SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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ROBERT MURGATROYD and THERESA MURGATROYD, Index No.: 162447/2015

Plaintiffs,

-against-

TRINITY SCHOOL, TRINITY SCHOOL REALTY HOLDING CORPORATION, TRINITY HOUSING COMPANY, INC. and TISHMAN INTERIORS CORPORATION,

Defendants.

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Kalish, J.:

This is an action to recover damages for personal injuries allegedly sustained by an ironworker on November 23, 2015 when he was struck by a recently hoisted steel beam that he was in the process of placing, while working on a renovation project at Trinity High School located at 139 West 91st Street, New York, New York (the School).

Plaintiffs Robert Murgatroyd (plaintiff) and Theresa Murgatroyd move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants Trinity School, Trinity School Realty Holding Corporation, Trinity Housing Company, Inc. (collectively, Trinity) and Tishman Interiors Corporation (Tishman) (collectively, defendants).

BACKGROUND

On the day of the accident, Trinity owned the School where the accident occurred. Trinity hired Tishman to serve as the general contractor on a project to renovate the School (the Project). Plaintiff, an ironworker hired by nonparty United Structural Works (USW), was

performing I-beam connector work on the Project at the time of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by USW as a journeyman ironworker/connector on the Project. Plaintiff's work was solely supervised by his USW general foreman, Joseph Daula. Plaintiff's work entailed connecting I-beams for the creation of floors that were being added to the School.

At the time of the accident, plaintiff was installing a steel brace diagonally between the second and third floors of the School (the Beam). The Beam was approximately 15-20 feet long and weighed approximately 3,000 pounds. The Beam had been hoisted and brought to plaintiff via a knuckle boom crane. Plaintiff explained that after the Beam was successfully hoisted to the area where he was located, and, as he was in the process of placing the Beam into its proper location for installation, the Beam suddenly "shot at [him], picked [him] up between [his] legs and pinched [him] between [the Beam] and a column" (plaintiff's tr at 71).

Plaintiff further testified that, at the time of the accident, he "[p]robably had [his] spud wrench in [his] hands," as the USW men "weren't at the point of sticking any kind of spud wrench anywhere . . . [he] was still in the process of getting [the Beam] in place" (*id.* at 72). When he was asked if he ever learned what had caused the Beam to strike him, plaintiff replied, "No, I haven't" (*id.* at 88). When he was asked if there was any other equipment that was needed to perform the aforementioned work, plaintiff offered that "it might have been easier [with a bigger crane], instead of the mobile crane that we were using" (*id.* at 70).

Plaintiff's Affidavit

In his affidavit dated December 20, 2017, plaintiff stated, "The piece of steel I was struck

by did not have a tag line on it" (plaintiff's aff).

Deposition Testimony of Michael Davison (Tishman's Superintendent)

Michael Davison testified that he served as Tishman's superintendent on the Project on the day of the accident. As such, he was in charge of Tishman's structural steel and concrete work. Davison explained that when ironworkers connect pieces of steel, they use spud wrenches to hold the pieces of steel in place until bolts or welds are installed. After the bolts or welds are placed, the spud wrenches are removed. If the steel pieces are not properly aligned, the spud wrenches will not fit into place. Davison testified that Daula told him that plaintiff had removed his spud wrench from the connection just prior to the happening of the accident. However, Daula did not tell Davison how long before the accident plaintiff did so.

Davison also maintained that "usually someone is on a tagline" when performing the subject installation work. That said, he did not know "specifically" whether or not the Beam had a tagline attached to it at the time of the accident. In addition, Davison did not know what caused the Beam to move into plaintiff and injure him.

Deposition Testimony of Dennis Andree Leon and Berisford Lewis

Dennis Andree Leon and Berisford Lewis both testified that they were USW ironworkers on the Project on the day of the accident, and that they received all of their work assignments and supervision from their USW foremen, Pete and Joseph Daula. At the time of the accident, the men were attempting to install the Beam, which was still connected to the crane with a choker. Leon and Lewis did not know what caused the Beam to strike plaintiff.

Deposition Testimony of James Palma (USW's Driver and Crane Operator)

James Palma testified that he was USW's tractor trailer driver and knuckle boom crane

operator on the day of the accident. He noted that the subject knuckle boom crane had a certificate of on-site inspection that was current until November 23, 2015.

At the time of the accident, the USW crew was placing the Beam into a stairway, about ten yards above the ground. He asserted that the crane was not moving at the time of the incident, and that the rolling up of the Beam into plaintiff could not have been caused by the crane.

Palma testified that although he "didn't see" the accident, he was told by someone (whose name he could not recall) that plaintiff was sitting on a beam prior to the accident, and that, when he pulled a "bull pin out of that beam," it "went up in the air" (Palma's tr at 38-39). When Palma was asked, "And how would pulling out the bull pin holding the beam to the column, how would that result in the beam shifting and going upward?" Palma replied, "I do not know" (*id.* at 81).

Deposition Testimony of Joseph Daula (USW Foreman)

Daula testified that he was employed by USW as a foreman on the day of the accident. He could not recall whether a tagline was used on the Beam, although he maintained that taglines were used on some of the other pieces of steel that had been set during the day. Daula further testified that when he observed the Beam in the process of being hoisted, he noticed it to be "in control" (Daula tr at 25).

The Workers' Compensation C-2 Report

In the Workers' Compensation C-2 Report (the Report), which was filled out by Daula, it is stated that the accident occurred when a "brace came up [and] pinched [plaintiff] in between [his] thighs" (plaintiff's reply, exhibit 2, the Report).

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 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]).

The Labor Law § 240 (1) Claim

Plaintiffs move for partial summary judgment in their favor 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]).

Plaintiffs argue that they are entitled to recover damages from defendants for their violation of Labor Law § 240 (1) under a falling objects theory, because the Beam that swung up and into plaintiff "was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]). In this case, it is undisputed that no tagline or other safety devices were in place at the time of the accident, so as to assist in controlling the subject load.

As such, Plaintiff is entitled to summary judgment in his favor on his cause of action for a violation of Labor Law § 240 (1). The Court finds that the instant case is similar to the facts of *Ray v City of New York*, where the plaintiff there was struck by a beam that was being lowered toward him and was moving side to side and up and down (62 AD3d 591, 591 [1st Dept 2009].) The court there awarded summary judgment to the plaintiff, finding that "[t]he undisputed testimony was that the tag line men on plaintiff's side of the beam could not control the swing of the beam." (Id.) Here, it is clear that a tag line was not present and any other safety device present was not adequate to prevent the beam from swinging up and striking plaintiff between the legs (*see Williams v Town of Pittstown*, 100 AD3d 1250, 1251 [3d Dept 2012]; *Flores v Metro. Transportation Auth.*, 164 AD3d 418, 419 [1st Dept 2018] ["The risk of the hoisted load of beams with no tag lines triggered the protections set forth in Labor Law § 240 (1)"]). Furthermore, although the beam was not being raised or lowered at the time that it struck plaintiff, the beam was still attached to the hoist and had been elevated to roughly 25 feet above ground. Accordingly, this Court finds that plaintiff injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011] [declining to adopt "same level" rule]).

The Labor Law § 241 (6) Claim

Plaintiffs also move for partial summary judgment in their favor 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' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not 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.* at 503-505).

Initially, it should be noted that, while plaintiffs assert multiple alleged Industrial Code violations in their bill of particulars, they only move for summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-2.3 (c); 23-8.1 (f) (2) (i) and (ii) and 23-8.2 (a) (1) and (c) (1) and (3).

Industrial Code 12 NYCRR 23-2.3 (c)

Initially, Industrial Code section 23-2.3 (c), which applies to structural steel assembly work, and which requires "[t]ag lines" to be provided and used during hoisting operations "to prevent uncontrolled movement of such panels or members," is sufficiently specific to support a Labor Law § 241 (6) claim (*Sebring v Wheatfield Props. Co.*, 255 AD2d 927, 929 [4th Dept 1998]).

Here, plaintiff stated in his affidavit that the Beam was not properly secured by any taglines at the time of the accident, so as to prevent its uncontrolled movement while plaintiff

was in the process of placing it. In opposition, defendants fail to put forth sufficient evidence to create an issue of fact as to this issue.

Thus, plaintiffs are entitled to partial summary judgment in their favor as to that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-2.3 (c).

Industrial Code 12 NYCRR 23-8.1 (f) (2) (i) and (ii)

Section 23-8.1 (f) (2) (i) and (ii) provide:

"(f) Hoisting the load.

(2) During the hoisting operation the following conditions shall be met:

(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.

(ii) The load shall not contact any obstruction."

Initially, section 23-8.1 (f) (2) (i) and (ii) are sufficiently specific to support a Labor Law claim (*see Long v Tishman/Harris*, 50 AD3d 356, 356 [1st Dept 2008]; *McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 309 [1st Dept 2007]).

Here, the actual raising and moving of the beam by the crane had stopped although the beam remained attached to the hoist. As such, a question of fact exists as to whether the accident was caused due to the improper acceleration and deceleration of the hoisting mechanism or because the Beam contacted an obstruction.

Thus, plaintiffs are not entitled to partial summary judgment in their favor on those parts of the Labor Law § 241 (6) claim predicated on alleged violations of section 23-8.1 (2) (i) and (ii).

Industrial Code 12 NYCRR 23-8.2 (a) (1)

Section 23-8.2 (a) (1), which deals with special provisions for mobile cranes, states:

> "(a) Inspection. (1) A mobile crane which is moved from one job site to another without dismantling beyond the folding of the boom and such additional dismantling as may be necessary for that purpose is not required to be inspected before being first erected or operated on each job site to which it is moved, providing the monthly inspections are performed on schedule."

Here, plaintiffs make no argument or put forth any evidence whatsoever to support their contention that section 8.2 (a) (1) applies to the facts of this case. To that effect, they have failed to demonstrate that the subject crane was dismantled "beyond the folding of the boom" before being moved from one job site to another, such that an inspection was necessary. In any event, Palma testified that the subject crane had a certificate of a proper on-line inspection at the time of the accident.

Thus, plaintiffs are not entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-8.2 (a) (1).

Industrial Code 12 NYCRR 23-8.2 (c) (1) and (3)

Section 23-8.2 (c) (1) and (3), which also deals with special provisions for mobile cranes, provides:

> "(c) *Hoisting the load.* (1) Before hoisting a load the person directing the lift shall see that the mobile crane is level and, where necessary, blocked."
>
> * * *
>
> "(3) Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard."

Initially, section 23-8.2 (c) is sufficiently specific to support a Labor Law § 241 (6) claim (see *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 667 [2d Dept 2006];

Here, plaintiff has not put forth any argument that the subject crane was not level or

properly blocked at the time of the accident. Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of 23-8.2 (c) (1).

However, section 23-8.2 (c) (3) applies to the facts of this case, as, even if tag lines were used, "there is sufficient evidence that the tag lines did not properly control the movement of the load as it was lifted" (*Naughton v City of New York*, 94 AD3d 1, 4 [1st Dept 2012]; Flores v Metro. Transportation Auth., 164 AD3d 418, 419 [1st Dept 2018] ["Based on the same evidence, plaintiff also established his Labor Law § 241(6) claim insofar as the swinging beams lacked tag lines, a violation of 12 NYCRR 23-8.2(c)(3), which requires tag lines or certain other restraints to be used to avoid hazards posed by swinging loads hoisted by mobile cranes"]). In opposition, defendants "failed to establish that the plaintiff's injuries were not caused by the rotation or swinging of the load" (*Locicero*, 25 AD3d at 667).

Finally, it should be noted that, for the purposes of Labor Law § 241 (6) liability, the aforementioned provision is

> "not rendered inapplicable as a matter of law simply because the accident occurred while the Beam was being propelled in a forward [or upward] direction, having already been lifted [off] the ground . . .. There is little logic to the idea that the Code would require a tag or restraint line to protect workers and others from rotation or swinging of a load, but only when the load is being raised, and not when an already raised load is being moved horizontally"

(*McCoy*, 38 AD3d at 309).

Thus, plaintiffs are entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-8.2 (c) (3).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the parts of plaintiffs Robert Murgatroyd and Theresa Murgatroyd's motion, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on Labor Law §240 (1) and on those parts of the Labor Law §241 (6) claim predicated on alleged violations of Industrial Code 12 NYCRR 23-2.3 (c) and 12 NYCRR 23-8.2 (c) (3) as against defendants Trinity School, Trinity School Realty Holding Corporation, Trinity Housing Company, Inc. and Tishman Interiors Corporation is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: Dec 13, 2018

ENTER:

J.S.C.

HON. ROBERT D. KALISH
J.S.C.