

<b>Lopez v City of New York Transit Authority</b>
2004 NY Slip Op 30169(U)
August 2, 2004
Supreme Court, New York County
Docket Number: 0123901/2000
Judge: Robert D. Lippmann
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROBERT D. LIPPMANN  
J.S.C. Justice

PART 21

0123901/2000

LOPEZ, DAVID  
vs  
TRANSIT AUTHORITY

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

SEQ 3

MOTION SEQ. NO. \_\_\_\_\_

DISMISS

MOTION CAL. NO. \_\_\_\_\_

CA # 67

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*Motion is resolved as per attached decision and order.*

**FILED**

AUG 11 2004

COURT

OFFICE

Dated: 8-2-04

*Robert D. Lippmann*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
DAVID LOPEZ and BRIDGETTE LOPEZ,

Plaintiffs,

-against-

Index No.

THE CITY OF NEW YORK TRANSIT AUTHORITY,  
THE CITY OF NEW YORK, and SLATTERY SKANSKA  
INC./ THE GOTTLIEB GROUP, LLC, A JOINT  
VENTURE,

123901/00

Defendants.

-----X  
ROBERT LIPPMANN, J. :

Defendants move for summary judgment dismissing the complaint. Plaintiffs cross-move for summary judgment.

This action relates to an accident that occurred on September 1, 1999. Plaintiff David Lopez (David) sustained injuries while performing work for non-party Ward Electric, Inc. on the uptown side of the N and R subway track in the Times Square Subway Station. Plaintiffs commenced this action against respective defendants for David's injuries, alleging violations of Sections 200, 240 and 241 (6) of the Labor Law and common-law negligence. David's wife Bridgette is suing for loss of services. Defendants are the owners of the site and the general contractor of the project.

David injured his right hand when it became caught between the rungs of an extension ladder that he was retracting. This occurred when plaintiff proceeded to climb down the ladder to the ground level. Once he reached the ground level, he attempted to disengage the ladder. David, who was installing an electrical conduit above the subway tracks, was standing on the ground while retracting the ladder, because he was signaled that an oncoming subway train was

approaching. He allegedly slipped on debris on the ground, which in turn caused his hand to slip in between the rungs of the closing ladder.

Defendants move for summary judgment dismissing the Section 240 (1) and 241 (6) claims in the complaint, claiming that the aforesaid provisions of the Labor Law are not applicable to the accident at bar. Defendants maintain that Section 240 (1) is not applicable because the accident was not gravity-related, because David was on the ground level when the accident occurred, and he did not fall off the ladder, nor was he struck by a falling object. Defendants assert that in the absence of an elevation differential, where the worksite was elevated or was positioned below the area where materials were hoisted or secured, defendants cannot be held liable.

Defendants also assert that Section 240 (1) is not applicable because the ladder used by David was not defective, malfunctioning, or improperly placed. They claim that David admitted at his 50-H hearing that the ladder was working properly. They believe that his injuries were due to his own negligence.

Defendants state that plaintiffs cannot maintain an action under Section 241 (6) of the Labor Law, because no issues of fact exist that show a violation of the Industrial Code. The Code provisions cited by plaintiffs in the complaint are alleged to be irrelevant or too general to be legally enforceable.

Plaintiffs oppose the motion and cross-move for summary judgment in their favor. They assert that the accident was gravity-related in that the top portion of the extension ladder had fallen on David's hand, and that the portion was improperly secured at the time of the accident. Plaintiffs also assert that the extension ladder was defective at that time. The ladder

allegedly was not equipped with a rope/cord-hoisting required to be positioned on a hook at one of the rungs of the extension or top stage of the ladder, thereby allowing a worker to hoist the top stage up and hoist it down from a standing position away from the ladder by use of leverage. David was directed to utilize the ladder in order to do his work, and was not assisted in his work. According to plaintiffs, if the ladder was working properly, the upper portion would not have been able to collapse without being caught by one of the clamps at the level of the upper rung. The nature of the ladder required that various hinges be positioned at each rung as one brings up the higher stage of the ladder and then lowers it with the rope. The extension stage of the ladder failed to catch a rung, allegedly due to the defect of the ladder. An affidavit from an engineer, Nicholas Bellizzi, discusses the alleged defects of the ladder in detail.

In opposition to the cross motion, defendants claim that in his testimony, David asserted that there was no indication that the extension ladder was defective, and that the affidavit from Bellizzi is speculative at best, because he apparently did not examine the ladder at bar.

Section 240 (1), the Scaffold Law, imposes a nondelegable duty upon owners and general contractors to furnish proper safety devices and protection in order to ensure the safety of workers exposed to elevation-related risks during the construction, repair, demolition, painting and alteration of a building or structure. See Brennan v RCP Associates, 257 AD2d 389 (1<sup>st</sup> Dept), lv dismissed 93 NY2d 889 (1999). Hazards against which this statute is designed to afford protections

“are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level, where the worker is positioned and the higher level of the materials or load being hoisted or secured.”

I d., quoting Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (1991). A claim is stated when an injury is occasioned as a result of the worker falling from a height or being struck by an object being improperly hoisted or secured at the time of the accident in the absence of, or the inadequacy of, a proper safety device. See McByrne v Ambassador Construction Co., Inc., 290 AD2d 243 (1st Dept 2002). In order to impose liability for violation of the law, the injured worker must prove both the violation of the statute, and that said violation was the proximate cause of his injuries. Zeitner v Herbmax Sharon Associates, 194 AD2d 414 (1st Dept 1993).

