| **Pascalli v Schiame Dev.** |
| --- |
| 2007 NY Slip Op 31772(U) |
| June 15, 2007 |
| Supreme Court, New York County |
| Docket Number: 0105347/2005 |
| Judge: Shirley W. Kornreich |
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SCANNED ON 6/22/2007

[* 1]

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

PRESENT: HON. SHIRLEY WERNER KORNREICH
Justice

PART 54

INDEX NO. 105347/2005

MOTION DATE 4/19/07

MOTION SEQ. NO. 002

MOTION CAL. NO.

Index Number : 105347/2005
PASCALLI, ROBERT
vs
SCHIAME DEVELOPMENT
Sequence Number : 002
SUMMARY JUDGMENT

this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1, 2 |
| Answering Affidavits — Exhibits | 2, 3 |
| Replying Affidavits | 4 |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

...ION IS DECIDED IN ACCORDANCE
... ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 6/15/07

HON. SHIRLEY WERNER KORNREICH
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: PART 54
----------------------------------------------------------------------X
ROBERT PASCALLI,

Plaintiff,

-against-

INDEX NO. 105347/2005
DECISION & ORDER

SCHIAME DEVELOPMENT, THE 220 FRONT STREET CONDOMINIUM, NAVILLUS CONTRACTING and YARROW, LLC,

Defendants.

----------------------------------------------------------------------X
KORNREICH, SHIRLEY WERNER, J.:

This is a personal injury action to recover damages suffered in a construction site accident, brought pursuant to Labor Law §§ 200, 240(1) and 241(6), as well as common law negligence. Plaintiff is an employee of a subcontractor hired by defendant Schiame Development, Inc.("Schiame"), the general contractor. Defendant Yarrow, LLC ("Yarrow") is the owner of the premises where the accident occurred. Defendant Navillus Contracting ("Navillus") was another contractor working on the premises; the status of defendant The 220 Front Street Condominium ("Front Street Condominium") is unclear from the record. Plaintiff now moves for summary judgment pursuant to Labor Law § 240(1), while defendants cross-move for summary judgment under all the Labor Law claims and common law negligence.

*I. Statement of Facts*

*A. Plaintiff's Proof*

Plaintiff submitted his deposition, a copy of the contract between his employer and Schiame, the EBT of John Fitzpatrick, an employee of Schiame, and photographs of the accident

site.

1. *Deposition of Plaintiff*

Plaintiff is an employee of Bass Plumbing ("Bass"), which was hired as a subcontractor by Schiame to complete plumbing work at eleven buildings on Front Street, New York, NY. Plaintiff was one of nine plumbers working under the Bass foreman, Mike Castanza, who was on site every day. Plaintiff had been working at Front Street from August 8, 2004 until his accident on March 7, 2005. At 7 a.m. on March 7, plaintiff and the other Bass employees met in the shanty in the B building. Shortly thereafter, Mr. Castanza informed plaintiff that he would be working that day in the G building, laying out pipes and installing them. This was the first time plaintiff had worked in the G building.

Plaintiff went with Charles Murrullo, a deputy foreman of Bass, to the G building where Mr. Murrrullo had a meeting with the project manager, John Fitzpatrick, an employee of Schiame. Plaintiff waited outside Mr. Fitzpatrick's office while Mr. Fitzpatrick and Mr. Murrullo had a 15 minute meeting. Mr. Murrullo exited the office and told plaintiff he would be doing pipe layout on the first and second floors of the G building. Plaintiff and Mr. Murrullo began laying out pipe on the first and second floors while Mr. Castanza supervised.

After the layout work was completed, Mr. Fitzpatrick and Mr. Castanza had a meeting on the next "angle" of work to be done. Mr. Castanza then told plaintiff and Mr. Murrullo that Mr. Fitzpatrick wanted them to start installing 5-inch piping that would drain storm water off the roof. Plaintiff and Mr. Murrullo then discussed what would be the best "angle" to begin the work. Plaintiff decided his "angle" would be to go up on the fourth floor and secure the 5-inch pipe to the wall in the corner with a J-bracket.

