Agramonte v New York Univ.
2007 NY Slip Op 30011(U)
March 1, 2007
Supreme Court, New York County
Docket Number: 0111434
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/12/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C.

PART 10

Index Number : 111434/2004
AGRAMONTE, ROSELIO
vs
NEW YORK UNIVERSITY
Sequence Number : 001
DISMISS

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for §3212 SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
MAR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: MAR 01 2007

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Supreme Court of the State of New York
County of New York: Part 10
---x

Decision/Order
Index No.: 111434/04
Seq. No.: 001

Roselio Agramonte,

Plaintiff,

-against-

Present:
Hon. Judith J. Gische
J.S.C

New York University,

Defendant.

---x

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's n/m (§ 3212) w/ KLB affirm, exhs	1
Pltff's x/m (§ 3212) w/HQN affirm, BR affid, exhs	2
Def's Reply w/KLB affirm, MO affid, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.:

Plaintiff alleges that he sustained personal injuries as a result of defendant's violations of Labor Law sections 240 (1), 241 (6) and also as a result of defendant's negligence (Labor Law § 200). The court has before it defendant NYU's motion for summary judgment dismissing all three of these labor law claims. Plaintiff (at times "Mr. Agramonte") has cross moved for summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims. He also seeks permission to serve a supplemental Bill of Particulars to address certain deficiencies in his pleadings raised by NYU in connection with its motion for summary judgment. Alternatively, he opposes NYU's motion for summary

judgment, contending that triable issues of fact exist as to all three of this causes of action. Since the note of issue has been filed with a statement that all discovery is complete in this action, and the motions were brought timely under CPLR § 3212, they will be considered. Brill v. City of New York, 2 NY3d 648 (2004). The court's decision follows.

Background

Mr. Agramonte was, at the time of his accident, working at an NYU dorm. He has testified at his EBT that he was doing "finishing work" which consisted of scraping bits of paint off freshly painted walls. He has also testified that it was Mr. Oliver, who he has identified as his boss and the principal of the company who employs him, who told him that his assignment was to scrape bits of paint off a freshly painted wall. Plaintiff has also testified the person who actually instructed him what to do, and provided him with the ladder he was to use that day was someone who worked at the dorm, and an NYU employee. Plaintiff cannot identify this person, but testified that this individual "was doing supervising work. He was looking at what I was doing. He was showing me." This person reportedly stayed near plaintiff while he performed his work.

Plaintiff has testified the ladder this person from the building gave him to use was approximately 10 feet tall and made of wood. Plaintiff placed the ladder in its closed position on the 3rd or 4th step of one staircase and then leaned it at an angle against the underside of the stair case above. He tested the ladder to make sure it was secure before he ascended it, and finding it secure, did so. After about 25 minutes of scraping the wall, the ladder suddenly slipped out from the bottom because, as he has testified, "the ladder was lacking the rubber soles to keep it in place." He fell backwards

on top of the steps, thereby sustaining the injuries he claims to have incurred.

Plaintiff offers the affidavit of Ms. Rosario to establish that NYU had a contract with "American Building Maintenance Co. of New York," and that this company was plaintiff's employer (hereinafter, "ABM maintenance"). Ms. Rosario avers that she was the manager of ABM maintenance and that it is a subsidiary of "ABM Industries, Incorporated." She further states that ABM maintenance provides construction, painting and janitorial services to NYU, and that it had a construction contract with NYU to do "finishing work" on this particular project. Thus, it is Ms. Rosario's sworn statement that Mr. Agramonte was doing painting related work [e.g. subject to the protections of Labor Law § 240 (1)] for NYU when he was injured. Ms. Rosario has further stated under oath that she personally observed an NYU employee provide plaintiff with the wooden A-frame ladder, and that this person appeared to be holding onto the ladder while plaintiff was standing on one of the rungs. She left the area only to later hear a crash. Ms. Rosario avers that when she rushed back, she observed plaintiff on the floor next to the ladder and she noticed that the bottom of the ladder did not have rubber footing

Plaintiff argues that because NYU owns of the building where he was working, and his work was related to painting, he is subject to the protections of Labor Law § 240 (1). He further contends that because the ladder had no rubber feet or other skid protection at the bottom, it lacked proper protections for his safety. Plaintiff contends that NYU also violated specific safety standards of the Industrial Code. Plaintiff relies upon the following code violations to support his Labor Law § 241 (6) claims: 23-1.7 (d) [slipping hazards], 23-1.16 (a), (b), (c) and (d) [life nets], 23-1.21 [installation and use of ladders] and 23-1.17 [life nets].

