[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN IA Part 10
Justice

JAMES D. WHITAKER, JR., et al.

- against -

THE LONG ISLAND RAIL ROAD COMPANY, et al.

Index Number 5859 2008

Motion Date October 26, 2010

Motion Cal. Numbers 8, 9

Motion Seq. Nos. 25, 26

The following papers numbered 1 to 32 read on this motion by defendant Bombardier Transit Corporation (BTC) pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety; and on the motion by defendant Hudson Machine Works, Inc. (Hudson) pursuant to CPLR 3212 dismissing the complaint and any all cross claims; and on the cross motion by the defendants LIRR and MTA pursuant to CPLR 3211(a)(7) and 3212 dismissing the plaintiff's complaint.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-12
Notice of Cross Motion - Affidavits - Exhibits.....	13-16
Answering Affidavits - Exhibits.....	17-23
Reply Affidavits.....	24-32

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for injuries allegedly suffered as a result of a work-place accident. The plaintiff alleges that he tripped over a box while walking through an unlit Long Island Rail Road train car on August 20, 2007, at the Arch Street Station

located in Long Island City, New York. Various work was performed at the Arch Street Station on passenger rail cars owned by the LIRR and Metro-North Railroad, pursuant to a contract in which the defendant BTC was a party. The work done at the station was being performed by Bombardier Mass Transit Corporation (BMTC), the plaintiff's employer. Another subcontractor, the defendant Hudson, was also doing modification to rail road cars at the Arch Street Station.

The plaintiff testified at his examination before trial that he worked for Bombardier modifying rail road train cars. The accident occurred when the plaintiff was inside a married pair of LIRR rail cars designated 7147 and 7148. The plaintiff testified that he entered the back end of the darkened rail car. The plaintiff was unable to describe the quantity or size of the boxes. The plaintiff stated the lights were not working in the rail road car and that he could not see the boxes in the car. The boxes were located in the middle of the rail road car and were not empty. The plaintiff further testified that he had previously seen boxes in train cars at the Arch Street Station. The plaintiff testified that he was performing work on rail road cars that had previously been in service. According to the plaintiff's testimony he was using a mini-drill on the day of the accident. However, at his examination before trial the plaintiff was unable to give a description of the work he performed on the day of the accident. The plaintiff also testified that he received his instructions from his supervisor, an employee of BMTC.

The defendant BTC submitted the affidavit of Don Cummings the general manager of BMTC. In his affidavit, he stated that the work performed at the Arch Street Station was modifications, adjustments and inspections of Long Island Rail Road and Metro-North Railroad passenger cars. This work included the application of interior decals, checking the electrical wire continuity, subsystem software uploads. Some work did involve the accessing of hardware located behind removable panels or ceiling tiles. He further stated that when structural work was required on the rail road car the car would be sent to Quebec, Canada and final assembly of the rail road cars would take place in Plattsburgh, New York.

In support of its motion the defendant BTC also submitted the affidavit of its vice-president, Robert Furniss. In his affidavit Mr. Furniss stated that BTC did not act as a general contractor, project manager or subcontractor for the work performed at the Arch Street Station. Furthermore, he stated that it did not maintain control or operate the Arch Street Station or otherwise supervise, direct or control any of the work performed at the station including the work performed by the plaintiff. Finally, he stated that BTC did not maintain an office or a place of business at the Arch Street Station and no BTC employees were assigned to perform work at the Arch Street Station.

The defendant Hudson, in a supplemental affidavit, submitted the examination before trial of the plaintiff's coworkers who witnessed the accident. These coworkers testified in detail regarding the work performed on the train. One witness explained that the work on the trains involved modification and testing. Additionally, the plaintiff's supervisor testified that BMTC supervised the work done by the plaintiff. He also testified that BMTC controlled the lighting in the rail road cars. The plaintiff's supervisor further stated that on the day of the accident the plaintiff was drilling holes to hang advertising pictures.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Owners and contractors are subject to strict liability under Labor Law § 240. To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (*Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280 [2003]). Here, all the moving defendants established that the plaintiff's cause of action under Labor Law § 240(1) must dismissed as the work involved did not involve elevation related risks for which special safety devices were required (*see Bonse v Katrine Apt. Assoc.*, 28 AD3d 990 [2006]; *Magnuson v Syosset Community Hosp.*, 283 AD2d 404 [2001]; *Wendell v Sylvan Lawrence Co.*, 279 AD2d 383 [2001]; *Rossi v Mount Vernon Hosp.*, 265 AD2d 542 [1999]). The plaintiff failed to raise any issues of fact in opposition.