There was no flooring yet installed on the fourth floor, but only support joists running the length of the building. Plaintiff and Mr. Murrullo pushed the pipe from the third floor up to the fourth floor. As instructed by Mr. Castanza, plaintiff then climbed a wooden ladder, which he had seen manufactured at the G building by employees of Schiame, to reach the fourth floor to secure the pipe. Plaintiff had never worked on a ladder before during his employment by Bass, nor was he provided any harnesses, braces, or straps by Bass. Mr. Castanza, Mr. Murrullo, and Mr. Fitzpatrick remained on the third floor. Plaintiff walked along a plank, which he had seen being brought up to the fourth floor and set down, but not secured, by Schiame. The plank was placed perpendicular to the support joists to reach the corner. Plaintiff states that it was Mr. Castanza who had instructed him to climb the ladder and walk across the plank. In a half-crouching position on the end of the plank, plaintiff secured the pipe in the corner with a J-bracket by using a set of pliers. As plaintiff stood up out of his crouching position, he spread his legs shoulder width apart to steady himself. When plaintiff had straightened himself, the plank underneath him titled, and slid away from his body.

Plaintiff fell 8 feet to the third floor, his left elbow striking one of the support joists of the fourth floor. His right foot hit the ground first, and he suffered extensive damage to his right ankle. Plaintiff states that Mr. Castanza, Mr. Murrullo, and Mr. Fitzpatrick all witnessed the accident. Both Mr. Castanza and Mr. Murrullo told plaintiff that they had witnessed the accident and had each filed an accident report.

2. *EBT of John Fitzpatrick*

Deponent is a job superintendent employed by Schiame. He was assigned to the 220 Front Street project in the beginning of March, 2005. Schiame had between 12 and 20

employees on site on any given day at Front Street, consisting of laborers, carpenters, and project managers. Mr. Fitzpatrick shared supervisory duties with his assistant superintendent, Mark Vidi. As the general contractor, Schiame had the sole responsibility of organizing the trades and had authority to stop work of any subcontractors if done in an unsafe manner. Schiame did not employ a safety inspector on an hourly basis, though there were weekly insurance walk-throughs by a safety director. As superintendent, one of Mr. Fitzpatrick's duties was to insure that work was being done in a safe manner.

Mr. Fitzpatrick testified that was in his office when he was notified of plaintiff's accident. He could not recall whether he was notified by walkie-talkie or in person. Mr. Fitzpatrick then went up to the third floor of the G building. When he arrived, he found plaintiff sitting on a step, and observed four scaffold planks, approximately 10 to 12 feet long, on the fourth floor, one kicked off at an angle. Mr. Fitzpatrick was informed by Mr. Murrullo that plaintiff was injured when a plank kicked out as he was moving between two planks. Mr. Fitzpatrick is unsure if the planks were secured in any way at the time of the accident.

Mr. Fitzpatrick was not aware of the condition of the fourth floor of the G building prior to the accident. To his knowledge, no employee of Schiame was aware that planking had been laid across the support beams of the fourth floor. He testified it was Mr. Vidi's responsibility to walk the G building on a daily basis and file daily reports. Mr. Fitzpatrick does not know if plaintiff was ever supplied with any safety devices. He surmised that plaintiff fell as he was trying to "hop" from one plank to another about four feet away. After the accident, Mr. Fitzpatrick returned to his office to fill out an accident report. Mr. Murrullo signed the report as a witness to the accident, but Mr. Fitzpatrick never interviewed him. Mr. Fitzpatrick filled out

the report with information he got from conversations on the third floor following the accident.

Mr. Fitzpatrick's report directed that the unsecured planks be removed to prevent a similar accident from occurring. Employees of Schiame then removed the planks, and barricaded the accident area. Mr. Fitzpatrick, then, had a telephone conversation with Schiame's safety coordinator, Douglas Pollock, since it is customary for the job superintendent to contact the safety director whenever people are injured. Mr. Pollock issued a report, in preparation for Mr. Fitzpatrick's deposition.

