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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 115690/2006

GUILLEN, MORYS W.

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 115690-06

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: June 17, 2010

HON. JUDITH J. GISCHE 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 10

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Morys W. Guillen,

Plaintiff (s),

-against-

The City of New York, Triborough Bridge & Tunnel Authority d/b/a MTA Bridges and Tunnels and Metropolitan Transportation Authority,

Defendant (s).

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DECISION/ ORDER
Index No.: 115690-06
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3212) w/ BJJ affirm, JDS affid, exhs	1
Pltff's opp w/MCM affirm, exhs	2
Defs' reply w/BJJ affirm,GS, WR affids, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action based upon alleged violations of Labor Law §§ 240, 241 (6) and 200. Plaintiff has also alleged a common law negligence claim. Issue has been joined and the defendants, who are jointly represented, seek summary judgment dismissing the claims against them. Plaintiff is opposed.

This motion was timely brought after plaintiff filed his note of issue on July 24, 2009. Since the motion is timely, it can and will be decided on the merits (CPLR § 3212, Brill v. City of New York, 2 NY3d 648 [2004]). At oral argument, plaintiff withdrew his Labor Law § 200 (and common law negligence) claim, leaving only the Labor Law

§§ 240 and 241 (6) claims for the court to decide. The court's decision is as follows:

Arguments

Plaintiff is a laborer. A the time of his accident, he was employed by non-party Tully Construction ("Tully"). Tully had a contract with defendants Triborough Bridge & Tunnel Authority d/b/a MTA Bridges and Tunnels and Metropolitan Transportation Authority, the owners of the Brooklyn Battery Tunnel where plaintiff was injured. Defendant, The City of New York, owns the land upon which the tunnel is situated. Tully's contract was to rehabilitate the Brooklyn Battery Tunnel.

Plaintiff served a bill of particulars and he was deposed. According to his examination before trial ("EBT") plaintiff was in the process of removing debris from a vertical, fresh air duct ("air duct") servicing the Brooklyn Battery Tunnel. The air duct extends from the street level down into the tunnel and the air duct is approximately 6 feet tall. Plaintiff was standing on the floor or bottom of the air duct handing up sections of cast iron pipe to a co-worker who was standing above him at the street (roadway) level. The pipes plaintiff was removing weighed approximately 40 to 50 pounds, were 10 to 12 feet long, and approximately 6 inches in circumference. At the time of the accident, the plaintiff was not standing on a ladder or elevated in any way although there is a ladder that leads from the air duct up to the street level.

Plaintiff had just handed up a pipe to his co-worker when plaintiff let go of the pipe, assuming the co-worker had a firm grip on it. The co-worker did not and the pipe fell back into the air duct, striking plaintiff and knocking him of his feet, causing him to fall backwards to the floor of the air duct. Plaintiff claims to have sustained injuries to his shoulder, head, neck and knee.

At the time of this accident, plaintiff was wearing a helmet, gloves, safety goggles and construction boots at the time of the accident. Plaintiff contends that his accident could have been prevented had he been provided with safety equipment like a pulley, brace or hoist. He claims these devices would have allowed the pipe to remain suspended, even if neither worker had a grip on the pipe. When asked why the pipe fell back in to the air duct, plaintiff stated his co-worker told him he had been putting on a glove when plaintiff handed up the pipe. The co-worker, however, was apparently not deposed.

Plaintiff contends that defendants also violated various sections of the Industrial Code, including 12 NYCRR §§ 23-1.5 (protection in construction- general responsibilities of employers, 23-1.7 (overhead hazards), 23-1.16 (safety belts, harnesses, tail lines and lifelines) and 23-1.21 (ladders and ladderways).

Plaintiff contends that defendants' motion is defective and should be denied because they have provided unsigned deposition transcripts and un-executed contract documents to the court for its consideration.

Defendants deny the accident is attributable to the absence of inadequacy of a safety device of the kind enumerated in Labor Law § 240 (1). They argue that the pipe struck plaintiff because his co-worker was inattentive. In support of its motion for summary judgment, defendants rely on the pleadings, plaintiff's deposition and the deposition of Piv Lim, their project manager. Defendants also provide the sworn affidavit of non-party Joshua D. Coppes, Tully's superintendent.

