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

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ANTHONY GONZALEZ and MARGARET GONZALEZ,

Plaintiffs,

-against-

PARAMOUNT GROUP, INC. and ALLIANZ GLOBAL INVESTORS U.S. LLC,

Defendants.

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DECISION AND ORDER

Index No. 152557/13

Motion Sequence No. 002

JENNIFER G. SCHECTER, J.:

In this action arising out of a workplace accident, plaintiffs Anthony Gonzalez (Gonzalez or plaintiff) and Margaret Gonzalez (together, plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240(1) as against defendants Paramount Group, Inc. (Paramount) and Allianz Global Investors U.S. LLC (Allianz).

Background

Gonzalez was allegedly injured on March 5, 2011 at a construction site located at 1633 Broadway in Manhattan. Plaintiffs allege that Paramount was the managing agent of the premises. According to plaintiffs, Allianz was a lessee of several floors in the building and hired nonparty J.T. Magen & Company, Inc. (J.T. Magen) as a general contractor to perform a "build-out" of its space. Gonzalez was an employee of J.T. Magen on the date of the accident.

At his deposition, Gonzalez testified that he was employed as a laborer on the 1633 Broadway project on March 5,

2011 (plaintiff tr at 20, 21). Gonzalez stated that he took directions from Mike Lynch (Lynch), J.T. Magen's labor foreman (*id.* at 22-23). According to Gonzalez, the duties of the laborers included "anywhere from the demolition at particular sites to general cleanup for the entire place" (*id.* at 26). J.T. Magen supplied all of the laborers' tools and equipment (*id.* at 27). On the date of the accident, Lynch directed Gonzalez to make rectangular openings in cinderblock walls to allow for ductwork to be routed through the walls (*id.* at 30, 33-34). Lynch handed Gonzalez a sledgehammer and a chopping gun (*id.* at 31). Lynch also told him to use a ladder to do the work (*id.* at 32). Gonzalez testified that the places where he was to make openings had been marked with spray paint (*id.* at 34). The openings were four feet wide and three feet high (*id.*). Gonzalez went to the floor where he was told to work and used his equipment and a 10-foot A-frame ladder to make an opening (*id.* at 36). It took about an hour to make an opening and clean up the debris (*id.* at 35). To make an opening, Gonzalez "would score the [marked] rectangle with the chopping gun and then . . . just blast away with the sledgehammer" (*id.* at 46). He first scored along the pre-marked lines, so that when he hit the wall with a sledgehammer, the area within the scored line broke off, leaving the remaining cinderblocks in place: "This way it

makes a little indentation in the cinderblock, so when [he] hit it, [he was] not breaking all the cinderblock, [he was] just going to break where [he] scored that square" (*id.*). He explained that once "you make an opening, then it is simple, you can just knock one at a time out, like a loose tooth, and then it is much easier to clean up the debris later on" (*id.* at 57).

According to Gonzalez, after he made a second opening, he told Lynch that he felt unsafe doing the work from a ladder (*id.* at 36, 38). Lynch told Gonzalez to use a baker's scaffold if he felt more comfortable doing the work from the scaffold (*id.* at 42). Gonzalez then started to use a baker's scaffold (*id.* at 43). Gonzalez also suggested that they install a lintel[1] to hold the cinderblocks above the openings that he was creating (*id.* at 42). However, lintels were not provided (*id.*). Gonzalez continued to make openings in the cinderblock walls for the rest of the day (*id.* at 45). As he was making the last opening of the day, he was injured (*id.*). He stood on the baker's scaffold and scored along the pre-marked rectangle (*id.* at 55-56). Gonzalez knocked all of the cinderblocks within the rectangle out with his sledgehammer

[1]A "lintel" is defined as "a horizontal architectural member spanning and usually carrying the load above an opening" (Merriam-Webster Online Dictionary, lintel [https://www.merriam-webster.com/dictionary/lintel]).

