

At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of July, 2004

P R E S E N T :

HON. DAVID B. VAUGHAN

Justice.

..... -X

JOSE RAFAEL MARIN,

Plaintiff,

- against -

Index No. 36813/01

THE CITY OF NEW YORK, et al.,

Defendants.

..... -X

The following papers numbered 1 to 6 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1-2, 3-4

Opposing Affidavits (Affirmations) _____

5, 6

Reply Affidavits (Affirmations) _____

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, defendant City of New York (the City) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Jose Rafael Marin's (plaintiff) complaint against it. Defendant Lomar Sales and Distributions, Inc. (Lomar) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it.

Background

On February 27, 2001, plaintiff sustained various injuries while performing work at the City-owned Bowery Bay Water Pollution Control Plant (the plant) in Queens, New York.

Prior to the accident, plaintiffs employer, Panos Markantonatos, was hired by the City to remove several old pumps and pipes at the plant, and to install new pumps and pipes in their place. On the day of the accident, plaintiff, a co-worker, and Mr. Markantonatos were attempting to install a new pipe, which was 15 feet long and weighed approximately 2000 pounds, in the basement of the plant. The pipe was delivered to the work site by Lomar using a flatbed truck with a crane mounted behind its cab.

Before installing the pipe in the basement of the plant, it had to first be lowered into position using the crane on the back of the truck. In order to accomplish this, a nylon sling, which was attached to a cable running from the crane's boom, was wrapped around the pipe. Thereafter, the crane-operator, "Mr. Rivera," who was employed by Lomar, attempted to lower the pipe through a trap door at ground level while plaintiff and Mr. Markantonatos waited in the basement. Initially, the pipe was attached to the sling so that the pipe was evenly balanced and hung parallel to the ground. However, when Mr. Rivera attempted to lower the pipe to the basement, he discovered that it would not fit through the trap door due to its length. Accordingly, the crane's **rigging** was adjusted so that the pipe hung at an angle, which enabled it to fit through the trap door. Thereafter, the pipe was lowered into the basement at an angle until one end of the pipe rested on the basement floor, and the other end was at a position approximately three feet above the floor.

Once the pipe reached this position, plaintiff took hold of the lower end of the pipe while Mr. Markantonatos grabbed higher end and Mr. Markantonatos directed Mr. Rivera

to lift the pipe off the ground so that he and plaintiff could manually rotate the pipe **180** degrees. According to plaintiff's deposition testimony, when the lower end of the pipe was lifted off the basement floor, the entire pipe began to swing and move. Plaintiff further testified that, when he attempted to rotate the swinging pipe, it struck a support column, thereby crushing and partially amputating his right middle finger. According to Mr. Markantonatos deposition testimony, when the pipe was lifted above the floor, it encountered an obstacle. Mr. Markantonatos testified that, when the pipe broke free of the obstacle, it swung and crushed plaintiff's finger against the support column.

By summons and complaint dated October **12, 2001**, and amended summons and complaint dated June **24, 2002**, plaintiff commenced the instant action against the City and Lomar alleging that the City violated Labor Law §§ **240 (1), 241 (6), 200**, and that Lomar was negligent. In a subsequent bill of particulars, plaintiff alleged that Lomar violated Labor Law §§ **200** and **241 (6)**. In support of the Labor Law § **241 (6)** claim, plaintiff's bill of particulars alleged violations of various New York State Industrial Code regulations. However, now that discovery is complete, plaintiff relies solely upon alleged violations 12 NYCRR **23-8.1 (f) (1) (iii) and (iv), 23-8.1 (f) (2) (ii), 23-6.1 (d), 23-6.1 (h), and 23-1.7(e)** in support of his Labor Law § **241 (6)** claim. The instant motions are now before the court.

Plaintiff's Labor Law § 240 (1) Claim

In support of its motion to dismiss plaintiff's Labor Law § **240 (1)** claim against it, the City points to the fact that the underlying accident was not gravity-related for purposes

of the statute. Plaintiff does not oppose this branch of the City's motion. Accordingly, plaintiffs Labor Law § 240(1) claim against the City is dismissed.'

Plaintiff's Labor Law § 241 (6) Claim

The City and Lomar move separately to dismiss plaintiffs Labor Law § 241 (6) cause of action. In so moving, both the City and Lomar argue that the Industrial Code regulations which plaintiff relies upon in support of this cause of action are either too general to support a Labor Law § 241 (6) claim, or inapplicable given the circumstances of the accident. Lomar also argues that there is no basis for plaintiffs Labor Law § 241 (6) claim against it because it does not qualify as an owner, contractor, or agent under the statute.

In opposition to the City and Lomar's respective motions, plaintiff argues that his allegations that City and Lomar violated 12 NYCRR 23-8.1 (f) (1) (iii) and (iv), 23-8.1 (f) (2) (ii), 23-6.1 (d), 23-6.1 (h), and 23-1.7 (e) are sufficient to support his Labor Law § 241 (6) cause of action. Plaintiff also argues that Lomar is subject to liability under Labor Law § 241 (6) because their employee controlled the crane that lowered and raised the pipe.

Labor Law §241 (6) provides in pertinent part that:

"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 persons employed therein or lawfully frequenting such places."

'Plaintiffs complaint does not allege a 240 (1) claim against Lomar.

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502). Accordingly, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code violation that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

It is undisputed that Lomar did not own the plant or serve as the general contractor on the underlying project. Accordingly, liability under Labor Law § 241 (6) will only attach against Lomar if it qualifies as an agent under the statute. In order to qualify as an agent, there must be evidence that Lomar had the authority to control or supervise plaintiff's work (*Russin v Picciano & Son*, 54 NY2d 311, 318 [1981]; *Morales v Federated Dept. Stores, Inc.*, 5 AD3d 744 [2004]).

Here, Lomar did not hire plaintiff's employer and it does not appear that Lomar had the authority to supervise plaintiff. However, there is evidence that Lomar exercised control over the lowering/hoisting operation that caused the accident. In particular, it is undisputed that Lomar's employee (Mr. Rivera) operated the crane. Furthermore, plaintiff testified that

Mr. Rivera is the person who attached the pipe to the sling and adjusted the crane's rigging so that the pipe was suspended at an angle. In addition, Mr. Markantonatos testified that Mr. Rivera told him what type of sling to use to hold the pipe. Under the circumstances, Lomar has failed to establish as a matter of law that it was not an "agent" under Labor Law § 241 (6).

Turning to the Industrial Code regulations alleged by plaintiff to have been violated, 12 NYCRR 23-1.7 (e) pertains to tripping hazards and sharp projections which can cut or puncture workers. Here, plaintiff's accident was not caused by, or in anyway related to such conditions. Accordingly, this regulation is inapplicable and may not serve to support plaintiff's Labor Law § 241 (6) cause of action.

12 NYCRR 23-6.1 (d) and 6.1 (h) are found within a subpart that does not apply to cranes (*see* 12 NYCRR 23-6.1[a]). Here, the underlying accident involved a crane mounted on the back of a truck. Indeed, this is the basis for plaintiff's allegations under subpart 12 NYCRR 23-8.1. Under the circumstances, 23-6.1(d) and 6.1 (h) may not serve to support plaintiff's Labor Law § 241 (6) cause of action.

12 NYCRR 23-8.1 (f) (1) (iii) and (iv) require that, before beginning hoisting operations with a mobile crane, inspections should be made to ensure that "(iii) the hook [is] brought over the load in such a manner and location as to prevent the load from swinging when hoisting is started" and "(iv) [t]he load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches." These provisions set forth

specific safety standards for Labor Law § 241 (6) purposes (*Puckett v County of Erie*, 262 AD2d 964, 965 [1999]). Furthermore, inasmuch as there is evidence before the court that the pipe began to swing after it was hoisted off the basement floor and that the pipe was not balanced in the sling, these provisions are applicable in this case. Accordingly, to the extent that it is based upon a violation of 23-8.1 (f) (1) (iii) and (iv), plaintiff has a viable Labor Law § 241 (6) claim.

12NYCRR 23-8.1 (f) (2) (ii) provides that during hoisting operations, “the load shall not contact any obstruction.” Although there do not appear to be any reported cases involving this regulation, in the court’s view, it is specific enough to support a Labor Law § 241 (6) claim. Furthermore, given Mr. Markantonatos’ testimony that the pipe encountered an obstruction when it was lifted off the basement floor, and struck plaintiff’s finger when it broke free from this obstruction, this regulation is applicable in this case. Accordingly, to the extent that it is based upon a violation of 23-8.1 (f) (2) (ii), plaintiff has a viable Labor Law § 241 (6) claim against.

Plaintiffs Labor Law § 200/Common-Law Negligence Claim

The City and Lomar separately move to dismiss plaintiff’s Labor Law § 200 and common-law negligence causes of action. In so moving, both defendants argue that they did not control or supervise plaintiff’s work. In opposition to this branch of the City motion, plaintiff argues that the City had notice of the fact that there certain pipes were stored in the basement in the area where the accident occurred. Plaintiff maintains that these pipes

presented an unsafe condition for which the City may be held liable under a Labor Law § 200 and/or common-law negligence theory. In opposition to this branch of Lomar's motion, plaintiff points out that Lomar's employee operated the crane and attached the pipe to the sling. Accordingly, plaintiff reasons that there is an issue of fact as to whether Lomar was negligent and or violated Labor Law § 200.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiffs work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

Plaintiff's accident arose out of the methods that were employed in lowering the pipe into the basement of the plant, and hoisting the pipe once it was positioned in the basement. It is undisputed that the City exercised no control or supervision over this operation. Furthermore, the City's alleged constructive notice of certain loose pipes on the floor of the basement is irrelevant inasmuch as these pipes did not play a role in the accident. Accordingly, there is no basis for plaintiff's Labor Law § 200/common-law negligence claim against the City.


However, plaintiff does have a viable Labor Law § 200/common-law negligence claim against Lomar given the evidence that Lomar exercised a degree of control over the lowering/hoisting operation that caused the accident. Specifically, the crane was operated by a Lomar employee and there is testimony that this employee told plaintiff's supervisor which sling to use, attached the pipe to the sling, and adjusted the crane's rigging so that the pipe was suspended at an angle. Accordingly, there are issues of fact which require the denial of Lomar's motion to dismiss plaintiff's Labor Law § 200/common-law negligence claim against it.

Summary

In summary, the court rules as follows: (1) that branch of the City's motion which seeks to dismiss plaintiff's Labor Law § 240 (1) claim against it is granted; (2) that branch of the City's motion which seeks to dismiss plaintiff's Labor Law § 241 (6) claim against it is denied; (3) that branch of the City's motion which seeks to dismiss plaintiff's Labor Law § 200/common-law negligence claim against it is granted; (4) that branch of Lomar's motion which seeks to dismiss plaintiff's Labor Law § 241 (6) claim against it is denied; and (5) that branch of Lomar's motion which seeks to dismiss plaintiff's Labor Law § 200/common-law negligence claim against it is denied

This constitutes the decision and order of the court.

ENTER ,


J. S. C.