SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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RAPHAEL MAMAN,

Plaintiff,

-against-

MARX REALTY & IMPROVEMENT CO., INC., FJ SCIAME CONSTRUCTION CORP. and WEIR WELDING COMPANY, INC.,

Defendants.

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MARX REALTY & IMPROVEMENT CO., INC. and FJ SCIAME CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

WEIR WELDING COMPANY, INC.,

Third-Party Defendant.

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WEIR WELDING COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

CROSS COUNTY CONTRACTING, INC.,

Second Third-Party Defendant.

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Index No.: 152441/12

DECISION AND ORDER

JENNIFER G. SCHECTER, J.:

This is an action to recover damages for personal injuries sustained by an ironworker on February 13, 2012, when he fell through an unguarded opening while he was working on the second floor of a construction site located at 201 West 57th Street, New York, New York (the Premises).

Plaintiff Raphael Maman moves, pursuant to CPLR 3212, for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims against defendants Marx Realty & Improvement Co., Inc. (Marx), FJ Sciame Construction Corporation (FJ) and Weir Welding Company, Inc. (Weir Welding) (collectively, Defendants).

Background

On the day of the accident, Marx owned the Premises where the accident occurred. Marx hired FJ to serve as the construction manager on a project to build a TD Bank at the Premises (the Project). FJ hired Weir Welding to provide the structural steel erection/fabrication work for the Project. Thereafter, Weir Welding hired plaintiff's employer Cross County Contracting, Inc. (Cross County) to provide the ironworkers for the Project. At the time of the accident, plaintiff and a coworker were retrieving a piece of steel Q-decking for installation when plaintiff slipped and/or tripped, lost his balance and fell through an unguarded opening which was located between two steel beams.

Plaintiff's Testimony

Plaintiff testified that he was employed by Cross County as an ironworker on the day of the accident. Plaintiff explained that, while he received his daily work instructions from his Cross County foreman, Aaron Tracy, Tracy did not supervise plaintiff's actual work, as plaintiff already knew how to perform it. In addition, plaintiff provided his own personal safety equipment, which included a harness, a six-foot lanyard, a hard hat, safety goggles and gloves. Plaintiff maintained that, while he was never specifically told to use a harness, it was his understanding that it was required when working at heights over six feet.

On the morning of the accident, Tracy directed plaintiff to help a coworker, "Ryan," install Q-decking on the second floor of Premises. Plaintiff described the second floor as having tools and materials scattered around. Two sides of the second floor were protected by perimeter cable. Although some portions of the second floor were covered with Q-decking, there were still areas with large open holes in the flooring.

To perform the installation work, it was necessary for plaintiff and Ryan to travel to the back right corner of the second floor to retrieve a piece of Q-decking from one of the stacks stored there. The corner was located next to an unguarded and open portion of the second floor deck. Plaintiff noted that, although he was wearing a harness, he was not tied off, because there was no place on the second floor to tie off to. While it might have been possible to tie off to one of the beams with a portable clamp, plaintiff did not know where to obtain one.

Just prior to the time of the accident, plaintiff and Ryan were in the process of retrieving a piece of Q-decking from a pile located approximately 20 feet from the area where it needed to be installed. At this time, plaintiff was walking on a five-inch-wide beam that was already installed. The areas on both sides of the beam were "open" (plaintiff's tr at 111). Suddenly, plaintiff tripped, lost his balance and fell head first through an unguarded opening to the floor

below. Plaintiff asserted that there was no protection, such as warning signs, barricades or caution tape, around the subject opening. Plaintiff testified that he never complained to anyone about the safety conditions at the Premises.

Testimony of FJ's Field Superintendent (Davey Glover)

Davey Glover testified that he served as FJ's field superintendent on the day of the accident. As field superintendent, Glover was responsible for coordinating the trades and making sure that "the job is being built to plans and specifications" (Glover tr at 10). He explained that Marx was the owner of the Premises on the day of the accident, and that Marx hired FJ to serve as the construction manager for the Project. Wier Welding, the Project's steel fabricators, subcontracted with Cross County for the installation of the Project's ironwork. At the time of the accident, Cross County was the only trade working at the Premises. Each trade was responsible for providing for its own safety at the site.

Glover explained that "as the job progress[ed] . . . [he would] make sure there were no openings for anyone to [be] exposed to" (*id.* at 85). However, Cross County was responsible for providing the static lines, which were strung between columns, that the ironworkers needed to tie off to. Glover maintained that static lines were in place on the second floor of the Premises on the day of the accident.

Glover testified that, after hearing the news of plaintiff's fall, he prepared an accident report. In order to do so, Glover "spoke to [Tracy] who spoke to his guys and [he] got the information that was presented to [him]" (Glover tr at 102). Based upon his investigation of the accident, Glover concluded that "[w]hile removing decking, [plaintiff] lost his footing, slipped and fell from the second floor to the first floor" (*id.* at 102-103).

