Ortiz v City of New York
2024 NY Slip Op 34988(U)
December 20, 2024
Supreme Court, Bronx County
Docket Number: Index No. 21877/2019E
Judge: Myrna Socorro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9

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RUBEN ORTIZ
Plaintiff

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, AND NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,
Defendants.

---X

Index №. 21877/2019E
Motion seq #1 & #2

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

The following papers were read on this motion by plaintiff (Seq. No. 1) for **summary judgment** noticed for July 21, 2023, and submitted on May 14, 2024, and on the motion by the defendants (Seq. No. 2) for **summary judgment** noticed for July 17, 2023, and submitted on May 14, 2024.

Papers	NYSCEF Doc. No.
Motion seq #1 Plaintiff's Notice of Motion, Affirmation in Support, Memorandum of Law in Support and Exhibits	# 15-28
Defendant's Affirmation in Opposition by Defendants and Exhibits	# 51-68
Reply Affirmation by Plaintiff	#69
Motion seq #2 Defendants' Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, Affidavits, and Exhibits	# 30-47
Plaintiff's Affirmation in Opposition	#70
Reply Affirmation by Defendants	#71

Motion by the plaintiff (Seq. No. 1), for an order pursuant to CPLR §3212, granting summary judgment on liability against defendants pursuant to Labor Law §240(1), and on the motion by defendants The City of New York, New York City Department of Education, & New York City School Construction Authority (hereinafter "the City defendants") (Seq. No. 2), for an order pursuant to CPLR §3212, granting summary judgment in favor of defendants and dismissing plaintiff's Labor Law §241(6), §200 and/or common-law negligence claims, are decided as follows:

Background

According to the plaintiff, on the day of the accident, to wit: August 5, 2018, he was employed by non-party Northeast Restoration Corp. ("Northeast") to perform work in connection with building a new elevator at a public school located at 1070 Castle Hill Avenue, Bronx County. It is undisputed that The City of New York owned the premises with the building operated by the New York City Department of Education. The New York City School Construction Authority hired Northeast, pursuant to a construction contract, to perform the elevator work at the property.

The plaintiff testified that he was welding metal brackets affixed to a cinder block wall of an elevator shaft before the incident occurred. He testified that he was standing on the second rung from the top of a twelve-foot metal A-frame ladder and that the ladder was not tied off. He testified that he was attempting "to weld the last two pieces on the upper part" above the metal bracket, grabbed a cable above and raised his arm when the ladder suddenly moved, tilted to the left and fell over causing him to fall ten- to eleven-feet landing on top of the ladder. The plaintiff testified that before his accident occurred, he previously requested a harness from his supervisor (Jozef) and was denied said harness on the basis that he did not need a harness for the particular job.

The plaintiff thereafter filed his summons and complaint on February 13, 2019, alleging that defendants are liable under Labor Law §240(1), §240(2), §240(3), §241(6), and §200/common law negligence.

In support of his motion for summary judgment, the plaintiff submits, *inter alia*, the deposition transcripts of plaintiff and Abul Miyan (consultant retained by the New York City School Construction Authority to run the subject project), a copy of the incident report, a copy of the construction contract between the New York City School Construction Authority and Northeast, and photographs of the accident scene. The plaintiff argues that the defendants failed to provide him with adequate safety devices to perform his work as he was provided with an unsecured ladder to perform his welding which suddenly moved and tilted causing him to sustain injuries in violation of Labor Law §240(1).

In opposition to the motion, the City defendants submit, *inter alia*, the sworn affidavit of expert engineer, Shawn Z. Rothstein, P.E., a sworn affidavit by Christopher Dickerson (claims specialist on behalf of The City of New York and The Department of Education), a sworn affidavit of Syed Ahmed (project manager for Northeast), and hospital records of the plaintiff in connection with the subject accident. The defendants argue that they cannot be found liable under Labor Law §240(1) as the ladder the plaintiff was provided was adequate and in proper working condition; that

conflicting evidence as to whether the subject ladder suddenly moved or whether plaintiff took a misstep raises triable issues of fact; and/or that plaintiff was the sole proximate cause of his injuries. Rothstein, in his affidavit, opined that no additional fall protection was necessary to perform the plaintiff's job aside from a portable ladder provided. Rothstein further averred that Labor Law §240(1) was not violated by the defendants where plaintiff failed to show that the ladder provided to him was either inadequate or defective and that such violation proximately caused his injuries.

In support of their motion for summary judgment seeking dismissal of the Labor Law §241(6), §200 and/or common-law negligence claims, the City defendants submitted, *inter alia*, a copy of the School Construction Authority-Northeast contract, the incident report, and the sworn affidavits of Abul Miyan (School Construction Authority), Syed Ahmed (Northeast), and Christopher Dickerson (The City of New York and Department of Education). The City defendants contend that the Labor Law §200 and/or common-law negligence claims should be dismissed as they did not possess any supervisory control over the plaintiff's work and they did not have any notice of an alleged dangerous condition. They also argue that the Labor Law §241(6) claim should be dismissed because none of the Industrial Codes alleged in the plaintiff's bill of particulars are applicable to the herein facts.

Plaintiff did not oppose that branch of the City defendants' summary judgment motion seeking dismissal of the Labor Law §200 and/or common-law negligence claims. Therefore, the branch of the City defendants' summary judgment motion (seq #2) seeking dismissal of the Labor Law §200 and/or common-law negligence claims is hereby **granted**. In opposition to the City defendants' motion as to §241(6), the plaintiff contends that the City defendants are liable under Labor Law §241(6) as a result of violating Industrial Codes 12 NYCRR §§ 23-1.5(c)(3), 23-1.21(b)(1), (b)(3)(i), and (b)(4)(iv).

<u>Summary Judgment Standard</u>

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508; 894 NYS 2d 422 [1st Dept 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]; Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a

motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr*, 64 NY 2d 851; 487 NYS 2d 316 (1985).

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

> "The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that "[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). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

This court finds the plaintiff established his *prima facie* burden of a Labor Law §240(1) violation by showing that his injuries resulted from a gravity-related fall stemming from the failure of

defendants to provide an adequate safety device to protect the plaintiff against the hazards associated with the performance of elevated work, a failure of which proximately caused his accident. *See Rivera v Suydam 379 LLC*, 216 AD3d 495 [1st Dept 2023]. "It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker." *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]].

In opposition, the City defendants failed to raise triable issues of fact or otherwise demonstrate *prima facie* that they provided the plaintiff with an adequate safety device to protect him from falling to comport with the statute. Any sole proximate cause argument fails if said defendants' statutory violation served as a proximate cause for the accident, thus, the plaintiff cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]; *see also Hoffman v SJP TS, LLC*, 111 AD3d 467 [1st Dept 2013]. Under a "falling worker" theory, strict liability here is imposed upon the City defendants for their failure to provide an adequate safety device to shield the plaintiffs from a gravity-related fall. *See Plaku v 1622 Van Buren LLC*, 198 AD3d 431 [1st Dept 2021]. To the extent that said defendants argue that hospital records of the plaintiff state that he sustained his alleged injuries as a result of sliding down the ladder after taking a misstep does not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved or shifted. *See Rodas-Garcia v NYC United LLC*, 225 AD3d 556 [1st Dept 2024].

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Codes 12 NYCRR §23-1.5(c)(3) (General responsibility of employers; Condition of equipment and safeguards), §23-1.21(b)(1) (General requirements for ladders; strength), §23-1.21(b)(3)(I) (General requirements for ladders; Maintenance and replacement), and §23-1.21(b)(4)(iv) (General requirements for ladders; Installation and use), therefore, abandoning all other predicates not raised in his legal arguments,

and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

Industrial Code 12 NYCRR §23-1.5(c)(3) is entitled "Condition of equipment and safeguards," and states: "(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Here, the plaintiff never testified that the ladder was not kept in sound, operable condition or needed repair or was damaged before the accident occurred. Therefore, the City defendants demonstrated their *prima facie* entitlement to dismissal of Labor Law §241(6) under this predicate. In opposition, the plaintiff failed to raise triable issues of fact.

The plaintiff further alleges the City defendants violated Industrial Code 12 NYCRR §23-1.21(b)(1), which requires a ladder to "be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load intended to be placed thereon." Here, the plaintiff testified that he inspected the subject ladder and ensured it was stable before using it. There is also no evidence that any component of the extension ladder broke, dislodged, or loosened or that it was incapable of supporting four times the maximum load as intended. *See Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]. Accordingly, the Labor Law §241(6) claim as predicated on a violation of §23-1.21(b)(1) is dismissed.

Inasmuch as the Labor Law §241(6) claim is predicated on a violation of 12 NYCRR §23-1.21(b)(3)(I), the court finds that the City defendants demonstrated their *prima facie* entitlement to dismissal of the Labor Law §241(6) claim under this predicate as the plaintiff specifically testified in the affirmative that he inspected the ladder as well as the footing on the ladder before using it the day of his alleged accident. *Cf. Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]. The plaintiff never testified that the subject ladder, upon his inspection, had "a broken member or part." In opposition, plaintiff failed to raise a triable issue of fact with respect to same.

As to an alleged violation of Industrial Code 12 NYCRR §23-1.21(b)(4)(iv), the court finds there are triable issues of fact as to whether this predicate was violated by the City defendants such that the subject ladder required that it "be held in place by a person" when performing the type of work the plaintiff was tasked.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movants were not addressed by the court, it is hereby denied.

Accordingly, it is hereby,

ORDERED, that the summary judgment motion by the plaintiff (Seq. No. 1) seeking summary judgment on the Labor Law 240(1) claim as against the City defendants, is **GRANTED**; and it is further

ORDERED, that the summary judgment motion by the City defendants (Seq. No. 2) seeking dismissal of the Labor Law §200 and/or common-law negligence claims, is **GRANTED** and it is further

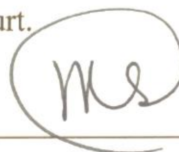
ORDERED, that the Clerk mark plaintiff's Labor Law 200 and/or common-law negligence claims against the City defendants as dismissed; and it is further

ORDERED that defendant's summary judgment motion (seq #2) as to dismissal of plaintiff's cause of action as to Labor Law §241(6) claims is **GRANTED TO AN EXTENT** in that all Industrial Code violations are dismissed **except for Industrial Code** 12 NYCRR §23-1.21(b)(4)(iv), which remains as a triable issue; and it is further

ORDERED, that the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within twenty (20) days of the date of this Decision and Order.

This constitutes the decision and order of this court.



Dated: December 20, 2024

Hon. Myrna Socorro, J.S.C.