

Gamarra v MTA Capital Constr. Co.
2018 NY Slip Op 31032(U)
May 17, 2018
Supreme Court, New York County
Docket Number: 159118/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

MARIA GAMARRA, Plaintiff, - v - MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, and ATC GROUP SERVICES, INC. D/B/A ATC ASSOCIATES A/K/A CARDNO ATC, Defendants. INDEX NO. 159118/2013 MOTION DATE 10/17/2017 MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 117, 118, 119, 120, 134

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this Labor Law action, plaintiff Maria Gamarra moves, pursuant to CPLR 3212, for partial summary judgment on her claims pursuant to Labor Law sections 240(1) and 241(6) as against defendants MTA Capital Construction Company (MTACC), Metropolitan Transportation Authority (MTA), New York City Transit Authority (NYCTA) (collectively the City defendants) and ATC Group Services Inc. d/b/a ATC Associates a/k/a Cardno ATC (ATC). Defendant ATC cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims pursuant to Labor Law sections 240(1) and 241(6). The City defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence claim against them, as well as the claims against them pursuant to Labor Law sections 200, 240(1), and 241(6). The City defendants further assert that, if their cross motion is denied, then ATC's cross motion must

be as well. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion and cross motions are decided as follows.

FACTUAL BACKGROUND:

This action arises from an incident on April 27, 2013, in which plaintiff Maria Gamarra, an asbestos handler employed by nonparty Trio Asbestos Removal Corp. (Trio), was allegedly injured while performing asbestos abatement work in a subway tunnel in Manhattan. The tunnel was leased by the City of New York to the NYCTA in 1953. Doc. 95.¹ Plaintiff claims that the alleged incident occurred when she was struck by, carried by, and then thrown from, a track dolly used to transport asbestos debris.

In or about March of 2009, NYCTA, on behalf of the MTA, contracted with ATC Group Services Inc. d/b/a Cardno ATC and ATC Associates ("ATC") to provide, inter alia, asbestos management services. Article 25 of the contract between MTA by NYCTA and ATC provides that "It is hereby agreed that all applicable provisions of the Labor Law of the State of New York shall be carried out in the performance of this Contract." Doc. 97, at Art. 25, p. 24. According to the scope of work of the contract, one of the two main activities to be provided is "asbestos management to assure the safety of the public, NYCT[A] employees and contractors" by, inter alia, "Overseeing individual work site activities to assure conformance with NYCT[A] requirements by other firms having separate Asbestos Abatement or Construction Contracts (hereinafter "Contractors")." Doc. 97, Scope of Work, Attachment 1, at p. 1. The scope of work further provided that "The Consultant shall act as the on-site representative for NYCT[A] and will

¹ All references are to the documents filed with NYSCEF in this matter.

have the authority to direct the actions of the Contractor as necessary. Doc. 97, Scope of Work, Attachment 1, at par. 1.1. Further, the scope of work provided that:

The Consultant shall provide continuous monitoring of the Abatement Contractor's activities. Any regulatory non-compliance or unsafe work conditions noted shall be brought to the immediate attention of the Abatement Contractor. Where the Consultant identifies any non-compliance or unsafe condition and determines that a work stoppage is required for the asbestos abatement, the Consultant shall stop the asbestos abatement and delay the Abatement Contractor's resumption of asbestos abatement activities until the conditions are corrected.

Doc. 97, Scope of Work, Attachment 1, at par. 1.2.2.2(d), at p. 5-6.

In or about December, 2010, NYCTA, on behalf of the MTA, retained Trio to perform asbestos removal in the tunnel. Doc. 96.

This action was commenced by plaintiff against MTACC, MTA, and NYCTA by filing of a summons and verified complaint on October 4, 2013. Doc. 1. In the complaint, plaintiff alleged a cause of action for common-law negligence, as well as violations of Labor Law sections 200(1), 240(1), and 241(6). Doc. 1. The said defendants joined issue by service of their verified answer filed November 21, 2013. Doc. 9.

On July 30, 2015, plaintiff amended the complaint to name ATC Group Services Inc. d/b/a ATC Associates a/k/a Cardno ATC. Doc. 53. MTACC, MTA, and NYCTA filed an answer to the amended complaint on August 11, 2015. Doc. 57. ATC joined issue by filing its answer on September 24, 2015. Doc. 59.

Plaintiff's Deposition

At her deposition, plaintiff testified that, at the time of the alleged incident, she was employed by Trio and was assisting in an asbestos removal operation in a subway tunnel. Doc. 98,

at 17-18, 22, 24, 28, 45. Before she began working at the project, the MTA required her to take a safety class, but she was not certain whether the MTA taught the class. Doc. 98, at p. 26-27.

Prior to her alleged incident, plaintiff was helping to bag asbestos. Doc. 98, at p. 191-192, 206. There were approximately four other Trio employees in the area, including Carlos Lobo, her foreman. Doc. 98, at p. 33, 202-203, 207-208. Her work was supervised and directed by a Trio employee, although Trio did not train or instruct her. Doc. 98, at p. 28-30. The asbestos was removed as follows: a worker bagged asbestos inside a tented area and handed it to a second worker, who placed the asbestos into a double bag. Doc. 98, at p. 208-209. The second worker then passed the double bag to plaintiff, who taped it closed and handed it to a fourth worker, who placed it on a metal track dolly. Doc. 98, at p. 45-46, 58-60, 141, 183, 209-210, 215. The dolly, which could hold approximately 20 bags weighing between 10 and 30 pounds, was about half-filled and was on the train tracks. Doc. 98, at p. 57, 63, 67, 93, 137, 224. When a dolly needed to be moved, a lever “like a brake” was usually released, although she did not see a brake on the dolly used on the date of the alleged incident. Doc. 98, at p. 72, 78, 195-196, 323.²

Plaintiff, who was standing on the tracks with her back to the dolly, turned to receive a bag from her left, taped it, and then turned the other way to pass it to the worker on her right. Doc. 98, at p. 66, 212, 220-223, 239-241. The dolly was on a sloped section of the tracks, about four feet away from her. Doc. 98, at p. 72, 74, 98, 181, 193-194, 204, 232. There was no room for her to stand in another location. Doc. 98, at p. 212-214. She was standing on the tracks in front of the dolly, bagging for 10-15 minutes before the incident occurred. Doc. 98, at p. 192, 215. At the time of the incident, the dolly was on an incline, although it did not move at all during the 10-15 minutes before it struck her. Doc. 98, at p. 192, 232-233. A chain across the track was usually

² Plaintiff later testified that Lobo told her after the accident that the “lever” on the dolly was not working. Doc. 98, at p. 286.

used to chock the wheels of the dolly but she did not notice the presence of such a chain on the day of the alleged incident. Doc. 98, at p. 87-88, 155-158, 195-196, 224, 285-286. She assumed, however, that a chain was in place. Doc. 98, at p. 270, 329. According to plaintiff, a chain was “[a]lways” used if a dolly is resting on an incline or decline. Doc. 98, at p. 155. Plaintiff recalled that, as she was still retrieving and passing the bags with her back toward the dolly, the dolly traveled about 2 feet, hit her leg, she fell backwards onto it, and it moved “like a runaway train.” Doc. 98, at p. 75, 103, 232, 235, 237, 239, 241. Although plaintiff did not see or hear the dolly before it hit her, she said it was moving “fast”. Doc. 98, at p. 234-236.³ When the dolly struck plaintiff, she fell onto the bags on the dolly and her leg became trapped beneath it. Doc. 98, at p. 75, 102, 242-244, 246-247. Although she managed to pull her leg out after a few seconds, the dolly quickly rolled downhill for a distance she estimated at two city blocks. Doc. 98, at p. 75, 105-106, 246-247. The dolly then struck a piece of wood laid across the track and the collision threw her onto the tracks. Doc. 98, at p. 75-76, 92-93, 242, 251-252. She landed on her back and the dolly was tipped over. Doc. 98, at p. 251-252.

After the incident, Lobo and another Trio worker ran to where she lay on the ground. Doc. 98, at p. 108, 290-292. Lobo apologized to plaintiff, saying that the dolly had no brake and that he had been holding the dolly in place using an electrical extension cord. Doc. 98, at p. 76-77, 92, 157, 271, 285, 292-293, 327, 339.

Affidavit of Carlos Lobo of Trio

In an affidavit submitted in support of the motion, Lobo stated that, at the time of the accident, plaintiff was “on the downhill side of the dolly, loading asbestos bags into it.” He

³ She had previously stated she did not know how fast it was traveling. Doc. 98, at p. 99.

admitted that he had used an orange extension cord to keep the dolly in place and that he removed it, believing that the area was flat enough to prevent it from rolling away. Doc. 99. He substantially reiterated plaintiff's account of how the dolly struck her and how she rolled downhill on the dolly until it was knocked off the tracks when it collided with a block chained to the tracks to prevent the dolly from entering an area where active trains were in use. Doc. 99. He recalled that, at the time of plaintiff's accident, only Trio supervisors were in the area. Doc. 99.

Deposition of MTA, MTACC, and NYCTA by Satya Datta

Satya Datta testified on behalf of the MTA and the MTACC, which he said were the same entity. Doc. 106, at p. 7. He also said he was an employee of the NYCTA. Doc. 106, at p. 7. On the date of the accident, he was an assistant project manager for the MTA. Doc. 106, at p. 10. The MTA hired Trio to perform asbestos abatement in the tunnel of the J and Z subway lines, which work was in progress as of the date of the accident. Doc. 106, at p. 15-16. The MTA also hired ATC as a consultant on the project. Doc. 106, at p. 16. He was not familiar with the contracts between the MTA and ATC or between the MTA and Trio. Doc. 106, at p. 19. However, ATC supervised Trio's work and was authorized to direct Trio's workers. Doc. 106, at p. 20-21, 29. The MTA had a resident engineer on site for each shift and that individual was to monitor the work area every 30 minutes. Doc. 106, at p. 21-22.

According to Datta, track dollies typically had a platform of approximately 4 feet x 4 feet and were moved manually. Doc. 106, at p. 61-62, 71. Track dollies were used on the project to bring bagged asbestos to a holding area. Doc. 106, at p. 76-77. The dollies used at the project were all the same and had metal wheels approximately six inches in diameter. Doc. 106, at p. 147-148. ATC, and not the MTA, was supposed to supervise the use of the dollies. Doc. 106, at p. 77-78.

He recalled that, if a dolly was on an uneven surface, it would be kept in place with a bumper block, which was a two by four. Doc. 106, at p. 79, 150. A bumper block chained to the tracks was used to prevent the dolly from entering an active subway area. Doc. 106, at p. 80.

On the date of the incident, he saw a dolly in plaintiff's work area which was secured with a two by four. Doc. 106, at p. 108-112. He did not know whether the dolly was involved in plaintiff's accident. Doc. 106, at p. 125. He never saw a dolly at the project secured by an extension cord and said such practice would have been unacceptable. Doc. 106, at p. 115. If Datta had seen an unsafe condition, he would have directed Trio's supervisor to correct it. Doc. 106, at 119-122, 131-132. If the condition could not be remedied, then he would speak to the MTA's resident engineer, who could stop the work. Doc. 106, at p. 119-121. ATC was responsible for checking the dollies and for monitoring site safety. Doc. 106, at p. 132.

Datta did not know whether anyone performed an investigation of the accident on behalf of the MTA. Doc. 106, at p. 102.

Deposition of Alfonso Forero of ATC Associates

Alfonso Forero was a project manager at for ATC Associates as of the date of the incident. Doc. 107, at p. 8.⁴ His duties included, inter alia, ensuring that contractors followed correct procedures. Doc. 107, at p. 34. Trio was the asbestos abatement contractor at the project. Doc. 107, at p. 12. Mark Starks was Trio's supervisor on the day of the incident. Doc. 107, at p. 25. Jonathan Rivera of ATC was also a project monitor on the date of the incident. Doc. 107, at p. 18, 32-33.

⁴ The name of ATC has since been changed to ATC Group Services LLC. Doc. 107, at p. 8.

Forero was not familiar with the contract between the MTA and ATC. Doc. 107, at p. 80-81. Forero believed that ATC, as a consultant, was to monitor the abatement activity and to test the air quality while abatement was in progress. Doc. 107, at p. 82. ATC's monitors continuously observed the abatement process and, if they saw something wrong, they were to report it to Trio's supervisor. Doc. 107, at p. 36-37, 85-86. If the monitors saw something unsafe, they could stop the contractor's work or direct the contractor as to how to do the work properly. Doc. 107, at p. 45. The MTA could also stop the work. Doc. 107, at p. 46.

Forero recalled that dollies were used at the project to remove asbestos waste away from an area of abatement. Doc. 107, at p. 48, 77-78. Although he initially stated that he was not certain whether the ATC monitors were to ensure that dollies were properly secured, he then stated that a monitor would notify a supervisor if he noticed such a condition, and then stated it was not the "primary responsibility" of the monitor to ensure that a dolly was properly secured. Doc. 107, at p. 53-54. He insisted that the dolly was the "supervisor's responsibility." Doc. 107, at p. 55. ATC could, however, direct Trio, the contractor, to secure a dolly. Doc. 107, at p. 59. He did not know whether anyone from ATC inspected any dolly at the site. Doc. 107, at p. 75. According to Forero, the platform of the dolly was approximately 4 feet x 4 feet and about a foot high. Doc. 107, at p. 60. He never saw a chain or wood block used at the site to prevent a dolly from rolling. Doc. 107, at p. 61-62. He did, however, see a large piece of wood placed on the tracks to prevent a dolly from rolling into an active subway area. Doc. 107, at p. 62-63. If he had seen an extension cord used to secure or move a dolly, he would have considered it a condition to be reported to the contractor's supervisor and could have directed the contractor to stop such activity. Doc. 107, at p. 78, 87. Similarly, if an ATC monitor saw a Trio employee using a track dolly in an unsafe manner, the monitor would direct the Trio employee to stop such conduct. Doc. 107, at p. 87.

Deposition of ATC By Jonathan Rivera

Jonathan Rivera, a project monitor for ATC⁵ on the date of the accident, testified that he oversaw Trio's asbestos handlers and their supervisor. Doc. 108, at p. 7, 10, 13. He said that ATC was at the site to oversee Trio's work. Doc. 108, at p. 48.⁶ His duties included making sure that Trio's workers followed code in performing the asbestos removal and in ensuring that the asbestos removal was performed safely. Doc. 108, at p. 50-51, 83-84. Rivera said that ATC could stop Trio's work if it needed to but that it could not control the means and methods of Trio's work because that was the job of Trio's supervisor. Doc. 108, at p. 17-18, 58-59. When he referred to means and methods, he meant the manner in which asbestos was moved from the area where it was removed and taken to an area where it was stored. Doc. 108, at p. 81-82. Included in the means and methods was the use of dollies to move asbestos. Doc. 108, at p. 82. He did not speak to Trio's workers but only to their supervisor. Doc. 108, at p. 18. If he saw what he believed was an unsafe practice, he would mention it to Trio's supervisor. Doc. 108, at p. 18. He said that holding a track dolly with an extension cord would have been unsafe and that he would have reported such an occurrence to Trio's supervisor and the MTA. Doc. 108, at p. 51-52.

Rivera said that something was needed in order to keep track dollies from rolling. Doc. 108, at p. 55. He was not familiar with rules, codes or regulations regarding the safe use of track dollies. Doc. 108, at p. 57-58, 62.

⁵ Rivera testified that ATC Associates had also been known as ATC Group Services, Inc. and Cardno ATC. Doc. 108, at p. 47.

⁶ Rivera did not review the contract between the MTA and ATC. Doc. 108, at p. 48-49.

Deposition of Mark Starks of Trio

Starks testified that, as of the date of the accident, he was employed by Trio as a supervisor and was working in the Broad Street tunnel on the J and Z lines of the subway. Doc. 109, at p. 9-11, 64-65. He was responsible for making sure that his 9 workers, including plaintiff and Trio's foreman Lobo, obeyed asbestos regulations and MTA protocols. Doc. 109, at p. 20-21, 30-31. Trio was hired by the MTA to work at the site. Doc. 109, at p. 21. The MTA also hired ATC, the project monitor, to be at the site to make sure that asbestos regulations and MTA protocols were followed. Doc. 109, at p. 21-22.

Asbestos debris was bagged up in tented areas and then would be passed out of the tent and put on a dolly "like [a] bucket brigade" system. Doc. 109, at p. 77. After the asbestos was placed on the dolly, it would be taken by the dolly to a work train. Doc. 109, at p. 80. Dollies were used to move equipment and waste from the work area. Doc. 109, at p. 24. He believed that the dolly used on the date of the accident was owned by Trio. Doc. 109, at p. 104. He checked the dollies each day and, if one had a problem, it would be taken out of service. Doc. 109, at p. 25. The dollies were metal, ran on the tracks, and did not have brakes. Doc. 109, at p. 26, 28. The MTA safety protocol for keeping a dolly stationary was to put a block in front of the dolly and to lock the back wheel with a chain and lock so that it could not move. Doc. 109, at p. 27, 42. If no blocks or chains were available, he would have noted this in his daily log, which he did not do. Doc. 109, at p. 27-28.

After the incident, Lobo advised Starks that plaintiff was injured. Doc. 109, at p. 37. When Starks asked Lobo how the accident occurred, Lobo initially responded that plaintiff fell, but then later stated that she fell on the dolly while he (Lobo) and plaintiff were "playing on the dolly." Doc. 109, at p. 37-38, 44, 54, 62, 94-95, 117-118, 121. He then asked plaintiff how she was injured

and she said she fell. Doc. 109, at p. 53. The following day, Lobo was fired. Doc. 109, at p. 38-39, 106.

Starks maintained that, had plaintiff been injured in the manner she described, he would have learned about the accident and would have made a record of it. Doc. 109, at p. 39-40. He never saw an orange extension cord on the day of the accident and, if he had, the dolly would have been taken out of service or he would have instructed a worker not to secure the dolly in such fashion. Doc. 109, at p. 41, 123. On the day of the accident, blocks and chains were available to secure dollies. Doc. 109, at p. 42-43. If a dolly had to be moved, the wood block would need to be removed from the tracks and the chain and lock removed from the wheels. Doc. 109, at p. 119. Starks stated that, had such equipment been missing, he would have noted this in his daily safety log, which he did not do. Doc. 109, at p. 47-49. On the date of the accident, he saw dollies with chains and locks around the back wheels and with wood blocks by their wheels both before and after the incident. Doc. 109, at p. 52-53, 122-123. He did not notice whether the tracks had any incline. Doc. 109, at p. 63.

Plaintiff filed a note of issue and certificate of readiness on March 21, 2017. Doc. 85. Although the preliminary conference order dated March 25, 2014 (Doc. 12) allowed the parties to file dispositive motions within 120 days after the filing of the note of issue, this period was shortened to 60 days by a compliance conference order dated January 24, 2017. Doc. 83.

Plaintiff thereafter filed the instant motion seeking partial summary judgment on her claims pursuant to Labor Law sections 240(1) and 241(6). Doc. 89. ATC filed a cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims pursuant to Labor Law sections 240(1) and 241(6). Doc. 101. The City defendants then cross-moved, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence claim, as well as

plaintiff's claims pursuant to Labor Law sections 200, 240(1), and 241(6). The City defendants also sought to conditionally deny ATC's motion for summary judgment in the event their motion for summary judgment was denied. Doc. 112.

CONTENTIONS OF THE PARTIES:

Plaintiff argues that she is entitled to summary judgment against all of the defendants on her claims pursuant to Labor Law sections 240(1) and 241(6). She claims that the MTA and NYCTA are liable since they are owners of the tunnel where the accident occurred and that ATC is liable since it is a statutory agent of the MTA and NYCTA. Plaintiff asserts that Labor Law section 240(1) was violated because plaintiff was not provided with any safety device which would have protected her from the rolling dolly. Further, plaintiff maintains that defendants are liable pursuant to Labor Law section 241(6) since she was injured due to a violation of Industrial Code rule 23-2.1(b), which addresses the handling and disposal of debris.

In support of its cross motion, ATC argues that plaintiff's claims against it pursuant to Labor Law sections 240(1) and 241(6) must be dismissed since it was neither an owner nor a general contractor. It further asserts that it was not a statutory agent of the City defendants. Thus, maintains ATC, it was not a statutory defendant pursuant to the aforementioned sections of the Labor Law.

In the event its cross motion is denied, ATC argues that an issue of fact exists regarding how the incident occurred. Specifically, plaintiff alleges that she was struck by a rolling metal dolly travelling on a downward slope, where, as Lobo admitted to Starks, plaintiff was injured while she and Lobo were playing on a dolly.

ATC also claims that all of the Industrial Code sections relied on by plaintiff in an attempt to invoke liability against it pursuant to Labor Law section 241(6) are inapplicable or insufficiently specific to impose such liability.

The City defendants also argue that plaintiff's motion must be denied because "there is a real question of fact as to whether the accident happened and whether [plaintiff] was hit by a dolly that then caused her to land on the dolly and be taken for a ride down the tracks and then thrown off the dolly or whether if [sic] she was standing on the dolly fooling around with Carlos Lobo in contravention of safety policies and then fell off the dolly." City Defs.' Aff. In Opp., at par. 29. They assert that the claim pursuant to Labor Law section 200 must be dismissed because they did not actually exercise supervision or control over the means and methods of plaintiff's work. Further, the City defendants maintain that they are not liable pursuant to Labor Law section 240(1) since plaintiff was not injured by a risk which could have been prevented by a device in the statute. Last, the City defendants assert that section 23-2.1(b) of the Industrial Code is insufficiently specific to support a claim pursuant to Labor Law section 241(6) and that the other sections of the Industrial Code relied on by plaintiff are inapplicable to the facts of this case.

The City defendants maintain that, if Labor Law sections 240(1) and 241(6) are not dismissed against them, then ATC must be considered a statutory agent for the purpose of these statutes since it had the ability to control the work in which plaintiff was engaged at the time of the accident.

In an affirmation in partial opposition to the City defendants' motion, ATC reiterates its argument that it is not liable under Labor Law sections 240(1) and 241(6). It further asserts that, if the City defendants are not liable under these statutes, then ATC should not be either. ATC further maintains that plaintiff's claims pursuant to Labor Law section 200 and for common-law

negligence should not be dismissed as against the City defendants since issues of fact exists regarding whether those defendants had the authority to control plaintiff's work.

Although the City defendants oppose ATC's motion to dismiss the Labor Law section 240(1) and 241(6) claims to the extent their motion to dismiss the complaint is denied, ATC maintains that the City defendants have not adduced any evidence to refute its prima facie showing that it was not an agent so as to give rise to its liability pursuant to Labor Law sections 240(1) and 241(6).

In an affirmation in opposition to defendants' cross motions and in further support of her motion for summary judgment, plaintiff reiterates her argument that defendants are liable pursuant to Labor Law sections 240(1) and 241(6). Plaintiff further argues that ATC is a statutory agent pursuant to the Labor Law. Additionally, plaintiff maintains that the City defendants' motion for summary judgment was untimely, having been filed more than 60 days after the filing of the note of issue. In any event, argues plaintiff, the City defendants are not entitled to dismissal of plaintiff's claims pursuant to Labor Law section 200 because issues of fact exist regarding whether those defendants had notice of the allegedly defective condition (use of the extension cord to secure the dolly) and whether the City defendants controlled the means and methods of plaintiff's work.

LEGAL CONCLUSIONS:

The movant on a motion for summary judgment must satisfy its initial burden to "make 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," after which the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*,

68 NY2d 320, 324 (1986); *see Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 (1st Dept 2017); *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 (1st Dept 2017). This Court will address plaintiff's motion and defendants' cross motions *seriatim*.

Plaintiff's Motion for Summary Judgment

Labor Law Section 240(1)

Plaintiff has established her prima facie entitlement to summary judgment pursuant to Labor Law section 240(1). Plaintiff testified that, as she was engaged in asbestos removal at the site, an unsecured dolly rolled into her, knocked her onto the dolly, and that she was carried by the dolly two city blocks before the dolly collided with a wooden barrier on the tracks, which collision threw her from the dolly. The metal dolly had a platform approximately 4 feet by 4 feet, had metal wheels 6 inches in diameter, was carrying approximately 10 bags of debris weighing between 10 and 30 pounds, was on an incline and was allegedly unsecured, thus causing it to roll into plaintiff. Labor Law § 240 (1) provides, in pertinent part, that:

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, 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) imposes absolute liability on owners, contractors and their agents for any breach of the duty imposed by this statute which proximately causes an injury. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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.*" *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009), quoting *Ross*, 81 NY2d at 501. "The dispositive inquiry [regarding liability under this section] does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential" *Runner*, 13 NY3d at 603. To establish liability under Labor Law section 240 (1), a plaintiff must prove that the statute was violated and that the violation proximately caused his or her injuries. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 (2003).

Here, although the dolly clearly did not fall from a height, it rolled towards plaintiff from an incline and "[t]here is no bright-line minimum height differential that determines whether an elevation hazard exists." *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 (1st Dept 2011). "The relevant inquiry . . . is [] whether the harm flows directly from the application of the force of gravity to the object." *Runner*, 13 NY3d at 604. This Court finds that where, as here, the metal dolly, with metal wheels six inches in diameter, was itself heavy and was loaded with hundreds of pounds of debris while on an incline, it was capable of rolling down the incline and generating significant force. Indeed, plaintiff testified that the dolly was moving fast when it struck her. Since the dolly was not secured with a chain and/or a block of wood, as was Trio's practice, this constituted a violation of Labor Law section 240(1). Indeed, Lobo stated in his affidavit that he had used an extension cord to keep the dolly in place and that he removed it before plaintiff was injured, mistakenly believing that the area was flat enough to prevent the dolly from rolling away.

Doc. 99.

The facts herein are similar to those in *Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848 (2d Dept 2017). In that case, plaintiff, a carpenter, was injured at a construction site while pushing a dolly loaded with sheetrock up a temporary plywood ramp which had a base approximately 4-5 feet above the ground. As the plaintiff pushed the dolly up the ramp, it suddenly stopped and, when plaintiff tried to push the dolly harder, it rolled back down the ramp and struck plaintiff, injuring him. Although there is no testimony herein regarding the height of the incline the dolly was on, this Court finds that the height was sufficient to invoke the application of section 240(1) since the dolly was, according to plaintiff's testimony, able to roll down the incline at a fast speed, knocking her onto the dolly, which carried her two city blocks.

Despite the foregoing, however, plaintiff is not entitled to summary judgment on her claim pursuant to Labor Law section 240(1) since a material issue of fact exists regarding how the incident occurred. Specifically, as noted previously, Lobo told Starks that the accident occurred while he (Lobo) and plaintiff were "playing on the dolly." Additionally, Starks, who was at the site on the date of the incident, saw dollies with chains and locks around their back wheels and with wood blocks by their wheels both before and after the incident. Further, he saw no extension used to secure a dolly on the date of the incident. Thus, that branch of plaintiff's motion seeking summary judgment on its claim pursuant to Labor Law section 240(1) is denied.

In opposing plaintiff's motion pursuant to Labor Law section 240(1), ATC and the City defendants rely on *Shaw v RPA Assoc., LLC*, 75 AD3d 634 (2d Dept 2010). However, that case is clearly distinguishable. In *Shaw*, plaintiff was injured at a construction site when the dump truck he was driving capsized and loose items in the cab of the truck pinned him down. The Appellate Division, Second Department held, inter alia, that plaintiff "was not exposed to any risk that the safety devices referenced in Labor Law section 240(1) would have protected against. (citations

omitted)." *Shaw*, 75 AD3d, at 636. Here, there is, at the very least, a question of fact regarding whether a safety device such as a chain or wooden block could have stopped the dolly from rolling in the manner described by plaintiff.

ATC also relies on *Davis v Wyeth Pharms., Inc.*, 86 AD3d 907 (3d Dept 2011). In that case, plaintiff, a construction laborer, was injured while moving a filtration unit weighing more than 1,000 pounds in a building owned by defendant. To move the unit, plaintiff and a coworker used two pallet jacks to hoist it 8 to 10 inches above the floor. Plaintiff and his coworker pushed the unit horizontally across the floor while it was on the pallet jacks. As they did so, plaintiff slipped and grabbed the unit, causing it to tip over and land on his leg as he fell to the ground. The IAS court determined that plaintiff's injury was not the result of a risk related to an elevation differential because the unit was not being hoisted or secured and tipped over because plaintiff grabbed the unit and pulled it towards himself when he slipped. *Davis* is distinguishable, however, since plaintiff therein was not injured due to an elevation differential, whereas the incline on which the dolly rested herein was a height from which the dolly rolled down towards plaintiff. Although there is no evidence of how high the dolly was elevated when it began to roll, this Court finds that, given plaintiff's testimony that it was traveling fast and had enough force to carry her two city blocks, it can infer that the elevation was sufficient to invoke Labor Law section 240(1).

Labor Law Section 241(6)

Labor Law section 241 (6) imposes a nondelegable duty on owners and contractors 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. *See Long v Forest-Fehlhaber*, 55 NY2d 154, 159 (1982). In order to establish a cause of

action alleging a violation of Labor Law section 241(6), a plaintiff must plead and prove a violation of a specific rule of the New York State Industrial Code. *See Ross*, 81 NY2d, at 505.

Although plaintiff alleged in her bill of particulars that defendants violated Industrial Code sections 23-1.5, 23-2.1, 23-3.3, 23-6.1, and 23-6.2 (Doc. 103 at par. 15), she claims only the violation of rule 23-2.1(b), which addresses disposal of debris, in her motion. Thus, her “failure to address [the other rules] indicates that [she] has abandoned them as bases for liability (*see Gary v Flair Beverage Corp.*, 60 AD3d 413 [1st Dept 2009]).” *Perez v Folio House, Inc.*, 123 AD3d 519, 520 (1st Dept 2014).⁷ Since the Appellate Division, First Department has held that rule 23-2.1(b) is insufficiently specific to qualify as a predicate for a cause of action pursuant to Labor Law section 241(6) (*see Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]), plaintiff’s motion for summary judgment pursuant to Labor Law section 241(6) must be denied.⁸

ATC’s Cross Motion for Summary Judgment

That branch of ATC’s cross motion seeking summary judgment dismissing plaintiff’s claim pursuant to Labor Law section 241(6) is granted since, as noted above, plaintiff has failed to identify a sufficiently specific rule of the Industrial Code upon which such a claim can be based.

That branch of ATC’s cross motion seeking to dismiss plaintiff’s claim pursuant to Labor Law section 240(1) is denied. As noted above, a question of fact exists regarding whether plaintiff was injured when struck by an unsecured dolly rolling towards her or she was injured while “playing” with Lobo on the dolly.

⁷ In any event, the sections other than 23-2.1(b) are inapplicable to the facts herein and are thus insufficient to support a claim pursuant to Labor Law section 241(6).

⁸ As plaintiff notes, however, the Appellate Division, Fourth Department has determined that this rule is sufficiently specific to support liability under Labor Law section 241(6). *See Dipalma v State of New York*, 90 AD3d 1659 (4th Dept 2011).

ATC's argument that the claim against it pursuant to Labor Law section 240(1) should be dismissed because it was not a statutory agent of the City defendants is without merit.

Labor Law §§ 240(1) and 241(6) impose absolute liability on owners, contractors, and their agents for a statutory violation resulting in injury, regardless of whether they directed or controlled the work (*Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]). Thus, the test of whether a defendant is a statutory agent subject to liability under those sections is not whether it actually supervised the work, but whether it had the authority to do so (*Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009]).

Merino v Continental Towers Condominium, 159 AD3d 471 (1st Dept 2018).

Here, Datta testified that ATC supervised Trio's work and was authorized to direct Trio's workers (Doc. 106, at p. 20-21, 29). Forero testified that ATC could direct Trio to secure a dolly and that, if ATC's monitors saw something unsafe, they could stop Trio's work or direct Trio as to how to do the work properly. Doc. 107, at p. 45, 59. Additionally, ATC's contract provided that ATC "shall act as the on-site representative for NYCT[A] and will have the authority to direct the actions of [Trio] as necessary. Doc. 97, Scope of Work, Attachment 1, at par. 1.1. However, Rivera said that ATC could stop Trio's work if it needed to but that it could not control the means and methods of Trio's work because that was the job of Trio's supervisor. Doc. 108, at p. 17-18, 58-59. Rivera specified that means and methods referred to the manner in which asbestos was moved from the area where it was removed and taken to an area where it was stored, including the use of dollies to move asbestos. Doc. 108, at p. 81-82. Thus, "a question of fact [exists regarding whether ATC] possessed the necessary authority to be cast as a statutory agent for purposes of the Labor Law. *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 195 (1st Dept 2011).

The Motion By The City Defendants for Summary Judgment

Plaintiff's argument that the City defendants' cross motion is untimely, having been filed more than 60 days after the filing of the note of issue, is only partially correct. "A cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion." *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 448-449 (1st Dept 2013) quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 (1st Dept 2006). Since plaintiff moved for summary judgment on her claims pursuant to Labor Law sections 240(1) and 241(6), this Court can thus consider the City defendants' cross motion relating to those statutes.⁹ However, that branch of the cross motion by the City defendants for summary judgment dismissing plaintiff's common-law negligence and Labor Law section 200 claims is denied since that section was not raised by plaintiff's motion.

Labor Law Section 241(6)

That branch of the cross motion by the City defendants seeking to dismiss plaintiff's claim pursuant to Labor Law section 241(6) is granted since, as discussed above, plaintiff has failed to establish its prima facie entitlement to recovery pursuant to this statute.

⁹ This Court notes that plaintiff's motion for summary judgment, filed on May 22, 2017, was technically late by two days given that the note of issue was filed on March 21, 2017. However, since none of the defendants raised the lateness of plaintiff's motion this Court deems plaintiff's motion timely. See *Alexandridis v Suede Night Club*, 17 Misc3d 1104(A) (Sup Ct New York County 2007).

Labor Law Section 240(1)

Additionally, that branch of the cross motion by the City defendants seeking to dismiss plaintiff's claim pursuant to Labor Law section 240(1) is denied. As noted in the discussion of ATC's cross motion above, a question of fact exists regarding whether plaintiff was injured when struck by an unsecured dolly rolling towards her in violation of this statute or she was injured while "playing" with Lobo on the dolly.

Labor Law Section 200

As noted previously, since the City defendants' cross motion was untimely and related only to plaintiff's claims pursuant to Labor Law sections 240(1) and 241(6), that branch of their cross motion seeking to dismiss plaintiff's claim pursuant to Labor Law section 200 must be denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Maria Gamarra seeking summary judgment on her claims pursuant to Labor Law sections 240(1) and 241(6) is denied; and it is further

ORDERED that the branch of the cross motion by defendant ATC Group Services Inc. d/b/a ATC Associates a/k/a Cardno ATC for summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241 (6) is granted, and that claim is dismissed as against said defendant; and it is further

ORDERED that the branch of the cross motion by defendant ATC Group Services Inc. d/b/a ATC Associates a/k/a Cardno ATC for summary judgment dismissing plaintiff's claim pursuant to Labor Law section 240 (1) is denied; and it is further

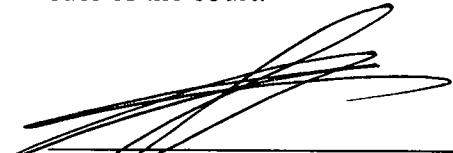
ORDERED that the branch of the cross motion by defendants MTA Capital Construction Company, Metropolitan Transportation Authority, and New York City Transit Authority seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241 (6) is granted, and that claim is dismissed as against those defendants; and it is further

ORDERED that the branches of the cross motion by defendants MTA Capital Construction Company, Metropolitan Transportation Authority, and New York City Transit Authority seeking summary judgment dismissing plaintiff's common-law negligence claim, as well as plaintiff's claims pursuant to Labor Law sections 200 and 240 (1) are denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

5/17/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE