

<b>Reavely v Yonkers Raceway Programs, Inc.</b>
2010 NY Slip Op 32018(U)
July 27, 2010
Supreme Court, New York County
Docket Number: 1140232/07
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

Index Number : 114023/2007  
**REAVELY, WALTER**  
vs.  
**YONKERS RACEWAY PROGRAMS**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 114023/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for Summary Judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1  
2-3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUL 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

Dated: 7-27-10

  
**MARCY S. FRIEDMAN** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
WALTER REAVELY and HOPE KORENSTEIN,

*Plaintiffs,*

Index No.: 1140232/07

- against -

YONKERS RACEWAY PROGRAMS, INC.,  
YONKERS RACEWAY MANAGEMENT AND  
CONSULTING CORP., and TISHMAN  
CONSTRUCTION CORPORATION OF NEW  
YORK,

*Defendants.*

DECISION/ORDER

**FILED**  
JUL 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_ x

In this Labor Law action, plaintiff Walter Reavely sues for injuries he sustained to his fingers when he slipped on waterproofing material, on which he was standing, while sawing plywood boards. Defendants Yonkers Raceway Programs, Inc. and Yonkers Raceway Management and Consulting Corp. (collectively, "Yonkers Raceway"), and Tishman Construction Corporation of New York ("Tishman") move for summary judgment dismissing the complaint. Plaintiff cross-moves for partial summary judgment on his Labor Law § 240(1) claim.<sup>1</sup>

Yonkers Raceway defendants are the owners of the property where the accident occurred and Tishman was the construction manager of the project. Plaintiff was employed by non-party

\_\_\_\_\_ <sup>1</sup>Plaintiff does not oppose the branch of defendants' motion seeking dismissal of his Labor Law § 200 claim. Accordingly, this claim will be dismissed.

RCC Concrete as a journeyman carpenter. Plaintiff testified that his accident occurred on August 11, 2006 as follows: Plaintiff was assigned to cut two-by-eight foot pieces of plywood with a circular saw in order to form a hang wall. (P.'s Dep. at 13, 19-20.) At the time of the accident, plaintiff was standing on waterproofing material sawing a piece of the plywood when a little section of the waterproofing slipped out underneath him, causing him to lose his footing. (Id. at 63.) As plaintiff slipped, he started to fall into a 10-12 foot deep gully that adjoined the hang wall. As he regained his balance, his right hand came away from the saw, but the saw severed his thumb and index fingers. (Id. at 62-63.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

#### Labor Law § 240(1) Claim

Labor Law § 240 (1) provides:

All contractors and owners and their agents, \* \* \* in the erection, demolition, repairing, 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.

“The purpose of the section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.”

(Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury.” (Gordon, 82 NY2d at 559.)

“The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.” (Rocovich, 78 NY2d at 514.)

It is well settled that an injured person “need not fall completely” from one elevation level to another “to recover under Labor Law § 240(1) so long as the injury resulted from an elevation-related hazard.” (Dominguez v Lafayette-Boynton Hous. Corp., 240 AD2d 310, 312 [1<sup>st</sup> Dept 1997] [fall off scaffold not necessary where scaffold failed to protect against injury due to effects of gravity].) Rather, “the injuries [the worker] allegedly sustained in preventing [himself] from falling may be compensable under Labor Law § 240(1) if shown to have resulted from a failure to provide a proper safety device in accordance with the requirements of that statute.” (Pesca v City of New York, 298 AD2d 292, 293 [1<sup>st</sup> Dept 2002] [240[1] claim maintainable even though plaintiff did not fall off ramp]. See also Peralta v American Tel. & Tel. Co., 29 AD3d 493 [1<sup>st</sup> Dept 2006] [granting plaintiff summary judgment on § 240[1] claim where plaintiff lost balance on, but did not fall off, unsecured ladder that moved]; Suwareh v

State, 24 AD3d 380, 381 [1<sup>st</sup> Dept 2005] [granting plaintiff summary judgment on § 240[1] claim where plaintiff lost balance “and almost fell from the roof,” and where plaintiff was not provided with adequate safety devices].)

Plaintiff testified that he was directed to perform the sawing and erecting work to the hang wall by his foreman, Alex (P.’s Dep. at 19, 46); that this required him to work adjacent to a trench and on top of waterproofing material that had been placed down only about 10 minutes beforehand (*id.* at 48, 62; P.’s Aff., ¶¶ 12, 17-19); and that the trench was about 10 to 12 feet deep, three to four feet wide, uncovered and unguarded, and plaintiff was not provided with any fall protection. (P.’s Dep. at 62; P.’s Aff., ¶¶ 18, 25.) Thomas Barba, the project superintendent, also testified that there was not any protection material covering the trench and that it was wide enough for a person to “walk back and forth through it easily” – about three feet wide and three feet deep. (Barba Dep. at 65-66.) Plaintiff further testified that when the waterproofing slipped out and caused him to “start to go over” the wall, he was injured as he “tried to pull [himself] back and [his] right hand came off and it plunged” the saw. (P.’s Dep. at 63, 71.) Based on this evidence, plaintiff makes a prima facie showing that he was injured in trying to prevent himself from falling into the trench, and that his injuries were therefore proximately caused by a violation of Labor Law § 240(1).

