Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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DEREK ARNOLD,

Plaintiff,

-against-

PAV-LAK CONTRACTING, INC., SKANSKA USA BUILDING, INC., MID-ISLAND STEEL CORPORATION and B&J WELDING AND STEEL CORPORATION,

Defendants,

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PAV-LAK CONTRACTING, INC.,

Third-Party Plaintiff,

-against-

MID-ISLAND STEEL and B&J WELDING AND IRON WORKS,

Third-Party Defendants,

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MID-ISLAND STEEL,

Second Third-Party Plaintiff,

-against-

RANGER STEEL CORP.,

Second Third-Party Defendant.

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INDEX NO.: 26919/2005
CALENDAR NO.: 200702583OT
MOTION DATE: 3/20/2008
MOTION NO.: 001 MG
002 XMOT D
003 MG
004 XMG

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Upon the following papers numbered 1 to 85 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-15; 30-50 ; Notice of Cross Motion and supporting papers 16-29; 51-63 ; Answering Affidavits and supporting papers 64-67; 68-69; 70-71; 72-76; 77-79 ; Replying Affidavits and supporting papers 80-81; 82-83; 84-85 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (motion sequence 001) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment as to defendants' liability pursuant to Labor Law § 240(1), is granted as against Mid-Island Steel Corporation and Pav-Lak Contracting, Inc., and is otherwise denied; and it is further

ORDERED that the cross motion (motion sequence 002) by defendant Mid-Island Steel Corporation for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is granted to the extent that plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that the motion (motion sequence 003) by Skanska USA Building, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, as well as any cross claims and counterclaims asserted against it, is granted; and it is further

ORDERED that the cross motion (motion sequence 004) by defendant Pav-Lak Contracting, Inc., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action, and summary judgment on its claim for contractual indemnification over and against the third-party defendant, Mid-Island Steel, is granted.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 240(1), 241(6), and 200, and common-law negligence, for injuries he allegedly sustained in a fall from steel decking at a construction site. Defendant Pav-Lak Contracting, Inc. (Pav-Lak) was the general contractor which hired Mid-Island Steel Corporation (Mid-Island) to provide and place all the steel necessary for the new building. Mid-Island fabricated and delivered the steel but subcontracted its placement to Ranger Steel Corp. (Ranger), plaintiff's employer. Skanska USA Building Inc. (Skanka), was hired by the owner to act as the construction manager

Plaintiff testified at his deposition that he was a journeyman iron worker with many years of experience. He and his coworker, George Goodleaf, were foremen directing Ranger's employees at the four-story building under construction. On the day of the accident, plaintiff was involved in placement of steel decking for the third floor. The second floor had already been decked and the concrete flooring had been poured. The third floor consisted of horizontal beams upon which the sheets of corrugated decking were being placed. After placement of the decking was completed, they would be welded together and concrete would be poured on top. The fourth floor consisted of the steel frame only. The steel decking was transported in stacks or bundles which were held together with metal straps. Plaintiff testified that he was marking beams for placement, that he walked across decking which had already been placed, and that, to avoid having to walk on a steel beam, he stepped up and onto a bundle of decking, which was still strapped together. As he neared the end of the bundle, he slipped and fell off the bundle, landing on the second floor below and sustaining the injuries alleged herein. Plaintiff was not wearing a harness which could be attached to a safety line. He testified that none of his workers was wearing safety vests or harnesses, that there were no vests or safety line available, and that neither he nor his coworkers ever complained about this.

Havor Foss, Ranger's field superintendent, testified at his deposition that he went to the site two or three times a week. Routinely, even if an employee was wearing a harness, the harness was not attached to a static line or safety line while the employee was placing decking. He testified that OSHA does not require that harnesses be attached to a safety line while performing "leading edge decking."[1] Even if a harness is worn to perform this work, there would be no line upon which the harness could be attached. However, he offered that a line could be attached to a beam by use of a beam clamp or a "beamer." He also testified that there were harnesses and beamers available at the site.

John Noone, Pav-Lak's project superintendent, testified at his deposition that he was at the site daily and that it was his job to coordinate and sequence the work of all of the subcontractors. He stated that the steel cables, to which a safety harness could be attached, were found on finished slab surfaces only, but not on the decks under construction. The decks under construction did not contain cables to which a lanyard or safety device could be attached.

Labor Law § 240(1) creates a duty that is nondelegable and an owner or general contractor or its agent who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is 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 (*id. supra* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). The legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accidents" (*Rocovich v Consolidated Edison Co.*, *supra*; *Koenig v Patrick Const.*, 298 NY 313 [1948]). While it is true that the "special hazards" contemplated do not encompass any and all perils that may be connected in some tangential way with the effects of gravity (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]), it is also true that the statute's purpose of protecting workers "is to be liberally construed" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra* at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). The injured plaintiff's contributory negligence will not exonerate a defendant found to have violated § 240(1) (*Raquet v Braun*, 90 NY2d 177, 184, 659 NYS2d 237 [1997]).

Where, as here, a plaintiff establishes that he was not provided with safety equipment, such as a safety harness or lanyard or a cable for its attachment, and that such failure was a proximate cause of his fall, Labor Law § 240(1) liability has been established (*Miglionico v Bovis*

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[1] In any event, the Occupational Safety and Health Act does not preempt a Labor Law § 240(1) claim (*Business for a Better New York v Angello*, 2007 WL 2892615 [WDNY 2007]; *Irwin v St. Joseph's Intercommunity Hosp.*, 236 AD2d 123, 129, 665 NYS2d 773 [1997]; *Vezzuto v The Parr Org.*, __ Misc 3d __, 2008 NY Slip Op 50261U, 2008 NY Misc LEXIS 459 [Sup Ct, Nassau County 2008]).

Lend Lease, 47 AD3d 561, 851 NYS2d 48 [2008]; *Lantry v Parkway Plaza*, 284 AD2d 697, 726 NYS2d 755 [2001]; *De Rock v Pyramid Co. of Watertown*, 190 AD2d 1092, 593 NYS2d 709, *lv dismissed* 81 NY2d 1007, 599 NYS2d 806 [1993]). "Once the plaintiff makes a prima facie showing[,] the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (*Blake v Neighborhood Hous. Serv. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

In opposition defendants appears to rely on Mr. Foss's testimony that there were harnesses available on site and that, although there was no line to which the harnesses could be attached, they potentially could have been attached to the steel beams via clamps or beamers, also at the site. Therefore, they argue that it was plaintiff's own action, in failing to avail himself of a safety device, which was the sole proximate cause of the accident. However, to rely on the recalcitrant worker defense a general contractor or agent must establish that the injured plaintiff disobeyed an "immediate specific instructions to use an actually available safety device [provided by the employer] or to avoid using a particular unsafe device" (*Santo v Scro*, 43 AD3d 897, 898-899, 841 NYS2d 627 [2007]; *see also*, *Robinson v East Med. Ctr.*, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 38-40, 790 NYS2d 74 [2004]). "[I]t is not enough to defeat liability to show the mere presence of alleged safety devices somewhere on the job site" (*Palacios v Lake Carmel Fire Dept.*, 15 AD3d 461, 463, 790 NYS2d 185 [2005]). Therefore, even if defendants can establish that there were harnesses available and that there was some plausible way to connect them to a fixed line, there is no evidence that plaintiff was directed to use a safety device and then refused or neglected to do so (*Cahill v Triboro Bridge & Tunnel Auth.*, *supra*; *Walls v Turner Constr. Co.*, 10 AD3d 261, 781 NYS2d 13 [2004], *affd* 4 NY3d 861, 798 NYS2d 351 [2005]; *Salazar v United Rentals*, 41 AD3d 684, 834 NYS2d 441 [2007]). Accordingly, plaintiff's motion for summary judgment as to defendants' Labor Law § 240(1) liability is granted against Pav-Lak and Mid-Island.

