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SCANNED ON 11/22/2010

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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 107465/2007

KEMPISTY, STEPHEN

VS.

246 SPRING STREET

SEQUENCE NUMBER : 004

PARTIAL SUMMARY JUDGMENT

INDEX NO. 107465/07

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits 1-17	1, 2
Answering Affidavits — Exhibits A + B	3
Replying Affidavits - Exh. 1	4, 5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

NOV 22 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: NOV 17 2010

MARTIN SHULMAN J.S.C.

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

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 1

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STEPHEN KEMPISTY,

Plaintiff,

Index No. 107465/07

-against-

246 SPRING STREET, LLC, BOVIS LEND LEASE LMB, INC., BAYROCK/SAPIR ORGANIZATION, LLC f/k/a Bayrock/Zar Spring LLC, and URBAN FOUNDATION COMPANY, INC.,

Defendants.

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Shulman, J.:

In motion sequence number 004, plaintiff Stephen Kempisty moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability under Labor Law §§ 240(1) and/or 241(6) against defendants Bovis Lend Lease LMB, Inc. ("Bovis") and Bayrock/Sapir Organization, LLC ("Bayrock").

Background

This action arises from an accident that occurred at the construction project site for the Trump SoHo Hotel at 246 Spring Street, New York, New York (the "Site"). Plaintiff, a journeyman member of Local 1456 Dock Builders and Carpenters Union, alleges that he suffered a serious injury to his right foot when a steel block being hoisted by a crane improperly swung in his direction as a result of the negligence of the defendants Bovis and Bayrock, the Site's construction manager and the Site's owner, respectively.

In November 2006, plaintiff was assigned to work for nonparty Falco Construction Corp. ("Falco"), a contractor hired to install steel piling at the Site in

connection with excavation and foundation work. To ensure that the building, when constructed, would not crack the foundation, Falco had to perform various load tests on the piles. The load tests entailed placing multi-ton rectangular steel blocks measuring two feet by four feet on top of a steel platform which was placed on top of the pile driven into the ground. Each steel block had built-in handles or "pad eyes," as plaintiff described, that were built into the sides of the block so that two steel hooks from the crane could attach to the block to lift it on top of the platform.

To conduct a load test, the crane operator, with the help of a signal man on the ground, would position the boom of the crane over the center of the load, and once centered, the crane's hooks were manually attached to the block. Once attached, the signal man would give a signal to lift the block. The block would lift vertically, and once a few feet in the air, the crane operator would then position and drop the block over the platform. Once the block was in position on the platform, workers on the platform would unhook it, and give the crane operator a signal to swing the boom back over to the remaining stack of blocks to be loaded onto the platform.

On November 28, 2006, the day of the accident, plaintiff arrived at the Site to assist in conducting the load tests. He was assigned the job of hooking the blocks to the crane and acted as the signal man for the crane operator, Leonardo Marino.

Right before the accident, Marino moved the crane's boom over to the area where the stacks of blocks were located. Marino lowered the hooks and plaintiff fitted them through the "pad eyes" of one of the blocks. This block was allegedly positioned on top of a stack of three other blocks. Thus, plaintiff alleges, to reach this particular block to hook up the cable, he stood on top of an adjacent stack of two blocks.

After attaching the hooked cable, plaintiff allegedly turned his back and went to stand on another existing stack of blocks. Plaintiff saw something in his peripheral vision moving towards him horizontally from his left. He turned around and tried to avoid the oncoming block by jumping up on another stack of two blocks located behind him, but only managed to get his upper half on that stack. The block the crane operator was hoisting struck plaintiff's right foot against the stack of blocks that he jumped onto, injuring him. When the block struck plaintiff's right foot, he was in a seated position with his right foot hanging over the edge of the block while his left leg was in the air.

Plaintiff now seeks partial summary judgment against defendants Bovis and Bayrock on the issue of liability under Labor Law §§ 240(1) and/or 241(6), arguing that a tag line should have been used to prevent the block from swinging as it was being hoisted.

Analysis

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law. Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial. *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008).

Labor Law § 240(1)

Plaintiff claims that Bayrock's and Bovis' failure to provide proper safety devices violated Labor Law § 240(1), making them liable for plaintiff's injuries. Labor Law §240(1) provides in relevant part:

> All contractors and owners and their agents ... in the erection ... 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.

Specifically, plaintiff argues that Bayrock and Bovis failed to provide tag lines, which would have prevented the block from swinging and hitting him.

Although cases brought pursuant to Labor Law § 240 typically involve injuries resulting from a person's fall or a falling object, recently the New York Court of Appeals, in *Runner v New York Stock Exchange, Inc.* (13 NY3d 599 [2009]), addressed the application of this statute, finding that liability under the statute did not require either a falling worker or a falling object, but rather, that (1) "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" and (2) the harm to the injured worker flowed directly "from the application of the force of gravity to an object or person." *Id.* at 603, 604.

Thus, in the case at bar, plaintiff must show that: (1) his injuries were a direct consequence of Bayrock and Bovis' failure to provide protective devices; (2) this risk arose from a physically significant elevation differential; and (3) his injury was attributable to the application of the force of gravity to the steel block. For the reasons below, plaintiff fails to meet this burden.

At his deposition, plaintiff testified that a second before the accident he was standing about two to three feet above the ground on a stack of blocks. Kempisty's Deposition, Notice of Motion, Exh. 7, at 110-11. Plaintiff further testified that the block

that struck him had been vertically lifted about two feet before the accident occurred. *Id.* at 121. Mr. Marino also testified that the block in question was vertically lifted about two to three feet. Marino's Deposition, Notice of Motion, Exh. 12, at 104.

Since Labor Law § 240(1) is intended to prevent hazards from height differentials, *e.g.*, loads being hoisted or positioned above a worker, there can be no liability under the statute where there is no appreciable height differential between a worker and the object that strikes him. *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 (1st Dept 2010). Here, plaintiff's own testimony indicates that he and the block were aligned at about the same height. Plaintiff was standing two to three feet off the ground and the block was lifted off the ground approximately two feet when it began to swing. This is not an appreciable height differential.

Accordingly, as plaintiff fails to make a prima facie showing of entitlement to partial summary judgment for liability pursuant to Labor Law § 240(1), this branch of his motion must be denied. Further, since the court has determined the lack of a risk to plaintiff arising from a physically significant elevation differential, plaintiff's claim under Labor Law §240(1) cannot be sustained. As this court has the power to search the record and award summary judgment to a nonmoving party, summary judgment is granted in favor of Bovis and Bayrock dismissing plaintiff's claim under Labor Law §240(1).

Labor Law § 241(6)

Plaintiff also seeks summary judgment on the issue of liability under Labor Law §241(6), which provides in relevant part:

> All contractors and owners and their agents, ... when constructing or demolishing buildings ... shall comply with the following requirements:
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> ***
>
> (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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

Labor Law § 241(6) "requires owners and contractors 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-Electric Co.*, 81 NY2d 494, 501-502 [1993]). The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23. "[T]he duty imposed on owners by the Labor Law is nondelegable, and supervision or control are not necessary to impose liability for statutory violations under Labor Law § 240(1) and Labor Law § 241(6) [interior citations omitted]" (*Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1273 [3d Dept 2010]; *see also Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010]).

"In order to support a claim under section 241(6), ... the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009], citing *Ross*, 81 NY2d at 504-505; *see also Pereira v Quogue Field Club of Quogue, Long Island*, 71 AD3d 1104, 1105 [2d Dept

2010]). Here, plaintiff argues that Bovis and Bayrock violated 12 NYCRR 23-8.2 (c) (3) and 12 NYCRR 23-8.1 (f) (1) (iii).[1]

12 NYCRR 23-8.2 (c) (3) states:

> (c) Hoisting the load.
> ***
> (3) Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard.

Plaintiff argues that Bovis and Bayrock violated this provision by not supplying tag lines to prevent the block from swinging as it was hoisted. Plaintiff submits the affidavit of his expert witness, Dennis Eckstine, a mechanical engineer with 25 years of engineering and product safety experience. Mr. Eckstine states that the safety device known as a tag line should have been used to prevent the block from swinging as it did and it is his expert opinion that tag lines are used precisely for this function .

