Marcinkowski v City of New York
2011 NY Slip Op 31209(U)
May 2, 2011
Supreme Court, New York County
Docket Number: 113932/08
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 5/6/2011

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

MARCINKOWSKI

Plaintiff (s),

INDEX NO. 113932/08

MOTION DATE

MOTION SEQ. NO. 002

- v -

CNY

Defendant(s).

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY 06 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 5/2/11

Hon. Judith J. Gische, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

---X

JULIAN MARCINKOWSKI AND NATALIE MARCINKOWSKI,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, NEW YORK CITY TRANSIT AUTHORITY, EMPIRE CITY SUBWAY (LIMITED), CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., VERIZON NEW YORK INC. AND ABOVENET COMMUNICATIONS, INC.,

Defendants.

---X

Decision/Order
Index №.: 113932/08
Motion Seq. Nos. 002 and 003

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

FILED
MAY 06 2011
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these motions:

Papers	**Numbered**
Motion Seq. No. 002	
PLTF's n/motion (CPLR 3212) w/BJI affirm in support, exhs	1
DEF Con Ed's partial opposition and x/m w/KL affirm in support, exh	2
DEF Transit Authority's partial opposition and x/m w/DEB affirm in support	3
DEFs City and DDC's partial opposition w/LAC affirm in support, exhs	4
So-ordered stipulation 1/6/2011	5
Motion Seq. No. 003	
DEFs City and DDC's n/motion (CPLR 3212) w/LAC affirm in support, exhs	6
PLTF's opposition and reply w/BJI affirm	7
DEFs City and DDC's reply w/BJJ affirm, exhs	8
PLTF's letter 4/6/2011	9
DEFs City and DDC's letter 4/13/2011	10
PLTF's letter 4/18/2011	11

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

In a case involving a chunk of asphalt from the intersection of Bowery and Houston Streets in Manhattan, which allegedly fell out of the bucket of an excavator and onto the ankle of a worker, plaintiffs Julian Marcinkowski (Marcinkowski) and Natalie Marcinkowski move, pursuant to CPLR 3212, for partial summary judgment as to defendants' liability under Labor Law § 240 (1) and Labor Law § 241 (6) (Motion Seq. No. 002). Defendants Consolidated Edison Company of New York, Inc. (Con Ed) and New York City Transit Authority (the Transit Authority) cross-move, separately, for summary judgment dismissing all claims and cross claims as against them. Finally, defendants City of New York (the City) and New York City Department of Design and Construction (the DDC) (together, the City) move for summary judgment dismissing all claims and cross claims as against them (Motion Seq. No. 003). Motion Seq. Nos. 002 and 003 are consolidated for disposition in this single diecision. As the parties have stipulated to discontinue all claims and cross claims as against Con Ed and the Transit Authority, both cross motions are denied as moot.

On June 7, 2008, Marcinkowski, a foreman for non party Tully Construction Co. Inc. (Tully), was working on a project involving the reconstruction of Houston Street for which the City had hired Tully as the general contractor (Sanjay Modi Deposition, at 22-23). Specifically, Marcinkowski and his crew were excavating a trench for the installation of a water main at the corner of Bowery and Houston Streets (Marcinkowski's August 29, 2008 50-h Hearing, at 8-9) (August 2008 50-h). Just before his accident, Marcinkowski attempted to get the attention of Marcos Loyola (Loyola), who was operating a CAT 315 excavator with a backhoe, to tell him to change locations; despite walking within 10 feet of the excavator and shouting at Loyola, Marcinkowski was unable to get his attention (August 2008 50-h, at 29-30; Loyola Affidavit, ¶ 5;

Dixon Affidavit, ¶ 8; Dewise Affidavit, ¶ 7) . Instead, Marcinkowski alleges, a large chunk of asphalt, weighing several hundred pounds, fell from the bucket of the excavator onto his ankle, injuring him (August 2008 50-h, at 32-44; Dewise affidiavit, ¶ 8). Marcinkowski testified that the bucket of the excavator was approximately two feet off the ground (*id.*, 32-33), and approximately 10 feet to his right immediately prior to the accident:

