Simms v Tishman Const. Corp.

2013 NY Slip Op 30382(U)

February 11, 2013

Supreme Court, New York County

Docket Number: 108298/2010

Judge: Shlomo S. Hagler

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[* 1]
SCANNED ON 2/22/2013

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler, *Justice* **PART:** 17

DAVID P. SIMMS and YVONNE GALLAGHER,

PlaintiffS,

- against -

TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, GOLDMAN SACHS HEADQUARTERS, LLC and BATTERY PARK CITY AUTHORITY,

Defendant/Respondent(s).

INDEX NO.: 108298/2010

MOTION SEQ. NO.: 002

DECISION and ORDER

Motion by plaintiffs for summary judgment pursuant to CPLR § 3212 on issue of liability under Labor Law § 240(1); cross-motion by defendants for summary judgment pursuant to CPLR § 3212 dismissing plaintiffs' Labor Law § 240(1), § 241(6), §200 and common-law indemnification claims.

	Papers Numbered
Notice of Motion with Affirmation of Plaintiffs' Counsel, Jay D. Jacobson, Esq., & Exhibits "A" through "K"	1, 2, 3
Notice of Cross-Motion with Affirmation of Defendants' Counsel Kimberly Brown, Esq., & Exhibits "A" through "F"	4, 5, 6
Memorandum of Law in Support of Cross-Motion	7
Reply and Affirmation of Plaintiffs' Counsel, Jay D. Jacobson, Esq., in Opposition to Cross-Motion & Exhibits "L" through "P"	8, 9
Reply Affirmation of Defendants' Counsel Kimberly Brown, Esq., & Exhibits "G" through "L"	10, 11
Transcript of Oral Argument of August 6, 2012	12

Cross-Motion: ❑ No ☑ Yes **Number of Cross-Motions:** 1

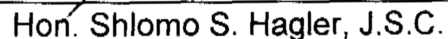
Cross-Motion(s) by defendants for summary judgment pursuant to CPLR § 3212 dismissing plaintiffs' Labor Law § 240(1), § 241(6), §200 and common-law indemnification claims.

Upon the foregoing papers, it is hereby ordered that Plaintiffs' Motion is GRANTED and Defendants' Cross-Motion is DENIED as set forth in the attached separate written Decision and Order.

FILED
FEB 22 2013
NEW YORK COUNTY CLERK'S OFFICE

The foregoing constitutes the Decision and Order of this Court

Dated: February 11, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one:	❑ **Final Disposition**		☑ **Non-Final Disposition**	
Motion is:	☑ Granted	❑ Denied	❑ Granted in Part	❑ Other
Cross -Motion is:	❑ Granted	☑ Denied	❑ Granted in Part	❑ Other
Check if Appropriate:		❑ SETTLE ORDER	❑ SUBMIT ORDER	
		❑ DO NOT POST	❑ REFERENCE	

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

--X

DAVID P. SIMMS and YVONNE GALLAGHER,

Plaintiffs,

-against-

TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, GOLDMAN SACHS HEADQUARTERS, LLC and BATTERY PARK CITY AUTHORITY,

Defendants.

--X

Index No. 108298/10

Motion Sequence: 002

DECISION & ORDER

FILED

FEB 22 2013

NEW YORK COUNTY CLERK'S OFFICE

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action arising out of a workplace accident which took place on July 14, 2009, at 200 West Street, New York, New York. Plaintiff David Simms ("Simms" or "plaintiff"), a laborer, alleges that he fell off the edge of an unguarded temporary loading dock while moving a cart to a hoist. Plaintiff and his wife, plaintiff Yvonne Gallagher (together, "plaintiffs") move, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). Defendants Tishman Construction Corporation, Tishman Construction Corporation of New York (collectively, "Tishman"), Goldman Sachs Headquarters, LLC ("Goldman Sachs"), and Battery Park City Authority ("BPCA") cross-move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint. Both the motion and the cross-motion are consolidated herein for disposition.

BACKGROUND

Goldman Sachs owned the building under construction at 200 West Street. BPCA was the fee owner of the land. Goldman Sachs hired Tishman to provide construction management services on the project.