Labor Law § 241(6) applies to owners or general contractors. A subcontractor who does not direct or control the work that brought about the accident cannot be liable. The defendant Hudson is entitled to summary judgment dismissing the Labor Law § 241(6) cause of action as it was a subcontractor and it did not have the authority to control or supervise the particular work that the plaintiff was engaged in when the accident occurred (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Armentano v Broadway Mall Props.*, 30 AD3d 450 [2006]; *Bopp v AM Rizzo Elec. Contrs.*, 19 AD3d 348 [2005]; *Morales v Federated Dept. Stores*, 5 AD3d 744 [2004]).

Under Labor Law § 241(6), liability is imposed on an owner or contractor for failing to comply with the Industrial Code, even if the contractor did not supervise or control the work site. However, Labor Law § 241(6) only applies if the injured worker's accident arose out of construction, excavation and demolition work (*see Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002]; *Wein v Amato Props., LLC*, 30 AD3d 506 [2006]). The evidence submitted in support of the motions for summary judgment established that the plaintiff was engaged in the maintenance and modification of existing rail road cars and was not involved in construction, excavation or demolition work. The moving defendants established their prima facie entitlement to summary judgment. In opposition, the plaintiff failed to raise an issue of fact. The plaintiff in his affidavit expanded on the work he was doing describing the

modifications, repairs and alterations made to air conditioning ducts, interior and exterior walls of the train cars, including listing the tools he used. However, the plaintiff did not raise an issue of fact as to whether the work was performed in the construction context. Inasmuch as the "the protections of Labor Law § 241(6) do not apply to claims arising out of the maintenance of a building or structure outside of the construction context" Labor Law § 241(6) is inapplicable (*Hartfield v Bridgedale, LLC*, 28 AD3d 608 [2006]). The moving defendants are therefore entitled to entitled to summary judgment dismissing the Labor Law § 241(6) cause of action.

For an owner or general contractor to be liable under Labor Law § 200 or common-law negligence, the plaintiff must show that the owner or general contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident (*see Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). Here, the defendants Hudson and BTC established their prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence put forth by these defendants, established as a matter of law that none of these defendants had notice of any defective condition or had and the authority to control or supervise the plaintiff, nor did the plaintiff receive any instructions from the defendants in the performance of his duties (*see Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an any issues of fact. The plaintiff's conclusory statements in his affidavit that an employee from BTC maintained an office at the Arch Street Station did not raise an issue of fact that would warrant denial of the summary judgment motion. In fact, the defendant BTC submitted records showing the that the employee was an employee of BMTC.

The defendants LIRR and MTA, on the other hand, failed to establish their prima facie entitlement to summary judgment. The defendants LIRR and MTA did not submit any evidence that it neither created nor had actual or constructive notice of the alleged dangerous condition (*Harsch v City of New York*, 78 AD3d [2010]; *Navarro v City of New York*, 75 AD3d 590 [2010]). In light of the fact that defendants MTA and LIRR failed to meet their initial burden of establishing a prima facie case for summary judgment dismissing the Labor Law § 200 and common law negligence causes of action, it is unnecessary to consider the sufficiency of the opposition papers (*see Jackson v Fenton*, 38 AD3d 495 [2007]; *Willis v New York City Tr. Auth.*, 14 AD3d 696 [2005]; *Meihang Qu*, 12 AD3d at 578-579 [2004]).

Accordingly, the motion by the defendant BTC for summary judgment dismissing the complaint is granted and the complaint against the defendant BTC is dismissed.

The motion by defendant Hudson for summary judgment dismissing the complaint is granted and the complaint against the defendant Hudson is dismissed.

The branches of the cross motion by the defendants LIRR and MTA for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action are granted and those causes of action are dismissed. The branches of the cross motion by the defendants LIRR and MTA for summary judgment dismissing the Labor Law § 200 and common law negligence causes of action are denied.

Dated: February 22, 2011

J.S.C.