

<b>Nedd v 44th St. Dev. LLC</b>
2014 NY Slip Op 32551(U)
September 30, 2014
Supreme Court, Kings County
Docket Number: 501371/12
Judge: David I. Schmidt
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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30<sup>th</sup> day of September, 2014.

P R E S E N T:

HON. DAVID I SCHMIDT,

Justice.

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MARTIN NEDD AND THERESA NEDD,

Plaintiffs,

- against -

Index No. 501371/12  
Motion Seq. Nos. 1&2

44<sup>TH</sup> STREET DEVELOPMENT LLC AND GOTHAM  
CONSTRUCTION COMPANY, LLC,

Defendants.

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The following papers numbered 1 to 6 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_

Papers Numbered

\_\_\_\_\_  
1-2, 3-4  
\_\_\_\_\_  
5  
\_\_\_\_\_  
6  
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Upon the foregoing papers, plaintiff Martin Nedd moves for an order pursuant to CPLR 3212 for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) and to amend the caption to reflect that Theresa Nedd is no longer a plaintiff. Defendants 44<sup>th</sup> Street Development LLC and Gotham Construction LLC, (defendants)

cross-move pursuant to CPLR 3212 for partial summary judgment dismissing plaintiff's Labor Law §§241 (6), 240 (3) and 200 and common law negligence claims.

**Background**

On April 24, 2012, plaintiff was employed as a journeyman carpenter by Cross Country Construction at a project located at 550 West 45<sup>th</sup> Street in Manhattan. On this date he was installing form work which were wooden forms that concrete would be poured into to form the superstructure of the building on the 10<sup>th</sup> and 11<sup>th</sup> floors of the building. Other workers were installing decking on the 11<sup>th</sup> floor which entailed erecting 4x4 beams of wood called stringers and laying 3x4 beams perpendicular to the stringers called ribs. Next, these workers would lay plywood sheets called decking on top of the criss cross beams. The stringers were approximately four feet apart while the ribs were approximately two feet apart. The practice was that the stringers and ribs were nailed into place from the floor below with workers standing on ladders or scaffolds and then they were braced and strengthened from below with 4x4 legs. The workers would then lay the plywood decking on top to form the floor surface. This required the workers to walk on the secured ribs. Plaintiff was installing ribs in an area near the stairwell and elevator on what would become the 11<sup>th</sup> floor. He was walking along the stringers and ribs to get material from one of his coworkers. As he was walking, an unsecured rib popped up and struck plaintiff casing him to fall into the gap between the stringers and strike his face on the stringers and ribs on the way down leaving him dangling by his arms from the stringers above the 10<sup>th</sup> floor.

[\* 3]

*Plaintiff's Motion*

Plaintiff moves for an order pursuant to CPLR 3212 for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) and to amend the caption to reflect that Theresa Nedd is no longer a plaintiff. Plaintiff argues that the failure of the 11<sup>th</sup> floor decking to protect plaintiff from the elevation related hazard was a prima facie violation of Labor Law §240 (1). He contends that the fact that the entire structure did not collapse and that the accident occurred when the rib popped up and struck plaintiff causing him to fall does not take this accident outside of the protections of Labor Law §240 (1). He contends that the kicking up of the rib is essentially a collapse akin to a ladder rung falling off of a ladder frame.

In opposition, defendants contend that plaintiff has failed meet his prima facie burden of demonstrating that the lack of an enumerated safety device was the proximate cause of his accident. Additionally, defendants contend that there are issues of fact as to whether plaintiff was the sole proximate cause of his injuries and whether such injuries arose from an elevation related hazard.

Labor Law § 240 (1) states, in relevant part,

“All contractors and owners and their agents . . . 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.”

This statute “imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *see also Hugo v Sarantakos*, 108 AD3d 744, 744-745 [2013]; *Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 711 [2013]).

A § 240 (1) plaintiff makes a prima facie showing of defendant’s liability by demonstrating that the absence of proper safety equipment resulted in an elevation-related injury (*see Probst*, 106 AD3d at 711-712; *Durando v City of New York*, 105 AD3d 692, 695 [2013]; *Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646, 647 [2013]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 478-479 [2012]; *see also Ortega v City of New York*, 95 AD3d 125, 128 [2012]).

