SHORT FORM ORDER

INDEX No. 620948/2016
CAL. No. 201900780OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

AMENDED ORDER

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 10/16/19 (002)
MOTION DATE 11/19/20 (003)
ADJ. DATE 10/13/20
Mot. Seq. # 002 MD
Mot. Seq. # 003 MG

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ANTHONY RICOTTONE,
Plaintiff,

- against -

PSEG LONG ISLAND, LLC, LONG ISLAND POWER AUTHORITY,
Defendant.

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Attorney for Plaintiff
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Woodbury, New York 11797

ZAKLUKIEWICZ PUZO & MORRISSEY
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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by plaintiff, on August 23, 2019 ; Notice of Cross Motion and supporting papers filed by defendant, on November 12, 2019 ; Answering Affidavits and supporting papers filed by defendant, on November 12, 2019; filed by plaintiff, on September 10, 2020 ; Replying Affidavits and supporting papers filed by plaintiff, on September 10, 2020; filed by defendant, on September 25, 2020 ; Other ___; it is

ORDERED that the motion by plaintiff Anthony Ricottone for summary judgment in his favor on his Labor Law §§ 240 (1), 241 (6) and 200 causes of action is denied; and it is further

ORDERED that the cross motion by defendant PSEG Long Island, LLC, Long Island Power Authority for summary judgment in its favor dismissing plaintiff's second, third and fourth causes of action alleging violations of Labor Law §§ 240 (1), 241 (6) and 200 is granted; and it is further

ORDERED, that if this Order has not already been entered, the movant is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk, who is directed to hereby enter such Order; and it is further

ORDERED, that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff Anthony Ricottone commenced this action against defendant PSEG Long Island LLC, Long Island Power Authority (PSEG) for injuries he allegedly sustained on November 21, 2016, as the result of an accident, which occurred on the southbound side of Glen Cove Road, near its intersection with the Northern State Parkway, in Carle Place, New York. Prior to the accident, a utility pole was struck and damaged by a vehicle, and PSEG and Verizon separately dispatched crews to repair the pole and attendant wires. During the repair process, while the PSEG crew was lifting the damaged pole out of the way so that the Verizon crew could install a new pole, the pole came loose from the grasp of PSEG's derrick vehicle, which caused electrical wires to detach from the pole, resulting in an explosion overhead. Plaintiff alleges that, in attempt to protect himself from the explosion he dove under his truck, which caused injury.

Plaintiff now moves for summary judgment on the issue of defendant's liability. With respect to his claims under Labor Law § 240 (1), plaintiff argues that PSEG did not offer safety devices to afford him adequate protection against the elevation related risk of PSEG's work on the subject utility pole, and that this violation was a proximate cause of his injuries. With respect to his claims under Labor Law § 241 (6), plaintiff argues that PSEG violated, inter alia, 12 NYCRR 23-8.1 (f) (1) and (2), and that such a violation renders PSEG strictly liable for his injuries. With respect to his claims under Labor Law § 200, plaintiff argues that PSEG had comprehensive authority, control, and direction over the subject work site, and that PSEG employees completed the work that led to his injuries. Plaintiff argues that he was present on the work site as an employee of a subcontractor of PSEG, and that, as such, PSEG owed him a duty to provide a safe place to work. Plaintiff further argues that PSEG had actual and constructive notice of the dangerous condition that existed, as it created the hazard by not de-energizing the electric lines before engaging in the work. In support of his motion, plaintiff submits, inter alia, the transcripts of his General Municipal Law § 50-h hearing and deposition, and the transcripts of the deposition of PSEG employees Randy Roussine and Jeremy Horan. PSEG opposes the motion, arguing, inter alia, that Labor Law § 240 (1) is inapplicable because plaintiff was not performing work on the subject utility pole at the time of his injury, that he was not hired by PSEG, and that he was not injured by a specific gravity-related accident such as falling from a height or struck by falling debris. PSEG also argues that Labor Law § 241 (6) is inapplicable because plaintiff was not engaged in construction, excavation, or demolition work, and that Labor Law § 200 is inapplicable because PSEG did not control or have any authority over plaintiff's work as a Verizon employee. PSEG submits the affirmation of its attorney.

