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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21

Justice

Index Number : 109301/2010
O'CONNELL, JOHN
vs.
TRIBOROUGH BRIDGE
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. 109301/10

MOTION DATE 6/20/13

MOTION SEQ. NO. 001

The following papers, numbered 1 to 10 were read on this motion for summary judgment and leave to amend bill of particulars.

Notice of Motion — Affirmation — Exhibits A-F, G [Affidavit], H — Affidavit of Service	No(s). 1-4
Affirmation in Opposition — Exhibits A-B — Affidavit of Service	No(s). 5-6
Reply Affirmation — Affirmation of Service	No(s). 7-8
Supplemental Affirmation — Affirmation of Service	No(s). 9-10

Upon the foregoing papers, it is ordered that plaintiff's motion is decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/3/14
New York, New York

_____, J.S.C.

1. Check one:..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

JOHN O'CONNELL,

Plaintiff,

- against -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendant.

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Index No. 109301/2010

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this action alleging violations of Labor Law §§ 200, 240, and 241, plaintiff moves for summary judgment in his favor as to liability only on his Labor Law § 240 (1) claim against defendant. Plaintiff also seeks leave to amend/supplement his bill of particulars to allege a violation of 12 NYCRR 23-9.6 (e). Defendant opposes the motion.

BACKGROUND

On August 26, 2009, plaintiff was an ironworker employed by Conti Enterprises, which was allegedly hired to perform construction work on the Whitestone Bridge.

Plaintiff testified at his deposition that he was "busting rivets" using a pneumatic punch tool called a hell dog, which was hooked up to an air compressor, with a chisel at the end. (McGrath Affirm., Ex F [O'Connell EBT], at 47-48.)

According to plaintiff, he was busting rivets "20 feet, 25 feet" above the ground in a manlift,[1] working on the underside of the Queens approach of the Whitestone Bridge. (O'Connell EBT, at 50; McGrath Affirm., Ex D [Verified Bill of Particulars] ¶ 2.)

At his deposition, plaintiff described the basket of the manlift as approximately 3 to 4 feet wide, and 6 to 8 feet long. (O'Connell EBT, at 41.) Plaintiff stated that the manlift basket had a mid-rail that came up about 2½ feet high, and a top rail that was approximately 4 feet high. (*Id.* at 41-42.) According to plaintiff, manlifts were being used with planks across the rails at the job site on the first day he had arrived at the site, and his foreman, Gerard Conner, told plaintiff on his first day to put a plank on the mid-rail. (*Id.* at 37.)

Plaintiff testified that, on August 26, 2009, around 2:30 p.m., he was in a manlift basket with his co-worker, Danny Matthews, and a plank was on the mid-rail of manlift basket. (*Id.* at 52, 54.) Plaintiff testified that the plank was not tied down

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[1] The Appellate Division, First Department recently used the construction "boom lift" "as a gender-neutral synonym for the terms manlift and man basket employed in the record." (*Kerrigan v TDX Const. Corp.*, 108 AD3d 468, 469 n 1 [1st Dept 2013].)

It is not possible from the instant record before this Court to determine if "boom lift" is a term having a specific meaning in the construction industry, or whether it is synonymous with "manlift." Accordingly, to avoid any possible confusion, this decision employs the term usage that appears in the witnesses' testimony and in the papers, which is spelled variously as "manlift", "man-lift", and "man lift."

at all or fastened, that the plank could slide back and forth, and that plaintiff slid the plank into position. (*Id.* at 79.)

According to plaintiff, he busted a rivet in a beam while standing on the floor of the manlift basket, but plaintiff stood on the plank when to begin work on the second rivet. (*Id.* at 76.) Plaintiff testified, "Once I took the bottom rivet out we had to put a bolt in it, gun it up to secure the steel tight and then I couldn't reach so that's why I got up on the plank to get leverage . . ." (*Id.*) Plaintiff then testified as follows:

> "I was leaning into the hell dog, I over extended when I over extended I slipped and I dropped backwards into the lift – into the man lift. Then I immediately felt sharp pain in my back.
>
> Q. We'll get back there. You said over extended?
>
> A. When I cut the rivet off they never cleaned the paint off the steel so it was slippery. When I went I slid with the thing so I went forward, I tried to catch my balance and that's when I slipped and I dropped backwards into the man lift."

(*Id.* at 80.) Plaintiff stated that he was hooked up to a harness at the time, and that he was wearing his lanyard. (*Id.*)

Plaintiff had testified that the manlift was not fully extended while he was busting rivets. (*Id.* at 73-74.) When asked if the manlift itself could have been extended higher, plaintiff answered:

> "If we extended it any higher you wouldn't be able – not where I was positioned.

Q. Why not?
A. Because I was underneath the gurder [*sic*].
Q. If you extended it higher what would have prevented it from being extended higher?
A. It would have hit the gurder [*sic*]."

(*Id.* at 74.)

In an affidavit, Daniel Matthews states,

"While John O'Connell was using the helldog on the head of a rivet on his side of the steel beam, I heard the helldog stop and I heard the crash of John and the helldog fall onto the floor of the manlift. I did not actually see him fall because my view was blocked by the flange of the beam that we were working on from opposite sides.

The rivet that was being busted at the time of the accident was too high for John to reach from the floor of the manlift. He was standing on a wooden plank that went across the middle rail of the manlift when he fell."

(McGrath Affirm. Ex G [Matthews Aff.] ¶¶ 5-6.)

DISCUSSION

The standards for summary judgment are well-settled.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations, quotation marks and emendation omitted].)

Labor Law § 240 (1), known as the Scaffold Law, provides, in relevant part that:

> "All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building of 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."

The duty imposed is "nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Here, Carl Redmond, a senior project engineer employed by "M.T.A., Bridges and Tunnels", testified at his deposition that, in 2009, he was assigned to project BW89, a project awarded to Conti Construction of New York LLC involving the Bronx Whitestone Bridge. According to Redmond, the TBTA hired Conti as the general contractor on the project. (Redmond EBT, at 7-8.), and the TBTA owns the Whitestone Bridge. (*Id.* at 8-9.)

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*, 81 NY2d at 501.)

> "In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240 (1), he must establish that there was a violation of the statute, which was the proximate cause of the worker's injuries. However, if adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under section 240 (1) does not attach. Hence, in determining whether there is a violation of Labor Law § 240 (1), or whether a worker is the sole proximate cause of his injuries, the issue to be addressed first is whether adequate safety devices were provided, 'furnished' or 'placed' for the worker's use on the work site."

(*Cherry v Time Warner*, 66 AD3d 233, 236 [1st Dept 2009] [citations omitted].)

Plaintiff argues that the wide plank that was placed across the mid-rail of the manlift basket was not secured in any way, and was "palpably improper" for the task assigned. (McGrath Affirm. ¶ 16.) Plaintiff testified at his deposition that the plank was not tied down at all or fastened, that the plank could slide back and forth, and that plaintiff slid the plank into position. (O'Connell EBT, at 79.)

Defendant contends that plaintiff's self-serving testimony is the only evidence that the plank was unsecured and argues that there are triable questions of fact as to whether the plank provided proper protection, and whether plaintiff should have been provided with additional safety devices. Although plaintiff testified that the plank was not secured, defendant points out that plaintiff also testified that he did not notice

whether or not the plank itself had moved when plaintiff fell off. (O'Connell EBT, at 92.) Although plaintiff testified that he "slipped", defendant points out that plaintiff does not assert that any debris, rubbish or liquid caused or contributed to his fall. In addition, defendant disputes plaintiff's contention that the plank was about 2½ feet high from the floor of the manlift basket. Matthews, plaintiff's co-worker, testified at his deposition that height of the mid-rail of the manlift basket was "Probably eighteen inches." (Liferidge Opp. Affirm., Ex B, at 14.)

Plaintiff's uncontroverted testimony that he was in a manlift basket working 20-25 feet above the ground establishes that he was exposed to elevation-related risks. Plaintiff's testimony also establishes that the manlift basket and his harness and lanyard were the devices that were provided to plaintiff to prevent him from falling from a height.

