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

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MICHAEL S. MELITO,

Index No.: 150784/2017

Plaintiff,

-against-

THE SHERATON LLC, SNYT LLC F/K/A SUPERNOVA NEW YORK REALTY LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, LLC, SHERATON LICENSE OPERATING COMPANY, LLC and LERCH BATES, INC.

Defendants.

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THE SHERATON LLC, SNYT LLC F/K/A SUPERNOVA NEW YORK REALTY LLC, STARWOOD HOTELS & RESORTS WORLDWIDE, LLC, SHERATON LICENSE OPERATING COMPANY, LLC and LERCH BATES, INC.,

Third-Party Plaintiffs,

-against-

SCHINDLER ELEVATOR CORPORATION,

Third-Party Defendants.

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LERCH BATES, INC.,

Second Third-Party Plaintiff,

-against-

SCHINDLER ELEVATOR CORPORATION,

Second Third-Party Defendant.

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Kalish, J.:

This is an action to recover damages for physical injuries allegedly sustained by an

elevator mechanic on December 1, 2016, when, while working on an elevator modernization project at the New Sheraton Times Square Hotel located at 811 Seventh Avenue, New York, New York (the Premises), an unsecured dolly, which was being used to transport a brake housing unit that he was unloading from the hydraulic lift gate of a truck, tipped over and crushed his hand.

In motion sequence number 002, plaintiff Michael S. Melito moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs the Sheraton LLC, SNYT LLC f/k/a Supernova New York Realty LLC, Starwood Hotels & Resorts Worldwide, LLC, Sheraton License Operating Company, LLC (collectively, the Owner defendants) and defendant/third-party/second third-party plaintiff Lerch Bates, Inc. (Lerch Bates).

In motion sequence number 003, Lerch Bates moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.[1]

For the following reasons, motion seq. 002 is granted as to the Owner defendants and is otherwise denied, and motion seq. 003 is granted.

BACKGROUND

On the day of the accident, the Owner defendants owned the Premises where the accident occurred. Third-party/second third-party defendant Schindler Elevator Corporation (Schindler) was hired by the Owner defendants to modernize and update the guest and employee elevators at

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[1]At oral argument held before this court on May 15, 2019, Lerch Bates withdrew those parts of its motion which sought summary judgment in its favor on the third-party/second third-party claims for contractual indemnification and breach of contract for failure to procure insurance as against Schindler.

the Premises (the Project). Lerch Bates was the entity hired to serve as the project manager of the Project. Plaintiff was employed by Schindler as an elevator mechanic.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed as an elevator mechanic by Schindler. That day, he and three other Schindler workers were unloading elevator machinery from a Schindler truck, which was parked at a loading dock at the Premises. The day before the accident, plaintiff was part of the crew that initially loaded the subject machinery, which consisted of a heavy brake housing unit, onto the truck at Schindler's warehouse. In order to do so, the men first secured the brake housing unit to an A-frame wheeled dolly. The men then secured the dolly to the inside of the truck with ratchet straps. Plaintiff described the dolly as having four wheels and a side wall.

Plaintiff further testified that, when the truck arrived at the Premises the next morning, he and two coworkers were called to the loading dock to unload and bring inside the brake housing unit, which was approximately five feet in height and weighed approximately 2000 pounds. After the truck driver backed the truck into the loading dock, he opened the back of the truck and pulled the lift gate from under the truck and raised it to the level of the truck bed. After the truck driver and another Schindler worker released the dolly from the ratchet straps, which had secured the dolly to the truck, they rolled the dolly and the brake housing unit onto the truck's lift gate. At this time, nothing was done to secure the dolly to the lift.

As the men were slowly lowering the lift gate, and as plaintiff was standing about a foot away at street level, the lift gate, which was now about 6 to 12 inches from the ground, suddenly "shuddered" and "rattled" (*id.* at 156). As a result, the dolly, as well as the brake housing unit on

it, "toppled over and bounced . . . [and] crushed [his] hand" against the wall (*id.* at 165).

Deposition Testimony of John Cribbin (Schindler Foreman)

John Cribbin testified that he was Schindler's foreman at the Project on the day of the accident. He described the truck as a "heavy duty truck" with a "standard lift gate" (Cribbin tr at 23). He described the dolly as weighing approximately 3,000 pounds and the elevator brake housing unit as weighing approximately 1,500 pounds, noting that the brake housing unit was strapped to the dolly's side wall.

Cribbin further testified that prior to the accident, he "never had a problem with [the lift gate] shuddering," nor did anyone ever complain of any problems with it (*id.* at 25). Cribbin asserted that the workers at the scene of the accident scene said that, when the dolly began to tilt, "they lost control of it" (*id.* at 40).

The Deposition Testimony of John Keddy (the Director of Engineering for the Premises)

John Keddy testified that he was the director of engineering for the Premises on the day of the accident. As such, he was in charge of the upkeep and general maintenance of the building. The Project entailed modernizing the guest and employee elevators at the Premises by installing new machinery. The Owner defendants hired Schindler to perform the elevator modernization work and hired Lerch Bates to serve as the project manager. Lerch Bates' duties on the Project included managing the schedule and payments and inspecting Schindler's work. In addition, Lerch Bates "wrote the specifications for the work" (Keddy tr at 11). Lerch Bates had employees at the site one or two days a week.

The Affidavit of Robert Delaney (Schindler's Senior Project Manager for Modernizations)

In his affidavit, Robert Delaney stated that he served as Schindler's territory operations

manager for modernizations on the day of the accident. Delaney explained that when the lift gate was approximately 6 to 12 inches from the ground, "it suddenly malfunctioned, by 'shuttering,' or vibrating, which caused the dolly and the elevator brake housing strapped to it, to tip" (Delaney aff).

The Affidavit of Mark Kasper (Lerch Bate's Project Manager)

In his affidavit, Mark Kasper stated that he was employed by Lerch Bates as the project manager of the Project on the day of the accident. He explained that the role of Lerch Bates on the Project was "a limited role" (Kasper aff). He maintained that Schindler was the contractor in charge of the elevator modernization work, and that Lerch Bates did not supervise or direct the means and methods of Schindler's work. In addition, Lerch Bates "did not supervise or control the means and methods of Schindler's delivery" (*id.*). He also noted that Lerch Bates was not aware of any problems with the lift gate at issue in this case.

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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *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

Plaintiff moves in motion seq. 002 for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the Owner defendants and Lerch Bates. Lerch Bates moves in motion seq. 003 for dismissal of said claim against it, as well as for dismissal of the Labor Law § 241 (6) claim against it. 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]).

Initially, as the owners of the Project, the Owner defendants may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined as to whether Lerch Bates, as project manager, may also be liable under the Labor Law as an agent of the owner and/or general contractor. As to this defendant, it is important to note that

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor'"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, although Lerch Bates may have been responsible for coordinating/scheduling the subject delivery and for inspecting Schindler's work, there is no evidence in the record that it supervised or controlled the actual injury-producing work, i.e., the unloading of the dolly and brake housing unit from the truck, and Lerch Bates has shown prima facie that it did not by means of the Kasper affidavit. In addition, Lerch Bates did not own the truck or the dolly used to transport the brake housing unit.

As such the Court finds that Lerch Bates is not a proper Labor Law defendant and is

entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. Hereinafter, that part of plaintiff's motion seeking summary judgment in his favor as to liability on the Labor Law § 240 (1) claim will be addressed in regard to the Owner defendants only.

As described previously, plaintiff's hand was crushed when the dolly, which was being used to support and transport the brake housing unit, tipped over because it was not properly secured to the lift gate. Initially, plaintiffs may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell onto plaintiff's hand finger, i.e., the heavy brake housing unit, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]; *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 addition, as there were no protective devices in place, such as nets or ropes, to adequately secure the dolly to the lift, Labor Law § 240 (1) is applicable, as plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10 [2011] [citation omitted]).

"'[T]he availability of a particular safety device will not shield an owner or general

contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

The Owner defendants argue that Labor Law § 240 (1) does not apply to the facts of this case because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, plaintiff testified that he was injured when the brake housing unit and dolly tipped over off the lift gate. At the moment of the accident, the lift gate had been lowered to approximately 6 to 12 inches from the ground.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (*supra*), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis" (*Wilinski*, 18 NY3d at 9). In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured 4 inches in diameter. In that case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the brake housing unit and dolly fell only a short distance, but, given the

significant amount of force that they generated during their fall, plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603; *see also Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [in a case where the plaintiff was injured when two 500-pound steel beams fell "a short distance" off an A-frame cart and landed on his leg, Labor Law applied "[g]iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent"]). Here, the dolly weighed approximately 2,000 pounds, and the brake housing unit weighed approximately 1,500 pounds.

The Owner defendants also argue that Labor Law § 240 (1) does not apply to the facts of this case because, as the lift gate was only 6 to 12 inches from the ground, plaintiff was not exposed to the kind of elevation-related risk contemplated by the statute. In support of this argument, they put forth the case of *Toefer v Long Is. R.R.* (4 NY3d 399, 408 [2005]), wherein Labor Law § 240 (1) did not apply, because the back of the flatbed truck where the plaintiff was working, which was four feet off the ground, was "not a situation that calls for the use of a device like those listed in section 240 (1) to prevent a worker from falling."

However, this case can be distinguished from *Toefer*, as well as other cases put forth by the Owner defendants, because, unlike a fall from a flatbed truck, plaintiff herein was injured due to the lack of a protective device, i.e., a rope or securing strap, specifically listed in the statute and intended to protect plaintiff from a falling object in the first place (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003] [Court noted that, while the scaffold at issue was only four feet above the ground, this did not constitute a basis for ignoring the requirements of section 240 (1), especially when liability is based upon a defect in a protective device specifically listed in the statute]).

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).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the Owner defendants.

The Common-Law Negligence and Labor Law § 200 Claims

Lerch Bates also moves for dismissal of the common-law negligence and Labor Law § 200 claims against it. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of

situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established

that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, plaintiff was injured when the dolly and the brake housing unit tipped over when the lift gate shuttered, due to the fact that the dolly was not properly secured to the lift. Therefore, the accident was the result of the means and methods of the work, i.e., the procedure used to secure the dolly as it was being unloaded from the truck's lift gate.

Here, Lerch Bates had no involvement whatsoever in the means and methods used to unload the brake housing unit from the lift gate, nor did it supply any of the equipment used to perform the subject work, such as the dolly or truck.

Thus, Lerch Bates is entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

CONCLUSION

Accordingly, it is

ORDERED that the part of plaintiff Michael S. Melito's motion (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants/third-party plaintiffs the Sheraton LLC, SNYT LLC f/k/a Supernova New York Realty LLC, Starwood Hotels & Resorts Worldwide, LLC, Sheraton License Operating Company, LLC (collectively, the Owner defendants) is

granted, and the motion is otherwise denied; and it is further

ORDERED that defendant/third-party/second third-party defendant Lerch Bates, Inc. (Lerch Bates) motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted, and the complaint is dismissed as against Lerch Bates, with costs and disbursements to Lerch Bates as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Lerch Bates; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel are directed to appear before Miles Vigilante, Esq. in ESC-1 on Tuesday, September 17, 2019, at 10:00 a.m., for a settlement conference.

Dated: July 17, 2019

ENTER:

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