(*id.* at 56-57). Gonzalez testified that about 18 to 20 cinderblocks had to be removed prior to his injury (*id.* at 57). He stated that "[a]s soon as [he] finished [his] last cinderblock, [he] put [his] sledgehammer down, [he] was just ready to get off the scaffold and then two of them that were remaining up against the ceiling came down and hit [him] in [his] knee" (*id.*). He later stated that he did not know whether one or both of the cinderblocks hit his knee (*id.* at 60). Gonzalez believed that the cinderblocks were loosened as a result of his striking the wall with the sledgehammer (*id.* at 59).

Plaintiffs commenced this action on March 20, 2013, asserting three causes of action against Paramount and Allianz for: (1) common-law negligence; (2) violations of Labor Law §§ 200, 240(1) and/or 241(6); and (3) loss of services and society on behalf of Mrs. Gonzalez.

Plaintiffs now move for partial summary judgment on the issue of liability under Labor Law § 240(1). Plaintiffs argue that they have met their burden on summary judgment because: (1) Gonzalez was injured by cinderblocks that were not supported or braced in any way; and (2) Gonzalez was not provided with any safety equipment, including a brace to protect him from the risk of the falling blocks. As support, plaintiffs submit an affidavit from a professional engineer,

Walter Konon, P.E. (Konon), who reviewed the accident reports, bills of particulars, and deposition testimony and opines that "smaller sectioned score marks (at least three more than he had been directed to do), should have been made approximately one foot apart from each other," and that "good and safe construction practice would mandate that two by four pieces of lumber (or a brace made from another suitable material), be set therein to provide a support or brace to protect plaintiff from the consequences of the falling blocks" (Konon aff, ¶ 7). Konon further opines that defendants violated 12 NYCRR 23-1.7(a) concerning overhead protection and 12 NYCRR 23-3.3(b), (c), and (e), which govern demolition of walls and partitions (*id.*, ¶¶ 4, 10, 11). In addition, plaintiffs contend that Gonzalez was neither the sole proximate cause of his accident nor a recalcitrant worker.

In opposing the motion, defendants argue that plaintiffs failed to meet their burden. Additionally, defendants maintain that Konon's affidavit must be disregarded, since it is conclusory and unsupported by the facts. Defendants further contend that section 240(1) is inapplicable and was not violated, relying on an affidavit from Martin Bruno (Bruno), a construction-safety expert who states that:

> "There is no hoisting or securing device that was required or that would have been expected. . . . [I]t is not necessary, customary or common industry practice to use a lintel when making wall openings

> for duct work. . . . A lintel is used, for example, to hold walls above windows up and is cemented into place, supported across the top of the window opening by the walls on the sides of the window. A lintel is never put in just to make a penetration in a wall.
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> "Moreover, the cinder blocks and/or concrete blocks here were self-supporting by virtue of their having been installed in an interlocking pattern and with the use of mortar . . . . There was no need to use a lintel (or anything else) . . . ."

(Bruno aff, ¶¶ 14, 15). Defendants also provide an affidavit from Lynch, Gonzalez's foreman, indicating that "[u]sing a brace is not necessary because such a small area is self-supported because the surround[ing] concrete block is interlocking and held in place by mortar" (Lynch aff, ¶ 8). Lynch states that Gonzalez was instructed to remove any loose blocks before removing debris (*id.*, ¶ 6).

Additionally, defendants contend that plaintiffs are not entitled to partial summary judgment under Labor Law § 241(6), since 12 NYCRR 23-1.7(a)(1) and 12 NYCRR 23-3.3(b), (c), and (e) do not apply and were not violated. Defendants further maintain that plaintiffs have not shown that defendants failed to use reasonable care or that Gonzalez was not comparatively negligent.

In reply, plaintiffs respond that section 240(1) was violated, and that the violation caused the accident because: (1) Gonzalez was engaged in construction work; (2) Konon's affidavit indicates that a "support or brace" would have been

necessary to protect Gonzalez from falling cinder blocks, not a lintel (Konon aff, ¶ 7); (3) even though Lynch states that the cinderblocks were self-supporting, Gonzalez was struck by falling cinder blocks, and there were no adequate safety devices present to protect him from the falling objects; and (4) it is undisputed that his injuries arose from an elevation-related risk.

Furthermore, plaintiffs assert that Labor Law § 241(6) was violated, because Gonzalez was not provided with "suitable overhead protection," as required by 12 NYCRR 23-1.7(a), and defendants did not provide a brace, as mandated by 12 NYCRR 24-3.3(b), (c), and (e).

