

<b>Flores v Metropolitan Transp. Auth.</b>
2016 NY Slip Op 31331(U)
July 13, 2016
Supreme Court, New York County
Docket Number: 161735/14
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 21

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RAFAEL FLORES,

Plaintiff,

Index No.: 161735/14  
Motion Seq. No. 001

-against-

**DECISION AND ORDER**

METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, NEW YORK CITY TRANSIT AUTHORITY, and THE CITY OF NEW YORK,

Defendants.

-----X  
**HON. MICHAEL D. STALLMAN, J.S.C.:**

In this workplace injury action arising during construction of the Second Avenue Subway, plaintiff Rafael Flores (Flores) moves, pursuant to CPLR 3212, for summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against all defendants. Defendants Metropolitan Transportation Authority (MTA), MTA Capital Construction Company (MTA Capital), New York City Transit Authority (Transit Authority), and the City of New York (the City) cross-move for summary judgment dismissing plaintiff's claims under Labor Law §§ 200, 240 (1) and 241 (6).

## BACKGROUND

On June 18, 2014, plaintiff was employed as a laborer by nonparty E.E. Cruz/Tully Construction, A Joint Venture, LLC (Cruz/Tully LLC) on the Second Avenue Subway Project (Plaintiff's 50-h Hearing tr at 18). Before falling, plaintiff, along with a coworker, was standing on the back of a truck with a 40-foot flatbed parked on Second Avenue near East 96th Street, and they were loading onto the truck 12-foot aluminum I-beams that were hoisted by a crane (*id.* at 18-33). The I-beams were hoisted in skids that each bundled together 60 beams (*id.* at 35).

Plaintiff attributes his fall to the absence of a tag-line to secure a particular skid that was hoisted into the truck:<sup>1</sup>

"When [the skid] was coming with the crane, I prepared in order to get it. The crane sent it to me, I was going to get it, so I prepared myself, and when I saw that it didn't have any tag lines, the material was coming, it was swinging, I was going to catch it and it pushed me because it didn't have the tag line. I wanted to hold it, but it pushed me back, so then I went back"

(*id.* at 31).

Plaintiff added that the skid was moving from side to side before his fall and that, when he raised his hands over his head to secure the beams, the beams knocked him off the truck (*id.* at 52-55).

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<sup>1</sup> Plaintiff testified that prior skids were secured by tag lines, while the one involved in his accident was not (*id.* at 44-45).

Plaintiff testified that he was knocked unconscious and injured his left wrist, elbow, and shoulder; he broke his elbow (*id.* at 59-74).

In addition to plaintiff, there were two other witnesses to the accident who have provided testimony. Plaintiff's coworker, Manny Mayi (Mayi), swore that:

"a skid of I-beams being lowered by the crane swung towards Rafael and caused him to fall off the truck bed onto the Second Avenue roadway below. I was on the bed of the truck with Mr. Flores at the time of accident but was unable to help him. I did not see any tag lines on the skid of I-beams that swung towards Rafael Flores and caused him to fall off of the truck"

(Mayi aff, ¶¶ 4-5).

The driver of the flatbed truck, Carlos Hernandez, also witnessed the accident:

"At the time of the accident, I was outside my truck, standing on Second Avenue by the passenger side of the cab of my truck, watching a skid of I-beams being lowered by the crane behind the fence toward the bed of my truck. Mr. Flores and another laborer were on the bed of my truck to properly guide the skid . . . I saw the skid of I-beams being lowered by the crane swing towards Rafael Flores and cause him to fall off the bed of my truck onto Second Avenue. I also saw that the skid of I-beams which swung toward Rafael Flores did not have any tag lines attached to it . . . Immediately after the Mr. Flores accident, the ambulance came, and persons I believe to be co-workers of Mr. Flores just threw tag lines on real quick, because all the big bosses started coming over"

(Hernandez aff, ¶¶ 5-6).

Hernandez also signed an MTA Capital Witness Report Form dated June 18, 2014, the day of the accident in which he stated: "Seen worker guiding material towards rear of truck the avoiding one beam sticking out (out of harm's way) he then took a small step back and slipped off truck."

Plaintiff filed his summons and complaint on November 25, 2014. The complaint alleges that the City owns the land comprising the stretch of Second Avenue where plaintiff's accident occurred, as well as all of the land on which the Second Avenue Subway Project is taking place (Complaint, ¶¶ 22-26). It also alleges that the City leases the subject land to the Transit Authority, MTA, and MTA Capital for the purposes of the 2nd Avenue Subway Project (*id.*, ¶¶ 27-32), that these entities were the general contractors for the project (*id.*, ¶¶ 55-58), and that they were agents of the City on the date of plaintiff's accident (*id.*, ¶¶ 58-60).

## DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent.*

*School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

#### I. Labor Law § 200 and common-law negligence

Labor Law § 200 “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 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, “liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). “General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that

the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed” (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor “is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, “whether [a defendant] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims . . .” (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Defendants argue that plaintiff’s employer, Cruz/Tully LLC, instead of defendants, supervised plaintiff’s work. In support, defendants offer testimony from plaintiff’s 50-h hearing that his supervisor from Cruz/Tully LLC directed him to perform the work that resulted in his injury (Plaintiff’s 50-h Hearing tr at 41).

Here, plaintiff's injury was clearly caused by the manner and materials of his work. Therefore, plaintiff must show supervisory control to maintain a claim under Labor Law § 200. Defendants, through plaintiff's own testimony, make a prima facie showing that they lacked supervisory control over Flores's work. Plaintiff, in opposition, fails to proffer any evidence that would raise an issue of fact as to this issue. Accordingly, the branch of defendants' motion that seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be granted.

## II. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

"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, 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection

against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff’s injuries, owners and general contractors are absolutely liable “even if they do not have a continuing duty to supervise the use of safety equipment” (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Plaintiff argues that a violation is presented because he was not provided with adequate protection against the risk of falling off the back of the flatbed while performing his work of guiding and stacking I-beams.

In support, plaintiff cites to *Naughton v City of New York* (94 AD3d 1 [1st Dept 2012]). In *Naughton*, the plaintiff was helping unload bundles of curtain wall from the back of a flatbed truck when he fell 15 to 16 feet -- plaintiff was standing atop one of the 10-foot to 11-foot bundles when he fell that distance, plus the distance from the flatbed to the ground (*id.* at 6-7). Similar to the subject accident, the load, which was being hoisted, swung toward the plaintiff and knocked him off the flatbed as he retreated from it (*id.* at 7). The plaintiff in *Naughton* had asked his supervisor for a ladder to perform his work, as he believed being on top of the bundles without one was dangerous, but his request was denied (*id.* at 8). The First Department held that the trial court erred in failing to grant the plaintiff

summary judgment on his Labor Law § 240 (1) claim, as he established that the failure to furnish a ladder was both a statutory violation and a proximate cause of the accident (*id.*).

Having found that liability was appropriate under the “falling worker” line of cases, *Naughton* also held that it was appropriate under the “falling object” line as well:

“section 240 (1) was designed to prevent those types of accidents in which the ... hoist ... proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object. Here, the harm plaintiff suffered was the direct consequence of the application of the force of gravity to the bundle that was being hoisted. The undisputed testimony in the record establishes that after the bundle began its ascent, one of the tag lines got slack, causing the load to swing toward plaintiff. Thus, plaintiff has shown that the hoist proved inadequate to shield him from harm, and defendants point to no evidence in opposition that would create an issue of fact. Accordingly, plaintiff was entitled to summary judgment on his section 240 (1) claim”

(*id.* [internal quotation marks and citation omitted]).

Here, plaintiff argues that the absence of a tag line, like the absence of a ladder in *Naughton*, caused his accident, and that his injuries flowed directly from the force of gravity from which defendants failed to protect him. In opposition, defendants argue that plaintiff did not fall far enough to implicate the protections Labor Law § 240 (1).

Specifically, defendants argue that courts have generally ruled that a fall from a flatbed truck does not meet the requirements of the “falling worker” line of cases. Defendants cite to *Toefer v Long Is. R.R.* which held that the risk of falling four to five feet from a flatbed truck “did not present the kind of elevation related risk that the statute contemplates” (4 NY3d 399, 408 [2005]). In *Toefer*, “no hoist or crane was used on the job” (*id.* at 410).

Plaintiff concedes that courts have held that a fall from a flatbed, alone, does not trigger the protections of the statute. However, plaintiff argues that courts have found that the protections of the statute are triggered when the flatbed is used as a platform. In support, plaintiff cites not only *Naughton*, but also *Phillip v 525 E. 80th St. Condominium* (93 AD3d 578 [1st Dept 2012]). In *Phillip*, the plaintiff was standing on top of scaffolding material on a flatbed truck when he fell nine feet (*id.* at 579). Although the plaintiff was provided with a safety harness, he was not provided with a place to secure the harness (*id.*). The First Department held that, in these circumstances, the plaintiff was entitled to summary judgment as to liability on his Labor Law § 240 (1) claim (*id.*).

Plaintiff’s claim under the statute is distinguishable from *Toefer* because, in *Toefer*, the worker’s fall did not involve materials being hoisted

by a crane. Here, as in *Naughton*, the materials being hoisted by the crane added to the gravity-related risk. That is, plaintiff was subjected to the gravity-related risk of a skid consisting of 60 I-beams, 12 twelve feet long, swinging toward him from above, as well as the risk involved with falling approximately four feet from the back of the flatbed. As the Court of Appeals held in *Runner*, the statute is applicable where a protective device proves “inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (13 NY3d at 604, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Here, the combined risk of the improperly hoisted and extremely heavy skid, comparable in weight to the reel of wire in *Runner*, and the height differential between the flat-bed and the ground clearly constitutes a gravity-related risk significant enough to trigger the protections of the statute. Moreover, there is no question that defendants violated the statute by failing to secure the skid with a tag line while hoisting it. Finally, there is also no question that this violation was a proximate cause of plaintiff’s accident, as the absence of a tag line caused the skid to swing toward plaintiff, which caused plaintiff to fall from the flatbed.

Nevertheless, plaintiff has not met his prima facie burden for summary judgment as to liability on his Labor Law § 240 (1) claim against defendants. Although plaintiff has demonstrated that a violation of Labor Law § 240 (1) has occurred, plaintiff has not met his prima facie burden of demonstrating that any of the defendants may be held liable for the violation.

Labor Law § 240 (1) applies to “owners,” “contractors” and their “agents.” “The meaning of ‘owners’ under Labor Law § 240 (1) and § 241 (6) has not been limited to titleholders but has ‘been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit’” (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). The key criterion is the “right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control” (*Sarigul v New York Tel. Co.*, 4 AD3d 168, 170 [1st Dept 2004], *lv denied* 3 NY3d 606 [2004] [internal quotation marks and citation omitted]).

Here, plaintiff has not made a prima facie showing that MTA, MTA Capital, and the Transit Authority are either “owners” or “agents” of the

“building” or “structure” where the contracted work was being performed, within the meaning of the Labor Law. Plaintiff submits a copy of a page of a contract made by Transit Authority, on behalf of the MTA, with Cruz/Tully LLC (Plaintiff’s Ex J), and so plaintiff contends that the MTA is the “owner of the project.”

By all accounts, the incident occurred on a flatbed truck parked on a City street. That is not to say that plaintiff had to prove that the Transit Authority or MTA had a property interest in the City street, which appears to have been used as a staging area for the ongoing construction of the Second Avenue subway. Rather, there is insufficient evidence in the record that MTA had any property interest in the “building” or “structure” where the contracted work was being performed. The cover page of a contract with Cruz/Tully LLC and the invented moniker of “owner of the project” is not sufficient to meet and shift the burden of summary judgment to defendants to contest their role as “owners” under the Labor Law.

While plaintiff need not prove that the City owns its streets, it appears that the City did not contract for the work that resulted in plaintiff’s injuries, given the contract between the MTA and Cruz/Tully LLC. Plaintiff has not shown that City’s role in this case went beyond its regulatory responsibilities arising out of its work permits; such “limited involvement

cannot subject the City to absolute liability under the Labor Law.” (*Albanese v City of New York*, 5 NY3d 217, 221 [2005].)

Therefore, summary judgment as to liability in plaintiff’s favor and against defendants on his claims under Labor Law § 240 (1) is denied.

### III. Labor Law § 241 (6)

Labor Law § 241 (6) provides that general contractors, owners, and their agents on qualifying construction, excavation and demolition work must comply with the following:

“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.”

It is well settled that this statute requires owners and contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502, quoting Labor Law § 241 [6]). While this duty is nondelegable and exists “even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), “comparative negligence remains a

cognizable affirmative defense to a section 241 (6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

Plaintiff claims that he is entitled to summary judgment as to liability under the statute based on two Industrial Code Violations: 12 NYCRR 23-6.1 (h) and 12 NYCRR 23-8.2 (c) (3).

Defendants are correct that 12 NYCRR 23-6.1 (h) is inapplicable because a crane was used to hoist the skid of I-beams. 12 NYCRR 23-6.1 applies “to all material hoisting equipment *except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks*” (12 NYCRR 23-6.1 [a] [emphasis supplied]). Thus, defendants are entitled to summary judgment dismissing so much of plaintiff’s claims under Labor Law § 241 (6) premised upon a violation of 12 NYCRR 23-6.1.

12 NYCRR 23-8.2 (c), provides, in relevant part, that “[l]oads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard” (12 NYCRR 23-8.2 [c] [3]). This regulation is also sufficiently specific to serve as a predicate to liability (see *McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 308 [1st Dept 2007]).

