SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DANIEL ENGELBERT,

Plaintiff,

-against-

FLUSHING COMMONS PROPERTY OWNER, LLC, FLUSHING COMMONS DM LLC and TISHMAN CONSTRUCTION OWNER,

Defendants.

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Index No. 162493/2015
Motion Seq. Nos. 003

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, Plaintiff Daniel Engelbert (Plaintiff, or Engelbert) moves for partial summary judgment as to liability on his Labor Law § 240 (1) and 241 (6) claims. Defendants Flushing Commons Property Owner, LLC (Flushing Commons), Flushing Commons DM LLC (Flushing Commons DM), and Tishman Construction Owner (Tishman) oppose the motion.

BACKGROUND

On November 24, 2015 Plaintiff, was working for nonparty Berlin Steel on the construction of a 17-floor condominium building located at 138-35 39th Avenue in Queens. Plaintiff is an ironworker. More specifically, Engelbert was a connector, "who actually assemble(s) the steel when it's going up" (Plaintiff's tr at 8, NYSCEF doc No. 48). "I'll be the one," Plaintiff testified, "that climbs up the steel, walks across it, and fastens it together" (*id.*).

On the project, known as Flushing Commons, Plaintiff was working in Berlin Steel's "raising gang" along with other workers he identified as foreman Chad Snow, Anthony, Tom, "Gegg," and "Old Man" (*id.* at 10-11). On the day of his accident, Plaintiff was involved in a

process known as "shaking out" steel. This involves a crane lifting individual pieces, or beams, from a stack of steel.

Prior to his accident, a crane "spotted over a load," that centered over a pile of steel beams (*id.* at 15). The beams were approximately 30-feet long and they were stacked five feet high (*id.* at 19-20). After the crane's signalman spotted the crane over the load, Plaintiff and his partner stuck sorting hooks into opposite ends of a piece of steel (*id.* at 15). Plaintiff and his partner gave the signal for the crane to begin lifting the piece of steel (*id.* at 15, 22). Plaintiff and his partner held the hooks while the crane lifted the beam so that the hooks would not fall out of the beam (*id.* at 27). "[I]t would," plaintiff testified, normally go up very slowly"[1] (*id.* at 22), but this time it "abruptly shot up about six feet" (*id.* at 15). As the beam was lifted abruptly, "it brought a secondary piece with it" (*id.*). The secondary beam went up approximately 6 feet (*id.* at 32) and fell back down and hit the load of stacked beams, causing it to "collapse" (*id.* at 15). One of the beams on the stack then rolled onto Plaintiff's leg (*id.*).

After he was struck, Plaintiff used his hands to prevent himself from falling to the ground and "scurried away as fast as I could because the beam was still floating above [his] head" (*id.* at 33). Plaintiff then sat down and his foreman, Chad Snow, helped him assess the severity of his injury (*id.* at 35). Two of his colleagues then carried him to Tishman's trailer.

Engelbert filed his complaint on December 7, 2015. It alleges that defendants are liable for his injuries pursuant to Labor Law § 200 and common-law negligence as well as Labor Law §§ 240 (1), 24 (2), 240 (3), and 241 (6). In this motion Plaintiff seeks partial summary judgment only as to his section 240 (1) and 241 (6) claims.

[1] Plaintiff testified that "normally" the crane would "just bring it up a few inches to make sure it was level .... [a]nd if it wasn't, you would put it back down and re-hook" (NYSCSEF at 30).

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 § 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]).

Here, Plaintiff alleges that the sorting hooks failed to sufficiently protect him from the gravity-related risk presented by the process of shaking out steel beams. Instead, Plaintiff contends, shackles should have been used to secure the steel beams to the crane. Plaintiff cites to his own testimony, in which he states that the Department of Buildings had specifically directed that the shaking out of steel was to be done with shackles instead of sorting hooks:

"My first two days on the job, the Department of Buildings [DOB] had a stop work order on the jobsite, because I had to replace another guy that broke his leg. Doing the same exact activity … They [the DOB] wanted us to no longer use the sorting hooks, and they wanted us to use shackles" (NYSCEF doc No. 48 at 71-73).

Plaintiff also submits a letter dated November 2, 2015, which references DOB violation # 35161691N; the letter is signed a by a representative of Berlin Steel, as well Tom Curran (Curran), Tishman's superintendent on the Flushing Commons project (NYSCEF doc No. 49). It states, in relevant part:

> "As a corrective means and methods, all employees engaged in the 'shaking out' of steel, whereby steel beams and members are taken from the load in which they were shipped and sorted out and organized in the laydown area in preparation for being erected, will be given supplemental training via the attached JHA[2] before erection continues. Open-ended 'sorting hooks' will not be used when the steel members are interlocked; instead, the pieces will either be manually shifted with a pry-bar or rigged with a shackle attached to the eye of a steel choker sling to prevent any slippage"

(*id.*).

In opposition, Defendants submit an affidavit from R. Michael Parnell (Parnell), the technical director of a consulting and accident investigation firm. Parnell opines that:

[2] JHA here stands for "Job Hazard Analysis."

> "the use of sorting hooks, as opposed to other rigging devices, played no role in the happening of the accident of November 24, 2015. [The subject accident] was the result of flange beam being hoisted getting caught on another beam in the pile, causing it to rise up with the beam being hoisted, then separate [sic] and fall back onto the pile of steel … All things considered, [the subject accident] would have happened regardless of whether sorting hooks, shackles or other types of rigging hardware were used to attach to the holes at each end of the beam being hoisted"

(NYSEF doc No. 55).

Defendants argue that the sorting hooks provided Plaintiff with adequate protection against the gravity-related risk that he faced. In support, Defendants cite to *Vega v Metropolitan Transportation Authority* (133 AD3d 518 [1st Dept 2015]), in which the plaintiff injured his index finger when an excavator dumped construction debris into a dumpster while he was standing next to it. The First Department held that the trial court properly dismissed the section 240 (1) claim, as the debris did not fall "while being hoisted or secured, *because* of the absence or inadequacy of a safety device" (*id.* at 519). Instead, the debris was "purposefully released from the [excavator] by the operator at the designated location" (*id.*).

This case is plainly inapplicable, as the hoisting of the steel did not, as in *Vega*, go as intended. Instead, the hoisted piece of steel dragged another piece 6-feet into the air and dropped it on an unsecured pile of steel. Defendants alternatively argue that the pile of steel did not constitute a gravity-related risk, as it was stacked on the ground.

Plaintiff argues that when a crane fails in its core objective of securing a hoisted item as it is lifted, a violation of the statute is present. In support of this argument, Plaintiff cites to *McCoy v Metropolitan Transp. Auth.* (133 AD3d 308 [1st Dept 2007]) and *Cosban v New York City Tr. Auth.* (227 AD2d 160 [1st Dept 1996]). In *McCoy*, the Court gave a broad reading to the term "hoisting" under Industrial Code provisions, but it did not discuss Labor Law § 240 (1). In *Cosban*, the Court held that the Plaintiff was entitled to summary judgment on his Labor Law

section 240 (1) claim where the crane in which he was working toppled over causing Plaintiff to fall approximately 20-feet. The Court reasoned: "The toppling of a crane on its side for no apparent reason constitutes a *prima facie* violation of Labor Law § 240 (1) and defendant has not offered any evidence to raise a question of fact or an acceptable excuse for its failure to furnish proper protection to plaintiff" (227 AD2d at 161).

Plaintiff also cites to *Ray v City of New York* (62 AD3d 591 [1st Dept 2009]) and *Osowksi v Amec Construction Management, Inc.* (2008 NY Misc Lexis 7722 [Sup Ct, NY County 2008]). In *Ray*, the plaintiff was injured when he was struck by a steel beam that was being transported by a crane on a barge onto 25-foot high steel towers. The barge was struck by waves, causing it to rock, and causing the beam to "jump around" and injure the plaintiff who was trying to secure it to the tower. The Court held that summary judgment as to section 240 (1) was appropriate as the "plaintiff's injuries were attributable at least in part to defendants' failure to provide proper protection" (62 AD3d at 592). "That it is unclear from the record whether plaintiff had a tie line or a lifeline does not preclude summary judgment in his favor, since his injury was at least partly attributable to the defects in the hoisting equipment and the scaffold" (*id.*).

In *Osowski*, the plaintiff was injured while helping to unload steel beams from a truck. Specifically, the plaintiff helped attach the beam to a crane, then after the crane lifted the beam, the plaintiff was assisting in rotating it when "the crane operator unexpectedly let the beam drop" (*id.* at 2). The dropped beam hit another beam which was suspended two-feet above the truck-bed on which the plaintiff was working. Judge Solomon found that the plaintiff was entitled to summary judgment on his section 240 (1) claim. Defendants argue that Osowski is distinguishable, as, in the preset action " the third beam rolled onto plaintiff's leg, it did not fall

from an elevated height" (NYSCEF doc No. 56). This argument, however, is belied by Judge Solomon's reasoning:

> "Although Osowski was not struck directly by the original falling object, the proximate cause of his injuries was the second beam falling and striking the first beam, which struck Osowski and fell on him. The second beam's rapid, unexpected descent was the proximate cause of Osowski's injury, and the undisputed proof shows that the crane was not operated as to give proper protection to Osowski, in violation of § 240(1)"

(*id.* at 5).

Here, Plaintiff faced a gravity related risk. Under *Runner*, two 30-foot steel beams, raised six-feet in a worker's proximity is certainly a gravity-related risk. Moreover, the unsecured stack of steel from which the beam which injured plaintiff fell is also a gravity related risk (*see Wilinski* 18 NY3d 1 [2011] [stacked pipe represented a gravity-related risk]).

Further, Defendants failed to sufficiently protect Plaintiff from the gravity-related risk posed by the pipes. While Parnell, Defendants' expert, opines in conclusory terms that the use of sorting hooks was not a cause of Plaintiff's accident, he does not opine or cite to any evidence which would support a conclusion that Defendants provided Plaintiff sufficient protection against the gravity related risk. Plainly, Defendants did not provide such protection.

As in *Osowski*, the movements of the crane itself are part of they system of protection for which owners and general contractors are responsible. The crane here jerked the attached beam suddenly, causing another beam to jump six-feet into the air. This constitutes a violation of the statute. This violation was a proximate cause of the third beam coming loose from the unsecured pile and injuring Plaintiff. As Defendants violated the statute and that violation was the proximate cause of Plaintiffs' injuries, Plaintiff is entitled to summary judgment on his section 240 (1) claims.

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "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 494, 501-502 [1993], 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]).

Plaintiff argues that Defendants violated 12 NYCRR 23-8.1 (e) (6), 12 NYCRR 23-8.1 (f) (2) (i), and 23-8.1 (f) (2) (ii). These provisions apply to mobile cranes, tower cranes and derricks. 12 NYCRR 23-8.1 (e) is entitled "Load handling" and its subdivision (6) provides: "No more than one load shall be suspended from the same load line of a mobile crane, tower crane or derrick at one time." 12 NYCRR 23-8.1 (f) is entitled "Hoisting the load" and its subdivision (2) (i) provides: "There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions." Subdivision (2) (ii) of the regulation provides: "The load shall not contact any obstruction."

Initially, 12 NYCRR 23-8.1 (e) (6), 12 NYCRR 23-8.1 (f) (2) (i), and 23-8.1 (f) (2) (ii) are each sufficiently specific to serve as a predicate to section 241 (6) liability (*see Locicero v Princeton Restoration, Inc.*, 25 AD3d 664 [2d Dept 2006] [finding discrete subdivisions of 12

NYCRR 23-8.1 to be sufficiently specific]). Moreover, these regulations are all plainly applicable to Plaintiff's accident, and their violations were each a proximate cause of Plaintiff's injuries. Thus, Plaintiff makes a *prima facie* showing of entitlement to summary judgment as to Defendants liability under section 241 (6).

Defendants' sole argument is that Plaintiff fails to make a *prima facie* showing as to the type of crane involved in his accident. That is, Defendants argue that the court should deny the application for summary judgment, as Plaintiff did not state whether the crane involved in his accident was a mobile crane, a tower crane, or a derrick.

This argument is unpersuasive as the regulation is written broadly, as to encompass all cranes used on construction projects (*see e.g.* Ray, 62 AD3d at 591-592 [the First Department refers to the subject crane merely as a "crane" without specifying the type]). In any event, Plaintiff submits an affidavit in reply stating that the subject crane was a tower crane (NYSCEF doc No. 003). While Defendants are correct that Plaintiff could not remedy a failure to make a *prima facie* showing on reply, Plaintiff, as discussed above, did make such a showing.

As Plaintiff made a *prima facie* showing in its moving papers, the submission of the reply affidavit specifying which type of crane was involved in his accident was proper (see *Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 Ad3d 451, 452 [1st Dept 2012] ["the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"]). Thus, as Defendant has failed to raise a material question of fact in opposition, plaintiff is entitled to summary judgment on the issue of Defendants liability under section 241 (6).

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff's motion for partial summary judgment as to Defendants liability under Labor Law §§ 240 (1) and 241 (6) is granted; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: March 13, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.