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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Bruce Escalera and Maria Escalera,
Plaintiffs,

-against-

SNC-Lavalin, Inc., Astoria Energy II, LLC, and Astoria Energy, LLC.,
Defendants.

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SNC-Lavalin, Inc. and Astoria Energy II, LLC,
Third-Party Plaintiffs

-against-

E-J Electric Installation,
Third-Party Defendant.

----------x

Index No. **301889/2011**
DECISION AND ORDER

Index No. 301889/11

HON. HOWARD H. SHERMAN, J.S.C.:

The plaintiffs commenced this action to recover damages for injuries that plaintiff Bruce Escalera[1] allegedly sustained on August 28, 2010, when he received an electrical shock. At the time of the accident, plaintiff, a journeyman electrician employed by the third-party defendant, was in the process of re-routing wires in a "Conex box" located on premises belonging to the defendants. As a result of the accident, plaintiff was shocked with 480 volts of electricity, losing consciousness for three to five minutes. Plaintiff alleges that he has sustained permanent injuries.

[1] Reference herein to "plaintiff" in the singular refers only to plaintiff Bruce Escalera, unless otherwise indicated. His wife, Maria Escalera, sues derivatively only.

The premises where the accident occurred was a Con Edison[2] plant located in Queens, New York. The Conex box on which plaintiff was working was a five by ten-foot unit containing transformers and live, high voltage wires. Because the Conex box contained high voltage, it was protected from unauthorized access by a lock. Under the safety procedures in place at the time of the accident, the Conex box was subject to a "Lock Out/Tag Out" protocol. In essence, authorized personnel would de-energize the Conex box, and then remove the lock, signaling that the Conex box was disconnected from any source of electricity and therefore safe to work on.

On the day of the accident, plaintiff was waiting by the Conex box before starting work; the Conex box was still locked. Plaintiff then went to retrieve "tie wraps," which are used to insulate the Romex cable inside the Conex box. When plaintiff returned, his partner Yvon Remy, and Horn, the E-J foreman, were present, and the lock was removed. Plaintiff therefore believed that the entire Conex box had been de-energized. He did not believe it was his responsibility to test for the presence of electricity, or to wear a protective suit.

In opposition, the defendants submit various work reports which

[2] Con Edison was previously a party, but the action was discontinued against it.

indicate that plaintiff stated that his partner had pried the lock from the Conex box with a screwdriver. These reports include a written statement from plaintiff's co-worker Remy admitting that he had pried off the lock.

Plaintiffs move for summary judgment under the common law, and Labor Law §§ 200, 240(1)[3] and 241(6) against defendants. Plaintiffs, in their motion papers, rely on 12 NYCRR 23-1.5(c)(3) (safety devices shall be kept sound and operable) in support of their Labor Law § 241(6) claim.[4] In their opposition to the defendants' cross-motion, however, the plaintiffs rely on their expert's affidavit. The expert, in turn, relies on 12 NYCRR 23-1.13(b).[5]

In their cross-motion for judgment dismissing the complaint, the defendants argue that they did not supervise the plaintiff's work, did not have notice of any dangerous condition or exposed wiring, and did not fail to remedy a dangerous condition, as a result of which defendants were not negligent, nor liable under Labor Law §200. Further, defendants argue that they are not liable under Labor Law §240(1), as there was no elevation-

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[3] The accident was not gravity-related, and plaintiff makes no argument in support of judgment under Labor Law § 240(1), even though that section is cited in plaintiffs' motion.

[4] Plaintiffs also cite 12 NYCRR 23-1.27, which appears to be an error, as it does not relate to electric shocks.

[5] Defendants do not argue that this section of the Industrial Code is properly raised, and they address this section in their reply papers. The court accordingly considers the applicability of this section.

related risk; and that neither 12 NYCRR §23-1.13(b)(4), nor the other regulations identified in plaintiffs' bill of particulars, give rise to liability or are applicable under the facts presented.

Analysis

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Labor Law § 241(6)

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 [1st Dept. 2011] ["Labor Law §

240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was unaware, and therefore over which it exercised no supervision or control.")

As a prerequisite to a Section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. 12 NYCRR 23-1.5(c)(3) is sufficiently specific to support the cause of action alleging a violation of Labor Law § 241(6). (*See Misicki v Caradonna*, 12 NY3d 511, 520-521, 909 N.E.2d 1213, 882 N.Y.S.2d 375 [2009]; *Tuapante v LG-39, LLC*, 151 A.D.3d 999, 1000, 58 N.Y.S.3d 421, 423 [2d Dept. 2017].)