PSEG cross-moves for summary judgment dismissing the complaint. With respect to plaintiff's claims under Labor Law § 240 (1), PSEG argues that the statute is inapplicable because it was not an owner or general contractor, or an agent thereof, with regard to the work performed on the utility pole, nor did it hire plaintiff to perform work; that the work plaintiff was performing was not necessary and incidental to the erection or repair of a building or structure; and that plaintiff did not suffer injury due to a gravity-related accident, such as falling from a height or being struck by falling debris or objects that were improperly hoisted or inadequately secured. With respect to plaintiff's claims under Labor Law § 241 (6), PSEG argues that the statute is inapplicable because plaintiff was engaged in repair work, not construction, excavation, or demolition work. With respect to plaintiff's claims under Labor Law § 200,

PSEG argues that it did not control or have authority to control any work performed by Ricottone, as he was employed by. In support of its cross motion, PSEG submits, inter alia, transcripts of the deposition testimony of plaintiff, Roussine, and Horan. Plaintiff opposes the cross motion, arguing that, with respect to the Labor Law § 240 (1) claim, the subject utility pole was a structure within the meaning of the section, that PSEG was an "owner" within the meaning of the section as it owned the electrical wires attached to the subject pole, that PSEG was otherwise a statutory agent within the meaning of the statute, and that plaintiff was performing a covered activity within the meaning of the section. Plaintiff further argues that PSEG violated sections of the Industrial Code, and that those violations proximately caused his injuries. Plaintiff also argues that PSEG violated Labor Law § 200, as it created the hazard, provided the equipment and personnel to perform the work on the subject pole, that it had notice of the danger posed by the power lines, and that it performed and exercised supervisory control over the work performed. Plaintiff submits the affirmation of his attorney.

The facts of the case can be summarized as follows: Plaintiff was employed by nonparty Verizon as a lineman, and his typical duties involved setting utility poles. Plaintiff testified that on November 21, 2016, he was assigned to set a pole that had been damaged by a motor vehicle accident, which occurred at or near the address known as 200 Glen Cove Road. Plaintiff testified that the subject pole was owned by Verizon, but that wires from several utilities, including primary and secondary electrical lines owned by PSEG, were attached to the pole. Plaintiff testified that when he and the crew, including his foreman, arrived at the location, a PSEG crew was already present. Plaintiff testified that he observed the subject pole broken in two sections, approximately 12 to 15 feet up, with the bottom half still in the ground and the top half suspended by the utility wires. He testified that his crew's common practice would be to determine if the electricity was on and if the site was safe, and to perform an inspection of the site. Plaintiff testified that he never spoke with a member of the PSEG crew, but was informed by his foreman that the PSEG crew would use their derrick truck to lift the broken pole, without de-energizing or detaching the utility wires, to make room for the Verizon crew to set a new pole, before transferring the utilities from the damaged pole to the new one. Plaintiff testified that he was on the ground, next to his truck, approximately 150 feet away from the subject pole, as the PSEG crew began lifting the broken pole using the derrick and attached claw. Plaintiff testified that he was wearing all of his safety equipment, including a helmet, glasses, vest, and steel toed boots. He testified that as his back was turned to the pole, he saw a "bright light explosion" and heard "pop pop," which caused him to dive under his truck in an attempt to clear the location.

Labor Law § 240 (1) imposes a nondelegable duty on owners and general contractors, and their agents, to provide safety devices necessary to protect workers from risks inherent in elevated work sites (***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; *see* ***Roblero v Bais Ruchel High Sch., Inc.***, 175 AD3d 1446, 109 NYS3d 329 [2d Dept 2019]; ***Graziano v Source Bldrs. & Consultants, LLC***, 175 AD3d 1253, 109 NYS3d 115 [2d Dept 2019]). Specifically, Labor Law § 240 (1) requires that safety devices, including scaffolds, hoists, stays, ropes, or ladders be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834-835, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that such violation was a proximate cause of his or her injuries (*see* ***Barreto v Metropolitan Transp. Auth.***, 25 NY3d 426, 13 NYS3d 305 [2015]; ***Graziano v Source Bldrs. & Consultants, LLC***, *supra*; ***Luna v 4300 Crescent, LLC***, 174 AD3d 881, 107 NYS3d 115 [2d Dept 2019]). In general, the question of whether a particular safety device provided proper protection within the meaning of Labor Law § 240 (1) is a question of fact for the jury (*see* ***Lozada v St.***

Patrick's RC Church, 174 AD3d 879, 106 NYS3d 325 [2d Dept 2019]; ***Yao Zong Wu v Zhen Jia Yang***, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; ***Karwowski v Grolier Club of City of New York***, 144 AD3d 865, 41 NYS3d 261 [2d Dept 2016]). The hazards contemplated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]).

Here, PSEG has established, prima facie, entitlement to summary judgment dismissing plaintiff's cause of action for an alleged violation of Labor Law § 240 (1) by demonstrating that plaintiff's alleged injury, "while tangentially related to the effects of gravity" on the utility pole and electrical wires, was not caused by the limited type of elevation-related risk within the contemplation of the statute, but rather from the usual and ordinary dangers of the work site (*see* ***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 490, 634 NYS2d 35 [1995]). PSEG has further established the absence of a nexus between plaintiff's alleged injury and a lack or failure of a device prescribed by Labor Law § 240 (1) (*see* ***Fabrizi v 1095 Ave. of the Ams., LLC***, 22 NY3d 658, 985 NYS2d 416 [2014]; ***Henriquez v Clarence P. Grant Hous. Dev. Fund Co., Inc.***, 186 AD3d 577, 129 NYS3d 121 [2d Dept 2020]; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]). In opposition, plaintiff has failed to raise a triable issue of fact that his injuries were proximately caused by a hazard contemplated by Labor Law § 240 (1). Accordingly, plaintiff's cause of action for a violation of Labor Law § 240 (1) is dismissed, and the branch of plaintiff's motion for summary judgment in his favor on this cause of action is denied, as moot.

Labor Law § 241 (6) imposes a nondelegable duty on owners and general contractors to provide reasonable and adequate protection to workers, and makes them liable for injuries proximately caused by a violation of the statutory duty in all areas where construction, excavation or demolition work is being performed (*see* ***Root v County of Onondaga***, 174 AD2d 1014, 572 NYS2d 174 [4th Dept], *lv denied* 78 NY2d 858, 575 NYS2d 454 [1991]). To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish that his or her injuries were proximately caused by the violation of an Industrial Code provision that sets forth specific, applicable safety standards (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 505, 601 NYS2d 49 [1993]; ***Biafora v City of New York***, 27 AD3d 506, 811 NYS2d 764 [2d Dept 2006]). PSEG has established, prima facie, entitlement to summary judgment dismissing the cause of action pursuant to Labor Law § 241 (6). Here, it is undisputed that plaintiff and PSEG employees were at the site to perform repair work, namely replacement of a damaged utility pole owned by Verizon. Unlike Labor Law § 240, which includes repair work, Labor Law § 241 (6) "is limited to those areas in which construction, excavation, or demolition work is being performed" (***Barrios v 19-19 24th Ave. Co., LLC***, 169 AD3d 747, 749, 93 NYS3d 428 [2d Dept 2019]; *see* ***Esposito v N.Y. City Indus. Dev. Agency***, 1 NY3d 526, 770 NYS2d 682 [2003]). In opposition, plaintiff failed to raise a triable issue of fact with respect to whether he was engaged in construction, excavation, or demolition work. Accordingly, plaintiff's cause of action for a violation of Labor Law § 241 (6) is dismissed, and the branch of plaintiff's motion for summary judgment in his favor on this cause of action is denied, as moot.

As for plaintiff's claims under the common law and Labor Law §200, where, as in this case, the injury resulted from an alleged dangerous condition, an owner or contractor may be held liable in

common-law negligence and under Labor Law §200 if they had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Russin v Louis N. Piccado & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Campanello v Cinquemani***, 179 AD3d 763, 117 NYS3d 262 [2d Dept 2020]; ***Pchelka v Southcroft, LLC***, 178 AD3d 836, 115 NYS3d 382 [2d Dept 2019]). A defendant exercises sufficient authority to supervise or to control the work to be held liable under Labor Law § 200 "when that defendant bears the responsibility for the manner in which the work is performed" (***Boody v El Sol Contr. & Constr. Corp.***, *supra* at 865, quoting ***Ortega v Puccia***, *supra* at 62; *see* ***Pchelka v Southcroft, LLC***, *supra*; ***Lombardi v City of New York***, 175 AD3d 1521, 109 NYS3d 373 [2d Dept 2019]). However, the mere retention of general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (*see* ***Boody v El Sol Contr. & Constr. Corp.***, 180 AD3d 863, 116 NYS3d 586 [2d Dept 2020]; ***Pchelka v Southcroft, LLC***, *supra*; ***Lazo v Ricci***, 178 AD3d 811, 115 NYS3d 424 [2d Dept 2019]).

To constitute constructive notice of a defective condition, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 475, 781 NYS2d 47 [2d Dept 2004]; *see* ***Lal v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]). Both plaintiff and PSEG acknowledge that the type of repair work at issue is conducted without de-energizing power lines. Further, the parties agree that PSEG had no authority to control or supervise plaintiff's work, and that each crew was working alongside one another, with neither exerting supervisory control over the other. Thus, PSEG established, prima facie, that it did not have the authority to control or supervise plaintiff's work, and that it neither created nor had actual or constructive notice of the alleged dangerous condition (*see* ***Pilato v 866 U.N. Plaza Associates, LLC***, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]; ***Ortega v Puccia***, *supra*). In opposition, plaintiff failed to raise a triable issue of fact. Accordingly, plaintiff's cause of action for a violation of Labor Law § 200 is dismissed, and the branch of plaintiff's motion for summary judgment in his favor on this cause of action is denied, as moot.

Dated: 3/17/21

HON. LINDA KEVINS J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION