

Como v 330 Jay St. Assoc., LLC

2007 NY Slip Op 30883(U)

April 13, 2007

Supreme Court, New York County

Docket Number: 0107961/2004

Judge: Doris Ling-Cohan

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JUDGE: *Hon. Doris Ling-Cohan*

PART 36

Index Number : 107961/2004

COMO, ANTONIO

VS
330 JAY STREET ASSOCIATES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion ^{*& cross-motion*} to/for *Summary judgment*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

5

6

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion *& cross-motion* for *Summary judgment* are denied in accordance with the attached memorandum decision.

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

FILED

APR 24 2007

NEW YORK COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: *4/13/07*

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
ANTONIO COMO,

Plaintiff,

Index No. 107961/04

- against -

Motion Seq. No.: 001

330 JAY STREET ASSOCIATES, LLC and
TURNER CONSTRUCTION,
Defendants.

FILED

APR 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----x
DORIS LING-COHAN, J.:

Defendants 330 Jay Street Associates, LLC ("330 Jay Street") and Turner Construction ("Turner") move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. Plaintiff, Antonio Como, opposes the motion and cross-moves for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1).

Background

Plaintiff commenced this action seeking to recover damages for personal injuries he allegedly sustained when he fell from a scaffold while working on a renovation project at 330 Jay Street, Brooklyn, New York. 300 Jay Street, which owns the premises where plaintiff was allegedly injured, retained Turner to perform construction work at the premises. Turner subcontracted a portion of the work to Rose Construction, which employed plaintiff as a painter.

Plaintiff asserts that on April 8, 2004, at approximately 10:00 a.m., he began painting the top of the walls of a corner room on the eighth floor of 330 Jay Street. Plaintiff claims that he was using a mobile, four-foot high Bakers scaffold, which was equipped with functioning wheel locks. He further claims that after working for approximately one-half hour, he descended the scaffold, unlocked the wheels, and moved the scaffold to another wall before ascending it to resume painting. In addition, he asserts that when he raised his right hand to paint the wall, the scaffold wiggled and tilted beneath him, causing him to lose his balance, fall, and sustain injuries. Although no one witnessed the alleged incident, Joseph DeMeglio, a carpenter working nearby, responded to plaintiff's call for help and alerted plaintiff's foreman, Frank Bella, who also responded to the scene.

Plaintiff claims that the incident was caused by defendants' failure to provide him with a safe place to work and safe equipment with which to perform that work. In particular, plaintiff claims that the scaffold malfunctioned and tilted on uneven flooring, causing him to fall and sustain injuries. The Complaint alleges causes of action for negligence (first cause of action) and violation of Labor Law §§ 200 (second cause of action), 240 (third cause of action), 241 (fourth cause of action), and 241(6) (fifth cause of action). Plaintiff also

served a Bill of Particulars setting forth allegations similar to those in the Complaint.

Defendants answered, generally denying the allegations in the Complaint and asserting several affirmative defenses, including that plaintiff's own negligence was the sole proximate cause of his injuries. Specifically, defendants maintain that the alleged incident was caused by plaintiff's failure to engage the wheel locks on the scaffold before using it.

Defendants now seek summary judgment dismissing the Complaint. Plaintiff opposes the motion and seeks summary judgment on the issue of defendants' liability under Labor Law § 240(1).

Discussion

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action

(*Winegrad v New York Univ. Med. Ctr.*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*Zuckerman v City of New York*, *supra*).

As stated, the Complaint alleges causes of action for negligence, violation of Labor Law §§ 200, 240, and 241, and violation of §§ 23-1.5, 23-1.7; 23-1.16, and 23-1.21 of Rule 23 of the Industrial Code.

Negligence consists of a duty of care owed to another, and the breach of that duty resulting in injury (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976], citing *Palsgraf v Long Is. R.R. Co.*, 249 NY 339 [1928]). The Complaint alleges that defendants were negligent in the ownership and maintenance of the premises, and in failing to provide plaintiff with a safe place to work. Plaintiff also alleges that defendants had actual or constructive notice of the defect.

In seeking summary judgment, defendants deny breaching any duty to plaintiff, resulting in injury, or having notice of any defects at the work site. In fact, defendants insist that the scaffold from which plaintiff reportedly fell was neither defective nor lacking appropriate safety devices, as it was equipped with functioning wheel locks. Defendants urge that

plaintiff's failure to engage the wheel locks on the scaffold before using it was the sole proximate cause of his injuries.

To support their position, defendants submit, *inter alia*, copies of the transcript of plaintiff's examination before trial held on April 7, 2005. There, plaintiff testified, in part, that he had been working with the same scaffold for about three weeks before the alleged incident; that he considered the scaffold to be in good condition; and that he did not have any prior problems with the scaffold (EBT of Como, Not of Mot, Exh F, p. 27).

