Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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ARTURO CESAR,

Plaintiff,

-against-

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendant.

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Index No.: 700217/18
Mot. Date: 5/18/21
Mot. Seq. 4

The following papers were read on this motion by plaintiff Arturo Cesar for an order granting him summary judgment, pursuant to CPLR 3212, on his Labor Law 240(1) and 241(6) claims against defendant Triborough Bridge and Tunnel Authority,

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 45-51
Memorandum of Law in Support.....	EF 52
Answering Affidavits-Exhibits.....	EF 55-59
Replying Affidavits-Exhibits.....	EF 61-64

Upon the foregoing papers, it is ordered that the motion by plaintiff is denied.

Plaintiff commenced this action alleging liability against defendant, pursuant to Labor Law §§200, 240(1), and 241(6). Plaintiff Arturo Cesar maintains that, on August 3, 2017, he was lawfully working on a project, at the premises, located at the Marine Parkway Bridge, in Queens, New York, performing various bridge painting duties, when he was caused to fall through an opening in a tarp and into the water below, a height of approximately fifty (50) feet. Plaintiff further maintains that he was caused to sustain serious personal injuries. The record reflects that defendant Triborough Bridge and Tunnel Authority is the owner of the subject premises. It is undisputed that non-party, Kiska Construction Co., Inc. (Kiska) was the plaintiff's employer at the time of the accident.

Plaintiff now moves for an order granting him summary judgment, pursuant to

CPLR 3212, on his Labor Law 240(1) and 241(6) claims against defendant Triborough Bridge and Tunnel Authority.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee' s Div. of Stop & Shop, Inc*., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Turning first to plaintiff's claims, under Labor Law 240(1), the plaintiff established a *prima facie* case in support of his claim, under Labor Law 240(1). Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action, pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

"Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either

itself elevated or is positioned below the level where materials or loads are hoisted or secured." (*Orner v Port Authority*, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (*Salinas v Barney Skansa Construction Co.*, 2 AD3d 619 [2d Dept 2003]).

The Court finds that the plaintiff has established a *prima facie* entitlement as to his cause of action, pursuant to Labor Law § 240(1). By virtue of his 50-h hearing and deposition testimony, the plaintiff has demonstrated that the defendant failed to provide him with an adequate safety device while he was working at an elevated height, and that this failure was a proximate cause of his injuries (*see Inga v EBS N. Hills, LLC*, 69 AD3d 568 [2010]; *Barr v 157 5 Ave., LLC*, 60 AD3d 796 [2009]; *Crooks v E. Peters, LLC*, 60 AD3d 717 [2009]). Plaintiff established that, while he was performing various bridge painting duties, he lost his balance and was caused to fall through an opening in the tarp and into the water below - a height of approximately 50 feet, causing him to become injured. Plaintiff further established that he was not provided with proper safety equipment in tha, while he was provided with a safety harness, there were no safety lines in place for him to tie off to where he was working at the time of the accident.

In opposition, the defendant raises a triable issue of fact. Defendant demonstrates that there is a triable issue as to whether it provided the plaintiff with proper protection. Defendant submits, *inter alia*, an affidavit from the Safety Director of Kiska, Brian Van Westervelt, who avers, *inter alia,* that: the tarp in the area where Mr. Cesar had been working at the time of the accident was completely closed and there were no openings through which he could have fallen; "there was a safety cable spanning the area that was within easy reach of Mr. Cesar and which Mr. Cesar could have easily clipped his lanyard onto," and he had both a harness and a place to tie off to–-"either to the safety cable or to the latticework of the bridge structure itself." Defendant also submits an affidavit of defense Construction Site Safety Expert, Martin Bruno, who avers, *inter alia,* that: there was a safety line in the area where the plaintiff was working which the plaintiff could have tied off to that would have prevented this accident. As the defendant submits affidavits from individuals with personal knowledge, which assert that there were safety

devices readily available to the plaintiff, the defendant proffers admissible evidence which raises an issue of fact.

As such, there are triable issues of fact as to whether the defendant is liable, under Labor Law 240(1). Thus, summary judgment is denied to the plaintiff on his Labor Law 240(1) cause of action.

Turning now to the plaintiff's claims, pursuant to Labor Law §241(6), summary judgment shall not be granted as to same. Labor Law 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (*see Toefer v Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v Manocherian*, 66 NY2d 452 [1985]; *Kollmer v Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." *(Rizzuto v LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards," but rather must establish "concrete specifications." (*See Mancini v Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996]). A plaintiff asserting a Labor Law § 241(6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code (*see Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494 [1993]; *Samuel v A.T.P. Dev. Corp*., 276 AD2d 685 [2000]), and that such violation was a proximate cause of his or her injuries (*see Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396 [2005]; *Plass v Solotoff,* 5 AD3d 365, 367 [2004]). Section 241 (6) of the Labor Law imposes strict liability on owners and their agents for injuries that occur to workers irrespective of the owner's or agent's control or supervision of the work site where the work was performed during construction, excavation or demolition (*see Mosher v State of New York*, 80 NY2d 286 [NY 1992]) and where the defendant violated a rule or regulation that sets forth a specific standard of conduct (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 at 501-502).

In the instant case, the plaintiff's Labor Law § 241(6) claim is predicated on violation of Industrial Code Regulation 12 NYCRR 23-1.7(b)(1). Said section states:

> (b) Falling hazards.
> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

The Courts have held that this Industrial Code violation is specific enough to support a Labor Law §241(6) cause of action (*Alonzo v. Safe harbors of the Hudson Housing Dev Fund Co., Inc.,* 104 AD3d 446 [1st Dept 2013; *Restrepo v. Yonkers Racing Corp. Inc*., 105 AD3d 540 [1st Dept 2013]).

Plaintiff established through submission of, *inter alia*, his own examination before trial testimony and his own 50-h hearing testimony that he fell through an opening in a tarp. As such he established a *prima facie* case that defendant violated Industrial Code Regulation 12 NYCRR 23-1.7(b)(1).

In opposition, the defendant raises an issue of fact as to whether it had violated Industrial Code Regulation 12 NYCRR 23-1.7(b)(1), via submission of, *inter alia*, the affidavit of Brian Van Westervelt, the Safety Director for Kiska, who testified, *inter alia*, that the area where Mr. Cesar had been working at the time of the accident was completely closed and there were no openings through which he could have fallen.

As there are triable issues of fact, summary judgment in plaintiff's favor on the Labor Law §241(6) cause of action is not warranted.

Accordingly, it is
ORDERED that the motion by plaintiff is denied.

The forgoing constitutes the decision and order of the Court.

Dated: July 30, 2021

TIMOTHY J. DUFFICY, J.S.C.