NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 29

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

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

Carlos Carona

Index Nº. 301256/2008

-against-

Hon. ROBERT E. TORRES JUDGE Justice.

LAL Gen & Concourse Management

The following papers numbered 1 to ____ Read on this motion,
Noticed on _____ and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-7	
Answering Affidavit and Exhibits	8-12	
Replying Affidavit and Exhibits	13-18	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the attached decision.

This constitutes the Decision and Order of the Court.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 11, 23, 2011

Hon. ROBERT E. TORRES J.S.C.
JUDGE

FILED Dec 01 2011 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 29

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CARLOS CARONA,

Plaintiff,

-against-

DECISION & ORDER
Index No. 301256/08

L.A.L. GRAND CONCOURSE MANAGEMENT COMPANY LLC, CITY LIMITS GROUP INC., and L.A.L. PROPERTY MANAGEMENT CORP.,

Defendants.

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L.A.L. GRAND CONCOURSE MANAGEMENT COMPANY LLC,

Third-Party Plaintiff,

-against-

TP Index No. 84284/08

FRANK MICELI JR. CONTRACTING, INC.,

Third-Party Defendant.

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HON. ROBERT E. TORRES:

In this action wherein plaintiff seeks to recover damages for injuries sustained at a construction site, plaintiff moves by order to show cause for an order pursuant to Labor Law §§240(1) and 241(6) granting partial summary judgment on the issue of liability against defendants. All defendants oppose plaintiff's motion and cross-move for summary judgment relief as well. The motions are consolidated for disposition as follows:

This action arises out of an occurrence at a construction site located at 2605 Grand Concourse, Bronx, New York, that took place on November 23, 2007. Plaintiff has asserted negligence claims pursuant to Labor Law §200 as well as statutory liability claims against the defendants for allegedly violating Labor Law §§240(1) and 241(6). Co-defendant L.A.L. Grand Concourse Management Company LLC ("LAL Grand Concourse") commenced a third-party action against Frank Miceli Jr. Contracting, Inc. ("FMC"), the plaintiff's employer, sounding in negligence,

contribution and indemnity.

On November 23, 2007, plaintiff was employed as a machine operator with third-party defendant FMC working at a demolition project located at 2605 Grand Concourse, Bronx, NY. The property was owned by defendant LAL Grand Concourse. L.A.L. Property Management Corp. ("LAL Property") was the effective property manager for the subject premises.

Defendant LAL Property solicited bids and ultimately entered into a construction trade agreement with defendant City Limits Group Inc. ("City Limits") to perform demolition work at the property. City Limits then subcontracted the actual demolition work to FMC.

The scope of the work called for the complete demolition of the existing two story wooden house and attached three story brick building at the property, removal of debris, backfilling of the basement and the leaving of the site graded and clean.

On the day of the accident, a portion of the wooden house and the third floor of the brick building was already demolished. In addition to operating the excavator, the plaintiff also threw out demolition debris and garbage from the upper level down into a dumpster to re-arrange the debris and pack it tighter so that it could hold more materials.

Prior to his accident, plaintiff was on the second floor of the brick building; he was discarding used furniture by tossing it through a window down to a dumpster. At the time of plaintiff's accident, Efrain and Pedro, other employees of FMC, were demolishing a brick wall by chopping out bricks. Efrain was using a jackhammer to chop bricks loose and Pedro was pushing the loose debris off the side of the building to the ground.

At the time of the accident, plaintiff was walking out the front door when he was struck in the head by a piece of brick that had been pushed off the building by Pedro and Efrain from about

30 feet above him. The piece of debris measured 2' by 3' and weighed approximately 50-100 pounds.

The proponent of a motion for summary judgment must make 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. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action. *See Zuckerman v. City of New York*, 49 NY2d at 562. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *See Makaj v. Metropolitan Transport Authority*, 18 AD3d 625, 626 (2d Dep't 2005).

Plaintiff generally argues that the failure of the owners and contractors to provide any safety devices to protect the workers from falling debris is a violation of the Labor Law. Plaintiff further submits that there are no issues of fact regarding a violation of Labor Law §240(1) based on the defendants' failure to secure the large concrete chunk of brick that fell on the plaintiff and their failure to provide proper overhead protection around the demolition site including overhead protection around the doorway in general. The large chunk of brick that fell was a load that required securing when it was pushed off the side of the building from the upper levels by FMC workers. The protective devices that could have shielded plaintiff from harm directly flowing from the application of the force of gravity to the large chunk of brick were absent and thus inadequate.

In opposition, defendants LAL Grand Concourse, LAL Property Management and City Limits

argue that they had no physical presence at the construction site and played no role in directing, controlling or supervising the demolition work activity taking place at the same time as plaintiff's accident and as such cannot be held negligent for the happening of the accident at issue. Furthermore, they set forth that the Labor Law sections do not apply to them and that they should be dismissed from the case.

FMC sets forth that the plaintiff was a very experienced demolition worker who had been employed by FMC for over 11 years (Exhibit F, p.24 and Exhibit H, p.99), worked at the site for weeks prior to the date of the accident and was instructed not to go in and out of the area where his accident occurred because things were going to be thrown down from the building (Exhibit H, pp.17-18).

In accordance with the Labor Law and recent Appellate Division case law, plaintiff's motion is denied and defendants' cross-motions for summary judgment are granted in that plaintiff's claims pursuant to Labor Law §§200 and 240(1) are dismissed. Plaintiff's cause of action pursuant to Labor Law §241(6) remains.

Labor Law §200 is "a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Singh v. Black Diamonds, LLC*, 24 AD3d 138, 140 (1st Dep't 2005). "Liability under this section required not only direct supervision or control over the injury-producing work but also actual or constructive notice of the dangerous condition that caused plaintiff's injury." *Cahill v. Triborough Bridge and Tunnel Authority*, 31 AD3d 347, 350-351 (1st Dep't 2006).

The court finds that defendants have met their burden of establishing entitlement to summary judgment based upon the testimony submitted herein that plaintiff never received directions or

instructions with respect to how to perform his job from anyone other than FMC employees. Moreover, the testimony established that the accident did not result from any dangerous condition at the jobsite but rather the manner in which FMC employees demolished the building. The court further finds that plaintiff has failed to demonstrate the existence of an issue of fact requiring a trial on this issue.

Plaintiff claims that it is entitled to summary judgment with regard to liability pursuant to Labor Law §§240(1) and 241(6). Defendants argue that they are entitled to dismissal of these claims.

Labor Law § 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

With respect to "falling object" theories of liability, Labor Law §240 applies only where the falling of an object is related to a significant risk inherent in the relative elevation(s) at which materials or loads must be positioned or secured, and that for the statute to apply, a plaintiff must show more than an object falling and causing injury to a worker. A plaintiff must show that the object fell while being hoisted or secured, and because of the absence or inadequacy of a safety device of the kind enumerated in the statute. *See Narducci v. Manhasset Bay Assocs.*, 95 NY2d 259 (2001).Since the brick in this case was not being hoisted or secured, Labor Law §240(1) does not apply. *See Narducci v. Manhasset Bay Associates, supra. See also Garzon v. Metropolitan Transp. Authority*, 70 AD3d 568 (1st Dep't 2010); *Doucore v. Atlantic Development Group, LLC*, 18 AD3d

337 (1st Dep't 2005). Furthermore, the brick was purposely, not accidentally dropped. *See Roberts v. General Electric Co.*, 97 NY2d 737 (2002).

The First Department recently denied plaintiff's motion for partial summary judgment on his Labor Law cause of action and granted defendants' cross-motions for summary judgment. The Court held that the plywood that struck plaintiff had been deliberately dropped from a window, thus it did not constitute a "falling object" under the Labor Law. *See Solano v. The City of New York*, 77 AD3d 571 (1st Dep't 2010), *citing Roberts v. General Electric Co., supra.*

The evidence submitted with the motion and cross-motions established that the brick that hit the plaintiff was deliberately being dropped, and thus, is not considered a "falling object" under the Labor Law. *See also, Fried v. Always Green, LLC*, 77 AD3d 788 (2d Dep't 2010). As such, plaintiff has failed to meet his burden entitling him to summary judgment and defendants have met their burden entitling them to dismissal of plaintiff's claim pursuant to Labor Law §240(1).

Plaintiff argues that pursuant to Labor Law §241(6), defendants violated numerous Industrial Code violations. Defendant sets forth that in order to state a claim under Labor Law §241(6), plaintiff must not only demonstrate that the injuries were proximately caused by an Industrial Code violation that is applicable given the circumstances of the accident, but he must also set forth a concrete standard of conduct rather than a reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993).

Labor Law § 241(6) provides in relevant part:

> 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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

With respect to his claims under Labor Law § 241(6), plaintiff alleges that defendants violated 12 NYCRR 23.1.7(a)(1)(2); 23-3.2(b)(c); 23-3.3(b)(3),(c), (g); 23-3.4(b); 23-3.2(b)(c), 23-3.3(b)(3) and 23-3.4(b). Plaintiff alleges violations of additional claims in his Bill of Particulars but fails to rely upon these sections in his moving papers. As such, this court deems that plaintiff has abandoned his claims with respect to the remaining sections.

12 NYCRR 23-1.7(a)(1) mandates that "[e]very place where a person is required to work...that is normally exposed to falling materials and objects, shall be provided with suitable overhead protections." Since there is a question of fact as to whether overhead protections would have been feasible with the manner in which the demolition was being performed, it is for a jury to determine whether the defendants violated this provision. Likewise, with respect to 12 NYCRR 23-1.7(a)(2), there is a question for the jury to determine whether the plaintiff was required to work or pass in an area where the demolition pieces would fall in order to remove the pieces from the work area.

12 NYCRR 23-3.2(c) and 3.3(c) provide rules for the fencing in of demolition sites and involve the inspection against hazards created by the demolition work. Therefore, these provisions are applicable to the case at bar.

The remainder of the sections, including 12 NYCRR 23-3.2(b), 23-3.3(b)(3) and (g), and 23-3.4 are inapplicable to this case and are thus dismissed.

Pursuant to Labor Law §241(6), plaintiff has created an issue of fact as to whether

there was adequate or any overhead protection to protect workers from falling debris (See Exhibit G, p.21-22, 29, 34-35). Moreover, no verbal or visual warnings were given by the workers upstairs before they dropped the demolition debris (Exhibit G, p. 31-32). Thus, plaintiff may pursue his claims pursuant to Labor Law §241(6).

That branch of LAL Grand Concourse, LAL Property and City Limits' cross-motion for indemnification is to be determined by the trier of fact pending resolution of the liability issues at trial.

This matter is decided in accordance with CPLR 9002.

Accordingly, plaintiff's motion is denied, defendants' cross-motions are granted to the extent that plaintiff's causes of action pursuant to Labor Law §§200 and 240(1) are dismissed; and the plaintiff's claim pursuant to Labor Law §241(6) remains as to all defendants.

This constitutes the decision and order of the court.

Dated: November 23, 2011
Bronx, New York

Robert E. Torres, J.S.C.

ROBERT E. TORRES
JUDGE