Here, plaintiffs are claiming that the upper level of an extension ladder was a falling object that was unsecured at the time of the accident. They are also indicating that the ladder was defective and malfunctioning. In previous testimony, David stated that he was not aware of any defects in the ladder. Now, plaintiffs state that the ladder was defective and violated sections 240 (1) and 241(6) of the Labor Law. They rely upon the affirmation of their attorney and an affidavit from an engineer.

An attorney's affidavit or affirmation which lacks personal knowledge is not probative, unless the basis thereof is documentation in the attorney's possession which is relevant to the issue. See Zuckerman v City of New York, 49 NY2d 557 (1980). The most relevant documentation is the engineer's affidavit. Although he states that he is thoroughly familiar with the nature and type of extension ladder that the plaintiff was using at the time of the accident, he did not actually examine or inspect the ladder. The court finds the affidavit to be speculative and insufficient for summary judgment purposes.

Moreover, the court does not find this to be a gravity-related accident. The ladder being retracted does not qualify as a falling object. As there is insufficient proof of a defective or

malfunctioning extension ladder, defendants are granted summary judgment and the Section 240 (1) claim is dismissed.

The next claim involves Section 241 (6). To successfully prosecute a cause of action under this statute, plaintiff is required to plead and prove the violation of specific regulations promulgated by the Commissioner of Labor. Blysmá v County of Saratoga, 296 AD2d 637 (3d Dept 2002). Plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command and that rule must be applicable to the facts of the case. Singleton v Citnalta Const. Corp., 291 AD2d 393 (2d Dept 2002).

In the complaint, plaintiffs allege that defendants violated the following regulations: 12 NYCRR 23-1.7 (a), (b), (c), (d), (e) (1); 1.5 (a), (b), (c) (1), (2), (3); 1.21 (b) (4) (i), (b) (4) (ii), (c) (3); 1.15; 1.22(c); 1.30; 2.1(b); and 3.3 (b) (1-6), (c), (f) While defendants argue that plaintiffs have not alleged violations of relevant rules, plaintiffs rely upon the affidavit of engineer Bellizzi. Bellizzi states that the extension ladder violated specific sections of the Industrial Code of the State of New York, sections 12 NYCRR 23-1.21 (a), 1.21 (b) (3), 1.21 (b) (4) and 1.21 (b) (4) (d). He states that the fact that David slipped on debris on the ground level while lowering the ladder was a violation of sections 12 NYCRR 23-1.7 (d) and 1.7 (o) (2).

Plaintiffs did refer to section 12 NYCRR 23-1.21 in their complaint and bill of particulars. The section refers to ladders and ladderways and deals with defective ladders. However, since plaintiffs did not demonstrate that the ladder at bar was defective, the section is not relevant to this case. There is no such statute as 1.21 (b) (4) (d).

Plaintiffs refer to 12 NYCRR 23-1.7 (d), which concerns “slipping hazards.” The rule provides that “employers shall not suffer or permit any employee to use a floor, passageway,

walkway, scaffold, platform or other elevated working surface which is in a slippery condition.” Although it is alleged that David slipped on the floor, due to debris, the slip was not the cause of his injury. The ladder falling on his hand was the cause of his injury. Therefore, this rule would not apply to his situation. The other parts of 12 NYCRR 23-1.7 refer to hazards that are not relevant to this case. Section 12 NYCRR 1.7 (o) (2) does not exist.

Section 12 NYCRR 23-1.5 refers to the general responsibility of employers. Section 12 NYCRR 23-2.1(b) refers to the disposal of debris. These sections do not sufficiently set forth a specific standard of conduct for violations to qualify as a predicate for a Section 241(6) violation. See, Quinlan v City of New York, 293 AD2d 362 (1st Dept 2002), Sibley v NYC Transit Auth, 282 AD2d 337 (1st Dept 2001).

Section 12 NYCRR 23-33 involves demolition by hand, which is not relevant because plaintiffs did not allege that David was doing demolition work. Section 12 NYCRR 23-1.15 involves the use of safety railings. Section 12 NYCRR 23-1.22(c) refers to the use of safety railings on platforms. These rules are not applicable because plaintiffs did not allege a lack of safety railings in their complaint.

Section 12 NYCRR 23-1.30 refers to illumination. Nowhere in the complaint does plaintiffs allege that a lack of illumination on the ground level caused David’s hand to slip between the closing rungs of the ladder. This rule is not applicable to this case.

Thus, defendants are granted summary judgment and the Section 241 (6) claims are dismissed. Defendants have not sought dismissal of the Section 200 claim or the common-law negligence claim in the complaint. These claims shall remain intact.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted with respect to claims brought under sections 240 (1) and 241 (6) of the Labor Law, which are dismissed as against them; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is denied.

DATED: Aug. 2, 2004

AUG 02 2004

ENTER:

*Robert D. Lippmann*  
J.S.C.

HON. ROBERT D. LIPPMANN  
J.S.C.

**FILED**  
AUG 11 2004  
NEW YORK  
COUNTY CLERK'S OFFICE