Juseinoski v Board of Education of the City of New York
2005 NY Slip Op 30078(U)
June 28, 2005
Supreme Court, Queens County
Docket Number: 0000845/0845
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 10
Justice

ALI JUSEINOSKI - against - THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.	Index Number 845 2003 Motion Date October 19, 2004 Motion Cal. Number 17

The following papers numbered 1 to 17 read on this motion by plaintiff for partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240(1); and this cross motion by defendants for partial summary judgment dismissing the causes of action asserted against them based upon violations of Labor Law §§ 200 and 241(6).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-10
Answering Affidavits - Exhibits	11-15
Reply Affidavits	16-17

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action alleging he suffered personal injuries on June 19, 2002 at P.S. 29, located at 125-10 23rd Avenue, in College Point, Queens, New York, during the course of his employment by Colonial Roofing, Co. (Colonial), the general contractor hired by defendant New York City School Construction Authority (SCA) to perform renovation work there. As part of his alleged duties, plaintiff was required to inspect and repair the exterior scaffolding used on the project, including tightening loose netting and safety bars of the scaffolds. Plaintiff alleges that at the time of the accident, he allegedly was on the scaffolding, approximately 18-20 feet off the ground, when he noticed a loose net on a scaffold to his right. Plaintiff

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testified that in an effort to get closer to the net to tighten it, he swung his body to the right, placing his left foot on a cross brace of the next scaffold. Plaintiff further testified that as he was ready to put his other foot on the brace, the brace bent, and then gave way, causing him to fall to the ground and to suffer bleeding and other injuries.

Plaintiff claims that defendants had a non-delegable duty under Labor Law § 240(1) to protect him against foreseeable and inherent elevation-related risks, and violated that duty by failing to provide him with a proper safety device to protect him from falling. Plaintiff also asserts causes of action based upon common-law negligence and violations of Labor Law §§ 200 and 241(6).

Plaintiff previously moved for summary judgment on the issue of liability pursuant to Labor Law § 240(1). Defendants opposed the motion on the ground, inter alia, that they had no opportunity to obtain discovery to refute plaintiff's version of the accident. By order dated December 4, 2003, the court denied plaintiff's motion with leave to renew after completion of discovery. Plaintiff has appealed to the Appellate Division, Second Department, from the order, and the appeal has been perfected and all briefs have been filed.

Thereafter, on April 19, 2004, plaintiff and Anastasio Tzallak, a witness produced on behalf of defendant SCA, were deposed. The note of issue was filed on July 8, 2004. Plaintiff asserts that discovery has been completed and seeks partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240(1). Defendants oppose the motion asserting that questions of fact exist as to the manner in which the accident occurred, whether plaintiff's actions were the sole proximate cause of the accident, and whether he was a recalcitrant worker. They cross-move for partial summary judgment dismissing the causes of action asserted against them based upon violations of Labor Law §§ 200 and 241(6).

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The statutory duty imposed by sections 240(1), 241(6) and 200 of the Labor Law places ultimate responsibility for safety practices upon owners of the work site and general contractors (see

Gordon v Eastern Ry. Supply, 82 NY2d 555 [1993]; Russin v Picciano & Son, 54 NY2d 311 [1991]; Kowalska v Board of Educ. of the City of N.Y., 260 AD2d 546 [1999]; Sabato v New York Life Ins. Co., 259 AD2d 535 [1999]; Coleman v City of N.Y., 230 AD2d 762 [1996], affd 91 NY2d 821 [1997]). The duty imposed by sections 240 and 241(6) of the Labor Law is nondelegable, and the liability of an owner under these sections is not dependent on whether the owner exercised control or supervision over the work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]; Allen v Cloutier Constr. Corp., 44 NY2d 290 [1978]). On the other hand, section 200 of the Labor Law codifies the common-law duty of an owner or an employer to provide employees a safe place to work (see Jock v Fien, 80 NY2d 965 [1992]). Liability will attach when the plaintiff establishes that the owner or general contractor supervised or controlled the work performed, or had actual or constructive notice of the unsafe condition which precipitated the plaintiff's injury (see Rizzuto v Wenger Contr. Co., 91 NY2d 343 [1998]; see Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]; Kennedy v McKay, 86 AD2d 597 [1982]).

Labor Law § 240(1) imposes a duty upon owners and contractors to provide or cause to be furnished certain safety devices for workers at an elevated work site, and the absence of appropriate safety devices constitutes a violation of the statute as a matter of law (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 499-500; Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520-521 [1985]; Smith v Xaverian High School, 270 AD2d 246 [2000]). Plaintiff's account of the accident is not based upon a claim of a dangerous condition at the premises, but rather that while he was engaged in his inspection and repair work, on a scaffold at an elevated height at the premises, he was injured as a result of the alleged defect with the cross brace of the scaffold and the lack of a safety harness.

Plaintiff testified at his deposition that on the date of the accident, he was assigned to perform the inspection and repairs of the scaffold by Colonial, his employer. He further testified that he had attended safety meetings at which the issue of the importance of wearing safety harnesses when at an elevated height was discussed, and that he had worn one during the three or four prior occasions he had been assigned to perform scaffold inspections. He also testified that after receiving his assignment on the accident date, he looked for a safety harness in the "key box" where they were usually stored. Plaintiff testified that when he could not find a safety harness in the key box, he asked Bujar Polozhani, a Colonial foreman and his supervisor, for one to

wear during his work, but was told by Polozhani that there were no more available. Plaintiff further testified that he performed his duties without using a safety harness or safety line. He also testified that after he stepped on the cross brace, and it bent and gave way, the cross brace was left "hanging straight down." Plaintiff testified at his General Municipal Law § 50-h hearing that the scaffold remained in place notwithstanding the detachment of the brace.

Defendants assert that plaintiff's account of his accident does not comport with known facts, and, therefore, that this was not an accident within the purview of Labor Law § 240(1). They offer the affidavits, dated September 16, 2004, of Adriana Sela, Colonial's superintendent for the project, and Mr. Polozhani and the Workers' Compensation C-2 form to dispute plaintiff's claim that he fell from the scaffold. They assert plaintiff tripped while on the scaffold, banged his head in the process, and then climbed down the scaffold of his own accord to the ground.

Plaintiff opposes the consideration of the affidavits of Ms. Sela and Mr. Polozhani and the C-2 form. To the extent plaintiff asserts Ms. Sela and Mr. Polozhani failed to swear, under the penalties of perjury, to the contents of their affidavits, he has apparently confused the requirements for an affirmation with those for an affidavit (see CPLR 2309; General Construction Law § 12; see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2309:347-348). To the extent the affidavit of Mr. Polozhani was executed before a notary public in New Jersey, any failure to comply with CPLR 2309(c) may be waived or cured nunc pro tunc (see e.g. Sparaco v Sparaco, 309 AD2d 1029, 1031 [2003]; Nandy v Albany Med. Center Hosp., 155 AD2d 833 [1989]; Raynor v Raynor, 279 App Div 671 [1951]; cf. Jenkins v Diamond, 308 AD2d 510 [2003]; Citibank (S.D.) N.A. v Santiago, 4 Misc 3d 138[A], 2004 N.Y. Slip Op 50899[U] [App Term, 2d & 11th Jud Dists]; Ford Motor Credit Co. v Prestige Gown Cleaning Serv., 193 Misc 2d 262 [2002]).

To the extent Ms. Sela was a previously unidentified witness, discovery was not complete at the time of the denial of the first summary judgment motion by plaintiff and plaintiff's deposition was not held until April 19, 2004. At the deposition, plaintiff identified Ms. Sela as the first person who spoke to him after he crawled to a grassy area in front of the school following his fall. Thus, notwithstanding that defendants failed to identify Ms. Sela in pretrial disclosure, and served her affidavit after filing a note of issue (see Dawson v Cafiero, 292 AD2d 488, 489 [2002]; Lau Lee Chan v Mikhalov, 279 AD2d 456 [2001]; Ortega v New York City Tr. Auth., 262 AD2d 470 [1999]; Mankowski v Two Park

Co., 225 AD2d 673 [1996]), the court, in an exercise of discretion, shall consider Ms. Sela's affidavit in opposition to the motion by plaintiff.

With respect to the Workers' Compensation C-2 Form, notwithstanding it contains hearsay statements, it arguably contradicts plaintiff's version of the facts, and, thus, may be considered for the purpose of opposing this summary judgment motion (see Maldonado v Townsend Ave. Enterprises, 294 AD2d 207 [2002]; see also Guzman v L.M.P. Realty Corp., 262 AD2d 99 [1999]; Koren v Weihs, 201 AD2d 268, 269 [1994]).

Ms. Sela avers that on June 19, 2002, she found plaintiff sitting on the steps in front of the school, and he informed her that he had slipped and fallen. She also avers that she looked at the scaffold, but observed no debris or broken braces or parts of the scaffold in the vicinity of the area where plaintiff told her he had fallen. Ms. Sela states she noticed he was not bleeding and was able to walk on his own, but nevertheless drove him to the hospital.

Mr. Polozhani avers in his affidavit dated June 19, 2002, that he was informed via radio that plaintiff had been involved in an accident. He also avers that when he reached the area where plaintiff allegedly had fallen, he learned plaintiff had been taken to the hospital by a coworker. Mr. Polozhani states he then inspected the scaffold, observed that one of the braces was bent, and replaced the bent brace. Mr. Polozhani also states that he later spoke to plaintiff regarding the cause of the accident. According to Mr. Polozhani, plaintiff never mentioned that the scaffold had broken, but rather indicated that he had lost his footing while working on the second tier of the scaffold, and banged his head against the scaffold during the process.

The Workers' Compensation Form C-2 filed by Colonial and executed by its president, states that plaintiff "was approx. 6 feet above the ground and was wearing his hardhat and safety harness." It further states that "[w]hile working his way down the scaffold [plaintiff] lost his footing and banged his forehead against the scaffold. He then proceeded to make his way to the ground where he was attended to by coworkers."

In reply, plaintiff offers an affidavit of Mr. Polozhani, dated, April 23, 2004, wherein he mentions for the first time that the cross brace was "hanging down," notwithstanding he initialled handwritten portions of his first affidavit stating only that the brace was bent. The September 16, 2004 affidavit itself raises questions of fact as to credibility of the witness regarding

whether any cross bar was detached on one end, and whether the "bent" one mentioned in his first affidavit was in fact the same one upon which plaintiff contends he placed his foot.

Under these circumstances, plaintiff has failed in the first instance to establish his entitlement to summary judgment as a matter of law under Labor Law § 240(1) since it has not been demonstrated that his injuries resulted from a fall off the scaffold or any elevation-related risk (see Delmar v TerraStruct Corp., 249 AD2d 259 [1998]; Groves v Land's End Hous. Co., 80 NY2d 978 [1992]; Miller v Long Is. Light. Co., 166 AD2d 564 [1990]). The motion by plaintiff is denied.

With respect to the cross motion by defendants, plaintiffs allege that defendants are responsible for plaintiff's injuries under Labor Law § 241(6). It is settled that to support a claim pursuant to Labor Law § 241(6), a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a "specific" standard of conduct, and that such violation was the proximate cause of his injuries (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501-502; Vernieri v Empire Realty Co., 219 AD2d 593, 597 [1995]).

In the complaint, plaintiff relies upon alleged violations of the Occupational Safety & Health Act (OSHA) (29 USC 651 et seq.), and New York State regulations (12 NYCRR 23-1.2[a], 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-5.1, 23-5.4, 23-5.5, 23-5.6) to support his Labor Law § 241(6) claims. The alleged violations of OSHA, however, cannot support a Labor Law § 241(6) claim (see Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311 [1997]; Ciraola v Melville Court Assocs., 221 AD2d 582 [1995]; Vernieri v Empire Realty Co., 219 AD2d 593, supra). The alleged violations of 12 NYCRR 23-1.2[a], 23-1.5, and 23-5.1(f), which merely establish general safety standards, are insufficient to give rise to the non-delegable duty imposed by Labor Law § 241(6) (see Stairs v State Street Associates L.P., 206 AD2d 817 [1994]; Mancini v Pedra Constr., 293 AD2d 453 [2002]; Schiulaz v Arnell Const. Corp., 261 AD2d 247 [1999]). Section 23-5.1(a) provides the scope of the subsection, and, thus, cannot serve as a basis for a Labor Law § 241(6) claim. The alleged violations of 12 NYCRR 23-1.7, 23-1.15, 23-5.1(b), 23-5.1(d)-(e) and 23-5.1(g)-(k) are inapplicable under the facts asserted by plaintiff, and, therefore, also cannot support his cause of action under Labor Law § 241(6). The alleged violation of 12 NYCRR 23-1.16 is inapplicable herein where plaintiff claims that no safety harness was provided to him (see Avendano v Sazerac, Inc., 248 AD2d 340 [1998]).

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Sections 23-5.4, 23-5.5, and 23-5.6, respectively, contain directives concerning tubular welded frame scaffolds, tube and coupler metal scaffolds and pole scaffolds, and each is sufficiently specific to support a Labor Law § 241(6) claim (see Bender v TBT Operating Corp., 186 Misc 2d 394, 403 [2000]). However, plaintiff has failed to allege the type of scaffold used at the accident site. Furthermore, Anastasios Tzallak, who became the project officer for the P.S 29 project after the accident, testified on behalf of defendant SCA, that the type of scaffolding used at the project was "pipe" scaffolding. Plaintiff has made no showing that pipe scaffolding is the same as one type of scaffold specifically listed in the regulations. Under such circumstances, plaintiff has failed to meet his burden of showing these provisions are available to support his claim under Labor Law § 241(6) (see Cardenas v American Ref-Fuel Co. of Hempstead, 244 AD2d 377 [1997]).

With respect to the alleged violation of section 23-5.1(c) and 23-1.17, these sections are sufficiently specific to predicate a Labor Law § 241(6) claim. The record, which includes references to nets and to diagonal bracing, is unclear as to the applicability of these sections. Under such circumstances, that branch of the cross motion by defendants seeking partial summary judgment dismissing the Labor Law § 241(6) claim is granted only to the extent of dismissing so much of that claim that is based upon alleged violations of OSHA regulations, and 12 NYCRR 23-1.2[a], 23-1.5, 23-1.7, 23-1.15, 23-5.1(a)-(b), 23-5.1(d)-5.1(k), 23-5.4, 23-5.5, and 23-5.6.

Labor Law § 200, which governs general safety in the workplace, imposes upon employers, owners and contractors the affirmative duty to exercise reasonable care to provide and maintain a safe place to work and is a reiteration of common-law negligence standards (see Allen v Cloutier Constr. Corp., 44 NY2d 290, supra). Therefore, a party charged with liability must be shown to have notice, actual or constructive, of the unsafe condition and to have exercised sufficient control over the work being performed to correct or avoid the unsafe condition (see Leon v J & M Peppe Realty, Corp., 190 AD2d 400 [1993]). In this instance, there is no evidence that defendants exercised supervisory control, supplied the scaffold or had any input into the manner in which plaintiff performed his work. Indeed, plaintiff testified that the scaffolds were provided by Colonial, and that he received instructions from his supervisor and other unidentified employees of Colonial. Plaintiff also testified during his General Municipal Law § 50-h hearing that it was his job to inspect the cross braces of the scaffolds and that the purportedly defective one looked "fine."

Furthermore, the record contains no proof that defendants actually supervised or controlled the project site. General oversight over the progress of the work or a contractual obligation to oversee the performance of work and ensure safety compliance is not to be equated with the direct supervision and control over the manner of the work's performance necessary to establish liability under Labor Law § 200, or at common-law negligence (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876, supra; Perez v Spring Creek Assocs., 265 AD2d 314 [1999]; Werner v East Meadow Union Free School Dist., 245 AD2d 367 [1997]).

The branch of the cross motion by defendants seeking partial summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

Dated: January 28, 2005

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J.S.C.