Analysis

"It is well settled that '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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1061 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat a motion for summary judgment, the opposing party must "show

facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]), by "producing evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 240(1)

Labor Law § 240(1), known as the Scaffold Law, 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."

Plaintiffs move for partial summary judgment against Paramount. Paramount's witness testified that it was the managing agent of the building (Gauci tr at 7). A managing agent may be liable under the statute as a statutory agent (*Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 98 [1st Dept 1999] ["court correctly found LaSala to be a statutory agent within the meaning of Labor Law § 240(1) since the management contract vested LaSala with authority to supervise the injury-producing work"]). Plaintiffs, however, make no arguments as to how Paramount may be held liable and have not submitted its management contract with the owner of the premises. Accordingly, plaintiffs have not sufficiently demonstrated that Paramount is a responsible party under section 240(1) to warrant summary judgment.

Plaintiffs have established that Allianz qualifies as an "owner" under section 240(1). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). "The statute may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor" (*id.* at 339-340). Defendants admitted that Allianz Global Investors of America L.P. was a lessee of the 41st through 45th floors (amended answer, ¶ third). In addition, defendants admitted that, on or about November 1, 2010, defendant Allianz Asset Management of America L.P. f/k/a Allianz Global Investors of America L.P. i/s/h/a Allianz Global Investors U.S. LLC "entered into a '*Standard Form of Agreement Between Owner and Construction Manager*' with J.T. Magen . . . with regard to certain work to be performed on certain floors within the premises . . ." (*id.*, ¶ fifth). Allianz's witness also testified that "Allianz" hired J.T. Magen to perform the construction work at issue (Collica tr at 10-12). Defendants have not disputed that Allianz is a proper defendant. Thus, Allianz may be held liable under Labor Law § 240(1).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protection of Labor Law § 240(1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross*, 81 NY2d at 501).

To establish liability based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Moreover, "'[a] plaintiff must show that the object fell . . . *because* of the absence or inadequacy of a *safety device* of the kind enumerated in the statute'" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014], quoting *Narducci*, 96 NY2d at 268 [emphasis in original]).

In *Misseritti v Mark IV Constr. Co.* (86 NY2d 487, 489 [1995], *rearg denied* 87 NY2d 969 [1996]), the decedent was struck by a completed fire wall while sweeping the floor at a construction site. The Court of Appeals, noting that the

decedent was not working at an elevation at the time of his tragic accident, held that "the collapse of the fire wall is the type of 'ordinary and usual' peril a worker is commonly exposed to at a construction site and not an elevation-related risk subject to the safeguards prescribed by Labor Law § 240(1)" (*id.* at 489, 491;[2] *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 8 [2011]).

In subsequent cases, the First Department has held that section 240(1) may apply where the plaintiff is struck by a collapsing wall. In *Greaves v Obayashi Corp.* (55 AD3d 409, 409 [1st Dept 2008], *lv dismissed* 12 NY3d 794 [2009]), the worker "was standing on a scaffold, while working on a portion of a concrete wall, when the wall collapsed." It was undisputed that the portion of the wall on which the worker was working was neither braced nor secured (*id.*). The First Department held that the worker was entitled to partial summary judgment under Labor Law § 240(1), reasoning that "[t]he accident clearly fell within the scope of Labor Law § 240(1), as the evidence shows [the worker] was struck by falling objects that could have been, but were not, adequately secured by one of the devices enumerated in the statute"

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[2] The *Misseritti* Court construed the term "braces" in section 240(1) to "mean those used to support elevated work sites not braces designed to shore up or lend support to a completed structure" (*Misseritti*, 86 NY2d at 491).

(*id.*). In addition, the defendants failed to rebut the worker's prima facie showing, thus entitling the plaintiff to summary judgment against them (*id.*).

Similarly, in *Purcell v Visiting Nurses Found. Inc.* (127 AD3d 572, 573 [1st Dept 2015]), the plaintiff was standing on a ladder, pulling one end of an eight or 10-foot-long piece of steel known as a C-channel. An unsecured terracotta wall, which had been resting on the C-channel, collapsed, causing the plaintiff and the ladder to fall to the floor (*id.*). The First Department held, citing *Greaves*, that "plaintiff established that his injuries were also caused by the lack of any safety devices to secure the terracotta wall" (*id.*). The Court further determined that the defendants failed to raise a triable issue of fact as to whether adequate safety devices were provided or whether the lack or failure of safety devices proximately caused plaintiff's injuries (*id.*). In particular, there was evidence in the record that various shoring methods could have been used to secure the terracotta wall to the structural wall (*id.* at 574). In analyzing the section 240(1) claim, the *Purcell* Court distinguished *Misseritti*, noting that "[t]he decedent in *Misseritti* was sweeping the floor when he was fatally struck by a completed wall," and "by contrast, plaintiff's work raised an extraordinary, elevation-related risk beyond that which workers are routinely exposed to on

construction sites, and the terracotta wall 'was an object that required securing for the purposes of the undertaking'" (*id.*, quoting *Outar*, 5 NY3d at 732).

In contrast, in *Kaminski v 53rd St. & Madison Tower Dev., LLC* (70 AD3d 530, 531 [1st Dept 2010]), a construction worker was injured at a demolition site when a portion of an exterior wall collapsed onto him while clearing debris on the landing of a staircase. The First Department wrote that "[t]he cause of the wall's collapse is not discernable from the record. Plaintiff was not working at an elevation so as to require a protective device enumerated in Labor Law § 240(1)," and therefore, the plaintiff's section 240(1) claim was correctly dismissed (*id.*).

Here, the cinderblock wall was an object that "required securing for the purposes of the undertaking" (*Outar*, 5 NY3d at 732). "'What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken'" (*Jordan v City of New York*, 126 AD3d 619, 620 [1st Dept 2015], quoting *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). Gonzalez testified that he was working on a baker's scaffold, knocking cinderblocks out with his sledgehammer just prior to his accident (plaintiff tr at 43, 56-57). The cinderblocks that fell and

hit his knee were, prior to falling, located above where he had made the opening (*id.* at 57, 59). As in *Greaves* and *Purcell*, it was foreseeable that cinderblocks above where Gonzalez had made the opening in the cinderblock wall could fall and strike him.

Plaintiffs have also established that Gonzalez's injuries were caused by the lack of any safety devices to secure the cinderblock wall. Gonzalez testified that "on most job sites, when we are leaving cinderblock above the opening we are creating, we usually put in what is called a lintel and that will prevent whatever is not part of the hole from falling down" (plaintiff tr at 42). However, no lintels were provided (*id.*). In addition, Konon states that two-by-four pieces of lumber, or other types of supports or braces, could have been placed in the opening to protect Gonzalez from the consequences of falling blocks (Konon aff, ¶ 7).

Defendants have failed to raise an issue of fact as to whether adequate safety devices were provided, or whether the lack of safety devices was a proximate cause of the accident. Indeed, defendants do not claim that any enumerated safety devices were provided. While defendants claim that using a lintel or brace was unnecessary and that there was compliance with industry standards (Lynch aff, ¶ 8; Bruno aff, ¶¶ 14, 15), this evidence is insufficient to establish the absence of

a violation of Labor Law § 240(1) (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985], *rearg denied* 65 NY2d 1054 [1985] ["where injury is allegedly caused through a violation of section 240(1), which establishes its own unvarying standard, evidence of industry practice is immaterial"];[3] *Bonaerge v Leighton House Condominium*, 134 AD3d 648, 649 [1st Dept 2015] ["the testimony and expert opinion that [enumerated] devices were neither necessary nor customary is insufficient to establish the absence of a Labor Law § 240(1) violation"]). Assuming that defendants claim that the cinderblocks were safety devices, because they were "self-supported" (Lynch aff, ¶ 8), they were obviously inadequate and did not offer "proper protection," as they fell and struck Gonzalez. Defendants have also failed to demonstrate that any securing device would have defeated the task of making openings in the wall, since the cinderblocks that fell and

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[3] Recently, in *O'Brien v Port Auth. of N.Y. & N.J.*, ___NY3d ___, 2017 NY Slip Op 02466 [2017]), the Court of Appeals distinguished *Zimmer* in a case where the plaintiff was injured after slipping on a temporary metal staircase. In that case, the parties submitted competing expert affidavits (*id.*). *O'Brien* noted that "the holding in [*Zimmer*] was that 'in light of the uncontroverted fact that *no* safety devices were provided at the worksite, it was error to submit to the jury for their resolution the conflicting expert opinion as to what safety devices, if any,' should have been employed" (*id.*, quoting *Zimmer*, 65 NY2d at 523). The Court explained that "[b]y contrast, [in *O'Brien*], the experts differ as to the adequacy of the device that was provided" (*id.*). In this case, it is undisputed that no safety devices were provided. Indeed, defendants claim that safety devices were unnecessary under the circumstances (Bruno aff, ¶ 15 ["(t)here was no need to use a lintel (or anything else)"]).

struck Gonzalez were not the target of demolition (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011] ["the installation of a protective device of the kind that (plaintiff) posits . . . would have been contrary to the objectives of the work plan in the basement"]; *Wilinski*, 18 NY3d at 11 ["the pipes that caused plaintiff's injuries were not slated for demolition at the time of the accident"]; *Ross v DD 11th Ave., LLC*, 109 AD3d 604, 605 [2d Dept 2013] ["securing of pieces of form to the column would not have been 'contrary to the objectives of the work plan, as the plaintiff testified that the forms were cut into sections and that he was removing a different section than the one that fell on him"] [internal citation omitted]).

Moreover, even if Gonzalez failed to follow instructions to remove loose concrete blocks prior to removing debris (*see* Lynch aff, ¶ 6), this would constitute, at most, comparative negligence, which is not a defense to liability under section 240(1) (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Plaintiffs' motion for partial summary judgment under Labor Law § 240(1) is thus granted as against Allianz.[4]

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[4] Plaintiffs' request for partial summary judgment on the Labor Law § 241(6) claim cannot be entertained as it was not included in their notice of motion (*see All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015]). Additionally, as to Allianz, Labor Law §

Accordingly, it is ORDERED that plaintiffs' motion for partial summary judgment under Labor Law § 240(1) is granted solely as against defendant Allianz Asset Management of America L.P. f/k/a Allianz Global Investors of America L.P. i/s/h/a Allianz Global Investors U.S. LLC, with the issue of

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241(6) is academic as plaintiffs were awarded summary judgment on § 240(1) claim (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617 [1st Dept 2014]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011] ["plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic"]). In any event, plaintiffs failed to demonstrate that 12 NYCRR 23-1.7(a)(1) applies and was violated as a matter of law since it does not appear that the accident occurred in an area that was "normally exposed to falling material or objects" (12 NYCRR 23-1.7[a][1]; *see also Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1475 [4th Dept 2011], *lv dismissed and denied in part* 17 NY3d 843 [2011] [section 23-1.7(a) was inapplicable where "there [was] no evidence that the area in which [plaintiff] was working was 'normally exposed to falling material or objects'"]; *see also Griffin v Clinton Green S., LLC*, 98 AD3d 41, 49 [1st Dept 2012]). Nor have they shown that 12 NYCRR 23-3.3(b), (c), and (e) apply here, or were undisputably violated. Gonzalez was making openings in a cinderblock wall. 12 NYCRR 23-3.3 governs "Demolition by hand." The Industrial Code defines "demolition" as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4[b][16]). Courts have held that removal of portions of a wall does not constitute "demolition work" for purposes of sections 23-1.4(b)(16) or 23-3.3 (*see Baranello v Rudin Mgt. Co.*, 13 AD3d 245, 246 [1st Dept 2004], *lv denied* 5 NY3d 706 [2005] ["removal of a portion of a wall does not constitute demolition work as defined in 12 NYCRR 23-1.4(b)(16)"]; *Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002] ["neither the creation of the hole in the wall nor plaintiff's attempt to repair it constituted demolition work"] [internal quotation marks omitted]).

damages to await the trial of this action. In all other respects, plaintiffs' motion is denied.

This constitutes the decision and order of the court.

Dated: April 21, 2017

HON. JENNIFER G. SCHECTER