In opposition, defendants fail to raise a triable issue of fact. Defendants do not dispute that plaintiff’s work required him to work near an uncovered trench. Nor do they dispute his testimony that he lost his balance, almost fell into the trench, and was injured as he attempted to regain his balance. Rather, defendants contend that plaintiff’s accident was not elevation-related because he did not fall into the trench. This contention is without merit. On the authority

discussed above, a violation of Labor Law § 240(1) will be found where the plaintiff did not actually fall but was subject to an elevation-related hazard for which adequate safety devices were not provided. Here, plaintiff was subject to the hazard of falling into the nearby trench.

Defendants further contend that the cause of plaintiff's accident was not the lack of a cover on the trench but the fact that the waterproofing moved from under him, causing him to slip and lose his balance. This contention is misplaced. While, according to plaintiff's own testimony, the slip contributed to his accident, defendants failed to provide plaintiff with a safety device to protect him from falling over into the trench as a result of his loss of balance.

Defendants' conclusory assertion that plaintiff would have reacted in the same manner, whether or not there was a cover for the trench or other safety device, is unsupported by any evidence. On this record, defendants fail to show that their failure to provide a safety device, and thereby to comply with § 240(1), was not also a proximate cause of plaintiff's accident.

Labor Law § 241(6) Claim

Labor Law § 241(6) provides:

All contractors and owners and their agents \* \* \* 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, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners and contractors and their agents "to provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law § 241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as

\* 7]

opposed to a provision that “establish[es] general safety standards.” (*Id.* at 505.) “The former give rise to a nondelegable duty, while the latter do not.” (*Id.*)

Plaintiff only opposes dismissal of his Labor Law § 241(6) claim to the extent it is based on Industrial Code Sections 23-1.7(b) and (d) (12 NYCRR). Section 23-1.7(b)(1)(i), entitled Hazardous Openings, provides that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).” Section 23-1.7(d), entitled Slipping Hazards, prohibits employers from “suffer[ing] or permit[ing] any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

Defendants make a prima facie showing that plaintiff’s claim under 12 NYCRR 23-1.7(d) should be dismissed. It is undisputed that the substance on which plaintiff slipped was the waterproofing material that contained a hot tar adhesive underneath it. Defendant cites undisputed evidence that this substance was integral and necessary to the construction work being performed - i.e., that the purpose of the waterproofing was “to keep rain water, ground water out,” and that the waterproofing was included as an item in the architect’s specifications for the project. (Barba Dep. at 28, 50-51, 75.) Under governing authority, Section 23-1.7(d) is not applicable where the substance on which the employee slips, like the waterproofing material here, is an “integral part” of the construction. (*See Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2d Dept 2008], *lv denied* 12 NY3d 709 [2009]; *Stafford v Viacom, Inc.*, 32 AD3d 388, 390 [2d Dept 2006]; *Gist v Central School Dist. No. 1*, 234 AD2d 976, 977 [4<sup>th</sup> Dept 1996].) The case on which plaintiff relies for the proposition that tar constitutes a foreign substance, *Stasierowski v Conbow Corp.* (258 AD2d 914 [4<sup>th</sup> Dept 1999]), is distinguishable. In

Stasierowski, the plaintiff was injured while carrying a bucket of hot tar, and slipped on "a stringer of hot tar that blew from a spigot." Under these circumstances, the court found that the hot tar was a foreign substance within the meaning of Section 23-1.7(d), rather than an integral part of the roof. (Id. at 915.) Here, in contrast, it is undisputed that the tar was necessary for proper installation of the waterproofing. Accordingly, plaintiff's Labor Law § 241(6) claim, to the extent it is based on a violation of 12 NYCRR 23-1.7(d), will be dismissed.

Defendants fail to establish as a matter of law, however, that plaintiff's claim under 12 NYCRR 23-1.7(b) should also be dismissed. As discussed above, plaintiff demonstrates that the absence of a cover or other safety device to prevent his fall into the trench was a proximate cause of his injuries. To the extent defendants argue that plaintiff's claim should be dismissed because he did not fall into the hazardous opening, "there is no requirement that a plaintiff relying on this rule fall to a floor below." (Salazar v Novalez Contr. Corp., 72 AD3d 418, 427 [1<sup>st</sup> Dept 2010].) Thus, this branch of defendants' motion will be denied.

Accordingly, it is hereby ORDERED that the motion of defendants Yonkers Raceway Programs, Inc., Yonkers Raceway Management and Consulting Corp., and Tishman Construction Corporation of New York to dismiss the complaint is granted to the extent of dismissing plaintiff's Labor Law § 200 claim and Labor Law § 241(6) claim except to the extent that it is based on Industrial Code § 23-1.7(b); and it is further

ORDERED that plaintiff's cross-motion is granted to the extent that plaintiff is awarded judgment as to liability on his Labor Law § 240(1) claim.

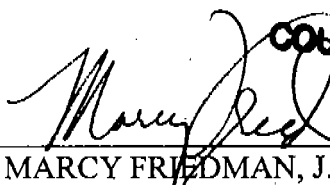
This constitutes the decision and order of the court.

Dated: New York, New York  
July 27, 2010

**FILED**

**JUL 30 2010**

**NEW YORK  
COUNTY CLERKS OFFICE**

  
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MARCY FRIEDMAN, J.S.C.