Further, 12 NYCRR §23-1.13(b)(4) requires that workers who may come into contact with an electric power circuit be protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. Specifically, the regulations at issue here, 12 NYCRR §23-1.13(b)(3), (4), provide as follows:

"(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be

taken.

"(4) Protection of employees. No employer[6] shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

"These code sections are clear and specific in their commands that before work is started, it is to be ascertained whether the work will bring a worker into contact with an electric power circuit, and, if so, that the worker not be permitted to come into contact with the circuit without it being de-energized. (*DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241[6] where plaintiff was standing on an A-frame ladder when he was struck by a live, energized and exposed electrical wire].)

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[6] Owners and general contractors may be held liable for violation of these regulations, even though they impose obligations on the employer, since they have a nondelegable duty to provide adequate safety protections. (*Rubino v. 330 Madison Co., LLC*, 150 A.D.3d 603, 56 N.Y.S.3d 55 [1st Dept. 2017].)

Based on the foregoing, neither plaintiff nor defendants are entitled to summary judgment. In the present case, there exist issues of fact as to whether defendants are liable under Labor Law § 241(6) by virtue of alleged violations of 12 N.Y.C.R.R. 23-1.13 (b)(2) – (4) (in failing to ensure that the plaintiff did not come into contact with exposed live wires), and under 12 NYCRR 23-1.5(c)(3) (in failing to keep lock for the Conex box lock "sound and operable.") The sufficiency of the Lock Out/Tag Out protocols raises questions for the trier of fact. Defendants arguments that that the plaintiff was provided warnings, and that he should have tested for the presence of voltage, and also, should have worn a protective suit, also raise issues of fact as to comparative negligence, but they do not establish, as a matter of law, that plaintiff's conduct was the sole proximate cause of the accident. In this regard, it is noted that comparative negligence is a valid defense to a Labor Law 241(6) claim; moreover, breach of a duty imposed by a rule in the Industrial Code (12 NYCRR) is merely some evidence for the factfinder to consider on the question of a defendant's negligence.

(*Misicki v. Caradonna, supra.*, 12 N.Y.3d 511, 514.)

Common law and Labor Law § 200 claims

An owner may be liable under the common law or under Labor Law § 200 for a dangerous condition arising from either the condition of the premises or the means and methods of the work. (*See Cappabianca v Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143-144, 950 N.Y.S.2d 35 [1st Dept. 2012]). An owner's liability only attaches for an injury arising from the means and methods of the work if the owner exercised supervisory control over the work (*id.* at 144). Thus, liability if any under the common law or under Labor Law § 200 must be predicated on the defendants' alleged conduct in supervising the work, creating a dangerous condition, or having actual or constructive notice of it (*id.*). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). However, "constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection." (*Curiale v Sharrotts Woods, Inc.*, 9 A.D.3d 473, 475, 781 N.Y.S.2d

47 [2d Dept. 2004].)

The defendants have met their respective burdens of establishing that they did not supervise or control plaintiff's work. Plaintiff testified that he received all of his instructions from his foreman, an employee of the third-party defendant E-J. There is no showing that the defendants had notice of the alleged dangerous condition or defect which lead to the accident – i.e., the failure to follow proper safety protocols. (*See Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 435, 34 N.E.3d 815, 820, 13 N.Y.S.3d 305, 310 [2015]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878, 631 NE2d 110, 609 NYS2d 168 [1993]). In this regard, it is noted that E-J had authority to remove the locks and shut down the power to the work area. There is no evidence that the defendants had notice that any worker attempted to remove a lock without authorization, or that E-J had failed to follow the "lock out/ tag out" procedures.

There is similarly no evidence that the defendants had notice that any person had broken a lock in order to access the Conex boxes. (*Carrillo v. Circle Manor Apts.*, 131 A.D.3d 662, 15 N.Y.S.3d 463 [2d Dept. 2015] [defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the defect].)

The remaining arguments of the parties not discussed herein are found either to be without merit, or not dispositive of the issues presented.[7]

Conclusions

Accordingly, based upon the foregoing, it is hereby

ORDERED that plaintiffs' motion is denied, and it is further

ORDERED that the cross motions brought by defendants is granted only to the extent of dismissing the claims raised under Labor Law §§ 200, 240(1) and the common law, and it is further

ORDERED that all other relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 21, 2018

HON. HOWARD H. SHERMAN, J.S.C.

[7] While the plaintiffs state that they seek dismissal for failure to preserve evidence, there is no argument supporting the request.