

**Hilly v Metropolitan Transp. Auth.**

2014 NY Slip Op 33087(U)

July 21, 2014

Supreme Court, Queens County

Docket Number: 62/12

Judge: Darrell L. Gavrin

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## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

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 PATRICK HILLY and JOANNE HILLY,

Index No. 62/12

Plaintiffs,

Motion

Date January 15, 2014

- against-

METROPOLITAN TRANSPORTATION AUTHORITY,  
THE MTA EAST SIDE ACCESS PROJECT, THE MTA  
CAPITAL CONSTRUCTION AGENCY, 29-76 REALTY  
CO., LLC, THE CITY OF NEW YORK and THE NEW  
YORK CITY TRANSIT AUTHORITY,

Motion

Cal. No. 74 &amp; 75

Motion

Seq. No. 3 &amp; 4

Defendants.

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The following papers numbered 1 to 21 read on a motion by defendants, Metropolitan Transportation Authority (MTA), the MTA East Side Access Project, and the MTA Capital Construction Agency (collectively, the MTA Defendants), for summary judgment dismissing the amended complaint and all cross claims against them; dismissing plaintiffs' amended complaint for failure to provide discovery; or, in the alternative, compelling plaintiffs to comply with discovery demands and extending the deadline for summary judgment motions; and a separate motion by defendant 29-76 Realty Co. (29-76 Realty) for similar relief.

Papers  
Numbered

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Upon the foregoing papers, it is ordered that these motions are consolidated for purposes of disposition and are determined as follows:

Plaintiff, Patrick Hilly (Hilly), and his wife, suing derivatively, commenced this action to recover for personal injuries allegedly sustained by Hilly as a result of an accident on May 19, 2011, while working on a public works commuter railroad construction project for the Long Island Railroad, commonly known as the "East Side Access Project."

29-76 Realty was the owner of a commercial building located at 29-76 Northern Boulevard in Long Island City, New York. Both MTA and defendant, Granite Taylor Frontier

(GTF), were tenants. In settlement of a condemnation action by MTA, by stipulation dated July 23, 2004, 29-76 Realty granted the MTA a temporary easement to the underground portion of “Lot 49” for construction on the project.

After a bidding process, the MTA Defendants hired GTF as general contractor for the East Side Access Project. Plaintiff was employed by GTF as a “sandhog” for tunnel construction on the project. According to his deposition testimony, plaintiff’s job was to help rig materials to the crane and to signal and guide the crane as it moved materials around the construction site. At the time of the accident, plaintiff was deconstructing a temporary crane platform and attaching crane rigging to the “crane mats.” The crane mats were made of 20-foot long timbers which were bolted together to form a two-layer platform. The mats had a square cut-out on both ends and an exposed piece of rod where hooks would be attached to lift the mat. As plaintiff was removing mats from the top layer of the platform while standing on the lower layer, he hooked rigging to a mat and took a step backwards. His left foot stepped into a cut-out of a mat on the lower layer, approximately ten inches square and one foot deep, allegedly causing multiple injuries.

As a preliminary matter, the court denies movants’ request to dismiss plaintiffs’ amended complaint under CPLR 3126 for failure to comply with discovery orders. As plaintiff has produced the sought disclosure upon receipt of the instant motions, the court cannot conclude that plaintiffs’ actions were so willful or contumacious so as to warrant the extreme penalty of dismissing the complaint (*see Joe DeMartino Mason Contrs. & Sons, Inc. v Main Plaza Realty Co.*, 44 AD3d 716 [2d Dept 2007]).

On a motion for summary judgment, the proponent bears the burden of demonstrating *prima facie* entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate 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]). Initially, movant 29-76 Realty argues that it is not liable under Labor Law §§ 240 (1), 241 (6) or 200 because it is not the owner of the premises where the accident occurred, was not the general contractor on the project, and did not possess supervisory authority or control over the work performed. As the location of the subject accident is unclear – that is, whether it occurred on Lot 49, which is owned by 29-76 Realty, or on the adjacent Lot 48 – defendant fails to demonstrate that it is not an owner under the statute, and summary judgment is not appropriate on that basis (*see Ferreira v Village of Kings Point*, 68 AD3d 1048 [2d Dept 2009]).

Labor Law § 240 (1), commonly called the “Scaffold Law,” provides:

“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 . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

The statute imposes absolute liability in situations where a worker is “exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated worksite” (*Rocovich v Consolidated Edison Co.*, 167 AD2d 524, 526 [2d Dept 1990], *affd.* 78 NY2d 509 [1991]). However, not every gravity-related injury is within the Scaffold Law’s special protections (*see Gasques v State*, 59 AD3d 666, 667 [2d Dept 2009]).

Movants contend that Hilly did not sustain a gravity-related injury within the Scaffold Law because the mat on which he was standing was level with the ground, and his step into the hole was not a fall from a significant elevation differential. Moreover, they allege that it would have been illogical to require defendants to cover the very hole that plaintiff uncovered in order to perform his work. While there is no minimum elevation from which a plaintiff must fall in order to determine whether Section 240 (1) applies (*see Amo v Little Rapids Corp.*, 301 AD2d 698, 701 [3d Dept 2003]), plaintiff must demonstrate that the fall was due to “a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

In the case at bar, a hole with dimensions ten inches square and one foot deep, at ground level, does not present an elevation-related hazard to which the protective devices enumerated in Labor Law § 240 (1) are designed to apply (*see Avila v Plaza Constr. Corp.*, 73 AD3d 670 [2d Dept 2010]; *Miller v Weeden*, 7 AD3d 684 [2d Dept 2004]; *Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578 [2d Dept 2003]; *Alvia v Teman Electr. Contr., Inc.*, 287 AD2d 421 [2d Dept 2001]). In that the bottom layer of the platform was “lower” because the upper layer was on top of it does not automatically trigger Section 240 (1) as an “elevated” work site (*see D'Egidio v Frontier Ins. Co.*, 270 AD2d 763 [3d Dept 2000]). There is not a scintilla of evidence upon which the court conclude that the platform on which the subject cut-out was located was an elevated work site requiring the use of the protective devices enumerated in Section 240 (1). Plaintiff’s misstep backwards into the cut-out did not result from a “special” elevation-related hazard, but rather, resulted from “the type of peril a construction worker usually encounters on the job site” (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]). Moreover, as movants correctly contend, requiring defendants to cover or barricade the cut-out would have been illogical, as plaintiff’s work of deconstructing the platform required him to uncover the same cut-out which allegedly caused his fall (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134 [2011]).

In opposition, plaintiffs fail to raise a triable issue of fact as to whether Hilly fell from an elevated platform bringing the accident within the purview of Section 240 (1) (*see Alvarez*, 68 NY2d at 324; *Whitehead v City of New York*, 79 AD3d 858, 861 [2d Dept 2010]). Plaintiffs’ reliance on case law is misplaced, as the cases cited by plaintiffs involve falls from a significant height differential (*see e.g. Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]; *Beharry v Public Stor., Inc.*, 36 AD3d 574 [2d Dept 2007]; *Serpe v Eyriss Prods.*, 243 AD2d 375 [1st Dept 1997]) rather than a step backwards into a hole in the ground on which plaintiff was standing. Therefore, summary judgment dismissing the plaintiffs’ Labor Law § 240 (1) claim is warranted.

Next, Labor Law § 241 (6) provides in pertinent 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 statute, enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a non-delegable duty upon owners and contractors to comply with specific safety regulations set forth in the New York State Industrial Code regulations (12 NYCRR § 23 *et seq*) (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Thus, a plaintiff supports a Labor Law § 241 (6) cause of action by demonstrating that his or her injuries were proximately caused by a violation of an Industrial Code rule applicable to the circumstances of the accident and setting forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*Ross*, 81 NY2d at 502; *Cabrera v Revere Condominium*, 91 AD3d 695, 696 [2d Dept 2012]).

The court may consider allegations of Industrial Code violations made for the first time in plaintiffs’ bill of particulars, as annexed to their papers in opposition to the MTA Defendants’ summary judgment motion, as long as plaintiffs do not raise any new factual allegations or theories of liability which would cause prejudice to defendants (*see Kowalik v Lipschutz*, 81 AD3d 782 [2d Dept 2011]). The court thus declines to consider the claims predicated on alleged violations of Industrial Code §§ 23-6.1 (b), 23-8.1 (f), and 23-8.2, insofar as they are based on a new defective hoisting equipment or improper hoisting practices theory of liability not asserted in the pleadings.

First, Industrial Code §§ 23-1.7 (d) (slipping hazards), 23-1.7 (e) (tripping hazards), and 23-1.24 (roof work) are inapplicable to the facts herein and cannot support a claim under Labor Law § 241 (6). Additionally, while plaintiff was working on a platform, he does not allege that he was injured by the insufficient thickness of the platform (Industrial Code § 23-1.22 [c] [1]), nor that the subject platform was located more than seven feet above the ground (Industrial Code § 23-1.22 [c] [2]).

With respect to Industrial Code § 23-1.7 (b) (1), which requires hazardous openings to be guarded with a cover or safety railing, the court finds that the subject opening in the mat was not of the type contemplated by the regulation, as it is “inapplicable where the hole is too small for a worker to fall through” (*Alvia*, 287 AD2d at 422-423; *see Rice*, 302 AD2d at 579; *Piccuillo*, 277 AD2d at 94; *D'Egidio*, 270 AD2d at 764-765).

Therefore, summary judgment dismissing the plaintiffs’ Labor Law § 241 (6) claim is warranted.

Finally, Labor Law § 200 codifies a common-law duty placed upon owners and

contractors to provide employees with a safe place to work (*see Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000]). Imposing liability on an owner or contractor under a Labor Law § 200 and/or a common-law negligence cause of action requires evidence that the owner or contractor either had authority to control and supervise the manner in which the underlying work was performed, or that the owner or contractor created or had actual or constructive notice of the alleged dangerous condition which caused the accident (*see DiMaggio v Cataletto*, 117 AD3d 984, 986 [2d Dept 2014]; *Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 814 [2d Dept 2013]).

Relying on plaintiff's deposition testimony that the only MTA personnel on the work site were observers and that they never instructed him on how to perform his job, the MTA Defendants argue that they did not have the requisite authority to supervise plaintiff's work of deconstructing the platform. However, the affidavit by the MTA Defendants' construction manager is conclusory and tailored for summary judgment purposes (*see Forssell v Lerner*, 101 AD3d 807 [2d Dept 2012]). In the absence of further evidence with respect to their role on the work site, the MTA Defendants fail to demonstrate that they did not have the authority to control and supervise the work (*see Harris v Arnell Constr. Corp.*, 47 AD3d 768 [2d Dept 2008]). Similarly, the court finds that Michael Feigenbaum's affidavit submitted on behalf of movant 29-76 Realty is insufficient to establish that it did not have authority to supervise or control the work (*see Forssell*, 101 AD3d 807). Therefore, questions of fact remain which preclude summary judgment under Labor Law § 200 and common-law negligence with respect to the MTA Defendants and 29-76 Realty.

It is **ORDERED** that any outstanding discovery shall be completed within 60 days after service of a copy of this order with notice of entry. The parties are advised to proceed expeditiously and adhere to the schedule detailed in this Order and all subsequent Orders of the court. Failure to comply with the directives herein may result in the imposition of sanctions. The deadline to move for summary judgment is extended to 120 days following the completion of outstanding discovery.

The court has considered the parties' remaining contentions and deems them unavailing.

Accordingly, the branches of the movants' respective motions for summary judgment are granted to the extent of dismissing plaintiffs' claims under Labor Law §§ 240 (1) and 241 (6). The claims under Labor Law § 200 and common-law negligence shall be resolved at trial. The branches of their respective motions regarding discovery are denied as to sanctions against plaintiffs, but granted to the extent of directing compliance with the discovery schedule set forth herein and extending the deadline for summary judgment motions.

Dated: July 21, 2014

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DARRELL L. GAVRIN, J.S.C.