[* 1]

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

PRESENT: DEBRA A. JAMES PART 59
Justice

EUGENE MASLAUSKAS, JR.,
Plaintiff,
- v -
BILTMORE TOWER, LLC, MANHATTAN THEATRE CLUB, INC., and BILTMORE THEATRE, LLP,
Defendants.

Index No.: 112052/04
Motion Date: 06/05/07
Motion Seq. No.: 01
Motion Cal. No.: 24

The following papers, numbered 1 to __ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	
Answering Affidavits - Exhibits	
Replying Affidavits - Exhibits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The court shall grant plaintiff's motion for summary judgment on the Labor Law 240 (1) claim and shall grant the defendants' cross-motion for summary judgment dismissing the Labor Law 200 & negligence claims. The court shall deny plaintiff's motion and defendants' cross motion for summary judgment on the Labor Law 241(6) claims.

This action arises out of an accident that occurred during the renovation of the Biltmore Theatre on November 8, 2002. Plaintiff, while employed by non-party Sweet Construction, was struck and injured by a steel beam thrown from the mezzanine

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

level onto the ground below. The beam bounced off the ground near the plaintiff and struck plaintiff in the leg. Plaintiff was on the ground level at the time of the accident. Plaintiff was apparently working near some dumpsters which were the intended target for the beam. Defendants are the owners and lessees of the premises.

There is no dispute about how the accident occurred. The dispute among the parties is of course the liability that should attach thereto, if any. With respect to plaintiff's Labor Law 240 (1) claim, defendants argue that there was no violation of that provision in that the evidence shows that safety devices were provided, the deposition testimony indicates that plaintiff was provided with a hard hat and gloves and that a series of scaffolds were erected to protect the workers as well as hoists and pulleys supplied to lower material from the jobsite to the ground. Defendants argue further that they are not responsible for injuries suffered where one of plaintiff's co-workers intentionally threw the beam instead of utilizing the proper equipment that was available at the work site.

The defendants' arguments are unavailing. Although the defendants' did provide safety devices on the jobsite, the evidence is that such devices were inadequate in this instance, where there were no net or other catching devices to prevent injuries to workers such as the plaintiff from falling objects.

Furthermore, the defendants do not dispute that no safety device was utilized to lower the beam to the ground at the time of the accident. The failure of an employee of defendants' subcontractor (plaintiff's co-worker, the shop steward) to use hoists available at the jobsite constitutes mere contributory negligence, which is irrelevant to an inquiry under Labor Law § 240(1). Hernandez v 151 Sullivan Tenant Corp., 307 A.D.2d 207, 208 (1st Dept. 2003).

> 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 either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured'....[T]he 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."

Ross v Curtis-Parlmer-Hydro-Electric Co., 81 NY2d 494, 502-503 (1993)(citations omitted, emphasis added.)

The applicable legal principles as more recently set forth by the Court of Appeals are that

> Labor Law § 240 (1) applies to both "falling worker" and "falling object" cases. With respect to falling objects, Labor Law § 240 (1) 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. Thus, for section 240 (1) to apply, 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.

Narducci v Manhasset Bay Associates, 96 NY2d 259, 267 -268 (2001) (citation and internal quotation omitted).

As applied by the Second Department to facts similar to those presented here, it was stated

> The accident occurred when the plaintiff's coworker hit a section of pipe with a hammer causing the pipe to fall striking the plaintiff in the face. It is undisputed that no protective device designed to catch the falling pieces of pipe was utilized in connection with the work. Contrary to the defendants' contention, the plaintiff was exposed to a gravity-related hazard within the meaning of Labor Law § 240 (1). Furthermore, the plaintiffs met their prima facie burden of entitlement to judgment as a matter of law by demonstrating that the absence of a safety device of the kind enumerated in the statute proximately caused the plaintiff's injury.

Tylutki v Tishman Technologies, 7 AD3d 696 (2d Dept 2004) (citations omitted, emphasis added); see Orner v Port Authority of New York and New Jersey, 293 AD2d 517 (2d Dept 2002) (summary judgment granted where plaintiff hit by unsecured roofing material that had fallen from the roof); see also Petteys v City of Rome, 23 AD3d 1123, 1124 (4th Dept 2005).

As the Court made clear in Narducci, "[a]bsolute liability for falling objects under Labor Law § 240 (1) arises only when there is a failure to use necessary and adequate hoisting or securing devices" rather than those causes that are "a general hazard of the workplace." Narducci, 96 NY2d at 268-269. In this case, the defendants argument that the throwing of the steel beam off the mezzanine constitutes an intervening superseding event that absolves them of statutory liability is incorrect. The defendants do not dispute, and no evidence is presented, that the steel beam was in the process of being disposed of as part of the

demolition occurring at the site. This is not a case where the sole proximate cause of plaintiff's injuries was plaintiff's recalcitrance in failing to use a safety device. Instead, an employee of defendants' subcontractor failed to use the hoists and pulleys available. Such failure is not chargeable to the plaintiff but is instead the statutory responsibility of the defendants for failing to provide devices to catch such falling objects or otherwise provide protection to workers below the demolition. Therefore, the plaintiff has established a prima facie case of Labor Law 240 (1) liability and the defendants have failed to raise any triable issue of fact.

The court shall deny both plaintiff's motion and defendants' cross- motion as to plaintiff's claim under Labor Law § 241 (6). Plaintiff is correct that the duty under such statute rests upon the defendants, as owners and lessees, notwithstanding that they had no supervision and control over the work site. "As the duty imposed by Labor Law § 240(1) duty, the Labor Law Section § 241(6) duty to comply with the Commissioner's regulations is nondelegable." Ross, supra.

However, defendants duty under § 241(6) arises only from any violations of the Commissioner of Labor's rules and regulations that are "specific", as opposed to general.

In that regard, section 23-3.3 of the Industrial Code (12 NYCRR 23-3.3) entitled "Demolition by Hand", which plaintiff

asserts was violated by defendants, is not a general but a particular regulatory requirement. Plaintiff has submitted evidence that he was injured as a result of a violation of subsection (h) of that Section, which provides, in pertinent part, that "large steel members shall not be thrown or dropped from the building or other structure, but shall be carefully lowered." However, unlike Labor Law § 240(1), such a violation does not constitute absolute liability but is merely some evidence of negligence. Furthermore, any contributory negligence on the part of plaintiff's co-worker, a non-party to this action, in violating subsection (e) of that section concerning the use of buckets or hoists is a valid defense to such violation, and this court cannot apportion liability thereunder as a matter of law. Ross, supra.

Plaintiff alleges a violation of another specific regulation of the Industrial Code, i.e., Section 23-1.7 (a) (1), which states that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection." Such provision has also been held to be a sufficient predicate for liability under the statute. See Zervos v City of New York, 8 AD3d 477, 480 (2d Dept 2004). However, that section is inapplicable to the action at bar as there is no evidence that the area in which plaintiff suffered injury was one where workers

are normally exposed to falling objects. Portillo v Roby Anne Development, LLC, 32 AD3d 421 (2d Dept. 2006).

The court shall dismiss plaintiff's Labor Law § 200 and negligence claims as plaintiff has failed to submit any evidence that the defendant owners and tenant had control over the worksite or notice of the dangerous condition.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is GRANTED ON LIABILITY as to plaintiff's Labor Law § 240 (1) causes of action and is otherwise DENIED; and it is further

ORDERED that defendants' cross-motion for summary judgment is GRANTED to the extent of DISMISSING plaintiff's negligence and Labor Law § 200 claims and is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation before Mediation Part 1 on October 12, 2007 at 10:30 A.M. and if the action is not settled thereat, the parties are to attend a pre-trial/inquest conference on October 30, 2007, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set an inquest date.

This is the decision and order of the court.

Dated: October 3, 2007 ENTER:

DEBRA A. JAMES J.S.C.