Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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MIGUEL L. TRUJILLO,

Plaintiff,

Index No: 12894/10
Motion Date: 5/10/12
Motion Cal. No: 30
Motion Seq. No: 2

-against-

M.A. ANGELIADES, INC.,

Defendant.

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The following papers numbered 1 to 19 read on this motion for an order, pursuant to CPLR § 3212, for partial summary judgment as to liability on plaintiff's Labor Law §2 40(1) and Labor Law § 241(6) claims as against defendant; and upon this motion by defendant, pursuant to CPLR §§ 3211 and 3212, dismissing all claims.

	PAPERS NUMBERED
Notices of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 11
Answering Affidavits-Exhibits.....	12 - 15
Reply.....	16 - 19

Upon the foregoing papers, it is hereby ordered that the motions are disposed of as follows:

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

A cause of action under section 240(1) of the Labor Law, imposes a nondelegable duty upon owners and general contractors which applies when an injury is the result of one of the elevation-related risks contemplated by that section, which prescribes safety precautions to protect laborers from unique gravity-related hazards such as falling from an elevated height or being struck by a falling object where the work site is positioned at or below the level where materials or loads are being hoisted or secured. See, Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1 (2011); Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335 (2011); Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); La Veglia v. St. Francis Hosp., 78 A.D.3d 1123 (2nd Dept. 2010); Novak v. Del Savio, 64 A.D.3d 636 (2nd Dept. 2009) . The section provides, in pertinent part, the following: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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."

The central premise triggering Labor Law § 240(1) is "that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability." Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1, 7 (2011). Thus, "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity.'" Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625, 627 (2nd Dept. 2007); see, Cohen v. Memorial Sloan-Kettering Cancer Center, 11 N.Y.3d 823 (2008); Nieves v. Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999).

In the context of the falling objects, "in order to recover damages for violation of the statute, the 'plaintiff must show more than simply that an object fell causing injury to a worker.' A plaintiff must show that, at the time the object fell, it was 'being hoisted or secured' (citations omitted) or 'required securing for the purposes of the undertaking.'" Novak v. Del Savio, 64 A.D.3d 636 (2nd Dept. 2009); see, Ravinov v. Popeye's, 68 A.D.3d 1085 (2nd Dept. 2009). "Moreover, the plaintiff must show that the object fell 'because of the absence or inadequacy of a safety device of the kind enumerated in the statute.'" Marin v. AP-Amsterdam 1661 Park LLC, 60 A.D.3d 824 (2nd Dept. 2009). Lastly, "[r]outine maintenance activities in a non-construction, non-renovation context are not protected by Labor Law § 240 (citations omitted)." Paciente v. MBG Development, Inc., 276 A.D.2d 761 (2nd Dept. 2000); see, Garcia v. Piazza, 16 A.D.3d 547 (2nd Dept. 2005); Jani v. City of New York, 284 A.D.2d 304 (2nd Dept. 2001).

Here, plaintiff moves for partial summary judgment and defendant cross-moves for dismissal of this claim. Notwithstanding plaintiff's contentions to the contrary, he has failed to demonstrate his prima facie entitlement to partial summary judgment on the Labor Law §240(1) claim. "[N]ot every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1)." Novak v. Del Savio, 64 A.D.3d 636, 638 (2nd Dept. 2009). Though plaintiff asserts, in conclusory fashion, that the wooden plank that fell on him was "a load which required securing," and the

"wooden clamp[s] were absent and thus inadequate," whether plaintiff's injuries were proximately caused by an unsecured load and the lack of a safety device of the kind required by the statute are issues for a trier of fact to determine. Consequently, those branches of the motion and cross-motion are denied. However, those branches of defendant's cross-motion for summary judgment and dismissal of plaintiff's claims under sections 240(2) and (3) of the Labor Law, pertaining to the requirements and specifications for scaffolding, is granted, and those claims are hereby dismissed.

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed." See, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 347 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993). It is well settled that to support a § 241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a specific standard of conduct, and that such violation was the proximate cause of his injuries. See, St. Louis v. Town of North Elba, 16 N.Y.3d 411 (2011); Gasques v. State, 15 N.Y.3d 869 (2010); Fusca v. A & S Const., LLC, 84 A.D.3d 1155 (2nd Dept. 2011); Forschner v. Jucca Co., 63 A.D.3d 996 (2nd Dept. 2009); Harris v. Arnell Const. Corp., 47 A.D.3d 768 (2nd Dept. 2008). "In order to support a claim under section 241(6), however, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles." Misicki v. Caradonna, 12 N.Y.3d 511 (2009).

Here, plaintiff moves for partial summary judgment and defendant cross-moves for dismissal of this claim. With regard to the cross-motion, defendant has demonstrated its prima facie entitlement to summary judgment and dismissal of Labor Law § 241(6) based upon plaintiff's failure to demonstrate the applicability, or allege specific violations of the New York State Industrial Code which were the proximate cause of his injuries. From the outset it is noted that although plaintiff claims various violations in the bill of particulars, in opposition to defendant's prima facie showing, plaintiff only proffers opposition to dismissal of Industrial Code § 23-1.7(a)(1) and (a)(2), to wit, the provisions of the Industrial Code requiring suitable overhead protection where workers are normally exposed to falling objects. Consequently, the other provisions asserted in the bill of particulars under Labor Law § 241(6), hereby are dismissed. With regard to 12 N.Y.C.R.R. 23-1.7(a)(1) and (a)(2), the provisions provides as follows:

> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

Notwithstanding plaintiff's contentions to the contrary in opposition to the cross-motion, as nothing in the record suggests that the area in which plaintiff's accident occurred was one where the workers normally were exposed to falling objects, the provisions are inapplicable. See, Marin v. AP-Amsterdam 1661 Park LLC, 60 A.D.3d 824 (2nd Dept. 2009); Mercado v. TPT Brooklyn Assoc., LLC, 38 A.D.3d 732 (2nd Dept. 2007). As such, that branch of defendant's motion for dismissal of the Labor Law § 241(6) claim is hereby granted, and the claim is dismissed in its entirety. In light thereof, that branch of plaintiff's motion for partial summary judgment on this claim is denied.

Lastly, defendant cross-moves for dismissal of the common law negligence and Labor Law § 200 claims. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace. See, Reilly-Geiger v. Dougherty, 85 A.D.3d 1000 (2nd Dept. 2011). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed. Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (citations omitted). By contrast, when the manner of work is at issue, 'no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed' (citations omitted). Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (citations omitted)." Ortega v. Puccia, 57 A.D.3d 54, 61-62 (2nd Dept. 2008); see, Reyes v. Arco Wentworth Management Corp., 83 A.D.3d 47 (2nd Dept. 2011); LaRosa v. Internap Network Services Corp., 83 A.D.3d 905 (2nd Dept. 2011); Aragona v. State, 74 A.D.3d 1260 (2nd Dept. 2010); Martinez v. City of New York, 73 A.D.3d 993 (2nd Dept. 2010); Kwang Ho Kim v D & W Shin Realty Corp., 47 A.D.3d 616, 620 (2nd Dept. 2008); Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2nd Dept. 2003). "The determinative factor is whether the party had 'the right to exercise control over the work, not whether it actually exercised that right.'" Herrel v. West, 82 A.D.3d 933, 933-934 (2nd Dept. 2011); see, Bakhtadze v. Riddle, 56 A.D.3d 589 (2nd Dept. 2008).

"Moreover, '[a]lthough property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (citations omitted).'" Pilato v. 866 U.N. Plaza Associates, LLC, 77 A.D.3d 644, 646 (2nd Dept. 2010); see, Cabrera v. Revere Condominium, 91 A.D.3d 695 (2nd Dept. 2012). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." McKee v.

Great Atlantic & Pacific Tea Co., 73 A.D.3d 872 (2nd Dept. 2010); Ortega v. Puccia, 57 A.D.3d 54, 61-62 (2nd Dept. 2008).

In the case at bar, the evidence adduced establishes that defendant is not liable under Labor Law § 200, as it did not have notice of the allegedly defective condition, nor did it have the opportunity to direct or supervise the work, or take measures to ensure the safety of plaintiff. As plaintiff failed to proffer opposition addressing this claim, defendant is also entitled to summary judgment and dismissal of this claim as well.

Accordingly, the cross-motion by defendant M.A. Angeliades, Inc., granting summary judgment and dismissal of plaintiff's complaint, pursuant to CPLR § 3212, is granted to the extent that the claims for violations of Labor Law § 200 and common law negligence, Labor Law § 240(2) and (3), and Labor Law § 241(6), hereby are dismissed. Further, the branch of the cross-motion for summary judgment and dismissal of the Labor Law § 240(1) claim is denied. The motion by plaintiff for partial summary judgment hereby is denied in its entirety.

Dated: August 10, 2012

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J.S.C.