

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

GUILLERMO E. ALARCON, et ano., x
Plaintiffs,

Index
Number 2624/1998

Motion
Date May 20, 2003

- against -

Motion
Cal. Number 1

STAHL YORK AVENUE CO., et al.

Defendants.

x

The following papers numbered 1 to 8 read on this motion by the defendants for an Order summary judgment dismissing plaintiff's cause of action pursuant to §241 of the Labor Law of the State of New York.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Memorandum of Law.....	5
Affirmation In Opposition.....	6 - 8

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

On November 8, 1997, Guillermo E. Alarcon, (hereinafter "plaintiff"), an employee of nonparty Merry Gates, was carrying a window security gate which was to be installed in one window in apartment 3KK on the third floor of a six-floor walk-up building owned by the defendants and located at 444 East 66th Street, in New York City. He was walking up the flight of stairs providing the only access to the apartment, and was below the third-floor landing when he was allegedly caused to slip and fall due to the presence of a slippery substance on the third step from the third-floor landing. Installation of the window security gate had not begun at the time of the occurrence, nor was there any other related construction ongoing in the building. Plaintiff brought suit for injuries sustained in the fall, alleging, *inter alia*, common law negligence as well as a violation of Labor Law §241(6).

Labor Law §241(6) imposes a nondelegable duty on owners and contractors regardless of their control or supervision of the work site, and plaintiff need not prove that defendant had actual or

constructive notice of the dangerous condition in issue. (See, *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 [1998]; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). The statute requires that safeguards be taken in all "areas in which construction, excavation, or demolition work is being performed."

The case at bar presents a scenario involving an alleged "alteration" to the building. In determining what constitutes an "alteration", within the ambit of Labor Law §240(1) and 241(6), the Court of Appeals has treated the scope of each statute distinctly, holding that the scope of "altering" within Labor Law §240(1) requires the making of a significant physical change to the configuration or composition of the building or structure, and does not encompass simple, routine activities such as maintenance and decorative modifications, (see, *Joblon v. Solow*, 91 N.Y.2d 457, 465 [1998]), while in the case of Labor Law §241(6), the Court looks to the regulations contained in the Industrial Code (12 N.Y.C.R.R. §23-1.4[b][13]), in order to determine what constitutes construction work within the meaning of the statute. (*Joblon v. Solow*, *supra* at 466.)

The Industrial Code (12 N.Y.C.R.R. §23-1.4[b][13]) defines the term "construction work" to apply to

All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose.

In order to prevail on a Labor Law §241(6) claim, the plaintiff must establish that the defendant violated a regulation that sets forth a specific standard of conduct. (See, e.g., *Whalen v. City of New York*, 270 A.D.2d 340 [2d Dept. 2000]).

Courts have struggled to define when an activity arises within the context of construction, demolition or excavation. As the Court of Appeals aptly noted in *Joblon*,

the Appellate Divisions have reached inconsistent results on essentially indistinguishable facts (compare, *Tauriello v New York Tel. Co.*, 199 AD2d 377, and *Dedario v New York Tel. Co.*, 162 AD2d 1001 ["altering"], with *Kesselbach v Liberty Haulage*,

182 AD2d 741, and *Borzell v Peter*, 285 App Div 983 [not "altering"]; see also, *Malsch v City of New York*, 232 AD2d 1 [noting conflict]). As the District Court observed, "the cases [provide] ample authority for either side's case" (921 F Supp 218, 220).

(*Joblon v. Solow*, *supra* at 466.) Other courts applying the above regulatory standard have found that work was within the scope of the statute where the plaintiff was installing duct work, (*Primavera v. Benderson Family 1968 Trust*, 294 A.D.2d 923 [4th Dept. 2002]), installing a satellite communication system, (*Tassone v. Mid-Valley Oil Co.*, 291 A.D.2d 623 [3d Dept. 2002]), doing plaster repair work, (*Camacho v. 101 Ellwood Tenants Corp.*, 289 A.D.2d 102 [1st Dept. 2001]), installing a sign above a doorway, (*Steves v. Campus Industries*, 288 A.D.2d 914 [4th Dept. 2001]), installing a "for sale" sign on a building, (*Buckley v. Radovich*, 211 A.D.2d 652 [2d Dept. 1995]), replacing two windows, (*Enright v. Buffalo Technology Building "B" Partnership*, 278 A.D.2d 927 [4th Dept. 2000]), installing a cable wire, (*Bedasse v. 3500 Snyder Avenue Owners Corp.*, 266 A.D.2d 250 [2d Dept. 1999]), repairing an overhead florescent light, (*Piccione v. 1165 Park Avenue, Inc.*, 258 A.D.2d 357 [1st Dept. 1999], *appeal dismissed*, 93 N.Y.2d 957 [1999]), installing a heavy sign, (*Quinn v. Fisher Development, Inc.*, 272 A.D.2d 106 [1st Dept. 2000]), installing insulation on an air conditioning unit, (*Cuddon v. Olympic Board of Managers*, 300 A.D.2d 616 [2d Dept. 2002]), and drilling holes to install cable telephone service.

