

Weekes v Tishman Tech. Corp.
2020 NY Slip Op 31645(U)
May 22, 2020
Supreme Court, Kings County
Docket Number: 521701/2016
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of May 2020

PRESENT

HON. DAWN JIMENEZ-SALTA,

Justice

_____X

Samuel Weekes,

Plaintiff

-against-

Index Number 521701/2016

Tishman Technologies Corporation, Eagle Scaffolding Services, Inc., Forest Electric Corp., Safety and Quality Plus, Inc., Lafata-Corallo Plumbing & Heating, Inc., Rael Automatic Sprinkler Company, Inc., Atlantic Hoisting & Scaffolding, LLC, Olympic Plumbing & Heating Services, Inc., Manhattan Boiler & Equipment Corp., H. & L. Electric, Inc., Greg Logistics, LLC, Urban Foundation Engineering LLC and XYZ Corp.,
Defendants.

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Recitation as required by CPLR 2219(a) of the papers considered in review of:

- 1) Plaintiff Samuel Weekes' ("Weekes") Motion for Partial Summary Judgment Pursuant to CPLR 3212 Against Defendant Tishman Technologies Corporation ("Tishman") According to Labor Law Section 240(1) and Labor Law Section 241(g), dated May 10, 2019 with Counsel's Affirmation in Support dated May 10, 2019 in Addition to Plaintiff's Affidavit, dated May 8, 2019;
- 2) Defendants Tishman, Eagle Scaffolding Services, Inc. ("Eagle"), Rael Automatic Automatic Sprinkler Company, Inc. ("Rael"), Atlantic Hoisting and Scaffolding, LLC ("Atlantic"), Olympic Plumbing & Heating Services, Inc. ("Olympic"), Greg Logistics, LLC ("Greg") and Urban Foundation Engineering, LLC's ("Urban") ("collectively Defendants") Cross Motion for Summary Judgment Pursuant to CPLR 3212, dismissing all claims and cross claims against these Defendants Pursuant to Labor Law Section 240(1), Labor Law Section 241(6), Labor Law Section 200 as well as Common Law Negligence and Granting Such Other and Further Relief, dated August 6, 2019;
- 3) Plaintiff's Affirmation in Opposition to Defendant Tishman's Cross Motion for Summary Judgment and in Reply to Defendant Tishman's Opposition to Plaintiff's Motion for Partial Summary Judgment Pursuant to Labor Law 240(1) and Labor Law 241(6), dated August 12, 2019, all of which submitted on August 14, 2019;
- 4) Plaintiff's Supplemental Memorandum of Law in Support of Partial Summary Judgment Pursuant to Labor Law Section 240(1), dated February 20, 2020;
- 5) Letter from Defendants' Counsel, dated February 26, 2020 in Opposition to Plaintiff's Supplemental Memorandum of Law.

Papers	Numbered
Notice of Motion	Plaintiff 1, Exhs. A-T; Counsel's Affirmation in Support; Plaintiff's Affidavit
Notice of Cross Motion	Defendants 2, Exhs. A-E; Defendants' Memorandum of Law
Answering Affidavits	Plaintiff 3 Plaintiff Supplemental Memorandum of Law 4 Defendants Letter in Opposition 5

Upon the foregoing cited papers, the Decision/Order on this Motion and Cross Motion is as

Follows: This Court denies Plaintiff Weekes' Motion for Partial Summary Judgment Against Defendant Tishman pursuant to Labor Law Section 240(1) and Labor Law Section 241(6). It grants Defendants Tishman, Eagle, Rael, Atlantic, Olympic, Greg and Urban's Cross Motion pursuant to CPLR 3212, dismissing all claims and cross claims pursuant to Labor Law Section 240(1), Labor Law Section 241(6), Labor Law Section 200 as well as common law negligence against all Defendants Tishman, Eagle, Rael, Atlantic, Olympic, Greg and Urban.

BACKGROUND AND PROCEDURAL HISTORY

On December 10, 2013, at approximately 1:30 p.m., Plaintiff Weekes was employed as a sheet metal worker for AABCO, installing air conditioning conduits at 350 Marconi Street, Bronx, New York on the Sixth Floor ("the project"). Although Plaintiff was not assigned and/or authorized to perform such a task, he volunteered to assist one of "the ceiling guys" who was installing pencil rods when that worker from another trade had difficulty in disassembling a Baker's scaffold. Because of a miscommunication between the two men, the other worker dropped the side of the scaffold, causing it to swing horizontally, hitting Plaintiff on the side of his head and face, injuring him. Plaintiff is unable to identify the other worker from the other trade.

According to the City of New York Department of Design and Construction, Construction Management/Build Services Project Specific Contract, dated April 20, 2009, Defendant Tishman was the construction manager but not the general contractor on the 350 Marconi Street project.

Plaintiff testified at his Examination Before Trial ("EBT") on November 8, 2018 that neither Defendant Tishman nor its subcontractors, Defendants Eagle, Rael, Atlantic, Olympic, Greg and/or Urban directed, controlled or supervised his work. He further testified that he never

raised any safety issues to Defendant Tishman.

Marcel Rhoden (“Rhoden”), Safety Director for Defendant Tishman at the project testified at his EBT on January 25, 2019 that Defendant Tishman did not provide the Baker scaffold which was involved in the accident. He further testified that Defendant Tishman did not give any instruction on how to dismantle scaffolding equipment to any of the subcontractors.

Plaintiff commenced this action by the filing of a Summons and Complaint on December 6, 2016.

Defendants Tishman, Eagle, Rael, Olympic, Greg and Urban filed their Answer on January 16, 2017.

Defendant Lafata-Corallo Plumbing and Heating (“Lafata”), Defendant Atlantic Hoisting & Scaffolding LLC (“Atlantic”), Defendant Forest Electric Corp. (“Forest”), Defendant Safety and Quality Plus, Inc. (“Safety”), Defendant H&L Electric, Inc. (“H&L”) and Defendant Manhattan Boiler & Equipment Corp. (“Manhattan”) filed their respective Answers on January 6, 2017; January 12, 2017; February 10, 2017; March 8, 2017; and May 2, 2017.

Defendant Tishman served a Demand for a Verified Bill of Particulars on Plaintiff on January 19, 2017. Plaintiff served a Verified Bill of Particulars on Defendant Tishman on May 4, 2017. Plaintiff served a Supplemental Verified Bill of Particulars on Defendant Tishman on December 3, 2018.

Defendant Lafata, Defendant H&L and Defendant Safety filed their respective motions for summary judgment on April 11, 2017; May 12, 2017; and May 25, 2017. The Court granted the motions on default on July 12, 2017.

A Preliminary Conference was held on August 9, 2017. A Compliance Conference was held on February 1, 2018. A Final Pre-Note Conference was held on August 16, 2018. Plaintiff filed a Motion to Restore on September 18, 2018.

Plaintiff testified at his Examination Before Trial (“EBT”) on November 8, 2018. Defendant Tishman’s Safety Director Marcel Rhoden testified on behalf of Defendant Tishman at his EBT on January 25, 2019.

The Court granted the separate motions for summary judgment by Defendant Forest and Defendant Manhattan on August 14, 2019, dismissing Plaintiff’s complaint and all cross claims against Defendant Forest and Defendant Manhattan.

Plaintiff filed his Notice of Motion for Partial Summary Judgment against Defendant Tishman on May 10, 2019 pursuant to Labor Law Section 240(1) and Labor Law Section 241(6). Defendants Tishman, Eagle, Rael, Atlantic, Olympic, Greg and Urban filed their Notice of Cross Motion pursuant to CPLR 3212 along with a Legal Memorandum of Law, seeking dismissal of all claims and cross claims against them pursuant to Labor Law Section 240(1), Labor Law Section 241(6), Labor Law Section 200 as well as common law negligence on August 6, 2019. Plaintiff filed his Affirmation in Opposition to Defendant Tishman’s Cross Motion for Summary Judgment, dismissing all claims and cross claims against the Defendants pursuant to Labor Law Section 240(1), Labor Law Section 241(6), Labor Law Section 200 as well as common law negligence and in Reply to Defendant Tishman’s Opposition to Plaintiff’s Motion for Partial Summary Judgment pursuant to Labor Law Section 240(1) and Labor Law Section 241(6) on August 12, 2019. Six (6) months after the submission of the parties’ papers to the Court on August 14, 2019, Plaintiff filed a Supplemental Memorandum of Law in Support of his Motion for Partial Judgment pursuant to Labor Law Section 240(1) on February 20, 2020.

Counsel for Defendants Tishman, Eagle, Rael, Atlantic, Olympic, Greg and Urban filed a Letter, dated February 26, 2020 in Opposition to the Supplemental Memorandum of Law.

COURT RULINGS

This Court denies Plaintiff Weekes' Motion for Partial Summary Judgment pursuant to Labor Law Section 240(1) and Labor Law Section 241(6). It grants Defendant Tishman, Eagle, Rael, Atlantic, Olympic, Greg and Urban's Cross Motion for Summary Judgment, dismissing all claims and cross claims against the Defendants pursuant to Labor Law Section 240(1), Labor Law Section 241(6), Labor Law Section 200 as well as common law negligence.

Plaintiff's claims pursuant to Labor Law Section 240, Labor Law Section 241(6) and Labor Law Section 200 are dismissed against Defendant Tishman because Defendant Tishman was a construction manager but not a general contractor on the project. When a construction manager does not have the authority to direct, supervise or control the work which brought about a worker's injury, the construction manager is entitled to summary judgment under the Labor Law. See *Kindlon v. Schoharie Central School District*, 887 NYS2d 310 (3rd Dept., 2009); *Dose v. Jenn-Matt Corp.*, 661 NYS2d 811 (4th Dept., 1997); *Phillips v. Wilmorite, Inc.*, 723 NYS2d 590 (4th Dept., 2001); *Giannas v. 100 3rd Avenue Corp.*, 88 NYS2d 442 (2nd Dept., 2018). Since Plaintiff's actions were voluntary and unauthorized, Defendant Tishman did not and could not have the authority to direct, supervise or control work which was outside of Plaintiff's employment. Because Plaintiff was performing unauthorized work, Defendant Tishman, the construction manager was never delegated that work. When a construction manager was never delegated the construction work in which the injured party was engaged at the time of his injury, there is no liability. See *Wong v. New York Times Co.*, 747 NYS2d 213 (1st Dept., 2002). Accordingly, since Defendant Tishman was the construction manager but not the general contractor, the Labor Law claims against it are dismissed.

Summary judgment is further granted to Defendants Eagle, Rael, Atlantic, Olympic, Greg and Urban because each of these entities is a subcontractor which had no connection to the accident. Consequently, they are not subject to liability under either Labor Law or common law negligence. When a subcontractor is neither a general contractor nor a statutory agent but instead merely a prime contractor responsible for its specific role, there is no liability under the Labor Law. See *Aversano v. JWH Contracting, LLC*, 831 NYS2d 222 (2nd Dept., 2007); *Filchuk v. Lehrer McGovern Bovis Construction, Inc.*, 648 NYS2d 557 (1st Dept., 1996); *Hornicek v. William H. Lane, Inc.*, 696 NYS2d 557 (3rd Dept., 1999); *Fumo v. NAB Construction Corporation*, 798 NYS2d 66 (2nd Dept., 2005).

Absolute liability imposed on owners and general contractors under the Labor Law does not apply to prime contractors without the authority to supervise or control the work being performed at the time of the injury. See *Titus v. Kirst Construction, Inc.*, 843 NYS2d 878 (4th Dept., 2007). Whether a prime contractor will be deemed a statutory agent depends upon whether the prime contractor was delegated the work in which a plaintiff was engaged at the time of his injury. If so, the prime contractor is responsible for the work, giving rise to the duties referred and imposed by the statute. See *Coque v. Wildflower Estates Developers, Inc.*, .818 NYS2d 546 (2nd Dept., 2006).

Plaintiff testified at his EBT that the unidentified worker whom he voluntarily assisted was working on the ceilings, installing pencil rods (ceiling work). Plaintiff further testified that Eagle, Rael, Atlantic, Olympic, Greg and Urban had nothing to do with his work. Since Defendants Eagle, Rael, Atlantic, Olympic, Greg and Urban had no connection to Plaintiff's work or to the unidentified other worker whom Plaintiff voluntarily assisted, none of those subcontractors can be deemed a statutory agent of Plaintiff.

Regarding any claim for common law negligence, there can only be liability against Defendants Eagle, Rael, Atlantic, Olympic, Greg and Urban if any of those subcontractors had a comprehensive maintenance obligation for the premises; if Plaintiff detrimentally relied upon one of those subcontractor's performance of its duties or; if one of them launched a force or instrument of harm. See *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002).

Since Plaintiff's work and the work which caused the accident did not involve any of the subcontractors, Plaintiff fails in any claim that he detrimentally relied upon any of those Defendants. In addition, none of those parties had a comprehensive maintenance obligation for the premises. Because of no connection between any of those entities and Plaintiff's accident, Plaintiff is unable to argue that those entities launched a force or instrument of harm. Thus, the claims against Defendants Eagle, Rael, Atlantic, Olympic, Greg and Urban are dismissed in their entirety.

Since Plaintiff volunteered to perform the task which resulted in his injury, he is not eligible for Labor Law protections. As the Court of Appeals found in *Stringer v. Musacchia*, 11 NY3d 212 (2008), the strict liability provisions of Labor Law Section 240(1) apply to employees but not to persons who volunteer to work on a project. See also *Lipsker v. 650 Crown Equities, LLC*, 917 NYS2d 362 (2nd Dept., 2011); *Navarro v. City of New York*, 905 NYS2d 258 (2nd Dept., 2010); *Mattes v. Joseph*, 723 NYS2d 217 (2nd Dept., 2001). Consequently, it is the employer who decides what tasks are to be performed. Any tasks performed by the employee outside the scope of the employer's assigned tasks are not subject to the Labor Law. See *Doskotch v. Pisocki*, 90 NYS3d 661 (3rd Dept., 2009); *Nelson v. E&M 2710 Clarendon, LLC*, 12 NYS3d 51 (1st Dept., 2015).

Plaintiff's accident does not fall within the hazards covered by Labor Law Section 240. The Second Department has held that Labor Law Section 240 does not apply when a scaffold or

beam swings laterally or horizontally, causing a worker to be injured. See also *Tsatsakos v. Citicorp.*, 744 NYS2d 475 (2nd Dept., 2002); *Palomeque v. Capital Improvement Services LLC*, 43 NYS3d 483 (2nd Dept., 2016); *Turner v. Garten Foods*, 823 NYS2d 182 (2nd Dept., 2006). As the Court of Appeals held in *Toefer v. Long Island Railroad*, 4 NY3d 399 (2005), the horizontal movement of the instrument, striking the plaintiff on the head and propelling him backwards, causing his injury, as horrendous as it is, is not attributable to the sort of elevation-related risk which Labor Law Section 240 was not meant to address. Consequently, since the horizontal or lateral movement which allegedly caused Plaintiff's accident and resultant injury does not fall under Labor Law Section 240, his Labor Law Section 240 claim is dismissed.

Plaintiff's Labor Law Section 241 (6) claim is dismissed against all Defendants because there is no violation of a sufficiently specific Industrial Code alleged by Plaintiff. Although Plaintiff alleged several sections of the Industrial Code, including 23-1.5, 23-1.6, 23-1.7, 23-1.8, 23-2.1(a)(1), 23-3.3, 23-5.1 and 23-5.18, Plaintiff's motion only seeks summary judgment based upon Section 23-5.1(h). However, this Court finds that Defendants in their cross motion have shown that none of the Industrial Code sections are applicable.

Section 23-1.5 on "General Responsibility of Employees" has been found insufficient to support liability under Labor Law Section 241(6). See *Rau v. Bagels N Brunch, Inc.*, 820 NYS2d 111 (2nd Dept., 2008). Section 23-1.6 on "Responsibility of Employees" contains requirement for employees, addressing employee tampering with safety devices. Consequently, it is inapplicable to the circumstances in the current case. See *Lawyer v. Rotterdam Ventures Inc.*, 612 NYS2d 682 (3rd Dept., 1994).

Section 23-1.7 on "Protections from General Hazards" addresses tripping, slipping and falling hazards as well as protection from falling objects which are not applicable to Plaintiff's accident. See *Vatavuk v. Genting New York LLC*, 37 NYS3d 445 (2nd Dept., 2016). Section 23-1.8

on "Personal Protective Equipment" is inapplicable because it addresses items such as eye protection, head protection and foot protection which Plaintiff did not allege.

Section 23-2.1(a) on "Storage of Material and Equipment" pertains to storage and equipment. Thus, it is inapplicable to Plaintiff's accident which occurred during his voluntary dismantling of a scaffold. See *Zamajts v. Cholewa*, 924 NYS2d 163 (2nd Dept., 2011). Section 23-3.3 on "Demolition by Hand" is inapplicable to Plaintiff's voluntary dismantling of a scaffold.

Although Section 23-5.18 on "Manually Propelled Mobile Scaffolds" does have provisions for such scaffolds, it does not address the dismantling of such scaffolds.

The only section on which Plaintiff relies is Section 23-5.1(h) on "Scaffold Erection and Removal". In particular, it states that "Every scaffold shall be erected and removed under the supervision of a designated person." A designated person is a person selected and directed by their employer to perform a specific task or duty. See *Vitolo v. City of New York*, 11 NYS3d 12 (1st Dept., 2015). Since the worker whom Plaintiff voluntarily assisted has been identified only as someone working with the "ceiling guys", there is no evidence that this person was a designated person. Even if Plaintiff were able to establish that this section was violated, there is nothing to show that the failure to have a designated person, supervising the disassembling of the scaffold was the proximate cause of the accident. See *Pontes v. F&S Construction, LLC*, 44 NYS3d 43 (2nd Dept., 2017).

Consequently, since Plaintiff has failed to establish any violation of an Industrial Code section, Labor Law Section 241(6) is dismissed against the Defendants.

Pursuant to Defendants' request in their cross motion, this Court dismisses Labor Law Section 200 and common law negligence claims against all Defendants because Defendants have shown

that Plaintiff is unable to prove that any of the Defendants directed, supervised or controlled Plaintiff's work. In addition, none of the Defendants had actual or constructive notice of any allegedly dangerous condition. When a plaintiff's claims arise out of the means and methods of the work, an owner or contractor will not be held liable under Labor Law Section 200 or common law negligence unless there is proof of supervision or control over the work performed. See *Sullivan v. New York Athletic Club of the City of New York*, 80 NYS3d 93 (2nd Dept., 2018); *Giovanniello v. F.W. Howell Co., LLC* 961 NYS2d 513 (2nd Dept., 2013); *White v. Village of Port Chester*, 940 NYS2d 94 (2nd Dept., 2012).

Moreover, when there is no notice, actual or constructive, Labor Law Section 200 and common law negligence claims are subject to dismissal. See *McKee v. Great Atlantic & Pacific Tea Company*, 905 NYS2d 601 (2nd Dept., 2011); *Capolino v. Judlau Contracting, Inc.*, 848 NYS2d 346 (2nd Dept., 2007); *Mikova v. Alps Mechanical Inc.*, 823 NYS2d 130 (2nd Dept., 2006). Since the accident occurred during the disassembly of a scaffold, it is within the means and methods of the subcontractor. Because Defendant Tishman had no actual or constructive notice of any allegedly dangerous condition, Labor Law Section 200 and common law negligence claims against Defendant Tishman are dismissed.

The Court declines to consider Plaintiff's Supplemental Memorandum of Law, dated February 20, 2020 because it was submitted six (6) months after the submission of the parties' papers. Even if the Court were to do, *Touray v. HFZ 11 Beach Street LLC*, 2020 NY Slip Op 01029 (1st Dept., 2020) is not persuasive since it deals with a different factual situation than the facts presented in the current case.

Based upon the foregoing, it is hereby ORDERED as follows:

Plaintiff Samuel Weekes' motion for partial summary judgment pursuant to Labor Law

Section 240(1) and Labor Law Section 241(6) is DENIED.

Defendants Tishman, Eagle, Rael, Atlantic, Olympic, Greg and Urban's cross motion for dismissal of all claims and cross claims against them pursuant to Labor Law Section 200, Labor Law Section 240(1), Labor Law Section 241(6) as well as common law negligence is GRANTED pursuant to CPLR 3212, and all claims and cross claims against the Defendants are DISMISSED.

This constitutes the Decision/Order of this Court.

DATE: May 22, 2020

Weekes v. Tishman et al (Index Number 521701/2016)



Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

HONORABLE DAWN JIMENEZ-SALTA

J.S.C.