

Calo v L & L Painting Co., Inc.
2019 NY Slip Op 32957(U)
October 1, 2019
Supreme Court, Suffolk County
Docket Number: 01605/2016
Judge: Paul J. Baisley, Jr.
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY**

**PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.**

INDEX NO.: 01605/2016
CALENDAR NO.: 2018021690T
MOTION DATE: 4/18/19
MOTION SEQ. NO.: 002 MG

-----X
THOMAS CALO and LYNN CALO,

Plaintiffs,

PLAINTIFFS' ATTORNEYS:
Law Office of Frank A. Cetero
248 Higbie Lane
West Islip, New York 11795

-against-

L & L PAINTING CO., INC., and ABC COMPANY
1 through ABC COMPANY 10 (fictitious names
meant to described the owner of the bucket lift whose
name is presently unknown),

DEFENDANTS' ATTORNEYS:
Bartlett, LLP
Attorneys for L & L Painting Co.
170 Old Country Road
Mineola, New York 11501

Defendants.
-----X

Upon the following papers numbered 1 to 30 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-26; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27-28; Replying Affidavits and supporting papers 29-30; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 002) by defendant L & L Painting Co. for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Thomas Calo ("Calo") on June 28, 2013, when he fell from a manlift while performing inspection work on a construction site located at the County Route 19 bridge, which overpasses the Long Island Railroad tracks in Hauppauge, New York. At the time of the accident, plaintiff was employed by nonparty Nelson, Pope & Voorhis, LLC. Defendant L & L Painting Co. (L & L) is alleged to be the general contractor for the construction project. By his complaint, plaintiff Thomas Calo alleges causes of action for violations of Labor Law §§200, 240 (1) and 241 (6) and for common law negligence. Plaintiff's wife, Lynn Calo, asserts a derivative claim for loss of services.

Thomas Calo testified he was employed by nonparty Nelson, Pope and Voorhis, LLC as a construction inspector since May 2010. He stated that his job duties included reviewing civil engineering plans and specifications at construction sites, monitoring contractors' work as it was performed, and generating reports based upon the work that has been performed on a site. He testified that on the date of the accident, he was working on a project for the Suffolk County Department of Public Works (DPW), which involved a bridge remediation project on the County Route 19 bridge which traversed the Long Island Railroad tracks. It is undisputed that L & L was the general contractor for the project and was contracted to paint the bridge after steel repairs

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were complete. It is undisputed that Calo's employer did not have a contract with L & L for inspection work. Calo testified his duties required him to be on the job site every day for the entire day while work was being performed on the premises, for the entire duration of the project. Calo further testified that he was supervised by the DPW and that no one at L & L had authority to supervise his work.

Calo testified that on the date of the accident, the project was in the painting phase and that he was inspecting the underside of the bridge. Calo testified he boarded a manlift with Mario Carrera ("Carrera"), from DPW, to ascend to the bridge. He testified L & L employee and foreman, John Lawson, operated the lift controls. Calo testified he was not "tied off" while on the manlift but acknowledged that he should have been. He further testified that on either the ascent or descent, the lift stopped working and he and Carrera were suspended approximately three feet from the ground. Calo stated that Lawson attempted to get the lift started again but could only tilt the platform where the men were standing to a 45-degree angle, lessening the distance to the ground. Calo testified that after approximately five to seven minutes, Carrera decided to exit the manlift and "hung down" and dropped to the ground. Calo testified he followed Carrera; and while he was hanging, he felt a pop in his shoulder. He testified he dropped to the ground and landed on both feet. Calo further testified he had never observed or heard of a manlift malfunctioning on the subject job site.

Mario Carrera, Clerk of Works for the DPW, testified that he serves as a resident engineer and his duty was to oversee construction projects for Suffolk County. Carrera testified that Calo's employer was hired to provide inspection and documentation services, daily work reports, daily attendance sheets, payroll certification, filing services and wage acknowledgement. Carrera testified that, on the date of the accident, he was with Calo on the platform of the manlift, completing an inspection of the bridge underpass. Carrera testified that, as they were descending, the motor of the manlift stopped running; and it stopped moving. Carrera testified the manlift stopped about three feet off the ground and that Lawson had left to find a ladder to bring to them, to allow them to exit the lift. Carrera testified that instead of waiting for a ladder, he opened the door to the manlift bucket, stepped out onto a tire, and stepped onto the ground. Carrera denies hanging from the manlift and falling to the ground, testifying that the platform they were standing on was not far enough off the ground. He testified Calo followed him out. Carrera testified he did not know that Calo hurt himself getting out.

Declan Farrington, Project Superintendent for L & L, testified that L & L was the general contractor for the bridge remediation project on the subject job site. He testified the manlift involved in the subject accident was a JLG manlift and that it had been rented from either Able Equipment or United Rentals. He testified he was unaware of any problems or complaints about any of the manlifts on the job site. Farrington acknowledged that L & L did not have any authority to direct or supervise Calo's work as he was a third party inspector for the DPW.

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L & L now moves for summary judgment in its favor arguing that Calo is not a covered person under the Labor Law, that they had no notice of any dangerous condition on the premises, that they had no authority to supervise or control Calo's work, and that Calo's own actions were the sole proximate cause of his alleged injuries. In support of its motion, L & L submits, *inter alia*, transcripts of the deposition testimony of Calo, Declan Farrington and Mario Carrera. Plaintiffs oppose the motion arguing that Calo is a covered person under the Labor Law and that L & L, as general contractor, had supervision and control over the entire project including over Calo's work and of the maintenance and use of the subject manlift at the time of the accident. Plaintiffs submit the affirmation of their attorney.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, evidence must be viewed in the light most favorable to the nonmoving party (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]).

"The critical inquiry in determining coverage under the [Labor Law] is 'what type of work the plaintiff was performing at the time of injury'" (*Panek v County of Albany*, 99 NY2d 452, 457, 758 NYS2d 267 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465, 672 NYS2d 286 [1998]; *see Moreira v Osvaldo J. Ponzio*, 131 AD3d 1025, 16 NYS3d 813 [2d Dept 2015]). Labor Law §240 (1) only provides protection to employees engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law §240 [1]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 770 NYS2d 682 [2003]; *Martinez v City of New York*, 93 NY2d 322, 690 NYS2d 524 [1999]; *DeJesus v Metro-North Commuter Railroad*, 159 AD3d 951, 73 NYS3d 581 [2d Dept 2018]). Coverage under Labor Law §241 (6) is also withheld where the alleged injury occurred outside the context of a construction, demolition or excavation project (*see Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581 [2002]; *Guevera v Simon Prop. Group, Inc.*, 134 AD3d 899, 22 NYS3d 490 [2d Dept 2015]). Nevertheless, it is well established that work constituting an alteration of a building

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or structure is covered under both Labor Law §§240 (1) and 241 (6) (*see Joblon v Solow, supra; Fuchs v Austin Mall Assoc.*, 62 AD3d 746, 879 NYS2d 166 [2d Dept 2009]). In determining whether a project falls within the definition of “altering,” the court “must examine the totality of the work done on the project to determine whether it resulted in a significant physical change” to the building or structure (*see Aguilar v Henry Marine Serv.*, 12 AD3d 542, 543, 785 NYS2d 95 [2004]). Further, a court must be careful not to isolate the moment a plaintiff was injured to determine whether he or she was engaged in a covered activity. Rather, the court must consider whether the plaintiff was a member of a team that undertook an enumerated activity and whether he or she was performing duties ancillary to the covered work at the time of his accident (*see Prats v Port Auth.*, 100 NY2d 878, 882, 768 NYS2d 178 [2003]).

Initially, the court must determine whether Thomas Calo is a covered person under New York Labor Law. “[T]he question of whether inspection work falls within the purview of Labor Law §240 (1) and §241 (6) ‘must be determined on a case-by-case basis, depending on the context of the work’” (*Prats v Port Auth., supra* at 883; *see Bonilla-Reyes v Ribellino*, 169 AD3d 858, 94 NYS3d 181 [2d Dept 2019]; *Channer v ABAX Inc.*, 169 AD3d 758, 93 NYS3d 444 [2d Dept 2019]). An employee will be deemed covered by the statute when he or she performs inspections that are ongoing and contemporaneous with other work on a construction project (*Prats v Port Auth., supra* at 883). Here, Thomas Calo is a covered person with respect to Labor Law §§200, 240 (1) and 241 (6) as his inspection work was part of an ongoing construction project, the construction was still taking place at the site when the accident occurred, and Calo’s inspection work was essential and integral to the progress of the construction (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 86 NYS3d 566 [2d Dept 2018]; *see Prats v Port Auth., supra; Dubin v S. DiFazio & Sons Constr., Inc.*, 34 AD3d 626, 826 NYS2d 325 [2d Dept 2006]).

Labor Law §§240 and 241 apply to “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith.” Labor Law §240 (1) provides, in relevant part, that “[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish, 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) imposes liability even on contractors and owners who had nothing to do with a plaintiff’s accident (*see Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31 [2012]; *Bish v Odell Farms Partnership*, 119 AD3d 1337, 989 NYS2d 719 [4th Dept 2014]). The law “imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124, 8 NYS3d 229 [2015]). The hazards intended to be

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mitigated by Labor Law §240 (1) “are those 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” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49 [1993]; *Simmons v City of New York*, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; *Flossos v Waterside Redevelopment Co., L.P.*, 108 AD3d 647, 970 NYS2d 51 [2d Dept 2013]). The statute will be liberally construed to accomplish the purpose for which it was formed, that is to “protect workers by placing the ultimate responsibility for safety practices . . . on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident” (*Rocovich v Consolidated Edison Co.*, *supra* at 513).

Nevertheless, “[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law §240 (1). Rather, liability is contingent upon . . . the failure to use, or the inadequacy of, a safety device of the kind enumerated [in the statute]” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 727 NYS2d 37 [2001]; see *Toefer v Long Is. R. R.*, 4 NY3d 399, 795 NYS2d 511 [2003]; *Novak v Del Savio*, 64 AD3d 636, 883 NYS2d 558 [2d Dept 2009]). To prevail on a claim pursuant to Labor Law §240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (see *King v Villette*, 155 AD3d 619, 63 NYS3d 500 [2d Dept 2017]; *Orellana v American Airlines*, 300 AD2d 638, 753 NYS2d 114 [2d Dept 2002]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection “except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker” (*Briggs v Halterman*, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; see *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562, 606 NYS2d 127 [1993]). However, where “a worker confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources . . . to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself” (*Abbadessa v Ulrik Holding*, 244 AD2d 517, 518, 664 NYS2d 620 [2d Dept 1997]; see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Ochoa-Hoernes v Finkelstein*, 172 AD3d 1080, 101 NYS3d 81 [2d Dept 2019]).

L & L has established a *prima facie* case of entitlement to summary judgment on the Labor Law §240 (1) cause of action. Here, plaintiffs allege the malfunctioning manlift and the unavailability of elevation-related safety devices, namely tie-offs and harnesses, were the proximate cause of Calo’s injuries as they would have prevented his fall. However, it is undisputed that Calo elected to descend from the manlift himself, after approximately five to

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seven minutes, while Lawson was in the process of locating a ladder to assist. There is no indication from the evidence presented that Calo could not wait on the platform of the stalled manlift for a ladder to arrive. Calo had both the time and the resources to enable him to proceed down from the stalled manlift safely but chose not to wait (*see Abbadessa v Ulrik Holding, supra; Ochoa-Hoenes v Finkelstein, supra*).

In opposition, plaintiffs have failed to raise a triable issue of fact. Plaintiffs' conclusory allegations that the presence of "tie-ins" would have prevented Calo's injury are insufficient to defeat summary judgment. Calo acknowledges in his testimony that he was not tied in to the manlift, despite knowing that he should have been, thus rendering the allegation that the presence of a "tie-in" would have prevented injury unavailing.

Labor Law §241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Guevarro v Wreckers Realty, LLC*, 169 AD3d 651, 93 NYS3d 134 [2d Dept 2019]; *Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 90 NYS3d 316 [2d Dept 2018]). It imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control of supervision of the work site (*id.*). However, an owner or general contractor may raise any valid defense to the imposition of vicarious liability, including contributory and comparative negligence (*id.*). To support a claim under this section, "a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Aragona v State of New York*, 147 AD3d 808, 809, 47 NYS3d 115 [2d Dept 2017]; *see Grosskopf v Beechwood Org.*, 166 AD3d 860, 88 NYS3d 561 [2d Dept 2018]).

L & L has established a *prima facie* case of entitlement to summary judgment on the Labor Law §241 (6) cause of action. Plaintiffs allege a violation of Industrial Code 12 NYCRR §§23-9.2 (a) and (b), which govern the maintenance and operation of power-operated equipment. Section 23-9.2 (a) provides that:

All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

While the first two sentences of §23.9-2 (a), which refer to “good repair,” “proper operating condition” and “sufficient inspections”, are not specific enough to permit recovery under Labor Law §241 (6), the third sentence imposes an affirmative duty on the employer to correct any unsafe condition regarding equipment or machinery upon discovery (*see Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375 [2009]). Therefore, a plaintiff who claims to have suffered injuries proximately caused by a violation of this section must show a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery (*id.*). L & L has established that it did not have notice of any unsafe condition regarding the manlifts on the site as there was never a report of any of the manlifts malfunctioning. Further, Calo admitted that he never observed, or had knowledge of, any lift on the site malfunction.

With respect to §23-9.2 (b) of the Industrial Code, L & L has made a *prima facie* showing of entitlement to summary judgment. §23-9.2 (b) (1) provides as follows: “All power-operated equipment used in construction, demolition or excavation operations shall be operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times.” L & L’s submissions show that their foreman, John Lawson, was operating the manlift and that L & L provided adequate training.

In opposition to this branch of the motion, plaintiffs fail to raise a triable issue of fact. Plaintiffs argue that §23.9-2 (a) of the Industrial Code mandates regular inspection of power equipment. However, this section of the Industrial Code only mandates remedy upon discovery. As such, plaintiffs have failed to present evidence showing that any defect or unsafe condition in the manlift was discovered prior to the accident. With respect to an alleged violation of §23.9-2 (b) (1), plaintiffs fail to raise a triable issue of fact. Plaintiffs merely conclusively state that material facts exist.

“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” (*McDonnell v Sandaro Realty*, 165 AD3d 1090, 1094, 87 NYS3d 86 [2d Dept 2018]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Haider v Davis*, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). “Cases involving Labor Law §200 fall into two broad categories, namely those where workers were injured as the result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed” (*Messina v City of New York*, 147 AD3d 748, 749, 46 NYS3d 174 [2d Dept 2017], quoting *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). If a plaintiff’s injuries are attributable to dangerous premises conditions at a work site, “the general contractor may be held for a violation of Labor Law §200 if he or she had control over the work site and either created the condition that caused the accident, or had actual or constructive notice of the dangerous condition” (*Simon v Granite Bldg. 2, LLC*, 170 AD3d 1228, 1232, 97 NYS3d 240 [2d

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Dept 2019]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; *Ortega v Puccia, supra*). When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged “had the authority to supervise or control the performance of the work” (*Simon v Granite Bldg. 2, LLC, supra*).

With respect to plaintiffs’ claims in common law negligence and under Labor Law §200, L & L has established a *prima facie* entitlement to summary judgment. With respect to the claims regarding the methods or materials of the work performed, L & L has established through the undisputed evidence that it did not supervise or control Calo’s work. Farrington, as the project superintendent, testified that neither he nor anyone at L & L supervised Calo’s work and that L & L had no authority to direct Calo’s work. Further, Calo testified he was supervised by DPW but that no one at L & L had any authority over him or his work (*see Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Ortega v Puccia, supra*; *cf. Rizzuto v L.A. Wenger Contr. Co., supra*). L & L has also established *prima facie* entitlement to summary judgment with respect to plaintiffs’ claims regarding a dangerous premises. L & L has established that proper equipment was present on the site and that Calo’s injury arose from his own action in exiting the stalled manlift (*see Comes v N.Y. State Elec. & Gas Corp., supra*; *Cuartas v Kourkoumelis*, 265 AD2d 293, 696 NYS2d 475 [2d Dept 1999]). Here, the dangerous condition that existed was a result of the manner in which Calo exited the manlift; and therefore, liability cannot be imposed absent a showing that L & L supervised or controlled Calo’s work (*see Comes v N.Y. State Elec. & Gas Corp., supra*; *Cuartas v Kourkoumelis, supra*; *Merkle v Weibrecht*, 234 AD2d 696, 650 NYS2d 471 [3d Dept 1996]).

In opposition, plaintiffs have failed to raise a triable issue of fact with respect to the Labor Law §200 claims. Plaintiffs argue that because L & L had supervision and control over the entire project as general contractor, then L & L had supervision and control over Calo. However, the testimony of each witness, including Calo, reveals that L & L did not exercise any supervision or control over Calo and his work; and therefore, there is no question of fact with respect to this cause of action (*Simon v Granite Bldg. 2, LLC; Honeyman v Curiosity Works, Inc., supra*).

Accordingly, L & L’s motion for summary judgment dismissing the complaint against it is granted.

Dated: October 1, 2019

HON. PAUL J. BAISLEY, JR.

J.S.C.