SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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SCOTT MILLER and JENNIFER MILLER,

Plaintiffs,

-against-

Index No.: 155573/2012

177 NINTH AVENUE CONDOMINIUM, CHELSEA ENCLAVE, CHELSEA ENCLAVE OWNERS CORP., THE BRODSKY ORGANIZATION, L.L.C., BRODSKY CONTROL, L.L.C., CHELSEA 234 PROPERTIES L.L.C., CHELSEA WEST 21st STREET, L.L.C., CHELSEA WEST 21st STREET RETAIL, L.L.C., CHELSEA 20th STREET DEVELOPMENT, L.L.C., LMS REALTY L.L.C., 2 CHELSEA SQUARE PROPERTIES, L.L.C., 4 CHELSEA SQUARE, L.L.C., THE GENERAL THEOLOGICAL SEMINARY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES,

Defendants.

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ELLEN M. COIN, J.:

Defendants 177 Ninth Avenue Condominium, Chelsea Enclave, The Brodsky Organization, L.L.C., Brodsky Control, L.L.C., Chelsea West 21st Street, L.L.C., Chelsea West 21st Street Retail L.L.C., and The General Theological Seminary of the Protestant Episcopal Church in the United States move pursuant to CPLR 3212 for an order granting summary judgment as to plaintiffs Scott Miller and Jennifer Miller's claims for common law negligence, loss of services, and violations of Labor Law §§ 200, 240, and 241 (6).

Plaintiffs cross-move pursuant to CPLR 3212 for an order granting summary judgment as against the moving defendants on plaintiffs' claims alleging violations of Labor Law §§ 240(1) and 241 (6).

At oral argument of these motions, plaintiffs' counsel withdrew their claims for violation

of Labor Law §§ 200 and 241 (6). Therefore, the balance of defendants' motion regarding common law negligence, loss of services, and both sides' motion as to the alleged violation of Labor Law § 240 (1) remains.

FACTUAL ALLEGATIONS

Plaintiff Scott Miller alleges that he was injured on August 19, 2009 at a construction site at 177 Ninth Avenue, New York, New York, while working as a laborer for Bovis Lend Lease (Lend Lease). Plaintiff maintains that a Lend Lease supervisor named "Ken" or "Kevin" instructed him to transport garbage bins from the building floors and bring them to a dumpster located at ground level in an open area lot (Affidavit of Scott Miller, sworn to November 23, 2016, ¶¶ 3, 7, 9). The bins were about three feet deep by three feet wide by four feet long, and were made of canvas, with metal bars around the top, middle and bottom. Plaintiff would put construction debris in the bins, push the bins into a freight elevator, bring them to ground level, and dump them into a dumpster. The dumpster into which he emptied the bins was about 15 feet long, six-and-a-half to seven feet tall, and six to eight feet wide. In order to empty a bin, plaintiff and his co-worker would press the bin over their heads and dump the debris into the dumpster. He maintains that some of the bins were too heavy to lift and had to have some debris removed to lessen their weight. Plaintiff, who was 5'10" tall, maintains that the bins had to be lifted to a height of about six-and-a-half feet in order to empty their contents into the dumpster (id., ¶¶ 8-18).

At the time of plaintiff's accident, he and his co-worker were lifting a bin weighing about 300 pounds. Plaintiff maintains that he had lifted four or five bins prior to his accident. The bins contained metal pipes, sheetrock, and metal studs. Although plaintiff was concerned that he

would get hit by a pipe as the debris was protruding over the bin, the superintendent and foreman on the job had instructed him and his co-worker to perform their task this way (id. ¶¶ 9-10, 12-17, 20).

There were no ramps around the dumpster. In his prior experience plaintiff had never dumped garbage in this manner, nor had he seen laborers manually lifting filled bins to dump them. Plaintiff claims that prior to the accident, he had asked another laborer if a ramp could be utilized to dump the debris, but the laborer responded that they did not use ramps. Plaintiff had worked at another site in which heavier bins were lifted by a "bobcat" machine (id. ¶¶ 25-29).

As plaintiff was lifting the bin, he and his co-worker began "seesawing" the weight of the bin back and forth in order to raise it. As the bin was being raised, it touched the dumpster. The co-worker's side of the bin came down, causing plaintiff to lose his grip at the bottom of the bin. As plaintiff tried to regain his grip and grab the middle bar of the bin, the bin began to descend abruptly, wedging plaintiff's arm with the bar that went around the bin, and bending plaintiff's arm backwards. The bin proceeded to fall to the ground. Plaintiff was able to pull his arm free when the bin hit the ground. Plaintiff maintains that the bottom of the bin was five feet, six inches above the ground when it slipped (Affirmation of Thomas J. Cappello dated November 25, 2016, ex. F at 51-52, 66-69).

Plaintiff alleges that as a result of the accident, he injured his right elbow, requiring him to undergo osteocapsuectomy, arthroscopic loose body removal, ulnar nerve decompression, arthroscopic synovectomy, arthroscopic contracture release, and open ulnar nerve subcutaneous transposition.

Plaintiff maintains that both his supervisor and foreman were present at the site, that they

were aware of the work, and that both had instructed him how to perform the task. Plaintiff states that representatives of the owners of the property, the general contractor, and representatives from Brodsky were present on the job site every day. Plaintiff maintains that he was not provided with any ropes, pulleys, machinery, or power equipment to assist with hoisting the bins; that there were no ramps on which to roll the bins; that there were no instructions provided to him on the proper procedure to perform his task; and that there were no "tool box" meetings (Miller Aff. ¶ 33; Cappello Aff., ex. F at 69-71).

Christopher Corbo (Corbo) testified at deposition that he works for Lend Lease, the general contractor on the construction project. Corbo believes that 2 Chelsea Square Properties is the owner of the subject premises and that Brodsky Organization, L.L.C., was the developer that hired Lend Lease. In 2009 Corbo was a superintendent at 177 Ninth Avenue. His duties included overseeing the mechanical installation, acting as a fire safety manager, and inspecting the job site. Corbo testified that there were about six laborers whose duties included cleaning up the project and taking down debris.

Corbo recalls the use of steel mini-containers and canvas laundry bins at the site. Corbo testified that it was not proper to use laundry bins to remove or hold construction debris, sheetrock or pipes. Corbo maintains that the only way to properly dispose of the debris was to fill the mini-containers and bring them down to a truck which had a hoist to lift the containers (Cappello Aff., ex. G at 8, 15, 26-32).

Shawn McKeon (McKeon), plaintiffs' expert, is a site safety manager. McKeon maintains that Labor Law § 240 (1) applies to plaintiffs' case, because defendants failed to utilize proper methods and equipment and did not provide proper protection or safety devices to

plaintiff for an elevation-related risk.

McKeon notes plaintiff's claim that he and his co-workers were expected to lift and dump approximately 15 bins, each weighing 300 pounds, and that the bins were made of canvas, allowing the weight inside to shift. McKeon opines that Corbo's testimony confirms that the laborers should not have been lifting canvas filled with debris. McKeon further opines that the defendants should have had a ramp or platform constructed around the dumpster, or allowed the debris to be collected into mini-containers which would then be mechanically lifted. McKeon concludes that an adequate safety plan should have been in place and followed, that the method in which plaintiff was required to dump the debris was inappropriate, and that defendants created a risk which could have been avoided if they had employed proper means.

Defendants' expert, Robert J. O'Connor (O'Connor), is a safety expert and professional engineer. O'Connor maintains that since plaintiff was injured while standing at ground level and manually lifting a bin containing debris with a co-worker, the accident did not involve plaintiff falling or material falling from a significant distance above plaintiff.

O'Connor disagrees with McKeon's opinion that the use of a "stand alone" dumpster without ramps or platforms was improper and unsafe. O'Connor also disagrees with McKeon's opinion that ramps or walkways should have been constructed so that bins could have been rolled directly to the top of the dumpster and tipped. He opines that utilizing ramps and walkways for disposal of debris is not necessarily safer than the method plaintiff used.

O'Connor concludes that it was not the method itself that was the cause of plaintiff's accident or that the accident was due to an elevation-related hazard. Instead, he contends that the accident resulted from the actions of plaintiff and his co-worker in attempting to lift a bin that

they either knew, or should have known, was overloaded. O'Connor disagrees that the use of mini-containers was unavailable to plaintiff, in light of Corbo's testimony that steel containers with wheels were available and used at the site.

