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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 102481/2011
SCHUMANN, ROBERT
vs
250 EAST 57TH STREET, LLC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5, 6

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 3/27/13

_____, J.S.C.
HON. EILEEN A. RAKOWER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ROBERT SCHUMANN,

Plaintiff,

Index No.
102481/2011

- against -

DECISION and ORDER

250 EAST 57TH STREET, LLC and
GOTHAM CONSTRUCTION COMPANY, LLC,

Mot Seq. 001

Defendants.

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HON. EILEEN A. RAKOWER:

Plaintiff brings this action to recover for injuries allegedly sustained when he was performing construction work at 250 East 57th Street, New York, New York ("the Premises") which is owned by 250 East 57th Street, LLC. Gotham Construction Company LLC ("Gotham") was hired by 250 East 57th Street, LLC to act as a general contractor and construction manager of the premises. Gotham entered into a steel subcontract with A.J. McNulty for work on the premises. Plaintiff was employed by A.J. McNulty. He had been sent to the job by his union hall to act as a signal man for the raising gang. Throughout the job, plaintiff was on the ground or the derrick floor, performing his duties as a signal man.

On February 19, 2011, several members of A.J. McNulty's gang did not show up, and they were shorthanded. Plaintiff was ordered by A.J. McNulty's supervising foreman, Sean Kenny, to act as a connector on that day. As a steel connector, plaintiff had brought to the jobsite his own harness which he wore throughout the day. Initially, the gang was told to shake out structural steel for erection. After the steel was shaken out, several columns were lifted up so that the steel beams could be connected into them. Thereafter, Plaintiff and his connecting partner, Anthony Molina, climbed the columns and got into place to connect the structural steel at about 12-15 feet above the tenth floor below which was filled with corrugated decking.

The steel was initially connected at the perimeter of the building and the connectors worked their way into the middle of the building. When the steel was being connected on the perimeter of the building, the steel beams had static lines going across the bottom flanges so that the connector could tie a belt into it for a connection point.

At the time of the accident, plaintiff and his partner were connecting beams on the interior of the building in a hallway area. The beams were shorter, stemming anywhere from 7-10 feet in length, and had a 1-inch steel tube prefabricated on top of the beam which made it difficult to maneuver. Plaintiff asserts that the smaller beams did not have any safety cables or tie off points, and therefore, he could not tie off.

Just before the accident, plaintiff made a connection on the steel beam, but his partner was having difficulty making a connection on his end. Accordingly, plaintiff walked across the beam to help his partner. During the course of the walk over, plaintiff slipped off the beam and fell to the derrick floor, about 12-15 feet below.

The complaint specifically alleges:

> defendants, their contractors, agent and employees failed to provide plaintiff with proper protection; further, failed to provide life-lines, stanchions, high-lines, tie-lines and other safety devices to prevent a fall from an elevated work-site, further, failed to provide scaffolding that was properly constructed, placed, operated and maintained, failed to provide welded stachions, tie-lines, life-lines and other devices to utilize a safety-belt; further, failed to provide man-lifts and other devices thereat; further, allowed dangerous and hazardous tripping hazards to be and remain on thereat, further, violated Section §200, §240 and §241(6) of the Labor Laws of the State of New York.

Plaintiff Robert Schumann moves for summary judgment on the Labor Law §240(1) claim, pursuant to CPLR §3212. 250 East 57th Street, LLC and Gotham Construction Company, LLC ("collectively, "defendants") cross-move for summary judgment on the Labor Law §200 and Labor Law §241(6) claims, pursuant to CPLR §3212. Both sides oppose the other's motions for summary

judgment.

In support of its motion, plaintiff annexes: the affidavits of Sean Kenny and James Sweeney, safety foremen at the site of the accident,, the pleadings, a preliminary conference order dated June 21, 2011, the deposition of Richard Agresta a supervisor for Gotham Construction Company, the Construction Management Agreement between 250 East 57th Street, LLC and Gotham Construction Company, LLC for 250 East 57th Street, dated April 9, 2010, and the deposition of Plaintiff Robert Schumann.

In opposition, and in support of its cross-motion, Defendants provide: the Affirmation of David Persky, attorney for defendant, and a photograph of the incident location.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Labor Law §240(1)

Section §240(1) of the Labor Law ("Scaffolding and other devices for use of employees") 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 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.

Section §240(1) is applicable to "gravity related accidents such 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 NY3d 494, 610 NY2d 49 [1993]) Where an owner or contractor fails to provide any safety devices, liability is mandated by Labor Law §240(1), without regard to external considerations. (*See, Zimmer v. Chemung,* 65 NY2d 522 [1985]).

Plaintiff provides an affidavit of its foreman, Sean Kenny, who was present at during the accident and indicates that "there were no safety cables nor were there any safety devices erected for the connectors to tie into." Likewise, the Affidavit of James Sweeney, a safety foreman for A.J. McNulty, who was also working that day, states,

> there were no static lines, safety lines, yo-yo's or beamers available, and we generally put static lines for tie-off points only on the perimeter beams and some time-in beams. However, we were not instructed to and were not provided with any cable to string on the smaller beams where Robert had his accident. Accordingly, where he fell, there were no safety devices provided, whatsoever, to use as a tie off point, nor were there any safety nets below.

In opposition, defendants assert that Mr. Agresta's testimony raises a question of fact in that there may have been a retractable cable attached to the top of a column where the accident occurred, or a retractable cable may have been available for use by plaintiff.

Mr. Agresta's testimony is as follows:

> Q. At this particular site, are you aware of whether McNulty had a supply of retractable cables on site?
> A. Yes.
> Q. Do you know where McNulty kept those retractable cables?
> A. They typically keep them in a job box located on the various floors.
> Q. Are you aware that there was a job box on the floor where work

was being performed on the day of the accident in which the retractable cable was stored.
A. I cannot attest that they were actually there that day, but they were typically kept in the job box.
Q. When you say "typically", is it your understanding based upon the work at this site and the thirty-five years at other sites that retractable cables are typically kept by ironworkers contractors in their storage boxes where work is performed?
A. Yes.
Q. Why do they keep it there?
A. Just as a point of assembly keep it in a box so it doesn't' lost throughout the site. [sic]
Q. Is there any reason to have it on the floor where the work is being done?
A. Yes, so they could utilize it.
Q. Who from your knowledge, again, of the work at this site and from your thirty-five years of experience, who generally attaches or installs these retractable cables?
A. The ironworker would install it on the columns prior to the columns being erected.
Q. Can any ironworker install a retractable cable on a column?
A. Yes.
(Agresta deposition, page 81-82).

When asked whether it was "difficult to tie off to the retracables" Mr. Agresta responded, "no".

However, the general availability of safety equipment at a work site does not relieve the defendants of liability. (*Cherry v. Time Warner*, 66 AD3d 238, 885 NYS2d 28 [1st Dept 2009]). To avail itself of a sole proximate cause defense, a defendant must establish that plaintiff knew exactly where the device was located and that, based on a job-site practice, plaintiff was to obtain the safety device him or herself because it was easy to do so. (*Auriemma v. Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS3d 130 [1st Dept 2011]). Defendant fails to provide proof in admissible form that anyone told plaintiff to use the retractable cable, if indeed there was any there on that day, or that plaintiff, regularly a signal man, knew where to find them.

Labor Law §241(6)

Labor Law 241(6) imposes a non-delegable duty upon contractors and owners of demolition and construction work sites "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). For a general contractor to be liable under Labor Law 241(6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command. (*See, Rizzuto v. Wenger Contr. Co.*, 91 NY2d 343 [1998]). In addition, even if the alleged breach is of a specific Industrial Code rule, the rule must be applicable to the facts of the case. (*Singleton v. Citnalta Constr. Corp.*, 291 AD2d 393 [2nd Dept 2002]).

In opposition to defendant's cross-motion to dismiss Plaintiff's §241(6) claims, plaintiff relies solely on his claim of violation of Industrial Code Section 23-1.16. Section 23-1.16, Safety belts, harnesses, tail lines and lifelines is applicable, in that it provides in pertinent part:

> (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hangline lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachment shall be so arranged that if the user should fall such fall shall not exceed five feet.

Here, plaintiff was required to wear a safety belt or harness but was allegedly not furnished with the tail lines or lifelines required by the foregoing provision. Accordingly, this provision applies.

Where a defendant moves for summary judgment, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular

Industrial Code Section. (*Kempisty v. 246 Spring Street, LLC*, 92 AD3d 474 [1st Dept 2012]). Accordingly, Plaintiff has abandoned reliance on all other Industrial Code Sections alleged in its bill of particulars, such as NYCRR 23-15, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-2.1, 23-2.3, 23-4, 23-5, 23-6, 23-7 and 23-8. . Regardless, section §241(6) claims premised upon sections 23-15, 23-1.7, 23-1.15, 23-1.17, 23-2.1, 23-2.3, 23-4, 23-5, 23.6, 23-7 and 23-8 are inapplicable under the circumstances presented, and are dismissed.

Labor Law §200

Plaintiff also brings a Labor Law §200 cause of action against Defendants. Labor Law §200 codifies the common law duty of the owner or employer to provide employees with a safe place to work. In cases arising from the manner in which the work was performed, the owner or general contractor may only be held liable if it exercised supervision or control of the work that led to the injury. *(O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745 [2006]). In addition to a showing of supervision or control over the injury-producing work, a plaintiff must also prove that defendants had notice, either actual or constructive, of the defective condition which caused the accident, to prove a case under either Labor Law §200 or the common law. (*Ross v. Curtis Palmer Hydro Electric Co., Inc.*, 81 NY2d 494, 601 NYS2d 49 [1993]).

Gotham move for summary judgment based on the assertion that the accident was a result of the means and methods used by plaintiff to install the beams, and neither Mr. Agresta nor Gotham supervised the means and methods of the work that was performed by A.J. McNulty. However, Mr. Agresta states in his deposition testimony that he, as well as other Gotham supervisors, performed daily walk-throughs of the premises and "had the authority to let the foreman know tht there was a violation safety-wise, and they would have to take care of it immediately." Moreover, he had the authority to stop their work where there was "gross negligence". The fact that neither Mr. Agresta, nor anyone else from Gotham, was present at the time and location of the accident, does not relieve Gotham of its obligation to keep the work site and workers safe under Labor Law §200. Therefore, a question of fact exists as to whether Gotham may be found liable under Labor Law §200.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for partial summary judgment on the Labor Law §240(1) claim is granted as to liability only, and an assessment of damages will be determined at the trial of the remainder of the action; and it is further,

ORDERED that Defendant's cross-motion for summary judgment is granted only to the extent that Plaintiff's Labor Law §241(6) cause of action pursuant to NYCRR 23-15, 23-1.7, 23-1.15, 23-1.17, 23-2.1, 23-2.3, 23-4, 23-5, 23-6, 23-7 and 23-8 is dismissed; and it is further,

ORDERED that the Labor Law §241(6) cause of action pursuant to NYCRR §23-1.16 and the Labor Law §200 cause of action remain; and it is further,

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 27, 2013

EILEEN A. RAKOWER, J.S.C.