Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Shane Steinsvaag,

Plaintiff,

- against -

The City of New York, The New York City Department of Education, The New York City School Construction Authority, The New York City Economic Development Corporation and Leon D. DeMatteis Construction Corporation,

Defendants.

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Index Number: 1339/09

Motion Date: 12/13/10

Motion Cal. Number: 27

Motion Seq. No.: 2

The following papers numbered 1 to 14 read on this motion by defendants, The City of New York, New York City Department of Education (DOE) and Leon D. DeMatteis Construction Corporation (DeMatteis), for summary judgment.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1-6
Memorandum of Law	7-8
Affirmation in Partial Opposition-Exhibits	9-11
Reply-Exhibit	12-14

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City, the DOE and DeMatteis (collectively, the moving defendants) for summary judgment dismissing plaintiff's claims against them pursuant to Labor Law sections 240(1), 241(6) and 200, and for common law negligence, is granted.

Plaintiff, a carpenter's apprentice employed by Island Acoustics, LLC, a carpentry sub-contractor on a construction project at Frank Sinatra High School in Queens County, allegedly sustained injuries on October 27, 2005 when his co-worker, Michael

Fratianni, dropped his end of a metal doorframe, called a doorbuck, he and plaintiff were carrying into the construction site, causing the end that plaintiff was carrying on his shoulder to strike his shoulder. DeMatteis was the general contractor.

Plaintiff's duties included carrying supplies to and from the construction site. For just under an hour before the accident, plaintiff and Fratianni had been unloading a shipment of doorbucks from a delivery truck and carrying them from the street inside the entrance of the school, where they stacked them. He and Fratianni carried the smaller doorbucks, which measured 6 feet by 3 or 4 feet and weighed 80-90 pounds, by themselves, but carried the larger doorbucks, the largest of which measured 11½ by 4 or 5 feet and weighed 200-300 pounds, together. They walked on a wooden ramp that had been placed over the curb so that they would not have to step up over the curb when they carried the materials into the building. Samuele Metitiero, Acoustics' shop steward, testified in his deposition that he and Acoustics' foreman, Eric McNamara, made the ramp at the behest of DeMatteis. The ramp was constructed of three sheets of 3/4-inch plywood screwed together and laid over the street curb.

Plaintiff testified that at the time of the accident, he and Fratianni were carrying a door buck that was a little over 7 feet by 4 feet. He was carrying the front end with both hands 6 or 7 inches above his right shoulder and walking forward, and Fratianni was carrying the rear portion, not over his shoulder, but in front of his chest. As he stepped off the ramp with one foot, plaintiff heard what he describes as a "scamper" by which he meant "[l]ike a slipping. I guess of Michael's feet", and heard Fratianni's end of the door buck fall onto the ramp. At that point the door buck slipped out of plaintiff's hands and all the weight of it came down on his shoulder.

As to plaintiffs' claim under §240(1) of the Labor Law, that section is a strict liability provision that imposes upon owners and contractors absolute liability for any breach of the statutory duty that proximately causes injury (see Panek v. County of Albany, 99 NY 2d 452 [2003]). What is meant by "strict" or "absolute" liability in the Labor Law context is that any negligence on the part of plaintiff which contributes to his injuries is not a defense and will not diminish the owner's or contractor's liability under Labor Law §240(1), if it is established both that there was a violation of the statute and that the violation was a proximate cause of the injury (see Blake v. Neighborhood Housing Services of New York, 1 NY 3d 280 [2003]). Section 240(1), however, applies only to accidents and injuries arising from elevation-related hazards (see Rocovich v. Consolidated Edison Company, 78 NY 2d 509 [1991].