Glover also testified that Ryan Boyle, plaintiff's coworker who witnessed the accident, provided him with a signed statement, which confirmed that the accident occurred when plaintiff fell into a floor opening. The statement did not specify whether plaintiff was tied off at the time. Glover explained that a guardrail was not yet in place around the opening, because such protection is put in place "[a]fter all the steel erection is done" (*id.* at 172).

Testimony of Cross County's Foreman (Aaron Tracy)

Aaron Tracy testified that he was Cross County's foreman on the day of the accident. Cross County was retained by Weir Welding to "perform the steel erection at [the Project]" (Tracy tr at 24). Tracy maintained that, on the day of the accident, he directed plaintiff and Ryan to remove temporary Q-decking from the second floor and to install a pour stop. Tracy told the two men to "setup your lifelines [horizontal

static line] before you rip up your platforms . . . so you have a tie up point" (Tracy tr at 73). In addition, Tracy asserted that he "help[ed] them set [the horizontal safety line] up" (*id.* at 73-74).

Tracy explained that Cross County provided the workers with full body harnesses and six-foot lanyards. However, at the time of the accident, plaintiff was wearing his own personal harness that he had brought to the construction site. Four lifelines, which were provided by Cross County, were typically in place at different locations on the second floor. Such locations included the areas around the perimeter of the stairs, elevator shafts and duct work. Tracy testified that, at the time of the accident, horizontal lifelines were in place at the accident location.

Tracy further testified that he specifically instructed plaintiff to tie off when working around the openings on the second floor, and that he remembered plaintiff being tied off. Therefore, plaintiff must have untied himself at some point in time after Tracy left him. Tracy explained that plaintiff was injured when he fell through "the opening for the ductwork" (*id.* at 97).

After the accident, FJ requested that Tracy prepare an accident report, which he read into the record, as follows:

> "[Plaintiff and Ryan] were working on the second floor removing long sheets of deck around elevator and duct shaft. Worker under [an OSHA guideline for

> steel and deck installation] with horizontal lifelines in place, [plaintiff] tripped or slipped on deck and fell into opening down to elevated first floor. Both [plaintiff and Ryan] had on their harnesses and both had the ability to tie off at the location. [Plaintiff] fell approximately fourteen feet"

(*id.* at 130-131).

Testimony of Plaintiff's Cross-County Coworker (Ryan Boyle)

Ryan testified that he was working with plaintiff on the day of the accident. He explained that Tracy had directed him and plaintiff to finish laying Q-decking on the second floor of the Premises. At the time that they were performing this work, the only safety equipment present on the second floor of the Premises was the safety cables that had been strung around the outside perimeter of the building. He explained that perimeter lines were different from static lines that are installed on the inside of the building for workers to tie off to when working at heights. Ryan was not a member of the Cross County crew in charge of installing safety protection on the second floor.

Ryan explained that just prior to the accident, Tracy instructed the men to retrieve some decking stored at the northeast corner of the second floor. On the way there, plaintiff tripped on some decking, lost his balance and then "went head over heels . . . into the [elevator shaft] hole" (*id.* at 75-76). The opening that plaintiff fell into did not

have any protection or toe boards surrounding it. In addition, at the time of the accident, no static lines had been installed on the second floor, and, thus, it was not possible to tie off a lanyard there. Ryan specifically testified that he did not perform his work with a lifeline "because there wasn't one there and [he] had to get to work" (Ryan tr at 59). Ryan noted that, after the accident, but before the OSHA representative arrived, someone put up "static lines" on the second floor (*id.* at 89-91).

Analysis

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d

223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240(1)

Plaintiff moves for partial summary judgment as to liability on the Labor Law § 240(1) claim against Defendants. Labor Law § 240(1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "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) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the

> existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Plaintiff argues that he is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240(1) claim because he has sufficiently established that, due to the lack of a proper barrier protection over or around the opening, or a static line to tie off his lanyard to, he was caused to fall approximately 14 feet through the subject opening to the floor below and become injured.

In opposition to plaintiff's motion, Defendants assert that conflicting deposition testimonies contained in the record reveal that a question of fact exists as to whether plaintiff was, in fact, provided with a static line to attach a lifeline to. To that effect, while plaintiff and Ryan both testified that there were no static lines installed in the

accident area for the men to tie off to, Glover and Tracy testified to the contrary.

