SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

----------x

MICHAEL SOMEREVE and LISA SOMEREVE, Index No. 150136/2012

Plaintiffs,

-against-

PLAZA CONSTRUCTION CORP.,

Defendant.

----------x

David B. Cohen, J.

Motion sequence numbers 006 and 007 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a labor foreman on August 5, 2011 when, while working at a construction site located at 1065 Elton Street, Brooklyn, New York (the Premises), he was thrown from the rear platform of a small forklift that suddenly tipped forward while in the process of lifting a pallet of bricks.

In motion sequence number 006, plaintiffs Michael Somereve (plaintiff) and Lisa Somereve move, by order to show cause, pursuant to CPLR 3212, for partial summary judgment in their favor on their Labor Law § 240 (1) claim against defendant Plaza Construction Corp. (Plaza).

In motion sequence number 007, defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.

BACKGROUND AND PROCEDURAL HISTORY

On the day of the accident, Plaza served as the general contractor on a project at the Premises that entailed the construction of a new school building, known as the Spring Creek

Community School (the Project). Plaza retained nonparty Town Masonry to construct the Project's walls. Plaintiff was a labor foreman employed by Town Masonry.

On June 11, 2013, plaintiff filed a pre-note of issue motion for partial summary judgment as to liability (motion sequence number 002) (the Prior Motion). Defendant opposed the Prior Motion on the ground that discovery had yet to be completed and questions remained as to whether plaintiff was the sole proximate cause of his accident. On January 14, 2014, after conducting oral argument on the motion, the court (Singh, J.) summarized the facts and arguments as follows:

> "Plaintiff's version of the accident, as testified to at his deposition, is that he was operating a prime mover, which is a type of mini forklift utilized to pick up materials. Prior to the accident another employee, Louis, who was inexperienced in using the prime mover, was picking up a pallet of bricks which weighed 1,500 pounds and had raised the pallet approximately three inches above the ground. At plaintiff's request, Louis got off the prime mover and Plaintiff took control . . . .
>
> "[Plaintiff] then raised the pallet to approximately five feet to align the pallet with the scaffold so that materials could be removed from the pallet onto the scaffold. At this time, the prime mover flipped down causing the back of the machine to come off the floor and catapulting Plaintiff to the ground.
>
> "A different version of the accident was given by the project superintendent of Plaza Construction, Charles Krammer. According to Krammer, he went to the scene after being advised of the accident. Krammer states that he spoke with Plaintiff who told him that he was using the prime mover to move bricks when suddenly he flew over the handles"

(Fishman affirmation, exhibit G, p. 17-18, transcript of decision on the record [the Prior Order]).

The court explained that defendant's primary opposition to the Prior Motion was that it was premature due to two outstanding non-party depositions, namely, Louis Caratini (a

purported eye witness), and Michael Catalano, Town Masonry's supervisor (who did not witness the accident). While Catalano provided an affidavit, he had not been deposed.

Ultimately, the court held that plaintiff had made out his prima facie case because it was "uncontroverted that the accident occurred when Plaintiff hoisted materials from the ground level to a scaffold some feet above the ground, the effect of gravity upon the prime mover [as well as] Plaintiff threw Plaintiff from the device" (*id.* at 20).

The court also held that defendant failed to establish that plaintiff was the sole proximate cause of the accident because, "[t]he prime mover was inadequate to lift the pallet safely, causing Plaintiff to be ejected from the device" (*id.* at 21). Based on the foregoing, the Prior Motion was granted.

Shortly thereafter, defendant appealed the Prior Order on the ground that the outstanding depositions would have supported its' sole proximate cause argument. The First Department, in a split decision, upheld the Prior Order, noting that "[e]ven assuming for the sake of argument that the outstanding depositions shed light on either one of these theories, the testimony would at most touch on the issue of comparative negligence, which is not a defense to a Labor Law § 240 (1) claim" (Fishman affirmation, exhibit H, p. 4).

Defendant appealed to the Court of Appeals, which reversed the Prior Order due to the outstanding discovery. Specifically, the Court of Appeals held as follows:

> "Here, where there is insufficient evidence concerning how the accident occurred, the requested discovery could aid in establishing what happened, and the note of issue was not due to be filed for another six months, summary judgment was prematurely granted"

(*Somereve v Plaza Constr. Corp*, 31 NY3d 936 [2018], annexed to Fishman affirmation, exhibit I, p. 2). The matter was then remanded to this court for further discovery. That discovery

commenced, resulting, as relevant, in (1) the non-party deposition of Michael Catalano (which supplemented his prior affidavit) and (2) the affidavit of non-party Michael Berzolla, plaintiff's coworker.

Deposition of Michael Catalano

In his deposition, Catalano testified that on the day of the accident, he was a supervisor employed by New Town, assigned as the field superintendent for the Project. He visited the Premises daily, for about an hour a day. New Town's work at the Project included the installation of exterior brickwork and interior concrete walls. The bricks used on the project weighed between two and three pounds each and came from the manufacturer in stacked "cubes" of approximately "100 brick per band, 500 brick per cube" (Catalano tr at 20).[1] Each cube weighed at least 1,000 pounds (*id.* at 96). Cubes were brought to the project on trucks and were then lifted from the back of the truck and placed on a pallet. Then, a worker operating a "prime mover" would move the pallets around the work site, as necessary (*id.* at 47).

Catalano also testified that the prime movers were small one-man operated, gas-powered forklifts made by a company named "Lift Jockey" (*id.*). Only one Lift Jockey mover was available at the Project (the Lift). It had a small platform on the back for the operator to stand. When asked about the size of the platform, Catalano testified that it was big enough for one person to use (*id.* at 52). In addition, the maximum load for the Lift at the Project was "[a]pproximately 1,000 to 1500" pounds (*id.* at 135).

[1] Catalano explained that a band of bricks is a single row of bricks, approximately ten bricks long and ten bricks wide, banded together with a metal or plastic strap. Typically five bands would be stacked on top of one another, and then, in turn, banded together into a "cube." The cubes were typically shrink wrapped by the manufacturer.

Catalano also testified that he was present at the Premises at the time of plaintiff's accident, though he did not witness it. At that time, Catalano was on the roof installing a machine and couldn't go to the accident site until the installation was finished. Once he finished his work, he went to see plaintiff. Catalano testified that plaintiff was sitting down on a cinderblock, and complained about pain in his shoulder, neck and back. Plaintiff told him that he "got thrown off of" the Lift while he was lifting "a skid of bricks" (*id.* at 71).

Catalano explained that if the Lift was having trouble lifting a pallet of bricks due to their weight, it was possible to break the pallet down and take "a band off" (*id.* at 83) or manually pass bricks up to the scaffold with a "brick tong" – a long handheld device that could hold several bricks at a time (*id.* at 116).

After the accident, Catalano inspected the scaffold and noticed that "the cross brace that was holding two scaffold frames together" was bent downward and there were bricks and other debris on the floor (*id.* at 72).

Affidavit of Michael Berzolla (nonparty witness)[2]

In his affidavit, Berzolla states that on the day of the accident, he was a laborer employed by Town Masonry at the Project. His duties included loading bricks and blocks onto scaffolds for bricklayers to install. To do so, he used the Lift.

According to Berzolla, the Project used two different colors of bricks on the exterior walls of the Premises, "a lighter colored brick and darker, purple colored brick" that was "slightly heavier than the lighter colored bricks" (Berzolla aff, ¶ 3).

[2] According to defendant, Berzolla was subpoenaed to appear for a deposition, but was unable to appear on several scheduled days. In the absence of his deposition, defendant obtained Berzolla's affidavit.

Berzolla and his coworker Luis used the Lift regularly to raise both the lighter colored and purple bricks to the scaffolding. However, when lifting the purple bricks, both Berzolla and Luis had to stand on the back of the Lift "to provide extra balance to prevent the lift from tipping" (*id.* at ¶ 5). Berzolla noted that the Lift "never tipped over" when used in that manner (*id.* at ¶ 5).

On the day of the accident, Berzolla saw plaintiff using the Lift to move a palate of heavier purple bricks towards the scaffold. Berzolla then "warned" plaintiff that "the lift could tip if he tried to lift the . . . purple bricks by himself and that it takes two men" to lift them (*id.* at ¶ 7). Plaintiff purportedly "responded that "I got it, I got it" and proceeded to lift the skid of bricks" (*id.* at ¶ 7). Berzola stated that, shortly thereafter, the Lift tipped, which "caused the forks to go down and the rear of the [Lift] to raise up" (*id.* at ¶ 9).

DISCUSSION

"[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

The Labor Law § 240 (1) Claim

Based on the facts and determination in the Prior Order, coupled with the new evidence obtained, plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim. Defendant moves for summary judgment dismissing said claim on the ground that evidence establishes that plaintiff was the sole proximate cause of his accident.

"'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]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). That said, liability under the statute "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]).

Here, the new evidence obtained in response to the Court of Appeals' decision does not materially challenge the court's prior finding that plaintiff's accident was caused by "the effect of gravity upon the [Lift] and Plaintiff" the resulting force of which "threw Plaintiff from the device," and, therefore, Labor Law § 240 (1) was violated (Fishman affirmation, exhibit G, p. 20 [the Prior Order]). To that effect, plaintiff established that the Lift "was inadequate to lift the

pallet safely causing Plaintiff to be ejected from the device" (Fishman affirmation, exhibit G, p. 21 [the Prior Order]; *see also Penaranda v 4933 Realty, LLC,* 118 AD3d 596, 597 [1st Dept 2014] [holding that section 240 (1) applies where plaintiff was thrown from a front-end loader when its overloaded front end suddenly tipped down, causing its rear wheels to raise]). Accordingly, as the Lift was insufficient to keep plaintiff safe while he performed his work, plaintiff has established his *prima facie* entitlement to summary judgment on the Labor Law § 240 (1) claim.

Defendant argues that the new evidence establishes that plaintiff was the sole proximate cause of his accident and/or that he was a recalcitrant worker. "[T]here can be no liability under section 240 (1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

As discussed previously, the Lift was an inadequate safety device for the undertaking in the first instance. Moreover, it is uncontroverted that the failure of the Lift to remain upright while lifting a pallet of bricks was a proximate cause of plaintiff's accident. Accordingly, when "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*id.* at 290; *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted] ["[W]here the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence"]). Therefore, plaintiff was not the sole proximate cause of his accident.

Defendant also argues that plaintiff was recalcitrant in that he failed to heed Berzolla's warning to not use the Lift without another worker to act as a counterweight. However, "[t]he

recalcitrant worker defense requires a showing of 'the injured worker's *deliberate refusal* to use available and visible safety devices in place at the work station'" (*Harris v Rodriguez*, 281 AD2d 158, 158 [1st Dept 2001] [citation omitted]). Importantly, "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" (*Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 563 [1993]; *Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]).

It should also be noted that Berzolla was not an owner or employer, but rather, he was plaintiff's coworker. "[M]erely failing to follow [a] coworkers' advice [does] not render [a] plaintiff 'recalcitrant'" (*Morin v Machnick Bldrs.*, 4 AD3d 668, 671 [3d Dept 2004]). Also, to the extent that defendant argues that the Lift would have been safe if another worker stood on it along with plaintiff, "a coworker is not a safety device contemplated by the statute" (*Noor v City of New York*, 130 AD3d 536, 541 [1st Dept 2015] [internal quotation marks and citations omitted]).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendant, and defendant is not entitled to dismissal of the same.

The Labor Law § 241 (6) Claim (Motion Sequence Number 007)

Defendant moves for summary judgment dismissing the Labot Law § 241 (6) claim against it.

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 of reasonable care upon owners and contractors "'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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [citation omitted]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, defendant argues that it is entitled to summary judgment dismissing the section 241 (6) claim because plaintiff did not identify a violation of any specific provision of the Industrial Code in his complaint or bill of particulars. In opposition to defendant's motion for summary judgment, plaintiff raises for the first time that defendant violated two specific code provisions – 12 NYCRR 23-9.8 (a) and (b).

> "[T]he failure to identify the specific [Industrial] Code provision allegedly violated in support of a Labor Law § 241(6) cause of action either in the complaint or in the bill or supplemental bills of particulars is not necessarily fatal. A plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241(6) claim for the first time in opposition to a motion for summary judgment if the allegation involve[s] no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants"

(*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal citations and quotation marks omitted]).

Industrial Code 12 NYCRR 9.8 provides the following, in pertinent part.

> "Lift and fork trucks.
>
> "(a) Capacity. A metal plate with legible etched or stamped figures giving the capacity rating in pounds shall be attached to every lift or fork truck. A pouch firmly secured to the truck and containing a document having the following information may be used as a means of identifying the load rating of the truck . . .
>
> "(b) Overloading prohibited. No lift or fork truck shall be loaded beyond its capacity rating."

As an initial matter, plaintiff's claim pursuant to section 23-9.8 (a) is based on a new theory – the failure to warn. As this section is raised for the first time in opposition to defendant's motion for summary judgment, it is improper, and defendant is entitled to the dismissal of the Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-9.8 (a) (*Kowalik v Lipschutz*, 81 AD3d at 783).

That said, section 9.8 (b) deals with the "Overloading" of vehicles such as the Lift, which is a core issue of plaintiff's claim. Accordingly, plaintiff's reliance on section 9.8 (b) raises no new factual allegations or new theories of liability. In addition, in light of defendant's awareness that the accident involved an allegedly overloaded lift, and the fact that weight and load limits were addressed in the depositions and affidavits submitted to this court, defendant has not established that it would be prejudiced by the inclusion of this claim. Accordingly, section 9.8 (b) is properly before the court.

In its reply papers, defendant does not offer any argument that section 9.8 (b) was not violated or that it is otherwise inapplicable to the facts of this case. Accordingly, defendant has

not established its entitlement to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-9.8 (b).

The Common-Law Negligence and Labor Law § 200 Claims

Defendant moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it on the ground that it did not direct, control or supervise the injury producing work; i.e. the use and operation of the Lift (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under Labor Law § 200 "requires actual supervisory control or input into how the work is performed"]). Here, defendant has established, prima facie, that it did not control or supervise the use or operation of the Lift and, notably, plaintiff does not oppose this part of defendant's motion. Thus, defendant is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

The court has considered the parties' remaining arguments and finds them unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Michael Somereve and Lisa Somereve'e motion (motion sequence number 006), pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim is granted as against defendant Plaza Construction Corp.; and it is further

ORDERED that the part of defendant Plaza Construction Corp.'s motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as the Labor Law § 241 (6) claim predicated upon an alleged violation of Industrial Code 12 NYCRR 23-9.8 (a), is granted, and

said claims are dismissed as against Plaza Construction Corp., and the motion is otherwise denied.

Dated: November 25, 2019

Hon. David B. Cohen, A.J.S.C.

HON. DAVID B. COHEN
J.S.C.