Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

JOSE NAVAS,

Plaintiff,

-against-

GS 149 LLC,

Defendant.

Index No. 29684/08

Motion
Date September 11, 2012

Motion
Cal. No. 22

Motion
Sequence No. 2

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Upon the foregoing papers it is ordered that the motion by plaintiff, Jose Navas, for summary judgment pursuant to CPLR 3212 on his Labor Law §§ 240(1) and 241(6) claims and defendant, GS 149 LLC's cross-motion for summary judgment dismissing the plaintiff's Complaint against it are hereby decided as follows:

Plaintiff, Jose Navas, maintains that on October 9, 2008, he was lawfully working on a project at the premises located at 441 East 148th Street, Bronx, New York "when a pipe attached to a wall at said location was caused to fall onto the plaintiff due to the negligence of the defendants in the improper supervision of the demolition work ongoing thereat as well as the failure to comply with the Labor Law". Plaintiff maintains that he was caused to sustain serious personal injuries as a result of defendant's negligence. Plaintiff commenced this action alleging liability against defendant pursuant to Labor Law §§ 200, 240(1), and 241(6). Defendant, GS 149 LLC cross-moves for summary judgment dismissing the plaintiff's Complaint. It is undisputed that Ancor Construction Services Inc. was the plaintiff's employer at the time of the accident.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]).

Plaintiff's motion and Defendant's cross motion for summary judgment on plaintiff's Labor Law § 240(1) claim.

Plaintiff established a prima facie case that his claim under Labor Law § 240(1) must be granted as there are no triable issues of fact regarding this section. Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]; see, Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Gasques v. State of New York, 59 AD3d 666 [2009]; Rau v. Bagels N Brunch, Inc., 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see, Gordon v. Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Ortega v. Puccia, 57 AD3d 54 [2008]; Riccio v. NHT Owners, LLC, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (see, Chlebowski v. Esber, 58 AD3d 662 [2009]; Rakowicz v. Fashion Inst. of Tech., 56 AD3d 747 [2008]; Rudnik v. Brogor Realty Corp., 45 AD3d 828 [2007]).

"Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured" (Orner v. Port Authority, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a

significant risk posed by the elevation at which material or loads must be positioned or secured (Salinas v. Barney Skansa Construction Co., 2 AD3d 619 [2d Dept 2003]).

Plaintiff established that 240(1) was violated by defendant in that he was not provided with any safety devices and aside from a hard hat, he was not given or wearing any kind of protective devices. In support of this branch of the motion, plaintiff, presented, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testifies that: on the day of the accident, he was working inside a movie theater at the premises, plaintiff was working on a platform which was 15 feet up which had a metal bar on it, while he was throwing a piece of concrete demolition debris off the platform a metal bar fell from a height of 4-5 feet above and struck his leg and foot and some metal hooks on the bar punctured his foot, the bar was part of the building; the examination before trial transcript testimony of Angelo Latempa, who testified that: he was the owner of Ancor Construction Services Inc., Ancor was in the business of demolition, Ancor was hired by GS 149 LLC to do the demolition work, the plaintiff was his employee, no steps were taken to secure the railing which eventually fell on plaintiff, he did not know if the owner GS 149 LLC provided any safety equipment to the plaintiff, Ancor did not provide plaintiff with any safety equipment of any kind to prevent the railing from falling on the plaintiff. Plaintiff established *a prima facie* case that at the time of the accident, he was engaged in interior demolition work, and that he was working 15 feet up in the air on a mezzanine, and the steel railing fell on him from above.

In opposition to this branch of the motion and in support of its cross motion, defendant argues as follows: A permanent structure located above grade level does not constitute an elevation-related hazard under the purview of Labor Law § 240(1); plaintiff cannot prove that he was working at an elevated-height differential such that Labor Law § 240(1) would apply in this case; plaintiff was not subjected to a significant or extraordinary risk at the time of the alleged incident as required by the statute at the time of the alleged incident; and the railing that fell was not in the process of being hoisted or secured as required by the statute.

Defendant first contends that: A permanent structure located above grade level does not constitute an elevation-related hazard under the purview of Labor Law § 240(1). Defendant maintains that plaintiff was working on a permanent, rather than a temporary structure at the time he was allegedly injured and that

the Appellate Division, Second Department has dismissed Labor Law § 240(1) claims brought by plaintiffs on permanent or fixed appurtenances as such have not been designated as safety devices to protect workers from elevation-related risks citing, inter alia, Norton v. Park Plaza Owner Corp., 263 AD2d 531 [2d Dept 1999]). Defendant alleges that in the instant case, the mezzanine where plaintiff was working was a fixed and permanent structure, which he testified he used stairs to access; and therefore, the mezzanine does not constitute a fixed and permanent structure within the purview of Labor Law § 240(1).

This Court finds that defendant's argument that Labor Law § 240(1) does not apply because the mezzanine he was working on was a "permanent structure" to be unavailing since the mezzanine is the functional equivalent of a scaffold or ladder or safety device since plaintiff would not have been able to reach the spot he was working at without a ladder or scaffold or in this case a mezzanine or balcony (see, Berrios v. 735 Avenue of the Americas LLC, 82 AD3d 552 [1st Dept 2011]; Beard v. State of New York, 25 AD3d 989 [3d Dept 2006]).

Defendant further contends that: plaintiff cannot prove that he was working at an elevated-height differential such that Labor Law § 240(1) would apply in this case. Defendant cites to case law establishing that there can be no violation of Labor Law § 240(1) when the plaintiff and the object that struck him were on the same level, citing Mendez Arqueta v. Hamparian, 2010 NY Slip Op 30425U [Sup Ct, Queens County 2010]; Malecki v. Wal-mart Stores, Inc. et. al., 222 AD2d 1010 [4th Dept 1010]). In the instant case, defendant argues that plaintiff's attorney concedes the railing that allegedly injured plaintiff was on the same level where he was working. Specifically, plaintiff testifies that the subject railing was annexed to the concrete wall that surrounded the mezzanine and was thus on the same level as the plaintiff who was also working on the mezzanine at the time of the alleged incident. Therefore, defendant maintains that there was no elevated differential between the subject railing and the plaintiff pursuant to the statute.

The Appellate Division, Second Department has granted summary judgment to workers struck by falling objects. In Salinas, supra, ductwork fell several feet onto a worker's head and the court held that plaintiff met its burden of establishing that the duct fell due to the absence or inadequacy of a safety device enumerated in the statute for securing or lowering the load. In Orner, supra, the worker was injured while hit upon the head by unsecured roofing material that had fallen from the roof. The Court granted summary judgment to the plaintiff, holding that a plaintiff may recover under Labor Law § 240(1) where an object

falls from a height, when it was not properly secured(see also, Outar v. City of New York, 286 AD2d 671 [2d Dept 2001] [holding that where worker was injured when an unsecured dolly fell from the top of a bench wall 5 ½ feet high, plaintiff was entitled to summary judgment on the issue of liability under § 240[1]).

The Court finds that in the instant matter, plaintiff testified that an unsecured railing fell on him from a height of approximately five (5) feet above him while he was working fifteen (15) feet up from the ground floor of a movie theater in a mezzanine or balcony upon which he was standing. Therefore, the plaintiff and the object that struck him were not at the same level (see, Runner v. New York Stock Exchange, 13 NY3d 599 [2008][holding "[t]he relevant inquiry--one which may be answered in the affirmative even in situations where the object does not fall on the worker--is rather whether the harm flows directly from the application of the force of gravity to the object"]).

Defendant further contends that: plaintiff was not subjected to a significant or extraordinary risk at the time of the alleged incident as required by the statute at the time of the alleged incident, citing, inter alia, Rodriguez v. Tietz Ctr for Nursing Care, 84 NY2d 841 [1997]). Defendant maintains that plaintiff was not exposed to an extraordinary elevation risk at the time of the incident since the plaintiff testified that the railing that struck him fell from a minimal height of five (5) feet, which cannot be considered a physically significant height. In Rodriguez, supra, the plaintiff was working on the roof of defendant's building and was injured when he was lowering 120 pound steel beam from seven (7) inches above his head when it slipped from the hoist and fell on the plaintiff and the Court held that Labor Law § 240(1) was inapplicable because plaintiff was "exposed to the usual and ordinary dangers of a construction site", as opposed to the extraordinary elevation risks which would fall within the purview of the statute.

The Court finds that there is no minimum height differential that an object must fall before the Labor Law is implicated (see, Salinas, supra; see, Outar, supra).

Finally, defendant contends that the railing that fell was not in the process of being hoisted or secured as required by the statute, citing, inter alia, Perillo v. Lehigh Construction Group, Inc. et. al., 17 AD3d 1136 [4th Dept 2005] and as such, the plaintiff's claim under Labor Law § 240(1) must be dismissed. Defendant maintains that the object that fell was not a material or load that was being hoisted or secured at the time of the

incident, but rather the railing did not require securing for the purpose of being affixed to the ceiling and/or concrete wall surrounding the mezzanine, citing Novack v. Del Savio, 64 AD3d 636 [2d Dept 2009]). Instead, the railing was permanently affixed to the concrete wall surrounding the mezzanine, and so it cannot be considered a falling object within the statute.

The Court finds that in the instant matter, plaintiff alleges that an unsecured railing fell on him from a height of approximately 5 feet onto plaintiff, while he was working 15 feet up from the ground. This Court finds defendant's argument that the rail or pipe was not actively being hoisted unavailing, as § 240(1) has been found to apply where objects were not actively being hoisted at the exact moment an accident happened (see, Cammon v. City of New York, 21 AD2d 196 [1st Dept 2005]; Manganello v. Hamilton, 2006 NY Slip Op 51301U [Sup Ct, Queens County 2006]).

The Court finds that as there are no triable issues of fact as to whether defendant is liable under Labor Law § 240(1), summary judgment is granted to plaintiff on his Labor Law § 240(1) cause of action and that branch of defendant's cross motion for summary judgment on Labor Law § 240(1) is denied.

Defendant's cross motion for summary judgment on plaintiff's Labor Law § 200 and Common Law Negligence claim.

It is well settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see, Pirotta v. EklecCo., 292 AD2d 362 [2002]; Kobeszko v. Lyden Realty Investors, 289 AD2d 535 [2001]; Giambalvo v. Chemical Bank, 260 AD2d 432 [1999]). Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (Damiani v. Federated Department Stores, Inc., 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (Id.).

Defendant established a prima facie case that the

plaintiff's claims under Labor Law § 200 must be dismissed. Defendant submitted, inter alia, an affidavit of Gideon Shaffir, a representative of defendant, who avers that: while he appeared at the premises on a daily basis, his duties and responsibilities were limited to providing general supervisory tasks such as monitoring the status of the project and providing payment to Ancor, at no time did he or any other employee of defendant provide safety directives to plaintiff or direct, supervise, or control the work plaintiff was performing at the time of his accident, prior to the date of the incident, GS 149 LLC was not aware of any dangerous condition on the mezzanine where plaintiff was injured, including with respect to the subject railing, and GS 149 LLC did not receive any complaints or other notice of any dangerous conditions with regard to the mezzanine or the metal railing, and did not create any hazardous conditions; a copy of the Demolition Contract between Ancor and GS 149 LLC, which Contract stated that Ancor was to "supply and install all pipe scaffolding, safety netting and sidewalk bridging as necessary," and provide "proper safety and clean up"; plaintiff's own examination before trial transcript testimony wherein he testified that on the date of the accident, he worked for Ancor, Mr. Latempa directed him to clean the concrete debris on the mezzanine; the examination before trial transcript testimony of Angelo Latempa who testified that: he was the safety manager for the premises. Defendant established that there is no evidence that: it gave plaintiff any safety directives or directed, supervised, or controlled the injury producing work, had any notice of a dangerous condition, or created a dangerous condition.

