SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRANSIT PART: 21

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Angel Cruz,

Plaintiff,

-against-

Metropolitan Transit Authority, New York City Transit Authority, MTA Capital Construction Company, Inc., Tully Construction Company-EE Cruz & Company, JV, LLC, and The City Of New York City,

Defendants.

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DECISION AND ORDER

Index No. 157923/2013

Mot. Seq. 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendants' Motion/ Affirmation/Memo of Law	1	48-63
Plaintiff's Affidavit in Opposition	2	70-72
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Defendants' Supplemental Memo	5	76

LISA A. SOKOLOFF, J.

This is an action arising out of a construction site accident that occurred on October 24, 2012 on the Second Avenue subway project for Contract C-26005. Plaintiff Angel Cruz, a union carpenter, alleges that he was injured when he was struck in the torso by a washer that fell from above while in the course of his work for his employer, Tully Construction Co.-EE Cruz & Company JV LLC (TCJV).

Defendants Metropolitan Transportation Authority, incorrectly s/h/a Metropolitan Transit Authority, New York City Transit Authority, MTA Capital Construction Company, incorrectly s/h/a MTA Capital Construction Company Inc., and the City of New York, move for summary judgment and to dismiss the complaint which alleged violations of Labor Law §§ 200, 240(1), and 241(6), in that Defendants allegedly violated §§ 23-1.7(d) (slipping hazards) and 23-1.30 (illumination) of Rule 23 of the Industrial Code (other code

sections alleged to have been violated have been deemed abandoned by Plaintiff and dismissals are warranted as to those code sections).

The action was discontinued as to Defendant TCJV, a joint venture, incorrectly s/h/a Tully Construction Company-EE Cruz & Company JV LLC, by a Stipulation of Discontinuance dated December 5, 2017 and e-filed on December 21, 2017.

At the time of the accident, Plaintiff and his co-worker, Charles Ruoff, were working together underground, between 96th and 97th Streets to install the bottom bracket to support an overhead water pipe. Plaintiff and Ruoff were standing about two to three feet apart, on either side of the bracket, on an unstable mound of mud, dirt and debris that rose about five feet off the ground. Ruoff testified that, although both he and Plaintiff were wearing headlights, the lighting condition was very dark. Ruoff could see Plaintiff's face, across the bracket, which was at Ruoff's chest level and Plaintiff's eye level. An angle, rod and other components of the bracket were passed to Plaintiff by other workers, who, in turn, passed them to Ruoff.

According to the Mr. Ruoff's testimony, Ruoff and Plaintiff were in the process of securing a threaded rod to the support bracket with two washers and two nuts sandwiching it together. They had already put on one washer and Plaintiff had asked Ruoff for another one. The washer, a 4 x 4 square metal piece, weighing about two pounds, was resting on the top of the bracket for easy access. Ruoff leaned over to hand the washer to Plaintiff "and he went to accept it and somehow it got fumbled around and … just came off the top of that plate and when it went from one side of the plate to the other that's when it fell."

Plaintiff testified that it was not until after he was struck, that he saw that a washer had hit him, which he saw lying on the mud in front of him.

It is well established that the proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as

a matter of law (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012]. "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

Labor Law § 240 (1)

Defendants maintain that §240(1) does not apply because Plaintiff's accident resulted from a usual and ordinary danger of a construction site and not by the absence or malfunctioning of a hoisting or securing application. In opposition, Plaintiff claims that as a result of not being provided with the proper safety devices to work, there was no adequate way to secure the washer and other tools they were using, causing the washer to fall when Plaintiff lost his balance on the unstable berm.

Section 240 (1) of the Labor Law, known as the Scaffold Law, requires contractors and owners engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" to provide "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."

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985]. Thus, a plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) claim (*Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]).

Labor Law § 240(1) is intended to protect against risks caused by "the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514 [1991]) and imposes strict liability on owners and contractors for accidents arising from the absence of, or defects in, such protective devices (*Thompson v St. Charles Condominiums*, 303 AD2d 152 [1st Dept 2003]) which proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]. Additionally, the statute must be construed as liberally as may be for the accomplishment of the purpose for which it was framed (*Harris v City of New York*, 83 AD3d 104 [1st Dept 2011] citing *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 [1993]).

However, section 240 (1) does not automatically apply simply because an object fell and injured 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 (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658 [2014]; *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267-268 [2001];)

> In addition, the fact that an injured plaintiff may have been working at an elevation when the object fell is of no moment in a "falling object" case, because a different type of hazard is involved. Working at an elevation does not increase the risk of being hit by an improperly hoisted load of materials from above. The hazard posed by working at an elevation is that, in the absence of adequate safety devices (e.g., scaffolds, ladders), a worker might be injured in a fall. By contrast, falling objects are associated with the failure to use a different type of safety device (e.g., ropes, pulleys, irons) also enumerated in the statute. Because the different risks arise from different construction practices, the hazard from one type of activity cannot be "transferred" to create liability for a different type of accident.
>
> (id. at 268)

Thus, it is not sufficient for Plaintiff merely to establish that he was injured by a falling object while he worked at an elevation. Here, Plaintiff's counsel claims that because

he and his co-worker were forced to work from an elevation, without the use of scaffolds or any type of mechanized lift, there was no adequate way to secure the washer. But the washer that fell wasn't an object that needed hoisting or securing for the purpose of the undertaking (i.e. affixing the washer and nut to the threaded rod). A scaffold or mechanized lift may have reduced the risk that *Plaintiff* would fall, but would not have reduced the risk that the *washer* would fall. The evidence in the record is that Ruoff attempted to pass the washer to Plaintiff when it fumbled and slipped off the bracket.

Although the Court of Appeals has determined that under certain circumstances the statute should apply despite the fact that the falling object was no higher than the worker's reach (*Outar v City of New York*, 5 NY3d 731, 732 [2005]), in each instance that a "falling object" case has been deemed by the First Department to be within the ambit of the statute, the object has been consequential by virtue of its bulk, weight, inherent danger and/or the distance that it could fall (*cf. Suwareh v State*, 24 AD3d 380 [1st Dept 2005] [plaintiff, working at an elevated height and hoisting a bucket of hot tar, injured when bucket became stuck on ledge and tipped over]; [*Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404 [1st Dept 2007] [unsecured, six-foot long, threaded rods, weighing 10 to 15 pounds fell two stories onto plaintiff's back]; [*Brown v VJB Const. Corp.*, 50 AD3d 373 [1st Dept 2008] [1000-pound slab of granite fell a distance of about three feet as it was being hoisted due to the failure of clamp]; [*Metus v Ladies Mile Inc.*, 51 AD3d 537 [1st Dept 2008] [Plaintiff, who was struck by junior beam which fell from scaffold as he handed sheet of tin up to coworker standing on top of scaffold, entitled to summary judgment on § 240(1) claim since junior beam was not clamped to header beam at time scaffold was erected]; [*Harris v 170 East End Ave., LLC*, 71 AD3d 408 [1st Dept 2010] [the bundle of 4" by 4" by 16' wooden beams known as stringers fell as a result of a foreseeable construction-related accident]; [*Matthews v 400 Fifth Realty LLC*, 111 AD3d 405 [1st Dept 2013] [metal grate

that had not yet been welded in place fell on plaintiff while he work in elevator shaft] ; [*Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686 [1st Dept 2017] [plaintiff was removing furniture from an exhibition booth at the conclusion of a trade show when a lighting bar simultaneously being removed from above by electricians fell and struck him in the head] [*Tropea v Tishman Constr. Corp.*, 172 AD3d 450 [1st Dept 2019] [10-foot long, metal wire cable tray, weighing 15-20 pounds, that fell on plaintiff's head from atop two ladders was an object that required securing to prevent it from falling]; [*Villanueva v 114 Fifth Avenue Associates LLC*, 162 AD3d 404 [1st Dept 2018] ["the half foot that the steel I-beam dropped onto plaintiff's shoulder is not de minimis"].

