47 Misc.3d 1217(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Supreme Court, Warren County, New York.

William WRIGHT, Plaintiff,
v.
ELLSWORTH PARTNERS, LLC and A P Construction, LLC, Defendants.
Ellsworth Partners, LLC and A P Construction, LLC, Third–Party, Plaintiffs,
v.
Jag I, LLC, Third–Party, Defendant.

No. 56892. | April 30, 2015.

Attorneys and Law Firms

Finkelstein & Partners, LLP, (Lawrence D. Lissauer of counsel), for plaintiff.

Napierski, VanDenburgh, Napierski & O'Connor, LLP, Albany (Andrew S. Holland of counsel), for defendants/third-party plaintiffs.

Shantz & Belkin, Latham (M. Randolph Belkin of counsel), for third-party defendant.

Opinion

ROBERT J. MULLER, J.

***1** Plaintiff commenced this personal injury action after he suffered multiple fractures and a traumatic brain injury in an accident that occurred on September 3, 2010 on an upper floor of a building under construction at a project known as Malta Commons located in the Town of Malta, Saratoga County. The property was owned by defendant/third-party plaintiff Ellsworth Partners, LLC (hereinafter Ellsworth). Defendant/third-party plaintiff AP Construction, LLC (hereinafter AP) was the general contractor, and third-party defendant JAG I, LLC (hereinafter JAG) was a concrete subcontractor and plaintiff's employer.

On the date of this incident plaintiff observed his co-workers dismantling and stacking scaffolding that had been used for laying blocks in an elevator shaft. Plaintiff was employed by JAG as a truck driver, laborer and mason tender who undertook whatever work his supervisors required of him. On this occasion he did not assist in this process and was simply standing on the same floor, and at the same level—that is, absent an elevation differential—with a broom in his hand "to make it look like [he] was doing something...."

The scaffolding was stacked vertically in a row, analogous to a bookshelf, and leaning against a wall at an approximate 70 to 80 degree angle. Masonry blocks were placed on the floor by JAG personnel, as a stop for the scaffolding. As the stack was started a pipe section was placed opposite the concrete blocks to brace the scaffolding. This pipe brace was intended to secure the leaning scaffolding sections and to prevent the stacked sections from collapsing. The pipe cross-member ran down from the scaffolding sections to the floor. Despite the placement of these masonry blocks the scaffolding sections, nevertheless, fell forward as dominoes might, striking and injuring plaintiff who was found on the floor some 15 feet from the closest piece. He had no communications with representatives of Ellsworth or AP and never took any direction from a representative of either.

Plaintiff commenced this action against Ellsworth and AP, asserting claims under Labor Law §§ 200, 240(1) and 241(6). A third party action was then commenced by these defendants against JAG. Presently before the Court is a motion for summary judgment on behalf of JAG seeking dismissal of both the third-party complaint and underlying complaint. Plaintiff also moves for partial summary judgment against Ellsworth and AP based solely upon the alleged Labor Law § 240(1) violation. JAG's motion takes issue with all three statutes. This Court thus proceeds mindful that "issue-finding, rather than issue-determination, is the key" when addressing a summary judgment motion (*Sillman v. Twentieth Century–Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957] [citation and internal quotation marks omitted]; *see Tenkate v. Tops Mkts., LLC*, 38 A.D.3d 987, 989 [2007]; *Hierro v. Bliss Co.*, 145 A.D.2d 731, 732 [1988]) and that the evidence must be viewed in the light most favorable to the nonmovant (see *Blandin v. Marathon Equip. Co.*, 9 A.D.3d 574, 576 [2004]; *Walton v. Albany Community Dev. Agency*, 279 A.D.2d 93, 95 [2001]).

***2** Under Labor Law § 200 and at common law no liability attaches to an owner or general contractor if the dangerous condition arose from the manner or method in which a subcontractor performed its work and the owner or general contractor had no supervisory control over the activity that caused the injury (see *Comes v. New York*

State Elec. & Gas Corp., 82 N.Y.2d 876, 877 [1993]; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505 [1993]). Accordingly, when "a plaintiff's claim arises due to a defect or dangerous condition at the work site, the plaintiff must show that the defendants had actual or constructive notice of the condition that caused the accident *and* control over the place where the injury occurred" (*Gadani v. Dormitory Auth. of State of NY*, 43 A.D.3d 1218, 1220 [2007] [emphasis added; citations omitted]); *see Harrington v. Fernet*, 92 A.D.3d 1070, 1071 [2012]; *Cook v. Orchard Park Estates, Inc.*, 73 A.D.3d 1263, 1264 [2010]; *Wolfe v. KLR Mech., Inc.*, 35 A.D.3d 916, 918 [2006]).

The record on this motion demonstrates that AP and Ellsworth's on-site representative did not direct JAG's activity nor give advice on how to perform its work. The site supervisor inspected the site from time to time to check the progress of JAG's work, making it clear that—although they may have been aware of the conditions that caused the accident—they did not control the circumstances that created it. JAG performed this work under the direction of none other than its own employees.

To find defendants liable under this codification of common law, however, it is not enough to demonstrate one had the ability to "supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations," as this "does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200" (*Dennis v. City of New York*, 304 A.D.2d 611, 612 [2003]). Notably,

> "[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200" (*id.; see Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 48–49 [2012]; *Carty v. Port Auth. of N.Y. & N.J.*, 32 A.D.3d 732, 733 [2006], *lv denied* 8 N.Y.3d 814 [2007]; *Carney v. Allied Craftsman Gen. Contrs., Inc.*, 9 A.D.3d 823, 825 [2004])."

