SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

TELESFORD, GARFIELD

- v -

CITY OF NEW YORK

INDEX NO. 150073-2010

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 6, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Notice of Cross-Motion — Affirmation — Affidavit(s) — Exhibits	No(s). 3, 4
Affirmation in Opposition to Cross-Motion	No(s). 5
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 6

Upon the foregoing papers, the motion is decided as follows:

In this Labor Law action, plaintiff Garfield Telesford ("plaintiff") moves pursuant to CPLR § 3212 for an order granting him summary judgment on his Labor Law § 240 [1] claim. Defendants City of New York, Metropolitan Transportation Authority ("MTA") and Long Island Railroad ("LIRR") (collectively "defendants") oppose the motion and cross-move for summary judgment dismissing plaintiff's Labor Law §§ 241 [6], 200 and common law negligence causes of action.

In support of the motion, plaintiff avers that on July 3, 2009 he was working for the joint venture of Dragados/Judlau on the construction project known as Eastside Access, which when completed will allow Long Island Railroad trains to travel directly to Grand Central Station. Plaintiff was injured in a tunnel that was being dug out as part of the project. Specifically, plaintiff avers that he was injured while working on the trailing gear of a tunnel-boring machine. The trailing gear was located behind the tunnel-boring machine, a large device that dug out the tunnel as it moved forward on tracks laid on the floor of the tunnel. Plaintiff and a co-worker had lifted a drum roller from the floor of the tunnel onto the upper deck of the trailing gear using a chain fall and pulley. Plaintiff and the co-worker were then directed to move the drum roller down a set of four stairs leading from the upper deck to the lower deck fo the trailing gear. Plaintiff and co-worker proceeded the carry the drum roller down the steps by hand, as directed by their supervisor. No lifting device or safety equipment was provided to plaintiff. The drum roller, which was shaped like a cylinder, measured approximately five feet across and weighed 500 pounds. An axle ran through the center of the cylinder and stuck out one foot on either side. As they walked to the staircase in the trailing gear, plaintiff was holding one end of the axle and his co-worker was holding the other. Plaintiff placed his foot onto the second step below the upper deck but began to slip and fall because the stair tread was slippery from water, grease oil and hydraulic fluid. Plaintiff tried to prevent the drum roller from striking the staircase by keeping his grip on it and pulling it up but because of its weight he was unable to stop the drum roller's descent. Plaintiff's hand was still on the axle and his finger was crushed when it became pinned between the bottom of the axle and one of the

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

staircase treads. Plaintiff's finger was partially amputated.

Labor Law § 240 [1]

Labor Law § 240 [1] provides:

> "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."

"Labor Law § 240 [1] provides exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7, 959 NE2d 488, 935 NYS2d 551 [2011], *quoting Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490, 657 NE2d 1318, 634 NYS2d 35 [1995]). "To establish entitlement to recovery under the statute, the plaintiff must demonstrate both a violation of the statue- i.e., a failure to provide the required protection at a construction site-proximately caused the injury and that the "injury sustained is a type of elevation-related hazard to which the statute applies" (*Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31 [3rd Dept 2012] [internal citations omitted]). Not every hazard or danger encountered in a construction zone falls within the scope of Labor Law § 240 [1] as to render the owner or contractor liable for an injured worker's damages. The Court of Appeals has expressly held that Labor Law § 240 [1] was aimed only at elevation-related hazards and that injuries resulting from other types of hazards are not compensable under the statute even if proximately caused by the absence of a required safety device (*Misseritti*, 86 NY2d at 490). Thus, the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 99 NE2d 865, 895 NYS2d 279 [2009]). In determining whether an elevation differential is "physically significant" versus "de minimis" the "weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent must be taken into account (*id.* at 605). "In *Runner*, the plaintiff and his co-workers were directed to move an 800 pound reel of wire down a flight of stairs using a rope wound around the reel. [The plaintiff], with two other workers, were, as directed, holding the loose end of the rope and acting as a counterweight to control the descent of the reel. This makeshift device proved inadequate and [the plaintiff] was pulled horizontally and jammed into the metal bar that the other end of the rope had been tied to, sustaining crush injuries to his hands" (*Mapp v NYC Hous. Corp.*, 38 Misc3d 1215[A] [Sup Ct, Kings County 2012]). *Runner* did not overturn prior Court of Appeals' holdings that Labor Law § 240 [1] was aimed only at elevation-related hazards (*see* (*Makarius v Port Authority of N.Y. & N.J.*, 76 AD3d 805 [1st Dept 2010] [a significant height differential between the work being performed and the object being hoisted or secured continues to be a required element of Labor Law § 240 [1]]). Rather, the Court clarified the law in two respects-first that the statute's reach is not limited to falling worker cases or falling object cases in which the object directly strikes the worker and second, that the weight an force of the object during descent must be considered in determining whether a height differential is de minimis (*Oakes*, 99 AD3d at 38).

Here, plaintiff has failed to specify facts from which it can be deduced that his injury resulted from a significant height differential. Plaintiff does not describe the height of the drum roller or where it

was in relation to his body when the accident occurred. Presumably, the drum roller was not elevated above the work site but was at a level equal to, if not lower than plaintiff, as plaintiff was holding in his hands the axle running through the center of the drum roller. Thus, notwithstanding the substantial weight of the drum roller and the significant force it likely generated as it descended toward the stair tread, plaintiff has not established that there was an elevation differential present here, let alone a "physically significant" one. Since there has been no showing of an appreciable height differential between the drum roller and plaintiff, plaintiff has failed to establish that he was exposed to the extraordinary elevation risk contemplated by Labor Law § 240 [1] and not the usual and ordinary dangers of a construction site (*see Sajid v Tribeca North Assocs. L.P.*, 20 AD3d 301 [1st Dept 2005]). Plaintiff's motion for summary judgment is, therefore, denied.

Labor Law § 241 [6]

Plaintiff alleges in his verified bill of particulars that defendants violated Industrial Code sections 23-1.7 [d], 23-1.7 [e], 23-17 [2] and 23-1.30. Defendants argue that section 23-1.7 [e], which deals with tripping and other hazards on passageways and in working areas is not applicable because plaintiff is not alleging he tripped. Defendants contend that section 23-1.7 [2] does not exist and that section 23-1.30, which requires sufficient illumination, cannot serve a predicate to a Labor Law § 241 [6] claim in light of plaintiff's deposition testimony that the lighting conditions in the tunnel were sufficient. Plaintiff offers no opposition to defendants' argument that these sections either do not exist or are inapplicable. Accordingly, plaintiff's claims pursuant to these sections are dismissed. Defendants, however, have not made a prima facie showing of entitlement to summary dismissal of plaintiff Labor Law § 241 [6] claim under section 23-1.7 [d] of the Industrial Code, which protects workers against slipping hazards, as they have not set forth any arguments as to why the section is not applicable. Therefore, defendant's cross-motion is denied with respect to that provision of the Industrial Code.

Labor Law § 200

Section 200 [1] of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]; *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]). Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed (*see Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1264 [3rd Dept 2010]). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken (*Mitchell v N.Y. Univ.*, 12 AD3d 200 [1st Dept 2004]; *Canning v Barneys N.Y.*, 289 AD2d 32 [1st Dept 2001]). Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work (*Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

Defendants' submission establishes that they did not supervise or control plaintiff's work. Plaintiff testified that he received all his tools from his employer and that he was never instructed by anyone from the LIRR or the MTA as to how to perform his work or with respect to safety. Defendants, however, have failed to establish the prima facie absence of creation or notice on their part of the alleged grease, water and hydraulic fluid on the stair tread of the trailing gear. Defendants have not submitted an affidavit or deposition transcript from anyone with personal knowledge establishing that defendants' did not have notice of the allegedly dangerous condition (*Picaso v. 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]; *compare Bayo v 626 Sutter Ave. Assoc., LLC.* 2013 NY Slip Op 3801 [1st Dept]; *Rodriguez v Domitory Auth. of the State of N.Y.*, 104 AD3d 529 [1st Dept [2013]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted to the extent that plaintiff's Labor Law § 241 [6] is dismissed to the extent said claim is predicated upon sections 23-1.7 [e], 23-17 [2] and 23-1.30 of the Industrial Code. Defendants' cross-motion is otherwise denied; and it is further

ORDERED that plaintiff is to file a new note of issue and certificate of readiness within 60 days from the date of entry of this order; and it is further

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, upon defendants within 20 days of entry.

Dated: JUN 21 20[illegible]
New York County

George J. Silver, J.S.C.

GEORGE J. SILVER