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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7

Justice

MIROSLAW LENIARTEK,

Plaintiff,

- v -

200 WEST 86TH APARTMENTS, CORP. and WALLACK MANAGEMENT COMPANY, INC,

Defendants.

INDEX NO. 100376/04

MOTION DATE 1/16/07

MOTION SEQ. NO. 004

MOTION CAL. NO. ____

The following papers, numbered 1 to 8 were read on this motion and cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits 1-7	1-2
Notice of Cross Motion— Answering Affidavits — Exhibits A-F	3-4
Replying and Sur-Reply Affidavits; Stipulation	5-8

Cross-Motion: X Yes ☐ No

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

HON. MICHAEL D. STALLMAN

Dated: 3/29/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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MIROSLAW LENIARTEK,

Index No.: 100376/2004

Plaintiff,

-against-

200 WEST 86TH APARTMENTS, CORP. and
WALLACK MANAGEMENT COMPANY, INC.,

Defendants.

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200 WEST 86TH APARTMENTS, CORP. and
WALLACK MANAGEMENT COMPANY, INC.,

Index No.: 591062/2005

Third-Party Plaintiffs,

-against-

BREND CONTRACTING CORPORATION,

Third-Party Defendant.

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HON. MICHAEL D. STALLMAN, J.:

In this action alleging violations of the Labor Law and negligence, plaintiff seeks to recover damages for personal injuries that he allegedly sustained as a result of falling from a scaffold, which occurred on August 7, 2002, at 200 West 86th Street in Manhattan. Pursuant to CPLR 3212, plaintiff moves for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants 200 West 86th Apartments, Corporation (200 West 86th) and Wallack Management Company, Inc. (Wallack). Defendants cross-move for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims.

BACKGROUND

At the time of plaintiff's alleged accident, 200 West 86th owned the five-story building located at 200 West 86th Street in Manhattan (the premises) where plaintiff's accident occurred. Wallack was the management company for the premises. Plaintiff was employed by Brend Construction Corporation (Brend Construction), a bricklaying company that specialized in using scaffolding.

Plaintiff was performing brick replacement work at the crown or top portion of the premises He was working on a stationary scaffold, the feet of which extended to the balcony or terrace below. The flooring of the scaffold consisted of two planks of wood approximately eight centimeters wide placed side-by-side. The planks were placed on top of metal pipes. A loosely draped rope was tied around two-inch by four-inch wooden uprights. The scaffold contained no middle or upper railings. To reach the scaffold, plaintiff and other workers had to lower themselves over the edge of the building from the roof onto the scaffold planking.

Plaintiff was using an electric rotary saw, supplied by his employer, to cut out a brick. As plaintiff was cutting at the height of his waist and with both hands operating the saw, the saw blade hit something in the brick. The saw kicked back, causing plaintiff's hands to let go of the saw as he fell backwards and downwards into a drop cloth below the level of the scaffold flooring. The drop cloth, which had been nailed to the wall and lowered onto the planks, had been put in place to prevent debris from falling from the scaffold structure. As plaintiff was falling backwards and downwards, the saw fell and landed on plaintiff's left hand while the blade was still spinning, severely cutting plaintiff's fingers.

DISCUSSION

"'The 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'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Motion for Summary Judgment

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, Inc., 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Hous. Serv. of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]).

Plaintiff establishes a prima facie for summary judgment as to 200 West 86th, the undisputed owner of the premises where plaintiff allegedly fell. A photograph indicates that the scaffold lacked middle and upper railings where plaintiff was working (see Radna Affirm., Ex 3). The absence of guardrails or other protective devices on the scaffold was a failure to give "proper protection" within the meaning of Labor Law § 240 (1) (Kapa v O&Y Liberty Plaza Co., 218 AD2d 635, 636 [1st Dept 1995]). Plaintiff establishes proximate cause by showing that the railings may have prevented his fall (Crespo v Triad, Inc., 294 AD2d 145, 146 [1st Dept 2002]).

In opposition to plaintiff's motion for partial summary judgment, defendants submit that his injuries were not gravity-related, so as to fall within the purview of Labor Law § 240 (1). Defendants argue that plaintiff's injuries were caused when the saw came into contact with his hand, which happened before he was caused to lose his balance and fall downwards beyond the scaffold and into the drop cloth.