Plaintiff testified at his deposition that on July 14, 2009, he was employed as a laborer by Cirocco & Ozzimo, a concrete and brick subcontractor that was hired to pour concrete on the upper floors of the construction site (Plaintiff's EBT, at 17, 18, 28). On the date of his accident, plaintiff was assigned to build wooden curbs to waterproof rooms on the 10th floor (*id.* at 50-52). At approximately 7:30 A.M., a truck arrived with wood for the job at the temporary loading dock that was attached to the construction elevator staging area (*id.* at 53-55). There was no safety railing guarding the loading dock's edge (*id.* at 22, 73). Plaintiff and his co-worker unloaded the materials from the truck onto the dock's platform and onto an A-frame cart (*id.* at 62).

After plaintiff had completed unloading the materials, the elevator operator told plaintiff and his co-workers to wait because there were other workers waiting to use the elevators ahead of them (*id.* at 63). At about 9:30 A.M., the elevator operator told them that they could use the elevator (*id.* at 66). At that time, plaintiff and his co-worker started to push the A-frame cart over to the elevator (*id.*). Plaintiff's co-worker was in the front and plaintiff was in the back, closer to the edge of the loading dock (*id.* at 66-67). Plaintiff was looking directly ahead of him at the A-frame cart (*id.* at 71). Plaintiff's left foot slipped off the exposed edge of the loading dock (*id.* at 70, 73). He fell sideways, using his hands to brace himself (*id.* at 72). Plaintiff fell four-and-a-half feet from the loading dock to the concrete below (*id.* at 60). Plaintiff broke his wrist (*id.* at 22-23). According to plaintiff, a safety harness was provided by Cirocco & Ozzimo (*id.* at 45). However, plaintiff testified that he did not know where the harnesses were located on site and stated that "they usually bring gang boxes to every job, and they would have safety equipment in them" (*id.* at 45, 46). When shown photographs of the loading dock, plaintiff said that the edge of the loading dock was shaped

like an arc (*id.* at 80-81). Nonetheless, he also testified that he did not notice the condition when he was standing on the loading dock (*id.* at 81).

Roger Cettina ("Cettina") testified that he was employed as the general superintendent by Tishman (Cettina EBT, at 6). According to Cettina, the building had a temporary loading dock on the east side of the hoist complex off Murray Street (*id.* at 10-12). Tishman was "in control of the loading dock" (*id.* at 14). Cettina testified that the contractors would block out an eight-hour period of time and would give Tishman's dock master and the operators of the hoist a list of who was coming at what time (*id.* at 15). The temporary loading dock had a pipe rail that was supposed to be up when deliveries were not being made and taken down when deliveries were made (*id.* at 23). Cettina testified that it was the responsibility of the contractor making the delivery to remove the bar and put it to the side, and then to put it back when it was done (*id.*). If the workers failed to replace the railing, Tishman's dock master was supposed to replace the railing, have someone from Tishman replace the railing, or remind the workers to replace the railing if they were still in the vicinity (*id.* at 42, 53).

Christopher DiGioia ("DiGioia") testified that he was employed by non-party Select Safety Consulting Services, Inc. ("Select Safety") as a safety manager (DiGioia EBT, at 7, 8). Select Safety was the safety consulting firm at the Goldman Sachs construction site (*id.* at 9). DiGioia took directions from Cettina, Tishman's general supervisor (*id.* at 11). DiGioia conducted walk-throughs of the entire building, including the area where the temporary loading dock was located (*id.* at 27). If DiGioia observed a rule or code violation, he had the power to immediately correct it (*id.* at 16). DiGioia testified that if a worker was on the temporary loading dock, the safety railing should have been up (*id.* at 37). He further stated that, if he observed workers on the temporary loading dock

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when trucks were not loading or unloading when the safety railing was not in place, he would clear the workers because of the unguarded edge of the loading dock (*id.* at 41). DiGioia was the first to respond to plaintiff's accident (*id.* at 46, 47). When he arrived at the scene, he observed plaintiff on the floor beneath the temporary loading dock (*id.* at 47). Plaintiff was rolling back and forth in pain, and there was a bone sticking out of plaintiff's left arm (*id.* at 50, 52). The temporary loading dock was located 54 inches above the ground (*id.* at 61).

Plaintiffs commenced the instant action on June 23, 2010, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiff's wife seeks to recover derivatively for loss of services, society, comfort, and affection. In plaintiffs' verified bill of particulars, plaintiffs allege violations of 12 NYCRR 23-1.7(b)(1), 12 NYCRR 23-1.15, 12 NYCRR 23-1.17, 12 NYCRR 23-1.22, and 29 CFR 1910.23 (a)(2), (7), and (8) and 29 CFR 1910.23(c)(1), (3) and (e) (Verified Bill of Particulars, ¶ 10). Additionally, in a supplemental bill of particulars, plaintiffs allege violations of 12 NYCRR 23-5.1(f) and (g) (Supplemental Bill of Particulars, ¶ 10).

