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SCANNED ON 1/11/2008

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

PRESENT: JANE S. SOLOMON PART 58

Justice

Index Number : 107097/2005
OSOWSKI, FRANCIS
VS
FOREST CITY RATNER
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/25/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-10

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided as per annexed decision + order.

FILED
JAN 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1-9-08

JANE S. SOLOMON 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: IAS PART 55

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FRANCIS OSOWSKI and MARGARET OSOWSKI,

Plaintiffs,

INDEX NO. 107097/2005

-against-

AMEC CONSTRUCTION MANAGEMENT, INC., and NEW YORK TIMES BUILDING, LLC.,

DECISION and ORDER

Defendants.

----------X

JANE S. SOLOMON, J.

In this personal injury action, defendants New York Times Building, LLC ("NYT Building") and Amec Construction Management, Inc. ("Amec") move for summary judgment to dismiss the Complaint. Plaintiffs Francis Osowski ("Osowski") and his wife Margaret Osowski oppose and cross-move for summary judgment on Osowski's Labor Law §§ 240 and 241(6) claims. The motion and cross-motion are decided a follows.

Defendant NYT Building is the owner of the New York Times Building located at 8th Avenue and 40th Street in Manhattan, and Amec was the construction manager for the building's construction. Osowski was employed as an iron worker by one of Amec's subcontractors, DCM Erectors. On May 13, 2005, he was helping to unload two steel beams from a truck. The plan was to rotate the beams and place them next to each other in preparation

for being hoisted onto the construction site in a process called "shaking out the steel."

The beams were approximately 40 feet long, 14 inches high, and 36 inches wide. Each weighed between 4 and 4½ tons. The beams were not symmetrically shaped, and when lifted by the crane, one end hung three or four feet lower than the other. The first beam was successfully lifted and rotated, and placed down on the truck bed without Osowski's help. The foreman called on Osowski to assist with the second beam, which needed to be rotated in the opposite direction. Osowski climbed to the truck bed and stood on the opposite side of the beam from the foreman and another worker. They hooked the beam to the crane, and it was lifted to a height of about six feet above the flatbed surface (eleven feet above the ground) at one end, and two to three feet above the flatbed surface (seven to eight feet above the street) at the other end. As the workers attempted to rotate the second beam, the crane operator unexpectedly let the beam drop, causing it to fall and hit the first beam. The first beam knocked Osowski off the truck, then it fell from the truck and crushed his legs, one of which had to be amputated. The second beam remained hooked to the crane; it did not fall from the truck.

In the complaint, Osowski alleges common law

negligence and violations of Labor Law §§ 200, 240 and 241 for his injuries; his wife has a derivative claim.

Labor Law § 240

Labor Law § 240(1) requires an owner or general contractor to furnish "scaffolds, hoists . . . slings . . . pulleys, braces, irons and other devices" and have them "constructed, placed and operated as to give proper protection" to construction workers. A plaintiff need not establish "fault" on the part of the owner or contractor, as the statute provides for absolute liability (Koenig v. Patrick Constr. Co., 298 N.Y. 313 [1948]).

Defendants argue that Osowski's accident was not the type of accident to which Labor Law § 240 applies. Specifically, they argue that in order for liability to be imposed under Labor Law § 240(1), a plaintiff must show that the object fell while being hoisted or secured due to the absence or inadequacy of a safety device of the kind enumerated in the statute (*see* Narducci v. Manhasset Bay Assocs., 96 NY2d 259 [2001]).

Defendants contend that the activity which resulted in Osowski's injury was not hoisting, "but rather *repositioning and rotating* the steel to enable the two piece[s] to later be rigged together and hoisted in one pick from the truck into the

construction site" This, they contend, was "preparation" for the hoisting that would be done once the workers placed chokers on the beam, and there is no evidence that the beam that rolled off the flatbed would have been secured had stanchions or other safety devices been present. They further argue that § 240 is not implicated because the beam was never lifted above his head and was, at its lowest point, only waist high (Affirmation of Stephen Cohen, Esq., paragraph 8). In addition, they cite several cases holding that injuries caused by objects falling off a flatbed truck are not the type of elevation-related risk protected by Labor Law § 240 (*see e.g.* Phelan v. State, 238 AD2d 882 [4th Dep't 1997]).

