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

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JHONNY GUTIERREZ,

Plaintiff,

DECISION/ORDER
Index No. 158284/2012

-against-

HARCO CONSULTANTS CORP., 218-222 WEST 35TH STREET LLC,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Jhonny Gutierrez commenced the instant action seeking to recover for personal injuries he allegedly sustained when he was working on a construction site. Defendants Harco Consultants Corp. ("Harco") and 218-222 West 35th Street LLC ("218-222") (hereinafter collectively referred to as the "moving defendants") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint. Plaintiff cross-moves for an Order pursuant to CPLR § 3212 granting him summary judgment as to liability against the moving defendants on his Labor Law § 240(1) claim.

The relevant facts are as follows. This action arises out of a construction project located at 218 West 35th Street, New York, New York (hereinafter referred to as the "premises" or the "project"). Harco was the general contractor on the project and 218-222 was the owner of the premises. Plaintiff testified that on or about October 17, 2012, he was employed by third-party defendant Sky Materials Corp. ("Sky") as a carpenter on the project when he allegedly sustained injuries after he was struck with a piece of rebar. Specifically, plaintiff testified that at the time of his accident, he was standing on footing rebar which was

situated approximately nine feet above the ground and tying up 18-foot-long pieces of rebar that his coworkers were passing him from the ground below. Plaintiff testified that as his coworkers passed him a piece of rebar, they let it go before he was ready to grab it, causing it to fall and hit him in the head which made him lose his balance and fall onto the footing rebar upon which he was standing and sustain injuries (hereinafter referred to as the "accident").

Thereafter, plaintiff commenced the instant action asserting causes of action for negligence and violations of Labor Law § 200, 240 and 241 and 241-a. Defendants Harco and 218-222 now move for summary judgment dismissing the complaint. Plaintiff cross-moves for partial summary judgment as to liability on his Labor Law § 240(1) claim.

As an initial matter, that portion of the moving defendants' motion for summary judgment dismissing plaintiff's common law negligence, Labor Law §§ 200 and 241-a claims and plaintiff's Labor Law 241(6) claim predicated on Industrial Code provisions 23-1.5, 23-1.7, 23-1.8, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.20, 23-1.21, 23-1.22, 23-1.23, 23-1.24, 23-1.28, 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-2.2, 23-2.3, 23-2.4, 23-2.5, 23-2.6, 23-2.7, 23-3.2, 23-3.3, 23-3.4, 23-4, 23-5.1-9, 23-5.10-22, 23-7.1, 23-8.2 and 23-9.2 is granted without opposition. Additionally, to the extent plaintiff has asserted claims pursuant to Labor Law §§ 240(2) and (3) and 241(1), (2), (3), (4) and (5), that portion of the moving defendants' motion for summary judgment dismissing such claims is granted without opposition.

The court next turns to plaintiff's cross-motion for partial summary judgment as to liability on his Labor Law § 240(1) claim. 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. *See Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006).

In the instant action, plaintiff has established his *prima facie* right to partial summary judgment as to liability on his Labor Law § 240(1) claim against Harco and 218-222 as he has shown that his accident occurred due to said defendants' failure to provide an adequate safety device to prevent the rebar from falling and hitting him as it was being hoisted up to plaintiff by his coworkers in violation of Labor Law §240(1). As an initial matter, plaintiff's accident clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto the 18-foot long, 170-pound piece of rebar as it was being hoisted up to plaintiff by his coworkers. Indeed, plaintiff testified at his deposition that as he was standing on the rebar footing, nine feet above the ground, his coworkers were "pass[ing] [the piece of rebar] to [him]…and [they] let it lose [sic] and it hit me. That's when I lost balance, and what happened happened." Moreover, the foregoing activity of an employee working with materials being hoisted on a construction site is considered the kind of foreseeable risk within the contemplation of Labor Law § 240(1). *See Rocovich*, 78 N.Y.2d 509. The fact that plaintiff was hit with the piece of rebar when it

fell, causing plaintiff to fall and sustain injuries is proof that there was a failure to provide adequate safety devices to protect plaintiff from being hit with materials being hoisted pursuant to Labor Law § 240(1). Indeed, although at the time of plaintiff's accident, he was wearing a safety harness to prevent him from falling off the rebar footing, the piece of rebar being hoisted up to plaintiff by his coworkers was not secured in any way. When plaintiff was asked at his deposition whether the rebar that ultimately hit him in the head was tied up or secured, plaintiff testified "[n]o, it was loose." Additionally, plaintiff has provided his affidavit in which he affirms that "[w]e were not given any hoists or other equipment with which to raise the rebar before installing it. We were not given any ropes, hoists, or any other equipment, or other protective devices, to hoist, lift or secure the rebar as it was passed up."

In opposition, the moving defendants have failed to raise an issue of fact sufficient to defeat plaintiff's cross-motion for partial summary judgment. Defendants assert that plaintiff's motion should be denied and that they should be granted summary judgment dismissing the § 240(1) claim on the ground that § 240(1) does not apply here because plaintiff's accident did not occur due to an elevation- or gravity-related risk as plaintiff was injured when his coworkers hit him in the head with the piece of rebar and not when the piece of rebar fell on him. However, the moving defendants have failed to provide any evidentiary basis for their assertion that that is how the accident occurred. Indeed, in both his deposition testimony and his affidavit, plaintiff consistently states that his accident occurred after the piece of rebar that was being hoisted up to where he was standing, nine feet above the ground, fell on him after his coworkers "let it loose," hitting him in the head and causing him to fall and sustain injuries. The mere fact that plaintiff testified that he was looking at the work he was performing at the time his accident occurred and not specifically at the piece of rebar being hoisted up to him is not evidence that the piece of rebar did not fall on him.

To the extent the moving defendants assert that even if the piece of rebar was dropped by plaintiff's coworkers and fell, striking plaintiff in the head, plaintiff's motion should be denied on the ground that the accident still does not qualify as a gravity-related risk as contemplated by 240(1), such assertion is without merit. Specifically, the moving defendants argue that the mere fact that the piece of rebar fell and struck plaintiff does not establish that plaintiff's accident fits within the intended application of § 240(1). It is true that "not every object that falls on a worker[] gives rise to the extraordinary protections of Labor Law § 240(1)." *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 267 (2001). However, the Court of Appeals has held that "[w]ith respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in…the relative elevation…at which materials or loads must be positioned or secured'" and that "for section 240(1) to apply,…[a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute." *Id.* at 267-68, quoting *Rocovich*, 78 N.Y.2d at 514. Here, at the time of the accident, the eighteen-foot-long piece of rebar which struck plaintiff was being hoisted to the level at which plaintiff was standing, nine feet above the ground, and fell on plaintiff, causing plaintiff to sustain injuries. Moreover, it is undisputed that the rebar was not secured in any way to prevent it from falling on plaintiff as it was being hoisted over nine feet above the ground. Thus, section 240(1) applies.

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

The court next turns to that portion of the moving defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on Industrial Code section 23-2.3. 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).

In the instant action, the moving defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-2.3 as this provision does not apply to this case. Specifically, such provision dictates precautions to be taken when placing structural steel members and using hoisting ropes, cranes, exterior metal lintels and steel panels, none of which was being placed or used by the plaintiff or his coworkers at the time of the accident.

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

DATE : 2/9/17

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