Labor Law §240(1) is inapplicable to the present matter, since plaintiff's injuries neither resulted from his falling from an elevated work site to a lower level nor from an object falling upon plaintiff from an elevated position. There is no issue of plaintiff being injured as a result of his falling from a height. As to the door buck falling from his partner's grasp causing plaintiff's end to strike his shoulder, such was not an elevation-related fall of an object within the contemplation of the Labor Law. "With respect to falling objects, Labor Law §240[1] applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (Narducci v. Manhasset Bay Associates, 96 NY 2d 259, 268 [2001] [quoting Rocovich, supra at 514). Stated the Court of Appeals in Rocovich, "The contemplated hazards 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 lever 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. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides. Consistent with this statutory purpose we have applied section 240(1) in circumstances where there are risks related to elevation differentials" (supra at 514 [citations omitted]).

Here, one end of the door buck was being held by plaintiff in his hands over his right shoulder and Fratianni was holding the other end of it in his hands at chest level. Since there was, therefore, no elevation differential between plaintiff and the door buck at issue, §240(1) is not implicated (see Melo v Consolidated Edison Co. of New York , 92 NY 2d 909 [1998]). Merely because plaintiff was carrying a heavy object did not give rise to liability under that section of the Labor Law (see Carroll v Timko Contracting Corp., 264 AD 2d 706 [2nd Dept 1999]).

Indeed, plaintiff does not oppose that branch of the motion for summary judgment dismissing his claim pursuant to §240(1) of the Labor Law.

Moving defendants are also entitled to summary judgment dismissing plaintiff's claims against them brought pursuant to §§241(6) and 200 of the Labor Law and pursuant to common law negligence.

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that the owner or contractor violated a specific rule or regulation of the Industrial Code and that such violation was a substantial factor in causing plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept

2004]).

Plaintiff alleged in his bill of particulars a violation of §23-1.7(d) of the Industrial Code (12 NYCRR). That section provides: "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Counsel for plaintiff contends that Fratianni dropped his end of the door buck because he slipped on the ramp. However, moving defendants have presented uncontested evidence that the accident was not caused by a slippery condition of the ramp.

In his 50-h hearing, Fratianni, when asked if he ever slipped on the ramp while he was carrying the door bucks, responded, "No." Under further questioning, he repeatedly stated that he did not slip. He stated that he believes that plaintiff threw him off when plaintiff stepped. He further stated, "I think just from the weight when he stepped down, I think I kind of lost it and put it down." He also stated, "I wouldn't say I slipped, though. I would say maybe lost control of holding it, something like that." Therefore, Fratianni's own testimony is that he did not slip on the ramp but dropped the door buck because he lost control of it due to its weight and plaintiff's movement. No admissible proof is proffered to contradict his testimony and raise an issue of fact.

Plaintiff testified that he did not see Fratianni drop the door buck. Plaintiff's hearsay testimony that he asked Fratianni what happened and the latter told him that he slipped because it was wet is inadmissible and may not be considered. The Court may consider hearsay proffered in opposition to a motion for summary judgment only where it is not the only evidence submitted in opposition and does not become the sole basis for the Court's denial of the motion (see DiGiantomasso v City of New York, 55 AD 3d 502 [1st Dept 2008]; Candela v City of New York, 8 AD 3d 45 [1st Dept 2004]; Matter of New York City Asbestos Litigation, 7 AD 3d 285 [1st Dept 2004]; see generally Phillips v Joseph Kantor & Co., 31 NY 2d 307 [1972]). Here, no other competent, relevant, probative or admissible evidence is proffered so as to raise an issue of fact to defeat the granting of summary judgment.

Likewise, the testimony of Metitiero about what Fratianni told him, namely, "What do you want from me, it's wet here", to the extent that such testimony is interpreted as meaning that Fratianni told Metitiero that the wetness caused his feet to slip, and, thus, that the accident was caused by the slipperiness of the ramp, is inadmissible hearsay. Even were this hearsay testimony admissible, it fails to raise any issue of fact as to whether Fratianni slipped

on the ramp.

Plaintiff's counsel quotes the following portion of Metitiero's deposition testimony: Metitiero was asked, "Did he ever tell you that I slipped on water?, Metitiero replied, "He did say it was wet, you know, what do you want from me, it's wet here, that was his response. Whereupon he was asked, "Did he say it's wet meaning the door buck is wet, the ramp is wet, the concrete he was standing on was wet or something else?" Metitiero replied, "He didn't specify, but the whole area was wet, so I just assumed the combination of things."