Defendants also rely on the transcripts of the examination before trial of Anthony Monforte and Francisco Sekiquchi, a superintendent and assistant superintendent, respectively, of Turner. Mr. Monforte noted that he first learned of the alleged incident two days before his examination before trial, and that the safety of the work site was handled by an outside contractor (EBT of Monforte, Not of Mot, Exh J, p. 12, 21). Mr. Monforte also testified that Turner maintained daily construction reports, which were accounts of the manpower and a brief description of the work being performed by Turner employees and subcontractors (*id.*, p. 15).

Mr. Sekiquchi testified, in part, that he learned of the alleged incident the same day it occurred from a two-way transmission work site radio, and that he arrived at the scene

approximately 20 minutes thereafter (EBT of Sekiquchi, Not of Mot, Exh K, pp. 18-23). He also stated that he examined the scaffold and found that the wheels were unlocked (*id.* at 23-24). In addition, he took photographs and completed an accident report. The accident report, dated April 4, 2006, states, in part, that "workers advised to set brakes when working on a scaffold" (Not of Mot, Exh G).

Defendants also submit an Employer's Report of Work-Related Accident/Occupational Disease, dated April 4, 2001, prepared for the Workers' Compensation Board, which states, in part, that the wheels on the scaffold were not locked prior to the alleged incident (Not of Mot, Exh H). Furthermore, defendants submit an unsworn, written statement prepared by Mr. DeMeglio, who was installing floors in a nearby room and responded to plaintiff's call for help (Exh L). However, the statement is without evidentiary value and thus unavailing (*Zuckerman v City of New York, supra*, at 563). In addition, defendants submit an affidavit from Howard I. Edelson, and expert in the field of construction site safety, stating, in part, that "[w]heel locks are appropriate to prevent the Bakers scaffold from moving while being utilized" (Edelson Aff, Not of Mot, Exh M, p. 3). The Edelson affidavit also states that "plaintiff was afforded proper protection to perform the work he was assigned and the only

reason he fell was his failure to lock the wheels on the scaffold" (*id.*, p. 5).

In opposition, and in support of his cross motion for summary judgment, plaintiff also relies on his deposition testimony, particularly his statement that he locked the wheels before ascending the scaffold (EBT of Como, Not of Cross Motion, Exh 1, pp. 27, 35). Plaintiff also testified that when he raised his right hand to paint the wall, the scaffold wiggled and tilted beneath him, causing him to lose his balance, fall, and sustain injuries (*id.*, p. 35). Plaintiff further testified that the scaffold malfunctioned and tilted because the floor was uneven, and that he lost his balance and went to the floor face down (*id.*, p. 36). In addition, plaintiff testified that he experienced the scaffold tilting several times before the alleged incident, but that during the previous times, he somehow managed to maintain his balance and stay on the scaffold (*id.*). Plaintiff also contends that the scaffold was defective since it was missing side rails or other protective devices to prevent workers from falling off the sides. Plaintiff cites to § 23-5.18(b) of the Industrial Code, which states that "[t]he platform of every manually-propelled scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule)" (12 NYCRR 23-5.18[b]).

In reply, defendants rely on the statement in the Edelson affidavit that it is physically impossible for the Bakers scaffold to move away from the wall if the wheels are locked, even if the floor is uneven. Defendants also argue that § 23-5.18 of the Industrial Code does not apply to this case, since § 23-5.1(j) exempts any scaffold platform with an elevation of not more than seven feet from the requirement of a railing (see 12 NYCRR 23-5.18; 23-5.1[j]).

From the submissions, the Court cannot conclude as a matter of law, whether defendants breached a duty of care resulting in injury to plaintiff. Plaintiff raises triable issues as to whether the scaffold was defective, and if so, whether said defect was a proximate cause of his injuries. Furthermore, the parties submit conflicting evidence as to whether plaintiff's failed to engage the wheel locks before using the scaffold, resulting in injury. Under the circumstances, the request for summary judgment dismissing the first cause of action must be denied.

The request for summary judgment dismissing the second cause of action, for violation of Labor Law § 200, must also be denied. Section 200 of the Labor Law is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Lombardi v*

Stout, 80 NY2d 290, 294 [1992]). Section 200 provides that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places" and that "[a]ll machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons." An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Russin v Picciano*, 54 NY2d 311, 317 [1981]).

Defendants assert that dismissal of the Labor Law § 200 claim is warranted since plaintiff's employer alone directed, supervised, and controlled the work assignment of its employees. However, the written contract between 330 Jay Street, as Owner, and Turner Construction, a construction manager, required Turner Construction to "use its best efforts to furnish efficient business administration with emphasis on budget control, construction scheduling, coordination of the work, supervision and construction management and to perform the actual construction of the Project in an expeditious and economical

manner consistent with the interests of Owner" (Contract, Not of Cross Mot, Exh 4, ¶ 2.03). In addition, Mr. Sekiguchi testified that the responsibilities of Turner Construction, as construction manager, included overseeing the project and making sure that the project was completed in a timely and safe manner (EBT of Sekiguchi, Not of Cross mot, Exh 3, pp. 12-13), and that his responsibilities as Turner's assistant superintendent for the project included walking the site daily to get an accurate count of people working for the various subcontractors; making sure that the people were in fact working, making sure the subcontractors were using the correct materials; and attending weekly safety meetings conducted by Total Safety (*id.* at 9, 12). In addition, as stated, Mr. Sekiguchi prepared the report concerning plaintiff's accident. The facts raise triable issues as to whether defendants supervised the work site (*see Moore v Metro North R. R.*, 233 AD2d 192, 192-193 [1st Dept 1996]). As further noted, triable issues of fact exist as to whether an alleged defect in the scaffold or plaintiff's misuse of it was a proximate cause of his injuries.

The third cause of action alleges violations of Labor Law § 240(1). Section 240(1) of the Labor Law, often referred to as the "scaffold law", provides that "[a]ll contractors and owners and their agents" engaged in cleaning a building or structure

must furnish or erect proper scaffolding, ladders, and similar safety devices to protect employees in the performance of their work" (see also *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]). Section 240(1) imposes absolute liability on contractors, owners, and their agents for any breach of the statutory duty which has proximately caused injury (*id.*). The statute was enacted to prevent those types of accidents in which a scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield an injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 499-500 [1993]). The duty imposed by Labor Law § 240(1) is nondelegable (*id.* at 500). However, an accident alone does not establish a Labor Law § 240(1) violation or causation (*Blake v Neighborhood Hous. Servs. of New York*, 1 NY3d 280, 289 [2003]). Rather, § 240(1) establishes absolute liability for a breach which proximately causes an injury (*id.*). A violation of § 240(1) creates absolute liability, and the failure to provide any safety devices is such a violation (*id.*). Thus, plaintiff must show that the violation of § 240(1) was a contributing cause of his fall and resulting injuries (*id.*).

The gravamen of plaintiff's § 240(1) claim is that defendants failed to provide him with a safe place to work and

failed to provide a scaffold with side rails. As stated, triable issues of fact exist as to whether the alleged incident was caused by a defect in the scaffold or plaintiff's failure to use the safety equipment in a proper manner. As such, neither party establishes entitlement to summary judgment in its favor on the Labor Law § 240(1) claim.

Labor Law § 241(6), by its very terms, imposes a non-delegable 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 (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). The statute also requires owners and contractors to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 501-502 [1993]). The purpose of the statute is to place the "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*Rizzuto v L.A. Wenger Contr. Co.*, *supra* at 348, quoting 1969 NY Legis Ann. at 407-408). In order to support a cause of action under Labor Law § 241(6), plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision

that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct (see *Ross v Curtis-Palmer Hydro Elec. Co.*, *supra*, at 502, 504).

The fourth cause of action in the Complaint alleges that defendants, by reason of their failure to provide adequate safety devices, violated Labor Law § 241, causing plaintiff to sustain injury. The fifth cause of action alleges that defendants' negligence also constituted a violation of Labor Law § 241(6) and §§ 23-1.5; 23-1.7, 23-1.16, and 23-1.21 of the Industrial Code. It appears from the submissions, however, that plaintiff has abandoned his allegations of violation of the above-mentioned sections of the Industrial Code, and now alleges a violation that § 23-5.18. Section 5.18(b) of the Industrial Code sets forth a specific mandate that "[t]he platform of every-manually propelled scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule)" (12 NYCRR 23-5.18[b]; see also *Vergara v. SS 133 West 21, LLC*, 21 AD3d 279 [1st Dept 2005]).

Plaintiff may properly allege a new Industrial Code violation in papers opposing a summary judgment motion (*Kellier v Supreme Indus. Park, LLC.*, 293 AD2d 512, 513-514 [2d Dept 2002]). As discussed above, a triable issue of fact exists as to whether plaintiff's injuries were caused by a violation of the Industrial

Code or his misuse of appropriate safety equipment. Thus, the request for summary judgment dismissing plaintiff's Labor Law 241(6) claims must be denied.

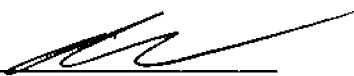
Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

Dated:

4/13/07


Hon. Doris Ling-Cohan, J.S.C.

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