Given the weight of the washer and distance it traveled, Plaintiff's accident was not the result of the elevation risks contemplated by the statute, which give rise to liability, but rather to the usual and ordinary dangers of a construction site, which do not (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 153 [1st Dept 2003]. This is not a situation in which the washer was too heavy to maneuver, nor was it being stored, secured, or hoisted. Nor did the washer fall on its own accord but rather fell when it was passed from the hands of Ruoff to Plaintiff.

Labor Law § 241 (6)

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to "provide reasonable and adequate protection and safety" for workers in which construction, excavation or demolition work is being performed" and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343 [1998]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). In order to state a claim under section 241(6), a plaintiff must allege that the property owners violated a regulation that sets forth a specific

standard of conduct and not simply a recitation of common-law safety principles (*Id.* at 505; *St. Louis v Town of North Elba*, 16 NY3d 411 [2011]).

Additionally, a violation of Labor Law § 241(6) does not establish negligence as a matter of law, but is merely considered as "some evidence" of negligence which the jury may or may not take into consideration along with all other evidence bearing on the question of negligence (*Id.* at 508, n 3; *Sawicki v AGA 15th Street, LLC*, 143 AD3d 549 [1st dept 2016]).

§ 23-1.7(d) Slipping Hazards

12 NYCRR §23- 1.7(d), directs employers not to "suffer or permit any employee" to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that any "foreign substance which may cause slippery footing" be removed … to provide safe footing." As such, 12 NYCRR 23–1.7(d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and is considered a "concrete specification" that *Ross* requires (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]) as a predicate for a § 241(6) cause of action.

The court finds there is nothing in the record to suggest that a violation of § 23-1.7(d) was the proximate cause of plaintiff's accident. Plaintiff's co-worker, Ruoff, testified that the accident did not occur due to any slipping on his part. Plaintiff testified that he was turning to his right to face the pipe and did not attribute the accident to slipping.

§ 23-1.30 Illumination

12 NYCRR §23-1.30 requires that owners and contractors provide "[i]llumination sufficient for safe working conditions" wherever persons are required to work or pass in construction, demolition and excavation operations… but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where

persons are required to pass." (*Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347 [1st Dept 2006]).

For purposes of Labor Law § 241(6), 12 NYCRR §23-1.30 is a concrete and specific regulation, whose violation can serve as a predicate for liability (*Murphy v Columbia University*, 4 AD3d 200 [1st Dept 2004]).

Here, Plaintiff testified that he was wearing a headlight and could see where he was walking, could see the pipe he was securing and could see the washer on the ground after it struck him. Although Ruoff testified that at the time Plaintiff's accident occurred, the lighting was "... pitch black. It was dark" and that at the time he was reaching for the washer, it was difficult to see based on the lighting, he was nonetheless able to see Plaintiff's face as he worked across from him. The unsubstantiated and equivocal nature of the testimony thus precludes a finding that the lighting fell below the specific statutory requirements (*Kochman v City of New York*, 110 AD3d 477 [1st Dept 2013]).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors and their agents to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229 [1st Dept 2008]). An implicit precondition to this duty is that the party charged with that responsibility either have had the authority to control the activity bringing about the injury or had actual or constructive notice of the unsafe manner in which the work was performed (*Comes*, at 877-878; *Ventura v Ozone Park Holding Corp.*, 84 AD3d 516 [1st Dept 2011]).

There is no evidence in the record to suggest that Defendants supervised or controlled Plaintiff's work, nor created or had notice of any unsafe condition or practice at the jobsite. Even if the record supports Plaintiff's allegation that the berm was unstable, Plaintiff has not established that the unstable condition was a proximate cause of his accident. As such, Plaintiff's Labor Law § 200 and common law negligence claims must be dismissed as a matter of law.

Accordingly, it is

ORDERED that the Defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Capital Construction Company and the City of New York's motion for summary judgment on the issue of liability under Labor Law § 240 (1) is granted, and it is further

ORDERED that the motion of Defendants for summary judgment on the issue of liability under Labor Law § 241 (6), predicated upon violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.30, is granted; and it is further

ORDERED that the motion of Defendants for summary judgment under Labor Law § 200 and under principles of common-law negligence is granted.

Dated: January 21, 2020
New York, New York

ENTER:

Lisa A. Sokoloff, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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