Plaintiff has met his prima facie burden of establishing a violation of 12 NYCRR 23-8.2 (c) (3), based on his 50-h hearing testimony, Mayi’s affidavit, and Hernandez’s affidavit. Plaintiff, Mayi, and Hernandez all stated that the skid of I-beams being lowered by a crane was swinging, and plaintiff testified that the beams knocked him off the flatbed truck (Plaintiff’s 50-h hearing tr at 52-55). Plaintiff testified and Hernandez stated that the load did not have any tag lines; Mayi stated that he did not see any tag lines on the skid.

Contrary to defendants’ argument, Mayi’s statement that he did not see a tag line (as opposed to stating more definitively that there were no tag lines) fails to raise a triable issue of fact as to whether a tag line was used.

Defendants point to the accident report filled out by Hernandez, in which he states that plaintiff fell after stepping back to avoid the skid, and they contend that plaintiff has not been deposed. However, plaintiff testified at his 50-h hearing that he was standing “three feet from the edge in the middle” of the flatbed truck, and the skid was swaying “from front to back.” (Plaintiff’s 50-h Hearing tr at 54). Even assuming, for the sake of argument, that plaintiff retreated backwards to avoid the skid, plaintiff’s actions would be reasonable under the circumstances as a matter of law. Thus, it is immaterial whether plaintiff stepped back (and fell off the truck) to avoid the skid, or whether he was pushed off the flatbed after making contact with the skid. Under either scenario, plaintiff’s actions cannot constitute comparative negligence as a matter of law.

Nevertheless, this branch of plaintiff’s motion for summary judgment in his favor on his claims under Labor Law § 241 (6) is also denied. Like Labor Law § 240 (1), Labor Law § 241 (6) similarly applies to “owners,” “contractors” and their “agents.” As discussed above in the analysis of plaintiff’s claims under Labor Law § 240 (1), plaintiff did not meet his prima facie burden of demonstrating that defendants are either owners, contractors, or agents within the meaning of the Labor Law, so as to be held liable for a violation of 12 NYCRR 23-8.2 (c) (3).

Notwithstanding the above, the Court exercises its discretion under CPLR 3212 (g) to “[salvage] something of value from an otherwise aborted CPLR 3212 motion” (*Kamyr, Inc. v St. Paul Surplus Lines Ins. Co.*, 152 AD2d 62, 65 [3d Dept 1989] [internal quotation marks and citations omitted]; see also *Lambos v Weintraub*, 256 AD2d 446, 447 [2d Dept 1998] [holding that pursuant to CPLR 3212 (g), “diagnostic tests were performed to support that diagnosis, and that the appropriate and timely treatment was initially instituted” are deemed facts established for all purposes in the action” [internal quotation marks and citation omitted]). CPLR “3212 (g) permits the court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action” (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]).

Here, pursuant to CPLR 3212 (g), the following will be deemed as facts established for all purposes in this action: that plaintiff was performing construction work in connection with construction of the Second Avenue subway project when he was allegedly injured; that a skid of I-beams being lowered by a crane required a tag or restraint line; that plaintiff was exposed to elevation-related risks; that proper protection was not provided was not provided to plaintiff to protect him from elevation-related risks; that

the lack of proper protection, including failure to use a tag line in connection with hoisting and lower of the skid, was a substantial factor in causing plaintiff's injury; and that plaintiff did not act negligently.

### CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment for liability against defendants on his claims under Labor Law §§ 240 (1) and 241 (6) is denied; and it is further

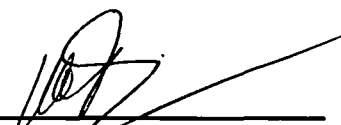
ORDERED that defendants' cross motion for summary judgment is granted in part, and plaintiff's claims under Labor Law § 200 and common-law negligence claims are dismissed, and so much of plaintiff's claims under Labor Law § 241 (6) premised upon a violation of 12 NYCRR 23-6.1 is dismissed, and the cross motion is otherwise denied; and it is further

ORDERED that the following will be deemed as facts established for all purposes in this action: that plaintiff was performing construction work in connection with construction of the Second Avenue subway project when he was allegedly injured; that a skid of I-beams being lowered by a crane required a tag or restraint line; that plaintiff was exposed to elevation-related risks; that proper protection was not provided to plaintiff to protect him from elevation-related risks; that the lack of proper protection, including

the failure to use a tag line in connection with hoisting and lower of the skid, was a substantial factor in causing plaintiff's injury; and that plaintiff did not act negligently.

Dated: July 13, 2016  
New York, New York

ENTER:

  
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J.S.C.

ON. MICHAEL D. STALLMAN