Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

DEAN FORMICA,

Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY and PERMADUR INDUSTRIES, INC. t/a SISSCO,

Defendants.

Index No. 13863/06

Motion Date December 16, 2008

Motion Cal. No. 14

Motion Sequence No. 2

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Upon the foregoing papers it is ordered that this motion by defendants is determined as follows:

Plaintiff, Dean Formica, is a sheet metal worker employed by International Sheet Metal Company, which company was a subcontractor for defendant Permadur Industries, Inc. t/a Sissco ("Permadur"). Permadur was hired by defendant New York City Transit Authority ("NYCTA") in conjunction with a construction project to move ductwork at NYCTA's Fresh Pond Bus Depot in Queens, New York. Plaintiff commenced this action to recover for serious injuries sustained on February 9, 2006, when, while working at the Fresh Pond Bus Depot, he was allegedly caused to fall from a man-lift onto the concrete floor fifteen feet below. Plaintiff argues liability against both defendants pursuant to Labor Law §§ 200, 240(1) and 241(6). Defendants move for summary judgment dismissing the plaintiff's claims as against them with prejudice.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.

(*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

I. LIABILITY OF DEFENDANTS UNDER LABOR LAW § 200

Defendants maintain that they are not liable to plaintiff under Labor Law § 200 because: defendants did not direct, supervise and/or control plaintiff's work, and the alleged incident, if it occurred at all, arose from Independent Sheet Metal's means and methods of installing the sheet metal ducts.

Plaintiff opposes defendants' motion and argue that defendants are liable to plaintiff under Labor Law § 200 since the defendants have failed to show that they did nothing to supervise the work of plaintiff's employer. Plaintiff maintains that the examination before trial testimony of witness for the NYCTA, Donald Wood, established that the plaintiff's work was being supervised by defendant Permadur. Additionally, plaintiff asserts that Mr. Wood testified that the NYCTA also supervised plaintiff's work.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." (*Damiani v. Federated Department Stores, Inc.*, 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (Id.)

Defendants failed to present a prima facie entitlement to summary judgment under Labor Law § 200. Defendants failed to present any evidence from one with personal knowledge of the facts in the matter establishing that defendants did not exercise the requisite amount of supervision or control over the work being performed by plaintiff that resulted in his injury (*see, Damiani, supra; Ross, supra; Caldas v. 71st Avenue Assoc.*, 227 AD2d 428 [2d Dept 1996]). Defendants also have proffered no admissible evidence to support the proposition that the

defendants had no actual or constructive notice of the defective condition (see, *Caldas*, *supra*; *Mantovi v. Nico Construction Co.*, 217 AD2d 650 [2d Dept 1995]). The evidence submitted by the defendants for the first time in their reply (ie. an affidavit of William Schneider, President of Permadur Industries, Inc.) was disregarded, (*Adler v. Suffolk County Water Authority*, 760 NYS2d 523 [2d Dept 2003]), as it was not properly before the Court *(Johnston v. Continental Broker-Dealer Corp.*, 287 AD2d 546 [2d Dept 2001]).

Accordingly, as defendants failed to present any evidentiary, non-conclusory proof sufficient to establish the lack of material issues of fact, summary judgment is denied to defendants regarding Labor Law § 200.

II. LIABILITY OF DEFENDANTS UNDER LABOR LAW § 240(1)

Defendants move for summary judgment against plaintiff claiming that plaintiff's claims under Labor Law § 240(1) must be dismissed. They contend that there can be no liability under Labor Law § 240(1) since case law states that a property owner and general contractor are not liable to a plaintiff injured in a gravity related accident when the owners and general contractors provide the plaintiff with proper safety equipment in order for him to be able to perform his work in a safe manner.

Plaintiff opposes defendants' motion as to liability on his Labor Law § 240(1) cause of action, alleging that defendants violated Labor Law § 240(1) which states in relevant part that:

> All contractors and owners and their agents ... in the erection, demolition, repairing, and altering, painting, cleaning or pointing of a building or structure shall furnish or erect, 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.

Plaintiff contends that defendants violated section 240(1) of the Labor Law and that this violation was the proximate cause of plaintiff's accident. Plaintiff argues that the statute's protections extend to a class of "special hazards" and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity . . . In other words,

Labor Law 240(1) was designed to prevent those types of accidents, in which the scaffold, hoist, stay, ladder 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."

The Court finds that this accident involved the elevation-related risks necessary to implicate the protections afforded by section 240(1). "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 is either itself elevated or is positioned below the level where materials or loads are hoisted or secured." (*Orner v. Port Authority*, 293 AD2d 517, [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (*Salinas v. Barney Skansa Construction Co.* , 2 AD3d 619 [2d Dept 2003]).

