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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

DAVID SEPULVEDA and GINA SEPULVEDA,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK and SLATTERY SKANSKA, INC.,

Defendants.

INDEX NO. 107149/05

MOTION SEQ. NO 001

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: This is a personal injury action arising out of an accident which occurred on April 26, 2004 while the plaintiff David Sepulveda was engaged in construction work at a power plant in Queens. At the time of the accident, the plaintiff, an electrician who was employed by a company named EJ Electric, was standing on a temporary floor made of wood on the 44th level of the building. He was installing cable trays. A horizontal duct which had been previously installed was located approximately six feet above the temporary floor. The duct was approximately six feet on each side. A co-worker, James Forrester, had climbed from the temporary floor to the top of the duct using a six-foot A-frame ladder. He then pulled the ladder up, placed the ladder on a sheet of plywood which he laid on top of the duct and climbed a few rungs up to perform some work. While he performed this work, Forrester was secured by a safety harness. However, when he finished and was about to climb down, he unhooked the harness. At the second to last step, the ladder tipped over, causing Forrester to fall down to the temporary floor. At the time Forrester fell, the plaintiff had already finished his own work and was standing approximately five feet away from the area directly beneath Forrester, watching as his co-employee climbed down the ladder. When he saw the ladder topple and Forrester begin to fall, plaintiff ran over in an attempt to break the fall. In doing so, the impact with Forrester knocked plaintiff to the floor, causing his injuries. The plaintiff brought this action against the alleged building owner (Consolidated Edison Company of New York) and the general contractor (Slattery Skanska, Inc.). The complaint asserts causes of action against the defendants under Labor Law §§ 200, 240(1) and 241(6). The plaintiffs have now moved, pursuant to CPLR 3212, for partial summary judgment against Slattery Skanska on the issue of liability on their Labor Law § 240(1) claim. Con Edison has cross-moved for summary judgment dismissing all claims which have been asserted against it herein. Slattery Skanska has cross-moved for summary judgment dismissing the complaint as against it.

Discussion

1. Con Edison's Summary Judgment Motion - In moving to dismiss all claims as against it, Con Edison has submitted an affidavit from Gregory W. Moore, a Project Manager in its Facilities Management Department, who states that Con Edison has had no connection to the property where plaintiff was injured. Since neither the plaintiffs nor Slattery Skanska has offered any evidence to the contrary and, indeed, have not offered any opposition, the motion must be granted and all claims against Con Edison are dismissed.

2. Plaintiffs' Labor Law § 240(1) Claim - Labor Law § 240(1) requires that all contractors and owners engaged in the renovation of a building or other structure "furnish 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." The statute contemplates protecting workers from the special hazards which arise when a work site is either elevated or positioned below the level where materials are hoisted or secured. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-02 (1993).

Here, the plaintiff alleges that his accident was proximately caused by the absence of adequate safety devices which would have prevented Forrester from falling. He asserts that Forrester's fall from the ladder was caused by the ladder's failure as a safety device. He further asserts that Forrester's six-foot fall from the level of the duct to the temporary floor below was caused by the absence of any safety device such as a man-lift which could have transported Forrester between the duct and floor rather than be relegated to the use of a ladder in order to do so.

As to the ladder, it is well settled that a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1) unless there is also evidence that the fall was caused by a violation of the statute. *See Miro v. Plaza Construction Corp.*, 38 AD3d 454 (1st Dept 2007); *Costello v. Hapco Realty, Inc.*, 305 AD2d 445, 446 (2nd Dept 2003); *Williams v. Dover Home Improvement, Inc.*, 276 AD2d 626, 627 (2nd Dept 2000). If a worker himself undermined the stability of the ladder by mis-stepping on one of the rungs and losing his balance, thus causing the ladder to slide way, the ladder is not considered to have failed and his actions are deemed to be the sole proximate cause of the accident. *See Costello v. Hapco Realty, Inc.*, 305 AD2d at 447. If a plaintiff is claiming liability because the ladder was unsecured, failure to secure the ladder must have been a substantial factor leading to the plaintiff's injuries. *See Williams v. Dover Home Improvement, Inc.*, 276 AD2d at 627. Here, although there is evidence that the ladder which Forrester used was unsecured, there is nevertheless a triable issue of fact as to whether the ladder's collapse was a subsequent effect, rather than a preceding cause, of his fall. *See Costello v. Hapco Realty, Inc.*, 305 AD2d at 447. On the one hand, Forrester has submitted a statement that, as he was descending, the ladder wobbled and fell off the duct, causing him to fall. On the other hand, at his deposition, plaintiff testified that as he observed Forrester coming down the ladder, Forrester appeared to have mis-stepped and lost his balance. In view of these inconsistent statements, the court is unable to conclude, as a matter of law, that the ladder tipped over because of a violation of section 240(1).

As to Forrester's six-foot fall from the duct to the temporary floor, the court agrees that the presence of a safety device was required in order to prevent him from falling below the level where the ladder was seated. In fact, Forrester was equipped with a safety device in the form of a harness belt but had unhooked the belt as he came down the ladder. If it was necessary for Forrester to unhook the belt in order to reach the duct at the bottom of the ladder, the harness was inadequate and the absence of any other safety device would constitute a violation of Labor Law § 240(1). However, if it was unnecessary for him to do so, the harness must be considered to have been an adequate safety device which he failed to utilize. *See Avila v. Ashton Management Co.*, 24 AD3d 273 (1st Dept 2005); *Fajardo v. Trans World Equities, Co.*, 286 AD2d 271 (1st Dept 2001). In the event that Forrester's fall to the temporary floor is found to have been caused by both his mis-step on the ladder and his unnecessary failure to utilize the harness belt as he came down the ladder, there can be no violation of section 240(1). If, however, either the ladder failed because it was inadequately secured or the harness was an inadequate safety device, a violation of the statute may be found. In view of the triable issues of fact which exist with respect to both phases of the fall, the plaintiffs' motion for partial summary judgment on their section 240(1) claim must be denied.

As to Slattery Skanska's cross-motion, it argues that even if section 240(1) was violated, any such violation only applies to Forrester and should not extend to plaintiff since plaintiff, who was standing five feet from the spot where Forrester fell, voluntarily put himself in harm's way by moving to a position where he could break Forrester's fall. In support of this argument, the defendant relies on two Second Department decisions which concluded that the "danger invites rescue" doctrine, which makes a defendant liable to a plaintiff who was injured coming to the aid of a person whom the defendant had negligently

imperiled, is not applicable to a Labor Law § 240(1) claim. *See Del Vecchio v. State of New York*, 246 AD2d 498, 499-500 (2nd Dept 1998). *See also George v. State of New York*, 251 AD2d 541 (2nd Dept 1998). Although the First Department has not addressed this issue, the Second Department's conclusion is not binding on this court since the Fourth Department has found that the "danger invites rescue" doctrine is applicable to a Labor Law claim. *See Butler v. County of Chautauqua*, 261 AD2d 855, 856 (4th Dept 1999).

In any event, the court need not address the issue. Unlike here, the plaintiffs in *Del Vecchio* and *George* made a conscious, deliberate decision to rescue an imperiled co-worker and, towards that end, undertook an extended rescue operation during which they were injured. In *Del Vecchio*, the plaintiff's co-worker fell into a body of water and the plaintiff, lying on his stomach, attempted to reach him. The plaintiff was injured only when a second co-worker jumped on the plaintiff's back in an apparent effort to prevent him from falling into the water as well. *See Del Vecchio v. State of New York*, 246 AD2d at 498-499. In *George*, the plaintiff climbed down to ascertain the condition of a co-worker who had fallen from a ladder and then went to summon help. Although the co-worker was not in any serious danger, the plaintiff nevertheless made a return trip to where the co-worker lay. On the return trip, he jumped down a distance of 8 feet onto a debris field and sustained injuries to his back and ankle. *See George v. State of New York*, 251 AD2d at 541.

