[* 1]
SCANNED ON 5/17/2005

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

PRESENT: Kornreich Justice PART 54

Index Number : 101980/2001
BOYLE, MATTHEW
VS
42ND STREET DEVELOPMENT
Sequence Number : 10
REARGUMENT/RECONSIDERATION

NO. 101980/01
ON DATE 4/21/05
ON SEQ. NO. 10
ION CAL. NO.

The following papers, numbered 1 - 9 on to/for Reargument

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 7, 8, 9
Answering Affidavits — Exhibits	2, 3, 4, 5, 6
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

FILED
MAY 17 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/5/05

SHIRLEY WERNER KORNREICH J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MATTHEW BOYLE and KATHLEEN BOYLE,

Plaintiffs,

Index No.: 101980/01

DECISION and ORDER

-against-

42nd STREET DEVELOPMENT PROJECT, INC., 42nd STREET COMPANY and F.J. SCIAME CONSTRUCTION COMPANY, INC.,

Defendants.

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42nd STREET DEVELOPMENT PROJECT, INC., 42nd STREET COMPANY and F.J. SCIAME CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiffs

Index No.: 590758/02

-against-

ARCHER'S IRON WORKS and CNA COMMERCIAL INSURANCE

Third-Party Defendants.

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ARCHER'S IRON WORKS,

Second-Third Party Plaintiffs,

Index No.: 590842/04

-against-

CANRON CONSTRUCTION CORP.,

Second-Third Party Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for work-related injury allegedly sustained by plaintiff while working on the construction of an eleven-story building located at 229 West 42nd Street, in New York City. 42nd Street Development Project, Inc., 42nd Street Company (together, "42nd Street") was the owner of the building, and F.J. Sciame Construction Company, Inc. ("Sciame") was the construction manager/general contractor for the project. Archer's Iron Works ("Archer") was retained by Sciame to install steel stairs on the inside of the building. Canron Construction Corp. ("Canron") was the structural steel subcontractor for the project. Valley Forge Insurance Company, s/h/a CNA Commercial Insurance ("Valley Forge"), was the liability insurer who allegedly insured defendants against loss arising from Archer's work.

Plaintiff alleges that he was one of a six-man crew, all Archer employees, engaged in hoisting the components of steel stairs to the sixth floor. The component materials had to be hoisted through an open elevator shaft. According to plaintiff, three men were at ground level, attaching the materials to a hoisting mechanism called an electric chain fall; plaintiff was on a beam within the shaft at the sixth-floor level, operating the chain fall, and guiding the hoisted materials, in order to ensure they did not get caught on anything in the shaft; and two men were at the sixth floor landing, receiving the material. In addition, two Archer employees were located on the eighth or ninth floor level of the shaft, performing actual installation work.

The assembly of steel stairs requires threaded rods, steel rods approximately six feet long, weighing approximately six pounds, which act as a kind of bolt, holding parts of the stairs together. Plaintiff alleges that, on the day of his accident, while he was working in the shaft, a

threaded rod fell from two or three floors above him, where his co-workers were installing stairs, and struck him on the right side of his back and hip, injuring him. Plaintiff's co-worker, Fred Fegel, testified that the rod that struck plaintiff had been attached to the stairway structure with "bolts and washers." EBT of F. Fegel, p. 76. Fegel further testified that, as is customary with hanger rods, the bolts holding the rod in place had not been tightened, to allow for adjustment. Id. at 75. Fegel surmised that the rod that struck plaintiff came loose as a result of vibrations caused by hand tools "used to hammer the stringer into realignment." Id. at 74.

The Court's Decision and Order dated January 11, 2005

In Motion Sequence No. 6, plaintiffs moved for summary judgment on their causes of action under Labor Law §§ 240(1) and 241-a; and 42nd Street, Sciame and Archer cross-moved for summary judgment dismissing plaintiffs' Labor Law and common law negligence claims. 42nd Street and Sciame also cross-moved for contractual indemnification against Archer. By decision and order dated January 11, 2005 (the "Decision"), the Court, insofar as is pertinent here: (1) denied summary judgment on most of the Labor Law causes of action,[1] finding a question of fact as to "whether a statutorily enumerated protective device would have been necessary or even expected to shield plaintiff," (see Bush v. Gregory/Madison Ave., LLC, 308 A.D.2d 360,361 (1st Dept. 2003) (citation, internal quotation marks omitted)); and (2) granted summary judgment to the defendants for contractual indemnification against Archer.