Defendants presented a *prima facie* entitlement to summary judgment as to Labor Law § 240(1) by establishing that plaintiff was provided with proper safety equipment. Defendants established through, inter alia, the examination before trial testimony of plaintiff, Dean Formica, that plaintiff: conceded that he was provided with a proper safety harness; that he secured himself to the lift with a harness; that he made sure the safety harness was securely attached to the man-lift; that the harness did not break; and that plaintiff had no concerns whatsoever about the safety harness on the date of the accident.

Plaintiff raised a triable issue of fact with regard to Labor Law § 240(1). "[T]he issue of whether a particular safety device provided proper protection is generally a question of fact for a jury." (*Alava v. City of New York*, 246 AD2d 614 [2d Dept 1998][internal citations omitted]). Plaintiff's examination before trial transcript testimony and plaintiff's own affidavit indicate there are triable issues of fact involving whether a man-lift [mobile scaffold] provided by defendants was caused to topple due to the negligence of defendants, and whether the safety harness provided to plaintiff provided proper protection or was defective. On these issues, a trial is needed and summary judgment is unwarranted.

Accordingly, defendants' motion with respect to Labor Law § 240(1) is denied.

III. LIABILITY OF DEFENDANTS UNDER LABOR LAW § 241(6)

Defendants contend that they are not liable under Labor Law § 241(6) because plaintiff failed to allege that the defendants

violated a specific Industrial Code Regulation, and that such failure is fatal to plaintiff's cause of action under Labor Law § 241(6). Defendants argue that plaintiff is required to both plead and prove that defendants violated a provision of the New York Industrial Code that sets forth a specific statutory standard. Defendants further argue that there has been no violation of any specific, positive command contained in the Industrial Code. In support of the motion, defendants submit, inter alia, a Complaint, an Amended Verified Complaint and Plaintiff's Verified Bill of Particulars.

Plaintiff, in his affirmation in opposition states that he submitted a further Bill of Particulars, in which he sets forth the statutory provisions violated by defendants herein, including 12 NYCRR 23-1.29, which section prohibits non-construction vehicular traffic in areas where construction is going on "where . . .traffic may be hazardous to the persons performing such work"; as well as 12 NYCRR 23-1.16, which section requires proper safety belts, harnesses, tail line, and lifelines; and 12 NYCRR 23-5.18, which section requires that mobile scaffolds, like the one plaintiff was using, "rest on stable footing" and that the "platform shall be level and the scaffold shall stand plumb."

Plaintiff's Complaint and Amended Complaint indicate merely that there has been a violation of Labor Law §§ 200, 240, 241 and 242-a. Plaintiff's Verified Bill of Particulars merely claims violations of Labor Law §§ 200, 240(1), 241(6) and "related sections." Plaintiff submits a Supplemental Verified Bill of Particulars dated October 2, 2007, as part of its Affirmation in Opposition. Said Supplemental Verified Bill of Particulars seeks to now add violations of inter alia, 12 NYCRR 16.5, 12 NYCRR 23-1.29, 12 NYCRR 23-1.16, 12 NYCRR 23-5.18. The Court notes that it is undisputed that the note of issue has already been filed in the instant case. The plaintiff has not sought leave of Court to either amend or supplement the Verified Bill of Particulars, but merely attaches a Supplemental Verified Bill of Particulars in its opposition papers to the instant motion, with no affidavit of service. Pursuant to CPLR 3042(b), once the note of issue has been filed, an amendment of the bill of particulars cannot be granted in the absence of leave of Court. Furthermore, pursuant to CPLR 3043(b), the plaintiff in a personal injury action can serve a supplemental bill of particulars as of right (without leave of Court), only if it is "with respect to claims of continuing special damages and disabilities," and it cannot be used to add new grounds or theories. In the instant matter, plaintiff is not seeking to serve a supplemental bill of particulars "with respect to claims of continuing special damages and disabilities," and therefore plaintiff cannot supplement its bill of particulars without leave of Court.

Accordingly, this Court finds that plaintiff's claims under

Labor Law § 241(6) must fail. This section imposes a non-delegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (*see, Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." (*Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards," but rather must establish "concrete specifications." (*See, Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996]). Defendants proved as a matter of law that it is not liable under Labor Law § 241(6), and plaintiff failed to rebut the presumption. Accordingly, as plaintiff has failed to present any proof establishing that a specific statutory violation caused his injury, summary judgment is granted to defendants on this cause of action.

Accordingly, defendants are granted summary judgment regarding plaintiff's claim under Labor Law § 241(6). Plaintiff's claim under Labor Law § 241(6) is dismissed.

This constitutes the decision and order of the Court.

Dated: March 18, 2009

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Howard G. Lane, J.S.C.