There is no evidence Ellsworth and AP controlled or supervised JAG's work and thus, even viewing the evidence in a light most favorable to plaintiff, Ellsworth and AP cannot be held liable to plaintiff on the Labor Law § 200 cause of action.

Turning next to an analysis of Labor Law § 240(1), while these facts support a finding that plaintiff's injuries flowed directly from the force of the falling stacked scaffolding sections which struck him, his injuries were not the result of his exposure to the risk of gravity while working with materials that were above the surface on which he was standing (*see Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 6 [2011]; *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604 [2009]; *Jackson v. Heitman Funds/191 Colonie LLC*, 111 A.D.3d 1208, 1209–1210 [2013]). The risk of this injury in this manner did not arise from a physically significant elevation differential but rather occurred where there was no height differential at all.

***3** In order to establish entitlement to recovery under Labor Law § 240(1) the plaintiff must demonstrate both that a violation of the statute—that is, a failure to provide the required protection at a construction site—proximately caused the injury and that "the injury sustained is the type of elevation-related hazard to which the statute applies" (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d at 3, 935 N.Y.S.2d 551, 959 N.E.2d 488; see *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 288–289 [2003]). Liability depends upon whether the method and manner of stacking the scaffolding sections "create[d] an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681 [2007]).

The trail of more liberal interpretations of Labor Law § 240(1) ended in *Rocovich v. Consolidated Edison Co.* (78 N.Y.2d 509, 513–514 [1991]) and *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500–501 [1993], with the Court of Appeals limiting the scope of the statute to "the special hazards' that arise when the work site either is itself elevated or is positioned below the level where materials or load [are] hoisted or secured" ' (*id.* at 500–501, 601 N.Y.S.2d 49, 618 N.E.2d 82, quoting *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932). The Court of Appeals expressly refused to adopt a rule permitting recovery whenever the occupational "injury was related to the effects of gravity" ' (*Ross v. Curtis–Palmer Hydro–Elec. Co .*, 81 N.Y.2d at 500, 601 N.Y.S.2d 49, 618 N.E.2d 82), "even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist" (*id.* at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82). The Court reasoned that

> "[t]he special hazards' ... do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or

inadequately secured" (*id.*).

In determining whether an elevation differential is physically significant or de minimis courts now also takes into account "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent" ' (*Oakes v. Wal—Mart Real Estate Bus. Trust,* 99 A.D.3d 31, 36 [2012], quoting *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865).

The facts at hand, however, are substantially different from circumstances where these calculations have added up to liability under Labor Law § 240(1)—the formula being substantial weight plus height. For example, in *Jackson v. Heitman Funds/191 Colonie, LLC* (111 A.D.3d 1208 [2013]), where "plaintiff established that a membrane roll weighing between 600 and 800 pounds was hoisted by the roll carrier to a height of approximately 11/2 feet off the roof's surface at the time of the accident," the Third Department found "a significant elevation differential given its substantial weight and the powerful force it generated when it fell, so as to require a safety device as set forth in Labor Law § 240(1)" (*id.* at 1210, 976 N.Y.S.2d 283).

***4** Here, plaintiff's expert describes that concrete blocks were placed on the floor as a stop for the scaffolding, that a pipe section was used opposite the concrete blocks to brace the scaffolding and prevent the stack from collapsing and that a pipe cross-member ran down from the scaffolding sections to the floor. This expert then opines that these less than perfectly vertical stacked scaffolding sections were unstable in that proper structural support was not provided to secure and stabilize the stack of scaffolding sections. Even if this opinion were universally accepted it is "not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident" (*Oakes v. Wal—Mart Real Estate Bus. Trust,* 99 A.D.3d at 36, 948 N.Y.S.2d 748). Absent an elevation differential "[t]he protections of Labor Law § 240(1) are not implicated simply because the injury is caused by the effects of gravity upon an object" (*Melo v. Consolidated Edison Co. of NY,* 92 N.Y.2d 909, 911 [1998]; *see Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 270 [2001]). Plaintiff thus cannot succeed on his Labor Law § 240(1) claim.

Turning now to plaintiff's final cause of action, liability under Labor Law § 241(6) requires proof that a particular, non-general rule promulgated by the Commissioner of Labor has been violated. The rule upon which plaintiff relies is 12 NYCRR § 23–1 .7(a)(2), which provides: "Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

Here, the very area where plaintiff was theoretically required to work was the area where he was injured when a stack of scaffolding fell on him. While he may have been with broom in hand "to make it look like [he] was doing something," he was JAG's employee and required to perform whatever work they may have required of him. Under these circumstances, no barricades were required. Plaintiff therefore cannot succeed on his Labor Law § 241(6) claim.

Accordingly, and based upon the foregoing, it is hereby

ORDERED that JAG's motion for summary judgment is granted and both the third-party complaint and underlying complaint are dismissed in their entirety; and it is further

ORDERED that plaintiff's motion for partial summary judgment, although rendered moot, is nonetheless denied; and it is further

ORDERED that any relief not specifically addressed herein has been considered and is expressly denied.

The original of this Decision and Order is returned to counsel for third-party defendant for filing and service with notice of entry. The Notices of Motion dated December 2, 2014 and January 26, 2015 have been filed by the Court together with the submissions referenced below.

Parallel Citations

2015 WL 1948254 (Table), 2015 N.Y. Slip Op. 50651(U)

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