as a result of one of the hazards which Section 240 was enacted to eradicate, the general common-law defenses are not available, and absolute liability is imposed on all responsible entities.

The "sole proximate cause" defense must logically be limited to the situation where a worker has been provided with "proper protection," and the worker thereafter, through intentional misuse of the safety device, or via other egregious misconduct, neutralizes the protections afforded by the safety device. Thus, once a plaintiff makes a prima facie showing that he or she was subjected to one of the hazards covered by Section 240, the burden shifts to the defendant to provide evidentiary proof in admissible form sufficient to establish that proper protection was afforded but rendered ineffective as a result of intentional or culpable conduct on the part of plaintiff.

Herein, defendant Cord Meyer does not deny that it failed to provide any safety devices to plaintiff to properly protect him while he worked on the top of the 10-foot retaining wall. Thus, having breached the non-delegable duties imposed by Labor Law § 240(1), Cord Meyer is subject to absolute liability for plaintiff's injuries. Inasmuch as Cord Meyer failed to provide plaintiff with any safety devices, the "sole proximate cause" defense is unavailable to Cord Meyer in this case.

Accordingly, plaintiffs' motion for partial summary judgment against defendant Cord Meyer on the issue of liability on plaintiffs' Labor Law § 240(1) claim is hereby granted. Defendant Cord Meyer's cross motion for summary judgment dismissing plaintiffs' complaint and all cross claims on the ground that plaintiff Stanislaw Harasim's actions were the sole proximate cause of his injuries, and defendant Demolition's cross motion for the same relief, are both hereby denied.

Dated: May 6, 2005

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J.S.C.