Motions

Archer now moves for leave, pursuant to CPLR 2221(d), to reargue: (1) its motion for

[1]The Court did grant summary judgment dismissing certain of plaintiffs' claims under Labor Law § 241(6) on the grounds that the cited sections of the Industrial Code were insufficiently specific or not applicable.

summary judgment dismissing plaintiffs' Labor Law claims; and (2) the grant of summary judgment to 42nd Street.[2] Archer submits the affirmation of its attorney, excerpts of deposition testimony, a copy of Archer's contract with Sciame, and other documentary evidence.

In opposition, plaintiffs submit the affirmation of their attorney. Plaintiffs also cross-move to reargue their motion for summary judgment, and, pursuant to CPLR 5519(c), for an order staying the trial of this action pending appeal of the Court's January 11 Decision.

Defendants cross-move to reargue their prior motions, and for reformation and coverage under the Valley Forge insurance policy issued to Archer. Defendants submit the affirmation of their attorney, together with copies of pleadings and further documentary evidence.

Conclusions of Law

A. Summary Judgment

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. Zuckerman v. City of N.Y., 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. See In re Dissolution of Rencor Controls, Inc., 263 A.D.2d 845 (3rd Dept. 1999) citing Hanson v. Ontario Milk Producers Coop., Inc., 58 Misc.2d 138 (Sup.Ct. Oswego County 1968)(Aronson, J.); Bank of New York v. Spitzer, 43 A.D.2d 105 (1st Dept. 1973). In its Decision, the Court denied summary

[2]Although Archer's Notice of Motion seeks reargument as to contractual indemnification as to 42nd Street only, its Memorandum of Law refers to the grant of summary judgment to "defendants." Because the same issues are involved, the Court will treat Archer's application as one to reargue the grant of summary judgment to 42nd Street and Sciame.

judgment to all moving parties as to the Labor Law claims, except certain of the claims under Labor Law § 241(6). The Court now concludes that it misapprehended certain facts, and, thus, misapplied the law, to the extent set forth below.

B. Labor Law Section 240(1)

It is well settled that not every falling object injury that occurs on a construction site gives rise to a Section 240 claim. See Narducci v. Manhasset Bas Assocs., 96 N.Y.2d 259 (2001). "[A] plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Id. at 268 (citations omitted). The Court's Decision was premised on the fact that the rod which struck plaintiff was being hoisted into place at the time of the accident. Upon review of the present submissions, and reconsideration of the record, it is undisputed that the rod which struck plaintiff was *not* being hoisted into place. Instead, the rod had been placed into the stairway structure prior to the accident. The testimony of Mr. Fegel suggests that the rod was shaken loose by vibrations caused by construction of the staircase. In any event, it is plaintiffs' contention now that the accident is encompassed by Section 240 because the rod was not properly secured. Plaintiff argues that the lack of additional bolts to secure the rod constituted a violation of Section 240. The Court disagrees.

The First Department, applying Narducci, has clearly held that the protection of the statute is only available where the object falls *while* being hoisted or secured. See Doucoure v. Atl. Dev. Group, LLC, 12 A.D.3d 252 (1st Dept. 2004); see also Gambino v. Mass. Mut. Life Ins. Co., 8 A.D.3d 337, 338 (2nd Dept. 2004). Here, the rod was not being hoisted or secured at

the time of the accident. Thus, Section 240 does not apply. Nor are "bolts" a safety device "of the kind enumerated in the statute." To the contrary, the malfunctioning or absence of a bolt holding a structure in place is the type of hazard normally encountered on a construction site. It may be the result of negligence, but does not reflect conduct encompassed within Labor Law § 240(1). See Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490 (1995); cf. Dias v. Stahl, 256 A.D.2d 235, 236 (1st Dept. 1998) (Section 240 did not apply where "an integral part of the structure, a section of air conditioning duct work suspended from an approximately 10-foot-high ceiling by metal support straps, fell on [plaintiff]."). Therefore, upon reargument, summary judgment is granted to 42nd Street, Sciame and Archer, dismissing plaintiffs' claim under Labor Law Section 240(1).

C. Labor Law § 241(6) and 241-a

"Labor Law § 241(6) requires building owners and contractors to 'provide reasonable and adequate protection and safety' for workers involved in building construction, excavation or demolition and to comply with safety rules and regulations promulgated by the State Commissioner of Labor." Messina v. City of New York, 300 A.D.2d 121, 122 (1st Dept. 2002) quoting Ross v. Curtis Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502 (1993). "To assert a sustainable cause of action under section 241(6), a plaintiff 'must allege a violation of a concrete specification of the [Commissioner's regulations in the] Industrial Code.'" Messina, 300 A.D.2d at 122 quoting Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp., 271 A.D.2d 231, 232 (1st Dept. 2000). "The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court." Messina, 300 A.D.2d at 123 (citations omitted). However, while the violation of an

Industrial Code provision "constitute[s] some evidence of negligence," it is for a jury to determine "'whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances.'" Belcastro v. Hewlett-Woodmere Union Free Sch. Dist. No. 14, 286 A.D.2d 744, 746 (2nd Dept. 2001) quoting Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 351 (1998).

Archer argues that the Court erred in denying its motion for summary judgment dismissing plaintiffs' claims under Labor Law §§ 241(6) and 241-a because: (1) plaintiffs failed to establish that the accident occurred in an area "normally exposed to falling material or objects" (12 NYCRR 23-1.7(a)); and (2) Section 241-a does not apply where, as here, an open shaftway was reasonably required for the work being performed. Defendants argue that neither section applies because the work required an open shaftway, thus precluding the "planking" called for by both section. The Court disagrees with these arguments.

First, unlike in the cases cited by Archer, there is evidence here that plaintiff's accident occurred in an area where there was a reasonable possibility of falling objects. Cf. Quinlan v. City of New York, 293 A.D.2d 262, 263 (1st Dept. 2002) (claim based on 12 NYCRR 23-1.7 (a) properly dismissed where there was "no evidence that plaintiff was working in or frequenting an area that was 'normally exposed to falling material or objects'") citing Daly v. City of New York, 254 AD2d 214 (same). Indeed, Canron was responsible for covering shaftway openings throughout the site, in order to protect the workers against falling hazards.

Second, the undisputed fact that an open shaftway was required for plaintiff's work does not preclude application of Labor Law §§ 241(6) or 241-a. The issue in contention here is whether the work required the entire shaftway to be open, or whether, as plaintiffs contend, a

smaller shaftway opening should have been created by laying planking over the existing opening, and creating a hole in the planking, through which the stairway components could be raised. The Court concludes that a question of fact is raised as to this issue. "Labor Law § 241-a is to be construed in pari materia with Labor Law § 241. Doucoure, 12 A.D.3d at 253 citing Khela v. Neiger, 85 N.Y.2d 333, 336 (1995). The Second Department has held that Section 241-a does not apply where an open shaftway is "reasonably required" to perform the work. See Brzoza v. Park P.E.P. Corp., 28 A.D.2d 867 (2nd Dept. 1967); Vivian v. J.W. Enterprises, Inc., 16 A.D.2d 933 (2nd Dept. 1962). Neither Industrial Code § 23-1.7(a), nor Labor Law § 241-a, specifies that the entire shaftway opening must be covered by planking. Nor do the parties cite any case construing these statutes in connection with a partially covered shaftway opening. The Court concludes that a question of fact is raised as to whether, and to what extent, partial planking of the shaftway opening would have been reasonable.

In this connection, the Court notes that the record is unclear as to whether plaintiffs' proposed partial-planking solution would have been feasible because of the size of the materials being hoisted through the shaft. Steven Schottmuller testified, on behalf of Sciame, that the dimensions of the shaft were approximately "sixteen by nine." EBT of S. Schottmuller, p. 62. Plaintiff's co-worker, Frederick Fegel, testified that the materials being hoisted up had to be carefully maneuvered so that they would not catch on various beams and other components within the shaft. EBT of F. Fegel, p. 104. Plaintiff indicated that the stringers could "get[] caught on the ceiling of the first floor if it's longer than the floor itself." EBT of M. Boyle, p. 34. Moreover, Schottmuller indicated that the practice of second third-party defendant Canron Construction Corp. ("Canron"), which was responsible for covering all the shaftways on the site,

was to cover the entire shaft opening using "netting or planking." EBT of S. Schottmuller, p. 59. Under the circumstances, the Court cannot determine as a matter of law whether plaintiff's injury was caused by a violation of Labor Law Section 241(6) or 241-a.

D. Contractual Indemnification

Archer argues that the Court erred in granting 42nd Street's motion for contractual indemnification without making an express finding that Archer was negligent. The Court agrees, in part. The contract provision at issue required Archer to indemnify 42nd Street from claims arising out of Archer's work "to the fullest extent permitted by law...but only to the extent caused in whole or in part by the negligent acts or omissions of [Archer]." Affirmation of D. Beke, Exhibit G. Where such a provision is in effect, but the negligence of the indemnifying party has not been established, summary judgment must either be denied the indemnified party, or granted conditionally, upon a finding of the indemnifying party's negligence. See Crimi v. Neves Assocs., 306 A.D.2d 152 (1st Dept. 2003) citing Zeigler-Bonds v. Structure Tone, 245 A.D.2d 80 (1st Dept. 1997). Here, the record does not establish Archer's negligence, though the non-negligence of the defendants has been established. The Court disagrees with 42nd Street's argument that if there was any negligence, it had to have been committed by Archer. As discussed above, third-party defendant Canron was responsible for safety measures with respect to shaftways and, thus, may have been negligent with respect to plaintiff's accident. The Court concludes, upon reargument and reconsideration, that summary judgment on contractual indemnification should have been granted to 42nd Street conditionally, upon a finding of Archer's negligence.

E. Coverage under the Valley Forge Policy Issued to Archer

In its Decision, the Court rejected Defendants' argument that the Valley Forge policy should be reformed to include them as additional insureds under the theory of mutual mistake. The Court held that Defendants submitted no evidence making it "apparent" that an innocent mistake had occurred causing them not to appear as additional insureds, when the policy was renewed in 1999. Now, Defendants repeat the argument, but offer no new evidence in support. Upon reargument and reconsideration, the Court concludes that it did not misapprehend the facts or the law with respect to this issue.

F. Motion for Stay of Proceedings

Plaintiffs cross-move for a stay of the trial pending resolution of the appeal taken of the same Decision that is the subject of the instant reargument motions. Plaintiffs' attorney affirms that the parties have agreed to a briefing schedule on the appeal, with argument set for September of this year. No party opposes the motion. Therefore, the Court, in its discretion pursuant to CPLR 5519(c), grants the motion to stay this action, which shall be set down for a pre-trial conference on October 20, 2005. Accordingly, it is

ORDERED that the motion of third-party defendant Archer's Iron Works pursuant to CPLR 2221(d), for leave to reargue its prior motion for summary judgment dismissing plaintiffs' claims under Labor Law §§ 240(1), 241(6) and 241-a is granted to the extent that summary judgment is granted to Archer's Iron Works dismissing plaintiffs' claims as against it under Labor Law § 240(1), and otherwise denied; and it is further

ORDERED that the motion of third-party defendant Archer's Iron Works, pursuant to CPLR 2221(d), for leave to reargue the grant of summary judgment to defendants 42nd Street Development Project, Inc., and 42nd Street Company, for contractual indemnification is granted

only to the extent that summary judgment is granted to said defendants for contractual indemnification against Archer's Iron Works, conditioned upon a finding of negligence, total or partial, of Archer's Iron Works; and it is further

ORDERED that the cross-motion of defendants for leave to reargue their motion for summary judgment dismissing plaintiffs' claims against them under Labor Law §§ 240(1), 241(6) and 241-a is granted to the extent that summary judgment is granted to defendants dismissing plaintiffs' claims as against them under Labor Law § 240(1), and otherwise denied; and it is further;

ORDERED that the cross-motion of defendants for leave to reargue their motion for summary judgment for reformation and coverage under the insurance policy issued by third-party defendant Valley Forge Insurance Company s/h/a CNA Commercial Insurance, to Archer's Iron Works, is denied; and it is further

ORDERED that the cross-motion of plaintiffs for leave to reargue their motion for summary judgment on their claims under Labor Law §§ 240(1), 241(6) and 241-a is denied; and it is further

ORDERED that the cross-motion of plaintiffs for an order pursuant to CPLR 5519(c), staying the trial of this action pending hearing and disposition of the appeal herein, is granted, and the parties are directed to appear before the Court for a pre-trial conference on October 20, 2005 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Date: May 5, 2005
New York, New York

SHIRLEY WERNER KORNREICH