Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Jorge Ferri and Aline Toledo,

Plaintiffs,

- against -

The City of New York,

Defendant.

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Index Number: 29523/09

Motion Date: 10/18/11

Motion Cal. Number: 8&9

Motion Seq. No.: 1&2

The following papers numbered 1 to 18 read on this motion by plaintiff for partial summary judgment and motion by defendant, the City of New York, for summary judgment.

	Papers Numbered
Notice of Motion (Plaintiff)-Affirmation-Exhibits..	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9
Notice of Motion (Defendant)-Affirmation-Exhibits..	10-13
Affirmation in Opposition-Exhibits.....	14-16
Reply.....	17-18

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motion by plaintiff for partial summary judgment (Calendar No. 8) and motion by the City for summary judgment (Calendar No. 9) are consolidated for disposition.

Motion by plaintiff for partial summary judgment on the issue of liability as to his causes of action brought pursuant to Labor Law §§240(1) and 241(6) is denied. Motion by the City for summary judgment dismissing the complaint or, in the alternative, dismissing his cause of action for lost wages, is granted solely to the extent that plaintiff's causes of action premised upon a violation of §§240(1) and 200, and for common law negligence, are

dismissed, and is denied in all other respects.

Plaintiff, an employee of a painting contractor, L&L Painting, was engaged in painting the Queens side of the Queensboro Bridge (also known as the 59th Street Bridge) in Queens County on July 15, 2009, when the aerial basket he was in allegedly malfunctioned, causing it to move and pin his left arm between the basket's mechanical arm and a pipe or cable attached to the bridge.

Plaintiff was working approximately 15-20 feet above the ground. The aerial basket he was in was attached by a mechanical arm to a van. The basket had a set of controls on the arm next to the basket (the upper controls) and there was a second set of controls inside the van (the lower controls). The lower controls were to override the upper controls in the event a worker in the basket was unable to control the basket with the upper controls.

Plaintiff testified in his deposition that he was trained to use three switches: one to move up and down, one to move sideways and one to stretch the mechanical arm. He had entered and exited the basket several times on the night of the accident. After he finished painting one area, he would descend and exit the basket, drive the van 20-30 feet to the next location and re-enter the basket. Just prior to the accident, he entered the basket, moved forward 10 feet and raised it approximately 15-20 feet, positioned it and started painting. He testified that after approximately 15 minutes, "I was painting and something caused the mechanical arm to all of a sudden go up quickly. And then it grabbed onto my arm and shoulder and I was stuck there." The basket moved straight up two to three feet. He did not know whether any part of his body hit any of the switches immediately prior to the basket going up quickly. The basket "grabbed onto the bottom of my arm, then it grabbed into my arm, pinned me under a pipe and I was stuck there." The mechanical arm was under his left armpit and "on top of my shoulder was the pipe" that was attached to the bridge. The switches were under his armpit. The mechanical arm was putting pressure on his left arm and he was unable to remove his left arm from in between the mechanical arm and the pipe. His arm was thus pinned between the mechanical arm of the basket and the pipe for approximately one hour. Immediately after his arm was pinned, he called down to his partner George and asked him to try to move the mechanical arm with the bottom controls that were located in the back of the van. He testified that he saw George use the bottom controls and that George kept trying for five minutes to no avail. He then told George to turn off the ignition to the van, which also turned off the motor to the mechanical arm. However, the pressure against his arm from the mechanical arm was not alleviated. He then asked George to cut the hose that carried oil to the mechanical arm.

However, this procedure also was unsuccessful in alleviating the pressure of the mechanical arm against his arm. He finally told George to call 911.

Plaintiff also testified that the aerial basket had moved suddenly on four or five previous occasions. When asked what caused the basket to move suddenly on those occasions, plaintiff stated that sometimes the line of his safety belt "hit the button and it made it go up all of a sudden." On other occasions he did not know what caused it to move. He complained about this problem to Alison, who was his brother-in-law, and one Miguel and one Anthony, all employees of L&L Painting. He stated that he complained to Anthony once, some days before the accident, and told him that "the way the switches were exposed, it was very dangerous because anything that hit against them would make the basket move."

Jorge Montesdeoca, the George to whom plaintiff referred to in his deposition, testified in his deposition, inter alia, as follows: He was employed by L&L as a first-year apprentice assigned to work with plaintiff, who was a journeyman. They were working on the Queens side outer roadway of the lower level of the bridge. Plaintiff was doing touch-up work on everything that was high, and he was doing the touch-up painting on the bottom. Plaintiff was using the aerial basket. Jorge was approximately half a mile distant from the van and plaintiff at the time of the accident, and he saw plaintiff waving at him and heard him yelling for help. He arrived at the van in under a minute and observed plaintiff's arm extended outside the basket and pinned between the basket and a steel rod or cable on the bridge. Plaintiff told him to call Anthony, who was their foreman, and also to go into the van and try to bring the arm down from the inside switches. He called Anthony but could not reach him and tried to use the switches, but nothing happened after 3-4 minutes of manipulating the controls. He then exited the van and tried to pull the mechanical arm down manually, to no avail. Plaintiff then told him to cut the arm's hydraulic cables, which he did, also to no avail. The Fire Department then arrived, as did Anthony, approximately 15 minutes into plaintiff's ordeal. The Fire Department freed plaintiff's arm. Thereafter a mechanic from L&L, who repaired all of their electrical equipment, arrived and apprised them of a switch in the van that when activated takes the pressure out of the mechanical arm and lowers it. Jorge was not aware of this switch. As a result of what the mechanic did, the mechanical arm dropped. Jorge explained that the arm dropped in free-fall fashion. He stated that had he known of this switch and utilized it, the basket would have let go of plaintiff's arm but would have also free-fallen directly onto the traffic.

Eric Fonseca also testified in his deposition, inter alia, as follows: he was employed by L&L as an assistant foreman whose duties were "To supervise the workers and whatever job they are performing and to let them know exactly what it is they have to do." With respect to the work that plaintiff and Jorge were paired up to do, which was touch-up painting, they were given a paint brush, a bucket of paint, a scraper and the bucket truck. L&L only had one bucket truck. He assumes L&L owns it but is not sure. He was on the bridge when he received a radio call from Jorge who apprised him that plaintiff's arm was stuck and that he had called 911. Fonseca then drove to the location where he saw plaintiff on the bucket truck elevated approximately 15-20 feet from the roadway with his arm stuck between the pipe and the bucket. Jorge tried the cut-off switch, but he had already cut the hoses off. Fonseca then climbed the steel up to where plaintiff was and tried to move the arm but could not get to the switch. He then climbed down and tried to extricate plaintiff by taking the air out of the van's tires, to no avail. He climbed back up to where plaintiff was and, in vain, tried to alleviate the pressure bearing against his arm by manually trying to push the basket away from the pipe. He could not see whether plaintiff's arm was touching the controls because his body was leaning over everything and he could not see the control box. The ESU and FDNY arrived and pulled the mechanical arm down away from plaintiff's arm a few inches with a pulley just enough to free his arm, after which the mechanical arm sprang back to its original position. Plaintiff was brought down on a ladder. Fonseca also related that the mechanic employed by L&L came and cut the hoses on the hydraulics, which caused the arm to come down. He stated that he saw the mechanic cut the hydraulic hoses, heard a big explosion, and the arm then free-fell. He did not know what hoses Jorge had cut, however, which had no effect. Fonseca also testified that he never used the lower controls and did not know whether they were operational.

Plaintiff contends that he is entitled to summary judgment under §240(1) upon the ground that his injuries were proximately caused by the failure of a safety device to protect him in his work at an elevated work site. The City argues that §240(1) is inapplicable to the facts of this case because plaintiff did not fall and his injuries were not gravity-related.

Labor Law §240(1) is a strict liability provision that imposes upon owners and contractors absolute liability for any breach of the statutory duty that proximately causes injury (see Panek v. County of Albany, 99 NY 2d 452 [2003]). What is meant by "strict" or "absolute" liability in the Labor Law context is that any negligence on the part of plaintiff which contributes to his injuries is not a defense and will not diminish the owner's or

contractor's liability under Labor Law §240(1), if it is established both that there was a violation of the statute and that the violation was a proximate cause of the injury (see Blake v. Neighborhood Housing Services of New York, 1 NY 3d 280 [2003]).

Painting is a specifically enumerated category of work covered under Labor Law §240(1). Moreover, it is undisputed that the City is the owner of the Queensborough Bridge and would be subject to liability under §240(1) if a violation of that section were established.

However, Labor Law §240(1) only applies to elevation-related hazards where the peril to be protected against, and the injury it affords a worker a cause of action for, is gravity-related. "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. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides" (Rocovich v Consolidated Edison Co., 78 NY 2d 509, 514 [1991]). The Court of Appeals subsequently, in Ross v Curtis-Palmer Hydro-Elec. Co. (81 NY 2d 494, 501 [1993]), further explaining the parameters of the statute's application, stated, "The 'special hazards' to which we referred in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured"...In other words, Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. The right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist"[emphasis in original, and citations omitted]; see also Rau v Bagels N Bruch, Inc., 57 AD 3d 866, 867 [2nd Dept 2008]).

Plaintiff's counsel argues that §240(1) is applicable because plaintiff was working at a height, was on a scaffold or protective device and the protective device failed. He argues that the failure of the aerial basket, in and of itself, entitles plaintiff to summary judgment under §240(1). However, as the Court of Appeals

has made clear, injury to a worker caused by a malfunctioning or defectively designed protective device does not implicate §240(1) unless the injury was the direct result of the force of gravity. Thus, in a similar case, where a worker's arm was caught between the ceiling of the work site and the aerial basket he was in, allegedly as a result of malfunctioning or defectively designed controls, his cause of action under §240(1) was dismissed since it 'did not involve a fall, or a falling object" (Moore v Metro N. Commuter R.R., 233 AD 2d 192, 192 [1st Dept 1996]). In contrast, where a worker was injured when he and a co-worker on an ascending scaffold pushed the scaffold away from the side of the building in order to clear a protruding air conditioner and the scaffold swung back and smashed into the air conditioner, such was deemed to establish liability on his §240(1) cause of action because he offered unrebutted evidence in the form of an expert's affidavit that the accident was gravity-related, thus resulting in the holding by the Appellate Division, First Department, that "[s]ince the effects of gravity caused the scaffold to smash into the air conditioner, and the scaffold was not equipped with sufficient devices to prevent these injuries, plaintiffs' motion for summary judgment should have been granted" (Dominguez v Lafayette-Boynton Hous. Corp., 240 AD 2d 310, 312 [1st Dept 1997]).

The Court notes that a worker need not actually completely fall in order for his injuries to be considered gravity-related under §240(1). For example, where a ladder on which a worker was standing moved and lost contact with the building against which it was leaning and turned sideways, and the worker, in saving himself from falling, managed to turn the ladder back against the wall but ruptured a disc in his spine in the process, he was entitled to summary judgment on his §240(1) cause of action because his injury was gravity-related notwithstanding that he prevented himself from falling. Reasoned the Appellate Division, Second Department in that case, "The fact that the plaintiff did not actually fall from the ladder is irrelevant as long as the 'harm directly flowed from the application of the force of gravity to an object or person'" (Lacey v Turner Construction Co., 275 AD 2d 734, 735 [2nd Dept 2000] [quoting Ross v Curtis-Palmer Hydro-Elec. Co., supra]).

The cases cited by plaintiff in support of his argument that the failure of a scaffold or other protective device made out a prima facie case of liability under §240(1) all involved situations where the protective device either collapsed and the worker actually fell (see Dos Santos v State of New York, 300 AD 2d 434 [2nd Dept 2002]) or collapsed onto the worker who did not fall (see Acosta v Bentley Apts., 298 AD 2d 124 [1st Dept 2002] [§240[1] held applicable where ladder descended, trapping the worker's hand, since the injury directly flowed from the application of the force

of gravity to an object or person]), or where the worker was injured in the process of preventing himself from falling or being prevented from falling an appreciable distance by a fortuitous event such as his leg becoming caught in the scaffolding as he fell (see Franklin v Dormitory Auth. Of Stae of N.Y., 291 AD 2d 854 [4th Dept 2002]).

Thus, plaintiff fails to state a cause of action under §240(1) since it is undisputed that he "was not injured while falling from, or attempting to prevent himself from falling from, the [aerial basket]" (Milligan v Allied Builders, Inc., 34 AD 3d 1268, 1268 [4th Dept 2006]). His injuries resulted, not from the force of gravity, but from the mechanical force of the aerial basket's hydraulic arm. The Court finds the case of Elezaj v P.J. Carlin Constr. Co. (225 AD 2d 441 [1st Dept 1996]) instructive in this regard. In that case, the bucket of a crane/backhoe being used to lower a worker into a trench crushed the worker's hand. The Appellate Division, First Department, held that §240(1) was not implicated, since there was no evidence that the worker's hand was crushed because the bucket swayed on its hinge as a result of gravity, but only that the bucket crushed his hand as a result of the mechanical operation of the machine by its negligent operator. In our case, plaintiff's arm was not injured as a result of his falling from the basket or the basket falling or descending onto his hand under the pull of gravity, but as a result of the basket ascending under mechanical power. Whether or not the aerial basket's mechanism malfunctioned or was defectively designed is irrelevant since plaintiff's injuries were not gravity-related.

Therefore, the City is entitled to summary judgment dismissing plaintiff's cause of action under §240(1) of the Labor Law.

The City is also entitled to summary judgment dismissing plaintiff's cause of action under §200 of the Labor Law. Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY 2d 343 [1998]). Therefore, the same principles governing common-law negligence apply to claims under §200. Where the unsafe condition of the work site was caused by the methods or manner in which the contractor performed the work and the owner did not exercise supervision and control over the work, no liability attaches to the owner either under §200 or common law (see Dupkanicova v. Vasiloff, 35 AD 3d 650 [2nd Dept 2006]).

Where the condition was not caused by the contractor's unsafe work practices, liability may only be imposed upon the owner under either §200 or common law if the owner created the dangerous condition or, where the condition was a defect of the premises

itself as opposed to one created by the contractor, if it is shown that the owner had actual or constructive notice of the condition (see Bradley v. Morgan Stanley & Co, 21 AD 3d 866 [2nd Dept 2005]).

There is no issue that plaintiff's injuries were not the result of any condition of the bridge but resulted from an accident in the operation of the aerial basket provided to him by his employer, and the City has met its burden of demonstrating that it did not exercise any supervision or control over plaintiff's work on the Queensboro Bridge (see Verel v. Ferguson Electric Const. Co., 41 AD 3d 1154 (4th Dept 2007]). Indeed, plaintiff offers no opposition to this branch of the City's motion. In addition, notwithstanding that the City moved for dismissal of plaintiff's §200 claim but did not also move for dismissal of his common law negligence claims, the Court, in searching the record, also dismisses plaintiff's common law negligence cause of action since, as heretofore stated, §200 is merely a codification of the common-law duty of an owner or contractor to maintain a safe construction area, and, therefore, the City's entitlement to summary judgment dismissing plaintiff's §200 cause of action also requires dismissal of plaintiff's cause of action under common law negligence, as a matter of law.

Plaintiff also asserts a cause of action pursuant to Labor Law §241(6). That section provides, in relevant portion, "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 . . . . 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." Unlike §200 of the Labor Law, §241(6) imposes vicarious liability upon owners and contractors for violations of a provision of the Industrial Code and, unlike §240(1), it is not a strict liability statute and, therefore, the owner or contractor may still raise any valid defense to the imposition of vicarious liability under §241(6), including comparative negligence (see Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY 2d 343 [1998]).

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that there was a violation of a specific rule or regulation of the Industrial Code and that such violation was a proximate cause of plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept 2004]). Plaintiff asserts in his bill of particulars a violation of Industrial Code (12 NYCRR) §23-9.6(b)(1) and (2). Section 23-9.6(b)(1) states, "Where aerial basket controls are so located that they may come into contact with obstructions, such controls shall be protected by

guarding or equivalent protection shall be provided." Section 23-9.6(b)(2) states, "The lower controls at ground level shall be capable of overriding the controls located in the basket." The record, on these motions, raise issues of fact as to whether the upper controls of the aerial basket in question were adequately shielded from accidental contact, and whether the lower controls were capable of overriding the upper controls. Although Jorge Montesdeoca testified that he manipulated the lower controls and nothing happened, he also stated that he had never before used these controls and also testified that the company mechanic, when he arrived, showed him a switch that he was unaware of that brought the arm down. Plaintiff, Jorge Montesdeoca and Fonseca testified that they never before used the bottom controls, and Fonseca testified that he did not know whether they were functional. Fonseca also testified, in essence, that when he arrived on the scene, he could not determine whether the bottom controls functioned because Jorge had cut the hoses. Therefore, since the deposition testimony raises unresolved issues of fact concerning whether the upper controls had adequate safeguards and whether the lower controls functioned, whether Montesdeoca did not know how to work the lower controls and disabled them by cutting cables, or whether and to what extent plaintiff was comparatively negligent, summary judgment is inappropriate.

Finally, although it is undisputed that plaintiff is an illegal alien and that he presented a false Social Security card to his employer, he testified in his deposition that he informed his employer that his Social Security card was counterfeit and he purchased it but that his employer told him to write down the false number on his employment application and hired him notwithstanding that it knew he was an illegal alien. The record on this motion thus raises an issue of fact as to whether plaintiff's employer was fraudulently induced to hire plaintiff or whether it hired him notwithstanding that it knew about his undocumented status and knew that the Social Security number he provided was false, and thus, whether or not plaintiff's claim for lost wages is barred pursuant to the Immigration Reform and Control Act of 1986 (8 U.S.C. §1324a, et seq.) (see, e.g. Balbuena v IDR Realty LLC, 6 NY 3d 338 [2006]). Therefore, the City has failed to establish an entitlement to summary judgment dismissing plaintiff's cause of action for lost wages.

Accordingly, plaintiff's motion for partial summary judgment is denied and the City's motion for summary judgment is granted solely to the extent that plaintiff's causes of action based upon a violation of §§240(1) and 200, and his cause of action alleging common law negligence, are dismissed, and is denied in all other respects.

Dated: October 31, 2011

KEVIN J. KERRIGAN, J.S.C.