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February 8, 2010

**VIA e-mail and First Class Mail**

Frank DeCarlo, CR, CMRS  
Paragon Restoration Group  
5230 Transit Road  
Depew, New York 14043  
Fdecarlo3534@comcast.net

Jeff Valone  
Try-Lock Roofing Company  
400 Northwood Drive  
Town of Tonawanda, New York 14223  
Jeff@trylock.com

Dear Jeff and Frank:

Re: Businesses for a Better New York - Labor Law 240 Challenge

I enclose a copy of the motion papers served by the State seeking to dismiss our new complaint. The Court has not yet scheduled the date upon which the motion will be heard, but I anticipate that it will be sometime in March. As soon as I learn the schedule, I will immediately advise you.

I will also work on Frank's motion to appear pro se. If you have any questions, please call me.

Very truly yours,

A handwritten signature in black ink, appearing to be "HMR", written over a horizontal line.

Hugh M. Russ, III

HMR/dah  
Enclosure

044525/00000 Litigation 7226036v1

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BUSINESSES FOR A BETTER NEW YORK,  
et al.,

Plaintiffs,

**MOTION TO DISMISS**

vs.

09-CV-891A

M. PATRICIA SMITH, in her official  
capacity, et al.,

Defendants.

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Defendants, by their counsel, Andrew M. Cuomo, Attorney General of the State of New York, Michael J. Russo, AAG, of counsel, hereby move this Court to dismiss the Complaint against them, which motion is to be heard at the United States Courthouse, 68 Court Street, 6th Floor, Buffalo, NY, at a date and time to be established by the Court, for the reasons set forth in the Defendants' Memorandum of Law, submitted herewith.

ANDREW CUOMO  
Attorney General of the State  
of New York  
Attorney for Defendants  
By: /s/ Michael J. Russo  
MICHAEL J. RUSSO  
Assistant Attorney General,  
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350 Main Street  
Main Pace Tower  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BUSINESSES FOR A BETTER NEW YORK,  
et al.,

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09-CV-891A

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---

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system.

ANDREW M. CUOMO  
Attorney General of the  
State of New York  
BY:

s/ Michael J. Russo  
MICHAEL J. RUSSO  
Assistant Attorney General  
of Counsel  
Counsel for Defendants  
NYS Office of the Attorney General  
350 Main Street  
Main Place Tower, Suite 300A  
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(716) 853-8479  
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**Hughes, Deborah**

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**From:** webmaster@nywd.uscourts.gov  
**Sent:** Friday, January 29, 2010 5:12 PM  
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**Subject:** Activity in Case 1:09-cv-00891-RJA Businesses For A Better New York et al v. Smith et al  
Motion to Dismiss

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**U.S. DISTRICT COURT**

**U.S. District Court, Western District of New York**

**Notice of Electronic Filing**

The following transaction was entered by Russo, Michael on 1/29/2010 at 5:12 PM EST and filed on 1/29/2010

**Case Name:** Businesses For A Better New York et al v. Smith et al

**Case Number:** 1:09-cv-891

**Filer:** Andrew Cuomo  
M. Patricia Smith  
James J. Wrynn  
Robert E. Beloten

**Document Number:** 13

**Docket Text:**

**MOTION to Dismiss by M. Patricia Smith, James J. Wrynn, Robert E. Beloten, Andrew Cuomo.(Russo, Michael)**

**1:09-cv-891 Notice has been electronically mailed to:**

Hugh M. Russ , III [hruss@hodgsonruss.com](mailto:hruss@hodgsonruss.com), [dhughes@hodgsonruss.com](mailto:dhughes@hodgsonruss.com), [efilingbfo@hodgsonruss.com](mailto:efilingbfo@hodgsonruss.com),  
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ebf967ad6f71cfc020da17c74680990d689431e11250b6c05698f87e53f7f]]

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BUSINESSES FOR A BETTER NEW YORK,  
et al.,

Plaintiffs,

vs.

09-CV-891A

M. PATRICIA SMITH, in her official  
capacity, et al.,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS COMPLAINT**

ANDREW CUOMO  
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of New York  
Attorney for Defendants  
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**Procedural Statement**

Plaintiffs, Businesses for a Better New York (BBNY) and Paragon Restoration (Paragon), challenge in this action the constitutionality of a New York statute, Labor Law § 240(1), alleging that the statute violates the Due Process Clause of the United States Constitution. Plaintiffs also seek injunctive relief directing the Defendants to immediately cease enforcement of § 240(1).

The Defendants in this action are M. Patricia Smith, the Commissioner of Labor, James J. Wrynn, the Superintendent of Insurance, Robert E. Beloten, the Chairman of the Workers' Compensation Board, and Andrew M. Cuomo, Attorney General of the State of New York, all of whom are named in their official capacities.

**Plaintiffs' Prior Suit.**

Plaintiffs BBNY and Paragon (along with several other business entities who are not parties to this suit) previously commenced an action in this Court challenging the constitutionality of § 240(1), along with a related statute, Labor Law § 241(6), on grounds other than those raised here. See Businesses for a Better New York v. Valone, et al.; 06-CV-669 (W.D.N.Y).

There, the Plaintiffs asserted that §§ 240(1) and 241(6) (together, the "scaffold laws") violated their Equal Protection rights and the Dormant Commerce Clause of the United States Constitution. Plaintiffs further asserted that the scaffold laws violated the Supremacy Clause because they purportedly were preempted by the federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (OSHA).

The Magistrate Judge's Decision.

In a report and recommendation filed on May 31, 2007, the magistrate judge recommended that the Defendants' motion to dismiss in that action be granted, explaining that §§ 240(1) and 241(6) were rationally related to the legitimate state interest in protecting the safety of workers and thus did not violate equal protection. [Dkt. # 43.] With respect to the Dormant Commerce Clause claim, the magistrate judge found that the statutes did not discriminate against interstate commerce because they applied equally to in-state and out-of-state construction companies doing business in New York, adding that any incidental effect on interstate commerce was not "clearly excessive" in relation to the local safety benefits promoted by the provisions. Finally, the magistrate judge found no viable claim that the statutes were preempted by OSHA, holding that the statutes were preserved by the "savings clause" in 29 U.S.C. § 653(b)(4) (noting the solid judicial consensus that § 653(b)(4) operates to save state tort

remedies like those contained in §§ 240(1) and 241(6)). No Due Process argument was made to the magistrate judge, as that issue had not been raised in the Complaint.

This Court's Decision on the Report and Recommendation.

Plaintiffs filed objections to the magistrate judge's report and recommendation, which this Court adopted for the reasons stated therein, and a judgment dismissing the complaint was filed on September 28, 2007. [Dkt. 54.] This Court did not address the Due Process argument advanced by the Plaintiffs for the first time in Plaintiffs' objections to the report and recommendation.

The Second Circuit's Summary Order.

The Plaintiffs appealed this Court's decision to the Second Circuit Court of Appeals, which was affirmed by Summary Order filed August 12, 2009 (Summary Order), attached to the Complaint in this action as Exhibit A.

The Second Circuit, like this Court, declined to address the Due Process issue belatedly raised by the Plaintiffs in the prior action. That Due Process claim is now the sole claim raised in the Complaint in this action.

Because the Plaintiffs in the prior action advanced many of the same arguments that Plaintiffs raise here, all of which were rejected, a review of the Second Circuit's Summary Order is warranted.

Plaintiff's Equal Protection Claim.

The Second Circuit affirmed the dismissal of the Plaintiffs' Equal Protection argument wherein they asserted that the scaffold laws violated the Equal Protection Clause because construction businesses that engage in work involving height-related risks are purportedly subject to higher insurance premiums than construction businesses who work at ground level.

The Second Circuit held that this challenged classification did not implicate a protected class and that there are no fundamental rights at stake, so the statutes are evaluated under rational basis review and are "accorded a strong presumption of validity". See Summary Order, p. 5. The Court recognized that the obvious purpose of the scaffold laws (including § 240(1)) is to minimize injuries to construction workers, and recognized the evident reasonable belief of the New York State legislature that the enactment of the laws would serve that purpose. Id.

The Court rejected Plaintiffs' unsubstantiated assertion that in practice and fact the use of the challenged classification did not promote the stated purpose, holding that the Equal Protection Clause is satisfied if the Court concludes that the state legislature rationally could have believed that the state action would promote its objective. The Second Circuit held that the legislature did have a rational basis to believe that the scaffold laws would minimize injuries to construction

workers, and therefore dismissed the Plaintiffs' Equal Protection claim.

Plaintiffs advance the identical argument here relative to their Due Process claim, requiring dismissal for the same reasons set forth by this Court and by the Second Circuit in its Summary Order.

Plaintiffs' Dormant Commerce Clause Claim.

The Second Circuit also affirmed the dismissal of the Plaintiffs' Dormant Commerce Clause claim wherein they alleged that the scaffold laws disproportionately affect non-New York construction companies which engage in work involving height-related risks in New York. This argument was dismissed by the Second Circuit on two bases. First, the Court held that New York's scaffold laws apply equally to in-state and out-of-state construction companies working in New York, so there could be no disparate impact and no economic protectionism. Second, even if the laws had a disparate impact on interstate commerce, the laws would survive under controlling law, which prohibits any statute that creates burdens on interstate commerce that clearly exceed the putative local gains. The Court held that the burden imposed consists of increased insurance premiums, but the putative local gains involve either protection of construction workers or compensation in event of injury, and concluded that the increased premiums do not "clearly exceed" those putative gains. Id., p. 7.

Thus, the Plaintiffs' argument in this case that the scaffold laws are unconstitutional based on their assertion that the laws increase insurance premiums was previously rejected by this Court and the Second Circuit.

Plaintiffs' Supremacy Clause Claim.

The Second Circuit affirmed the dismissal of the Plaintiffs' Supremacy Clause claim, rejecting Plaintiffs' assertion that New York's scaffold laws violate the Supremacy Clause because they are pre-empted by OSHA. Id., p. 8.

**STATUTE AT ISSUE**

**New York Labor Law § 240(1)**

"Special statutory protections against the dangers of elevation-related hazards in the workplace have existed in [New York] State since 1885." Joblon v. Solow, 91 N.Y.2d 457, 462 (1998). These protections are now contained in New York Labor Law § 240(1), which provides in relevant part:

**Scaffolding and other devices for use of employees**

1. 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.

N.Y. Labor Law § 240(1). Through the imposition of tort liability on owners and contractors, the "purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on the workers themselves." Abbatiello v. Lancaster Studio Assocs., 3 N.Y.3d 46, 50 (2004) (internal quotation marks omitted).

Section 240(1) is "aimed only at elevation related hazards." Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490 (1995). It was "in recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites that section 240(1) prescribes safety precautions for workers laboring under unique gravity-related hazards." Id. at 491. Thus, "injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device." Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 500 (1993). Liability is "contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 267 (2001).

Section 240(1) creates tort liability that is "strict or absolute, in two senses." Cahill v. Triborough Bridge and Tunnel

Auth., 4 N.Y.3d 35, 39 (2004). First, "the duty it imposes is nondelegable, and thus contractors and owners are liable under the statute whether or not they supervise or control the work." Id., at 39. Second, if an accident is caused by a violation of the statute, the worker's comparative negligence does not provide a defense. However, where a worker's actions are the sole proximate cause of the accident, the employer is not liable. Id. (no liability where employer provided adequate safety devices and employee disregarded instructions to use them); see also Robinson v. East Med. Cent., 6 N.Y.3d 550, 554-55 (2006).

**Summary of Plaintiffs' Due Process Claim in this Action**

Plaintiffs allege that § 240(1) violates the Due Process Clause of the United States Constitution because there is no apportionment of liability among the parties responsible for having caused the accident since a defendant is not allowed to present evidence that it was not at fault in having caused the accident which underlies the suit, and is not permitted to present evidence of the plaintiff's comparative fault in having caused the accident. See Complaint, ¶¶ 16 and 20.

Plaintiffs further assert that § 240(1) no longer reasonably accomplishes the intended purpose of protecting construction workers who perform work in New York State, as they claim that construction workers in New York State are not safer