Plaintiffs filed the note of issue and certificate of readiness on February 16, 2012.

DISCUSSION

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of

fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Labor Law § 240(1)

Plaintiffs move for partial summary judgment on the issue of liability against Goldman Sachs, BPCA, and Tishman, citing *Cassidy v Highrise Hoisting & Scaffolding, Inc.* (89 AD3d 510 [1st Dept 2011]). Plaintiffs argue that the unguarded temporary loading dock served as an elevated platform under Labor Law § 240(1), and that there was no safety railing on the platform.

Defendants also cross-move for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim. Defendants argue that plaintiff's fall of less than four-and-a-half feet from a large and stable loading dock after unloading materials from a flatbed trailer does not present the sort of elevation-related risk that triggers statutory coverage, relying upon *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]). Defendants further contend that plaintiff was the sole proximate cause of his accident because he failed to observe the edge of the loading dock, failed to unload the materials in a safe manner, and failed to use a safety harness provided by his employer.

Labor Law § 240(1), known as the Scaffold Law, imposes a duty upon all contractors and owners and their agents "in the erection, demolition, repairing . . . or pointing of a building or structure" to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The purpose of the Scaffold Law

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is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Thus, Labor Law § 240(1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Jock v Fien*, 80 NY2d 965, 967 [1992]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). To prevail under Labor Law § 240(1), the plaintiff must establish the following two elements: (1) a violation of the statute, i.e., that the owner or general contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]).

Labor Law § 240(1) applies to "'extraordinary elevation risks,'" and not the "'usual and ordinary dangers of a construction site'" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011], quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). "'Labor Law § 240(1) was designed to prevent those types of accident in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]).

Initially, this Court notes that defendants BPCA, Goldman Sachs, and Tishman, have not disputed that the statute applies to them as the owners and construction manager of the building where the accident occurred (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993] ["Liability

rests upon the fact of ownership and whether (the owner) had contracted for the work or benefitted from it are legally irrelevant"]; *Castellon v Reinsberg,* 82 AD3d 635, 636 [1st Dept 2011] [construction manager may be liable under section 240(1) where it has the ability to control the activity which brought about the injury]).

Labor Law § 240(1) requires that scaffolds and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (Labor Law § 240[1]). In *Cassidy*, the plaintiff, a laborer employed by a concrete subcontractor, was injured while working on a temporary loading dock (89 AD3d at 510). The temporary loading dock was about 48 to 60 inches above the ground, about the height of a trailer truck (*id.*). The plaintiff was waiting for a hoist to come to the loading dock level, when he leaned against the dock railing, which collapsed (*id.*). The First Department held that "[t]he motion court properly granted plaintiff summary judgment on his Labor Law § 240(1) claims. Plaintiff was performing work protected by Labor Law § 240(1), his injuries were gravity-related, and the elevated platform served as a device designed to protect a worker from gravity-related hazards" (*id.* at 510-511). The Court continued, stating that "[s]ince the safety rail which was intended to protect the plaintiff from falling off the elevated platform failed, the owner and the general contractor were in violation of section 240 (1)" (*id.* at 511).

In *John v Baharestani* (281 AD2d 114, 118 [1st Dept 2001]), the First Department wrote that:

> Under plaintiff's account, he walked onto a makeshift scaffold three stories high at a construction site to unload bricks from a forklift when he fell 30 feet to the ground below. While he was not sure whether the wooden plank broke or moved, it is undisputed that there were no safety devices or belts on either the plank or the pallet. His proof thus shows that the makeshift scaffold failed to provide proper protection in violation of Labor Law § 240(1).

In *Aiello v Rockmor Elec. Enters.* (255 AD2d 470, 471-472 [2d Dept 1998], *lv dismissed and denied in part* 93 NY2d 952 [1999]), the plaintiff tripped on debris and fell off a loading dock which was five to six feet off the ground. While falling, the plaintiff attempted to jump onto two planks positioned over a loading bay which were unsecured, and which propelled plaintiff from the planks to the uninstalled leveler on the ground about six feet away (*id.*). The Court held that:

> [T]he permanency of the loading dock does not preclude liability under Labor Law § 240(1). Inasmuch as the plaintiff established that he was injured while working at a building which was under construction, that he fell into a pit which was to be used for the installation of a leveler for the loading dock, and that he had not been provided with any safety devices to prevent his fall, he should have been granted summary judgment on the issue of liability against the defendant third-party plaintiff-respondent, Waldbaums, Inc., s/h/a Waldbaum-College Point Center, on the first cause of action insofar as it is based on Labor Law § 240(1).

(*id.* [citations omitted]).

Here, plaintiffs have shown that plaintiff was performing covered work under Labor Law § 240(1), and that he was subjected to the risk of falling four-and-a-half feet off the edge of the unguarded temporary loading dock (Plaintiff EBT, at 18, 28; DiGioia EBT, at 61). The temporary loading dock was being used as the functional equivalent of a scaffold to move the A-frame cart to the elevator (Plaintiff EBT, at 66). In addition, plaintiffs have established that the temporary loading dock had no safety railing in place, and that no other protective devices were provided to prevent him from falling off the edge (*id.* at 22, 73). Accordingly, plaintiffs have made a prima facie showing that the temporary platform failed to provide adequate protection for his work. (*See also Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204 [2d Dept 2007] [plaintiff who fell from a "floating stage" was entitled to summary judgment under Labor Law § 240(1) where there was a difference in elevation between plaintiff's work and the creek below, the elevated platform was necessary to

enable plaintiff to do his job, and a sufficient number of tie lines and/or a guardrail would have prevented his accident]).

Defendants' reliance on *Toefer* is misplaced. In *Toefer* and its companion case, *Marvin v Korean Air*, the Court of Appeals denied recovery to plaintiffs injured when they fell four to five feet to the ground from the surface of flatbed trucks (*Toefer*, 4 NY3d at 405). In *Toefer*, the plaintiff was injured when a wooden pole being used as a lever to lower beams from a four-foot- high truck bed flew up at him and propelled him to the ground (*id.*). The Court held that the plaintiff "was working on a large and stable surface only four feet from the ground. That is not a situation that calls for the use of a device like those listed in section 240(1) to prevent a worker from falling" (*Toefer*, 4 NY3d at 408). Similarly, in *Marvin*, a case in which the plaintiff was injured when stepping off a truck, the Court held that:

> A four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240(1)'s coverage. Safety devices of the kind listed in the statute are normally associated with more dangerous activity than a worker's getting down from the back of a truck.

(*id.* at 408-409; *see also Ortiz*, 18 NY3d at 339 ["(a) worker may reasonably be expected to protect himself by exercising due care in stepping down from a flatbed truck"]). This Court limits the holdings in *Toefer, Marvin* and *Ortiz* to the specific facts in those cases, *i.e.* where the plaintiffs fell from a truck. Here, plaintiff was not subjected to the ordinary risk of descending from a truck; rather, plaintiff fell off the unguarded edge of the temporary loading dock. Therefore, plaintiff's accident was more analogous to the facts of *Cassidy* and *Aiello* where the courts granted summary judgment to the injured workers on their Labor Law § 240(1) causes of action.

Defendants' assertion that plaintiff was the sole proximate cause of his accident is also unpersuasive.

> Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury.

(*Gallagher v New York Post*, 14 NY3d 83, 88 [2010], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). Nevertheless, if "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

Although defendants point out that plaintiff did not use a safety harness, plaintiff testified that while "they usually bring gang boxes to every job, and they would have safety equipment in them," he also testified that he did not know where the harnesses were located on site (Plaintiff EBT, at 45, 46). In addition, defendants did not present any evidence that plaintiff knew where the safety harnesses were available and located, that he was instructed to use one immediately prior to the accident and that he chose for no good reason not to do so. (*See Augustyn v City of New York*, 95 AD3d 683, 685 [1st Dept 2012] [plaintiff was not sole proximate cause of his accident where there was no evidence that he was expected or instructed to use a harness while walking on a sidewalk bridge]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 905 [1st Dept 2011] [worker was not sole proximate cause of his accident where defendants did not submit any evidence that plaintiff knew that he should have used a safety harness, or that he knew that his partner had a suitable 50-foot lifeline to which the harness could have been attached].)

In addition, plaintiff's failure to observe the edge of the loading dock and failure to use the cart in a safe manner constitutes, at most, comparative negligence, which is not a defense to a Labor

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Law § 240(1) claim (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). In any case, plaintiff's injuries are at least partially attributable to the absence of a safety railing on the loading dock and, therefore, can not be the **sole** proximate cause of his accident.

Accordingly, plaintiffs are entitled to partial summary judgment on the issue of liability under Labor Law § 240(1) against Goldman Sachs, the owner of the building under construction, BPCA, the fee owner of the land, and Tishman, the construction manager on the project. The part of defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is denied.

