

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY
Justice

IAS PART 16

KEVIN McTIGUE,

INDEX NO. 26101/2005

Plaintiff,

MOTION

- against -

DATE March 25, 2008

AMERICAN AIRLINES, INC and VRH/TORCON,
a joint venture,

MOTION

CAL. NO. 13

Defendants.

MOT. SEQ.

NUMBER 1

The following papers numbered 1 to 16 read on this motion by the plaintiff for partial summary judgment on his claims under Labor Law §240[1] and 241[6]. The defendants cross-move for summary judgment dismissing the plaintiff's complaint.

PAPERS
NUMBERED

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Upon the foregoing papers the motion and cross-motion are determined as follows:

This action arises out of an accident that occurred on May 12, 2004 just outside the American Airlines terminal at John F. Kennedy International Airport in Queens. The plaintiff was employed by E.J. Electric which, in turn, was engaged as an electrical subcontractor at a construction project at the terminal. For the purposes of the Labor Law, the defendant American Airlines, Inc. ("American") was the owner of the terminal and the defendant VRH Torcon ("Torcon") was the general contractor on the project.

On the day of the accident, the plaintiff was an apprentice with E.J. Electric and was assigned the task of hand digging an approximate 5' by 5' by 6' deep hole directly adjacent to the concrete foundation of the terminal. This excavation was being performed as a precursor for mechanical drilling that was to take place in the foundation of the terminal for the purpose of installing electrical equipment. The plaintiff testified at his deposition that just after his lunch break he walked to the hole to see if any water was present. He averred that the accident occurred as he was standing on the edge of the hole with his shovel in hand when the earth beneath his feet collapsed and he fell into the hole.

After the accident, the plaintiff completed an incident report which included a description of the incident. In that report, the plaintiff wrote as follows: "I was digging a hole, slipped with shovel in hand and turned the wrongway [sic]. I felt a strong strain and something pop in my arm". At his deposition, the plaintiff acknowledged composing this description of the accident, but explained that he wasn't digging at the time he fell and his statement to that effect was meant to convey that he "was digging a hole that day". In addition, during his deposition, the plaintiff denied either tripping or slipping on the day of the accident.

William Ackerman ("Ackerman"), the plaintiff's foreman at the job site who was also employed by EJ Electric, testified as a non-party witness. Ackerman averred that while standing between twenty and forty feet distant, he saw the plaintiff drop into the hole. He further testified that when he approached the excavation he realized that the plaintiff fell because "part of the earth gave way". Ackerman surmised that the plaintiff had not been digging for a couple of hours prior to the accident because water was being pumped out of the hole. Ackerman also averred that the plaintiff had been "checking on the water level" accumulation when he approached the hole.

Joseph Desthers ("Desthers"), the site safety manager on the project, testified at a deposition on behalf of the defendant Torcon. Desthers testified that in excavations greater than five feet in depth, "[s]loping, shoring and bracing, or benching" was required for protection to prevent collapses. He also testified that where bracing is used its purpose is to protect not only workers within the excavated area but also persons on top. With respect to safety procedures, Desthers stated that the defendant Torcon had established a written policy with respect to excavations and testified that unsecured excavations in excess of five feet in depth would violate Torcon's written safety policies.

In their motions, the parties have disputed whether this accident falls within the purview of Labor Law §240[1]. That statute provides in relevant part: "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes or other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed". The duty imposed upon contractors and owners pursuant to Labor Law § 240[1] is non-delegable (See, Rocovich v Consolidated Edison Co., 78 NY2d 509), and a violation of the duty results in absolute liability (Bland v Manocherian, 66 NY2d 452). "Negligence, if any, of the injured worker is of no consequence" (Rocovich v Consolidated Edison Co., supra).

While Labor Law § 240[1] does not protect a worker from "any and all perils that may be connected in some tangential way with the effects of gravity," the statute does offer protection from "specific gravity-related accidents such 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). The harm must flow "directly . . . from the application of the force of gravity to an object or person" (Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501). In other words, there must be "a foreseeable risk of injury from an

elevation-related hazard to impose liability under the statute" (Shipkoski v Watch Case Factory Assocs., 292 AD2d 587, 588).