Metitiero's speculative and vague statement that he merely "assumed the combination of things," lacks any probative value and fails to raise an issue of fact as to whether Fratianni slipped on the ramp. Indeed, the above-quoted testimony, when read in the context of Metitiero's full testimony, establishes that what he relates that Fratianni told him was not that his feet slipped on a wet ramp surface, but that his hand grip slipped on the wet surface of the door buck. Metitiero related, "He just said that the door buck slipped out of his hand." Thereupon he was asked, "Did he tell you that his feet slipped at the time that the door buck came out of his hand?" he replied, "I don't recall that." Thereupon, when he was asked if he inquired of Fratianni what caused the door buck to come out of his hand, Metitiero replied that Fratianni told him, "It slipped out of my hand." The next series of questions and answers was the aforementioned portion quoted by plaintiff's counsel in his affirmation in opposition.

Although Metitiero testified that he actually saw the accident, he did not state that he saw Fratianni's feet slip. Rather, he testified that Fratianni "just dropped it". When asked if he saw why Fratianni dropped the door buck, Metitiero stated, "Well, it was heavy, it was heavy and it was an awkward walking – because the frames are 10 foot wide and you're going over this four foot wide ramp that's maybe only five foot to the point, so it is just very awkward, very awkward. And they didn't have a good grip foothold and it slipped <u>out of his hand</u>" (emphasis added). Therefore, Metitiero testified that the reason Fratianni dropped his end of the door buck was because it was heavy and cumbersome and it slipped out of his hands. He did not see Fratianni's foot slip. Rather, he only speculated that he must have slipped. When asked if he saw any problem with Fratianni's footing before he dropped the door buck, since he mentioned the word "foothold", Metitiero replied, "Not really, not really. Just again, it was wet and I could imagine that he must have slipped somehow or another. I don't really know." Therefore, Metitiero only conjectures that

Fratianni may have slipped because it was wet. His only actual observation was that he saw the door buck slip from Fratianni's grip. He did not see Fratianni slip or otherwise lose his foothold, and even his hearsay testimony is that Fratianni told him merely that the door buck slipped out of his hand. This is consistent with Fratianni's own testimony that he did not slip, but rather lost control of the door buck because it was heavy.

Therefore, in light of Fratianni's testimony that he did not slip but that he dropped the door buck because it was heavy and he lost control of it, and in the absence of any admissible evidence that the accident was caused by Fratianni slipping on the ramp, there is no issue as to defendants' liability under §241(6) of the Labor Law. Even if §23-1.7(d) of the Industrial Code could be deemed to be ostensibly applicable since there was testimony from Metitiero that the ramp was wet and slippery, the unrebutted evidence establishes that the slipperiness of the ramp was not a proximate cause of plaintiff's injuries. Since the only basis for plaintiff's §241(6) claim was defendants' purported violation of §23-1.7(d) of the Industrial Code, his claim predicated upon this section of the Labor Law must fail.

For the aforementioned reasons, moving defendants are also entitled to summary judgment dismissing plaintiff's remaining claims pursuant to Labor Law §200 and common law negligence.

Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY 2d 343 [1998]). Since the only basis for plaintiff's claims under §200 of the Labor Law and common law negligence is his allegation that the accident was caused by a slippery ramp that lacked a slip-resistant surface, and since moving defendants have proffered unrebutted evidence that plaintiff's accident was not caused by a slippery condition of the ramp, movants are also entitled to summary judgment dismissing plaintiff's claims under §200 of the Labor Law and common law negligence as a matter of law. Therefore, since the evidence adduced, on this record, is that plaintiff's injuries were not proximately caused by a slippery condition of the ramp, the Court need not address, and will not decide, the issues of whether movants had supervisory control over the performance of plaintiff's work and whether they had actual or constructive notice of the condition of the ramp.

Accordingly, the motion is granted and the complaint is dismissed as against the City, the DOE and DeMatteis.

Dated: February 1, 2011

KEVIN J. KERRIGAN, J.S.C.