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2 No. 37
Arlene Toefer, &c. et al.,
 Appellants,
 v.
Long Island Rail Road,
 Respondent;
Jana Construction Co., Inc.,
et al.,
 Third-Party Respondents;
et al.,
 Third-Party Defendants.

(And a fourth-party action.)

1 No. 38
Robert V. Marvin et al.,
 Appellants,
 v.
Korean Air Inc., et al.,
 Respondents,
Centria Inc.,
 Defendant.

Case No. 37:

Scott N. Singer, for appellants.
Peter Riggs, for respondent Long Island Rail Road.
Michael A. Baranowicz, for third-party respondent Jana
Construction Co., Inc.
Erika C. Aljens, for third-party respondent Harris-Camden
Terminal Company.
Defense Association of New York, Inc., amicus curiae.

Case No. 38:

Michael J. Hutter, Jr., for appellants.
Brendan T. Fitzpatrick, for respondents.

R. S. SMITH, J.:

We decide in these cases that workers who fall when
working on, or getting down from, the surface of a flatbed truck
that is between four and five feet off the ground may not recover
under Labor Law § 240 (1), because their injuries did not result
from the sort of "elevation-related risk" that is essential to a

cause of action under that section.

Facts and Procedural History

A. Toefer v Long Island Rail Road

Toefer is brought by the guardians of Eric Casey, who suffered a disastrous accident while working on the rehabilitation of a Long Island Rail Road bridge. Casey and another man were assigned to unload large steel, lattice-type beams from a flatbed truck. They stood on the surface of the truck's trailer, some four feet above the ground, inserted eight-foot wooden poles into the beams, and pried the beams off by using the poles as levers. When the beams fell to the ground, the levers fell with them.

Casey and his co-worker pushed one beam off the truck without incident. When the next beam was unloaded, a wooden lever, for some reason that has not been explained, flew back at Casey with enormous force, striking him on the head and propelling him backwards, over the beams behind him that had not yet been unloaded, to the ground on the other side of the truck. He became a paraplegic as a result.

Casey's guardians sued the Long Island Rail Road, alleging among other things violations of Labor Law § 240 (1) and § 241 (6). The railroad claimed over against Casey's employer, which in turn impleaded several other parties. On a motion and cross motions for summary judgment, Supreme Court dismissed all plaintiffs' claims except those arising under Labor Law § 240

(1). The Appellate Division modified that ruling by ordering all of plaintiffs' claims dismissed. We granted plaintiffs' motion for leave to appeal, and now affirm.

B. Marvin v Korean Air Inc.

Robert Marvin was employed by a siding subcontractor that was working on the construction of a cargo building for Korean Air, Inc. at Kennedy Airport. Some paneling material was brought to the construction site on a flatbed truck; the trailer of the truck was between four and five feet off the ground. Marvin was assigned to cut the steel straps that secured the material to the truck. No ladder was present. Marvin climbed up on the truck and performed his task. When he was finished, he crouched and began to step off the truck, but his foot became tangled in a safety harness he was wearing and he fell, breaking his ankle.

Marvin and his wife sued Korean Air and several other defendants, alleging among other things a violation of Labor Law § 240 (1). Supreme Court dismissed all plaintiffs' claims, and the Appellate Division affirmed. We granted plaintiffs' motion for leave to appeal, and now affirm.

Discussion

In this Court, plaintiffs in both Toefer and Marvin seek reinstatement of their claims under Labor Law § 240 (1). Plaintiffs in Toefer also seek reinstatement of their Labor Law § 241 (6) claim. We conclude that both the section 240 (1) claims

and the section 241 (6) claim were properly dismissed.

A. Labor Law § 240 (1)

Labor Law § 240 (1) provides in pertinent 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."

In Rocovich v Consolidated Edison Co (78 NY2d 509 [1991]), we discussed the occupational hazards against which this statute was directed. We pointed out that, while the hazards themselves are not spelled out in the statute, they can be inferred from the "protective means" set forth in the statute "for the hazards' avoidance" -- scaffolding, hoists, stays, ladders and so forth (id. at 513). We explained:

"The various tasks in which these devices are customarily needed or employed share a common characteristic. All entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. 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 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. 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."

(Id. at 514.)

Applying this reasoning in Rocovich, we held that a worker who had been injured when he slipped into a twelve-inch-deep trough carrying a stream of hot oil had not suffered injury from an elevation-related risk, and so was not within the protection of the statute.