Among Mid-Island's arguments is that it cannot be subject to the vicarious liability imposed by Labor Law §§ 240(1) and 241(6), because it was the steel subcontractor and it was not an agent of the owner or general contractor. However, a prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor if it has been delegated the work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in, and imposed by, the Labor Law (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; *Nasuro v PI Assoc.*, __ AD3d __, 2008 NY Slip Op 2804 [2nd Dept 2008], 2008 NY App Div LEXIS 2725; *Coque v Wildflower Estates Dev.*, 31 AD3d 484, 488, 818 NYS2d 546 [2006]). Here, there is no dispute that the contract between Mid Island and Pav-Lak provides that Mid-Island was to furnish all the steel for the new structure, including labor and supervision thereof, and that Mid-Island then subcontracted the erection of the steel which it fabricated to Ranger, plaintiff's employer (*Timmons v Lynx Contr. Corp.*, __ AD3d __, 852 NYS2d 774 [2008]). Since Mid-Island had the authority to supervise and control the work being performed by plaintiff at the time of his accident, irrespective of whether it actually exercised that authority, it is subject to the nondelegable liability imposed by Labor Law §§ 240(1) and 241(6), and so much of its cross motion which seeks to dismiss those claims is denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, *supra*) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the general contractor and prime contractor exercised no supervision or control over the injured plaintiff's work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Accordingly, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is granted to Pav-Lak and Mid- Island.

As to the construction manager, Skanska, there is no evidence that Skanska assumed the duties of the general contractor or that it was responsible for coordinating and supervising the project such that it was invested with a concomitant power to enforce safety standards and to hire responsible contractors (*Bagshaw v Network Service Mgt.*, 4 AD3d 831, 772 NYS2d 161 [2004]). Therefore, Skanska has no liability under Labor Law §§ 240(1) or 241(6) (*Russin v Louis N. Picciano & Son*, *supra*; *Morales v Federated Department Stores*, 5 AD3d 744, 774 NYS2d 180 [2004]). Likewise, because Skanska did not have the authority to, and did not, supervise or control the work that caused the plaintiff's injuries, or create any dangerous condition, it also cannot be found liable under Labor Law § 200 or common-law negligence (*Russin v Louis N. Picciano & Son*, *supra*; *Lombardi v Stout*, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; *Morales v Federated Dept. Stores*, *supra*; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Further, plaintiff did not oppose Skanska's motion. Accordingly, Skanska's motion for summary judgment dismissing plaintiff's complaint and any cross claims asserted against it, is granted.

Pav-Lak also seeks summary judgment on its cross claim for contractual indemnification over and against Mid-Island. The contract between Pav-Lak and Mid-Island[2] provides, in relevant part, that Mid-Island would indemnify and hold Pav-Lak harmless from and against any and all claims "arising out of or resulting from performance of the Work," provided that such claim is "caused in whole or in part by any acts or omissions of the Subcontractor (Mid-Island), anyone directly or directly employed by the Subcontractor . . . ." Since Mid-Island employed Ranger to erect the steel which Mid-Island had fabricated and Ranger controlled and supervised plaintiff's work, Mid-Island is obligated to indemnify Pav-Lak for any acts or omissions of Ranger (*Sullivan v G & L Bldg. Corp.*, 43 AD3d 401, 839 NYS2d 918 [2007]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [2004]) and Pav-Lak's vicarious liability pursuant to Labor Law § 240(1) has been established (*Lesisz v Salvation Army*, 40 AD3d 1050, 837 NYS2d 238 [2007]; *Boshnakov v Higgins-Kieffer, Inc.*, 255 AD2d 983, 680 NYS2d 337 [1998]). Accordingly, Pav-Lak is granted summary judgment on its claim for contractual indemnification over and against Mid-Island.

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[2] To the extent that Pav-Lak seeks summary judgment against B & J Welding and Iron Works, its application is denied in that the contract only specifies Mid-Island Steel as the indemnitor.

Upon service of a copy of this order with notice of entry the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part calendar for the next available trial date.

Dated: 7/16/08

HON. PAUL J. BAISLEY, JR.
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION