

<b>Lockett v Union-Endicott Cent.Sch. Dist.</b>
2020 NY Slip Op 31580(U)
February 24, 2020
Supreme Court, Broome County
Docket Number: 2015-2618
Judge: Michael V. Coccoma
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Court/County: \_\_\_\_\_

Case Title: \_\_\_\_\_

Docket Number: \_\_\_\_\_ 2015/2618

Judge: \_\_\_\_\_ Michael V. Coccoma

EXPERT(s): \_\_\_\_\_

File date: \_\_\_\_\_ Type: \_\_\_\_\_

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	Trial Motion, Memorandum, and Affidavit	<b>_TM</b>	<b>LBLX</b>
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	Verdict, Agreement and Settlement (actuals)	<b>_VS</b>	Verdict forms submitted to jury Signed settlement agreements with no attached order Signed stipulations with no attached order Signed plea agreements with no attached order
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	Expert Depositions	<b>_ED</b>	FULL
	Expert Transcripts	<b>_ET</b>	FULL
	Partial Expert Testimony	<b>_EP</b>	Partial Depos or Transcripts
	Expert Report and Affidavit	<b>_ER</b>	Expert Reports Expert Affidavits
	Proposed Order, Agreement, and Settlement	<b>_PR</b>	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
	Paper Only	<b>_PO</b>	Letters, Correspondence, other docs as instructed (JV and Court Express Archive)
	CV	<b>_CV</b>	Curriculum Vitae

At a Term of the Supreme Court of the State of New York held for the County of Broome, at Chambers in the Village of Cooperstown, New York on the 24 day of February, 2020

PRESENT: HON. MICHAEL V. COCCOMA  
SUPREME COURT JUSTICE

SUPREME COURT:  
STATE OF NEW YORK: COUNTY OF BROOME

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MARK A. LOCKETT and KACEY LOCKETT

Plaintiffs

**DECISION AND ORDER**

-against-

Index No. 2015-2618  
RJI No. 2017-0417

UNION-ENDICOTT CENTRAL SCHOOL DISTRICT,

Defendant  
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Defendant made a motion *in limine* seeking a ruling, as a matter of law, that Section 23-9.7(c) of the New York State Industrial Code does not apply to the facts of the case thereby mandating the dismissal of Plaintiff's Labor Law § 241(6) claim. Plaintiffs have cross moved seeking a ruling, as a matter of law, that § 23-9.7(c) of the Industrial Code is applicable to this case. Further, Plaintiffs ask the Court to find, as a matter of law, that § 23-9.7(c) was violated at the time of the accident. The parties agree and case law confirms that it is this Court's function to determine the applicability of the cited section to the facts of the case. Morris v. Pavarini Constr., 22 NY3d 668 (2014).

The subject accident occurred on August 12, 2014 when Mark Lockett was injured during the course of his employment by Fahs Construction Group, Inc. at a construction site owned by the Defendant. The initial claims against the Defendant included common law negligence and violations of Labor Law Sections 200, 241(6) and 240(1). Both parties moved for summary judgment and the Hon. Molly Reynolds Fitzgerald dismissed all of Plaintiffs' claims except the Labor Law Section 241(6) cause of action. The case was transferred to this Court upon Judge Fitzgerald's appointment to the Appellate Division. The parties do not dispute that owners such as Defendant have a nondelegable duty under Labor Law Section 241(6) regardless of their supervision and control of the actual work. It is also undisputed that Section 23-9.7 of the Industrial Code is sufficiently specific to form the basis for liability under Labor Law § 241(6). See Duffina v. County of Essex, 111 AD3d 1035 (3<sup>rd</sup> Dept. 2013) and Bloomfield vs. General Elec. Co., 198 AD2d 655 (3<sup>rd</sup> Dept. 1993). What is strongly controverted is the applicability of Section 23-9.7(c) to the facts of this case.

The parties don't agree on various facts, but the Court has searched the record and finds certain salient facts to be undisputed. They include the fact that Mr. Lockett and co-workers were on a scissor lift which was in an elevated position when a load of Durock cement boards shifted and crushed Plaintiff's leg. The boards were on the lift with the workers and were not secured or tied down with straps or other mechanical devices. The workers were tasked with attaching the cement boards to the underside of the building being constructed when the accident happened. The scissor lift was used to elevate the workers into position to accomplish the task of attaching the boards. The scissor lift was also used to transport the workers and materials from one position to the next as the boards were affixed. The scissor lift

was power-operated with a joystick that moved the lift from one spot to another. The lift was able to move forwards and backwards.

The facts in dispute include whether the scissor lift was in motion or stationary when the load shifted and injured the Plaintiff. They also include how far and how fast the lift moved, if at all, when the accident occurred. However, by all accounts, it was the intent of the lift operator to move the men and materials to the next attachment spot when the boards fell and injured the Plaintiff.

Mr. Lockett submitted an Affidavit in Support of his cross motion *in limine*. It contains a number of statements that are not refuted in the record through opposing Affidavits or deposition testimony. Plaintiff describes the general use of the scissor lift at the work site including its use in delivering construction material off loaded from delivery trucks to the points of installation. It was also used to transport the Durock boards from a staging area to the installation areas. Plaintiff attests to the fact that the lift would transport materials approximately 100 yards from the delivery trucks and 50 feet from the staging areas. The lift had to navigate around numerous concrete columns, a large enclosed stairwell and other trades working in the area as it transported materials to the installation points.

My analysis of the applicability of Section 23-9.7(c) to this case begins with the Finding of Fact issued by the Legislature in adopting the New York State Industrial Code in 1972. It is found at 12 NYCRR § 23-1.2. There the Legislature recognized the elements of danger to the lives, health and safety of persons employed in construction, demolition and excavation such that special regulations were required for their protection. Specific hazards were identified including those associated with falling objects and materials; the dangers associated

with the operation of vehicles and construction machinery and equipment; the chance of injuries from the use of dangerous tools, machines and materials; and the risks incidental to the handling and movement of heavy materials. The regulations of the Industrial Code were promulgated to protect against the specific hazards enumerated in § 23-1.2.

12 NYCRR §23-9.1 states that the provisions of this Subpart shall apply to power-operated heavy equipment or machinery used in construction, demolition and excavation operations. Section 23-9.7 is one of the provisions of the Subpart and it specifically applies to motor trucks. The term “motor trucks” is not defined in the Industrial Code. Nor is the term scissor lift defined in the Code and it is undisputed that there is no specific regulation governing the use and operation of a scissor lift. The question is whether the scissor lift was being used as a motor truck at the time of the accident rendering § 23-9.7(c) applicable to this case. That section requires loads that are apt to become dislodged in transit to be securely lashed in place.

Despite the breadth and scope of the regulations in the Industrial Code, it is clear that not every piece of construction equipment or material is defined or referenced in a specific regulation. This has left the Courts to grapple with the applicability of a regulation to a set of facts in situations like this case. In Borowicz v. International Paper Co., 245 AD2d 682 (Third Dept. 1997), the Third Department dealt with a factual scenario much akin to the subject case. In Borowicz, Plaintiff was riding on a scissor lift being used to transport channel iron from one location to another at the work site. The scissor lift stopped suddenly causing the load to shift and injure the Plaintiff. Supreme Court allowed the Plaintiff to amend his pleadings to include an alleged violation of 12 NYCRR 23-9.7(c) and further found that the regulation was applicable to the action. The Third Department affirmed the Supreme Court in all respects including its

finding that Section 23-9.7(c) was applicable to the scissor lift as it was being used as a truck when the accident occurred. While Defendant argues that Borowicz is no longer good law, I find no credible support for this contention and note that the case had been cited by various courts throughout the state, including by the Court of Appeals in St. Louis v. the Town of N. Elba, 16 NY3d 411 ( 2011).

In St. Louis, the Court of Appeals as well as the lower courts were confronted with determining the applicability of 12 NYCRR 23-9.4(e) to the facts of the case where loaders and front-end loaders were not mentioned in the regulation, but power shovels and backhoes were. Supreme Court concluded that the regulation covered front-end loaders when used in the manner and circumstances presented relying on Copp v. City of Elmira, 31 AD3d 899 (3<sup>rd</sup> Dept. 2006). The Appellate Division affirmed finding that “the manner in which the equipment is used rather than its name or label” is the touchstone in assessing the applicability of a particular Code Section. On a certified question, the Court of Appeals affirmed the Appellate Division finding that the “Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace.” The Court further stated “accordingly, the preferred rule both as a matter of statutory interpretation and as a reinforcement of the objectives of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation.”

In the present case, there can be no doubt that the Plaintiff was engaged in an activity that exposed him to several of the specific hazards enumerated in the Finding of Fact

(§ 23-1.2) including the hazards associated with the operation of construction machinery and equipment and the hazards incidental to the handling and movement of heavy materials (i.e. the cement boards). There can also be no doubt that the scissor lift was a power-operated piece of machinery used in the construction of the subject building thereby placing it within the umbrella of 12 NYCRR § 23-9.1 despite not being defined or specifically mentioned in the Code. No matter what distance or at what speed the scissor lift moved, it is clear that one of its functions on this job site (both generally and specifically at the time of the accident) was to transport men and material from one location to another making it the equivalent of a motor truck. I would have to ignore Borowitz and St. Louis and all the cases coming after them to find that Section 23-9.7(c) is inapplicable to the facts of this case. The strength and precedence of those cases lead me to conclude that Section 23-9.7(c) is applicable to this case as a matter of law and that Plaintiff's cause of action pursuant to Labor Law 240(6) shall not be dismissed.

Having found Section 23-9.7(c) applicable to this case, I now address Plaintiffs' argument that the section was violated as a matter of law. There is no dispute that the cement boards on the scissor lift were not tied down or otherwise secured by any devices. The regulation requires loads that are apt to become dislodged in transit to be "securely lashed in place." This was not done and the boards became dislodged leading to the unavoidable conclusion that Section 23-9.7(c) was violated as a matter of law. Questions of fact regarding proximate cause and comparative fault remain for the jury to decide.

Therefore, Defendants motion *in limine* is denied and Plaintiffs' cross-motion is granted in its entirety.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THIS COURT.

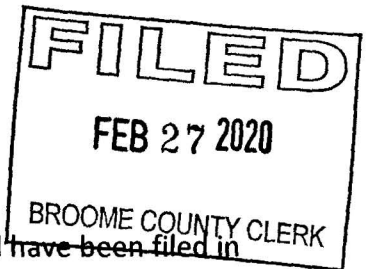
Dated: February 24, 2020  
at Cooperstown, New York

ENTER



Hon. Michael V. Coccoma  
Supreme Court Justice

To: Levene, Gouldin & Thompson, LLP, 450 Plaza Drive, Vestal, NY 13850  
Smith, Sovik, Kendrick & Sugnet, P.C.  
250 South Clinton Street, Suite 600, Syracuse, NY 13202  
Clerk of the Court



The following documents upon which this Decision and Order is based have been filed in the Office of the Broome County Clerk:

Papers on Defendant's Motion *In Limine*:

1. Notice of Motion by Defendant dated January 21, 2020
2. Attorney Affidavit of Kevin E. Hulslander, Esq. executed on January 21, 2020 with Exhibits A – K
3. Affidavit of Graig Sweetland executed on January 20, 2020
4. Affidavit of Jason Tripp executed on January 20, 2020
5. Affidavit of Edward Zemeck executed on January 20, 2020
6. Memorandum of Law dated January 21, 2020

Papers on Plaintiffs' Cross-Motion *In Limine*:

1. Cross Notice of Motion *In Limine* dated January 27, 2020
2. Affidavit of John L. Perticone, Esq. executed on January 27, 2020
3. Affidavit of Mark Lockett executed on January 24, 2020
4. Affidavit of John Coniglio executed on January 24, 2020
5. Copy of EBT Transcript of Graig Sweetland taken on April 4, 2016
6. Copy of EBT Transcript of Jason Tripp taken on May 25, 2016
7. Exhibits A – K
8. Memorandum of Law dated January 27, 2020

Reply Papers from Defendant:

1. Reply Attorney Affidavit of Kevin E. Hulslander, Executed on January 29, 2020
2. Reply Affidavit of Edward Zemeck executed on January 29, 2020 with Exhibit A
3. Reply Memorandum of Law dated January 29, 2020

**Reply Papers from Plaintiff:**

1. **Reply Affidavit of John L. Perticone, Esq. executed on January 30, 2020 with Exhibits A – C.**