In opposition, plaintiff fails to raise a triable issue of fact. In opposition, plaintiff presents, *inter alia*, the affidavit of Gideon Shaffir who averred that: he was (1) on the premises daily to monitor the progress of the work and (2) to issue payment to Ancor based on the status of the work completed.

"Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. A defendant had the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (Ortega v. Puccia, 57 AD3d 54 [2d Dept 2008] [internal citations omitted]). In the instant case, there is insufficient proof to establish that defendant had the authority to control the manner or method by which plaintiff performed his work (see, Picchione v. Sweet Construction Corp., et al., 60 AD3d 510 [1st Dept 2009][wherein the Court held that "the fact that their employee

had walked the construction site to monitor compliance with their alteration specifications, which contained virtually no directives regarding safety, constitutes general supervision insufficient to establish liability against an owner. Additionally, no issue of fact has been raised as to whether the owner had actual or constructive notice of the allegedly dangerous condition.

Accordingly, the defendant's cross-motion for summary judgment dismissing the plaintiff's claims predicated upon common-law negligence and Labor Law § 200 is granted.

Plaintiff's motion and Defendant's cross motion for summary judgment on plaintiff's Labor Law § 241(6) claim.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., 4 NY3d 399 [NY 2005]; Bland v. Manocherian, 66 NY2d 452 [1985]; Kollmer v. Slater Electric, Inc., 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care" (Rizzuto v. LA Wenger Contracting, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards", but rather must establish "concrete specifications" (see, Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]; Williams v. Whitehaven Memorial Park, 227 AD2d 923 [4th Dept 1996]).

Plaintiff has failed to establish a prima facie case that there are no triable issues of fact regarding a violation of Labor Law § 241(6). Via the instant motion for summary judgment, plaintiff seeks summary judgment regarding violations of Industrial Code Sections, 12 NYCRR 23-1.16 and 12 NYCRR 23-3.3(a)-(m). Plaintiff has failed to establish a prima facie case regarding Labor Law 12 NYCRR 23-1.16 and 12 NYCRR 23-3.3(a)-(m) in that he has failed to establish how his injuries were proximately caused by a violation of these Industrial Code provisions (see, Marin v. The City of New York, 798 NYS2d 710 [Sup Ct, Kings County 2004]).

Accordingly, plaintiff's motion for summary judgment on his Labor Law § 241(6) claim is denied.

On that branch of defendant's cross motion for summary judgment on plaintiff's Labor Law § 241(6) claim, defendant established a prima facie case that it did not violate Labor Law § 241(6). At the outset, defendant established a prima facie case that plaintiff has failed to properly plead violations of 12 NYCRR 23-3.3(a)-(m) as such have not been plead in the Complaint or Bills of Particulars (see, Smith v. Hercules Construction Corp., 274 AD2d 467 [2d Dept 2000]). Defendant has provided a prima facie case that plaintiff has not established a violation of 12 NYCRR 23-1.16. Such a section outlines the requirements for safety belts, tail lines, and lifelines and plaintiff fails to argue that such devices were provided and/or defective, nor has plaintiff established how such section was violated. Defendant has provided a prima facie case that plaintiff has not established a violation of 12 NYCRR 23.1(a)-(h). Such section sets forth the following: (a) requires suitable overhead protection to be provided to persons normally exposed to falling material in areas they are required to work or pass and this protection extends to persons who are lawfully frequently an area exposed to falling objects. Defendant established that 12 NYCRR section 23-1.7(a)(1)-(2) does not apply to the factual situation alleged by plaintiff because there has been no testimony to establish that at the time of the alleged incident plaintiff was working in an area where he was normally exposed to falling material. Also, plaintiff was not a patron required to pass an area exposed to falling objects. Additionally, plaintiff alleges violations of 12 NYCRR section 23-1.7(b) which pertains to falling hazards when workers are required to work near a hazardous opening and close to an edge. .However, a prima facie case has been established that this section does not apply to this case because the mezzanine where plaintiff was working was surrounded by a five (5) foot concrete barrier, thus plaintiff was not exposed to the type of falling hazard described in this section of the Industrial Code. Also, 12 NYCRR section 23-1.7(b)(2) applies to workers performing bridge or highway overpass construction and therefore does not apply in this matter because plaintiff was performing demolition work at the time of the alleged incident. Moreover, plaintiff alleges violations of 12 NYCRR section 23-1.7(c) Drowning hazards; 12 NYCRR section 23-1.7(d) Slipping hazards; 12 NYCRR section 23.1.7(e) Tripping and other hazards; 12 NYCRR section 23-1.7(f) Vertical passage in stairways, ramps or runways; 12 NYCRR section 23-1.7(g) Air contaminated or oxygen deficient work areas; and 12 NYCRR section 23-1.7(h) Corrosive substances. Said sections also do not apply here because there has been no evidence establishing that the alleged incident was caused by a drowning, slipping or tripping hazard. Also, the testimony does not establish that plaintiff was working in a stairway, ramp or runway where the alleged incident occurred or that the incident was the result of an

