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QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Ioannis Papantonakis and Flora Aparecida Fonseca,

Plaintiff,

- against -

New York City Transit Authority Metropolitan Transportation Authority, and City of New York,

Defendants.

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Index Number: 702701/12

Motion Date: 10/8/14

Motion Cal. Number: 101

Motion Seq. No.: 5

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibit.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants for summary judgment dismissing the complaint is granted solely to the extent that plaintiff's causes of action based upon a violation of Labor Law §200, common law negligence and Labor Law §241(6), except insofar as is predicated upon a violation of §23-1.7(e)(2) of the Industrial Code, are dismissed. In all other respects, the motion is denied.

Plaintiff, a painter employed by non-party Kiska Construction, Inc., allegedly sustained injuries as a result of falling on the platform of a scissor-lift while engaged in the painting of the "J" line elevated subway station on Jamaica Avenue and 116th Street in Queens County on September 11, 2012. He testified in his depositions conducted on January 3, 2013 and February 12, 2014 that he operated the lift to raise two other painters to a scaffold. He explained that there were two sets of controls: one on the lift platform and one at the base of the lift. He drove the lift

approximately 150 feet to the location of the painting work to be done that day and, operating the controls on the platform, raised the platform approximately 25 feet to the scaffolding, where the other workers disembarked and he passed to them two buckets of paint. On the lift platform were tarps, cones, two lengths of metal scaffold tubing, some C-clamps and a piece of wood approximately 4-5 feet long and half a foot wide. He also described the lift as having four stabilizers or "shoes", which, when lowered, raise the wheels of the lift off the ground. He testified that he lowered all four stabilizers prior to raising the platform. Before moving the lift he removed one of the tarps and attempted to remove the wood board but could not because it was stuck to the platform, probably from the paint.

After he handed the other workers the two buckets of paint, he heard someone, whom he surmised was his supervisor Jolani, screaming at him from below to hurry up and bring other workers up. As he was walking back to the controls to lower the platform, the lift dropped approximately one foot and shook left and right and, as the platform was shaking left and right, his foot struck the board causing him to fall backward and strike his head on a C-clamp or something metal.

When asked whether it was at the point that he started walking back to the controls to lower the platform after he heard the screaming that he felt the lift move, plaintiff answered in the affirmative, stating, "Like a foot before I go to the control, that's when I saw the machine, it shook left and right. Then I just turned my head a little bit and I just - you know." He explained that the reason he looked back was to see if the second worker had already climbed onto the scaffold and hooked up or whether he was still on the rail on top of the machine because he did not want the worker to fall. His concern was both to make sure that the worker was off the lift so he could lower it and "because the machine was moving and I was afraid. I don't know if the guy was already up in the scaffold or if he's still on the rail on the top of the machine." When asked, "When you looked did you see if he was already up?" plaintiff replied, "He was already up." He also testified, "And that's where I flipped on the piece of wood, on the wood, and I fall back." He testified that the machine was still shaking left and right when his foot made contact with the board.

Defendants are entitled to summary judgment dismissing plaintiff's causes of action under §200 of the Labor Law and common law. Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY 2d 343 [1998]). Therefore, the same principles governing common-law negligence apply to claims

under §200. Where the unsafe condition of the work site was caused by the methods or manner in which the contractor performed the work and the owner did not exercise supervision and control over the work, no liability attaches to the owner either under §200 or common law (see Dupkanicova v. Vasiloff, 35 AD 3d 650 [2nd Dept 2006]).

Where the condition was not caused by the contractor's unsafe work practices, liability may only be imposed upon the owner under either §200 or common law if the owner created the dangerous condition or, where the condition was a defect of the premises itself as opposed to one created by the contractor, if it is shown that the owner had actual or constructive notice of the condition (see Bradley v. Morgan Stanley & Co, 21 AD 3d 866 [2nd Dept 2005]).

There is no issue that plaintiff's injuries were not the result of any condition of the elevated subway structure but resulted from an accident in the operation of the scissor lift provided to him by his employer, and the City has met its burden of demonstrating that it did not exercise any supervision or control over plaintiff's painting work on the elevated subway (see Verel v. Ferguson Electric Const. Co., 41 AD 3d 1154 (4th Dept 2007]).

Plaintiff's counsel's argument that plaintiff's testimony that defendants had safety supervisors at the site raises an issue of fact as to whether defendants had the authority to supervise plaintiff's work is without merit. "The general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations"(Buccini v. 1568 Broadway Assocs., 250 AD 2d 466, 469 [1st Dept 1998]). Moreover, the authority of a safety inspector to stop the work if a safety violation is perceived does not give the safety inspector a duty to protect the contractor's employees (Peay v. New Yor City School Const. Authority, 35 AD 3d 566 [2nd Dept 2006]).

In the absence of any evidence showing that they had any direct control over the day-to-day work of plaintiff, defendants may not be held liable under Labor Law §200(see Peay v. New York City School Const. Authority, 35 AD 3d supra; Warnitz v. Liro Group, Ltd., 254 AD 2d supra; Buccini v. 1568 Broadway Assocs., 250 AD 2d supra; Sainato v. City of Albany, 285 AD 2d 708 [3rd Dept 2001]).

Therefore, defendants are entitled to summary judgment dismissing plaintiff's claim against them pursuant to §200 of the Labor Law. For the same reasons, since §200 of the Labor Law is a

codification of common law principles of negligence, plaintiff's claim against defendants based upon common law negligence must also be dismissed.

That branch of the motion for summary judgment dismissing plaintiff's cause of action based upon a violation of §240(1) of the Labor Law is denied.

Defendants contend that §240(1) of the Labor Law is inapplicable to the facts of this case in that plaintiff's injuries did not result from falling from a height or being struck by something falling from a height and, therefore, was not elevation-related. In addition, §240(1) is inapplicable because there is no evidence that the lift was in any respect defective but that plaintiff's supervisor, Jolani, caused the accident by pushing the ground control lift button in an attempt to hurry plaintiff along and, thus, was an independent, intervening and superseding cause of plaintiff's injuries.

Labor Law §240(1) is a strict liability provision that imposes upon owners and contractors absolute liability for any breach of the statutory duty that proximately causes injury (see Panek v. County of Albany, 99 NY 2d 452 [2003]). What is meant by "strict" or "absolute" liability in the Labor Law context is that any negligence on the part of plaintiff which contributes to his injuries is not a defense and will not diminish the owner's or contractor's liability under Labor Law §240(1), if it is established both that there was a violation of the statute and that the violation was a proximate cause of the injury (see Blake v. Neighborhood Housing Services of New York, 1 NY 3d 280 [2003]).

Painting is a specifically enumerated category of work covered under Labor Law §240(1). Moreover, there is no dispute that defendants can be considered owners within the meaning of §240(1) so as to be subject to liability if a violation of that section were established.

Defendants' counsel is correct in stating that Labor Law §240(1) only applies to elevation-related hazards where the peril to be protected against, and the injury it affords a worker a cause of action for, is gravity-related. He is also correct in his statement of the law that a §240(1) cause of action does not encompass every injury resulting only tangentially from the effects of gravity.

"The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and

a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides" (Rocovich v Consolidated Edison Co., 78 NY 2d 509, 514 [1991]). The Court of Appeals subsequently, in Ross v Curtis-Palmer Hydro-Elec. Co. (81 NY 2d 494, 501 [1993]), further explaining the parameters of the statute's application, stated, "The 'special hazards' to which we referred in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured...In other words, 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. The right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist"[emphasis in original, and citations omitted]; see also Rau v Bagels N Bruch, Inc., 57 AD 3d 866, 867 [2nd Dept 2008]).

The Court of Appeals has thus made clear that injury to a worker caused by a malfunctioning protective device does not implicate §240(1) unless the injury was the direct result of the force of gravity. However, defendants' counsel is in error in his contention that §240(1) is inapplicable to the facts of this case simply because plaintiff did not fall off the lift to the ground but fell onto the lift's platform on which he was standing. Plaintiff need not have fallen off the lift for the statute to apply, only that his fall, albeit onto the platform itself, was the direct result of the force of gravity acting upon the lift.

Thus, where a worker was injured when he and a co-worker on an ascending scaffold pushed the scaffold away from the side of the building in order to clear a protruding air conditioner and the scaffold swung back and smashed into the air conditioner, such was deemed to establish liability on his §240(1) cause of action "[s]ince the effects of gravity caused the scaffold to smash into the air conditioner" (Dominguez v Lafayette-Boynton Hous. Corp., 240 AD 2d 310, 312 [1st Dept 1997]).

Moreover, where a ladder on which a worker was standing moved and lost contact with the building against which it was leaning and

turned sideways, and the worker, in saving himself from falling, managed to turn the ladder back against the wall but ruptured a disc in his spine in the process, he was entitled to summary judgment on his §240(1) cause of action because his injury was gravity-related notwithstanding that he prevented himself from falling. Reasoned the Appellate Division, Second Department in that case, "The fact that the plaintiff did not actually fall from the ladder is irrelevant as long as the 'harm directly flowed from the application of the force of gravity to an object or person'" (Lacey v Turner Construction Co., 275 AD 2d 734, 735 [2nd Dept 2000] [quoting Ross v Curtis-Palmer Hydro-Elec. Co., supra]).

Defendants fail to eliminate all issues of fact as to whether the lateral swaying of the lift was the direct result of the force of gravity acting upon it and whether such was a proximate cause of plaintiff's fall and resulting injuries.

Defendants rely upon the affidavit of their expert mechanical engineer, Thomas Cocciola, in contending that the lift was not in any way defective and did not malfunction but that its downward movement of one foot distance could only have occurred in a manner consistent with plaintiff's belief that it was moved by Jolani from the ground.

In the first instance, Plaintiff did not testify that Jolani lowered the lift platform by operating the ground-level controls. He merely speculates as to a cause of the platform's movements. He testified in his deposition, "In my opinion, maybe somebody else tried to use the machine to put it down faster." When asked, "You indicated that someone may have operated the controller on the ground, which is what led the platform to shift left and right. Do you have any reason to believe that, or is that just speculation on your part?", he replied, "Speculation." Thus, Cocciola is inaccurate in stating that plaintiff testified that he believed that Jolani or someone else activated the auxiliary control button at the base of the lift.

Although Cocciola opines that a downward platform movement of one foot could not have been caused by a malfunction, defect or failure of the lift, but that such a movement is consistent with plaintiff's "stated belief" that someone at ground level operated the controls, he fails to eliminate all issues of fact as to whether the side-to-side movements of the lift platform were caused by a failure of the lift as opposed to the conjectural hypothesis with respect to the downward movement of the lift that perhaps someone at ground level may have operated the controls.

Indeed, Cocciola does not opine that the side-to-side

movements described by plaintiff could have been caused by someone operating the auxiliary lift control at the base of the lift. He only conjectures that the downward movement may have been caused by someone operating the auxiliary controls. Cocciola opined, "Side-to-side movement can only occur as a result of lateral forces exerted on the elevated JLG 260MRT platform" (emphasis added), thus eliminating the possibility that the operation of the control to lower the platform could have caused the side-to-side movement. Rather, he opines as to the cause of the side-to-side shaking, "The type of lateral forces that can cause the elevated 260MRT platform to move side-to-side can be exerted by workers pushing off against the platform or an adjacent structure or by wind. Such lateral movement would be consistent with the testimony of the plaintiff that two workers climbed from the elevated platform onto the adjacent scaffold just before he fell." Cocciola's opinion in this regard is entirely speculative in that it is inconsistent with plaintiff's testimony that the platform was shaking side-to-side after he looked back and saw that the second worker was already on the scaffold. Therefore, there is no basis beyond pure speculation that the platform was moving laterally because workers were pushing against it. Moreover, there was no testimony or evidence concerning any wind conditions. Thus, Cocciola's conclusory and unsupported assertion that the side-to-side movements described by plaintiff could not have been caused by a defect or failure of the lift is insufficient to support the granting of summary judgment.

The Court also notes that even if it were established that the side-to-side shaking of the lift platform was caused by the workers stepping off against it onto the scaffold, such fact would not eliminate, but rather raise, an issue of fact as to whether the lift was an adequate safety device to protect plaintiff. Whether a furnished device provided proper protection to the worker within the meaning of §240(1) is ordinarily a question of fact to be resolved at trial (see Canino v. Electronic Technologies Co., 28 AD 3d 932 [3rd Dept 2006]). "However, where the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to summary judgment under Labor Law §240(1) and the burden shifts to the defendant" (Ball v. Cascade Tissue Group-New York, Inc., 36 AD 3d 1187, 1188 [3rd Dept 2007]; see also Nelson v. Ciba-Geigy, 268 AD 2d 570 [2nd Dept 2000]). Although Cocciola opines that the side-to-side movement of the lift platform could have been caused by workers pushing off against the platform, he fails to set forth any opinion or data concerning whether such movement is normal and fails to explain why such an intended use of the platform would cause instability sufficient to result in side-to-side swaying precipitating plaintiff's fall.

Thus, defendants' argument, and the cases cited by them in support of said argument, that the operation of the base lift controls by Jolani or some other person was an independent, intervening and superseding cause of plaintiff's injuries are inapplicable to the facts of this case.

Therefore, questions of fact remain as to whether the lift was an inadequate safety device and failed to protect plaintiff and, thus, defendants failed to establish an entitlement to summary judgment on plaintiff's §240(1) cause of action.

With respect to plaintiff's cause of action under §241(6), in order to establish a cause of action under that section, it must be demonstrated that there was a violation of a specific rule or regulation of the Industrial Code and that such violation was a proximate cause of plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept 2004]). Plaintiff asserts in his bill of particulars a violation of Industrial Code (12 NYCRR) §§23-1.7, 1.15, 1.16, 1.28, 1.29. 1.30, 1.32, 1.33, 5.1, 5.3, 5.8, 5.9, 5.17, 5.18. 5.19, 7.1, 7.2, 9.2, 9.6, 9.7, 9.8 and 9.9.

Sections 23-1.15, 1.16, 1.28, 1.29. 1.30, 1.32, 1.33 are entirely irrelevant to the facts of this case and, indeed, plaintiff's counsel, in his affirmation in opposition, does not oppose dismissal of plaintiff's §241(6) cause of action as premised upon these sections of the Industrial Code. Likewise, all of the subsections of §23-9.2 are either inapplicable to the facts of this case or merely articulate general safety standards which may not serve as the basis for a cause of action under §241(6). Similarly, 23-5.1, 5.3, 5.8, 5.9, 5.17, 5.18 and 5.19 all deal with scaffolding and have no relevance to this case. Also, the provisions of 23-7.1 and 7.2 which deal with personal hoists and hoist towers have nothing to do with the facts of this case.

With respect to 23-1.7, none of its various provisions have any application to the facts of this case, except 23-1.7(e)(2).

Section 23-1.7(e)(2) provides that "the parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." This section of the Industrial Code is ostensibly applicable to the facts of this case since plaintiff testified that a proximate cause of his injuries was the board, or piece of wood, on the platform over which he tripped and fell.

Defendants' counsel argues that this section is inapplicable to support a cause of action under §241(6) because the wood board was not inconsistent with the work being performed but was placed on the platform by Kiska workers on the rails of the lift to gain access to the raised track structure when stepping up from the lift platform. In this regard, counsel cites cases (e.g., Galazka v WPF One Liberty Plaza Co., LLC, 55 AD 3d 789 [2nd Dept 2008]), setting forth the rule that a tripping hazard that is an integral part of the work being performed does not constitute a violation of this section of the Industrial Code. Counsel's argument is without merit.

Andreas Georgiou, a non-party witness and painter employed by Kiska, testified in his deposition that he saw the wood plank on the deck of the lift and that it is present on a daily basis. He explained that the plank is placed across the lower part of the rails 24-30 inches off the base of the platform to use as a step to gain an additional 24-30 inches in height when painting from the inside of the lift or to go onto the structure from the lift.

Plaintiff testified that he has observed workers using the board as a step to get up to the track structure. He explained that they would lay the board on top of the rails, then step on the board and go onto the scaffold. But he testified that it is not something that was generally done on the job because "It's against the law. You're not supposed to do that." Moreover, he testified that neither of his two co-workers used the board to go from the lift to the track structure.

Therefore, the testimony of plaintiff and Georgiou does not establish that the placement of the board on the platform deck was an integral part of the work being performed. Their testimony merely indicates that the plank was used occasionally as a makeshift step, which was unlawful to do but nevertheless done by some workers to gain 24-30 inches extra reach when painting from the lift deck or to make getting onto the scaffold or structure easier. Not only is there no testimony that the use of the board in this fashion was a necessary, and therefore, integral, part of the work performed by Kiska painters on the subway painting project, but plaintiff testified that the use of the board as a step was illegal. In addition, this board was so used by placing it across the top of the rails. When plaintiff tripped over the board, it was not on the rails but on the floor of the platform, and the two workers who plaintiff took up in the lift did not in fact use the board at all. In fact, plaintiff attempted to remove the board before utilizing the lift but could not because it was stuck to the floor.

Therefore, the testimony on this record clearly implicates §23-1.7(e)(2) since a jury could consider the board as, if not debris, at least material or a makeshift tool from which platforms should be kept free, and that, since there is no evidence that the board was necessary to the work being performed, keeping the platform clear of the plank would not be inconsistent with that work. Moreover, since the board was not positioned on the rails for use as a step and plaintiff's co-workers in fact did not use the board as a step, its being left on the platform floor rendered it as mere material or a tool at best, or debris at worse, that the platform should have been kept free of, and that its removal would not be inconsistent, but consistent with the work being performed.

Therefore, defendants are entitled to summary judgment dismissing plaintiff's cause of action under §241(6) of the Labor Law insofar as it is predicated upon all the aforementioned sections of the Industrial Code, except §23-1.7(e)(2).

Accordingly, defendants' motion for summary judgment is granted solely to the extent that plaintiff's causes of action pursuant to §200 of the Labor Law, for common law negligence and pursuant to §241(6) of the Labor Law, except as predicated upon a violation of §23-1.7(e)(2) of the Industrial Code, are dismissed. In all other respects, the motion is denied.

Dated: October 20, 2014

KEVIN J. KERRIGAN, J.S.C.