Defendant NYU contends that plaintiff has no legitimate claim against it under Labor Law § 240 (1) for a number of reasons. First, NYU contends that plaintiff was not engaged in an activity subject to the protections of Labor Law § 240 (1) because ABM did not have a contract for construction work with NYU, but only a cleaning contract. NYU offers the sworn affidavit of Mr. Oliver who denies ABM had a construction contract with NYU. He also states under oath that plaintiff was only required to dust the wall, and that he was provided with a long poled duster to do his job. Mr. Oliver states that plaintiff decided on his own to use a ladder he saw laying about, probably left by another contractor, but that NYU did not provide plaintiff with a ladder, nor did it own any ladders at the job site.

Mr. Oliver contends that he noticed plaintiff standing - not on the rungs of the ladder, but on its cross bars. He instructed plaintiff to get down, but then walked away. Mr. Oliver further avers that anything requiring a ladder would be work done by "[o]ther ABM crews, experienced in the use of ladders. . ." not someone like plaintiff. Finally, Mr. Oliver states that Ms. Rosario is a relative of Mr. Agramonte, therefore her testimony is unreliable.

Alternatively NYU contends that it is also entitled to summary judgment dismissing the § 240 (1) claim because plaintiff was the sole proximate cause of his injuries, and that he did not fall because he was provided with an unsafe ladder, but because of the method he employed in doing his job. NYU contends that it had no obligation to provide plaintiff with an A-frame ladder that had rubber feet, assuming *arguendo* that it did provide the ladder at all, and that plaintiff has failed to provided any expert testimony, to the contrary, that rubber feet are indeed necessary on a wooden

ladder.

In support of its motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, defendant contends that the industrial codes plaintiff relies are insufficient predicates for his claim because they are either inapplicable, or he has cited a general section of the code. NYU contends it was not negligent and did not violate Labor Law § 200 either because it did not supervise the work plaintiff was doing nor instruct him on how to do it.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. Id.

Labor Law § 240(1) mandates that owners and contractors provide "devices which shall be so constructed, placed and operated as to give proper protection to" persons performing work covered by the statute, which includes "erection, demolition, repairing, altering, painting, cleaning, or pointing a building . . ." Although NYU contends that it did not have a construction contract with ABM maintenance, and that plaintiff was simply cleaning or dusting when he was injured, they do not provide a copy of their contract with ABM maintenance. In any event, § 240 (1) expressly includes the activity that plaintiff was engaged in, even if it was simply cleaning up after the construction (whether dusting the wall or scraping paint balls off of it). Therefore, this is

not a basis to grant defendant's motion, dismissing plaintiff's § 240 (1) claim.

Where a ladder is offered as a work-site safety device, it must provide the proper protection; the failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1). Schultze v. 585 W. 214th St. Owners Corp., 228 A.D.2d 381, 644 N.Y.S.2d 722). The failure of a ladder to have rubber feet, and the absence of "proper protection" establishes plaintiff's prima facie case under Labor Law § 240 (1). Szymanski v. Nabisco, Inc., 256 AD2d 1154 (4th dept. 1998). There is, however, a triable factual dispute, presented by Mr. Oliver's affidavit, as to who provided plaintiff with the ladder and whether plaintiff took it upon himself to use a ladder although he was provided with a long handed duster with which to perform his tasks. Miraglia v. H&L Holding Corp., ___AD3d___; 2007 N.Y. Slip Op. 00093 (1st Dept 2007). *Compare*: Klein v. City of New York, 89 NY2d 833, 835 (1996). Defendant also raises an issue of fact as to how plaintiff's accident occurred. If the ladder was inadequately secured due to plaintiff's improper use of it, then there is no § 240 (1) violation since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed. Mead v. Rock McGraw, Inc., 307 AD2d 156 (1st Dept 2003).

Turning to plaintiff's Labor Law § 241 (6) claims, and defendant's argument that the code sections cited by plaintiff are either inapplicable, or only general sections that cannot serve as the predicate for his claims, the court examines the sections at issue. In relevant part 12 NYCRR 23-1.21(b)(4)(ii) provides that "[a]ll ladder footings shall be firm." This is a sufficient predicate for plaintiff's § 241 (6) cause of action in light of his claim that there were no rubber feet or other gripping materials at the bottom of the

ladder. Symonds v. 1114 Ave. of Americas, LLC, 7 Misc.3d 1008(A) (N.Y.Sup., 2005). 12 NYCRR 23-1.21 (b) (4) (iv) separately requires that a second person stabilize a ladder while the other worker is working upon it. There is a factual dispute whether someone was holding onto the ladder plaintiff was using or not. Mr. Oliver's statement, that Ms. Rosario is untruthful or biased calls into question her credibility. Credibility findings are for the trier of fact to make at trial, not the province of the court on a motion for summary judgment. Thus, this is another triable factual dispute.

Although in his bill of particulars plaintiff only pled 12 NYCRR 23-1.21, without specifying the subsections thereunder, his pleading is sufficiently specific and provided defendant with adequate notice of his claims which he also testified about at his EBT. Therefore, the failure to expressly cite the subsections is not fatal to his claim. Noetzell v. Park Avenue Hall Housing Development Fund Corp., 271 AD2d 231 (1st Dept 2000).

Section 23-1.16 relates to "safety belts, harnesses, tail lines and lifelines" and how they are used and secured. This section is inapplicable to plaintiff's accident as there is no evidence that safety belts were provided to him. Avendano v. Sazerac, Inc., 248 AD2d 340 (2nd Dept. 1998). Therefore, this section cannot be a predicate basis for his Labor Law § 241 (6) claims.

Plaintiff also asserts a violation of 12 NYCRR § 23-1.7 (d), "slipping hazards." This section is inapplicable, however, to the factual circumstances of his accident, as he claims it occurred. Although plaintiff claims the ladder "slipped" from the step it was resting on because it did not have proper gripping material or rubber feet, "slipping" within the meaning of this code section, refers to a "slippery condition" on an elevated surface, like oil or ice on a scaffold, or a worker's boot slipping off a rung because of a

slippery condition. *For example*: Smith v. Fayetteville-Manlius Cent. School Dist., 32 AD3d 1253 (4th Dept 2006). This section cannot be a predicate basis for his Labor Law § 241 (6) claims either.

Although plaintiff also identified 12 NYCRR § 23-1.17 as another code section that was violated , and therefore a predicate for his Labor Law § 241 (6), he appears to have abandoned that claim. In any event, § 23-1.17, like § 23-1.16, provides rules for the use of life nets, and has no applicability here. Dzieran v. 1800 Boston Road, LLC, 25 AD3d 336 (1st Dept 2006).

Since defendant has failed to prove that it did not violate 12 NYCRR 23-1.21 et seq, and plaintiff has raised factual issues as to whether this particular code provision was violated and whether such violation proximately caused his injuries, defendant's motion for summary judgment on plaintiff's § 241 (6) claim, insofar as it is predicated on this particular code section. Hart v. Turner Const. Co., 30 AD3d 213 (1st Dept 2006). However, defendant's motion for the dismissal of the Labor Law § 241 (6) claims is granted only insofar as they are supported by the dismissed predicate code violations asserted [e.g. §§ 23-1.7 (d), 23-1.16 *et seq* and 23-1.17 *et seq*]. Plaintiff's cross motion for summary judgment on his Labor Law § 241 (6) claims is denied in its entirety as there are triable issues of fact, or the code sections are inapplicable, for the reasons addressed, *supra*.

Plaintiff's cross motion, to serve a supplemental bill of particulars is granted, but only as to his 12 NYCRR 23-1.21 *et seq* claims, otherwise it is denied as to the other code violations cited because they have been dismissed. He may serve the

supplemental bill within Fifteen (15) Days from the date of this decision and order.

The remaining Labor Law claim to be addressed is that under § 200 which is a codification of the common-law duty imposed upon owners and general contractors to provide construction site workers with a safe place to work. Cahill v. Triborough Bridge & Tunnel Authority, 31 AD3d 347 (1st Dept 2006). To impose liability for a violation of Labor Law § 200, plaintiff must show that NYU had authority and control over his work. Bell v. Bengomo Realty, Inc., ___AD3d____, 2007 N.Y. Slip Op. 00232 (1st Dept 2007). Defendant, to prevail on its own motion for summary judgment, must establish the contrary. Defendant has not met its burden of proving that it did not supervise, control or direct plaintiff's work, or that it did not have the authority to control the activity that brought about the injury. Cahill v. Triborough Bridge & Tunnel Authority, *supra.*

Plaintiff, on the other hand, has raised a factual dispute about the identity of the person who was at "the building" when he was doing his work, telling him what to do, and possibly even holding the ladder, or standing near him as he performed his tasks. There is trial factual issue about whether NYU had actual or constructive notice of the dangerous condition that caused plaintiff's injuries (e.g. the leaning ladder, and no rubber feet). Id. Therefore defendant's motion and plaintiff's cross motion for summary judgment are each denied.

Conclusion

Defendant's motion for summary judgment is granted only to the extent that plaintiff's Labor Law § 241 (6) claims are dismissed insofar as they are predicated on the inapplicable industrial code sections [e.g. §§ 23-1.7 (d), 23-1.16 *et seq.* and 23-1.17

et seq.]. He may, however, proceed with this claim predicated on 12 NYCRR 23-1.21 *et seq.* and plaintiff's cross motion to serve an amended bill of particulars to assert the applicable subsections thereunder is granted. The motion and cross motions for summary judgment are otherwise denied because triable issues of fact exist.

Since the Note of Issue has been filed, this case is ready for trial. Plaintiff shall serve a copy of this decision and order upon the Office of Trial Support within Twenty (20) Days from the date hereof so that the case can be scheduled and assigned for trial.

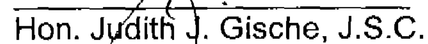
Any relief not addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

FILED
MAR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
March 1, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.