Defendants also contend, relying on an expert's affidavit, that the beams were not being "hoisted" within the meaning of an expert's understanding of the term (Affidavit of Howard I. Edelson, Exhibit M to Notice of Motion). Instead, the beams were being rotated and prepared for a "hoist", which, to the expert's thinking, requires the removal of the beams from the truck and lifting the beams over the worker's head (id., at paragraph 6).

When applied to the facts in this case, however, defendants' arguments are unconvincing. This is not a case where an injury occurred simply because an object fell off the back of

a flatbed truck, and courts have held that Labor Law § 240 will apply to such scenarios when other criteria are met (*see e.g.* Gonzalez v. Glenwood Mason Supply Co., Inc., 41 AD3d 338 [1st Dep't 2007][finding Labor Law § 240 liability where a load of cinder blocks became loose and fell on plaintiff as the load was being hoisted from a truck bed by a forklift boom]).

Although Osowski was not struck directly by the original falling object, the proximate cause of his injuries was the second beam falling and striking the first beam, which struck Osowski and fell on him. The second beam's rapid, unexpected descent was the proximate cause of Osowski's injury, and the undisputed proof shows that the crane was not operated as to give proper protection to Osowski, in violation of § 240(1). Also, § 240 is to be construed liberally to accomplish its goal (Rocovich v Consolidated Edison, 78 NY2d 509 [1991]), and the restrictive interpretation of the term "hoist" urged by defendants' expert is not consistent with the proper construction of the statute. Thus, NYT Building and Amec are liable for Osowski's injuries under Labor Law § 240(1) (*see* Costa v. Piermont Plaza Realt, Inc., 10 AD3d 442 [2nd Dep't 2004]; Nimirovski v. Bornado Realty Trust Co., 9 AD3d 762 [2nd Dep't 2006]).

operator. The drop propelled by the force of gravity constitutes a sudden acceleration within the meaning of the regulation (see, Sir Isaac Newton, Philosophiæ Naturalis Principia Mathematica,[1687]). Also, the workers intended to place the second beam on the truck bed, and its route was obstructed by the first beam; the contact between the beams proximately caused Osowski's accident, so there is evidence to support the claim that § 23-8.1(f)(2)(ii) was violated and the violation was a cause of the accident. Defendants' correctly argue that the accident did not arise from swinging the load in violation of § 23-8.1(f)(1)(iii), from improper balancing of the load in violation of § 23-8.1(f)(1)(iv), or from a failure to provide a sidewalk shed in violation of § 23-1.18, but plaintiffs need to show only a single violation to state a claim under § 241(6).

Because there is no indication that Osowski's negligence contributed to his accident, summary judgment also is appropriate on his Labor Law § 241(6) claim (*see* Hayden v. 845 UN Limited Partnership, 304 A.D.2d 499 [1st Dep't 2003]).

Common Law Negligence and Labor Law § 200

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 reasonably safe place to work (Lombardi v Stout, 80 NY2d 290 [1992]). Liability attaches to

the owner under Labor Law § 200 only where injuries are sustained as a result of dangerous conditions at the work site (Akins v. Baker, 247 AD2d 562 [2d Dept 1998]). In order to succeed, the plaintiff must also prove either that the defendant (1) exercised supervision and control over his work, or (2) had actual or constructive notice of the unsafe conditions that caused the accident (id.). Here, defendants did not directly supervise Osowski's work, and there is no evidence that they had notice of the hazard that resulted in the accident, so that part of defendants' motion for summary judgment to dismiss these claims must be granted. Accordingly, it hereby is

ORDERED that that part of defendants' motion for summary judgment to dismiss the common law negligence and Labor Law § 200 claims is granted, and the motion otherwise is denied; and it further is

ORDERED that plaintiffs' motion for summary judgment on his Labor Law §§ 240 and 241(6) claims is granted; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on January 14, 2008 at 3:15 PM.

Dated: January 9, 2008

ENTER:

J.S.C.

JANE S. SOLOMON