Harvey v Metropolitan Transp. Auth.
2017 NY Slip Op 31603(U)
August 1, 2017
Supreme Court, New York County
Docket Number: 154671/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ELTON S. HARVEY and HERMOINE JOHN, Index No.: 154671/2012

Plaintiffs,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, METRO NORTH RAILROAD and THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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Edmead, J.:

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a tunnel laborer on February 8, 2012, when, while working at the East Side Access Project in New York, New York (the Site), he was struck by a falling bag of dry shotcrete, which was in the process of being hoisted up and over a hopper.

In motion sequence number 002, plaintiffs Elton S. Harvey (plaintiff) and Hermoine John move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against defendants Metropolitan Transportation Authority (the MTA), Metro North Railroad (Metro North) and the New York City Transit Authority (the NYCTA) (collectively, defendants).

In motion sequence number 003, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them.

BACKGROUND

On the day of the accident, defendants owned the Site where the accident took place.[1] On that day, plaintiff was employed as a laborer by nonparty Dragados/Judlau Construction (DJ), a joint venture hired by defendants to serve as the general contractor on the East Side Access Project, an underground tunneling project designed to provided access to Grand Central Terminal for Long Island commuters (the Project). DJ also performed the actual physical construction work and supplied the materials and equipment for the Project. The MTA hired nonparty URS Corporation (URS) to serve as the Project's construction manager.

Plaintiff's Affidavit

In his affidavit, plaintiff stated that, on the day of the accident, he was working for DJ as a tunnel cutter on the Project. Plaintiff's duties that day included "empty[ing] bags of shotcrete into the shotcrete hopper as the bags were hoisted over the hopper" (plaintiff's aff). In order to perform this work, plaintiff and his coworkers "used a Menzi Muck excavator to hoist the bags over the hopper" (*id.*). Plaintiff described the bags of shotcrete as measuring over four feet in height and weighing over 2000 pounds. As the hopper was almost five-feet tall, it was necessary for plaintiff to stand on pallets in order to reach over the hopper to release the shotcrete bags, which were "suspended . . . above [his] head" (*id.*).

Plaintiff explained that the accident occurred as "[t]he bag was hoisted over the shotcrete pump hopper with the bag hanging from the pinhole" (*id.*). Plaintiff further explained that, "as

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[1] It should be noted that defendants do not oppose plaintiffs' assertion that they are owners for the purposes of the Labor Law statute.

[he] was reaching under the bag to undo the tie that releases the shotcrete, the sharp metal edges of the pin-hole cut the strap and the bag fell onto [his] arms" (*id.*). Plaintiff was injured as a result of his arms becoming "pinned between the bag and the hopper" (*id.*).

Plaintiff stated that, prior to the accident, one of his coworkers had used a nylon strap, which was fed through a pin-hole located at the end of the Menzi Muck's boom, to secure the shotcrete bag to the boom. Plaintiff noted that the strap "was fed directly through the pin-hole, without using a softener [sic] to protect the strap [from being cut]" (*id.*). Plaintiff noted that "[i]n the past [they] had always secured the shotcrete bags to the Menzi Muck by securing a strap to the shotcrete bag and wrapping it around the piston on the boom arm" (*id.*).

Plaintiff's Deposition Testimony

In his deposition, plaintiff testified that the strap that was used to secure the shotcrete bag to the boom was different than the kind that was normally used for hoisting shotcrete bags at the Site. Plaintiff asserted that, typically, the men used a 10-foot long nylon strap to attach the shotcrete bag to the boom of the Menzi Muck. However, on the day of the accident, a coworker changed the 10-foot long strap to a two-foot long strap, because the 10-foot long strap "was putting [too much] pressure on the piston" (plaintiff's tr at 59).

Plaintiff explained that, normally, the 10-foot long strap was secured to the Menzi Muck by wrapping it "around the piston," and then securing it to "the mouth [of the boom]," where the bucket hangs (*id.* at 61). However, on the day of the accident, the two-foot long strap was threaded through a small hole located in the boom of the Menzi Muck, where a bucket was normally attached (*id.* at 61). Plaintiff testified that, just prior to the accident, the shotcrete bag was "[a]bout one foot" above his head (*id.* at 52).

