Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

GOWKARRAN KOOM,
Plaintiff,

- against -

MUSLIM CENTER OF NEW YORK, INC., et al.,
Defendants.

MUSLIM CENTER OF NEW YORK, INC.,
Third-Party Plaintiff,

-against-

NORTH AMERICAN IRON WORKS, INC.,
Third-Party Defendant.

Index
No. 27733 2009

Motion
Date March 13, 2012

Motion
Cal. Nos. 9, 10 & 11

Motion
Seq. Nos. 3, 4 & 8

The following papers numbered 1 to 25 read on this motion by defendant Bay Crane Service, Inc. (Bay Crane Service) for an order granting it summary judgment dismissing the complaint and all cross-claims; and by separate notice of motion by plaintiff for an order granting him summary judgment against defendant Muslim Center of New York, Inc. (Muslim Center) on the issue of liability; and by separate notice of motion by defendant Sasco Builders, Inc. (Sasco), for an order vacating and setting aside the prior order of this court dated December 2, 2010, granting it renewal and reargument of the prior order dated January 23, 2012 and, upon renewal and reargument, for an order granting it summary judgment dismissing the complaint and all cross-claims.

	Papers Numbered
Notices of Motion - Affirmation - Exhibits.....	1-13
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Upon the foregoing papers is it is ordered that the motions are consolidated for purposes of disposition and determined as follows:

This is an action to recover damages alleged to have been sustained as a result of an injury which occurred on November 4, 2006 during the course of plaintiff's employment at a construction site owned by Muslim Center. According to the complaint, plaintiff – employed as an iron worker by third-party defendant North American Iron Works, Inc. (North American) – was injured "when a bundle of decking being hoisted on a crane fell and struck the Plaintiff or a portion of Plaintiff's body." Plaintiff has commenced the action against various defendants sounding in, inter alia, Labor Law §§ 200, 240, and 241, as well as common-law negligence.

With respect to Bay Crane Service, it has, without opposition,[1] conclusively established its entitlement to judgment as a matter of law in its favor by demonstrating that it is not an owner, contractor, or agent for purposes of liability pursuant to the Labor Law (or under theories of common-law negligence), as it neither supervised nor controlled plaintiff's work (*see Herrel v West*, 82 AD3d 933 [2011]; *Grochowski v Ben Rubins, LLC*, 81 AD3d 589 [2011]). Bay Crane Service was merely the company which leased the subject crane to plaintiff's employer, and neither the operator nor the oiler of the crane was employed by Bay Crane in any capacity.

With respect to Sasco, by order dated December 2, 2010, motions by plaintiff and Bay Crane Service of Long Island, Inc., (Bay Crane Long Island), for default judgment against Sasco were granted. Accordingly, Sasco's prior motion for summary judgment dismissing the complaint and cross claims was denied by order dated January 23, 2012. However, on this motion, Sasco has demonstrated that neither plaintiff nor Bay Crane Long Island intended to pursue default judgment and instead accepted Sasco's answer, and Sasco then engaged in all facets of discovery. Based on same, and based on the fact that Sasco has also

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1. Though plaintiff submits an "Affirmation in Partial Opposition to the Motion for Summary Judgment by Defendant Bay Crane Service Inc.," plaintiff specifically states therein that "there is no opposition to their [sic] motion to dismiss the Plaintiff's Complaint as it pertains to the Defendant, Bay Crane Service, Inc."

demonstrated its freedom from liability in the happening of this occurrence, Sasco is entitled to the relief being sought in its renewed motion.

Turning now to plaintiff's motion, he moves for summary judgment against Muslim Center on his claims under Labor Law §§ 240 (1) and 241 (6). Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

The circumstances surrounding the subject accident are described by plaintiff in his deposition testimony. Plaintiff testified that he was involved with "choking," or tying, a bundle of steel decking to be used as flooring for a building which was to be constructed. The bundle was originally resting on top of two wood skids located on either side of the bundle, thereby elevating the bottom of the bundle approximately four inches above ground. The decking rested on top of the skids to allow the workers to choke the bundle with steel ropes that had two eyes at the ends, which would then be connected to the crane hook and eventually lifted and moved by the crane. Plaintiff, his boss, and plaintiff's coworkers had already lifted two bundles and were working on their third, which first needed to be flipped over prior to it being moved to the building. Plaintiff choked one side and connected the rope to the crane, and his boss choked the other side. Plaintiff's boss then signaled to the crane operator to lift the bundle to allow the workers could choke the bundle again so that the load could be rotated to enable it to stand on its side. However, the crane operator lifted the bundle about eight feet in the air so that it was out of reach. As a result, plaintiff's boss signaled to the operator to lower the load back down. However, "suddenly," the operator lowered the load "quickly and abruptly," the load tilted, the workers attempted to push it, but the operator brought the bundle all the way down. As a result, plaintiff's foot was squeezed by the bundle, causing him to fall backward.