In opposition, Bovis and Bayrock assert that there was no requirement to use tag lines. Bovis and Bayrock rely on the deposition testimony of Mr. Marino, the crane operator, as well as an affidavit from their expert witness, Herbert J. Heller, Jr., a civil engineer. Carpenter Aff. in Opp. at Exh. A. Specifically, Mr. Marino testified that because of the small size of the blocks tags lines are not used because there is not a lot of swinging or swaying. Mr. Marino stated that tag lines are used for securing

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[1] While plaintiff has alleged violations of other Industrial Code provisions, he does not seek summary judgment on those claims. Although plaintiff includes a footnote stating that claims under these other provisions are not waived, by not moving for summary judgment on those provisions, plaintiff has abandoned those claims. *Musillo v Marist College*, 306 AD2d 782, 783 n (3rd Dept 2003).

something of great length or mass which needs to be controlled from the ground as well as from the crane.

Mr. Heller also states in his affidavit that tag lines are used to control the free swinging or rotation of long-length materials. However, plaintiff argues that Mr. Heller's affidavit should not be considered by the court because defendants did not disclose him as an expert witness when plaintiff made a demand for witnesses during discovery, and now that the note of issue has been filed discovery is complete.

It is within the court's discretion to determine whether it should allow an expert witness' affidavit to oppose a motion for summary judgment where the expert was not identified prior to filing the note of issue. *See Safrin v DST Russian & Turkish Bath, Inc.*, 16 AD3d 656 (2d Dept 2005). As this issue was raised in reply to Bovis and Bayrock's opposition, those defendants did not have an opportunity to offer a reason as to why they did not disclose their expert witness before this motion was brought. In this case, the court will consider Heller's affidavit, as it does not prejudice the plaintiff that the identity of an expert witness was not revealed prior to this motion.

Nevertheless, even if the court did not consider Mr. Heller's affidavit, Mr. Marino's testimony still raises an issue of fact as to whether 12 NYCRR 23-8.2 (c) (3) applies here. There is conflicting evidence as to whether Bovis and Bayrock were required to provide tag lines. On this record, the court cannot determine whether Bovis and Bayrock violated 12 NYCRR 23-8.2 (c) (3). As an issue of fact exists, the branch of plaintiff's motion for partial summary judgment under Labor Law § 241(6) for violating 12 NYCRR 23-8.2 (c) (3) is denied.

Plaintiff also argues that Bovis and Bayrock violated 12 NYCRR 23-8.1 (f) (1) (iii), which states:

> (f) Hoisting the load.
>
> (1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made: *** (iii) The hook shall be brought over the load in such manner and location as to prevent the load from swinging when hoisting is started.

Plaintiff asserts that Mr. Marino admittedly did not get the boom dead over the block, causing it to swing when hoisted.

Nonetheless, an issue of fact exists as to whether this regulation applies to the particular activity involved in this case. It is not clear who was responsible for conducting inspections and if any inspections were conducted before the accident. Indisputably, plaintiff himself was the person on the ground tasked with signaling Mr. Marino on where to place the boom over the block. And Mr. Marino relied on plaintiff to assist in placing the boom properly. See *Misicki v Caradonna*, 12 NY3d at 515 ("Contributory and comparative negligence are valid defenses to a section 241 [6] claim"). Thus, plaintiff's motion for partial summary judgment under Labor Law § 241(6) for violating 12 NYCRR 23-8.1 (f) (1) (iii) is denied.

Accordingly, it is

ORDERED that plaintiff Stephen Kempisty's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) and/or Labor Law § 241(6) against defendants Bovis Lend Lease LMB, Inc. and Bayrock/Sapir Organization, LLC is denied; and it is further

ORDERED that defendants Bovis Lend Lease LMB, Inc. and Bayrock/Sapir Organization, LLC are granted summary judgment in their favor dismissing plaintiff's claim pursuant to Labor Law § 240(1); and it is further

ORDERED that the remainder of this action is severed and continued. The parties shall proceed to mediation.

Dated: New York, New York
November 17, 2010

Martin Shulman, J.S.C.