

**December 2, 2008 - - M&H Wins Reversal and Dismissal of Labor Law Claims.**

Spiegler v. Gerken Building Corp., 57 AD3d 514 (2d Dept., 2008)

In this personal injury action, M&H wins a reversal of the order of the Supreme Court, Kings County, which had erroneously denied the Defendants' motions for summary judgment on the Plaintiffs' Labor Law §§ 240(1) and 241(6) claims. The Second Department found that neither of the Labor Law provisions applied in the case as a matter of law. As a result of this decision, a complaint was dismissed and the litigation was terminated in favor of M&H's clients.

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<b>Spiegler v Gerken Bldg. Corp.</b>
2008 NY Slip Op 09584
Decided on December 2, 2008
Appellate Division, Second Department
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Decided on December 2, 2008

**SUPREME COURT OF THE STATE OF NEW YORK**  
**APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT**  
REINALDO E. RIVERA, J.P.  
PETER B. SKELOS  
DANIEL D. ANGIOLILLO  
RUTH C. BALKIN, JJ.

2007-06091  
(Index No. 37906/02)

**[\*1]Kerry Spiegler, et al., plaintiffs-respondents,**

v

**Gerken Building Corporation, et al., respondents- appellants, North Fork Bank,  
appellant-respondent, et al., defendant (and a third-party action).**

Hoey, King, Toker & Epstein (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn], of counsel), for appellant-respondent.

Thomas D. Hughes and Richard C. Rubinstein, for respondent-appellant Gerken Building Corporation.

Quirk and Bakalor, P.C., New York, N.Y. (Gloria B. Dunn and Joel M. Maxwell of counsel), for respondent-appellant Integrity Contracting, Inc.

Brecher, Fishman, Pasternack, Heller, Walsh & Tilker (Diamond and Diamond, LLC, New York, N.Y. [Stuart Diamond], of counsel), for plaintiffs-respondents.

## DECISION & ORDER

In an action to recover damages for personal injuries, etc., (1) the defendant North Fork Bank appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Schack, J.), dated May 4, 2007, as denied those branches of its cross motion which were for summary judgment dismissing the plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) insofar as asserted against it and denied, as premature, the branch of the same cross motion which was for conditional summary judgment on its cross claim for contractual indemnification against the defendant Integrity Contracting, Inc., (2) the defendant Integrity Contracting, Inc., cross-appeals, as limited by its brief, from so much of the same order as denied those branches of its motion which were for summary judgment dismissing the plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) insofar as asserted against it, and (3) the defendant Gerken Building Corporation separately cross-appeals, as limited by its notice of appeal and brief, from so much of the same order as denied those branches of its separate motion which were for [\*2]summary judgment dismissing the plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) insofar as asserted against it and denied, as premature, the

branch of the same motion which was for summary judgment on its cross claim for contractual indemnification against the defendant North Fork Bank.

ORDERED that the order is reversed insofar as cross-appealed from by the defendant Integrity Contracting, Inc., insofar as reviewed on the appeal by the defendant North Fork Bank, and insofar as reviewed on the cross appeal by the defendant Gerken Building Corporation, on the law, and those branches of the separate motions of the defendants Integrity Contracting, Inc., and Gerken Building Corporation, and the cross motion of the defendant North Fork Bank which were for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims insofar as asserted against each of them are granted; and it is further,

ORDERED that the appeal by the defendant North Fork Bank from so much of the order as denied that branch of its cross motion which was for conditional summary judgment on its cross claim for contractual indemnification against the defendant Integrity Contracting, Inc., is dismissed as academic, without costs or disbursements, in light of the determination of the appeal from so much of the order as denied those branches of its cross motion which were for summary judgment dismissing the plaintiffs' Labor Law §§ 240(1) and 241(6) claims insofar as asserted against it (*see Abbattista v King's Grant Master Assn., Inc.*, 39 AD3d 439, 442); and it is further,

ORDERED that the cross appeal by the defendant Gerken Building Corporation from so much of the order as denied that branch of its motion which was for summary judgment on its cross claim for contractual indemnification against the defendant North Fork Bank is dismissed as academic, in light of the determination of the cross appeal from so much of the order as denied those branches of its motion which was for summary judgment dismissing the plaintiffs' claims pursuant to Labor Law §§ 240(1) and 241(6) insofar as asserted against it (*see Abbattista v King's Grant Master Assn., Inc.*, 39 AD3d 439, 442); and it is further,

ORDERED that one bill of costs is awarded to the appellant-respondent and the respondents-appellants.

Kerry Spiegler (hereinafter the plaintiff) was working for the third-party defendant, All Ran Electric of New York, Inc. (hereinafter All Ran), which had been subcontracted by the defendant Integrity Contracting, Inc. (hereinafter Integrity), to perform electrical work on a building owned by the defendant Gerken Building Corporation (hereinafter Gerken) and leased to the defendant North Fork Bank (hereinafter North Fork). On May 5, 2000, the plaintiff was working in an electrical room in the basement of the building with a coworker installing a new electrical box. They were in the process of installing an approximately 10-foot-long mounting channel, vertically from the ground to the ceiling against the wall, which was approximately 10 to 15 feet high. The plaintiff was working at ground level and allegedly was injured while he was securing the mounting channel to the ground, when it struck him in the head.

The plaintiff and his wife, suing derivatively, commenced this action alleging claims based on common-law negligence and Labor Law §§ 200, 240(1), and 241(6). Integrity moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. Gerken separately moved for summary judgment dismissing the complaint insofar as asserted against it and for summary [\*3] judgment in its favor, inter alia, on its cross claim for indemnification against North Fork. North Fork cross-moved for summary judgment dismissing the complaint insofar as asserted against it and for conditional summary judgment in its favor on its cross claim asserted against Integrity for contractual indemnification. The Supreme Court granted those branches of the separate motions of Integrity and Gerken and that branch of North Fork's cross motion which were to dismiss the claims based on common-law negligence and Labor Law § 200 and denied those branches of the respective motions and cross motion which were to dismiss the claims based on Labor Law §§ 240(1) and 241(6). The Supreme Court also denied as premature all branches of the motions and cross motion relating to indemnification.

The protections of Labor Law § 240(1) only apply to elevation-related hazards where the work site itself is elevated or is positioned below the level where the materials or load are being hoisted or secured (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501). "With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is

related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d at 267-268, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514). Here, the mounting channel that fell on the plaintiff did not fall from an elevated height and was not the type of hazard experienced by construction workers that is covered by Labor Law § 240(1) (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 568; *Mikcova v Alps Mech., Inc.*, 34 AD3d 769, 770; *Bailey v Benderson*, 255 AD2d 927). Therefore, the Supreme Court should have awarded summary judgment to North Fork, Integrity, and Gerken dismissing the Labor Law § 240(1) claim insofar as asserted against each of them.

The Supreme Court should also have awarded summary judgment to North Fork, Integrity, and Gerken, dismissing the Labor Law § 241(6) cause of action, which was predicated on alleged violations of Industrial Code § 23-1.8(c)(1) (12 NYCRR 23-1.8[c] [1]), insofar as asserted against each of them as the code provision relied on did not apply to the facts of this case (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502) because this was not a "hard-hat" job (see *Modeste v Mega Contr., Inc.*, 40 AD3d 255, 256; *Mikcova v Alps Mech. Inc.*, 34 AD3d at 770; *Castillo v Starrett City*, 4 AD3d 320, 321; *Sikorski v Burroughs Dr. Apts., Inc.*, 306 AD2d 844, 845).

RIVERA, J.P., SKELOS, ANGIOLILLO and BALKIN, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court