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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

MATTHEW CARAVELLO and ROSEANN CARAVELLO,
Plaintiff(s),

- v -

THE CITY OF NEW YORK, HUDSON RIVER PARK TRUST, SKANSKA USA, INC. and SPEARIN, PRESTON & BURROWS, INC.,
Defendant(s).

INDEX NO. 109449/09
MOTION DATE 08-03-2011
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 12 were read on this motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2,
Answering Affidavits — Exhibits ____ cross motion	3, 4, 7- 10
Replying Affidavits	5, 6, 11, 12

Cross-Motion: Yes X No

Upon the foregoing papers, it is Ordered that defendants, HUDSON RIVER PARK TRUST and SKANSKA USA, INC.'s , motion for summary judgment is granted, to the extent that plaintiffs' Federal Longshore and Harbor Worker's Compensation Act (LHWCA) causes of action; Labor Law §241 [6], those causes of action pertaining to violations of Industrial Code Sections (12 N.Y.C.R.R.), 23-1.5[b], 23-1.5[c][1] and [3], 23-1.7[d], 23-1.7[e][1] and [2], 23-1.22[b][1] and [2], 23-1.22[b][4], 23-2.1[a] [2], 23-2.2, 23-2.4 and 23-3; and the causes of action against Skanska USA, Inc. pursuant to Labor Law §200 are severed and dismissed. The remainder of the motion is denied.

Matthew Caravello was employed as a dock builder on a project known as Segment 5, expanding a section of pier located between 22nd and 27th Street and Twelfth Avenue along the Hudson River, which was to become part of a public park. He was involved in driving concrete piles, and setting and removing false work. He claims that cut metal H-beams had been placed so that they blocked direct access to the gangway leading to an exit. The H-beams were approximately 26" off the ground. On October 23, 2008, after he finished the day's work and was heading to his car, He walked approximately thirty feet along the length of the H-beams and as he approached the last part of the beam it twisted downwards causing his right leg to fall onto a concrete precast slab. He claims that his knee twisted and was injured as a result of the fall. Plaintiffs seek to recover for injuries pursuant to the Federal Longshore and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §905 and §933, pursuant to Labor Law §200, §240 [1] and §241 [6].

Hudson River Park Trust and Skanska USA Inc., hereinafter referred to as "the defendants," seek summary judgment claiming that LHWCA pre-empts New York's Labor Law against all defendants, and they are not liable under LHWCA. Defendants

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

claim that Labor Law §200, §240[1]1 and §241 [6] , do not apply to them.

The plaintiffs discontinued their action against Spearin, Preston & Burrows, Inc., by stipulation dated August 6, 2010 [Mot. Exh. I]. The action was discontinued against the City of New York by stipulation dated December 20, 2010 [Mot. Exh. J].

Plaintiffs oppose the motion claiming that LHWCA applies and does not pre-empt New York Labor Law §200, §240 [1] and §241 [6] ,which also apply.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Federal maritime law and admiralty jurisdiction does not necessarily supersede and preempt New York State Labor Law. In determining whether the New York State Labor Law should be preempted, the court should take into consideration, "whether the State rule conflicts with Federal Law, hinders uniformity, makes substantive changes, or interferes with the characteristic features of maritime law or commerce"(Cammon v. City of New York, 95 N.Y. 2d 583, 744 N.E. 2d 114 [2000]). Local laws that control liability issues concerning contractors and landowners within the state as opposed to the "negligence of vessel" do not have to be preempted (Lee v. Astoria Generating Company, L.P., 13 N.Y. 3d 382, 920 N.E. 2d 350, 892 N.Y.S. 2d 294 [2009]). An employee can receive benefits under LWHCA and also bring Labor Law claims against a landowner or contractor as long as there are no far-reaching implications to maritime commerce or threat to the uniformity of federal maritime law. Important state interests in protecting the health and safety of workers should not be displaced where there is no potential impact on federal maritime commerce or regulation (Cammon v. City of New York, 95 N.Y. 2d 583, supra and Lee v. Astoria Generating Company, L.P., 13 N.Y. 3d 382, supra).

LHWCA provides longshoremen and others engaged in maritime employment with no-fault workers' compensation benefits for injuries sustained in the course of employment. LHWCA §905[a] prevents employees from seeking any other remedy against their employers. LHWCA §933 permits employees to recover for injuries from third parties, other than employers, for negligence and prevents the need to make an election between compensation and damages (Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74, 100 S. Ct. 925, 63 L.Ed. 2d 215 [1980]). LHWCA §905[b] incorporates LHWCA §933 [a], but prohibits employees from seeking recovery against the owner of the vessel except as to negligence actions (Emmanuel v. Sheridan Transportation Corp., 10 A.D. 3d 46, 779 N.Y.S. 2d 168 [N.Y.A.D. 1st Dept. 2004] and Lee v. Astoria Generating Company, L.P., 13 N.Y. 3d 382, 920 N.E. 2d 350, 892 N.Y.S. 2d 294 [2009]).

Defendants have not made a prima facie showing entitling them to summary judgment based on preemption under LWHCA. Although the plaintiff was injured on a gangway located on navigable waters, he was not involved in an activity that would affect maritime commerce. Defendants have failed to sufficiently establish that the construction's proximity to Chelsea Piers or that it is located along the Hudson River, would directly affect maritime commerce. The defendants misconstrue the meaning of "local in nature" by their claim that the project is not local because the owner of the land is the State of New York. Laws that control liability issues concerning contractors and landowners within the state are "local in nature" as opposed to the "negligence of a vessel" which has federal maritime implications. The plaintiffs' labor law claims which reflect the state's interests in protecting health and safety of workers do not conflict with or threaten the uniformity of maritime law.

The defendants have established a prima facie case for summary judgment concerning the plaintiffs' LHWCA §933 [a] and §905[a],[b] claims. LHWCA §933, permits claims against third parties but the plaintiff has not sufficiently met their burden of proof establishing that the causes of action under federal maritime law would apply to the defendants. LHWCA §905[a] only applies to employers and LHWCA §905[b] only applies to the owner of the vessel. Neither Skanska USA Inc. or the Hudson River Park Trust are the employers of Matthew Caravello or the owners of the vessels involved in this action. The plaintiffs have not sufficiently met their burden of proof to sustain the LHWCA causes of action against the defendants.

On October 23, 2008, Matthew Caravello's duties included cutting steal H-beams with an acetylene torch, eventually they would be hoisted by crane to be placed in a dumpster. He left the beams and went to work on a barge where he burned holes in the spud until he finished working for the day [Mot. Exh. E, pp 39, 47]. He used upside down J-Hooks to get to work and did not observe the metal H-beams when he started work on October 23, 2008 [Mot. Exh.E, p. 38, 56]. At approximately 1:40pm, after he finished working for the day, he returned his life jacket to a shanty located on a nearby barge for storage [Mot. Exh. E, pp 48-50,52]. After returning the life jacket, he crossed to a second barge, and went up metal H-beams to get across the gangway which connected to the precast slab which had upside down metal hooks sticking up. He needed to walk over the precast slab after the gangway and over the seawall to get to where he parked his car [Mot. Exh. E, pp.54-57]. He testified that cut metal H-beams had been placed so that they blocked direct access to the gangway leading to an exit. The H-beams were approximately 26" off the ground [Mot. Exh. E, pp.57- 59]. He walked approximately thirty feet along the length of the H-beams with an operating engineer [Mot. Exh. E , p 51,57-60]. As he approached the last part of the beam he was standing on, it twisted downwards causing his right leg to fall onto a concrete precast slab between upside down metal hooks. He claims that his knee twisted and was injured as a result of the fall [Mot. Exh. E pp.62-65].

Pursuant to an agreement dated April 3, 1999, the Hudson River Park Trust leased the property from the State of New York and retained a possessory interest in the premises [Mot. Exh. R]. Although a lessee, Hudson River Park Trust was listed as owners in the consultant agreement dated October 17, 2005, with Skanska USA Inc. [Mot. Exh.S]. Pursuant to the agreement Skanska USA, Inc. was required to be a

liaison between the Hudson River Park Trust, the Architect and all other contractors. Skanska USA, Inc. was also required by contract to inspect the premises daily and advise contractors of the need for corrective work [Mot. Exh.S].

Brian Joseph testified on behalf of Skanska USA, Inc., that on October 21, 2008, he created a memorandum which was sent to Jeff Glennon of Spearin , Preston and Burrows, plaintiff's employer, which referred to the removal of metal piles. The Hudson River Park Trust was included in Skanska USA, Inc.'s safety meetings and memorandums [Mot. Exh. L, pp 14-18].

Peter Kelly, a project manager testified on behalf of the Hudson River Park Trust that the owner of the land was the State of New York. The Hudson River Park Trust leased the premises, but was responsible for overseeing the project and observed the construction. Peter Kelly reported to Mark Boddewyn, the Vice-President of Design and Construction for the project. Peter Kelly testified that a representative of the Hudson River Park Trust would attend meetings between contractors and Skanska USA Inc., the construction manager [Mot. Exh. K pp. 14, 18-26, 32].

The purpose of Labor Law §240[1], also known as the "scaffold law" is to protect construction workers by imposing strict liability on "owners, contractors and their agents," for violations which proximately cause injuries. Labor Law §240[1] is a strict and absolute liability statute, the comparative negligence of the worker is not a defense. Strict liability applies regardless of whether there was actual exercise of supervision and control over the work performed (Sanatass v. Consolidated Investing Company, 10 N.Y. 3d 333, 887 N.E. 2d 1125 [2008] and Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004]). Lessees can be deemed "owners" within the meaning of the statute (Ferlucka] v. Goldman Saks & Co., 12 N.Y. 3d 316, 908 N.E. 2d 869, 880 N.Y. 2d 879 [2009]). Labor Law §240[1], is to be construed liberally to accomplish its purpose, however, it is limited to "special hazards" involving elevation differentials (Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 [1993]). An accident alone is not sufficient to establish a Labor Law §240[1] violation or causation, because not every worker that falls at a construction site is covered under the statute. Recovery does not extend to harm resulting from routine workplace risks (Runner v. New York Stock Exchange, 12 N.Y. 3d 599, 922 N.E. 2d 865, 895 N.Y.S. 2d 279 [2009], and Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494,supra). The statute also applies to stationary objects, liability attaches to objects that need securing. The standard involved in securing an object, is the presence of a foreseeable elevation risk in light of the work being performed (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263, 841 N.Y.S. 2d 249 [N.Y.A.D. 1st Dept. 2007]).

The plaintiff has the burden of showing that protection was needed from the effects of gravity, that a risk of elevation based injury exists, and that the owner or contractor did not provide adequate safety devices (Broggy v. Rockefeller Group, Inc., 8 N.Y. 3d 675, 870 N.E. 2d 1144, 839 N.Y.S. 2d 714 [2007]). In determining whether an elevation hazard exists there is, "no bright line height differential." Defendants have been found liable over a fall that was only two and a half feet (Aurlemma v. Biltmore Theater, LLC, 82 A.D. 3d 1,917 N.Y.S. 2d 130 [N.Y.A.D. 1st Dept. 2011] citing to Lelek v.

Verizon, N.Y., Inc., 54 A.D. 3d 583, 863 N.Y.S. 2d 429 [N.Y.A.D. 1st Dept. 2008] and Megna v. Tishman Constr. Corp., 306 A.D. 2d 163, 762 N.Y.S. 2d 63 [N.Y.A.D. 1st Dept. 2003]). The statute has been applied when the plaintiff was injured while on a break, where the device involved was used as a staging area or an entryway to the work being performed and the risk of injury was foreseeable (Morales v. Spring Scaffolding, Inc., 24 A.D. 3d 42, 802 N.Y.S. 2d 41 [N.Y.A.D. 1st Dept., 2005]).

The defendants have not sufficiently established that they are entitled to summary judgment pursuant to Labor Law §240[1]. The plaintiffs have met their burden of proof, establishing that there remain issues of fact concerning the need for protection from the effects of gravity and the existence of an elevated risk. Skanska USA, Inc. and Hudson River Park Trust were aware of a potential risk from piles of metal beams as of October 21, 2008, two days before the accident. Matthew Caravello had to walk up over the gangway and pre-cast slab to exit the work site, the unsecured H-beams were approximately two feet off the ground and thirty feet long, potentially blocking passage, and were a possible gravity-related risk due to elevation. The fact that he was finished working at the time of the accident, does not necessarily eliminate liability since the injuries occurred in an area where he had performed work earlier in the day, and the exit and entrance to the job site was potentially blocked. There remain issues of fact concerning whether the defendants had sufficient notice of the hazard and that the risk of injury from using the beams was foreseeable. There also remain issues of fact concerning whether the area could have been secured or an alternate safe means of entrance or egress provided to and from the job site.

Labor Law §241[6] establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Padilla v. Frances Schervier Housing Development Fund Corporation, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [N.Y.A.D. 1st Dept., 2003] citing to Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, supra). To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the injuries. The Industrial Code section cited must be a "positive command," and not a reiteration of common law negligence (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263, supra citing to Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, supra). Causes of action pursuant to Labor Law §241(6), are subject to valid defenses of contributory negligence and comparative negligence (Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, supra).

The plaintiffs in Item 23 of their Verified Bill of Particulars dated September 8, 2009 [Opp. Exh. K], claim that the following Industrial Code Sections (12 N.Y.C.R.R.) were violated, 23-1.5[b], 23-1.5[c][1] and [3], 23-1.7[d], 23-1.7[e][1] and [2], 23-1.22[b][1] and [2], 23-1.22[b][4], 23-2.1[a][1] and [2], 23-2.2, 23-2.4 and 23-3.3.

Section 23-1.5 of the Industrial Code has been determined to be a generic directive that is insufficient to support causes of action made pursuant to Labor Law §241[6] (Sihly v. New York City Transit Authority, 282 A.D. 2d 337, 723 N.Y.S. 2d 189 [N.Y.A.D. 1st Dept., 2001]). Sections 23-1.5[b], 23-1.5[c][1] and [3] are insufficient to support plaintiffs' Labor Law §241[6] causes of action. An "open area" that is used between the job site and the street is not a "passageway, walkway and/or working area" as contemplated by Section 23-1.7 [d], [e][1] (Meslin v. New York Post, 30 A.D. 3d

309, 817 N.Y.S. 2d 279 [N.Y.A.D. 1st Dept., 2006] and Dalanna v. City of New York, 308 A.D. 2d 400, 764 N.Y.S. 2d 429 [N.Y.A.D. 1st Dept., 2003]). Matthew Caravello was injured in an open area therefore Section 23-1.7 [d], [e][1] does not apply. Industrial Code Section 23-1.7[e] [2], involves tripping over debris, tools or sharp projections in a work area. The plaintiff did not trip therefore Industrial Code Section 23-1[e] [2] does not apply. Industrial Code Section 23-1.22 [b][1] pertains to runways and ramps used for motor vehicles and does not apply to the facts of this case. Section 23-1.22 [b][2], [4] applies to runways or ramps used by people. There is no indication based on the facts that Section 23-1.22 [b][2] applies because the H-beams were intended to be used as a runway or ramp and no proof the gangway was unstable. Section 23-1.22 [b] [4] applies to a ramp and runway "...which is located at, or extends to, a height of more than four feet above the ground, grade, floor, or equivalent surface..," the plaintiffs have not submitted proof that the gangway or the beams in this action extends more than four feet. Section 23-2.1 [a][2] applies to excessive weight and a danger to, "any person beneath such edge," it does not apply to the facts of this case. Section 23-2.2 applies to concrete work, braces and supports involved in the pouring of concrete. In this case the H-beams were stacked for purposes of being removed and were not involved in the pouring of concrete, therefore Section 23-2.2 does not apply. Industrial Code Section 23-2.4, refers to flooring requirements in tiered building construction being erected by tower crane or derrick. There were no tiered buildings being constructed at the site therefore Industrial Code Section 23-2.4 does not apply. Section 23-3.3 applies to demolition by hand, in this case, a crane which is a mechanical device was involved, therefore, this section does not apply.

Industrial Code Section 23-2.1 [a][1] applies to the storage of material or equipment and states, "material piles shall be stable under all conditions" and that they be located so that they do not obstruct, "any passageway, walkway, stairway or other thoroughfare." A claim made pursuant to Section 23-2.1 [a][1], is specific enough to sustain Labor Law §241 [6] causes of action (Tucker v. Tishman Const. Corp. of New York, 36 A.D, 3d 417, 828 N.Y.S. 2d 311 [N.Y.A.D. 1st Dept. 2007]). The defendants have not sufficiently established that Section 23-2.1 [a][1] does not apply in this case or that Michael Caravello's contributory negligence caused his injuries. There remains issues of fact as to whether the H-beams were stored so that they obstructed the "thoroughfare" and prevented any other means of exiting on the precast and gangway.

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site. An implicit precondition to the common law duty is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury, mere directions as to the time and quality of the work is not enough to impose liability (Esposito v. New York City Industrial Development Agency, 305 A.D. 2d 108, 760 N.Y.S. 18 [N.Y.A.D. 1st Dept., 2003] aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 [2003] and Dalanna v City of New York, 308 A.D. 2d 400, 764 N.Y.S. 2d 429 [N.Y.A.D. 1st Dept., 2003]). A general duty to comply with safety regulations or to stop work for safety reasons does not render a construction manager liable (Burkoski v. Structure Tone, Inc., 40 A.D. 3d 378, 836 N.Y.S. 2d 130 [N.Y.A.D. 1st Dept. 2007] and Dalanna v. City of New York, 308 A.D. 2d 400, 764 N.Y.S. 2d 429 [N.Y.A.D. 1st Dept. 2003]). A lessee of a pier can be liable under Labor Law § 200 if it retained control of the work being performed at the premises. An issue of

fact is created if as a consequence of the construction manager's inspection, the lessee had notice of the alleged hazard (Olsen v. James Miller Marine Service, Inc., 16 A.D. 3d 169, 791 N.Y.S. 2d 92 [N.Y.A.D. 1st Dept., 2005]).

Skanska USA, Inc., has made a prima facie showing of entitlement to summary judgment concerning the Labor Law § 200 causes of action . Skanska USA, Inc. was the construction manager, it did not supervise Mark Caravello's work. Plaintiffs' have sufficiently raised issues of fact concerning whether Labor Law § 200 applies to Hudson River Park Trust. There remain issues of fact concerning whether the Hudson River Park Trust was given sufficient notice of the hazard concerning placement of the metal piles. The notice would be a consequence of its construction manager Skanska USA Inc.'s regular safety meetings which they were notified of and attended, and the memorandum dated October 21, 2008, two days before the accident. There also remains an issue of fact concerning whether Hudson River Park Trust retained supervisory control over the activity performed by Spearin , Preston and Burrows at the construction site.

Accordingly, it is ORDERED that defendants HUDSON RIVER PARK TRUST and SKANSKA USA, INC.'s motion for summary judgment is partially granted, plaintiffs' Federal Longshore and Harbor Worker's Compensation Act (LHWCA) causes of action against said defendants, plaintiffs' causes of action pursuant to Labor Law §241 [6] pertaining to violations of Industrial Code Sections (12 N.Y.C.R.R.), 23-1.5[b], 23-1.5[c][1] and [3], 23-1.7[d], 23-1.7[e][1] and [2], 23-1.22[b][1] and [2], 23-1.22[b][4], 23-2.1[a] [2], 23-2.2, 23-2.4 and 23-3.3,and the causes of action against Skanska USA, Inc. pursuant to Labor Law §200 are severed and dismissed, and it is further,

ORDERED that plaintiffs' causes of action against HUDSON RIVER PARK TRUST and SKANSKA USA, INC. pursuant to Labor Law §240 [1] and Labor Law §241 [6] pertaining to violation of Industrial Code Section Section 23-2.1 [a][1] , and plaintiffs' causes of action pursuant to Labor Law §200 against HUDSON RIVER PARK TRUST, remain in effect, and it is further,

ORDERED that the action shall continue to mediation and/or trial with the remaining defendants solely as to the plaintiffs' remaining causes of action .

This constitutes the decision and order of this court.

Dated: September 12, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

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