

Michael v City of New York

2011 NY Slip Op 33277(U)

November 3, 2011

Supreme Court, Queens County

Docket Number: 17343/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Aaron Michael and Curletta Michael,
Plaintiffs,
- against -

Index
Number: 17343/09
Motion
Date: 10/18/11

City of New York, NYC Department of
Education, New York City School
Construction Authority and Hunter
Roberts Construction Group, LLC,

Motion
Cal. Number: 18&19

Defendants.

Motion Seq. No.: 2&3

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The following papers numbered 1 to 23 read on this motion by plaintiff for summary judgment.

Papers
Numbered

Notice of Motion (Plaintiff)-Affirmation-Affidavit-	
Memorandum of Law-Exhibits.....	1-6
Affirmation in Opposition-Affidavits--Exhibits.....	7-12
Reply.....	13-14
Notice of Motion (Defendants)-Affirmation-Affidavits-	
Exhibits.....	15-21
Affirmation in Opposition.....	22-23

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff for partial summary judgment (Calendar No. 2) and motion by the City for summary judgment (Calendar No. 3) are consolidated for disposition.

Motion by plaintiff for partial summary judgment on the issue of liability as to his causes of action brought pursuant to Labor Law §§240(1) and 241(6) is denied. Motion by defendants for summary judgment dismissing the complaint is granted solely to the extent that plaintiff's cause of action pursuant to §200 of the Labor Law and his cause of action pursuant to §241(6) of the Labor Law except insofar as is predicated upon violation of §23- 1.21(e)(2) of the Industrial Code (12 NYCRR), and for common law negligence, are

dismissed. In all other respects the motion is denied.

Plaintiff, a taper employed by TNS Management Services, a subcontractor hired to work on the construction of P.S. 260 in Queens County, allegedly sustained injuries on March 10, 2009 as a result of falling from an A-frame ladder onto a Baker scaffold upon which he had placed the ladder to access an area for taping that he could not reach. Plaintiff testified, and it is uncontroverted, that the scaffold moved while he was on the ladder, causing the ladder to topple and plaintiff to fall onto the scaffold.

Plaintiff commenced the underlying action alleging violation of §§240(1), 241(6) and 200 of the Labor Law, and for common law negligence.

Those branches of defendants' motion for summary judgment dismissing plaintiff's causes of action alleging a violation of §200 of the Labor Law and common law negligence against all defendants and dismissing the complaint in its entirety against the New York City Department of Education (DOE) is granted. It is undisputed that defendants did not supervise or direct plaintiff in the manner of the performance of his work and the accident did not occur as a result of the condition of the premises so as to support a claim pursuant to §200 of the Labor Law and common law negligence. Moreover, it is conceded that the DOE did not own the subject school and therefore cannot be liable under §240(1) of the Labor Law. Plaintiff does not oppose, but, in his affirmation in opposition, consents to the granting of those branches of defendant's motion.

That branch of plaintiff's motion for partial summary judgment on his cause of action brought pursuant to §240(1) of the Labor Law and that branch of defendants' motion for summary judgment dismissing plaintiff's §240(1) cause of action are denied. The record on these motions raise questions of fact as to whether plaintiff was negligent and whether his negligence was the sole proximate cause of the accident.

Plaintiff testified in his deposition that he used what is called a Baker scaffold in his work of taping sheetrock joints at the work site. The scaffold had a 3 by 6-foot platform and was on four wheels. An eight-foot A-frame ladder was tied to it to provide a means to climb onto the scaffold. The scaffold was against the wall. Plaintiff testified that he was standing on the scaffold and after approximately half an hour of working, he got to an area that was too high for him to reach. He then called his foreman Pat and informed him that he could not reach, so Pat loosed the ladder from the scaffold, handed it up to him in a closed position and told him

to place it on the scaffold, lean it against the wall and proceed to work. He did not object to doing so because he was following the instructions of his foreman. He had never placed a ladder on a Baker scaffold before and had never been instructed by anyone not to put a ladder on a Baker scaffold, but had seen others do so. Plaintiff placed the ladder on the scaffold platform, leaned the ladder against the wall and proceeded climbing up the ladder. When he reached the fifth rung, the scaffold rolled backward away from the wall causing the ladder, and him, to fall.

Plaintiff also testified in his deposition that he did not check the wheels of the scaffold before climbing onto it and it was not his custom and practice to check the wheels before climbing onto a Baker scaffold. However, in his 50-h hearing, when asked if he secured the ladder to the wall after placing it on the scaffold, plaintiff stated, "Yeah, well, I hear the foreman say, 'The wheel already locked, so just rest it to the wall and do what you got to do.'"

Pat Cotter, the foreman of TNS, averred in his affidavit in support of defendants' motion that plaintiff did not need a ladder or an additional scaffold level to perform his work, that plaintiff never informed him that he could not reach the area where he had to tape and he never instructed plaintiff to place a ladder on top of the Baker scaffold. He also averred that it is the responsibility of the person using the scaffold to check to make sure the wheels are locked prior to climbing onto the scaffold. In his deposition, Cotter also testified that it was customary to lock the wheels of the Baker scaffold before getting on it and to check that scaffold. He also testified, "I don't know why he would put a ladder on top of it. It's not a smart thing to do." When asked again if it was unusual to place a ladder on top of a Baker scaffold, Cotter replied, "I wouldn't. We never do that." He further stated that this was "[b]ased on common sense. If I knew he was on the ladder, I would have told him not to."

There is no dispute that Labor Law §240(1) is implicated in this case since plaintiff fell from an elevation while engaged in the construction of a structure (see Beard v. State of New York, 25 AD 3d 989 [3rd Dept 2006]). It is a strict liability provision that imposes upon owners and contractors absolute liability for any breach of the statutory duty that proximately causes injury (see Panek v. County of Albany, 99 NY 2d 452 [2003]). What is meant by "strict" or "absolute" liability in the Labor Law context is that any negligence on the part of plaintiff which contributes to his injuries is not a defense and will not diminish the owner's or contractor's liability under Labor Law §240(1) if it is established both that there was a violation of the statute and that the

violation was a proximate cause of the injury (see Blake v. Neighborhood Housing Services of New York, 1 NY 3d 280 [2003]). Thus, since a plaintiff, in order to recover under §240(1), must establish that there was a violation of the statute and that such violation was a proximate cause of his injuries, if plaintiff's own conduct is the sole proximate cause of his injuries no liability can attach under Labor Law §240(1) (see Weininger v. Hagedorn & Company, 91 NY 2d 958 [1998]). Conversely, however, it is axiomatic that if a violation of the statute is a proximate cause of plaintiff's injury, plaintiff cannot also be solely responsible for it and, therefore, even were plaintiff also negligent and such negligence contributed to his injuries, such would not serve as a defense to absolve defendants of their liability under Labor Law §240(1) (see Blake v. Neighborhood Housing Services of NYC, 1 NY 3d 280 [2003]).

The conflicting deposition testimony and affidavits of plaintiff and Cotter raise questions of fact as to whether there was a violation of §240(1) of the Labor Law and whether plaintiff was the sole proximate cause of the accident, thereby precluding the granting of summary judgment either to plaintiff or to defendants.

Defendants, however, are entitled to summary judgment dismissing plaintiff's cause of action based upon violation of §241(6) of the Labor Law. That section provides, in relevant portion, "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 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." Unlike §200 of the Labor Law, §241(6) imposes vicarious liability upon owners and contractors for violations of a provision of the Industrial Code and the owner or contractor may raise any valid defense to the imposition of vicarious liability under §241(6), including comparative negligence (see Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY 2d 343 [1998]).

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that there was a violation of a specific rule or regulation of the Industrial Code and that such violation was a proximate cause of plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept 2004]). Plaintiff asserts in his verified bill of particulars a violation of Industrial Code (12 NYCRR) §23-1.5, 1.7, 1.15, 1.16, 1.21, 5.1(b) and (f) and 5.8(a) (b) (c) and (g).