> Q: Which side of the caterpillar were you walking on?
>
> A: The caterpillar was to my right, so I guess I was on the left side of the caterpillar.
>
> Q: Can you tell me how far was the bucket from your right leg when this piece of asphalt fell?
>
> A: About ten feet.
>
> Q: Immediately before you were struck by the asphalt, did you see any movement in the bucket?
>
> A: Yes
>
> Q: What did you observe?
>
> A: The machine was excavating, removing material from the ground.
>
> Q: Immediately before your accident happen(ed), had you observed the bucket to be stopped or in motion?
>
> A: In motion

(*id.* at 52-54).

Josea Dixon (Dixon), a non party Tully employee, who operated the dump truck into which the excavator deposited pieces of the roadway, and who witnessed the accident while

standing next to the dump truck, stated that "as [Loyola] was in the process of swinging the bucket around and lifting it onto the back of my truck, I saw a chunk of asphalt fall off the bucket onto [Marcinkowski's] leg" (Dixon affidavit, ¶ 9). Michael Sullivan (Sullivan), a safety inspector for the Transit Authority, also testified that Loyola was swinging the arm and bucket of the excavator when the piece of asphalt fell onto Marcinkowski's leg (Sullivan Deposition, at 94-95).

Loyola's account of the accident differs from Marcinkowski's, as well as that of Dixon and Sullivan, in that he maintains that the asphalt was never in the excavator's bucket, but instead was flipped up as the bucket's teeth engaged the roadway:

> The asphalt at this location was very thick and therefore difficult to rip and [I] had to work hard to get it out. After I got the teeth of the bucket under the asphalt, [Marcinkowski] approached the excavator from my left side. [Marcinkowski] was talking on a cell phone and walked in front of the cab of the excavator on the right side and stopped with his back to the excavation. The bucket of the excavator was level with the roadway and the teeth were under the asphalt when [Marcinkowski] walked in front of the excavator. At that time, the asphalt had already begun to peel away or pop from the roadway. Suddenly a piece of asphalt peeled away from the roadway due to the tension of the teeth of the bucket. I did not continue to rip or move the bucket of the excavator in any way after [Marcinkowski] appeared in front of the excavator. Nonetheless, the piece of asphalt rose up on edge with the bucket behind it still on the surface of the roadway. The piece of asphalt then came in contact with [Marcinkowski's] back causing him to turn around. [Marcinkowski] lost his balance, and the piece of asphalt which was still connected to the roadway at the bottom fell over from its leaning position and came into contact with his ankle

(Loyola Affidavit, ¶¶ 12-21).

Marcinkowski claims that defendants are liable for his injuries pursuant to Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1), and 241 (6). Natalie Marcinkowski brings derivative claims for loss of her husband's services.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Labor Law § 200 and Common-Law Negligence

The City, which owns the subject roadway, argues that it is not liable pursuant to Labor Law § 200 or common-law negligence, as Marcinkowski's injury was produced by the method and manner of the excavation work carried out by Tully on the morning of the accident, and the City did not exercise any supervisory control over that work.

Section 200 of the Labor Law "codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Where the alleged failure to provide a safe work place "arises from the contractor's methods and the [defendant] exercises no supervisory control ... no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). The control which owners or general contractors must have in order to be liable for dangers that arise from the method of the work is the "*authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition" (*Rizzuto v*

L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998] [internal quotation marks and citation omitted]). Thus, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [defendant] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

The City relies on Marcinkowski's testimony to show a lack of supervisory control:

> Q: Did either [the Transit Authority inspector] or [the DDC inspector] have the authority to tell the employees of Tully what to do?
>
> A: Not really, no.

(August 2008 50-h, at 51).

Plaintiffs fail to rebut the City's prima facie showing, as they do not address Labor Law § 200 or common-law negligence in their opposition. Thus, as the City shows that it did not have supervisory control over Tully's trench-construction work, the branch of the City's motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against it must be granted.

Labor Law § 240 (1)

The City and plaintiffs each move for summary judgment on the issue of liability under Labor § 240 (1), which provides, in relevant part:

> 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 Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). While "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003] [internal quotation marks and citation omitted]), the statute "is to be liberally construed" to accomplish its purpose of better protecting "work[ers] engaged in certain dangerous employments" (*Sherman v Babylon Recycling Ctr.*, 218 AD2d 631, 631 [1st Dept 1995] [internal quotation marks and citation omitted]).

Structure

"Section 240 (1), by its terms, requires that the enumerated activities, i.e., repair work, be performed with reference to a 'building or structure'" (*Dilluvio v City of New York*, 264 AD2d 115, 121 [1st Dept], *affd* 95 NY2d 928 [2000]). A "structure," in the context of Labor Law § 240, is defined as "'any production or piece of work artificially built up or composed of parts joined together in some definite manner'" (*Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991], quoting *Caddy v Interborough R.T. Co.*, 195 NY 415, 420 [1909]). Courts have construed this definition liberally, to include not just obvious structures, like a bridge (*Dougherty v State of New York,* 113 AD2d 983 [3d Dept 1985]), but also a grave vault (*Ciancio v Woodlawn Cemetery Assn.*, 249 AD2d 86 [1st Dept 1998]), a landfill (*Bockmier v Niagara Recycling*, 265 AD2d 897 [4th Dept 1999]), a buried gas pipeline (*Covey v Iroquois Gas*

Transmission Sys., 218 AD2d 197 [3d Dept 1996], *affd* 89 NY2d 952 [1997]), above-ground cable television lines (*Girty v Niagara Mohawk Power Corp.,* 262 AD2d 1012 [4th Dept 1999]), and a log truck (*Hutchins v Finch, Pruyn & Co.*, 267 AD2d 809 [3d Dept 1999]). Moreover, a trench constructed as part of a project to clean and repair underground water mains is a structure under section 240 (1) (*see Tooher v Willets Point Contr. Corp.*, 213 AD2d 856, 857 [3d Dept 1995] [while defendant failed to preserve its argument that the trench was not a structure, the court found the argument "to lack merit in any event"]).

However, "[r]epaving a parkway at grade does not constitute work on a structure for purposes of Labor Law § 240 (1)," even where that parkway passes through overpasses and bridges (*Dilluvio*, 264 AD2d at 121; *see also Spears v State of New York*, 266 AD2d 898, 898 [4th Dept 1999] ["a highway at grade is not a building or structure within the meaning of section 240 (1)"]; *Matter of Dillon v State of New York*, 201 AD2d 793 [3d Dept 1994]).

The City argues that plaintiffs' Labor Law § 240 (1) claims should be dismissed, as the intersection of Bowery and Houston Streets is not a building or structure. Plaintiffs argue that the structure requirement is satisfied, as Marcinkowski's work involved the repair and installation of water mains underneath the roadway.

The Court of Appeals has noted that, in evaluating Labor Law § 240 (1) claims, "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Here, while Marcinkowski and the other workers had not yet broken through the roadway and built a trench to repair and install water mains, the excavation of the roadway was clearly done with reference to that work, as breaking up the roadway was the first step in

constructing the trench. This work, then, is not like that in *Dilluvio*, *Spears*, and *Matter of Dillon*, where the work was limited to the roadway itself. Moreover, water mains here, like the gas pipelines in *Covey*, and the trench dug to repair and install them, like the trench in *Toohey*, are each structures for purposes of Labor Law § 240 (1). Thus, plaintiffs satisfy the structure requirement for a claim under this section.

Elevation

A plaintiff is not entitled to the protections of this section unless 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 Exch., Inc.*, 13 NY3d 599, 603 [2009]). While Labor Law § 240 (1) claims are typically grouped into "falling worker" and "falling object" cases, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.*).

