SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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GERARD WASIK, JR.,

Plaintiff,

-against -

METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY, and JUDLAU CONTRACTING INC. / TRANSITHEC, AJV,

Defendants.

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Index No. 309238/08
Submission Date 2/18/11

DECISION and ORDER

Present:
Hon. SHARON A.M. AARONS
Justice

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion/Order to Show Cause and Exhibits Annexed	1
Answering Affidavit and Exhibits	2
Reply Affidavit and Exhibits	3

Upon the foregoing papers and due deliberation, the Decision and Order on this motion is as follows:

This motion seeking an order dismissing the complaint and granting defendants' motion for summary judgment pursuant to CPLR § 3212 is decided in accordance with the annexed decision and order of same date.

Date: April 27, 2011

SHARON A.M.. AARONS, J.S.C..

FILED Apr 29 2011 Bronx County Clerk

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Upon the foregoing papers and due deliberation, the Decision and Order on this motion is as follows:

This motion seeks an order dismissing the complaint and granting defendants' motion for summary judgment pursuant to CPLR § 3212. Defendants' motion is granted only to the extent and for reasons stated below.

Plaintiff commenced this action by the filing of a summons and complaint on or about October 28, 2008. In support of the motion, defendants submitted copies of the pleadings, transcripts of plaintiff' statutory hearing and deposition, a transcript of defendant Jadlau Contracting, Inc./Transithec, AJV's ("Jadlau") employee, Richard Longenecker, and the notice of issue and certificate of readiness.

The action stems from a work site accident on October 16, 2007, in which plaintiff, an apprentice electrician employed by non-party subcontractor T.C. Electric, was knocked off a flatbed truck, five feet off the ground, from which he was running cable from a cable reel up to the elevated structure of the Mosholu train station which was operated and maintained by New York City Transit Authority ("NYCTA").

On the day of the accident, the cable truck was not available so the spool of cable was placed on a jack stand and onto the flatbed truck. While the metal axle, jack stand and wire reel were provided by plaintiff's employer T.C. Electric, the flatbed truck was provided by contractor Jadlau. Plaintiff claims that the accident was caused by the defendants' violation of labor Law §§ 200, 240 and 241(b).

Labor Law § 200

Labor Law § 200 has been deemed a codification of the common law duty of an owner or general contractor to provide employees with a safe place to work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). In order to establish liability for a violation of Labor Law § 200, plaintiff must demonstrate that the defendants (owner or general contractor) exercised supervision and control over the work performed, or had actual or constructive notice of the alleged unsafe condition which precipitated plaintiff's injury. *Pilch v. Board of Educ. of City of New York*, 27 A.D.3d 711, 815 N.Y.S.2d 617 (2nd Dept 2006); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993); *Butigian v. Port Auth.*, 266 A.D.2d 133, 699 N.Y.S.2d 41 (1st Dept 1999).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt that there are material and triable issues of fact present. *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *F. Garofalo Elec. Co. v. N.Y. Univ.*, 300 A.D.2d 186, 754 N.Y.S.2d 227 (1st Dept 2002). The motion should be denied where different conclusions can reasonably be drawn from the evidence. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992). All of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. *Udoh v. Inwood Gardens, Inc.*, 70 A.D.3d 563, 897 N.Y.S.2d 12 (1st Dept 2010).

Where the alleged dangerous condition arises from the contractor's methods and the owner exercised no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200. *Lombardi v. Stout*, 80 N.Y.2d 290, 295, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1992). General supervisory authority at the work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability pursuant to Labor Law § 200. *Alexandre v. City of New York*, 300 A.D.2d 263, 750 N.Y.S.2d 651, (2nd Dept 2002); *Vaneer v. 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 A.D.3d 161, 773 N.Y.S.2d 7 (1st Dept 2004). Here, there was no evidence offered that the MTA or NYCTA performed any supervisory function at the work site other than for inspection purposes, or that they had notice of a dangerous condition, and plaintiff does not argue otherwise.

On the other hand, while there is sufficient admissible evidence to establish that T.C. Electric supervised the work that plaintiff was performing and supplied him with the equipment to perform his duties, there remains a question of fact as to whether the use of the flatbed truck involved, which was owned by Jadlau, amounted to supervision and control of the subcontractor's method by Jadlau. While the method used in running the cable wire and the faulty Nextel phone were factors in bringing about the accident, this court is unable to conclude that as a matter of law, they were the sole proximate cause. *Seaman v. A.B. Chance Co.*, 197 A.D.2d 612, 602 N.Y.S.2d 693 (2nd Dept 1993), *lv. denied*, 83 N.Y.2d 847, 634 N.E.2d 606, 612 N.Y.S.2d 110 (1994).

Accordingly, liability cannot be found under Labor Law § 200 as to MTA and NYCTA. Summary judgment, however, is denied as to defendant Jadlau. *Ford v. HRH Constr. Corp.*, 41 A.D.3d 639, 838 N.Y.S.2d 636 (2nd Dept 2007).

Labor Law § 240

Labor Law § 240, commonly referred to as the "scaffold law," imposes a nondelegable duty to owners and contractor. *Sanatass v. Consolidated Investing Co., Inc.*, 10 N.Y.3d 333, 887 N.E.2d 1125, 858 N.Y.S.2d 67 (2008). Not every worker, however, who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001). "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." Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

To sustain an action under this section, a worker must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device. *Berg v. Albany Ladder Co., Inc.*, 10 N.Y.3d 902, 891 N.E.2d 723, 861 N.Y.S.2d 607 (2008). A fall from a flat bed truck about four and one-half to five feet off the ground is not the "elevation-related risk" required to maintain a cause of action under this statute. *Toefer v. Long Island R.R.*, 4 N.Y.3d 399, 405, 828 N.E.2d 614, 795 N.Y.S.2d 511 (2005). Here, plaintiff fell from a flatbed truck five feet off the ground while running wire from a reel that was also on the flatbed truck. Plaintiff has not offered evidence sufficient to create a question of fact as to whether his fall resulted from the lack of safety devices. *Berg*, 10 N.Y.3d at 904.

Labor Law § 241(6)

Labor Law 241(6) also imposes a nondelegable duty to both owner and contractor. In order to impose liability, plaintiff must allege that the property owner violated a regulation that set forth a specific standard of conduct instead of offering a recitation of common-law safety principles. *St. Louis v. Town of N. Elba*, 2011 N.Y. LEXIS 506 at * 2, 2011 NY Slip Op 2481 (N.Y. Mar. 31, 2011). Here, plaintiff concedes that liability does not attach because the Industrial Code is inapplicable. Therefore, those claims against all parties are dismissed.

Therefore, it is hereby

ORDERED, that plaintiff's claims against MTA and NYCTA under Labor Law § 200 are dismissed; it is further

ORDERED, that plaintiff's claims under Labor Law § 240 are dismissed as to all defendants; and it is further

ORDERED, that plaintiff claims under Labor Law § 241(6) are dismissed as to all defendants;

Dated: April 27, 2011

SHARON A. M. AARONS, J.S.C.