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

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RICHARD MOLLOY and MARGARET MOLLOY,

Index No. 154407/2013

Plaintiffs,

-against-

DECISION/ORDER

LONG ISLAND RAILROAD, URS CORPPORATIN, URS CORPORATION-NEW YORK, URS GREINER WOODWARD-CLYDE CONSULTANTS, INC., URS GROUP, INC and BECHTEL INFRASTURCTURE CORPORATION,

Defendants.

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HON. CYNTHIA 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
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Richard Molloy ("Mr. Molloy") commenced this action to recover for injuries he sustained while he was working in a tunnel that was under construction. Plaintiffs now move for an Order granting them summary judgment on their Labor Law § 240 claim. Defendants cross-move an Order granting them summary judgment dismissing plaintiffs' complaint in its entirety. For the reasons set forth below, plaintiffs' motion is denied and defendants' motion is granted in part.

The relevant facts are as follows. This is an action seeking recovery for personal injuries sustained by plaintiff Richard Molloy while he was working in a tunnel that was under construction as part of the East Side Access Project. On the day of the accident, Mr. Molloy

was working as a brakeman on a locomotive, which traveled back and forth in the tunnel. The accident occurred as Mr. Molloy was exiting the cab of the locomotive while it was parked on a ramp. Specifically, Mr. Molloy testified that once the locomotive was on the ramp, he exited and walked away. However, he went back to the locomotive to retrieve some equipment that he had left in the cab and it was at this time that he fell while exiting the locomotive. There are two footholds on the side of the locomotive, which are used to climb down from the cab. Mr. Molloy testified that as he was trying to find one of the footholds his left foot slipped and he could not get a good grip on the locomotive's handrail, so he fell to the ground. Mr. Molloy alleges that he was caused to fall due to the fact that there was a side view mirror attached to the locomotive's handrail, which prohibited him from getting a good grip on it; the footholds where slippery due to the accumulation of muddy water on the tunnel floor; and as the locomotive was on a ramp, he ran out of footholds to put his feet in as there was a greater distance between the bottom of the locomotive and the tunnel floor. The accident report filed on the day of the accident states that: "While stepping out of the motor, [Mr. Molloy] misjudged the drop and slipped on the step."

The East Side Access project and its tunnels are owned by the Metropolitan Transportation Authority ("MTA"). Raymond Moy ("Mr. Moy"), a Senior Project Manager for defendant Long Island Railroad ("LIRR"), testified that LIRR was a subsidiary of the MTA. Mr. Moy further testified that the newly bored tunnels, where Mr. Molloy's accident occurred, were owned by the MTA and LIRR had "no status with respect to those tunnels." Defendant URS Corporation – New York ("URS") performed construction management consultant services on the project pursuant to a contract with MTA. Defendant Bechtel Infrastructure Corporation ("Bechtel") also performed program management consultant services on the project pursuant to a

joint venture with URS. As to the remaining defendants URS Corporation, URS Greiner Woodward-Clyde Consultants, Inc. and URS Group, Inc., it is unclear from the papers submitted to the court what role these entities played in the East Side Access project or in Mr. Molloy's accident.

As a result of the above accident, Mr. Molloy and his wife commenced the instant action against defendants alleging violations of Labor Law §§ 200, 240(1), 241(6) as well as common law negligence and a claim for loss of consortium. Plaintiffs' claim under § 241(6) is predicated on violation of Industrial Codes 23-1.7(d), 23-1.7(f), 23-1.30, 23-3.3(f) and 23-4.3. Plaintiffs now move for summary judgment as to liability on their § 240 claim. Defendants have cross-moved for summary judgment dismissing plaintiffs' claims in their entirety.

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 Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). 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.*

In the present case, as an initial matter, defendants are entitled to summary judgment dismissing plaintiffs' Labor Law § 240(1) claim as they have established that plaintiffs cannot maintain a claim under § 240(1) as a matter of law. Pursuant to Labor Law § 240(1),

> 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).

In the present case, Mr. Molloy cannot maintain a claim under § 240(1) as his accident did not occur due to a hazard contemplated in § 240(1). The Court of Appeals has made clear that "[a]s a matter of law, the risk of alighting from [a] construction vehicle [is] not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law § 240(1)." *Bond v. York Hunger Constr.*, 95 N.Y.2d 883 (2000) (citing *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514-515 (1991)); *see also Hargobin v. K.A.F.C.I. Corp.*, 282 A.D.2d 31, 37-38 (1st Dept 2001). Here, it is undisputed that Mr. Molloy was caused to fall as he was exiting the cab of the locomotive. As such, Mr. Molloy's accident does not fall within the purview of Labor Law § 240(1) and his claim under this statute must be dismissed.

Additionally, defendants are entitled to summary judgment dismissing plaintiffs' Labor Law § 200 and common law negligence claims as they have made a prima facie showing that they did not supervise or control Mr. Molloy's work and plaintiffs have failed to raise an issue of

fact. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 (1st Dept 2012). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." *Id.* (citing *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 9 (1st Dept 2011)). By contrast, where a construction accident arises from the "means and methods" of the subcontractor's work, including the use of dangerous or defective equipment, liability under Labor Law § 200 will only be imposed where the owner or general contractor "exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition." *Alonzo v. Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.*, 104 A.D.3d 446, 449 (1st Dept 2013) (internal citations omitted); *see also Dalanna v. City of New*, 308 A.D.2d 400 (1st Dept 2003). Stated another way, "when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2nd Dept 2008).

In the present case, as an initial matter, Mr. Molloy's claims arises from the "means and methods" of his work. Mr. Molloy alleges that his accident happened because of four defective conditions: (1) a side-view mirror had been attached to the locomotive's handrail, preventing him

from putting his hand on the bar itself and instead requiring him to put his hand around the clamps and ties that held the mirror to the bar; (2) the extended height between the tunnel floor and the locomotive's cab due to the fact that the locomotive was parked on a ramp; (3) the foothold from which his foot slipped was covered with muck as a result of the one to three inches of mud and grease that was always on the tunnel floor; and (4) the absence of a lifeline or similar device, which would have prevented Mr. Molloy from falling to the tunnel floor in case he fell. These alleged conditions are not dangerous or defective conditions inherent in the tunnel itself. Rather, these conditions constitute a danger related to the locomotive, a material of plaintiff's work, and the method of plaintiff's work, i.e. exiting the locomotive while it was parked on a ramp.

Further, defendants have established prima facie that they did not control or supervise Mr. Molloy's work. There is nothing in the record to indicate that the defendants had the authority to control the manner or method by which Mr. Molloy performed his work or that they provided the subject locomotive. Rather, the locomotive he was exiting from was supplied by his employer and all instruction he received on how to do his job came from his employer. Indeed, Mr. Molloy himself testified that no one from the City of New York, the MTA or the LIRR told him how to do his job. Additionally, defendants have presented the affidavit of Mr. Moy who attests that the LIRR had no active construction role on the East Side Access Project, was not involved in the day to day construction operations and maintained no staff at the job site where Mr. Molloy was working.

In opposition, plaintiffs have failed to raise an issue of fact. Plaintiffs do not contest that defendants did not supervise or have the requisite control or authority over Mr. Molloy's work. Rather, plaintiffs argue that defendants have failed to make out their prima facie burden as they

were obligated to submit affirmative evidence that they did not have notice of the conditions. However, this argument is without merit as the dispositive issue here is whether defendants had supervisory control over plaintiff's work, not whether they had notice of the condition. Thus, plaintiffs' arguments in opposition are misplaced and insufficient to defeat defendants' motion for summary judgment.

The court now turns to the remainder of defendants' cross-motion seeking to dismiss plaintiffs' Labor Law § 241(6) claim. 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. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993); *see also Rakowicz v. Fashion Institute of Technology*, 56 A.D.3d 747 (2nd Dept 2008).

Here, as an initial matter, defendants' motion for summary judgment dismissing plaintiffs' § 241(6) claim predicated on Industrial Code §§ 23-3.3(f) and 23-4.3.(g) is granted without opposition as defendants have demonstrated that said Industrial Codes do not apply and

plaintiffs have presented no opposition thereto.

Additionally, defendants have met their burden of establishing that Industrial Code § 23-1.7(f), which applies to vertical passage ways, was not violated as this provision, on its face, does not apply to the instant situation. This provision states:

> Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

This provision does not apply to the facts of this case as Mr. Molly was not accessing "working levels above or below ground" when his injury occurred. Rather, Mr. Molloy was exiting the locomotive's cab, which is not a means of access to work levels above or below ground within the meaning of the regulation. Thus, plaintiffs' cause of action based on this Industrial Code provision is dismissed.

Similarly, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-1.30 as they have made a prima facie showing that a violation of this code was not the proximate cause of Mr. Molloy's injuries. Industrial Code § 23-1.30 requires that owners and contractors provide "[i]llumination sufficient for safe working conditions . . . but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass." In the instant case, this alleged code violation is unavailable as Mr. Molloy provided no testimony that the lack of lighting in the tunnel caused or contributed to his accident. Indeed, although Mr. Molloy described the lighting in the tunnel as "not the best light but not the worst light" he had seen, he did not state that this alleged lack of lighting caused him to fall. Rather, plaintiff testified that

he was caused fall due to the four defective conditions outlined above. Thus, there is no evidence that this alleged violation of Industrial Code § 23-1.30 was a proximate cause of Mr. Molloy's accident.

However, defendants' motion to dismiss plaintiff's § 241(6) claim to the extent it is predicated on Industrial Code § 23-1.7(d) is denied as defendants have failed to even address this Industrial Code in its moving papers.

Accordingly, based on the foregoing, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment dismissing plaintiffs' claims in their entirety is granted to the extent that plaintiff's claims for common law negligence and violation of Labor Law §§ 200; 240(1); and 241(6) predicated on Industrial Code §§ 23-1.7(f), 23-1.30, 23-3.3(f) and 23-4.3 are hereby dismissed. However, defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(d) is denied. This constitutes the decision and order of the court.

Dated: 9/21/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.