The above-quoted language from Rocovich identifies two distinct sources of elevation-related risk: "the relative elevation at which the task must be performed" and the elevation "at which materials or loads must be positioned or secured." In Narducci v Manhasset Bay Assoc. (96 NY2d 259, 267 [2001]), we described cases involving these risks as "falling worker" and "falling object" cases respectively. But, as we said in Narducci, "[n]ot 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)" (id.). In some cases involving falls of workers and objects, we have held that where a plaintiff "was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1)," the plaintiff cannot recover under the statute (Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc., 84 NY2d 841, 843 [1994]).

We have previously decided two Labor Law § 240 (1) cases involving falls from trucks -- though not flatbed trucks --

in which we held that the elevation-related risks contemplated by the statute were not present. In Bond v York Hunter Constr., Inc. (95 NY2d 883 [2000]) we denied recovery to a worker who, getting down from the cab of [a] construction vehicle, placed his foot on the vehicle's track to use it as a step, slipped and fell three feet to the ground. We held as a matter of law that "the risk of alighting from a construction vehicle was not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law § 240 (1)" (id. at 884-885 [citation omitted]). In Dilluvio v City of New York (95 NY2d 928 [2000]), we reached a similar result where the plaintiff fell some three feet from the back of a pickup truck in which he was riding. The Appellate Division has decided several cases involving flatbed trucks under Labor Law § 240 (1). The results in these cases vary, but most find elevation-related risk to be absent, as do both of the Appellate Division decisions now before us (see e.g. Tillman v Triou's Custom Homes, Inc., [253 AD2d 254 (4th Dept 1999)]; Cabezas v Consol. Edison, [296 AD2d 522 (2d Dept 2002)]; but see e.g. Monroe v Bardin [249 AD2d 650 (3d Dept 1998)]; Orr v David Christa Constr., Inc. [206 AD2d 881 (4th Dept 1994)]).

We conclude that the flatbed trucks in these two cases, like the trucks in Bond and Dilluvio, did not present the kind of elevation-related risk that the statute contemplates.

In Toefer, Casey was working on a large and stable

surface only four feet from the ground. That is not a situation that calls for the use of a device like those listed in section 240 (1) to prevent a worker from falling. Plaintiffs in Toefer argue that a hoist, which is one of the devices listed in the statute, should have been used instead of wooden poles to lower the beams from the truck, but this argument misconceives the issue. Labor Law § 240 (1) is arguably implicated in this case only because Casey fell from the truck's trailer to the ground. The purpose of a hoist here would not have been to prevent Casey from falling; it would have been to prevent the beams themselves from doing damage. But Casey was not injured by a beam, or by any falling object; the object that struck him inexplicably flew at him either upwards or horizontally. His injury, horrendous as it is, is not attributable to the sort of elevation-related risk that Labor Law § 240 (1) was meant to address.

The same is true of Marvin's less serious injury. A four-to-five foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240 (1)'s coverage. Safety devices of the kind listed in the statute are normally associated with more dangerous activity than a worker's getting down from the back of a truck. Obviously, the distance between the work platform and the ground is relevant; no one would expect a worker to come down without a ladder or other safety device from a work platform that was ten feet high. But the lesser distance Marvin had to travel,

considering the nature of the platform he was departing from, was not enough to make Labor Law § 240 (1) applicable.

The Appellate Division correctly dismissed the Labor Law § 240 (1) claims in both the Toefer and Marvin cases.

B. Labor Law § 241 (6)

Labor Law § 241(6) provides:

"All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

We pointed out in Ross v Curtis-Palmer Hydro-Elec. Co (81 NY2d 494, 503 [1993]) that this statute "is, in a sense, a hybrid." Its first sentence, requiring "reasonable and adequate" measures, "reiterates the general common-law standard of care;" the second sentence, however, "contemplates the establishment of specific detailed rules" (id.). Our cases hold that the statute imposes a nondelegable duty on owners and contractors to comply with those "specific detailed rules." Thus, the statute creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where, and only where, a "specific, positive command" (Ross, 81 NY2d at 503) or a "concrete specification" (Rizzuto v

L.A. Wenger Contr. Co, 91 NY2d 343, 350 [1998]), of a regulation promulgated by the Commissioner pursuant to the statute has been violated.

The Toefer plaintiffs contend that the failure to provide Casey with a mechanical hoist or a mobile crane to lower the beams from the truck violated specific provisions of the Commissioner's regulations. This contention is without merit. The regulations on which plaintiffs rely, subparts 23-6 and 23-8 of the Industrial Code, do not require the use of hoists or cranes under any particular circumstances; rather, they provide detailed rules to be followed when hoists or cranes are used. Since no hoist or crane was used on the job involved in Toefer, these regulations have no application and plaintiffs' Labor Law § 241 (6) claim must fail.

Conclusion

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

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In each case: Order affirmed, with costs. Opinion by Judge R.S. Smith. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and Read concur.

Decided April 5, 2005