Thus, in both cases there was a clear break in causation through intervening and superseding acts which were neither foreseeable nor apparently necessary. Under the circumstances, it was entirely appropriate that the Second Department declined to find the owner or general contractor strictly liable under Labor Law § 240(1). Here, in contrast, the plaintiff was injured as the result of a spontaneous, reflexive and understandable reaction to an incident occurring just a few feet away. Unlike the plaintiffs in *Del Vecchio* and George, his injury was the immediate consequence of the alleged absence of adequate safety devices. Notably, in *George*, the Second Department suggested that it may have reached a different result if there had been exigent, compelling circumstances requiring, as here, an immediate effort to rescue an imperiled co-worker. *See George v. State of New York*, 251 AD2d at 542. This court therefore concludes that the plaintiff is not precluded from recovering under Labor Law 240(1) for injuries he sustained while successfully attempting to break Forrester's six-foot fall from the ladder and duct. Since there are triable issues of fact regarding Slattery Skanska's liability under Labor Law § 240(1), its motion for summary judgment dismissing this claim must be denied.

3. Plaintiffs' Labor Law § 241(6) Claim - As to plaintiffs' Labor Law § 241(6) claim, to prevail under this statute, they are required to establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 504-05 (1993). Here, in opposing Slattery Skanska's summary judgment motion to dismiss their section 241(6) claim, the plaintiffs cite ten provisions which were allegedly violated. Of these provisions, there are only four which even merit discussion. The first of the four, 12 NYCRR § 23-1.7(b)(4)(i), requires that portable ladders be securely fastened in place when used as a regular means of access between floors or other levels in a building. Here, there is no evidence that, other than the discrete task which Forrester was performing, a ladder was regularly needed or used in the area above the duct where the accident occurred. This provision is therefore inapplicable. The second provision, § 23-1.7(b)(4)(ii), requires that all ladder footings be firm and that slippery surfaces and insecure objects not be used as ladder footings. This provision is applicable to the proceeding herein since the ladder in question was merely placed on a plywood laid on top of the duct. Moreover, the provision has been found to be sufficiently specific so as to support a section 241(6) claim. *See Hart v. Turner Constr. Co.*, 30 AD3d 213 (1st Dept 2006). The third provision, § 23-1.7(b)(4)(iii), requires that a leaning ladder be rigid enough to prevent excessive sag. This provision is inapplicable since there is no evidence that the ladder in question sagged while Forrester was climbing down. The fourth provision, § 23-1.7(b)(4)(iv), requires that a ladder be held

in place by a person stationed at the foot of the ladder when work is being performed from ladder rungs between six and 10 feet above the ladder footing. This provision is also inapplicable since the plaintiff testified at his deposition that, after placing the ladder on top of the duct, Forrester had climbed no higher than 3 rungs.

Thus, only one Industrial Code provision cited by plaintiff is applicable. However, since such a provision may provide a basis for section 241(6) liability, Slattery Skanska's motion for summary judgment dismissing this claim must be denied.

4. Plaintiffs' Labor Law § 200 Claim - As to Labor Law § 200, it is well established that no liability attaches under this provision where the owner or general contractor exercises no supervisory control over the operation. *See Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 878 (1993). In this respect, the assumption of general supervisory and coordinating duties does not rise to the level of supervision or control necessary to hold a general contractor liable under Labor Law § 200. *See Scott v. Amer. Museum of Natural History*, 3 AD3d 442 (1st Dept 2004).

Here, there is no evidence that Slattery Skanska had any direct involvement or control in the performance of plaintiff's work. Although it employed a safety engineer at the site, held biweekly safety meetings and conducted regular safety inspections of the construction site, the First Department has recently ruled that such activities do not constitute the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200. *See Hughes v. Tishman Constr. Corp.*, 2007 WL 1364685 at * 3-4 (1st Dept 2007). The plaintiffs' section 200 claim against Slattery Skanska must therefore be dismissed.

Accordingly, the plaintiffs' motion for partial summary judgment against Slattery Skanska on the issue of liability on their Labor Law § 240(1) claim is hereby denied. Slattery Skanska's cross-motion for summary judgment is granted to the extent that plaintiffs' Labor Law § 200 claim is hereby dismissed. The motion is otherwise denied. Con Edison's cross-motion for summary judgment is granted and the complaint and all cross claims which have been asserted against it herein are hereby dismissed.

FILED

JUN 20 2007

COUNTY CLERK'S OFFICE
NEW YORK

ENTER ORDER

Dated: 6-14-07

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION