

<b>Breda v City of New York</b>
2015 NY Slip Op 32474(U)
December 11, 2015
Supreme Court, Bronx County
Docket Number: 310774/2011
Judge: Norma Ruiz
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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No.: 310774/2011

DAVID R. BREDA and MARIA BREDA,

Plaintiffs,

-against-

Present:  
HON. NORMA RUIZ

THE CITY OF NEW YORK and THE NEW YORK  
CITY DEPARTMENT OF TRANSPORTATION

Defendants.

The following papers numbered 1 to 8 Read on this motion SUMMARY JUDGMENT  
Noticed on \_\_\_ and duly submitted as No. 8 &9 on the Motion Calendar of 11/17/14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
	Notice of Motions and Affidavits Annexed.....	1- 3
	Notice of Cross and Answering Affidavits .....	3-6
	Replying Affidavits .....	7-8
	Memorandum of Law .....	

Other:

*Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:*

Plaintiff moves for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) and defendants cross move to dismiss the plaintiff's action. Upon a review of the moving papers and opposition submitted thereto the motions are denied as set forth below.

In this Labor Law action, the plaintiff David R. Breda ("Breda") seeks damages for injuries he sustained in a work related accident on February 3, 2011 at 11:30 pm.<sup>1</sup> On the day of the accident, Breda was employed by nonparty Grace Industries, LLC ("Grace Industries") as a laborer.

<sup>1</sup>Plaintiff Maria Breda maintains a derivative action.

Grace Industries was the general contractor for the reconstruction of Shore Circle Bridge over Amtrak known as the Shore Road Circle Bridge project ("project"). Amtrak owned the property and had a track under the Shore Road Circle Bridge ("bridge") and an electrical facility above the bridge to operate its train. The actual bridge was owned by defendants The City of New York ("NYC") and The New York City Department of Transportation ("DOT"). At the time of the accident, Breda was performing demolition work on the underside of the bridge. According to the plaintiff, he was directed to use an aerial basket known as a "man-lift" or "boom lift" to access and remove rivets on the underside of the bridge approximately 25 feet above the ground level. The man-lift was rectangular and had controls which allowed the operator to maneuver the man-lift. Breda entered the man-lift with his co-worker Jose Perreira ("Perreira"). They also brought two jack hammers into the man-lift which were placed on the floor. Each jack hammer weighing about 35 pounds, had a pressure hose which was connected to a compressor t located on the ground level. The hose for each jack hammer was tied to the sides of the man-lift. Perreira raised the man-lift approximately 25 feet so they could begin working. They attempted to remove the rivets but could not because they needed to get closer. However, a beam prevented the man-lift from being raised any higher. Since it was concluded that due to the configuration of the steel girders the man-lift could not be raised higher and close enough to remove rivets, they spoke to their foreman-Carlos Nunes ("Nunes") - who directed them to come down. Plaintiff contends that prior to Perreira moving the controls, the man-lift dropped 5-6 feet. However, Perreira averred in his deposition that he did attempt to lower the man-lift but the controls did not respond (*see* Perreira's deposition transcript at p. 36). After trying several times, the man-lift dropped about 5 feet (*id* at lines 2-3). Perreira opined that the man-lift dropped due to the mal-function of the controls (*id* at lines 11-20). Perreira denied ever telling someone that the man-lift dropped because it had gotten stuck under a steel beam and they were trying to free it from the steel beam.

Plaintiff testified that after the man-lift's initial drop, it went back up and then started swaying from side to side. When the man-lift dropped and went back up it caused the jack hammer, which had been lying on the floor between his legs, to strike the plaintiff's leg.

Eventually, Perrera was able to lower the man-lift to the ground. The plaintiff was removed from the man-lift by an ambulance. Breda alleges that as a result of the accident he sustained the

following injuries: right mid/distal tibial shaft fracture with associated small ecchymosis with superficial skin abrasions and right proximal comminuted fibula fracture which necessitated surgical interventions including a failed external reduction, right tibia nail implantation, and removal of hardware, and chondroplasty of the distal tibia; nondisplaced tear of the posterior horn of the lateral meniscus; right knee arthroscopy with chondroplasty of the lalus; lysis of multiple adhesions with major synovectomy; chondroplasty of medial femoral condyle; achilles tendinosis; and plantar fasciitis with associated plantar calcaneal spur.

Mohammad Arain (“Arain”), Deputy Director for DOT, was the engineer in charge of the subject project. He testified at his deposition that he was told that the plaintiff’s accident happened because the man-lift had become stuck between two steel beams and dropped as a result of Breda and Pereira trying to free it. When the man-lift dropped, the plaintiff fell down in the bucket. He agreed that there were man-lifts that varied in shapes and sizes. Arain noted that the approved demolition plan from the contractor would depict what type of equipment was to be used for the work in question.

Arain explained that Amtrak assigned a flag man, a watch person, to watch the contractor’s operations to make sure that it’s facility was not damaged during construction. Amtrak conducted its own investigation of the accident and concluded that the cold weather conditions may have had an effect on the equipment, causing the equipment to “stick”. At his deposition, Arain was asked if he read Amtrak’s report, in particular, its conclusion of the effect cold weather may have played in this accident. Arain stated he did read the report, however, Amtrak’s conclusion was of no significance to him because there was no snow or ice accumulation under the bridge. Apparently, Amtrak also recommended that the subject man-lift be reinspected and instructed all personnel not to use the man-lift until it had been reinspected. Despite Amtrak’s suggestion, Arain believed the subject man-lift was not reinspected after the accident (see Arain’s deposition transcript at p. 57 lines 3-8, p 112 l.16-20). He explained that pursuant to a contract between Amtrak and the City, Amtrak was responsible for the safety of its facility. Thus, it was Amtrak’s responsibility to inspect whatever equipment was being used on the site. It was further established during Arain’s deposition that in addition to directing the subject man-lift not be used again until it got inspected, on the day of the plaintiff’s accident, Amtrak also stopped all work for the nigh time shift.

Apparently Amtrak did inspect the subject man-lift after the accident and generated a report. Arain was asked whether or not he knew that said inspection revealed the following deficiencies: (1) there was an alarm that was not sounding on the machine during operation and (2) the activation switch was not functioning on the control panel, to which he replied that he did not have such knowledge. Indeed, the repair records for the man-lift establish that the back-up alarm and emergency stop switch were replaced.

In support of the motion for partial summary judgment, plaintiffs annexed the deposition testimony of plaintiff, Pereira, Arain, the contract between Grace Industries and the City and DOT, and copies of the accident reports.

In addition, plaintiff annexed an affidavit from its expert engineer Leo Y Lee, P.E. ("Lee"). In forming an opinion, Lee reviewed the witness statements signed by Pereira and Nunes, Grace Industries accident report, NYC DOT accident report, Amtrak's Accident Report, Amtrak's "Employee injury/illness report", maintenance records for the subject manlift, accident pictures, drawings, plans, designs, for the project, deposition transcripts, plaintiff's bill of particulars, literature for the subject man-lift, a physical inspection of the man-lift and relevant statues, standards and regulations and the weather reports from February 1, 2001 until February 3, 2001.

Lee noted in his report the two aforementioned deficiencies discovered in the inspection of the man lift conducted on the same day of the accident. He essentially opined, based on his observation of pictures made available to him (unclear copies were annexed to Lee's report), that it was physically impossible for the man-lift to be used to remove the rivets because the top flange<sup>2</sup> of the sidewalk beam would not allow the man-lift to be raised high enough to be in a working position (front of platform face the beams with the rivets to be removed). Lee also noted that the picture of the man-lift did not show any signs of bending, dents, buckling or indications of the man-lift having come into contact with the bridge structure. Lee explained that "[g]iven the fact that it is harder to bend the flange of bridge structural beams than the guard rail of the [man] lift, it is highly unlikely that the two dents on the top flange of the bridge sidewalk support beam was caused by contact with the [man] lift machine. It is likely that the two dents above were caused by the claws

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<sup>2</sup>Flange: A projecting flat rim, collar, or rib on an object; serving to strengthen or attach (on a wheel) to maintain a position on a rail (Oxford Dictionary).

of an excavator or similar machine in the course of removing concrete pavement from the sidewalk” (see Lee’s report p. 16).

Upon a review of the above, Lee opined there were multiple causes for this accident, however, the court will discuss the most relevant for purposes of this motion. Lee opined that the subject man-lift was an incorrect choice of equipment because the width of the platform of the arial bucket made this man-lift too wide to fit between the steel girders which was necessary for the work to proceed. In addition, there was no pre-operation inspection as recommended by the man-lift’s operator manual. While there is an allegation that Nunez inspected the man lift prior to its use, there is no proof of such (no report or documentation). Had it been inspected, the issues with the alarm and the activation switch would have been discovered. Lee explained that the activation switch was an emergency control button, also known as the “dead man control” the most important safety device since it deactivates motion and power, thus particularly useful when certain control buttons are stuck in the open position. Lee also opined that severe weather most likely played a factor in the accident and the fact that the machine was not warmed up prior to being used by workers. He explained that cold hydraulic fluid and motor oil have high viscosity and if out of operation specification, can result in erratic behavior of the aerial lift platform.

The court finds that the plaintiffs met their initial burden of establishing entitlement to summary judgment as a matter of law. In *Nicometi v. The Vineyards of Fredonia*, the Court succinctly summarize the governing principles of Labor Law § 240(1) as follows:

“Pursuant to Labor Law § 240(1), owners and contractors engaged ‘in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure,’ except certain owners of one- and two-family dwellings, must ‘furnish or erect ... 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’ employed in the performance of such labor. Section 240(1) aims to ‘protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility.’ To achieve that goal, the statute ‘imposes absolute liability where the failure to provide [proper] protection is a proximate cause of a worker’s injury.’ Nevertheless, it is settled that ‘the extraordinary protections of the statute in the first instance apply only to a narrow class of dangers.’ More specifically, Labor Law § 240(1) relates only to ‘special hazards’ presenting ‘elevation-related risk[s].’ Liability may, therefore, be imposed

under the statute only where the ‘plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.’ Consequently, the protections of Labor Law § 240(1) ‘do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.’ ‘Rather, liability [remains] contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.’ Moreover, section 240(1) is not applicable unless the plaintiff’s injuries result from the elevation-related risk and the inadequacy of the safety device” (*Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 96-97 reargument denied, 25 N.Y.3d 1195, 37 N.E.3d 113 [2015][internal citations omitted]).

The court finds that the plaintiffs met their initial burden in establishing that the safety device provided, namely the man-lift, malfunctioned and dropped five to six feet causing the jack hammer to strike the plaintiff’s leg and cause injury.

In opposition, defendants argue that Labor Law § 240 (1) is not applicable to the case at bar because the plaintiff’s injuries were not caused by a gravity related risk. Instead, the plaintiff’s injuries were caused as a result of the man-lift becoming stuck and dropping when it was pried free. In support, an affidavit from Nunes<sup>3</sup> who opined that Pereira was an experienced operator and the man-lift was adequate to perform the work. Nunes averred that he stood and watched from underneath the bridge and did not see the man-lift make any abnormal movements. Once they were in position, Nunes went to the top of the bridge and watched the plaintiff and Pereira. He next observed that the basket got stuck “on a steel beam or something sticking out from a beam.” Nunes further averred that Pereira told him the basket was “stuck” to which he responded “to bend down below the top railing” while Pereira maneuvered the controls. Then, when the basket was released from its “stuck” position it dropped about three feet and then bounced around.

In addition, defendants submitted the opinion of their expert engineer Eugenia L. Kennedy (“Kennedy”) who concluded that only a component or hydraulic system malfunction, such as a ruptured or leaking seal or piston rod failure, would cause such a sudden drop due to gravitational forces without additional external forces applied. Kennedy stated upon her

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<sup>3</sup> A joint witness statement allegedly signed by Pereira and Nunes, however, it was not in admissible form, thus it was not considered by the court.

inspection of the subject man-lift and relevant repair records that the subject man-lift did not have such defects. Therefore, the accident could not have happened as the plaintiff alleges.

The court finds that the defendants' opposition raises an issue of fact regarding whether or not there was a Labor Law § 240(1) violation. As such, plaintiffs' motion must be denied.

Turning to the defendants motion to dismiss the plaintiffs' action, the court notes that the defendants do not deny that their motion for summary judgment was untimely. Nor do they submit any just cause for the delay. Instead, defendants rely on the court's inherent power to grant a party summary judgment upon a review of the record. While the court does possess such a power, the Court of Appeals has expressly condoned such untimely summary judgment motions (*see Brill v. City of New York*, 2 NY3d 648 [2004]; *Miceli v. Statefarm Auto Ins. Co.*, 3 NY3d 725 [2004]; *see also Cabibel v. XYZ Associates*, 36 AD3d 498 [1st Dept 2007]).

The court further finds that the defendants' motion for summary judgment is untimely and must be denied.

This constitutes the decision and order of the court.

Dated: 12/11/15  
Bronx, New York

  
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HON. NORMA RUIZ, J.S.C.