ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

ADAM ROSZKO, x

Plaintiff,

-against-

1333 BROADWAY ASSOCIATES, LLC, LHOTSE CONTRACTING CORP., d/b/a TRIDENT CONTRACTING CORP., LHOTSE CONTRACTING CORP., LHOTSE CORP. d/b/a TRIDENT CONTRACTING CORP., LHOTSE CORP and TRIDENT CONTRACTING CORP.,

Defendants.
x

LHOTSE CONTRACTING CORP. and LHOTSE CORP.,

Third-Party Plaintiffs,

-against-

AJB BUILDERS & COMPANY, INC.,

Third-Party Defendants
x

1333 BROADWAY ASSOCIATES, LLC

Second Third-Party Plaintiff,

-against-

AJB BUILDERS & COMPANY, INC.,

Second Third-Party Defendant.
x

Index Number 701537 2012

Motion Date September 2, 2015

Motion Cal. Numbers 112, 113 & 114

Motion Seq. Nos. 3, 4, & 5

FILED
DEC - 1 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 50 read on this motion by defendant/second third-party plaintiff 1333 Broadway Associates, LLC (1333 Broadway) for summary judgment dismissing the causes of action brought under Labor Law §§ 200 and 240 (1), and for common-law negligence, and for summary judgment against third-party defendant/second third-party defendant AJB Builders (AJB) for contractual indemnification; by separate notice of motion by defendants/third-party plaintiffs Lhotse Contracting Corp. d/b/a Trident Contracting Corp., Lhotse Contracting Corp., Lhotse Corp. d/b/a Trident Contracting Corp., and Lhotse Corp., and Trident Contracting Corp. (collectively referred to as "the Lhotse defendants") for summary judgment dismissing the action in its entirety, dismissing the causes of action brought under Labor Law §§ 200 and 240 (1), and for common-law negligence, and for summary judgment against AJB for contractual indemnification; by separate notice of motion by plaintiff Adam Roszko (plaintiff) for partial summary judgment on the issue of liability on his claims brought under Labor Law §§ 240 (1) and 241 (6); and by notice of cross motion by AJB for partial summary judgment dismissing the claim brought under Labor Law § 240 (1).

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-17
Notice of Cross Motion - Affidavits - Exhibits	18-20
Answering Affidavits - Exhibits	21-44
Reply Affidavits	45-50

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is an action to recover for personal injuries that plaintiff allegedly sustained on July 2, 2012, due to violations of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. 1333 Broadway owned the subject premises and hired Lhotse Corp., to perform certain construction work at the premises. Lhotse Contracting Corp., is allegedly an existing, but inactive corporation, while Lhotse Corp., doing business as Trident Contracting Corp., entered into a subcontract with AJB, for AJB to perform all of the work at the premises. Plaintiff has alleged that he was an employee of AJB and was working at premises located at 1333 Broadway, in the County of New York. He further alleged that he was delivering materials to the premises when he fell from a plywood ramp/platform to the floor below.

Labor Law § 240 (1)

1333 Broadway and the Lhotse defendants have moved, and AJB has cross-moved to dismiss plaintiff's claim brought under Labor Law § 240 (1), while plaintiff has moved for partial summary judgment on the issue of liability on this cause of action. 1333 Broadway has argued that plaintiff's accident was not elevation-related and was not within the protections afforded by this section of Labor Law. The Lhotse defendants and AJB have adopted 1333 Broadway's arguments and evidence in support of this branch of their respective motion and cross motion. Plaintiff, in opposition and in support of this branch of his motion, has argued that his accident does fall within the purview of this section of Labor Law because it was elevation-related and he was not provided with proper protection.

On a motion for summary judgment, a movant has the initial burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]). Labor Law § 240 (1) provides that:

> "[a]ll contractors and owners and their agents ... 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 scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect workers against elevation-related hazards (*see Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2009]). In order for a plaintiff to recover under Labor Law § 240 (1), a violation of that section must be shown to be a proximate cause of his or her injuries (*see Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2007]; *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 856 [2007]).

The record contains, among other things, plaintiff's deposition testimony. Plaintiff testified that he was assisting his co-workers in transporting materials consisting of steel decking from outside of the premises to the inside at the time of the accident. In order to access the premises, plaintiff testified that he and his co-workers carried the steel decking onto and over plywood ramps. He further testified that, as he carried the front of a piece

of decking, he stepped onto a plywood ramp, which moved and caused him to fall to the floor below.

Cases involving the types of platforms and/or ramps, such as in the instant case, fall into two general categories, "those in which the [platform and/or ramp] was used as a passageway or stairway, and those in which it served as the functional equivalent of a scaffold, ladder or other device enumerated in the statute" (*Paul v Ryan Homes*, 5 AD3d 58, 60 [2004]). "When the [platform and/or ramp] has been used as a passageway or stairway, section 240 (1) has been held not to apply" (*Paul v Ryan Homes*, 5 AD3d at 60; *see Donohue v CJAM Assoc., LLC*, 22 AD3d 710, 711-712 [2005]; *Sandi v Chaucer Assoc.*, 170 AD2d 663, 664 [1991]). "On the other hand, when the [platform and/or ramp] has served as the functional equivalent of a scaffold, ladder or other device enumerated in the statute, then section 240 (1) has been held to apply" (*Paul v Ryan Homes*, 5 AD3d at 61; *see Missico v Tops Mkts.*, 305 AD2d 1052 [2003]).

Based upon the evidence in the record, the facts as alleged by plaintiff have not set forth a prima facie violation of Labor Law § 240 (1). Under these circumstances, the failure of the "device" that plaintiff has alleged proximately caused his accident, is not one which falls within the protected category of "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" under section 240 (Labor Law § 240 [1]; *see Paul v Ryan Homes*, 5 AD3d at 60; *see Donohue v CJAM Assoc., LLC*, 22 AD3d at 711-712; *Sandi v Chaucer Assoc.*, 170 AD2d at 664). Therefore, plaintiff's claim brought under Labor Law § 240 (1) is dismissed.

Labor Law § 241 (6)

The Lhotse defendants have moved to dismiss the action in its entirety, which includes plaintiff's claim brought under Labor Law § 241 (6), while plaintiff has moved for partial summary judgment on the issue of liability on this claim. "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that ... defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2007]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "[R]esponsibility under Labor Law § 241(6) extends not only to the area where the work was actually being conducted, but to the entire construction site, including passageways and platforms, in order to insure the safety of workers going to and from the points of actual work" (*Fassett v Wegmans Food Mkts., Inc.*, 66 AD3d 1274, 1278 [2009]). In the instant matter, in his pleadings, plaintiff has predicated his section 241 claim upon alleged violations of various sections of the Industrial Code, including 12 NYCRR 23-1.5, 1.7 (e)(1), 1.22 (b)(1) and (2), and 2.1 (b).

In light of plaintiff's failure to adequately address 12 NYCRR 23-1.5 and 2.1 (b), in his papers, his claims alleged under those sections are hereby, deemed abandoned.

12 NYCRR 23-1.7 (e)(1) relates to tripping and other hazards and provides as follows: "Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered." This section has been found to be sufficiently specific to support a cause of action under Labor Law § 241 (6) (*see Cowan v ADF Constr. Corp.*, 26 AD3d 802, 803 [2006]).

Plaintiff testified that he was traversing a plywood ramp when it moved and caused him to fall to the floor below. He has failed to point to any evidence in the record to demonstrate that any dirt, debris, or other obstructions or conditions caused him to trip, or that he was injured by a sharp projection. Plaintiff has failed to make a prima facie showing that a violation of this section of the Industrial Code proximately caused his alleged injuries. Therefore, this claim is dismissed.

12 NYCRR 23-1.22 applies to runways, ramps and platforms. 12 NYCRR 23-1.22 (b)(1) provides as follows:

> "All runways and ramps shall be substantially constructed and securely braced and supported. Runways and ramps constructed for use by motor trucks or heavier vehicles shall be not less than 12 feet wide for single lane traffic or 24 feet wide for two lane traffic. Such runways and ramps shall be provided with timber curbs not less than 10 inches by 10 inches, full size timber, placed parallel to, and secured to the sides of such runways and ramps. The flooring of such runways and ramps shall be positively secured against movement and constructed of planking at least three inches thick full size or metal of equivalent strength."

12 NYCRR 23-1.22 (b)(2) provides as follows:

> "Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed."

These sections have been found to be sufficiently specific to support a claim under this section of Labor Law (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 596 [2009]). The record contains, among other things, the testimony of Dariusz Mroczek (Mroczek), a foreman for AJB, whose testimony conflicted with plaintiff's. While plaintiff testified that the plywood which he was traversing overlapped another piece of plywood to create a ramp, that it was unsecured and that it moved or shifted, Mroczek testified that the plywood ramp did not overlap, that it was properly secured and nailed to the existing floor and that he, nor anyone else, experienced any difficulty in traversing the ramp. Based upon the conflicting evidence in the record, an issue of fact exists, at least, as to whether the plywood ramp involved in the accident was "substantially supported and braced," or "substantially constructed and securely braced and supported," which precludes summary relief (12 NYCRR 23-1.22 [b][1], [2]; *see Alvarez v Prospect Hosp.*, 68NY2d at 324). In light of the above determination and the Lhotse defendants' failure to adequately address this cause of action in their motion papers, none of the moving parties are entitled to summary relief on the claim brought under Labor Law § 241 (6).

Labor Law § 200 and Common-law Negligence

1333 Broadway and the Lhotse defendants have moved to dismiss plaintiff's claims brought under Labor Law § 200 and for common-law negligence. Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). Claims brought under § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]). Where a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is shown that he or she had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63). Whereas, where a claim is brought as a result of a dangerous condition, an owner or general contractor may be liable if it is demonstrated that her or she created the dangerous condition or failed to remedy a dangerous condition of which he or she had actual or constructive notice (*see LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Chowdhury v Rodriguez*, 57 AD3d at 128). In the instant action, plaintiff's claims appear to have been based on both categories.

1333 Broadway and the Lhotse defendants have argued that they did not direct, supervise or control plaintiff's work and that they did not create the alleged condition or have actual or constructive notice of it. The record contains, among other things, plaintiff's testimony, the testimony of Mroczek, the affidavit of Anthony Melendez

(Melendez), the Building Superintendent of the subject premises at the time of the accident, and the testimony of Jason Jackowitz (Jackowitz), a loss control consultant, employed by non-party Durnam Group Managers, hired by non-party Newmark, which was 1333 Broadway's building manager of the subject premises.

Conflicting evidence in the record precludes summary relief on this branch of the motion for summary judgment by 1333 Broadway. While Melendez stated that he did not direct or control plaintiff's work, Mroczek testified that Melendez was the individual he worked with and that Melendez controlled how he performed his work leading up to and on the date of the accident. Jackowitz also testified that he was a safety manager at the worksite and that he did have the authority to control the work, particularly to stop any work if there was a safety issue. Furthermore, Melendez's affidavit is insufficient to demonstrate that 1333 Broadway did not have actual or constructive notice of the alleged condition. Based upon this evidence there is an issue of fact, at least, as to whether 1333 Broadway had actual or constructive notice of the alleged condition and whether it exercised control over the method and manner of plaintiff's work at the time of the accident (*see Alvarez v Prospect Hosp.*, 68NY2d at 324).

Similarly, issues of fact that are apparent from the record preclude the summary relief sought by the Lhotse defendants on this branch of their motion. The record contains, among other things, the deposition testimony of Zbigniew Chrzanowsky (Chrzanowsky). Based upon conflicts in Chrzanowsky's testimony regarding the level of control that the Lhotse defendants had over plaintiff's work, and their authority over AJB, an issue of fact remains, at least, as to whether they exercised the requisite level of control over plaintiff's work. Furthermore, Chrzanowsky testified that he did not recall ever seeing the ramp involved in the alleged accident and his testimony was insufficient to demonstrate that the Lhotse defendants did not receive any complaint regarding the ramp. Thus, the Lhotse defendants have failed to adequately demonstrate that they did not have actual or constructive notice of the alleged condition (*see id.*).

Third-Party Claims for Contractual Indemnification against AJB

1333 Broadway and the Lhotse defendants have both also moved for summary judgment on their claims for contractual indemnification against AJB. However, in light of the above determination and the fact that there has been no determination concerning the degree of fault attributable to each of the parties involved, any decision regarding 1333 Broadway's and the Lhotse defendants' claims for contractual indemnification against AJB would be premature at this juncture (*see Sheridan v Albion Cent. School Dist.*, 41 AD3d 1277, 1279 [2007]; *Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 705 [2007]).

Based on the foregoing, the branch of the motion by 1333 Broadway for summary judgment dismissing plaintiff's cause of action under Labor Law § 240 (1) is granted and that claim is dismissed, however all other branches their motion are denied.

The branch of the motion by the Lhotse defendants for summary judgment dismissing the causes of action brought under Labor Law § 240 (1) is granted and all other branches of their motion are denied.

Plaintiff's motion for partial summary judgment on the issue of liability on his claims under Labor Law §§ 240 (1) and 241 (6) is denied in its entirety. The cross-motion by AJB for partial summary judgment dismissing the claim brought under Labor Law § 240 (1) is granted.

This constitutes the Decision and Order of the court.

Dated: November 24, 2015

Denis J. Butler, J.S.C.