According to defendants, the pipes plaintiff was working with were lightweight, they were not being lifted a great distance, and since they were being lifted vertically,

they were taller than the height of the air duct, making them easy to be safely lifted to the street level without any rope, hoist, etc. Coppes described the air duct as looking like a manhole when it is closed. Coppes testified at his deposition that no equipment was necessary to do plaintiff's job because the debris was being passed from hand to hand. Thus, defendants contend the pipe fell no more than 2 or 3 feet and the protections of Labor Law § 240 (1) do not apply for that reason as well.

Defendant argues that the sections of the Industrial Code plaintiff relies on are an insufficient predicate for his Labor Law § 241 (6) claim because they are either general sections (12 NYCRR 23-1.5), or completely inapplicable to the facts of this case (12 NYCRR §§ 23-1.7, 23-1.16, and 23-1.21).

In reply to plaintiff's claim, that the deposition transcripts and other unsigned documents cannot be considered, defendants argue the plaintiff has adopted the transcripts as accurate because he has submitted them in opposition, rather than an affidavit and in any event, the signed transcripts were mailed to plaintiff over two years ago.

Law applicable to summary judgment motions

"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. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp ., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations

of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003). The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 AD2d 121 (1st Dept 2002).

Discussion

Plaintiff's argument, that the court cannot consider unsigned deposition transcripts or copies of the contract which are unexecuted, do not defeat defendants' motion, not only because the transcript of plaintiff's deposition was mailed to him over two years ago, but also because he does not deny any of its contents, and relies upon it himself. Pursuant to CPLR 31116 [a] an unsigned transcript can be deemed and used as if signed if the witness does not sign and return it within 60 days of it being sent to him or her.

Turning to the substantive merits of this motion, Labor Law § 240 (1), commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1st Dept 2007] *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 [1995]). The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and,

accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed (Panek v. County of Albany, 99 N.Y.2d 452 [2003]).

The statute is not intended to protect construction workers from routine workplace risks, but from pronounced risks arising from construction worksite elevation differentials. This means that there is no liability under this statute unless the accident is attributable to that kind of risk (Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 [2009]). Consequently, the statute's protections extend only to a narrow class of special hazards [Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914 [1999]) and not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 [1] (Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]).

The single decisive issue of whether plaintiff has a claim under Labor Law § 240 [1] is whether his injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential (Runner v. New York Stock Exchange, supra). Here, plaintiff's accident occurred as he was handing up pipe to a co-worker above him. The pipe, when placed on its end, could have stuck out from the vertical air duct, however, it necessitated two people: one person steadying the pipe and then handing it up to the other worker who grasped and pulled it out. This process went on for over half an hour without any incident. Plaintiff (weighing approximately 170 pounds) has never claimed the pipe (40-50 pounds) was too heavy for him to lift or uncontrollable.

Although plaintiff contends that hoisting equipment would have made his job safer and prevented the accident, he does not present any evidence to rebut defendants' contention that no safety device was required because of the small scale of

this particular task which involved the manual removal of debris. Labor Law § 240 (1) does not encompass every peril that may be connected in some tangential way with the effects of gravity (Hill v. Stall, 49 AD3d 438, 442 [1st Dept 2008] internal citations omitted). The magnitude of the task should also be taken into consideration (Runner v. New York Stock Exchange, supra [worker acting as counterweight to 800 pound reel]). Thus, the statute should not be applied to protect against "routine" workplace risks, but from pronounced risks arising from construction worksite elevation differentials (Runner v. New York Stock Exchange, *supra).*

Here, the pipe was being lifted manually without any problems until plaintiff's co-worker either dropped the pipe or failed to grasp it. The pipe did not fall a great distance or at least not far enough to generate a javelin kind of momentum. Defendant has established that none of the enumerated safety devices were necessary to do this job, which was of a small scale and did not involve a great distance (compare, Zuluaga v P.P.C. Constr., LLC, 45 AD3d 479 [1st Dept 2007]). Plaintiff has failed to come forward with any triable issue of fact tending to support his claim that a hoisting or other safety device was required, or would have been expected, for him to have done his job safely and/or avoided this accident (Narducci v. Manhasset Bay Assocs., supra at 268). Therefore, defendants' motion for summary judgment in its favor, dismissing the Labor Law § 240 [1] claim is granted.