B. Labor Law § 200 and Common-Law Negligence

In moving for summary judgment, defendants argue that they complied with all applicable OSHA standards and regulations, and that the unguarded loading dock edge was not inherently dangerous as a matter of law. In support of their position, defendants submit an affidavit from Bernard P. Lorenz, P.E., a professional engineer, who states, based upon his review of photographs, witness statements, daily logs, accident reports, and deposition testimony, that the loading dock "complied with all applicable codes, regulations, and standards, including O.S.H.A. and the New York State Industrial Code, and was, in all material respects, kept and maintained in accordance with the custom and standard of the construction industry" (Lorenz Aff., ¶¶ 4, 12). Lorenz further asserts that the alleged violations of OSHA sections 1910.23(a)(2), (7), and (8) and OSHA section 1910.23(c)(1), (2) and (e) are inapplicable because they only provide for general industry standards that do not govern the construction industry; the specific standards for the construction industry are set forth in 29 CFR 1926, *et seq.* (*id.*, ¶ 11). According to Lorenz, pursuant to 29 CFR 1926.501,

fall protection systems, such as guardrails, safety nets or personal fall arrest systems, are only required for unprotected edges six feet or more above a lower level (*id.*). Lorenz further states that no hazard or unsafe condition existed on the loading dock on which plaintiff was unloading his employer's construction materials (*id.*, ¶ 12).

Plaintiffs argue that defendants have failed to meet their burden on summary judgment. Plaintiffs further contend that the unguarded edge of the temporary loading dock constitutes a dangerous or defective condition. According to plaintiffs, defendants had notice that the exposed edge of the temporary loading dock existed on numerous occasions, and thus had notice of a recurring condition, which defendants failed to remedy.

It is well settled that Labor Law § 200[1] is a codification of an owner's and general contractor's common-law duty to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Generally, Labor Law § 200 claims fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising from the means or methods in which the work is performed (*see Ventura v Ozone Park Holdings Corp.*, 84 AD3d 516, 517 [1st Dept 2011]). Where the plaintiff's accident arises out of a dangerous or defective premises condition, an owner or general contractor may be held liable only if it created or had actual or constructive notice of the dangerous condition (*Raffa*

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[1]Labor Law § 200(1) provides that:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

v City of New York, 100 AD3d 558 [1st Dept 2012]; *Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Where the plaintiff's injury arises out of the means and methods of the construction work, the plaintiff must establish that the owner or contractor supervised or controlled the activity giving rise to the injury (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

While defendants submit an affidavit from an expert indicating that the loading dock complied with all rules, regulations, and standards (Lorenz Aff., ¶¶ 4, 12), defendants have failed to demonstrate that the unguarded loading dock was not inherently dangerous as a matter of law (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *compare Dinallo v DAL Elec.*, 43 AD3d 981, 982 [2d Dept 2007] [jack assembly which was three feet high, 30 inches wide, and 30 inches deep, was an open and obvious condition which was not inherently dangerous]).

Defendants have also failed to meet their burden to demonstrate that they did not create or have actual or constructive notice of the dangerous condition of the loading dock, namely the lack of the safety railing, at the time of the accident. It is undisputed that the temporary loading dock had a safety railing which was removed during loading and unloading (Cettina EBT, at 23). According to Cettina, Tishman's superintendent, while it was the responsibility of the contractor making a delivery to remove the railing and put it back when it was done (*id.*), if the railing was not replaced, Tishman's dock master was obligated to replace it or tell the workers to replace it (*id.* at 42, 53). Tishman's superintendent testified that on several occasions he put the pipe bar back in place when the dock was not in use (*id.* at 41). DiGioia, the site safety manager, who conducted site inspections,

also testified that if the loading dock was not being utilized, a pipe bar or safety bar should have been placed on the platform (DiGioia EBT, at 32-33). According to the site safety manager, if he saw that the safety railing was not up while loading or unloading was not taking place, he would "clear the workers" "because of the edge" (*id.* at 41). Although defendants argue that these few occasions were insufficient to show that they had notice of the dangerous condition, Cettina's and DiGioia's testimony clearly indicates that there had been occasions when the safety railing was not in place, that they were aware of such dangerous occasions, and were required to take the necessary actions to remedy the dangerous condition. This is sufficient to at least raise an question of fact as to whether the defendants, through their supervisors, had constructive notice of the dangerous condition of the unguarded loading dock edge.

This Court finds defendants' reliance on *Hinton v City of New York* (73 AD3d 407 [1st Dept 2010]) to be misplaced. In that case, the plaintiff fell off the loading side of a loading dock, and it was undisputed that there were no guardrails or other safety devices to prevent a fall (*id.*). The First Department determined that the owner and lessee made a prima facie showing that they owed no duty of care to install a guardrail, and that the plaintiff failed to raise an issue of fact as to whether the loading dock was in violation of any code, rule, or ordinance or was inherently dangerous (*id.* at 408). However, in that case, the plaintiff did **not** allege a violation of Labor Law § 200, which imposes a duty on contractors and owners to provide a safe place to work. As noted above, Labor Law § 200 requires "all machinery, equipment, and devices" to be "so placed, operated, **guarded**, and lighted as to provide reasonable and adequate protection" to workers (Labor Law § 200[1] [emphasis added]). Additionally, in this case, it is undisputed that the temporary loading dock did have a safety railing, that it was supposed to be in place when loading and unloading was not taking

place, and that plaintiff was injured while moving a cart to the construction hoist, i.e., when loading and unloading was not occurring (Plaintiff EBT, at 22, 73; Cettina EBT, at 42).

Moreover, to the extent that plaintiffs' claims are based on the absence of safe and proper equipment (Verified Bill of Particulars, ¶¶ 5, 9), defendants also failed to establish or even raise the defense that they did not supervise or control the work[place]. Accordingly, defendants' motion seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims must be denied, regardless of the sufficiency of plaintiffs' opposing papers (*see Winegrad*, 64 NY2d at 853).

C. Labor Law § 241(6)

Labor Law § 241(6) provides that all contractors and owners shall comply with the following requirement:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law § 241(6) is not self-executing because it depends upon an outside reference source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). In *Ross*, the Court held that,

> [F]or purposes of the nondelegable duty imposed by Labor Law § 241(6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4(a). The former give rise to a nondelegable duty, while the latter do not.

(*Ross*, 81 NY2d at 505).

[* 17]

Thus, to succeed under Labor Law § 241(6), the plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision, and show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

As noted by the First Department in *Kempisty v 246 Spring St., LLC* (92 AD3d 474, 475 [1st Dept 2012]),

> Where a defendant [] moves [for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section. However, that is not the case where the plaintiff is the moving party.

Here, although plaintiffs argue that defendants' motion is entirely supported by an untimely expert affidavit, the interpretation of an Industrial Code presents an issue of law for the court to decide (*see Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]), and this Court finds that expert testimony is not required in this action. Since plaintiffs have not relied upon any of the cited Industrial Code sections in opposition to defendants' motion, they have apparently abandoned the Labor Law § 241(6) claim.

In any event, this Court finds that section 23-5.1(f) is too general to support a Labor Law § 241 (6) claim (*see Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 831 [2d Dept 2012]; *Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]). In addition, Industrial Code section 23-1.7(b)(1) does not apply to these facts, because the unguarded edge of the temporary loading does not constitute a "hazardous opening" within the meaning of this section (*see Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007]). Industrial Code sections 23-1.15 and 23-1.17 are inapplicable because plaintiff was not provided with any safety nets or safety railings (*see Dzieran*

v 1800 Boston Rd., LLC, 25 AD3d 336, 337 [1st Dept 2006]). As for Industrial Code section 23-1.22, since the ramps, runways and platforms contemplated by this section are those "'used to transport vehicular and/or pedestrian traffic'" (*id.* [citation omitted]), and the temporary loading dock was only four-and-a-half feet above the ground, was utilized for the loading and unloading of materials and was not used to transport vehicular a/or pedestrian traffic, this section is also inapplicable. Additionally, Industrial Code section 23-5.1(g) does not apply because plaintiff fell from a temporary loading dock, not a scaffold.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion sequence number 002 for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted as against defendants Tishman Construction Corporation of New York, Goldman Sachs Headquarters, LLC, and Battery Park City Authority, with the issue of plaintiff's damages to await the trial of this action; and it is further

ORDERED that the cross-motion of defendants Tishman Construction Corporation, Tishman Construction Corporation of New York, Goldman Sachs Headquarters, LLC, and Battery Park City Authority for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 241(6) claim, and is otherwise denied.

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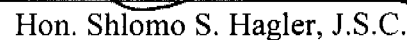

Hon. Shlomo S. Hagler, J.S.C.

Dated: February 11, 2013
New York, New York