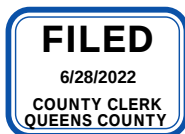


Arrington v City of New York
2022 NY Slip Op 35104(U)
June 23, 2022
Supreme Court, Queens County
Docket Number: Index No. 719180/2019
Judge: Kevin J. Kerrigan
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Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J Kerrigan IA Part 10
Justice

Robert M. Arrington, x

Index
Number 719180/ 2019

Plaintiff,

- against -

Motion
Date December 20, 2021

The City of New York,

Defendant.

Mot. Seq. No. 1

x

The following numbered papers were read on this motion by plaintiff seeking partial summary judgment granting plaintiffs' complaint on the Labor Law §§240 and 241 causes of action, pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits	E15-E28
Answering Affirmation - Exhibit	E30-E32
Reply Affirmation	E33-E34

Upon the foregoing papers, it is ordered that the instant motion for summary judgment on liability, on the Labor Law §§240 and 241 causes of action, pursuant to CPLR §3212, is determined as follows:

On September 24, 2018, plaintiff was employed by non-party, Oliveira Contracting, Inc. (Oliveira), as a construction "pitman" and "laborer," on a City of New York sidewalk renovation project located at the corner of the intersection of 102nd Street and 103rd Avenue, Ozone Park, New York, when he was injured by a piece of concrete that fell from a clamshell bucket attached to a backhoe excavator that hit his right ankle and leg. The New York City Department of Traffic (DOT) contracted with Oliveira to remove and install new pedestrian ramps at certain intersections in Queens, including the subject intersection where this

accident occurred.

Plaintiff's job as a laborer included "ordering the machine," *i.e.*, telling the operator of the backhoe, also an Oliveira employee, what to do. Plaintiff would use a "demo saw" and "jackhammer" to cut and break up the concrete sidewalk, which, upon plaintiff's order, the backhoe operator would then "pull out" with the attached clamshell bucket, and lift into a dump truck open-box bed, to be carried away. Plaintiff alleges that he "stopped" the backhoe, by telling the operator thereof that he was going to use a pinch bar to release a block of concrete near a pole. While plaintiff was working by hand, with his back to the backhoe, the operator picked up another piece of concrete to put in the truck. Plaintiff says he heard a noise from the backhoe, turned around, and saw that "concrete was falling" toward him from above. He attempted to avoid it, but it came in contact with his right ankle and leg, causing severe injuries.

Plaintiff commenced this action against defendant, by service of a summons and complaint, filed in Kings County, on June 27, 2019, alleging negligence and violations of Labor Law §§200, 240 and 241. Issue was joined and defendant moved to change venue to Queens county. The Kings County Court granted the motion, in October 2019, pursuant to a stipulation between the parties, and the file was transferred to Queens County, and assigned the present Index Number, in November 2019.

Plaintiff's motion seeks summary judgment on the causes of action regarding Labor Law §§240 (1) and 241 (6). "[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (See *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (See *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendant (See *Monroy v Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]; *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]). Credibility issues regarding the circumstances of the subject transactions require resolution by the trier of fact (See *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (See *Lopez v Beltre*, 59 AD3d 683,

685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is ‘arguable’ [citations omitted] (See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also, *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (See *Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Charlery v Allied Transit Corp.*, 163 AD3d 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Labor Law § 241(6), imposes a non-delegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (See *Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Fonck v City of New York*, 198 AD3d 874 [2d Dept 2021]; *Rivas-Pichardo v 292 Fifth Ave. Holdings, LLC*, 198 AD3d 826 [2d Dept 2021]; *Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717 [2d Dept 2019]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (See *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2d Dept 2008]). Thus, defendant had a non-delegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of defendant (See *St. Louis v Town of North Elba*, 16 NY3d 411 [2011]; *Fonck v City of New York*, 198 AD3d 874; *Zaino v Rogers*, 153 AD3d 763 [2017]).

“To establish liability under Labor Law §241 (6), a plaintiff ... 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 (See *Reyes v Astoria 31st St. Devs., LLC*, 190 AD3d 872, 874 [2d Dept 2021], quoting *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666 [2d Dept 2020]). In opposition, defendants must demonstrate, that such section did not apply in this case, or

was not violated (See *Guaman v 178 Ct. St., LLC*, 200 AD3d 655 [2d Dept 2021]; *Turgeon v Vassar Coll.*, 172 AD3d 1134 [2d Dept 2019]; *Quizhpi v South Queens Boys & Girls Club, Inc.*, 166 AD3d 683 [2d Dept 2018]; *Tuapante v LG-39, LLC*, 151 AD3d 999 [2017]). Such provision must state “a specific standard of conduct and not simply a recitation of common law safety principles” (See *St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Golec v Dock St. Constr., LLC*, 186 AD3d 463 [2d Dept 2020]).

Plaintiff asserts that defendant violated Labor Law §241 (6), insofar as it is based upon 12 NYCRR 23-9.4 (h)(5), entitled “Power shovels and backhoes used for material handling.” Defendant opposes, alleging that such section of the Industrial Code is “either not specific enough to give rise to the duty imposed by Labor Law §241 (6), or (is) inapplicable to the facts of this case” (See *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014]). While such provision may serve as a predicate for liability under Labor Law §241(6), as it involves a violation of a “specific, positive command” or “concrete specification” of the Industrial Code (See *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350), defendant, in opposition, has demonstrated that, contrary to plaintiff’s argument, the backhoe was not “[c]arrying or swinging suspended loads” at the time of the accident (See 12 NYCRR 23-9.4 (h) (5); *Cunha v Crossroads II*, 131 AD3d 440 [2d Dept 2015]). Plaintiff has failed to adequately rebut such contention. As such, defendant has shown its entitlement to judgment as a matter of law determining that such regulation is inapplicable to, and was not violated in, this case (See *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552). Consequently, this branch of plaintiff’s motion for summary judgment, brought under Labor Law §241 (6), is denied (See *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v. New York Univ. v Medical Center*, 64 NY2d 851 [1985]).

Labor Law §240 (1) protects a worker from “specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured,” and, to be applicable, the harm must flow “directly ... from the application of the force of gravity to an object or person” (See *Ross v Curtis Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (See *Saint v Syracuse Supply Co.*, 25 NY3d 117 [2015]; *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658 [2014]; *McCarthy v City of New York*, 173 AD3d 1165 [2d Dept 2019]; *Zamora v 42 Carmine St. Associates, LLC*, 131 AD3d 531 [2d Dept 2015]), and it “imposes a non-delegable duty upon owners, general contractors, and their agents to provide safety devices necessary to protect workers from the risks inherent in elevated work sites” (See *Martin V Hillside Enters., LLC*, 185 AD3d 809, 810 [2d Dept 2020] quoting *Vaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 925 [2d Dept 2017]; see *McCarthy v Turner Constr.*,

Inc., 17 NY3d 369 [2011]; *Orellana v 7 W. 34th St., LLC*, 173 AD3d 886 [2d Dept 2019]; *Vicuna v Vista Woods, LLC*, 168 AD3d 1124 [2d Dept 2019]). Liability is imposed where there exists a hazard contemplated under the statute; a failure to utilize a, or the use of an inadequate, safety device enumerated therein; and “plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (See *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]; *Soczek v 8629 Bay Parkway, LLC.*, 193 AD3d 1093 [2d Dept 2021]; *Zoto v 259 W. 10th, LLC*, 189 AD3d 1523 [2d Dept 2020]; *Lemus v New York B Realty Corp.*, 186 AD3d 1351 [2d Dept 2020]; *Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]).

Plaintiff must demonstrate that at the time of the subject occurrence, the safety device provided required securing for the purpose of the undertaking at hand, and failed due to “the absence or inadequacy of a safety device of the kind enumerated in the statute” (See *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). “The availability of a particular safety device will not preclude liability ‘if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures’ ” (See *Munzon v Victor at Fifth, LLC*, 161 AD3d 1183, 1184 [2d Dept 2018], quoting *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006]; *Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924 [2d Dept 2017]). Where there is no statutory violation, or where a securing device of the type enumerated in the statute would not be necessary (See *Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Garcia v Market Assoc.*, 123 AD3d 661 [2014]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2013]), or where the plaintiff’s actions are the sole proximate cause of his or her own injuries (See *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Loretta v Split Dev. Corp.*, 168 AD3d 823 [2d Dept 2019]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712 [2017]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700 [2017]), there can be no recovery under Labor Law §240 (1).

“To recover on a cause of action pursuant to Labor Law §240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident” (See *Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2014]; see *Berg v Albany Ladder Co., Inc.*, 10 NY3d 902 [2008]; *Andres v North 10 Project, LLC*, 192 AD3d 953 [2d Dept 2021]; *Soczek v 8629 Bay Parkway, LLC.*, 193 AD3d 1093; *Lozado v St. Patrick’s RC Church*, 174 AD3d 879 [2d Dept 2019]; *Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]; *Lorde v Margaret Tietz Nursing & Rehabilitation Ctr.*, 162 AD3d 878 [2d Dept 2018]; *Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813 [2d Dept 2018]). In this matter, plaintiff must demonstrate that at the time of the subject occurrence, for the purpose of the undertaking at hand, there existed an “absence or inadequacy of a safety device of the kind enumerated in the statute” (See *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Where there is no statutory violation, or where a securing device of the type

enumerated in the statute would not be necessary (See *Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Benavides-Portillo v G.B. Constr. & Dev., Inc.*, 149 AD3d 681 [2d Dept 2017]; *Garcia v Market Assoc.*, 123 AD3d 661 [2d Dept 2014]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2d Dept 2013]), or where the plaintiff's actions are the sole proximate cause of his or her own injuries (See *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Yaguachi v Park City 3 & 4 Apts., Inc.*, 185 AD3d 635 [2d Dept 2020]; *Loretta v Split Dev. Corp.*, 168 AD3d 823 [2d Dept 2019]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712 [2d Dept 2017]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700 [2d Dept 2017]), there can be no recovery under such statute. "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)" (See *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 267; see *James v City of New York*, 166 AD3d 739 [2d Dept 2018]; *Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016]).

Defendants' claim that plaintiff's injuries were not "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (See *Christie v Live Nation Concerts, Inc.*, 192 AD3d 971, 972 [2d Dept 2021] quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]), is without merit, according to the facts presented herein. Plaintiff has stated that the clamshell bucket attached to the backhoe was to be raised high enough to allow it to unload its contents into the bed of the truck - a height of approximately ten feet. When plaintiff first noticed the "falling," "100 pound" piece of concrete, it was above his head. Plaintiff proffered an affidavit from the backhoe operator at the time of the accident, who observed that the "clamshell bucket was not able to hold the piece of concrete because it opened up a bit" and stated, simply, that it was "not strong enough to hold that piece of concrete." Contrary to defendant's assertions, such sworn statements are deemed admissible for the purposes of this motion. While "[a]s a general principle of common-law evidence, lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts" (See *People v Russell*, 165 AD2d 327, 332 [2d Dept 1991]; *Gray v Brooklyn Heights R.R.*, 1785 NY 448 [1903]; *People v Hackett*, 228 AD2d 377 [1st Dept 1996]), "lay persons have been permitted to give opinion evidence only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression" (See *Kravitz v Long Is. Jewish-Hillside Med. Center*, 113 AD2d 577, 581-582 [2d Dept 1985]). The backhoe operator's first statement consisted only of facts, and what might not be considered "facts" in the second statement, still qualified as admissible opinion under *Kravitz*.

Through such testimony, plaintiff has, *prima facie*, adequately asserted that the subject "piece of concrete" was of excessive weight and generated a significant force when

it was dropped. The fact that it may have “only (fallen) a short distance, given the combined weight ... of its load, and the force it was able to generate over its descent, this difference was not de minimis” (See *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; see *Touray v HFZ 11 Beach Street, LLC*, 180 AD3d 507 [1st Dept 2020]; *Marrero v 2075 Holding Co., LLC*, 106 AD3d 408 [1st Dept 2013]), leaving extant only the issue of whether plaintiff’s injuries were caused by “the failure to use ... a safety device of the kind enumerated therein (Labor Law § 240 [1]; See *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1; *Wiski v Verizon New York, Inc.*, 186 AD3d 1590, 1590 [2d Dept 2020]); *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820 [2d Dept 2017]). As such, defendants have failed to show that “plaintiff’s injuries did not result from the type of elevation related hazard to which the statute applies” (See *Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2d Dept 2012])

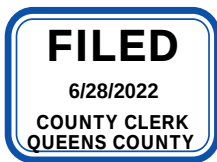
Labor Law §240 (1) does not automatically apply simply because an object fell and injured a worker (See *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658). “A plaintiff must show that the object fell ... because of the absence or inadequacy of a subject safety device of the kind enumerated in the statute” (See *Narducci v Manhasset Bay Assoc.*, at 268), and “that he was not provided with necessary protection from the gravity-related risk of his construction work, and that the absence of the necessary protection was a proximate cause of his injuries” (See *Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1024 [2d Dept 2018]; *Ramos-Perez v Evelyn USA, LLC*, 168 AD3d 1112 [2d Dept 2019]). Plaintiff has stated that he was not provided with any “safety devices” sufficient to protect him from a heavy object falling from above.

Further, although plaintiff alleged he instructed the backhoe operator to “stop” the operation of the machine, which said operator apparently disregarded, such “triable issues of fact” (See *Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]; *Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865 [2d Dept 2016]), is not one which impacts whether a violation of the statute, i.e., the absence of a safety device of the kind specified therein, was a contributing cause of the accident and a proximate cause of plaintiff’s injury (See *Robinson v East Med Ctr., LP*, 6 NY3d 550 [2006]; *Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280; *Weininger v Hagedorn & Co*, 91 NY2d 958; *Cacanoski v 35 Cedar Place Assoc., LLC*, 147 AD3d 810 [2d Dept 2017]). Such issue of fact is insufficient to negate plaintiff’s *prima facie* entitlement to judgment on a violation of Labor Law §240 (1) (See *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758 [2d Dept 2018]; *Alvarez v Vingsan, L.P.*, 150 AD3d 1177 [2d Dept 2017]), and the branch of plaintiff’s motion seeking summary judgment under Labor Law §240 (1) is granted.

The parties’ remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the branch of plaintiff's motion seeking summary judgment on his Labor Law §240 (1) cause of action is granted, and the branch based on § 241 (6) is denied.

Dated: June 23, 2022



A handwritten signature in black ink, appearing to be "KJ Kerrigan", written over a horizontal line.

Kevin J. Kerrigan, J.S.C.