

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22  
Justice

-----	Index No. 9402/06
SANTOS PADILLA,	Motion
Plaintiff,	Date March 27, 2007
-against-	Motion
THE NEW YORK CITY TRANSIT	Cal. No. 4
AUTHORITY, METROPOLITAN	Motion
TRANSPORTATION AUTHORITY, HALMAR	Sequence No. E 001
CONSTRUCTION COMPANY, INC., GRANITE	
CONSTRUCTION COMPANY and GRANITE	
HALMAR CONSTRUCTION COMPANY, INC.,	
Defendants.	
-----	

The following papers numbered 1 to 12 read on this motion by plaintiff for summary judgment.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-6
Affirmation in Opposition.....	7-9
Reply Affirmation.....	10-11
Supplemental Exhibit.....	12

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff, Santos Padilla, a construction plumber, commenced this action to recover for serious injuries sustained on February 1, 2006, when while working on the second floor of a building under construction at a site in Queens, New York, he was struck in the head by an allegedly unsecured cast iron pipe that had rolled off the top of a man-lift/scissor-lift located next to him. Plaintiff brought suit against defendants, The New York City Transit Authority ("NYCTA"), Metropolitan Transportation Authority ("MTA"), Halmar Construction Company, Inc. ("Halmar"), Granite Construction Company ("Granite"), and Granite Halmar Construction Company, Inc. ("Granite/Halmar"). Plaintiff moves for summary judgment under the Labor Law and additionally moves

to strike defendants' first, fourth, and fifth affirmative defenses.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2<sup>nd</sup> Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2<sup>nd</sup> Dept 1987]).

Plaintiff moves for summary judgment against all defendants pursuant to Labor Law §§ 240(1), 241(6), and 200. At the outset, the Court finds that that part of the motion seeking summary judgment against defendants, Granite, Halmar, and Granite /Halmar is denied. All three of the sections of the Labor Law statute that plaintiff has sued under impose duties only upon contractors, owners, and their agents. Plaintiff has failed to present any competent, admissible evidence to establish a *prima facie* case that Granite, Halmar, or Granite/Halmar are contractors, owners, or their agents regarding the site of the accident. Accordingly, that part of the motion seeking summary judgment against defendants, Granite, Halmar, and Granite/Halmar is denied in its entirety. Below, the Court discusses that branch of the motion seeking summary judgment only against the remaining defendants, NYCTA and MTA, and as such, all references to "defendants" below shall be read as applying to NYCTA and MTA only.

#### **I. LIABILITY UNDER LABOR LAW § 240(1)**

Plaintiff moves for summary judgment as to liability for his Labor Law § 240(1) cause of action. Plaintiff alleges that defendants violated Labor Law § 240(1) which states in relevant part that:

All contractors and owners and their agents  
... in the erection, demolition, repairing,  
and 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.

Plaintiff argues that this section was violated in that defendants failed to brace, stay, or otherwise properly secure the cast iron pipes that fell onto plaintiff's head; and plaintiff cites to case law stating that the statute has been interpreted to give protection to workers struck by falling objects that were not properly secured. In support of his motion, plaintiff submits, *inter alia*, the pleadings, unsworn accident reports, a certified accident investigation report of the Occupational Safety and Health Administration, an affidavit of plaintiff, himself, unsworn transcripts of plaintiff's 50-h hearing and deposition testimony, and unsworn deposition transcripts of non-party witnesses, Edmund Herzog (on behalf of the defendants), Shafik Eltoukhy (on behalf of the defendants), and William Byrne.

Defendants oppose plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action, contending that they are not liable under Labor Law § 240(1) because said section is specifically designed to protect employees on construction sites from elevation-related risks, and defendants maintain that this accident was not caused by a gravity related differential. Defendants maintain that this section 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. Defendants argue that plaintiff must prove more than that an object fell causing injury to a worker, but that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device like the kind enumerated in the statute. Defendants cite to case law as well as to plaintiff's own deposition testimony transcript which states that the cast iron pipe was not moving at the time of the accident; and they contend that there is no admissible evidence to suggest that the pipe was in the process of being hoisted or secured at the moment the accident occurred. Defendants maintain that the pipe was resting on the railing to the man-lift.

