SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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STEVE SOLTES,

Plaintiff,

Index No. 154706/12

-against-

DECISION/ORDER

TURNER CONSTRUCTION COMPANY and CANON USA, INC.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Cross-Motion and Affidavits Annexed.....	2
Answering Affidavits to Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff Steve Soltes commenced the instant action to recover for injuries he allegedly sustained in the course of his employment. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting him partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). Defendants Turner Construction Company ("Turner") and Canon USA, Inc. ("Canon") cross-move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's claims for common law negligence and violations of Labor Law §§ 200, 240 and 241(6). For the reasons set forth below, plaintiff's motion is denied and defendants' cross-motion is granted.

The relevant facts are as follows. Plaintiff alleges that on or about February 21, 2012, he

was employed by Koehler Masonry ("Koehler") as an erector on a job site at Canon Americas Headquarters located at One Canon Park, Melville, New York, on which a parking garage was being built (the "project"). Turner was the general contractor on the project and Canon was the owner. On that date, plaintiff was tasked with setting pieces of precast concrete to make the walls of the parking garage. Specifically, plaintiff was positioned inside a manlift as the concrete pieces were hoisted and lowered by a mobile crane, which was operated by plaintiff's coworker, Frank Cutrone. The mobile crane would lift the precast concrete pieces, one at a time, approximately twenty to thirty feet in the air and plaintiff, from the manlift, and another worker, who was standing on the second story of the garage, would then bolt the piece of precast concrete into place. After the precast concrete was bolted into place, plaintiff would then begin the process of disconnecting each of the four cables attached to the concrete piece. Plaintiff testified that this was done via communication with walkie talkies. Specifically, Mike O'Connor, the signalman, would signal the crane operator to stop moving the crane so that the workers could remove the cables which were connected to the concrete slab with a burke, or a type of lifting eye. The crane operator would "come down on the load" to provide enough slack in the connection lines so that the four burkes could be removed. Once all four burkes and cables were disconnected, the signalman would signal to the crane operator who would pick up on the cables with the burkes attached to the ends and swing back to the truck and connect the next piece of concrete to the cables hanging from the crane.

Plaintiff alleges that his accident occurred while plaintiff and his crew were erecting the third piece of concrete. Plaintiff testified that as he was about to disconnect either the third or fourth burke from the concrete piece, the crane engine revved and a burke that had previously

been removed, swung from the crane and struck plaintiff in the head and face causing him injuries. However, Mr. Cutrone, the crane operator, testified that the accident occurred differently than the way described by the plaintiff. Specifically, Mr. Cutrone testified that immediately before plaintiff's accident, he observed that one of the cables, with the burke attached, had gotten caught on the manlift in which plaintiff was standing. Mr. Cutrone testified that he signaled to plaintiff that the cable was caught by beeping the crane's horn at which point plaintiff released the cable by grabbing it, bringing it around the manlift and throwing it. Mr. Cutrone further testified that after plaintiff threw the cable, it swung past him and swung back toward him striking him in the head.

Plaintiff now moves for an Order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim. Defendants cross-move for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's claims for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, that portion of defendants' cross-motion for summary judgment

dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted without opposition.

That portion of defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is also granted. Labor Law §240(1) requires that:

> All contractors and owners and their agents . . . who contract for but do not control the work, 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.

Labor Law §240(1) was enacted to protect workers from hazards 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 materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 (2009). It is plaintiff's burden to establish the safety device as enumerated in the statute that would have prevented his injury. *See Berg v. Albany Ladder Co., Inc.*, 10 N.Y.3d 902 (2008); *see also DeRosa v. Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652, 654 (1st Dept 2012).

Additionally, the Court of Appeals has made clear that Labor Law Section 240(1) should be construed with a commonsense approach to the realties of the workplace at issue. *See, e.g.*, *Salazar v. Novalex Contr. Corp.*, 18 N.Y.3d 134 (2011). Thus, liability will not attach under Section 240(1) when use of safety devices as enumerated in the statute would be illogical to the objectives of the work being done. *Id.*

In the instant action, defendants have established their *prima facie* right to summary judgment dismissing plaintiff's Labor Law § 240(1) claim by demonstrating that the use of any safety devices as enumerated in the statute to prevent plaintiff's accident would have been illogical and contrary to plaintiff's work objective. Here, the burke and cable that caused plaintiff's injuries had been purposely disconnected by plaintiff at the time of the accident so that the crane operator could then attach a new piece of concrete to the cables. Thus, the objective of the work was to detach the cables from the concrete slab and any use of safety devices to secure the detached cables would have been contrary to the purpose of the work.

In response, plaintiff has failed to raise an issue of fact sufficient to defeat defendants' motion as he has failed to identify any safety device, as enumerated in the statute, that could have prevented his accident. His assertion in opposition to defendants' motion that "there was no process in place to allow the plaintiff to secure the Burke as they were removed from the concrete panel" is insufficient to raise an issue of fact as plaintiff does not demonstrate what safety device or "process" could have been provided or implemented that could have prevented his accident. Indeed, it is the plaintiff's burden to establish the safety device as enumerated in the statute that could have prevented his injury. *See Berg,* 10 N.Y.3d 902.

Additionally, that portion of defendants' motion for summary judgment dismissing

plaintiff's Labor Law § 241(6) claim is granted. Pursuant to Labor Law § 241(6),

> All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

As an initial matter, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR §§ 23-8.1(b),(e),(k), 8.2(a), 8.2(c), and 8.5(c) is granted without opposition. Additionally, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-8.1(f) is granted as said provision does not apply to this case. 12 NYCRR § 23-8.1(f) provides requirements for mobile cranes that are hoisting a load. Specifically, pursuant to 12 NYCRR § 23-8.1(f)(5), "[m]obile cranes...shall not hoist, lower, swing or travel while any person is located on the load or hook." However, in the instant action, plaintiff has not alleged, nor is there any evidence, that plaintiff's accident occurred while he was located on the load or

the hook. Specifically, plaintiff alleges that he was injured when he was standing in the manlift, not on the load or the hook, and the crane operator revved his engine causing one of the burkes to swing into his face and head. Plaintiff's reliance on *Catarino v. State of New York*, 55 A.D.3d 467 (1st Dept 2008) is misplaced. Although the First Department in *Catarino* held that "the language of the regulation is not limited to situations where a person is on the load while the load itself is being moved," the court explained that the regulation prohibits any use of the crane whatsoever "while a person is physically on the load." *Catarino*, 55 A.D.3d 467. As there is no allegation that plaintiff was located on the load when his accident occurred, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-8.1(f).

Finally, as this court has granted that portion of defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim is denied.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law §240(1) is denied and defendants' cross-motion for summary judgment dismissing the complaint is granted. This constitutes the decision, order and judgment of the court.

Dated: 2/5/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.