O'Connor maintains that plaintiff was not exposed to the type of elevation hazard that Labor Law § 240 (1) was intended to prevent. Plaintiff was not working in an area in which overhead work was presenting any danger of objects falling from above; the types of safety devices referenced in Labor Law § 240 (1) would not be used in this type of debris disposal; and the procedure plaintiff was using to dispose of garbage was appropriate and safe when correctly performed.

DISCUSSION

"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 . . . ." *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).

Common Law Negligence

Where a worker is injured as a result of the manner and means of the work, including the equipment used, liability for common law negligence may be imposed against the owner "if it actually exercised supervisory control over the injury-producing work." *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012). Plaintiffs rely on Corbo's testimony that Dan Brodsky, on behalf of Chelsea West 21st Street, L.L.C. (Chelsea West) was present on the

construction site "[m]aybe once every other week or so just to walk the project to see if it was being built right" (Cappello Aff., ex. G at 65-66). However, they fail to offer any evidence that Chelsea West, or any of the defendants, a actually exercised supervisory control over the injury-producing work and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury. Thus, the first cause of action for common law negligence must be dismissed. *Id.*, 99 AD3d at 144; *Gallagher v Levien & Co.*, 72 AD3d 407, 409 (1st Dept 2010).

Labor Law § 240(1)

Plaintiffs' Third Cause of Action alleges violation of Labor Law § 240 (1). The statute provides, in relevant part:

> "[a]ll 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, hoist, stay, ladder 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.*" *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993)(emphasis in text). To establish a claim under this provision, the plaintiff must prove a violation of the statute (i.e., that the owner or agent failed to provide adequate safety devices), and that the violation proximately caused his injury. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 (2003). Plaintiff "must have suffered an injury as the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation

differential." *Soto v J. Crew, Inc.*, 21 NY3d 562, 566 (2013) (internal quotation marks and citation omitted).

> "Labor Law § 240 (1) applies to both falling worker and falling object cases. With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to a significant risk inherent in … the relative elevation … at which materials or loads must be positioned or secured. Thus, for section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute."

Narducci v Manhasset Bay Assocs., 96 NY2d 259, 267-268 (2001) (internal quotation marks and citations omitted).

Defendants contend that plaintiff's Labor Law § 240 (1) claim must be dismissed, as plaintiff neither fell from a height nor was struck by an object being hoisted. Further, plaintiff testified that he was working at ground level, but never fell, and that he was not hit by the falling bin of debris. Instead, he testified that his arm got caught in the framing of the bin he was lifting. Moreover, plaintiff never let go of the bin as it returned to the ground level.

Defendants also argue that debris removal is not the type of construction-related, gravity risk activity intended to be covered by Labor Law § 240 (1). They urge that the affidavit of plaintiff utilizes semantics to depict a falling object scenario, while plaintiff testified at deposition that his arm slid into the side of the bin and was stuck or trapped as the bin went back.

In opposition, plaintiffs argue that the bin, which weighed 300 pounds, struck plaintiff on the right arm and entrapped his arm after falling from above his head, and that the bin continued to descend six-and-a-half to seven feet to the ground. They argue that because plaintiff's injury was a result of the application of gravity on the object, Labor Law § 240 (1) applies. They point

to defendants' incident report, which states that a "garbage bin fell and landed on [plaintiff's] arm," that the bin fell six feet, and that the materials were not secured or tied to prevent them from falling (Cappello Aff., ex. D).

Here, the activity which plaintiff was conducting posed a significant risk to plaintiff's safety due to the bin's weight and height. In *Runner v New York Stock Exch., Inc. (*13 NY3d 599 [2009]), plaintiff was injured while serving as a counterweight on a makeshift pulley to move an 800-pound reel of wire down a set of stairs. The plaintiff was dragged into the pulley mechanism after the reel rapidly descended the stairs, and his hands jammed against a metal bar placed horizontally on the same level as the reel. Even though the plaintiff did not fall and was not struck by a falling object, the Court of Appeals determined that section 240(1) applied, since "the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel" (*id.* at 604).

Similarly, in *Gove v Pavarini McGovern, LLC,* (110 AD3d 601 [1st Dept 2013]), the Appellate Division affirmed the grant of partial summary judgment on plaintiff's Labor Law § 240(1) claim. In *Gove*, after a bundle of rebar being lowered on a rope fell and hit plaintiff, his foot hit an unknown item on the platform and caused him to twist his back. The Court stated, "Even if plaintiff's injuries resulted in part from tripping or slipping on an object on the platform, the uncontroverted evidence demonstrates that these injuries resulted directly from the elevation-related risks that required plaintiff to struggle with the bundle of rebar" (110 AD3d at 619).

Here, plaintiff testified that he and his co-worker were lifting a canvas basket containing 300 pounds of debris; that they had lifted it to the level of six-and-a-half feet in order to empty its contents into the dumpster; and that his co-worker's side of the bin came down, causing plaintiff

to lose his grip and his arm to become caught in the falling basket. There is no evidence to the contrary in the record. As plaintiff has shown that the harm flowed from the application of the force of gravity to the basket (*see Runner*, 13 NY3d at 604; *Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011]), Labor Law § 240(1) applies.

The cases defendants cite are factually distinct from the situation here. In *Zduncyzk v Ginther* (15 AD3d 574 [2nd Dept 2005]), the plaintiff was injured while lifting a beam 1½ feet, a *de minimus* distance (held: injury incurred by lifting heavy object does not give rise to Labor Law § 240(1) liability). Here, the distance involved, according to plaintiff's uncontradicted testimony, was six-and-a-half feet. Moreover, given the approximately 300-pound weight of the cart, and "the amount of force it was capable of generating, even over the course of a relatively short descent," the distance was not de minimus. *Jordan v City of New York*, 126 AD3d 619, 620 (1st Dept 2015) (citation and interior quotation marks omitted); *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 1210 (3rd Dept 2013); *Marrero v 2075 Holding Co. LLC,* 106 AD3d 408, 409 (1st Dept 2013); *Kempisty v 246 Spring Street, LLC* (1st Dept 2012).

Defendants' other citations are equally distinguishable. In *Georgopulos v Gertz Plaza, Inc.* (13 AD3d 478 [2nd Dept 2004]), plaintiff slipped and fell on debris inside a dumpster, which caused him to fall to the floor. *Sandi v Chaucer Assoc.* (170 AD2d 663 [2nd Dept 1991]) also involved a worker's slip and fall while transporting debris. Finally, in *Monterroza v State Univ. Constr. Fund* (56 AD3d 629 [2d Dept 2008]), the plaintiff was injured while climbing out of a wet dumpster, not as a result of hoisting heavy material over his head. Moreover, significantly, all of defendants' citations precede the Court of Appeals decision in *Runner*, 13 NY3d 599, which clarified the application of Labor Law §240(1).

Further, here it is uncontested that no device of any kind was offered or provided to plaintiff and his co-worker to assist them in lifting the canvas basket loaded with 300 pounds of debris to a height of at least five feet in order to empty its contents into the dumpster. Accordingly, plaintiff has established his entitlement to partial summary judgment on his claim pursuant to Labor Law § 240(1).

Loss of Services

Defendants' motion to dismiss plaintiff Jennifer Miller's claim for loss of consortium must be denied, as it is derivative of the Labor Law §240(1) cause of action.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that so much of the motion for summary judgment of defendants 177 Ninth Avenue Condominium, Chelsea Enclave, The Brodsky Organization, L.L.C., Brodsky Control, L.L.C., Chelsea West 21st Street, L.L.C., Chelsea West 21st Street Retail L.L.C., and The General Theological Seminary of the Protestant Episcopal Church in the United States as seeks dismissal of the claims of plaintiff Scott Miller for negligence, violation of Labor Law § 200 and Labor Law § 241(6) is granted, and the balance of the motion is denied; and it is further

ORDERED that so much of the cross-motion of plaintiff Scott Miller as seeks summary judgment on his claim for violation of Labor Law § 240(1) is granted on the issue of liability as against defendants 177 Ninth Avenue Condominium, Chelsea Enclave, The Brodsky Organization, L.L.C., Brodsky Control, L.L.C., Chelsea West 21st Street, L.L.C., Chelsea West

21st Street Retail LLC and The General Theological Seminary of the Protestant Episcopal Church in the United States, and the balance of the cross-motion is denied.

Dated: August 22, 2017

ENTER:

Ellen M. Coin, A.J.S.C.