This argument is unavailing. "'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... 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'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but rather applies where the work itself involves risks related to differences in elevation (Binetti v MK West Street Co., 239 AD2d 214, 214-215 [1st Dept 1997]; see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 500-501] [a welder, who injured his back because of the twisted manner in which he was sitting on a scaffold, could not recover under section 240 (1) because his injuries did not occur as a result of an elevation-related hazard]).

The instant case is similar to the case of Gordon v Eastern Ry. Supply, Inc. (82 NY2d 555, 560-561 [1993]), wherein liability under Labor Law § 240 (1) was found when the worker was injured when he activated the trigger of a sandblaster, causing the ladder he was working on to tip over and fall. There, the defendants maintained that the plaintiff was not injured by the fall itself, but solely by loss of control of a defective sandblaster which sprayed the plaintiff with sand both during and after his fall from the defective ladder. Thus, the defendants argued that the sandblaster was the superseding cause of the plaintiff's injuries, completely independent of the defendants' violation of the statute.

However, in finding that the defendants' failure to provide the plaintiff with a safe scaffold or ladder while he was performing his sandblasting work was a substantial cause leading up to plaintiff's injuries, the Court noted that the

> [d]efendants are liable for all normal and foreseeable consequences of their acts. To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable. An independent intervening act may constitute a superseding cause, and be sufficient to relieve defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them.
>
> In this case, defendants' failure to provide plaintiff with a safe scaffold or ladder while he sandblasted the railroad car was a substantial cause leading to his fall and the injuries he sustained. Injury was a foreseeable result of cleaning railroad cars from an elevated position, and a fall and injury occasioned by an allegedly defective sandblaster used in the process is not of such an "extraordinary nature" that defendants' responsibility for the injury should be severed. If it were, recovery under section 240 (1) would be foreclosed in every case in which a worker was using a tool while working in an elevated position, fell and was injured by the tool [citations omitted]

(id. at 562; see also Johnson v General Design and Dev., Inc., 225 AD2d 970, 971 [3d Dept 1996]

[drill that jammed and threw worker off a ladder established a gravity-related hazard since the ladder was inadequate to provide proper protection to the worker]).

Becker v Royce (170 AD2d 974, 975 [4th Dept 1991]), cited by defendants, is distinguishable. In Becker, the plaintiff, while standing on a block of wood atop a crate frozen to the ground, was injured when the chain saw he was working with kicked back and struck him in the face, causing him to fall off the block and crate. In Becker, the plaintiff's injuries to his face occurred entirely before he was caused to fall from the crate. Unlike Becker, plaintiff's injuries occurred here as he was falling, as a result of losing his balance on the inadequate scaffold.

Contrary to defendants' assertions, plaintiff's responses were clear and consistent that the saw cut his hand during or after his fall from the scaffold, and that the injury to his hand was caused in part from his loss of balance and falling from the inadequately constructed scaffold. Specifically, plaintiff testified, in pertinent part:

A. When I was cutting, something blocked the saw.
Q. Did that stop the blade?
A. It hit something.
Q. It hit something. Did the blade stop when you hit something?
A. No.
* * *
A. I was pushed by the saw.
Q. Did the saw push you while you were cutting?
A. Yes.
Q. Which way did it push you?
A. Backward.
Q. When it pushed you backward, did you let go of the handle?
A. I let the saw go. I let go of the saw.
* * *
Q. As you let go of the saw, were you still being pushed backwards?
A. The saw pushed me and I lost my balance.
* * *
Q. Were you still being pushed back when you let go of the

handles?

A. I fell backwards. I fell backwards holding onto the planks.

Q. ... When the saw started pushing you back and you let go of the saw, at the point you let go, were you still being pushed back?

A. At that moment I fell.

* * *

Q. Where were your feet when you let go of the handle of the saw?

A. Well, down beyond the fabric, because I lost my balance.

* * *

Q. So, as you started to fall you had already let go of the saw?

A. No. I did not hold the saw.

* * *

Q. Were the fingers on the left hand cut before or after you first made contact with the drop cloth?

A. At the moment as I was falling down, the saw fell on my hand.

* * *

Q. When it made contact with your hands and cut your hand, was that before or after you made contact with the drop cloth?

A. I was pushed by the saw. I was falling backwards. I stretched my arms forward to help myself. The saw fell on my hands. I felt some kind of burning sensation in my left hand.

* * *

A. I was – it was like in the process of falling. I was already like half lying down and falling backwards

(Elder Affirm., Ex E [Leniartek EBT], at 105-119, 124). Plaintiff also noted that, when the saw pushed him backwards, he may have taken one step backward and then lost his balance because he was standing on two planks. In addition, plaintiff stated that he was already holding onto the planks when he felt the burning sensation in his hand. Further, when the saw cut his left hand, his waist and shoulders were already below the planks of the stationary scaffold at issue.

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim as against 200 West 86th.

As to Wallack, plaintiff contends that, as a managing agent, Wallack is liable under Labor Law § 240 (1) as an agent of the owner. Plaintiff points to a provision in the contract between 200

West 86th and Brend Construction, which provides that, with the exception of Wallack, there are no agents of owner 200 West 86th who are authorized to make decisions on behalf of owner 200 West 86th.

When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains "'the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005] quoting Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). Here, the fact that Wallack is authorized to make decisions on behalf of 200 West 86th does not make Wallack a statutory agent, without a showing that it had the authority to supervise and control the injury-producing work.

Plaintiff's reliance on the contract between Brend Construction and 200 West 86th is misplaced. The contract provides that Brend Construction was to "supervise and direct the Work," as well as to be "solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract ... " (See Radna Affirm., Ex 7 [Brend Construction Contract section 8.2]). Given that 200 West 86th, as owner, did not have a contractual right to supervise and control the injury-producing work, it follows that Wallack would not be authorized to do so on behalf of 200 West 86th.

No evidence indicates that Wallack actually supervised plaintiff's work. Plaintiff testified that, while working on the project, he received instructions only from his employer. In his deposition, as well as in his affidavit of November 9, 2006, Danny Millic, the superintendent of the premises, stated that no one from either 200 West 86th or Wallack had any authority or responsibility to direct, control or manage the plaintiff. Millic states that no one from either 200 West 86th or Wallack was

in charge of overseeing the project in any way, though someone from Wallack was present once every one or two weeks, and Brend Construction informed Wallack of the progress of the work. Millic noted that he was not present at the premises on the day of plaintiff's alleged accident.

Thus, plaintiff has not established a prima facie case for partial summary judgment in his favor against Wallack.

Finally, the Court notes that plaintiff has submitted a proposed supplemental bill of particulars on December 22, 2006, wherein, in addition to the Labor Law sections previously alleged in plaintiff's bill of particulars to have been violated by defendants, plaintiff claims that defendants also violated Labor Law § 240 (2). However, plaintiff's attempt to raise violations of Labor Law § 240 (2) for the first time in his reply papers was improper and need not be addressed by this Court (see Dominguez v Lafayette-Boynton Hous. Corp., 240 AD2d 310, 312 [1st Dept 1997] [Court declined to grant relief on plaintiff's Labor Law § 240 (2) claim which was never alleged in his cause of action and was raised for the first time in his papers seeking summary judgment]).

Defendants' Cross Motion

Defendants cross move for summary judgment dismissing plaintiff's claims alleging violations of Labor Law §§ 200, 240 (1) and 241 (6), and common-law negligence.

As discussed above, the Court rejects defendants' arguments that 200 West 86th is not liable under Labor Law § 240 (1) because plaintiff's accident was not elevation-related. However, the record lacks any evidence to support Wallack's liability as an agent of the owner under Labor Law § 240 (1). Therefore, summary judgment dismissing this claim as against Wallack is granted.

Turning to the other claims, Labor Law § 241 (6) provides, in pertinent part, as follows:

"All contractors and owners and their agents ... when constructing or

demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation and demolition work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501-502). Because the record lacks any evidence indicating that Wallack is liable as the agent of 200 West 86th. Therefore, plaintiff's Labor Law § 241 (6) claims are dismissed as against Wallack (see Russin v Louis N. Picciano & Son, 54 NY2d at 318).

Labor Law § 241 (6) is not self-executing, and to show a violation of this statute and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation, rather than a provision containing only generalized requirements for worker safety (id.). Here, plaintiff alleges violations of 12 NYCRR 23-1.12 (c) (1), 23-1.15 and 23-5.1 (j).[1]

Defendants have not established a prima facie case that there was no violation of 12 NYCRR 23-1.12 (c) (1), which sets forth that:

(1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed

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[1]By so-ordered stipulation dated January 31, 2007, the parties agreed that, in plaintiff's affirmation in opposition to defendants' cross motion, all references to 12 NYCRR 23-5.2 (j) and 12 NYCRR 23-4.3 are deemed to read 12 NYCRR 5.1 (j), and that the proposed amended bill of particulars should be read as 12 NYCRR 23-1.15 and 23-5.1 (j), not 23-1.15 and 23-4.3.

> guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.

Contrary to defendants' argument, plaintiff did not testify at his EBT that saw had the required guard. Plaintiff testified that the electric saw at issue had a guard which covered only half of the saw's blade and which was located on the side of the worker. Plaintiff stated that there should have been a guard for the moving part of the saw, because the saw blade would not stop moving immediately once plaintiff released the trigger activating the saw. Plaintiff stated that, after he had let go of the saw and as he was falling backwards and downwards, the saw's blade was still spinning, severely cutting his fingers.

Defendants also do not establish a prima facie case for summary judgment dismissing the alleged violation of 12 NYCRR 23-5.1 (j) (1), which requires that "[t]he open sides of all scaffold platforms ... shall be provided with safety railings constructed and installed in compliance with this Part (rule)." It is undisputed that the scaffold at issue, which was located five stories above ground, did not contain safety railings of any sort, only a loosely draped rope tied around two-inch by four-inch wooden uprights.

Defendants are entitled to summary judgment dismissing so much of plaintiff's Labor Law § 241 (6) claim based on 12 NYCRR 23-1.15, because this provision does not contain specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (see Hassett v Celtic Holdings, LLC, 7 AD3d 364, 365 [1st Dept 2004]; Maldonado v Townsend Ave. Enter., 294 AD2d 207, 208 [1st Dept 2002]).

Finally, although plaintiff asserts violations of 12 NYCRR 23-9.26 and 23-1.6 in his bill of

particulars, plaintiff does not address these violations in his affirmation in opposition to defendants' cross motion for summary judgment. Thus, this Court deems these claims as abandoned (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). In any event, the provisions of sections 23-9.26 and 23-1.6 do not need to be addressed by this court, as they either lack the requisite specificity required to support a claim or do not apply to the facts of this case.

As to plaintiff's claims under Labor Law § 200 and common-law negligence, Labor Law § 200 states, in pertinent part, as follows:

> "1. 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."

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 317).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Fresco v 157 East 72nd St. Condominium, 2 AD3d 326, 328 [1st Dept 2003] [plaintiff submitted no evidence that defendant had the right to

control his work, or in fact controlled the injury-producing activity]; Cruz v Toscano, 269 AD2d at 123 [the duty to provide a safe workplace not breached where plaintiff's alleged injuries arose out of an alleged defect in his employer's tools and methods]; Colon v Lehrer, McGovern & Bovis, 259 AD2d 417, 419 [1st Dept 1999]).

Here, the alleged defect or dangerous condition arose from plaintiff's methods and materials. As discussed prior, plaintiff was performing brick-cutting work with a saw when the saw hit something in the brick, pushed him backwards and caused him to lose his balance. There is no evidence in the record to suggest either that 200 West 86th or Wallack had any authority to control or supervise plaintiff's work, or that they actually exercised such control and supervision. As discussed above, pursuant to the contract between Brend Construction and 200 West 86th, Brend Construction was to supervise and control all of the work at issue. In addition, Millic testified that no one from either 200 West 86th or Wallack was in charge of overseeing the project or had any authority or responsibility to direct, control or manage the plaintiff. Further, plaintiff also testified that he only received instructions from his employer.

Moreover, in his opposition papers, plaintiff did not contest defendants' arguments regarding common-law negligence and Labor Law § 200 in order to defeat defendants' motion for summary judgment dismissing these claims. Thus, defendants 200 West 86th and Wallack are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiff Miroslaw Leniartek's motion for partial summary judgment is granted as to liability only on his Labor Law § 240 (1) claim as against defendant 200 West 86th

Street Apartments, Corporation, and the motion is otherwise denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted in part as follows: (1) the complaint is severed and dismissed as to defendant Wallack Management Company, Inc., and the Clerk is directed to enter judgment in favor of this defendant accordingly; (2) plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against defendant 200 West 86th Street Corp., along with so much of plaintiff's Labor Law § 241 (6) claims that are predicated on violations of 12 NYCRR 23-1.6, 23-1.15, and 23-9.26; and the remainder of the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated:
New York, New York

ENTER:

J.S.C.