Plaintiff met his prima facie burden of establishing his entitlement to judgment as a matter of law on this issue by demonstrating that he was injured by an elevated object which descended onto his foot (*see Cruci v General Elec. Co.*, 33 AD3d 838 [2006]; *Keaney v City of New York*, 24 AD3d 615 [2005]). Stated another way, the harm caused to plaintiff "flow[ed] directly from the application of the force of gravity to the object" *(Runner v New York Stock Exchange, Inc.*, 13 NY3d 559, 604 [2009]), and it was the "absence or inadequacy of a safety device of the kind enumerated in the statute" which caused his injury (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

In opposition to the motion, Muslim Center has failed to raise an issue of fact. First, to the extent that it argues that plaintiff may have been the sole proximate cause of the accident because there is testimony that he and his coworkers pushed the bundle, same is without merit. There is no evidence that plaintiff caused the bundle to tilt and land on his foot. In fact, plaintiff testified that, despite his efforts, the bundle "just kept coming" down. Even assuming plaintiff's act of pushing a three- to four-ton load contributed to the accident, comparative fault is no defense to a Labor Law § 240 violation (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]; *Torrillo v Kiperman*, 183 AD2d 821 [1992]). Second, Muslim Center does not refute the contention that the safety devices provided to plaintiff were inadequate in that they did not prevent the descending load from "squeezing" his foot. Finally, the record does not support the contention that the height between the load and plaintiff was minuscule, as plaintiff testified that the crane operator raised the load above plaintiff's head, and then lowered it onto his foot. As Muslim Center has failed to raise a triable issue of fact, plaintiff is entitled to summary judgment on the issue of liability with respect to this section of the Labor Law.

With respect to Labor Law§ 241 (6), that section requires owners, contractors, and their agents to provide reasonable and adequate protection and safety for workers, and to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor as set forth in the New York Industrial Code (*see Ross*, 81 NY2d at 501-502; *Galarraga v City of New York*, 54 AD3d 308 [2008]; *Lodato v Greyhawk N. Am.*, 39 AD3d 491 [2007]). In order for plaintiff to maintain a cause of action under section 241 (6), he must plead and prove a specific, positive violation of one or more of the above regulations (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349 [1998]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2006]), and that said violation was the proximate cause of plaintiff's injuries (*see Rakowicz*, 56 AD3d at 747; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579 [2008]; *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396 [2005]).

In the case at bar, plaintiff pleads violations of 12 NYCRR 23-1.7 (a) and 8.1 (f) (2) (i) and (6). Plaintiff has not demonstrated, prima facie, that the area in which he was

working was "normally exposed to falling material or objects" (*see generally Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824 [2009]; *Portillo v Roby Anne Dev., LLC.*, 32 AD3d 421 [2006]). However, with respect to subsection 8.1 (f) (2) (i), plaintiff conclusively established, by virtue of his testimony, that the moving load suddenly accelerated, and that there was no emergency situation presented, in violation of that section of the Code. In opposition, Muslim Center does not explain why the fact that the load titled while suspended creates an issue as to whether there was sudden acceleration. Finally, plaintiff has conclusively established that the load was lifted above plaintiff's head in violation of subsection 8.1 (f) (6). Contrary to the position of Muslim Center, the load was in front of him only after it was improperly lifted too high for the workers to adjust the steel wiring.

Accordingly, the motion by defendant Bay Crane Service, Inc., is granted. The motion by defendant Sasco Builders, Inc., is granted to the extent that: (1) the prior order of this court, dated December 2, 2010 and entered on January 5, 2011, is vacated to the extent that Sasco's default herein is vacated; (2) the branch of the motion to renew/reargue this court's prior order dated January 23, 2012 and entered on January 24, 2012 as it relates to Sasco is granted; and (3) upon such renewal/reargument, Sasco's motion for summary judgment dismissing the complaint and all cross-claims is granted. The branch of plaintiff's motion for summary judgment in his favor against Muslim Center on the issue of liability pursuant to Labor Law § 240 (1) is granted. That branch of the motion against Muslim Center on the issue of liability pursuant to Labor Law § 241 (6) is granted solely to the extent that the claim is predicated on violations of 12 NYCRR 23-8.1 (f) (2) (i) and (6).

Dated: April 5, 2012

J.S.C.