### Analysis

\_\_\_\_\_The Court finds that despite defendant's contentions, this accident involved the elevation-related risks necessary to

implicate the protections afforded by § 240(1). "Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured." (*Orner v. Port Authority*, 293 AD2d 517, [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (*Salinas v. Barney Skansa Construction Co.*, 2 AD3d 619 [2d Dept 2003]). The Appellate Division, Second Department has recently granted summary judgment to workers struck by falling objects that were not properly secured. In *Salinas, supra*, ductwork fell several feet onto a worker's head and the court held that plaintiff met its burden of establishing that the duct fell due to the absence or inadequacy of a safety device enumerated in the statute for securing or lowering the load. In *Orner, supra*, the worker was injured while hit upon the head by unsecured roofing material that had fallen from the roof. The Court granted summary judgment to the plaintiff, holding that a plaintiff may recover under Labor Law § 240(1) where an object falls from a height, when it was not properly secured (see also *Outar v. City of New York*, 286 AD2d 671 [2d Dept 2001] (holding that where worker was injured when an unsecured dolly fell from the top of a bench wall 5 ½ feet high, and the defendant failed to assert that the dolly was secured prior to the accident, plaintiff was entitled to summary judgment on the issue of liability under § 240(1))).

In the instant matter, the material facts are not disputed. Plaintiff alleges that an unsecured cast iron pipe fell from a height of approximately 10 feet onto plaintiff's head. Defendants do not dispute these facts in their opposition papers. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted." (*Kuehne & Nagel, Inc. v. Baider*, 36 NY2d 539 [NY 1975]; see also *Tortorello v. Carlin*, 260 AD2d 201 [1<sup>st</sup> Dept 1999]). Defendant argues that since the pipes were stationary at the moment the accident actually occurred, then the plaintiff should not be granted summary judgment. This Court finds this argument unavailing, as § 240(1) has been found to apply where objects were not actively being hoisted at the exact moment an accident happened (see *Cammon v. City of New York*, 21 AD2d 196 [1<sup>st</sup> Dept 2005]; *Manganello v. Hamilton*, 2006 NY Slip Op 51301U [Sup. Ct., Queens Cty 2006]). Accordingly, summary judgment is granted to plaintiff on this cause of action.

## II. LIABILITY UNDER LABOR LAW § 241(6)

Plaintiff also moves for summary judgment as to liability for his Labor Law § 241(6) cause of action. Plaintiff maintains that in order to maintain a cause of action under this section, plaintiff must establish that: (1) the defendant was an owner, general contractor or agent of an owner or a general contractor, that (2) plaintiff was a worker engaged in a protected activity and that (3) the defendant(s) violated one or more specific provisions of the Industrial Code, citing *Ross v. Curtis Palmer Hydo Electric Co.*, 81 NY2d 494 (1993) and *Leon v. J & M Peppe Realty Corp.*, 190 AD2d 400 (1<sup>st</sup> Dept 1993). Plaintiff contends that factors (1) and (2) are undisputed and as for factor (3), defendants allegedly violated 12 NYCRR 23-6.1 and 22 NYCRR 23-1.5 of the Industrial Code. 12 NYCRR 23-6.1, which deals with "Material Hoisting" states in relevant part that: "[t]he general requirements of this Subpart shall apply to all material hoisting equipment . . . such equipment shall be operated in a safe manner at all times . . . all loads shall be properly trimmed to prevent dislodgement of any portions of such loads during transit . . . [s]uspended loads shall be securely slung and properly balanced before they are set in motion." Plaintiff maintains that the scissor-lift was not operated safely and that the load was not properly trimmed or balanced. Plaintiff additionally argues that defendants violated 12 NYCRR 23-1.5 of the Industrial Code, which section states in relevant part that: "[a]ll load carrying equipment shall be designed, constructed, and maintained throughout to safely support the loads intended to be imposed thereon." Plaintiff argues that the man-lift was being used as "load carrying equipment" and by definition, did not safely support the loads.

Defendants contend they are not liable under Labor Law § 241(6) because plaintiff has not alleged a sufficiently concrete violation to maintain a § 241(6) cause of action. Defendants cite case law from the Court of Appals holding that an action may be maintained under Labor Law § 241(6) where the regulation plaintiff claims was violated mandates compliance with "concrete specifications", and that regulations which establish only "general safety standards" by invoking general descriptive terms are not a legally sufficient predicate for an action. Defendants contend that pursuant to case law, both Industrial Code Sections 23-1.5 and 23-6.1 have been held insufficient and not a concrete specification to support a cause of action under Labor Law § 241(6). Moreover, defendant alleges that even assuming that the violations were sufficiently specific to support a Labor Law § 241(6) cause of action, they did not apply to the accident as plaintiff was not hoisting, securing, or pulling at the time the

accident occurred. Finally, defendant alleges that a violation of § 241(6) is merely evidence of negligence which does not warrant summary judgment based upon a sole violation of the rules.

### **Analysis**

This Court finds that plaintiff's claims under Labor Law § 241(6) must fail. This section imposes a nondelegable duty upon homeowners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see *Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2<sup>nd</sup> Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." (*Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). 12 NYCRR 23-1.5 has been held not legally sufficient to support a Labor Law § 241(6) cause of action, since such a regulation establishes only "general safety standards," rather than "concrete specifications." (See *Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4<sup>th</sup> Dept 1996]). 12 NYCRR 23-6.1 has also been held not legally sufficient to support a Labor Law § 241(6) cause of action. Such a regulation has been held to "relate to general safety standards and . . . not concrete specifications sufficient to impose a duty on defendant." (*Narrow v Crane-Hogan Structural Systems Inc.*, 202 AD2d 841 [3d Dept 1994]; see also *Brown v. New York City Econ. Dev. Corp.*, 234 AD2d 33 [1<sup>st</sup> Dept 1996]; *Sharrow v. Dick Corp.*, 233 AD2d 858 [4<sup>th</sup> Dept 1996]). Accordingly, summary judgment is denied to plaintiff on this cause of action.

### **III. LIABILITY UNDER LABOR LAW § 200**

Plaintiff alleges in its Verified Complaint and Amended Bill of Particulars a violation of Labor Law § 200. In its moving papers, plaintiff indicates that it is moving under the "Labor Law" generally and devotes a section for argument under Labor Law § 240(1) and another section under Labor Law § 241(6). Defendants, in their opposition papers assert that plaintiff has not moved for summary judgment on his Labor Law § 200 cause of action.

## **Analysis**

Labor Law § 200 codifies the common law duty of an owner or contractor to provide construction site workers with a safe working environment, provided that the owner or contractor has supervisory control over the performance of the activity causing the injury (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

Plaintiff failed to present a *prima facie* entitlement to summary judgment under Labor Law § 200. In this instance, the allegedly dangerous condition arose out of the contractor's methods. Plaintiff has not established that defendants, who owned the construction site, exercised control over the performance of the activity that led to the injury (*Caldas v. 71<sup>st</sup> Avenue Assoc.*, 227 AD2d 428 [2d Dept 1996]; *Loreto v. Saint Johns Condo, Inc.*, 15 AD3d 454 [2d Dept 2005]). There is no admissible evidence in the record to show that the defendants "exercised supervisory control over the manner in which the work was performed." (*Caldas, supra*, at 428). Plaintiff also has not established that the defendants had actual or constructive notice of the defective condition (see *Caldas, supra*; *Mantovi v. Nico Construction Co.*, 217 AD2d 650 [2d Dept 1995]). While plaintiff presented the sworn affidavit of an employee who worked at the construction site for several months prior to the accident, who affirms that he complained to various people at the site prior to the accident that the pipes were being transported using the man-lifts, said complaints were only made by the employee to Granite/Halmar and its agents. As such, Granite/Halmar had notice of the defective condition, but the owners of the premises, NYCTA and MTA, could not be charged with having had actual or constructive notice based on the admissible evidence in the record before this Court. Accordingly, as plaintiff failed to present any evidentiary, non-conclusory proof sufficient to establish the lack of material issues of fact, summary judgment is denied to plaintiff pursuant to Labor Law § 200.

## **IV. STRIKING OF FIRST, FOURTH, AND FIFTH AFFIRMATIVE DEFENSES**

Additionally, plaintiff requests that the Court strike defendants' first, fourth, and fifth affirmative defenses, which claim, culpable conduct, the plaintiff's actions were the sole proximate cause of the accident, and that plaintiff disregarded safety precautions and equipment. Plaintiff contends that since the plaintiff was just standing there when a pipe fell on him, none of these defenses have an application to this case.

Defendant has failed to present any evidence whatsoever on this issue, and as such, this branch of plaintiff's motion will be granted and affirmative defenses one, four, and five shall be stricken.

**V. CONCLUSION**

Accordingly, summary judgment is denied to plaintiff with regards to defendants, Halmar, Granite, and Halmar/Granite. Regarding defendants, NYCTA and MTA, summary judgment is granted to plaintiff on its Labor Law § 240(1) causes of action, and denied to plaintiff on its Labor Law §§ 241(6) and 200 causes of action. Additionally, that branch of plaintiff's motion seeking to strike defendants' first, fourth, and fifth, affirmative defenses is granted.

This constitutes the decision and order of the Court.

Dated: April 16, 2007

.....  
**Howard G. Lane, J.S.C.**