In the falling object context, the Court of Appeals has held that a steel traffic plate, raised perpendicular to the ground by a backhoe, with its edge touching the ground, which toppled onto the foot and shoulder of a worker, did not implicate a significant elevation difference (*Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]). Similarly, the First Department recently found that a transformer which fell less than two feet onto a worker's head did not trigger liability under Labor Law § 240 (1) (*Makarius v Port Auth. of N.Y. and N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["there can be no liability under the statute ... where there is no appreciable height differential between a worker and the falling object that strikes him or her"]). However, "the weight of the falling object 'and the amount of force it was capable of generating,

even over the course of a relatively short descent' must be taken into account" (*Harris v City of New York*, -- AD3d ---, 2011 NY Slip Op 02743, *5 [1st Dept 2011], quoting *Runner*, 13 NY3d at 605).

As to what constitutes adequate protection from falling objects, the Court of Appeals has held that liability arises "only when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). However, liability "is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]; *see also Stawski v Pasternack, Popish & Reif, P.C.*, 54 AD3d 619 [1st Dept 2008]). In *Stawski*, a legal malpractice case in which the underlying incident involved a cinder block which fell 10 feet onto the head of a worker after it was returned to an open cavity without being cemented or secured in any way, the First Department held that, but for a procedural failure committed by the defendant attorneys, the plaintiffs "would have succeeded on the merits of a Labor Law § 240 (1) claim" (*Stawski*, 54 AD3d at 620).

The City contends that since the excavator was not a hoisting machine, or being used as a hoisting machine, plaintiffs cannot establish liability under Labor Law § 240 (1). This argument fails to shift the burden to plaintiffs, as plaintiffs do not need to show that the chunk of asphalt was in the process of being hoisted or secured. The City also argues that Labor Law § 240 (1) is inapplicable because the height differential between the excavator's bucket and plaintiff's leg was insignificant. The City refers to Loyola's affidavit, in which he stated that the chunk of asphalt did not fall, but rose up from the roadway under the pressure of the excavator, which drove it into Marcinkowski's leg (Loyola Affidavit, ¶¶ 12-21) .

Arguing that a significant height differential was present, plaintiffs refer to the testimony of Marcinkowski and Sullivan, the Transit Authority inspector, both of whom stated that the chunk of asphalt fell out of the bucket from a height of approximately two feet (August 2008 50-h, at 32-33; Sullivan Deposition, at 68). Plaintiffs also argue that Loyola's affidavit should be discounted, as it raises only feigned issues of fact. However, as they offer no basis for this conclusion, except for the conflicting testimony of other witnesses, and the supposition that non party Loyola is trying to exculpate himself, the court declines to determine Loyola's credibility (*compare Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001] [plaintiff's affidavit determined to be feigned where it "consists of nothing more than two relevant sentences of conclusory allegations," which "clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony"]).

If the factfinder were to credit Loyola's affidavit, Marcinkowski would not be entitled to recovery under Labor Law § 240 (1), as Loyola maintains that there was no height differential between the piece of asphalt and Marcinkowski's leg. In Loyola's account, this accident is different from those in *Runner* and *Harris* as, in both of those cases, a height differential was present, and while no falling object struck the plaintiff in either of those cases, the force of gravity flowed directly through an intermediary object, a rope and a piece of lumber, respectively, to plaintiffs Runner and Harris.

However, liability under this section may be present if the factfinder credits the testimony of Marcinkowski and Sullivan. If the chunk of asphalt fell out of the excavator's bucket, even from a height of two feet, the risk arising from this differential was significant, as the chunk of asphalt was extremely heavy. Thus, the City and plaintiffs each raise a material issue of fact as

to the height differential between the chunk of asphalt and Marcinkowski's ankle prior to the accident. As such, the branch of the City's motion which seeks summary judgment on the issue of liability under Labor Law § 240 (1), and the branch of plaintiffs' motion which seeks partial summary judgment on the issue of defendants' liability under this section, must both be denied.

Labor Law § 241 (6)

The City and plaintiffs each move for summary judgment on the issue of Labor Law § 241 (6), which provides:

> All areas in which construction ... 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 Court of Appeals has held that this section requires owners and contractors "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]). This duty is nondelegable and it exists even in the absence of control or supervision of the worksite (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 348-349). "Nonetheless, comparative negligence remains a cognizable affirmative defense to a § 241 (6) cause of action" (*St. Louis v Town of North Elba*, -- NY3d ---, 2011 NY Slip Op 02481, *2 [2011]).

To support a claim under section 241 (6), plaintiffs must allege a violation of an applicable Industrial Code regulation which "mandate[s] compliance with concrete specifications and [does] not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Violation of the regulation must also be the proximate cause of the plaintiff's injury (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d

263, 271 [1st Dept 2007]).

Plaintiffs allege that the City violated several provisions of section 23--9.4 of the Industrial Code, which is entitled "Power Shovels and Backhoes Used for Material Handling." Specifically, plaintiffs allege violation of 12 NYCRR 23-9.4 (e) (1), 12 NYCRR 23-9.4 (e) (2), 12 NYCRR 23-9.4 (h) (1), 12 NYCRR 23-9.4 (h) (2), and 12 NYCRR 23-9.4 (h) (5).

12 NYCRR 23-9.4 (e), "Attachment of load," provides:

> (1) Any load handled by such equipment shall be suspended from the bucket or bucket arm by means of wire rope having a safety factor of four; (2) Such wire rope shall be connected by means of either a closed shackle or a safety hook capable of holding at least four times the intended load.

The First Department has held that "section 23-9.4 (e) sets forth sufficiently specific requirements governing the movement of materials with a backhoe to constitute a standard for the imposition of statutory liability" (*Padilla v Frances Schervier Hous. Dev. Fund Corp.*, 303 AD2d 194, 197 [1st Dept 2003]; *see also Parrelli v City of New York*, 277 AD2d 167 [1st Dept 2000]).

The City contends that these provisions are inapplicable since Loyola was excavating debris, not material. This is a false distinction, as the First Department has held that these provisions apply where plaintiff had been using a backhoe "to pick up pieces of steel and other debris from piles on the ground and transfer the same into an adjacent dumpster . . ." (*Malloy v Madison Forty-Five Co.*, 13 AD3d 55, 56 [1st Dept 2004]). Thus, the fact that the chunk of asphalt was debris does not prevent these provisions from applying to Marcinkowski's accident.

The City also argues that section 23-9.4 of the Industrial Code does not apply because section 23-9.5, entitled "Excavating machines," which plaintiffs do not allege violation of, governs Marcinkowski's accident to the exclusion of section 23-9.4.

The Court of Appeals has recently held, while interpreting the applicability of section 23-9.4 in a different circumstance, that, according to the principle that " [t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 2011 NY Slip Op 02481, *4),

> the preferred rule both as a matter of statutory interpretation and as a reinforcement of the objectives of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation. This approach accounts for those circumstances where a slightly different machine is utilized for the same risky objective that is perhaps more frequently or more efficiently achieved by the machine designated by name in the Code

(*id.* [holding that subsection 23.9.4 (e) applies to front end loaders]).

The general applicability of section 23.9.4 is even clearer here than in *St. Louis*, as Loyola was operating an excavator with a backhoe attached to it, and thus, since the backhoe was handling materials, the accident is expressly regulated by this section (*but see Rodriguez v D & S Bldrs., LLC*, 29 Misc 3d 1217[A], * 6, 2010 NY Sip Op 51855[U] [Sup Ct, Queens County 2010] [12 NYCRR 23-9.4 (a)-(h) not implicated where excavator did not have a backhoe attached to it]). Thus, the City fails to make a showing of the inapplicability of 12 NYCRR 23-9.4 (e) (1) and 12 NYCRR 23-9.4 (e) (2), while plaintiffs make a showing that these provisions apply by offering evidence that the backhoe handled the chunk of asphalt while it was not suspended to the bucket or the bucket arm with a wire rope.

12 NYCRR 23-9.4 (h), entitled "General operation," provides, in relevant part:

> (1) Any load lifted by such equipment shall be raised in a vertical plane to minimize swing during hoisting. (2) Such equipment shall not travel with a suspended load except on surfaces which conform to the requirements of

subdivision (c) of this section[1] ... (5) Carrying or swinging suspended loads over areas where persons are working or passing is prohibited.

The City argues that subsection 23-9.4 (h) (1) does not apply, as plaintiffs have offered no evidence that Loyola failed to raise the backhoe in a vertical plane. As to 12 NYCRR 23-9.4 (h) (2), the City argues that this provision is inapplicable, as there is no allegation that the excavator was moving at the time of Marcinkowski's injury. As plaintiffs fail to offer evidence that Loyola did not raise the backhoe in a vertical plane or that the excavator was moving at the time of Marcinkowski's accident, neither of these provisions is applicable.

However, the City's contention that 12 NYCRR 23-9.4 (h) (5) does not apply, as the asphalt chunk was in the bucket rather than suspended from it, fails to switch the burden to plaintiffs. This argument not only contradicts the City's position that the bucket never picked up the chunk of asphalt, but it suggests that failing to conform to the provisions of 12 NYCRR 23-9.4 (e) somehow absolves defendants from liability under 12 NYCRR 23-9.4 (h) (5). Given the purpose of Labor Law § 241 (6), it cannot be the case that failing to secure a backhoe load with a wire rope absolves defendants of the responsibility to avoid carrying or swinging that load over areas where persons are working or passing. Plaintiffs make a prima facie showing as to the applicability of 12 NYCRR 23-9.4 (h) (5) by offering evidence that Loyola swung the backhoe over an area where Marcinkowski was passing.

---

[1] Subdivision (c), "Footing," provides:

Firm, level and stable footing shall be provided for each such machine. Where such footing is not otherwise supplied, it shall be provided by substantial timbers, cribbing or other structural members in sufficient numbers and of sufficient size to distribute the load so as not to exceed the safe bearing capacity of the underlying material.

While plaintiffs make prima facie showings as to the applicability as to 12 NYCRR 23-9.4 (e) (1), 12 NYCRR 23-9.4 (e) (2), and 12 NYCRR 23-9.4 (h) (5), the City raises a material issue of fact as to whether these provisions were violated, and whether such violations proximately caused Marcinkowski's accident, by submitting Loyola's affidavit, in which he states that the bucket never picked up the asphalt chunk. If the bucket never picked up the chunk of asphalt, then none of these provisions were violated, as the backhoe, in this scenario, did not handle the asphalt for purposes of 12 NYCRR 23-9.4 (*see generally Malloy*, 13 AD3d at 56).

Thus, as the City fails to make a prima facie showing of entitlement to summary judgment, its application for partial summary judgment on the issue of liability under Labor Law § 241 (6) must be denied. As the City raises an issue of fact as to whether the excavator's bucket picked up the chunk of asphalt, plaintiffs' application for summary judgment under this section must also be denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) is denied; and it is further

ORDERED that the branch of defendants City of New York and New York City Department of Design and Construction motion which seeks dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims as against them is granted; and it is further

ORDERED that the branches of defendants City of New York and New York City Department of Design and Construction's motion which seek dismissal of plaintiffs' claims under Labor Law §§ 240 (1) and 241 (6) are denied; and it is further

ORDERED that defendant Consolidated Edison Company of New York, Inc.'s cross motion for summary judgment dismissing all claims and cross claims as against them is denied as moot; and it is further

ORDERED that defendant New York City Transit Authority's cross motion for summary judgment dismissing all claims and cross claims as against them is denied as moot and it further

ORDERED that this matter is set for a status conference on June 2, 2011 at 9:30 a.m., No further notices will be sent, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY

May 2, 2011

So Ordered:

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Hon. JUDITH J. GISCHE, J.S.C.