Plaintiff used the plank as a makeshift scaffold, because plaintiff's uncontroverted testimony and Matthews's affidavit establish that the manlift basket was not able to be deployed so as to permit plaintiff to remove the second rivet without use of the plank. However, plaintiff's use of the plank increased the elevation-related risks of plaintiff's work and undermined the effectiveness of the manlift basket as a safety device to prevent plaintiff from falling out of the basket, because the plank was placed across the mid-rail of the manlift basket.

Contrary to plaintiff's argument, the unrebutted testimony of plaintiff that the plank was unsecured did not establish a prima facie violation of Labor Law § 240 (1). Plaintiff submits no expert opinion that securing the plank would have prevented plaintiff from falling. The lack of any evidence that the plank moved undermines plaintiff's argument that the fact that the plank was unsecured was a substantial factor in causing plaintiff to fall from the plank.

Rather, the issue presented is whether the lack of additional safety devices to prevent plaintiff from falling off the plank constitutes a violation of Labor Law § 240 (1). A related issue is whether the distance that plaintiff fell, which is somewhere between 18 inches to 2½ feet, constitutes an elevation-related risk covered under Labor Law § 240 (1).

As discussed above, plaintiff used the plank as a makeshift scaffold. The Appellate Division, Second Department has consistently ruled that "a fall from a scaffold does not establish, in and of itself, that proper protection was not provided, and the issue of whether a particular safety device provided proper protection is generally a question of fact for the jury." (*Martinez v Ashley Apts Co., LLC*, 80 AD3d 734, 735 [2d Dept 2011].) However, the Appellate Division, First Department has ruled,

"The plaintiff need not demonstrate that the scaffold was defective or

> failed to comply with applicable safety regulations. Rather, plaintiff must establish that the scaffold 'proved inadequate to shield [plaintiff] *from harm directly flowing from the application of the force of gravity to an object or person.*'"

(*Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [1st Dept 2007] [internal citations omitted].)

Here, the plank was an inadequate safety device as a matter of law, because it did not shield plaintiff from the risk of falling off the plank. Use of the plank exposed plaintiff to a risk of either falling onto the floor of the manlift basket, or a risk of falling out of the basket altogether. Although the harness and lanyard might raise a question of fact as to whether plaintiff was adequately shielded from the risk of falling out of the basket, defendant does not contend that the harness and lanyard would have prevented plaintiff's fall off the plank. Even assuming Matthews's estimate that the height of the mid-rail of the manlift basket was 18 inches, the distance of the fall from the plank to the floor of the manlift basket is an elevation-related risk covered under Labor Law § 240 (1). (*see Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163 [1st Dept 2003]["the shortness of the distance of plaintiff's fall—at least two feet according to plaintiff, no more than 16 inches according to defendants—is irrelevant"].)

Therefore, the branch of plaintiff's motion for summary judgment in his favor

as to liability on his Labor Law § 240 (1) claim against defendant is granted.

The branch of plaintiff's motion for leave to amend/supplement the bill of particulars to allege a violation of 12 NYCRR 23-9.6 (e) (12) is denied. Industrial Code 23-9.6 (e) (12) states, "Standing on the rim of the basket, placing and standing on boards across the rim of the basket or placing and standing on ladders in the basket is prohibited."

The Industrial Code provision is inapplicable to this case, given plaintiff's testimony that a plank was placed on the mid-rail of the manlift basket. The plain and ordinary meaning of the word "rim" is "the usually curved or circular border or edge of an object." (American Heritage Dictionary 1501 [4th ed. 2000][2].) A plank placed across the mid-rail of an aerial basket is not a board "across the rim of the basket", because it was not placed on the border or edge of the basket, i.e., across the top rail of the aerial basket.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted partial summary judgment in his favor as to liability on his Labor Law § 240

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[2] The American Heritage Dictionary is an accepted authority for the plain and ordinary meaning of words for statutory construction. (*See Fleming v Graham*, 10 NY3d 296 [2008] [citing the American Heritage Dictionary's definition of "severe"].)

(1) claim against defendant, and the motion is otherwise denied.

Dated: January 3, 2014
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED

JAN 06 2014

COUNTY CLERK'S OFFICE
NEW YORK