On the other hand, courts have found that the work was not within the scope of the statute where the plaintiff was moving a large sign which was to be installed on a building 60 to 80 feet away, where the affixing had not yet begun, (*Vernieri v. Empire Realty Co.*, 219 A.D. 593 [2d Dept. 1995]), installing an antenna on a rooftop, (*Kesselbach v. Liberty Haulage, Inc.*, 182 A.D.2d 741 [2d Dept. 1992]), installing and/or replacing window screens, (*Rogala v. Caspar Van Bourgondien*, 263 A.D.2d 535 [2d Dept. 1999]), temporarily installing a microphone cable laid inside the ceiling panels without being attached or affixed to the structure, (*Luthi v. Long Island Resource Corp.*, 251 A.D.2d 554 [2d Dept. 1998]), sanding a door located at the top of a three-step landing, (*Horton v. Otto*, 254 A.D.2d 259 [2d Dept. 1998]), changing light bulbs or tightening and taping a loose wire nut, (*Haghighi v. Bailer*, 240 A.D.2d 368 [2d Dept. 1997]), repairing a latch on an asphalt bin because the bin doors were not opening, (*Urbano v. Plaza Materials Corp.*, 262 A.D.2d 307 [2d Dept. 1999]), where a police officer in the Organized Crime Bureau fell from a telephone pole while removing a pen register device, (*Bloch v. City of New York*, 278 A.D.2d 351 [2d Dept. 2000]), and where a telephone repairman was injured while investigating a non-working telephone line. (*Breedon v. Sunset Industrial Park Assocs., L.L.P.*, 275 A.D.2d 726 [2d Dept. 2000])

The Court of Appeals has made it clear, however, that the

critical inquiry in determining coverage under the statute is not "how the parties generally characterize the injured worker's role, but rather what type of work the plaintiff was performing at the time of injury". (*Joblon v. Solow*, *supra* at 465.) Moreover, the Court of Appeals has held that

Liability under Labor Law § 241 (6) is not limited to accidents on a building construction site. (see, *Mosher v. State of New York*, 80 NY2d 286).

(*Joblon v. Solow*, *supra* at 466.) Subsequent to *Joblon*, the Court of Appeals, in *Nagel v. D& R Realty Corp.*, 99 N.Y.2d 98 [2002] found that a two-year safety inspection on an elevator, which was being performed by the plaintiff at the time of his injury, constituted maintenance work that was not connected to construction, and hence outside the reach of Labor Law §241(6). While reemphasizing that Labor Law §241(6) is not limited to building sites, the Court also stressed that, to come within the statute, the plaintiff's injuries must arise within a construction, demolition or excavation context.

Recently, in *Panek v. County of Albany*, 99 N.Y.2d 452 (2003), the Court of Appeals determined that plaintiff was engaged in a significant physical change to the configuration or composition of a building or structure when he was removing two 200-pound air handlers, requiring two days of preparatory labor, including the dismantling of electrical and plumbing components of the cooling system, and the use of a mechanical lift in order to support the weight of the air handlers.

In this Court's research, it has not found any decision explicitly addressing the activity involved in the case at bar, namely the installation of window security gates. At the time of plaintiff's accident, the work of actually installing the window security gate had not actually begun. Thus defendants contend that the Second Department's decision in *Vernieri v. Empire Realty Co.*, *supra*, is controlling in the instant matter. In *Vernieri*, the plaintiff was injured while moving a sign, which was approximately 28 feet long, a distance of 60 to 80 feet, so that it could be affixed to a building at a later time. The Second Department held that at the time of the plaintiff's injury, there was no construction, excavation, or demolition work being performed, and that the question of whether the act of affixing the sign to the building would or would not be construction under the statute was irrelevant because the affixing had not yet begun. However, in *Vernieri*, a pre-*Joblon* decision, the Court based its decision on two factors in addition to the fact that the work had not yet begun, namely, the distance from the actual construction site, and the absence of a violation of a specific, concrete provision of the Industrial Code sufficient to premise liability under Labor Law §241(6). In the case at bar, plaintiff's accident took place within close proximity to the site where the installation of the window

gate was supposed to take place. Moreover, plaintiff has established the requisite Industrial Code violation. It is well settled that liability pursuant to Labor Law §241(6) may be predicated upon a violation of 12 N.Y.C.R.R. 23-1.7(d), which requires removal, sanding, or covering "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing" from any "floor, passageway, walkway, scaffold, platform or other elevated working surface". (See, *Whalen v. City of New York, supra; Zeigler-Bonds v. Structure Tone*, 245 A.D.2d 80 [2d Dept. 1997][*plaintiff was injured when she slipped on a greasy substance and fell down a flight of stairs while carrying a crate of coffee she was bringing to her co-workers*]). The evidence adduced by the plaintiff on this issue is sufficient to raise an issue of fact as to whether the staircase where the accident occurred was a passageway to the work site. Responsibility under Labor Law §241(6) "extends not only to the point where the ... work was actually being conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work" (*Sergio v. Benjolo*, 168 A.D.2d 235, 236 [1st Dept. 1990]; see also, *Whalen v. City of New York, supra; Zeigler-Bonds v. Structure Tone, supra*).

However, notwithstanding these distinctions from *Vernieri* running in plaintiff's favor, plaintiff, in opposing the defendant's motion, has not provided one scintilla of evidence as to what the work of installing a window security gate entailed or whether such work would constitute a significant physical change to the configuration or composition of the building for purposes of the *Joblon* rule. Thus, the plaintiff has failed to carry his burden of opposing the defendants' motion. Absent such evidence, the Court simply cannot make an informed determination as to the scope and significance of the work that was to be performed, and whether that work would fit within the definition of an "alteration" as discussed above. For this Court to opine, for example, that the installation of a security gate on a window typically involves using bolts or other hardware to permanently affix the security gate to the window so that it cannot be removed, and that this work was the type of non-routine activity which would fall within the template of the Labor Law, or, alternatively, that it was not, would be to engage in sheer speculation, and to allow a jury to do the same. This Court declines to do so.

Accordingly, the defendants' motion is granted, and the plaintiff's cause of action pursuant to Labor Law §241(6) is dismissed.

Dated: June 16, 2003

JANICE A. TAYLOR, J.S.C.