Defendants further argue that plaintiff's recalcitrance in not tying off makes him the sole proximate cause of his accident, and, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240(1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). A plaintiff will be determined to have been recalcitrant when "(a) [the] plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them, he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *see also Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

Even if a static line was in place at the time of the accident, as the lack of a protection over or around the opening to prevent plaintiff from falling through was a more proximate cause of the accident, any alleged negligence on plaintiff's part in not tying off goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240(1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Bisram v Long Is. Jewish*

Hosp., 116 AD3d 475, 476 [1st Dept 2014]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [even "if there were admissible evidence [that the "plaintiff failed to attach his safety harness to the lifeline in the proper manner"] the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240(1) claim"]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] ["even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety (equipment) was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] ["even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d at 290). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that

failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]).

In opposition to plaintiff's motion, Defendants also argue that plaintiff is not entitled to partial summary judgment in his favor on the Labor Law § 240(1) claim, because there were some inconsistencies in his account of how he fell (*see Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 670 [2d Dept 2011]). "Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented" (*Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462 [1st Dept 1993]).

The minor inconsistencies in plaintiff's testimony put forth by Defendants, however, are not related to a material issue; thus, they do not preclude an award of partial summary judgment as to liability in plaintiff's favor (*Leconte v 80 E. End Owners Corp.*, 80 AD3d at 671; *Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).

Importantly, Labor Law § 240(1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d

Dept 2006]). "As has been often stated, the purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Plaintiff is therefore entitled to partial summary judgment in his favor as to liability on the Labor Law § 240(1) claim against Defendants.

Labor Law § 241(6)

Plaintiff also moves for partial summary judgment in his favor as to liability on the Labor Law § 241(6) claim against Defendants. Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). It is not, however, self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple alleged violations of the Industrial Code in his bill of particulars, plaintiff moves for partial summary judgment in his favor only as to liability on the alleged violation of Industrial Code 12 NYCRR 23-1.7 (b)(1)(i).

Initially, Industrial Code section 23-1.7(b)(1)(i), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241(6) claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

Specifically, Industrial Code 12 NYCRR 23-1.7 (b)(1)(i) states:

> "(b) Falling hazards
> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7(b), based upon a review of the regulation as a whole - particularly the safety measures delineated therein - it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through'" (*Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003], quoting *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422-423 [2d Dept 2001] ["hazardous openings" regulation inapplicable where the 12-by-16-inch hole was too small for worker to fall through]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [10-12-inch gap not a hazardous opening]).

Here, section 1.7 (b)(1)(i) applies because the subject unprotected opening was large enough for plaintiff to fall through. In addition, the opening was not guarded by either a substantial covering or a safety railing of the kind that the rule requires.

Further, Defendants' argument that plaintiff's alleged comparative negligence warrants a denial of his motion for judgment in his favor as to liability on the Labor Law §

241(6) claim fails, because "whether or not plaintiff was himself negligent may require an apportionment of liability but does not absolve defendants of their own liability under section 241(6)" (*Keegan v Swissotel N.Y.*, 262 AD2d 111, 114 [1st Dept 1999]).

Thus, plaintiff is entitled to partial summary judgement in his favor as to liability on that part of the Labor Law § 241(6) claim predicated on an alleged violation of section 23-1.7 (b)(1)(i).

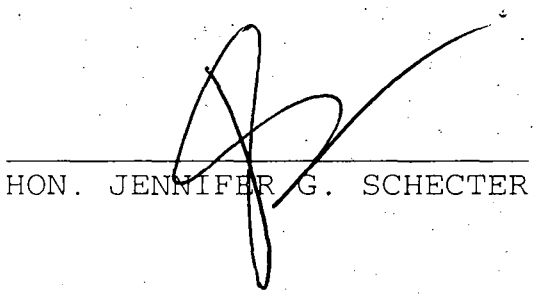
Finally, Defendants' argument that plaintiff's motion is premature because two nonparty depositions have not been held is insufficient. Defendants do not "offer an evidentiary basis to suggest that [said] discovery may lead to relevant evidence or that the facts essential to opposing the motion were exclusively within [plaintiff's] knowledge and control" (*Espada v City of New York*, 74 AD3d 1276, 1277 [2d Dept 2010], citing *Hill v Ackall*, 71 AD3d 829 [2d Dept 2010]). In addition, as noted by plaintiff, the facts surrounding plaintiff's accident, as well as Defendants' liability, are clearly laid out through plaintiff's deposition, Defendants' depositions, written incident reports and photographs. "Mere hope that somehow the [defendant] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion" (*Plotkin v Franklin*, 179 AD2d 746, 746 [2d Dept 1992]).

Accordingly, it is ORDERED that plaintiff Raphael Maman's motion, pursuant to CPLR 3212, for partial summary judgment on the Labor Law §§ 240(1) and 241(6) claims against defendants Marx Realty & Improvement Co., Inc., FJ Sciame Construction Corporation and Weir Welding Company, Inc. is granted; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: September 9, 2016



HON. JENNIFER G. SCHECTER