unventilated work area or failure to protect against chemicals such as corrosive substances. Defendant has provided a prima facie case that plaintiff has not established a violation of 12 NYCRR 23-3.1. Said section provides that "[a]ny method of demolition of any building or other structure not named or described in this Subpart shall not be used unless granted special approval." It does not apply because plaintiff fails to allege that he was performing demolition of kind that is not named in this subpart. Defendant has provided a prima facie case that plaintiff has not established a violation of 12 NYCRR 23-3.2(a)(d). Such section sets forth the following: 12 NYCRR section 23.3.2(a) Preparations for the demolition of any building or other structures; 12 NYCRR section 23-3.2(b) Protection of adjacent structures; 12 NYCRR section 23-3.2(c) Barricades and 12 NYCRR section 23-3.2(d) Dust control. Defendant established said sections do not apply to this case because plaintiff has not alleged that he was injured because of defendant's inadequate preparation of the worksite prior to the demolition, nor does he claim that his alleged incident was due to defendant's failure to protect an adjacent structure. Additionally, plaintiff does not allege that the incident arose out of defendant's failure to provide proper barricades or control the dust at the premises.

In opposition to defendant's cross motion, plaintiff raises triable issues of fact regarding the violation of certain Industrial Code sections only. In opposition, plaintiff raises a triable issue of fact with respect to 12 NYCRR 23-1.7(a) regarding whether the plaintiff was working in an area exposed to falling material. Plaintiff cites to examination before trial transcript testimony wherein defendant testifies that the demolition of the roof and ceiling was being performed from above the plaintiff and the demolition debris was simply thrown down in the theater below and that they would simply demolish the roof and ceiling by hand and throw or let drop the debris below onto the mezzanine or balcony and down into the floor of the theater.

Plaintiff established a triable issue of fact regarding 12 NYCRR 23-3.3(b)(3) which section states that walls or chimneys or other parts of a building or structure shall not be left in an unguarded state such that they may fall, collapse, or be weakened by wind pressure or vibrations. Plaintiff established that he pled a violation of 12 NYCRR 23-3.3 in his verified bill of particulars. Plaintiff established that the rail or pipe on the mezzanine wall or balcony which was being demolished was left in an unguarded condition such that it fell or collapsed.

Accordingly, that branch of defendant's cross motion for summary judgment on plaintiff's Labor Law § 240(1) claim is granted only to the extent of all Industrial Code Sections, except Sections 23-1.7(a)(1) and 12 NYCRR 23-3.3(b)(3).

Plaintiff raises a triable issue of fact with regards to Sections 23-1.7(a)(1) and 12 NYCRR 23-3.3(b)(3).

This constitutes the decision and order of the Court.

Dated: January 30, 2013

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Howard G. Lane, J.S.C.