*3. Contract*

The contract between Schiame and Bass is entitled "Standard Form of Agreement Between Contractor and Subcontractor." It lists Yarrow as the owner of the project. Paragraph 4.3 of the contract is entitled "Safety Precautions and Procedures." Paragraph 4.3.1 states the following:

> The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations, and orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

Rider "A" to the contract is entitled "General Requirements." Paragraphs 48 through 51 of Rider "A" state the following:

> Perform all work of your trade in full conformance with all federal, state, county and local laws and regulations governing such work. Conform to all applicable Codes. [Emphasis in original]
> It is your responsibility to provide all Scaffolding required to perform the work of your trade. Dismantle and remove your Scaffolding once no longer required. It is also your responsibility to move the levels of planking and bicycles on the Scaffolding should you require to reach other levels to perform the work of your trade.
> ...

> Should this Subcontractor elect to use any Scaffolding provided by the Construction Manager (whether listed in the above section or not), this shall constitute immediate approval of the language and clauses of the "Special Indemnification Agreement". In this case, fill-in, execute and return the above Agreement to the Construction Manager's office immediately.

Paragraph 64 of Rider "A" states in part:

> Comply fully with all requirements of the document entitled "Subcontractor's Safety Requirements". Comply in full with all State Safety codes ... as well as all safety rules and regulations established by the Construction Manager ... and safety regulations, procedures and programs described in the Superintendent's Safety Manual applicable to your scope of work on this project.

*4. Photographs*

Plaintiff submitted photographs of the fourth floor of the G building, showing the open floor and planks. They show several planks, some perpendicular and others parallel to the joists.

*B. Defendants' Proof*

Defendants also submitted the deposition of plaintiff and the EBT of John Fitzpatrick, as well as copies of the accident report filed by Mr. Fitzpatrick and a Workers' Compensation Report. Mr. Fitzpatrick's report lists unsecured planks as the cause of the accident and the height of the fall to be approximately 8 feet. Defendants do not explain who Front Street Condominium is, nor do they explain the role of Navillus at the project.

*II. Arguments*

*A. Labor Law § 200(1) and Common Law Negligence*

Plaintiff argues that since employees of Schiame constructed the ladder plaintiff used to access the fourth floor of the G building, defendants had either actual or constructive notice of the dangerous condition of the work area. Plaintiff further argues that it can be inferred that

Schiame placed the planking at issue, given that Schiame provided all carpentry on site.

Defendants argue that they cannot be held liable because they did not exercise any supervisory control over the work that caused the injury, as required by law. Defendants also argue that they had no notice, actual or constructive, of the dangerous condition prior to the accident.

*B. Labor Law § 241*(6)

Plaintiff argues that defendants violated New York State Industrial Code §§ 23-1.5(a) and ©; 23-1.7(b), (d), (e), (e)(1), and (e)(2); 23-1.15; and 23-4.2(a) which is sufficient to support a Labor Law § 241(6) cause of action. Defendants counter that New York State Industrial Code sections cited by plaintiff either do not apply to the case at bar, or are merely general safety standards which do not give rise to a Labor Law § 241(6) cause of action.

*C. Labor Law § 240(1)*

Plaintiff argues that in order for him to perform his work on the fourth floor of the G building, he had to traverse and stand upon unsecured wooden planks that did not cover the entire area of the floor. Plaintiff argues these planks constitute scaffolding as required in § 240(1). Defendants contend that the planking was used as a passageway, and thus does not constitute scaffolding.

*III. Conclusions of Law*

In order to prevail on a motion for summary judgment, the movant "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." *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Upon this showing, "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." *Id.*

*A. Labor Law § 200(1) and Common Law Negligence*

Labor Law § 200(1) provides:

> All 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. All 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. The board may make rules to carry into effect the provisions of this section.

This section is merely a codification of the common law duty of a landowner to provide workers a reasonably safe workplace. *Lombardi v. Stout*, 80 N.Y.2d 290, 294 (1992). Therefore plaintiff's two causes of action for Labor Law § 200 and common law negligence will be analyzed simultaneously. *See Comes v. New York State Elec. and Gas Corp.*, 189 A.D.2d 945 (3rd Dept. 1993) (considered negligence and § 200 claims simultaneously) *aff'd,* 82 N.Y.2d 876 (1993). Liability for common law negligence and § 200 "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury." *Sprague v. Peckham Materials Corp.*, 240 A.D.2d 392, 394 (2d Dept. 1997).

Plaintiff has not successfully shown that defendants exercised supervisory control over the work performed or had notice of the dangerous condition. Plaintiff testified that he received his daily orders from his foreman, Mr. Castanza, and not from an employee of any defendant. Though Mr. Fitzpatrick oversaw the project, "[a]bsent any evidence that [defendant] gave

anything more than general instructions as to what needed to be done, as opposed to how to do it, [defendant] cannot be held liable under Labor Law § 200 or for common-law negligence." *O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dept. 2006).

In addition, Mr. Fitzpatrick testified that he was not present at the accident, contradicting plaintiff's testimony that he was on the third floor with Mr. Castanza and Mr. Murrullo. Mr. Fitzpatrick also testified that neither he nor anyone in his company was aware of the dangerous condition of the fourth floor. Again, this is contradicted by plaintiff who testified that employees of Schiame constructed the ladder used to reach the fourth floor and was responsible for all carpentry on site. Consequently, a triable issue of fact is raised as to supervision and notice. Therefore defendant Schiame's cross motion for summary judgment with respect to common law negligence and Labor Law § 200 must be denied. Since Front Street Condominium and Navillus have presented no evidence relating to their role at the project, they have failed to meet their burden of demonstrating their entitlement to summary judgment. The motion of Yarrow, the owner of the project, however, is granted with respect to common law negligence and Labor Law § 200.

*B. Labor Law § 241*(6)

Labor Law § 241(6) provides in part:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

In a cause of action under § 241(6), a plaintiff "must allege a violation of a concrete

specification of the Industrial Code ." *Noetzell v. Park Avenue Hall Housing Development Fund Corp.*, 271 A.D.2d 231, 232 (1st Dept. 2000). In the case at bar, plaintiff has alleged violations of §§ 23-1.5(a) and (c); 23-1.7(b), (d), (e), (e)(1), and (e)(2); 23-1.15; and 23-4.2(a).

Plaintiff, however, has not successfully proven a violation of any applicable, specific section of the Industrial Code. A claimed violation of § 23-1.5 "lack[s] the specificity required to support a cause of action under Labor Law § 241 (6). *Madir v. 21-23 Maiden Lane Realty, LLC*, 9 A.D.3d 450, 452 (2d Dept. 2004). Moreover, § 23-4.2 deals with trench and area type excavations which does not apply to the present facts. Further, § 23-1.7(d) and (e) do not apply because there is no evidence of any foreign substance which made the plank slippery or any debris which caused plaintiff to trip.

Plaintiff focuses his argument on § 23-1.7(b)(1), which provides:

> (1) Hazardous openings
>
> (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> ...
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
>
> (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening
>
> ...

In support of his argument, plaintiff cites *Messina v. City of New York*, 300 A.D.2d 121 (1st Dept. 2002), where a worker atop Yankee Stadium fell into an unguarded drain opening. In that case, the opening was unrelated to the worker's job, and thus required a safety cover, even though the fall was only 7 to 10 inches. In the case at bar, the opening involved the entire fourth floor. Plaintiff was required to work close to the opening through which he fell in order to

accomplish his task of running pipe from the roof of the building down to the ground. Because his fall was less than 15 feet, the plywood third floor may have met the protection requirements of § 23-1.7(b)(1)(iii)(a). *See Dzieran v. 1800 Boston Road, LLC*, 25 A.D.3d 336, 338 (1st Dept. 2006). Since the record is unclear whether plaintiff was required to work near the opening through which he fell, and whether the third floor met the material strength requirements of subsection (iii)(a), the court is unable to reach a conclusion as a matter of law with regard to the § 23-1.7(b) claim. Therefore, the cross-motions of defendants Schiame and Yarrow for summary judgment must be denied with respect to Labor Law § 241. Again, since Front Street Condominium and Navillus have presented no evidence to support their cross-motions for summary judgment with respect to Labor Law §, their cross-motions for summary judgment must be denied.

*C. Labor Law § 240(1)*

Labor Law § 240(1) provides in part

> All contractors and owners and their agents ... 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.

§ 240(1) is intended "to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the 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 N.Y.2d 494, 501 (1993) (emphasis omitted). Moreover, it is well settled that the section is to be construed liberally to achieve this purpose. *See, e.g.*

*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991).

Plaintiff has met his burden of establishing a prima facie case for the § 240(1) cause of action. Plaintiff's accident was caused by the unsecured plank shifting from underneath him, leading to a fall from a height of 8 feet. The planks were the only means for plaintiff to cross the unfinished floor, and provided a platform for him to crouch and install the J-bracket. The planks were "used in the performance of the plaintiff's work" and were not "merely a passageway from one place of work to another." *Missico v. Tops Markets, Inc.*,305 A.D.2d 1052 (4th Dept. 2003) (citing *Ryan v. Morse Diesel, Inc*, 98 A.D.2d 615, 616 (1st Dept. 1983)).

Defendants have cited many cases attempting to establish a material issue of fact, including *Paul v. Ryan Homes*, 5 A.D.3d 58 (4th Dept. 2004) and *Kavanaugh v. Marrano/Marc Equity Corp.*, 225 A.D.2d 1037 (4th Dept. 1996), where planks were found to be merely passageways. These cases are unpersuasive. The planks laid across the unfinished floor were not merely providing access from point A to point B, but were the only support available to anyone working on the fourth floor. The fact that plaintiff used the planks to traverse from the top of the ladder to the pipe he was installing does not detract from the fact that the planks provided support for him to stand and walk. The planks were functioning as the equivalent of scaffolding. Therefore, plaintiff's motion for summary judgment as to liability only is granted with respect to Labor Law § 240(1) against defendants Schiame and Yarrow. Since the record does not establish that Navillus and Front Street Condominium are either owners or general contractors, plaintiff's motion against those entities must be denied. In sum, the cross-motions for summary judgment of defendants Schiame and Yarrow with respect to Labor Law § 240(1) are denied, and that cross-motions of defendants Front Street Condominium and Navillus are denied for failure to

present any evidence demonstrating their entitlement to dismissal. Accordingly, it is

ORDERED that the motion of plaintiff Robert Pascalli for partial summary judgment against defendant Schiame Development and defendant Yarrow, LLC under Labor Law § 240(1) is granted as to liability only, with damages to be determined at trial; and it is further

ORDERED that the motion of plaintiff Robert Pascalli for partial summary judgment against defendant The 220 Front Street Condominium and defendant Navillus Contracting under Labor Law § 240(1) is denied; and it is further

ORDERED that the cross-motion of defendant Schiame Development for summary judgment dismissing the complaint is denied with respect to all claims; and it is further

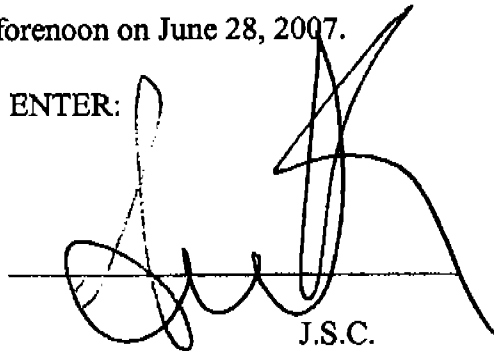
ORDERED that the cross-motion of defendant Yarrow, LLC for summary judgment dismissing the complaint is granted with respect to the claims under Labor Law § 200 and common law negligence, and denied with respect to the claims of Labor Law §§ 240(1) and 241(6); and it is further

ORDERED that the cross-motion of defendant The 220 Front Street Condominium for summary judgment dismissing the complaint is denied with respect to all claims; and it is further

ORDERED that the cross-motion of defendant Navillus Contracting for summary judgment dismissing the complaint is denied with respect to all claims; and it is further

ORDERED that all parties in Part 54 at 9:30 in the forenoon on June 28, 2007.

ENTER:



J.S.C.

Dated: June 15, 2007