Courts have consistently imposed Labor Law § 240 (1) liability where there is a collapse of any of the "elevation-related safety devices" (*see Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [2007]), including the "functional equivalent of scaffolding" (*Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 800 [2013])[a plank on a catwalk]; *see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [2014] [the metal deck flooring and beam on which plaintiff was standing to perform his job duties functioned as an elevated platform]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552 [2011] [holding that “[t]he I-beams, ribs, and plywood that, together with concrete, would become the second floor "served, conceptually and functionally, as an elevated platform or scaffold"]; *De Jara*

v 44-14 Newtown Rd. Apt. Corporation, 307 AD2d 948, 949-950 [2003] [fire escape]; see also *Dos Santos v State of New York*, 300 AD2d at 434 [elevated lift truck]; *Becerra v City of New York*, 261 AD2d 188, 189 [1999] ["unsecured plywood boards . . . served, conceptually and functionally, as an elevated platform or scaffold"]).

In fact *Bisram v Long Is. Jewish Hosp.*, 116 AD3d at 475-476) involved a plaintiff who testified that "when he stepped onto the metal decking he had just laid in place but not yet fastened, the beam beneath it shifted, causing him to fall from the first-floor level of the building to the cellar level." The court found he had established his entitlement to summary judgment as to liability on his Labor Law § 240(1) claim by. In *Bisram*, plaintiff was wearing a harness that was tied into a retractor at the time of his fall but the court noted that this safety device "proved inadequate to protect him against injury resulting from falling off the beam." Here, it is undisputed that plaintiff was not provided with any fall protection whatsoever.

Accordingly, the court finds that plaintiff has demonstrated his entitlement to summary judgment in his favor on his Labor Law §240 (1) claim and defendants have failed to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of his accident (see *Gambale v 400 Fifth Realty, LLC*, 101 AD3d 943 [2012]; *Zong Mou Zou v Hai Ming Constr. Corp.*, 74 AD3d 800 [2010]; *Beamon v Agar Truck Sales, Inc.*, 24 AD3d 481 [2005]; *Birbilis v Rapp*, 205 AD2d 569 [1994]). Based upon the foregoing, that branch

of plaintiff's motion seeking summary judgment in his favor on his Labor Law §240 (1) claim is granted.

Additionally, that portion of plaintiff's motion requesting that the caption be amended to reflect that Theresa Nedd is no longer a plaintiff is granted and the caption will be as follows:

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MARTIN NEDD,

Plaintiff,

- against -

Index No.501371/12

44<sup>TH</sup> STREET DEVELOPMENT LLC AND GOTHAM  
CONSTRUCTION COMPANY, LLC,

Defendants.

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**Defendants' Cross Motion**

Defendants cross-move pursuant to CPLR 3212 for partial summary judgment dismissing plaintiff's Labor Law §§241 (6), 240 (3) and 200 and common law negligence claims. Defendants maintain that plaintiff's Labor Law §240 (3) claim should be dismissed as against it inasmuch as it is not applicable to the facts of the instant case, the court agrees and said claim is hereby dismissed. Defendants also argue that plaintiff's Labor Law 200 and common law negligence claim should be dismissed as well since plaintiff's injuries arose

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from the means and methods utilized by his employer and defendants lacked the requisite degree of supervision and control over the work plaintiff was performing required to imposed liability pursuant to Labor Law 200 and common law negligence. The court notes that plaintiff has offered no opposition to this branch of defendants' motion. Inasmuch as the record is clear that these defendants did supervise or control plaintiff's work, that branch of defendants' motion seeking dismissal of these claims is granted and said claims are hereby dismissed.

Finally, defendants seek dismissal of plaintiff's Labor Law §241 (6) claim. In support of this claim, plaintiff alleges violations of Industrial Code sections 23-1.7 (b)(1), 23-2.4 (b) and 23-5.1c (e) and (f). Defendants note that plaintiff does not oppose that portion of the motion to dismiss the Labor Law §241 (6) claim to the extent it is based upon Industrial Code sections 23-2.4 (b) and 23-5.1 (f). Thus the court will only address the alleged violations of the remaining sections.

Industrial Code 23-1.7 (b) provides that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Defendants argue that although this Industrial Code section is specific enough to support a Labor Law §241 (6) cause of action it is not applicable to the facts of this case. Defendants argue that the gap into which plaintiff fell was an integral part of the work performed by plaintiff, the laying

of the plywood decking over the ribs and stringers and thus it cannot form the basis for liability under Labor Law §241 (6).

In opposition, plaintiff argues that the code provision requires there should have been a horizontal lifeline above the stringers so that plaintiff could tie off a harness. He contends that defendants fail to explain how furnishing a lifeline as required by the regulation would have been inconsistent with the work he was performing and that there should have been a safeguard in place to mitigate the risk of falling through the openings in the floor.

Courts have refused to impose Labor Law §241 (6) liability based upon a violation of Industrial Code 23-1.7 (b) where the hole that the plaintiff fell into was not large enough for a person to fit through (*see Cerverizzo v City of New York*, 111 AD3d 535, 536 [2013]; *DeLiso v State of New York*, 69 AD3d 786, 787 [2010]; *Messina v City of New York*, 300 AD2d 121, 123-124 [2002]; *Alvia v Teman Elec. Contr.*, 287 AD2d 42 [2003]). Here, it is undisputed that the hole that plaintiff fell into was not large enough for his whole body to fit through and he was, in fact, left dangling from the hole above the tenth floor. Accordingly, the court finds that Industrial Code 23-1.5 (b) can not be a predicate for liability in this case.

Next, defendants argue that Industrial Code section 23-5.1 (c) is too general to give rise to liability. Section 23-5.1 provides as follows: "Except where otherwise specifically provided in this Subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use. (*See*

[\* 9]

Labor Law, § 240, subdivision 3.) Such maximum weight shall be construed to mean the sum of both dead and live loads.”

In opposition, plaintiff correctly points out that the Second Department has found that this Industrial Code provision is specific enough to support a Labor Law 241 (6) violation (see *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 606 [2013]; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 800 [2013]; *Treu v Cappelletti*, 71 AD3d 994, 998 [2010]). In reply, defendants further argue that this code section is inapplicable to this matter because plaintiff was not utilizing a scaffold at the time of his injury, but, rather, was performing work on the floor that he was constructing. The court disagrees because as stated above, the floor beams that plaintiff was standing on at the time of his fall was the functional equivalent of a scaffold. However, defendants also correctly point out that plaintiff’s accident was not caused by a violation of the requirements of this Industrial Code provision inasmuch as it has not been alleged that the injury arose because the planking was not able to bear plaintiff’s weight or any allegations that it could not bear four times the maximum weight required to be placed upon it. Here the accident occurred when the unsecured rib popped up and struck plaintiff causing him to fall into the hole between a rib and stringer and was not due to the inability of the floor to bear his weight. Accordingly, this provision is inapplicable to the facts of the instant case and cannot support plaintiff’s Labor Law §241 (6) claim.

Finally defendants argue that Industrial Code §23-1.5 (e) is inapplicable to the facts of the case. This section pertinently provides that "scaffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place." Defendants argue that the unsecured rib was an integral part of the work being performed and thus this section cannot be a basis for liability under Labor Law §241 (6) and that there was no indication that rib that struck plaintiff was inclined but rather was level as it was forming the base of the floor. In opposition, plaintiff argues that the rib that popped up was not laid tight, did not extend beyond the support stringer and was not securely fastened in place in violation of this Industrial Code provision. Here, defendants fail to demonstrate the absence of a factual issue as to whether Industrial Code applies to the facts of this case inasmuch as the rib was not securely fastened. Accordingly, that branch of defendants cross motion seeking dismissal of plaintiff's Labor Law §241 (6) claim as based upon a violation of Industrial Code §23-1.5 (e) is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT

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