Deposition Testimony of William Ury (Senior Field Engineer for URS)

William Ury testified that, on the day of the accident, he was employed as the senior field engineer for URS, the Project's construction manager. URS was hired by the MTA, the owner of the Project. Ury testified that URS did not supervise the work on the Project, as it was "just there to record and report what was going on . . . they weren't supervising the actual work" (Ury tr at 12). He explained that the MTA hired DJ to serve as the general contractor on the Project. DJ supplied materials and equipment for the Project and performed the physical work. In addition, DJ's sandhogs performed the shotcrete work, which entailed installing reinforcement rods and spraying dry concrete. While Ury never gave any directions or instructions to the DJ employees, he would occasionally stop work if he observed any "impending danger" (*id.* at 38).

Ury testified that, on the day of the accident, shotcrete bags were being hoisted up and over a hopper via a Menzi Muck. Then, the bottoms of the bags were opened up and the material inside the bags was released into a pump. Ury maintained that, while there are two safe ways to use a Menzi Muck to attach and lift shotcrete bags, neither of these ways was being utilized on the day of the accident. That said, on the day of the accident, the lifting strap was improperly passed through a small pin-hole meant for attaching a bucket. He explained that, when a strap is passed through this pin-hole, the sharp edges of the pin-hole cut the strap, "almost like putting a knife on it" (*id.* at 47). Ury maintained that, if he had ever observed this unsafe rigging procedure being used at the Site, he would have asked the appropriate foreman to correct it. He also asserted that metal shackles should be used to connect items to a Menzi Muck's boom.

Deposition Testimony of Garry Baker (DJ's Site Safety Representative)

Garry Baker testified that he served as DJ's site safety representative on the day of the

accident. As site safety representative, he performed site safety inspections at the Project. He explained that the MTA, the owner of the site, also had its own safety inspectors. If the MTA inspectors noticed an unsafe condition at the site, they would speak to him about it, and then he would check it out.

Baker testified that, on the day of the accident, a Menzi Muck was being used to bring shotcrete bags to a hopper. The shotcrete bags, which weighed approximately 2,200 pounds each, were secured to the boom of the Menzi Muck using a single strap. The strap was fed through a pin-hole located on the boom of the Menzi Muck. Baker maintained that, although it was "normal to use a strap on the shotcrete bags to lift [them]," it was not normal to thread the strap through "the pinhole on the boom," because the pin-hole had sharp edges that might cut the strap (Baker tr at 28). Baker asserted that plaintiff's accident occurred because the pin-hole's sharp edges "tore th[e] nylon sling" (*id.*).

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v*

Ceppos, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is 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"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood*

Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Plaintiffs are entitled to summary judgment in their favor as to liability on the Labor Law § 240 (1) claim under a falling objects theory, because the object that fell on plaintiff, i.e., the 2000 pound bag of shotcrete, was not only in the process of being hoisted at the time that it fell, it "was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699-700 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him, while being hoisted to the top of the building, was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

In addition, plaintiff's injuries were the result of defendants' failure to protect plaintiff from being struck by said falling object (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]). As argued by plaintiffs, the subject bag of shotcrete was caused to fall onto plaintiff because the two-foot long nylon strap, which was used to secure the shotcrete bag to the boom of the Menzi Muck during the hoisting process, was improperly threaded through a sharp-edged pin-hole located on the boom. It is not surprising that the pin-hole's sharp edges cut the strap, causing it to fail and the shotcrete bag to fall onto plaintiff.

Further, in light of the aforementioned method used to hoist the shotcrete bag, additional

safety devices, such as wires or ropes, were necessary to ensure that it would not fall during the hoisting process (*see Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]). "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*id.*, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

In opposition to plaintiffs' motion, defendants argue that a triable issue of fact exists as to whether the actions of plaintiff's coworker in using a two-foot long nylon strap to hoist the 2000 pound bag of shotcrete, instead of the usual ten-foot long strap, was the sole proximate cause of the accident. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d at 554 [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

However, it should be noted that plaintiff testified that his coworker swapped out the 10-

foot long strap for the two-foot long strap, because the former strap was putting too much pressure on the Menzi Muck's piston. As such, plaintiff's coworker had a valid reason to swap the straps, and, thus, his decision to do so was not unforeseeable under the circumstances.

In any event, plaintiff's coworker's action in allegedly choosing the wrong strap, and/or attaching it to the boom in the wrong way (by threading it through the pin-hole, instead of wrapping it around the boon), goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur(ies)"]).

Defendants have also not demonstrated that this is a case of a recalcitrant worker by

demonstrating that plaintiff was specifically instructed to use any safety device and refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]). In addition,"[t]here is no evidence in the record that [plaintiff] knew where to find the safety devices . . . or that he was expected to use them" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants.

The Labor Law § 241 (6) Claim

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against defendants. Defendants move for summary judgment dismissing said claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or

lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

In support of their motion for summary judgment in their favor on the Labor Law § 241 (6) claim against defendants, plaintiffs assert that defendants violated Industrial Code sections 23-9.4 (e) (1) and (2), which require that loads handled by power shovels and backhoes "be suspended from the bucket or bucket arm by means of wire rope having a safety factor of four," and that "[s]uch wire rope shall be connected by means of either a closed shackle or a safety hook capable of holding at least four times the intended load."

However, as argued by defendants, plaintiffs allege said violations for the first time in their motion, as they did not assert them in the complaint or in their bill of particulars. In fact, plaintiffs did not specify any particular Industrial Code violation in their papers. Notably, plaintiffs do not request leave to amend the complaint to add alleged violations of sections 23-9.4 (e) (1) and (2).

Further, although plaintiff argues that defendants violated various OSHA violations, an OSHA regulation does not impose a non-delegable duty on an owner, and therefore, it may not be used as a predicate for a Labor Law § 241 (6) claim (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d

343, 348 [1998]).

Thus, plaintiffs are not entitled to summary judgment in their favor as to liability on that part of the Labor Law § 241 (6) claim predicated on alleged violations of section 23-9.4 (e) (1) and (2), and defendants are entitled to dismissal of the Labor Law § 241 (6) claim against them.

The Common-Law Negligence and Labor Law § 200 Claims

Plaintiffs move for summary judgment in their favor as to liability on the common-law negligence and Labor Law § 200 claims against defendants. Defendants move for dismissal of these claims against them. 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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor

Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion*

Tower, LLC, 38 AD3d 523, 524-525 [2d Dept 2007]).

As argued by plaintiffs, the accident was caused by the means and methods of the work, namely, the use of only a single nylon strap, which was improperly fed through a sharp-edged pin-hole. In addition, necessary additional safety equipment, like shackles or other such anchor points, were not provided to prevent the shotcrete bag from falling onto plaintiff during the hoisting process.

Here, plaintiffs have not sufficiently established that defendants exercised any supervision and control over any aspect of the subject hoisting process. Plaintiff testified that a coworker was responsible for changing the 10-foot long strap, which was typically wrapped around the boom, to a two-foot longstrap, which he inappropriately fed through the sharp-edged pin-hole. In addition, while Ury and Baker testified that they had the authority to stop work in the event that they observed an unsafe condition or practice at the Site, this evidence, alone, is insufficient to establish that they supervised the specific hoisting work that caused the accident (*see Hughes v Tishman Constr. Corp.*, 40 AD3d at 311) .

Thus, plaintiffs are not entitled to summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against defendants, and defendants are entitled to dismissal of said claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Elton S. Harvey and Hermoine John's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in their favor is granted as to liability on the Labor Law § 240 (1) claim against defendants Metropolitan Transportation

Authority, Metro North Railroad and the New York City Transit Authority (collectively, defendants), and the motion is otherwise denied; and it is further

ORDERED that defendants' motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them is granted, and these claims are dismissed as against them.; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for defendants.

Dated: August 1, 2017

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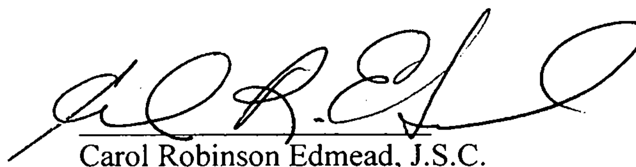

Carol Robinson Edmead, J.S.C.