

Macedo v J.D. Posillico, Inc.

2008 NY Slip Op 33198(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 108316/06

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Justice

Index Number : 108316/2006

MACEDO, JONAS

vs.

J.D. POSILICO

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/8/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff Jonas Macedo's motion (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim against defendant J. D. Posillico, Inc. (Posillico) is granted; and it is further

ORDERED that defendant's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as those parts of plaintiff's Labor Law § 241 (6) claim predicated on violations which plaintiff abandoned and a violation of Industrial Code 12 NYCRR 23-5.1 (h), is granted, and these claims are severed and dismissed against defendant, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

PAPERS NUMBERED


FILED

DEC 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/25/08



HON. CAROL EDMEAD 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: PART 35**

-----x
JONAS MACEDO,

Index No.: 108316/06

Plaintiff,

-against-

J.D. POSILLICO, INC. and URS CORPORATION,

Defendants.

-----x
J.D. POSILLICO, INC.,

Third-Party Index No.
590016/07

Third-Party Plaintiff,

-against-

CARABIE CORP.,

Third-Party Defendant.

-----x
Edmead, J.:

Motion sequence numbers 002 and 005 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a worker when he fell from a platform scaffold while working on the Long Beach Bridge in Nassau County, New York on June 20, 2005.

In motion sequence number 002, plaintiff Jonas Macedo moves, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim against defendant J.D. Posillico, Inc. Defendant cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims against it.

In motion sequence number 005, defendant/third-party plaintiff moves, pursuant to CPLR

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

3212, for summary judgment in its favor on its contractual indemnification claims against third-party defendant Carabie Corporation (Carabie).

BACKGROUND

In the year 2002, the New York State Department of Transportation (NYSDT) and the Nassau County Department of Public Works (NCDPW) began a project which entailed rebuilding the Long Beach Bridge (the bridge). NYSDT hired defendant to serve as general contractor for the project. Defendant retained plaintiff's employer, third-party defendant Carabie, to remove lead paint from the bridge and then repaint it.

Plaintiff testified that his duties on the project included sandblasting, painting, containment of dust and lead and assisting in the construction of the platform which he and the other workers utilized while performing their work on the bridge. Plaintiff stated that, on the day of his accident, as he was screwing plates on to the platform under one of the five sections of the bridge, his coworker, non-party Nilo Amorim (Amorim), yelled for him to assist him in retrieving a large heavy cone which hung by a rope from the bridge above. Plaintiff explained that Amorim needed his help because "the cone was too heavy and he couldn't pull it up by himself" (Defendant's Notice of Cross Motion, Exhibit O, January 30, 2008 Macedo Deposition, at 60). The cone, which was hanging over an area of the platform where no work was being done, was equipped with a yellow flashlight, so that it could be used to caution the boats traveling under the bridge that workers were working in the area.

Plaintiff testified that he and Amorim attempted to retrieve the cone while standing approximately two to three feet away from the edge of the platform. The platform was comprised of rows of zinc plates which were bolted on top of lines of cables. Plaintiff stated

that, as he and Amorim were standing next to each other, bending out over the edge of the platform and pulling up the rope, one of the two plates that plaintiff was standing on tilted, causing him to fall. As plaintiff was falling, he grabbed Amorim and pulled him down with him. The two men fell about six feet, or the length of their safety lines, before their safety lines stopped their fall with a sudden jolt. Plaintiff maintains that it was this jolt that caused him to sustain injury. Plaintiff stated that the platform possessed only a chest-high cable as a railing. Plaintiff also stated that Amorim was the only witness to his accident.

Plaintiff asserts multiple causes for his accident. For example, plaintiff attributes his accident to the fact that the two four-by-six-foot zinc plates that he was standing on at the time of his accident were missing a supportive metal plate, so that when plaintiff stepped on one of the plates, it tilted, causing him to fall. Plaintiff also attributes his accident to the platform's lack of a mid-rail and a toe board, in violation of the Industrial Code. As evidence that the platform was missing these safety items, plaintiff put forth a photograph of the subject platform, annexed to his papers as Exhibit 7.

In addition, plaintiff asserts that the lack of an overhead safety line contributed to his accident, as, if he had been able to tie off to an overhead line, instead of the waist-high cable located on the platform, he would not have fallen so far and experienced such a jolt. Finally, plaintiff maintains that, if he and Amorim were provided with a proper hoisting device, they would not have had to stand so dangerously near the edge of the platform to perform their task.

Specifically, plaintiff explained the various causes for his accident as follows:

When I stepped, one of the plates like tilted (indicating), because the lack of this underplate, because of this protection under it, and there were no rails, also, protecting it. There was no – there was no safety line on the top. If I had the

safety line, I wouldn't have fallen. My rope was attached to another cable which is not the right way to do it. I would say probably this high from the platform (indicating). This is the platform – there was a cable that was not the right one for security reasons, that's where I attached my belt Even if the plate had bent, I would still [be] hanging on my cord and I wouldn't have fallen

(Defendant's Notice of Cross Motion, Macedo June 7, 2007 Deposition, Exhibit N, at 54-55).

In support of his motion, plaintiff put forth the affidavit of Daniel S. Burdett, P.E. (Burdett), a licensed professional engineer and accident reconstruction safety expert. Burdett opined that, as a defect in the design, construction and installation of the platform substantially caused plaintiff's accident, defendant violated Labor Law § 240 (1). To this effect, Burdett noted that, pursuant to the requirements of the Industrial Code, the platform required a mid-rail and a toe board in addition to the one chest-high safety rail which was installed along the edge of the platform. Burdett also maintained that the sheet metal forming the floor of the platform bent because it was not supported by a sufficient number of cables running underneath it.

Further, Burdett stated that if plaintiff had been provided a hoist, he would not have had to work at the edge of the platform and, thus, he would not have been put in a position of danger. Finally, Burdett asserted that the lack of an overhead safety line was a substantial cause of plaintiff's accident, as, if such an overhead safety line had been provided, plaintiff's fall would not have resulted in such a strong jolt as to cause him injury.

In his deposition, Amorim testified that, on the day of plaintiff's accident, he was directed to retrieve the cone by his foreman. Upon attaching the safety line that had been provided by Carabie, he attempted to pull the cone up by himself while standing on the platform. Amorim described the platform as having only one chest-high cable and no other railings. Amorim stated that he hooked his safety line to the cable. When he realized that he could not lift the cone by

himself, he yelled to plaintiff to help him. After plaintiff attached his safety line to the cable, the two men stood six or seven inches from the edge of the platform, while standing on the same piece of sheet metal, as they bent over in an attempt to pull the cone up. Amorim stated that, as they pulled up the rope, the piece of sheet metal that they were standing on bent, causing the men to slide underneath the cable and off the platform. The men fell approximately six feet, or the length of their safety line, before the safety line stopped them in a jerking motion. Amorim explained that the sheet metal bent because it was missing a small plate that was supposed to have been placed on top of it. He also noted that, after he had climbed back up to the platform after the accident, he observed that the platform was still bent approximately 75 degrees.

In his affidavit, Amorim maintained that the platform collapsed and bent because it was not assembled properly. Amorim explained that a cable located underneath the platform was missing, and that there was no safety rail or toe board installed on the perimeters of the platform. In addition, Amorim stated that there was no overhead safety cable to tie their safety line off to. Amorim maintained that this improper set-up for the safety line caused him and plaintiff to experience a "jolt when [they] came to a stop after the platform collapsed" (Plaintiff's Notice of Motion, Exhibit 6, Amorim Affidavit).

Adriano Costos (Costos), Carabie's shop steward, also testified that the platform contained only one cable that ran along the entire edge of the platform. He stated that, after plaintiff's accident, he observed that the platform looked "[b]ended" at an approximately 90-degree angle (Defendant's Notice of Cross Motion, Exhibit T, Costos Deposition, at 41). In his affidavit, Costos also maintained that, when he inspected the platform after the accident, he observed that a section of the platform was bent due to the fact that it had not been installed

properly. Costos noted that, after the accident, the platform was repaired by installing a section of sheet metal in the correct fashion. Costos asserted that a cable was missing from underneath the platform, which would have made it more stable and secure had it been there. Costos also maintained that the platform did not have a necessary mid-rail or toe board installed around the perimeter of the platform, or a proper overhead safety tie off. In addition, Costos stated that plaintiff should have been provided with a hoisting mechanism, as it was dangerous to lift the cone by hand, while leaning over the platform. It should be noted, however, that, before the date of the accident, Costos had observed other workers pulling up the cone from the bridge by just grabbing the rope and pulling it.

Rocco Miano (Miano), Carabie's superintendent and foreman, testified that defendant hired Carabie to install the platform at issue, blast the paint off the bridge, clean up the paint and then take the platform down. Miano stated that the workers would move from location to location on the platform, which spanned the entire length of the bridge, as the work progressed from one area of the bridge to another.

Miano testified that, although defendant's employees may have been present during the construction of the platform, they never gave Carabie instructions as to how to construct and install the platform, which was comprised of sheets of metal bolted to the top of nine cables. Miano also testified that, when he inspected the platform after plaintiff's accident, he did not observe any defects or cables or bolts missing from the platform. When confronted with his entry in the accident report, Miano stated that his entry does not indicate that the decking was bent, just that plaintiff was bending over on the decking when the accident occurred.

In his affidavit, Randy Booty (Booty), plaintiff's foreman, stated that, on the day of the

accident, he did not receive any instructions to remove the cone, nor did he instruct anyone else to move the cone. He also stated that he supervised the construction of the platform, which was erected and inspected in accordance with a safety plan developed by the State of New York. Booty maintained that the span of platform where plaintiff fell had been inspected by safety engineers and no problems were found.

In his deposition, John May (May), defendant's senior project manager, testified that Carabie constructed and installed the platform at issue in this case. He also stated that the platform was not moved from section to section of the bridge as the work progressed, but remained in one place for the entire job. In his affidavit, May stated that the cone at issue, which weighed less than 10 pounds, is typically hoisted and lowered from the bridge, and that it did not make sense to him to move it from the platform. He also stated that he had never observed any workers using a hoist to move this type of traffic cone, and that he did not think that such a hoist was necessary.

In his affidavit, Jeff Schultheis (Schultheis), chief inspector for the State of New York on the date of the accident, stated that, based upon his experience, the type of cone at issue in the present case is not typically moved from the work platform, but from the bridge that it is tied off from. In addition, Schultheis never observed any workers using a hoist to remove this type of traffic cone.

In his affidavit, Tom Vandermark (Vandermark), defendant's expert and a construction consultant for non-party Vandermark Consulting, Inc., stated that his company was retained by Carabie to prepare schematics for the platforms to be constructed for the project. Vandermark asserted that the schematics for the subject platform complied with all state and OSHA

regulations governing light-duty platforms, and that said platform was capable of supporting its own weight and at least four times the maximum intended load. As such, the design was sufficient for Carabie's intended purpose of paint removal and sandblasting.

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 University Medical Center*, 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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

MOTION SEQUENCE NUMBER 002

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS

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

All contractors and owners and their agents ... in the erection, demolition, repairing ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... and other devices which shall be so constructed, placed and operated as to give proper protection to a

person so employed.

“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-Electric Company*, 81 NY2d 494, 501 [1993]).

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 Housing Services of New York City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe College*, 12 AD3d 261, 262 [1st Dept 2004]). “The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed (internal citations omitted)” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Labor Law § 240 (1) requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (*ibid*; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999] [defendant liable under Labor Law § 240 (1) for failure to provide other safety devices, such as a safety belt, to a worker who fell from an unsecured ladder]). “[W]here the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240 (1), and the burden shifts to the defendant” (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]). “Whether the device provided proper protection is a question of fact, except when the device

collapses, moves, falls, or otherwise fails to support the plaintiff and his materials” (*Nelson v Ciba-Geigy*, 268 AD2d 570, 571 [2d Dept 2000]).

However, “[w]hen the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist” (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d at 1188).

Here, plaintiff and Amorim both testified that, because one of the metal sheets that comprised the floor of the platform bent as plaintiff was standing on it, plaintiff was caused to fall from the platform and become injured. As such, plaintiff has established prima facie that the platform failed to support him, and that, therefore, defendant violated Labor Law § 240 (1) (*see Becerra v City of New York*, 261 AD2d 188, 190 [1st Dept 1999] [Court held that the collapse of unsecured plywood platform which supported a construction worker four stories above ground level constituted a prima facie violation of scaffolding statute]; *Aragon v 233 West 21st Street, Inc.*, 201 AD2d 353, 354 [1st Dept 1994] [collapse of a scaffold is prima facie evidence of a violation of Labor Law § 240 (1) which shifts the burden to defendants to raise a factual issue on liability]). In addition, defendants did not offer sufficient evidence to refute plaintiff’s showing or to raise a bona fide issue as to how the accident occurred (*see Pineda v Kechek Realty Corporation*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corporation*, 118 AD2d 485, 486 [1st Dept 1986]).

Defendant asserts that it is not liable for plaintiff’s injuries under Labor Law § 240 (1) because plaintiff’s alleged negligence in attempting to retrieve the cone from the platform, and not the bridge, constituted the sole proximate cause of his injuries. However, although there is

testimony in the record to indicate that the cone is often pulled up from the bridge rather than from the platform, there is no testimony indicating that pulling up the cone from the platform was overly risky. In fact, Costos described the work as “quick, it is not a big deal in the job” (Defendant’s Notice of Cross Motion, Exhibit T, Costos Deposition, at 72). Costos also noted that, although it may have been easier to pull the cone up from the bridge, on the day of the accident, the cone only needed to be moved a little bit.

In any event, as the statutory violation has been established as a proximate cause of his injuries, alleged contributory negligence attributable to plaintiff is immaterial (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [1st Dept 2007] [plaintiff sustained her prima facie burden under Labor Law § 240 (1) through admissible evidence that her decedent fell through an open hole when an unsecured piece of plywood laid over beams shifted and no safety device was provided to prevent the decedent’s fall]). Where “the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff’s injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]” (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]).¹

Defendant also argues that it is not liable for plaintiff’s injuries under Labor Law § 240

¹It should be noted that, as either a defective or inadequate protective device constituted a proximate cause of plaintiff’s accident, it is not necessary to ascertain which of the other multiple possible causes for his accident set forth by plaintiff apply in this case (*see Vergara v SS 133 West 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005] [where there was no issue of fact as to whether the defect or insufficiency in the provided protective devices constituted a proximate cause of the plaintiff’s accident, the Court stated that a lack of certainty as to exactly what preceded plaintiff’s fall to the floor below did not create a material issue of fact as to proximate cause]).

(1) because, as it was not one of plaintiff's duties to retrieve the cone at issue, it was unforeseeable that plaintiff would be exposed to the elevation-related risk created when plaintiff attempted to retrieve the cone without a proper hoist. There must be "a foreseeable risk of injury from an elevation-related hazard to impose liability under the statute" (*Shipkoski v Watch Case Factory Associates*, 292 AD2d 587, 588 [2d Dept 2002]).

However, a review of the testimonial evidence in this case reveals that it was common for the cone to be hoisted up and moved. Notably, plaintiff testified that there were no specific jobs that he was supposed to perform as opposed to other people in his work group, as "[e]verybody did the same, closing holes, screw the platforms and connect the plates" (Defendant's Notice of Cross Motion, Macedo June 7, 2007 Deposition, Exhibit N, at 91). Thus, although it was Amorim who was directed by Carabie's foreman to retrieve the cone, as Carabie's workers shared the various chores at the job site, it was foreseeable that plaintiff would undertake the task of helping his co-worker retrieve the cone.

In addition, although defendant argues that Burdett's statements should not be given any probative force, this is not a case where the "expert states his conclusion unencumbered by any trace of facts or data [citation omitted]" (*Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]; *Altschuler v Gramatan Management, Inc.*, 27 AD3d 304, 304 [1st Dept 2006] [plaintiff failed to raise a factual issue as to building code violations, where plaintiff offered only her expert's affidavit, which was based on speculation and facts controverted by the photographs]). In rendering his opinion, Burdett stated that he reviewed the transcripts of all of the parties, the accident report, the affidavits of plaintiff's co-workers and all photographs and discovery materials provided by defendant.

It should be noted that, even though plaintiff's safety harness did, in fact, stop his fall, and thus, prevented him from sustaining more serious injuries, this does not preclude recovery under Labor Law § 240 (1), as this safety device alone was not sufficient to keep plaintiff from becoming injured (*see Lopez v Boston Properties Inc.*, 41 AD3d 259, 260 [1st Dept 2007] [where the record established that the lack of a brake mechanism on the pulley system used to hoist overloaded buckets constituted a failure to provide proper protection against elevation-related risks, and that such a failure was a proximate cause of the plaintiff's injuries, the Court noted that "(t)he fact that the safety line and harness may have spared plaintiff from death by arresting his fall before he struck the ground does not preclude recovery under Labor Law § 240 (1), since the safety devices proved inadequate to shield him from gravity-related injuries"). "[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Nimirovski v Vornado Realty Trust Company*, 29 AD3d 762, 762 [2d Dept 2006]; quoting *Conway v New York State Teachers' Retirement System*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Finally, contrary to defendant's assertion, this is also not a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 87 [1st Dept 2003]; *DePalma v Metropolitan Transportation Authority*, 304 AD2d 461, 461 [1st Dept 2003] [Court rejected a recalcitrant worker defense where there was no evidence that plaintiff's decedent had refused to use a safety harness, and the fact that safety harnesses may have been available at the work site was insufficient to allow defendants to escape

Labor Law § 240 (1) liability]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]; *Sanango v 200 East 16th Street Housing Corporation*, 290 AD2d 228, 228-229 [1st Dept 2002]). “[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance” (*Aragon v 233 West 21st Street*, 201 AD2d 353, 354 [1st Dept 1994]).

Here, there is no evidence from which an inference can be made that plaintiff refused to avail himself of an available safety harness. Thus, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim against defendant.

LABOR LAW § 241 (6)

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 and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order 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 of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.15 (b) and (c), 23-1.16 (d), 23-5.1 (c) (1), (h) and (j) (1) and 23-5.3 (e), plaintiff does not address these Industrial Code violations in his opposition papers, and thus, they are deemed 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]). As such, defendant is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on these provisions.

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.15 (b) and (c) are sufficiently concrete in their specifications to support plaintiff's Labor Law § 241 (6) claim (*see Shaheen v Hueber-Breuer Construction Company*, 4 AD3d 761, 761 [4th Dept 2004]).

Industrial Code 12 NYCRR 23-1.15 (b) and (c) state:

Section 23-1.15 Safety Railing.

Whenever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:

* * *

- (b) A one inch by four inch horizontal midrail.
- (c) A one inch by four inch toe board except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.

Here, defendant is not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.15 (b) and (c), as testimonial and photographic evidence in the record indicates that a lack of a mid-rail and toe board on the platform proximately caused plaintiff's accident. To that effect, Amorim

testified that, when the piece of sheet metal that he and plaintiff were standing on bent, he and plaintiff slid underneath the cable. In addition, Burdett also stated that the lack of the toe board and a mid-rail was a proximate cause of plaintiff's accident in that they would have prevented plaintiff from falling off the platform.

Industrial Code 12 NYCRR 23-1.16 (d) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Mills v Niagara Mohawk Power Corporation*, 262 AD2d 901, 902 [3d Dept 1999]).

Industrial Code 12 NYCRR 23-1.16 (d) states:

Section 23-1.16 Safety belts, harnesses, tail lines and life lines

* * *

- (d) Tail lines. The length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet. Such tail line shall be attached to a hanging lifeline or to a substantial structural member at a point no lower than two feet above the working level.

Here, defendant is not entitled to summary judgment dismissing the part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.16 (d), because a review of testimony in the record reveals that plaintiff's tail line was at least six feet long. To that effect, both plaintiff and Amorim testified that they tied their six-foot safety line to the waist-high cable, and that, if plaintiff had not fallen so far, he would not have experienced the intense jolt that caused his injuries.

Industrial Code § 23-5.1 (c) (1) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see O'Connor v Spencer (1997) Investment Limited Partnership*, 2 AD3d 513, 515 [2d Dept 2003]).

Industrial Code § 23-5.1 (c) (1) states:

(c) Scaffold structure.

- (1) Except where otherwise specifically provided in this Subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use.

Here, defendant is not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 (c) (1), as defendant has not proved that the scaffold did support four times the maximum required weight.

Industrial Code 12 NYCRR 23-5.1 (h) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 712 [2d Dept 2007]).

Here, as there is evidence in the record that the platform at issue was erected under the supervision of a Carabie supervisor, defendant is entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 (h), which requires that "[e]very scaffold shall be erected and removed under the supervision of a designated person."

Industrial Code 12 NYCRR 23-5.1 (j) (1) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Crespo v Triad, Inc.*, 294 AD2d at 147).

Industrial Code 12 NYCRR 23-5.1 (j) (1) states, in pertinent part:

(j) Safety railings.

- (1) The open sides of all scaffold platforms ... shall be provided with safety railings constructed and installed in compliance with this Part (rule).

Here, as discussed prior, as the platform at issue did not possess a toe board or a mid-rail,

as required by Industrial Code 12 NYCRR 23-1.15 (b) and (c), defendant is not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 (j) (1).

Industrial Code 12 NYCRR 23-5.3 (e) is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Riccio v NHT Owners, LLC*, 13 Misc. 3d 1209[A], 2006 NY Slip Op 51752[u] [Sup Ct, Kings County 2006], *affd* 51 AD3d 897 [2d Dept 2008]). Industrial Code 12 NYCRR 23-5.3 (e) states:

- (a) Application of this section. This section applies to all scaffolds constructed of metal except mobile types.
- * * *
- (e) Safety railings. Safety railings constructed and installed in compliance with this Part (rule) shall be provided for every metal scaffold.

Here, defendant asserts that Industrial Code 12 NYCRR 23-5.3 (e) does not apply to the facts of this case because the subject platform was mobile, citing Industrial Code 12 NYCRR 23-5.3 (a). However, testimony in the record and photographs submitted indicate that the platform was not mobile, and defendant's assertions are insufficient to raise an issue of fact. Thus, as plaintiff's accident was caused in part because the safety railings on the platform were not constructed and installed in compliance with the requirements of the Industrial Code, defendant is not entitled to summary judgment dismissing that part of plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 (e).

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

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). Labor Law § 200 (1) 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.”

Although the parties in this case argue the issue of supervision, or lack thereof, on their part, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries allegedly arose from an unsafe condition created by the improperly supported metal plates which comprised the floor of the subject platform. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Keating v Nanuet Board of Education*, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; *Thomas v Claffee*, 24 AD3d 749, 751 [2d Dept 2005]; *Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, plaintiff testified that his duties included the construction of the platform at issue.

He also stated that, although he knew that there was a problem with the platform, he did not complain to anyone out of fear of being fired. In addition, he was not aware of any other persons making any complaints regarding the unsafe platform. May, defendant's project manager, also testified that Carabie constructed and installed the subject platform, and that defendant was not required to approve the platform's design. Amorim testified that he only took instructions from his Carabie foreman, and that, although his foreman knew about the platform's unsafe condition, no action was ever taken to correct it. Moreover, Costos, Booty and Vandermark all testified that, before the accident, no complaints had been made regarding the condition of the platform.

Thus, as there is no indication in the record to support a finding that defendant created the unsafe condition at issue, or that it had actual or constructive notice of the same, defendant is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it.

MOTION SEQUENCE NUMBER 005

CONTRACTUAL INDEMNIFICATION

Defendant/third-party plaintiff moves for summary judgment in its favor on its third-party claim for contractual indemnification against third-party defendant Carabie. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 402 [1st Dept 2005]). It is well settled that with respect to contractual indemnification, the one seeking indemnity need only establish

that it was free from any negligence and was held liable solely by virtue of its vicarious liability (*De La Rosa v Philip Morris Management Corporation*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82 [1st Dept 2002]).

The indemnification provision set forth in the contract between defendant/third-party plaintiff and third-party defendant Carabie, dated January 20, 2003 (the contract), sets forth, in pertinent part, as follows:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor ... from and against claims, damages, losses, expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury ... caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Subcontractors, anyone directly employed by them ...

(Defendant's Notice of Motion Sequence 005, Exhibit H, Posillico/Carabie Contract, ¶ 4.6.1).

Here, defendant/third-party plaintiff's possible Labor Law § 241 (1) liability, would be solely vicarious in that it played no role in the design, construction or inspection of the subject platform, nor did it have notice of the platform's unsafe condition. In addition, defendant/third-party plaintiff held no supervisory control over plaintiff's work.

As to Carabie, a review of the record reveals that Carabie's employees were responsible for constructing and installing the defective platform that caused plaintiff's accident, under the supervision of a Carabie foreman. In addition, plaintiff's work was solely directed and supervised by employees of Carabie.

In support of its contention that it was not negligent, Carabie puts forth testimonial evidence to show that the platform was constructed, installed and inspected in accordance with a safety plan developed by the State of New York. However, in light of the fact that the platform

collapsed, this evidence is insufficient to overcome defendant's showing that plaintiff's injuries arose as a result of Carabie's negligence. Thus, pursuant to the contract, defendant/third-party plaintiff is entitled to summary judgment in its favor on its contractual indemnification claim against third-party defendant Carabie.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Jonas Macedo's motion (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim against defendant J. D. Posillico, Inc. (Posillico) is granted; and it is further

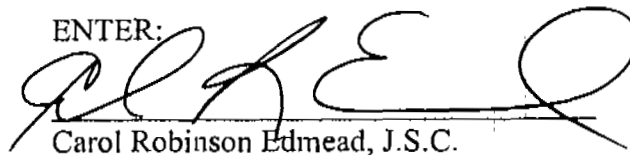
ORDERED that defendant's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as those parts of plaintiff's Labor Law § 241 (6) claim predicated on violations which plaintiff abandoned and a violation of Industrial Code 12 NYCRR 23-5.1 (h), is granted, and these claims are severed and dismissed against defendant, and the motion is otherwise denied; and it is further

ORDERED that defendant/third-party plaintiff's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment in its favor on its contractual indemnification claim against third-party defendant Carabie Corporation is granted; and it is further

ORDERED that the remainder of the action shall continue.

DATED: November 25, 2008

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

FILED
DEC 01 2008
COUNTY CLERK'S OFFICE
NEW YORK