SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

TODD GLEASON

INDEX NO. 155840/19

MOT. DATE

- v -

MOT. SEQ. NO. 002

TISHMAN SPEYER PROPERTIES, L.P. et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is an action for personal injuries allegedly sustained in violation of the Labor Law. Defendant, LIC Development Owner, L.P. ("LIC"), now moves for summary judgment dismissing plaintiff's Labor Law §§ 200, 240[1] and 241[6] claims as well as for common law negligence on the grounds that LIC "has no duty to protect against intentional tort or the dangers of criminal activity". LIC further argues that plaintiff's common law negligence and Section 200 claims should be dismissed for lack of notice and because it did not direct, control or supervise the means and methods of plaintiff's work. Finally, LIC argues that the Section 240[1] claim should be dismissed because plaintiff was not exposed to an elevation-related risk and the Section 241[6] claims are not based upon applicable or sufficiently specific provisions of the Industrial Code.

Plaintiff opposes the motion and cross-moves for partial summary judgment on his Section 241[6] claim. LIC opposes the cross-motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. For the reasons that follow, LIC's motion is granted and plaintiff's cross-motion is denied.

The facts are as follows. On June 13, 2016 at approximately 9:30am, plaintiff was injured while operating a hoist. At that time, plaintiff was employed as a hoisting engineer by Turner Construction Company ("Turner') and working at the property located at 28-10 Jackson Avenue, Long Island City, New York (the "premises"). On the date and time of the accident, an employee of United Hoist named Mike Hill turned power to the hoist off while the hoist was in motion, causing plaintiff's alleged injuries. Plaintiff described the accident at his deposition as follows.

> A: Okay. I was hoisting material. I was in the car with the project manager, the site safety guy from Tishman Speyer and the site safety guy for Turner, and we had a load of brick going up in the elevator. And an employee of some other company, I

Dated: 1/12/22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

think it was United Hoist, I don't know, turned the power off while we were in motion, and the car, bang, the car stopped.

Q: So when the car stopped, how did you become injured? Did you fall? Did you hit something?

A: Your momentum of your body is going up, and all of a sudden it's cut off, and I came back down. I reached. There is a handle, the handle for my arm. That's how I injured my arm. Then I injured by hip and my back from the – because it wasn't stable.

...

Q: So your body moved, based on your movements, but you did not actually fall to the ground; is that correct?

A: No. I fell over to the side onto the pile of bricks. I didn't hit the ground but I fell onto them.

Prior to his accident, plaintiff operated the hoist for approximately four months without incident as well as on the date of the accident from 6:30am up until the accident. Plaintiff unequivocally testified that the hoist was operating normally throughout that time. The hoist was owned and installed by United Hoist. Plaintiff acknowledged that the hoist had been inspected two or three times during the four months plaintiff worked at the project. Further, plaintiff admitted that "a mechanic c[a]me down from [] United Hoisting, and he would go over [the hoist] with the inspector from the city." In addition, plaintiff himself "would check it out, you know, make sure the doors worked. I would make it run every, you know, day. Before I took anybody in the car I made sure it was running properly."

The hoist was controlled by a power switch in a box located on a platform. Plaintiff turned the power on before he started operating the hoist on the date of the accident. He testified that he would also turn it off at the end of the day. When asked if anyone else controlled the power switch besides the hoist operator prior to the date of the accident, plaintiff answered "No."

Plaintiff maintained that he had never seen Hill cut power to a hoist before, although plaintiff stated: "I don't watch what he does, no. I didn't. I never saw him doing anything." When asked if he had any prior conversations with Mike Hill, plaintiff testified:

A: One time when he took somebody up to run the car, he took an inspector up to run the car and told the inspector, oh, you can run the people up and down, and I turned around. I said, no. That's not his job. His job is to inspect the car, and we kind of had words after that, and then this happened right after that.

Q: And did this exchange of you telling him that he can't allow the inspector to operate the car up and down, did that occur on June 13, 2016, or on a different day?

A: You know what, it could have been that morning. I doubt it, but John, the project manager was standing right there when I told him, and he says he's right. You cannot let anybody run that car. He told him, yes. Go ahead. Run the car. Like, I can't give that car over to anybody.

Q: Did Mike Hill have authority to run the car?

A: When there was a mechanical problem, yes.

Q: So if there was no mechanical problem being inspected, Mike Hill had no authority to operate the power to hoist number 1?

A: Not unless we were working on it, no.

Q: Okay. And you mentioned that you had words with Mike, so was it an altercation? Was there a little bit of an attitude? Can you describe the demeanor of the conversation?

A: He gave me an attitude. All they said to him and right in front of the project manager, John, is you have no right giving my work to somebody else that's not qualified, and he didn't like what I said. I told him the truth.

Q: Did you have any other similar type of altercations or similar conversations with Mike Hill before the conversations that you just described?

A: Not—no. Not that I recall, no.

Q: Was Mike Hill known at the Queens Plaza project to have any type of reputation as a certain type of worker at the project?

A: He wasn't a popular guy on the job. I'll put it to you that way.

Q: What do you mean by that?

A: He was unpopular. He was Mr. Know-it-all.

Q: Had he had previous altercations with other workers at the project that you saw?

A: No.

Q: Have you heard about him having previous altercations with other workers?

A: No.

...

Q: Do you recall Mike Hill physically threatening you at anytime while working at the Queens Plaza project?

A: He might have, but I didn't pay any attention to him, no.

...

Q: And are you aware if any action was taken against Mike Hill at the site regarding his behavior directly after the accident on June 13th, 2016?

A: He was – I heard he was terminated that day.

LIC has provided to the court a Survey Report dated June 13, 2016 and prepared by Keith Dowd, site safety manager, of Select Safety Consulting Services. In this report, Dowd wrote as follows:

> At approx 9.25 am I observed Todd Gleason car #4 operator and United Hoisting local 1 operator Mike Hill, in a verbal altercation on the 18 floor hoist platform. At this time I SSM Keith Dowd and 4 others (Turner Phil Schneider and 2 men of Rad& D'Aprile) entered Todd's hoist car to go to the upper floor when the discussion between the two men continued and became elevated. When the hoist car doors were shut I heard Mike Gleason state to Todd "I can take you out of service and deem you unfit for service" I believed that to be based on temperament. Todd's current mood. At this time Todd fired back some remarks like "you go call whoever" as we proceeded to leave the 1st floor landing Mike walked in the direction of the control switch when we reached midway between floors 1 and 2 we hit a sudden stop and the men on the car were shifted abruptly.
>
> Upon dropping the men off on their floor 8th, we asked if they we ok (sic) and they replied yes no worries and continued on with their duties. When returning to the 1st floor to discuss and possibly resolve this issue. When we exited the car. Todd and Mike began to continue their altercation; at this time I told both men their personal feelings for each other is not my concern as is the welfare of the men on site and having the hoist car in readiness.
>
> At approximately: 2:30pm Todd Gleason reported to our onsite medic of back pain and numbness in his left leg.
>
> Todd was given Naprocin and an ambulance was called to take him to Elmhurst Hospital.

When plaintiff was asked about Dowd's description of the incident, he admitted that Hill "said something like that" and plaintiff said "don't be a jerk... you have no authority to do that... you do what you have to do. Let me go back to work." LIC has provided a sworn affidavit by Dowd who confirms what he wrote in his survey report. Dowd concludes in his affidavit: "Mike Hill's intentional act of cutting the power switch to the hoist was the sole cause of the incident involving Todd Gleason on June 13, 2016."

In addition, LIC has submitted the sworn affidavit of its Vice President and Secretary, Michael B. Benner. According to Benner, LIC had an ownership interest in the premises on the date of plaintiff's accident. LIC contracted with Turner to perform certain work at the premises. A copy of the LIC/Turner contract has been provided to the court. Benner represents that LIC had no notice of any criminal activity or intentional tort at the Project on or before June 13, 2016. Benner further states that LIC did not direct, supervise or control any work that occurred at the Project, or the means and methods of that work, including any work performed by Turner or United Hoisting. Finally, LIC has submitted the sworn affidavit of Jon B. Halpern, P.E. a professional engineer and consulting engineer in the field of vertical transportation. Halpern opines that the hoist did not fall, and that the sole cause of the accident was the removal of power to the hoist. Thus, Halpern claims that there were no violations of the Labor Law or the Industrial Code.

LIC argues that the plaintiff's Labor Law claims against it fail as a matter of law because it was Hill's intentional act of cutting power to the hoist, rather than a violation of the Labor Law, which was the proximate cause of plaintiff's injury. LIC asserts that Labor Law § 240[1] does not apply because the hoist's abrupt stop was not a fall. Otherwise, LIC maintains that the Section 200 and common law negligence claims must be dismissed because LIC did not have notice nor did it supervise plaintiff's work and the Section 241[6] claim is not predicated upon application or sufficiently specific Industrial Code provisions.

Plaintiff contends that there is no dispute that Labor Law § 241[6] predicated on Industrial Code § 23-7.2(j)(2) was violated. Otherwise, plaintiff argues that LIC has failed to show what action it took to

prevent or protect plaintiff from the danger he complained of, to it, that the power control box was exposed.

In support of his cross-motion, plaintiff has submitted the affidavit of Patrick Carrajat, an elevator consultant. Carrajat asserts that Mike Hill was "operating the hoist" when he cut power to it and that his actions "constitute the unauthorized operation of the elevator (sic)."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court agrees with LIC that Hill's intentional conduct caused plaintiff's alleged injuries, rather than a violation of the Labor Law. Thus, defendant's motion must be granted (*see i.e. Jawara v. BHA, Inc.,* 24 Misc.3d 1201(A) [Sup Ct, Bx Co 2009]). Even if there was a triable issue of fact, LIC's motion would still be granted for the reasons that follow.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

There is no dispute that LIC neither had notice of Hill's propensity to engage in the type of conduct he exhibited on the date of plaintiff's accident. Nor is there any dispute that LIC did not supervise or control plaintiff's work. Thus, the Section 200 and common law negligence claims must be dismissed.

Section 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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.

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "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 the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

LIC has established that the hoist did not fall but rather, that plaintiff's accident occurred due to the usual and ordinary dangers of a construction site. Thus, the Section 240[1] claim must also be severed and dismissed.

Section 241[6]

The only claim which plaintiff raises any argument in support of is his Section 241[6] claims premised upon Industrial Code § 23-7.2(j)(2). The court deems the balance of plaintiff's Section 241[6] claim premised upon other alleged violations of the Industrial Code as abandoned.

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.21(3) and (4) was violated as a matter of law.

Industrial Code § 23-7.2(j)(2) states in pertinent part as follows:

> No person other than such car attendant shall cause or permit the car to move or shall open any car door or gate or hoistway door. The car attendant shall not cause the car to move until he is sure that the car door or gate and the hoistway doors are closed.

On this point, assuming *arguendo* that Hill qualifies as a hoist operator, the court agrees with defense counsel that Hill did not "cause or permit the car to move" but simply operated the power box. Thus, he did not control the movement of the hoist for the purposes of this Industrial Code provision and said provision does not apply. Accordingly, LIC's motion for summary judgment dismissing the Section 241[6] claim is granted and plaintiff's cross-motion is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that LIC's motion for summary judgment is granted, plaintiff's cross-motion is denied, the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/12/22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.