The court's research did not reveal a fact pattern directly on point to the particular circumstances presented here as neither the Court of Appeals nor the Appellate Division, Second Department have ruled on the applicability of Labor Law §240(1) where a worker has fallen into an excavation precipitated by an earthen collapse. The most similar case in the Second Department appears to be Alexandre v City of New York, 300 AD2d 263. In that case the plaintiff claimed "he fell 10 to 12 feet into a trench while attempting to take certain measurements above the trench". The defendants in Alexandre contended "that the injured plaintiff's accident occurred while he was attempting to lower a piece of sheathing into an excavation and slipped and fell". The court held that issues of fact existed as to whether the plaintiff was engaged in a statutorily covered activity.

The assertion by defendants' counsel that the "Second Department has repeatedly held that Labor Law §240[1] does not apply to injuries relating to collapsing trenches" is incorrect and the cases cited by the defendant in this regard, including Scarso v M.G. Gen. Constr. Corp., 16 AD3d 660; Vitaliotis v Village of Saltaire, 229 AD2d 575 and Rojas v County of Nassau, 210 AD2d 390, do not support this contention.

In Scarso, the plaintiff merely stumbled while alighting from a truck and fell into a nearby trench, and the court held that the plaintiff's fall was not within the statute as the elevation risk was wholly unrelated to his activity at the time of the accident¹. This holding is consistent with the Second Department's earlier decision in Alexandre, supra, where the defendants were found to have established prima facie that Labor Law §240[1] was inapplicable based upon proof that the plaintiff "slipped and fell" into an excavation.

Vitaliotis is distinguishable as that case involved a collapse of earth upon a worker already in a trench. Additionally, that case is customarily considered as authority in "falling object" cases, instead of cases involving a "falling worker" such as presented here. For Labor Law §240[1] to apply in a "falling object" case it must be shown that the "materials or load that fell were being hoisted or secured" (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514). Although this point was not expressly made by the Appellate Division, Second Department in Vitaliotis, a review of the trial court's decision contained in the record on appeal revealed that summary judgment dismissing the plaintiff's Labor Law §240[1] claim was based upon a determination that the earth which collapsed onto the plaintiff "was not a material or load being hoisted or secured in conjunction with the

¹ Other Second Department cases cited by the defendants in their reply papers are identically inapplicable. In Bellantoni v. I.C.E. Constr. Corp., 271 AD2d 560, the plaintiff "slipped on an unsteady limestone block and fell into [an] empty pool". In Rossi v. Mount Vernon Hosp., 265 AD2d 542, a plaintiff who was in a building to install wood panels and fell in a grease pit, was not covered by Labor Law §240[1] since his work "was wholly unrelated to the grease pits".

trench dug or retaining wall to be constructed"².

Finally, Rojas is completely inapplicable since the plaintiff in that case was not injured as the result of a fall, but rather when a co-worker fell holding a saw which struck the plaintiff's leg.

On the other hand, other departments of the Appellate Division have issued rulings in cases with factually similar circumstances to this case. The Appellate Division, First Department, in a case relied upon by the plaintiff and based upon facts very similar to the case at bar, ruled not only that Labor Law §240[1] was applicable, but also determined that plaintiff was entitled to summary judgment on that account (See, Bell v Bengomo Realty, Inc., 36 AD2d 479). This holding was not a new precedent for the First Department which had ruled similarly in the past (See, Trillo v City of New York, 262 AD2d 121). It also appears that the Appellate Division, Third Department has found Labor Law §240[1] applicable under like situations, although those cases are not as factually similar as those in the First Department (See, Finkle v A.J. Eckert Co., 11 AD3d 794; Tooher v Willets Point Contracting Corp., 213 AD2d 856).

However, it appears that the Appellate Division, Fourth Department has taken a different opinion on this issue and has determined that a worker falling because of an earthen collapse is not within Labor Law §240[1] (See, Williams v White Haven Mem. Park, 227 AD2d 923; Radka v Miller Brewing, Inc., 182 AD2d 1111).

Also worthy of analysis are decisions from the Second Department concerning collapsing floors within structures which are factually analogous to the situation at bar. Generally, Labor Law §240[1] has been found applicable to a worker who falls as the result of the collapse of a floor within a building where the accident is sufficiently related to the task the worker is performing (e.g. demolition) or where it was foreseeable that the premises was, or would become, structurally unstable as a result of the work being performed (See e.g., Cavanagh v Mega Contr., Inc., 34 AD3d 411; Shipkoski v Watch Case Factory Assocs., supra). However, Labor Law §240[1] would not apply where the floor collapse is determined to be "a separate, unrelated hazard" to the worker's activity (See, Balladares v Southgate Owners Corp., 40 AD3d 667).

Assuming that the true factual circumstances of this case are that the plaintiff fell into the excavation as the result of an earthen collapse in the manner testified to by plaintiff and Ackerman, the court is persuaded the holdings of the First and Third Departments, as opposed to the Fourth Department, provide the more logical analysis of the application of Labor Law §240[1] to this situation. This conclusion is compelled by the holdings in the floor collapse cases from the Second Department which, in the court's opinion, are significantly akin to the present case to be applicable.

The defendants also failed to establish prima facie that the

² O'Connell v Consolidated Edison Company of New York, 276 AD2d 608, cited by the defendants in their reply papers, is similarly distinguishable as a "falling object" case.

plaintiff was the "sole proximate cause" of his accident (See, Blake v Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280). Although the plaintiff indisputably dug the hole at issue, there is no proof that the plaintiff was instructed or had knowledge that he was to excavate in a particular manner and his disregard of the proper manner to perform his task constituted negligence and that such negligence was the sole cause of the collapse. Nor was there any proof that plaintiff was aware prior to his accident that the edge of the excavation was unstable and should have been avoided via use of an available safety device or what safety device would have eliminated plaintiff's presence on the edge of the excavation (See, Beamon v Agar Truck Sales, 24 AD3d 481; Cf. Robinson v East Medical Center, LP, 6 NY3d 550; Plass v Solotoff, 5 AD3d 365).

However, as was the case in Alexandre, there are issues of fact here concerning the happening of the accident which must be resolved prior to the application of Labor Law §240[1]. In particular, the plaintiff's accident report, completed very soon after the accident, contains his statement that the accident occurred when he "slipped" with his shovel in hand. Contrary to the plaintiff's counsel's argument, this statement raises an issue of fact as to whether the accident occurred due to the plaintiff merely slipping and falling in or into the excavation. If such were the case, this would not be a covered accident under Labor Law §240[1] (See, Alexandre v City of New York, supra; Scarso v M.G. Gen. Constr. Corp., supra).

Accordingly, the branches of the motion and cross-motion for summary judgment concerning the plaintiff's Labor Law §240[1] cause of action are denied.

Turning to those branches of the motion and cross-motion, where plaintiff seeks summary judgment and the defendants seek dismissal of the plaintiff's cause of action alleging the defendants violated section 241[6] of the Labor Law, that statute provides, inter alia, that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (See, Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343). The duty imposed by Labor Law § 241[6] upon owners and contractors is also nondelegable and exists regardless of their control and supervision of the job site (See, Rizzuto v L.A. Wenger Contracting Co., Inc., supra; Whalen v City of New York, 270 AD2d 340).

In order to prove a cause of action pursuant to Labor Law § 241[6], a plaintiff must show that a defendant "violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (Adams v Glass Fab, Inc., 212 AD2d 972, 973). The regulation upon which a plaintiff relies must "set forth 'a specific standard of conduct as opposed to a general reiteration of common-law principles' for its violation to qualify as a predicate for a Labor Law § 241(6) cause of action" (Mendoza v Marche Libre Associates, 256 AD2d 133, quoting Adams v Glass Fab, 212 AD2d 972, 973; Quinlan v City of New York,

293 AD2d 262).

In the bill of particulars, the plaintiff claims the defendants violated sixteen discrete provisions of the Industrial Code, namely 12 NYCRR §§23-1.2[6]; 23-1.5; 23-1.7[b] and [e]; 23-1.15; 23-1.23; 23-1.30; 23-1.32; 23-3.3; 23-4.1; 23-4.2; 23-4.4; 23-4.5; 23-9.5; 23-11.1 and 23-11.5.

Turning to each of the code sections individually, section 23-1.2[6] of the Industrial Code, as set forth by plaintiff, does not exist. The subsections of that section are denominated alphabetically from "a" through "f". In any event, that section can not form a foundation for liability against the defendants as it is not sufficiently specific (See, Biszick v Ninnie Constr. Corp., 209 AD2d 661). Likewise, section 23-1.5 is also not actionable as it "merely sets forth a general safety standard" (Cun-En Lin v Holy Family Monuments, 18 AD3d 800, 802).

Section 23-1.7[b] provides, in pertinent part that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part". In support of their motion, the defendants failed to establish prima facie that the excavation into which the plaintiff fell is not a "hazardous opening" within the meaning of this section.

In Scarso v M.G. Gen. Constr. Corp., supra, a case relied on by the defendants in support of the branch of the motion to dismiss the plaintiff's Labor Law §240[1] claim, the court held that the defendants in that case failed to prove "the regulations were not applicable to the plaintiff's accident". Although not stated in the decision, the deposition of that plaintiff contained in the record on appeal reveals that the trench that plaintiff fell into was several feet wide and "about six feet deep", which is similar to the excavation in this case. The defendant's reliance on the Appellate Division, Third Department's decision in D'Egidio v Frontier Ins. Co., 270 AD2d 763 is misplaced. In that case, the hole into which the plaintiff fell was merely 5 to 12 inches in diameter, an opening to which section 23-1.7[b] was clearly not intended to apply (See, Messina v City of New York, 300 AD2d 121, 123-24).

The above determination notwithstanding, the plaintiff failed to establish prima facie that the defendants violated this portion of the Industrial Code. The plaintiff argues that, in accordance with section 23-1.7[b], the defendants were required to either securely cover the excavation or place a safety rail around the edge. Since part of the plaintiff's theory of how the accident occurred was that he was "looking into the subject excavation" to determine the water level therein when he fell, this task could not have been accomplished with a "substantial cover" over the hole. Thus, there is insufficient proof proffered on this motion to establish that this purported violation was a proximate cause of the plaintiff's accident. Likewise, the plaintiff failed to prove in the first instance how a safety railing would have prevented

his fall when his claim is the ground beneath his feet collapsed, not that he accidentally fell into the hole.

Insofar as section 23-1.7[e] is concerned, that subdivision, according to the titles of its subheadings, governs "[p]assageways" and "[w]orking areas". Clearly, the location where the plaintiff fell, an open area outside the bounds of any structure, is not a passageway as defined by the Industrial Code (See e.g., Canning v Barneys New York, 289 AD2d 32, 34; Lenard v 1251 Americas Associates, 241 AD2d 391, 392). "Working areas", on the other hand, applies to "floors, platforms and similar areas where persons work or pass". While this section is not strictly limited to the interior of a structure, it does not include open area sites like the one here (See, Rose v A. Servidone, Inc., 268 AD2d 516; Muscarella v Herbert Constr. Co., 265 AD2d 264; O'Gara v Humphreys & Harding, Inc., 282 AD2d 209; Jennings v Lefcon Pshp., 250 AD2d 388).

Section 23-1.15 does not apply to this case because the section "does not specify when safety railings are required but, rather, sets forth only how they must be constructed when they are required" (Partridge v Waterloo Cent. Sch. Dist., 12 AD3d 1054).

Section 23-1.23 by its express terms is inapplicable to this case as that section regulates the construction of "[e]arth ramps and runways" neither of which were present in the excavation involved in the plaintiff's accident.

There was no testimony from the plaintiff to support application of section 23-1.30 which sets a minimum standard for illumination in excavation and construction operations (See, Herman v St. John's Episcopal Hosp., 242 AD2d 316). Indeed, the plaintiff testified that the accident occurred outdoors on a "sunny" day at approximately 1:30 p.m. and that the lighting was "excellent".

There was also no testimony proffered to support application of section 23-1.32 to this case. In particular, there is no evidence that "written notice thereof [was] given by the commissioner to the appropriate employer" of an "imminent danger" associated with the excavation.

With respect to Industrial Code section §23-3.3, this provision applies during the performance of "[d]emolition by hand". Section 23-1.4[b][16] of the Industrial Code defines, in pertinent part, demolition as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure . . ." Here, since the plaintiff was performing excavation, his work "does not fall within the purview of 'demolition' as defined in § 23-1.4(b)(16)" (Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389).

As to the claims based upon sections 23-4.1 and 23-4.5, the defendants offered no argument why these sections do not apply or should otherwise be dismissed. This is insufficient to establish entitlement to summary judgment since it is the movant's burden to establish the inapplicability of this Industrial Code provision (See, Sainato v City

of Albany, 285 AD2d 708; Bockmier v Niagara Recycling, 265 AD2d 897). Indeed, "a defendant moving for summary judgment does not carry its burden merely by citing gaps in the plaintiff's case" (Kucera v Waldbaums Supermarkets, 304 AD2d 531; see also, OLeary v Bravo Hylan, LLC, 8 AD3d 542; Nationwide Prop. Cas. v Nestor, 6 AD3d 409). Accordingly, the defendants have failed to establish prima facie entitlement to dismissal of these claims.

Contrary to the defendants' assertion, section 23-4.2 of the Industrial Code is applicable to the facts of this case (See, Bell v Bengomo Realty, Inc., supra at 480-81; Wells v. British Am. Dev. Corp., 2 AD3d 1141, 1144). The section is titled "[t]rench and area type excavations" and its first sentence states that "[w]henver any person is required to work in or is lawfully frequenting any trench or excavation five feet or more in depth which has sides or banks with slopes steeper than those permitted in Table I of this Subpart, such sides or banks shall be provided with sheeting and shoring in compliance with this Part". Here, the plaintiff testified that he was directed to dig a substantial hole, that at the time of his accident it was six feet in depth and Ackerman testified that the plaintiff was checking the water level in the excavation at the time of the accident.

The defendants' reliance on Ruland v Long Island Power Auth., 5 AD3d 580 to establish that section 23-4.2 does not apply here is misplaced. While not expressly stated by the Second Department in its decision, in the trial court's underlying decision contained in the record on appeal, which was affirmed, section 23-4.2 was found inapplicable because that plaintiff was not "working in" an excavation. In the case at the bar, the plaintiff was undisputably "working in" the excavation at some point and, at the time of the accident, he was "lawfully frequenting" the trench to check the water level therein.

Although this section applies in this case, the plaintiff failed to establish prima facie entitlement to judgment under section 23-4.2[a]. In particular, there is no testimony from the plaintiff, Ackerman or any one else establishing that the "sides or banks" of the excavation were steeper than permitted under the section. Moreover, other than a conclusory statement from Ackerman that the soil where the plaintiff was digging was "[v]ery sandy" there is no evidence of the soil composition which is necessary to determine the steepest allowable unbraced slopes under section 23-4.2³. The plaintiff has also not demonstrated in the first instance entitlement to judgment as a matter of law under 23-4.2[i]. That section is significantly similar to section 23-1.7[b] in requiring certain excavations to either be covered or surrounded by guard rails and, therefore, summary judgment fails for the same reasoning delineated by the court above.

³ The affidavit of submitted by the plaintiff from his expert, John K. Hagopian, II, in the reply papers in a belated attempt to establish a prima facie case is improper and may not be considered by the court (See, Canter v East Nassau Med. Group, 270 AD2d 381, 382; Fischer v Weiland, M.D., P.C., 241 AD2d 439).

Section 23-4.4 also applies to the circumstances here (See, Bell v Bengomo Realty, Inc., supra; Wells v. British Am. Dev. Corp., supra), but the plaintiff's motion for summary judgement under this section similarly fails. Like section 23-4.2[a], Industrial Code section 23-4.4[a] requires the installation of "sheeting, shoring and bracing" only when an "excavation is not protected by sloped sides or banks in compliance" with the table in section 23-4.2. Again, there is no testimony or evidence describing the inclination of the sides of the excavation dug by the plaintiff.

Section 23-9.5 is not applicable to this case as it regulates the use of "[e]xcavating machines" and the plaintiff was performing excavation by hand.

Sections 23-11.1 and 23-11.5 are inapplicable here as there is no allegation that the plaintiff's accident was caused by the use of "explosives".

Accordingly, the branch of the plaintiff's motion for summary judgment on its Labor Law §241[6] claim is denied. However, the branch of the defendants' cross-motion for summary judgment dismissing the plaintiff's Labor Law §241[6] claim is granted to the extent that all the claims are dismissed except those based upon Industrial Code sections 23-1.7[b], 23-4.1, 23-4.2, 23-4.4 and 23-4.5.

The branch of the defendants' cross-motion for summary judgment dismissing the plaintiff's Labor Law §200 claim is denied as the defendants never addressed this issue in their affirmation in support of the cross-motion.

Dated: July 1, 2008

Peter J. Kelly, J.S.C.