Labor Law § 241 [6]

Labor Law section 241 [6] imposes "a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations"

in a manner that provides for the reasonable and adequate protection of persons working at the site (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 [1998]). Whereas the scaffold law is "self-executing," to support a cause of action under section 241 (6), the plaintiff must plead and prove that a concrete specification of the Industrial Code was violated and that the violation was a proximate cause of his injuries. *Rizzuto v. L.A. Wenger*, supra.; Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d at 271.

Section 23-1.5 of the Industrial Code is not a concrete specification and therefore not a predicate basis for plaintiff's Labor Law 241 [6] claim because this code section only sets forth a general safety standard (Cun-En Lin v. Holy Family Monuments, 18 A.D.3d 800 [2nd Dept 2005]).

Section 23-1.7 contain subsections, but plaintiff has not identified which sub-section in particular he is relying on. Section 23-1.7 pertains to "general hazards." 23-1.7 [a] pertains to "overhead hazards" and 23-1.7 [b] to "falling hazards." Section 23-1.7 [f] applies to vertical passageways. The other subsections apply to slipping hazards or other hazards having no application to the claims asserted by plaintiff.

Section 23-1.7 [a] et seq applies to those situations were a worker is normally exposed to falling objects. In those circumstances, the requirement is that tightly lashed planks be provided over the worker's head to protect the worker. Section 23-1.7 [b] requires that workers be protected from falling hazards by having hazardous openings covered and the provision of safety railings, safety nets, etc. (Smith v. McClier Corp., 38 A.D.3d 322 [1st Dept 2007]). Section 23-1.7 [f] requires that a vertical passageway have a means of egress via a ladder, stairway or ramp.

None of these foregoing sections apply to the conditions plaintiff claims caused his injury and, therefore, do not, as a matter of law, provide an adequate predicate basis for plaintiff's Labor Law 241 [6] claim (Messina v. City of New York, 30 AD2d 121 [1st Dept 2002]).

Sections 23-1.16 (a) through (f) (1) are inapplicable as is section 23-1.21. Section 23-1.16 et seq pertains to safety devices that are required at a construction site in connection with work on elevations and Section 23-1.21 et seq pertains to situations where the worker has to use a ladder. Plaintiff was standing on firm ground when the accident occurred and, therefore, safety requirements about the size, weight and placement of ladders and other safety devices have no application to the facts as asserted by plaintiff.

Since defendants have proved there is no predicate basis for plaintiff's Labor Law § 241 [6] claim, and plaintiff has not presented any triable issues of fact, defendants' motion for summary judgment dismissing this claim is granted as well.

Conclusion

In accordance with the foregoing decision and order,

It is hereby

Ordered that the motion by defendants The City of New York, Triborough Bridge & Tunnel Authority d/b/a MTA Bridges and Tunnels and Metropolitan Transportation Authority for summary judgment dismissing the Labor Law § 240 and 241 (6) claims is granted for the reasons stated; and it is further

Ordered that the motion by defendants The City of New York, Triborough Bridge

& Tunnel Authority d/b/a MTA Bridges and Tunnels and Metropolitan Transportation Authority for summary judgment dismissing the Labor Law § 200 and common law negligence claims is hereby marked as resolved because plaintiff withdrew those claims on March 4, 2010, at oral argument; and it is further

Ordered that the Clerk shall enter judgment in favor of defendants The City of New York, Triborough Bridge & Tunnel Authority d/b/a MTA Bridges and Tunnels and Metropolitan Transportation against plaintiff Morys W. Guillen dismissing the complaint, and this action is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

Ordered that any relief requested not expressly addressed is hereby denied; and it is further

Ordered that this constitutes the decision and order of the court.

Dated: New York, New York
June 17, 2010

So Ordered:

Hon. Judith J. Gische, JSC