Plaintiff's expert, Kathleen Hopkins, in her affidavit in support of plaintiff's motion, however, only avers that there was a violation of §§23-1.7(f), 1.21(b)(4)(ii) and (e)(2), 5.1(b) and (f), and also of 5.18(b) and (g), which were not alleged in plaintiff's bill of particulars and, therefore, may not be considered.

Section 23-1.5 merely sets forth generic directives and is insufficient to form the basis of a claim under §241(6) (see Maldonado v Townsend Ave Enterprises, 294 AD 2d 207 [1st Dept 2002]).

Section 23-1.7(f) is inapplicable to the facts of this case, since that section only concerns vertical passage to work areas above ground and this case does not involve access between working levels. The remaining subsections of §23-1.7 are clearly inapplicable to the facts of the present matter.

Section 23-1.21(b)(4)(ii) states, "All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." There is no allegation that the A-frame ladder's footings were not firm, and the scaffold platform upon which plaintiff placed the ladder was not a footing. Therefore, this section is inapplicable to the facts of this case.

Section 23-5.1(b) which requires scaffold footing or anchorage to be sound, rigid, capable of supporting its maximum load and secure against movement in any direction and prohibits the use of unstable supports. There is no evidence, on this record, that the Baker scaffold in question was unsound or inadequate in any respect. In fact, the uncontroverted evidence presented was that it was equipped with locking wheels the locking mechanism of which functioned properly.

With respect to plaintiff's reliance upon §23-5.1(f), contrary to the contention of counsel for defendants, who cites and relies upon three cases from the Appellate Divisions of the First, Third and Fourth Departments dated 1997 and 1999, that this provision may not form the basis of a claim under §241(6) of the Labor Law because it is a general provision, the controlling law established in the Second Department is that the provisions of §23-5.1 set forth specific, rather than general, safety standards (see O'Connor v. Spencer Investment Ltd. Partnership, 2 AD 3d 513 [2nd Dept 2003]). However, although §5.1(f) may form the basis of a cause of action under §241(6) of the Labor Law, it is inapplicable to the facts of this case. It states, "Every scaffold shall be maintained in good repair and every defect, unsafe condition or noncompliance with this Part shall be immediately corrected before further use of

such scaffold." There is no evidence, on this record, and no issue has been presented in this case, that the scaffold was defective or not in proper repair or working order at the time of the accident. Indeed, the un rebutted evidence presented was that it was in proper working condition with wheels that properly locked.

As heretofore mentioned, although plaintiff's expert opines that there was a violation of §23-5.18(b) and (g), plaintiff did not allege a violation of said provisions in his bill of particulars and, therefore, said sections of the Industrial Code may not be relied upon as a basis for plaintiff's §241(6) cause of action.

However, §23-1.21(e) is ostensibly applicable to the facts of this case. Said section concerns stepladders. Subparagraph (2) concerns stepladder bracing and provides, "Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked." Here, an A-frame stepladder was used and was not opened to its full position with its spreader locked, but was leaned against the wall in its closed position. The evidence, on this record, raises an issue of fact as to whether the ladder which was placed on the scaffold platform with its top leaning diagonally against the wall, when loaded with the weight of plaintiff standing on it, pushed the scaffold away from the wall, causing the ladder to topple and plaintiff to fall. This also raises a question of fact as to whether the scaffold would have rolled away from the wall if the ladder had been set up on the scaffold in its opened position not touching, and therefore not pushing against, the wall and the platform. Contrary to the contention of defendants' counsel that 1.21(e)(2) is inapplicable because it only applies to ladders in excess of 20 feet, no such specification is contained in 1.21(e)(2), which refers to every stepladder and does not relate to subsection (1), which, in any event, does not state that subdivision (e), "Stepladders", only sets forth requirements for stepladders longer than 20 feet. On the contrary, subsection (1) prohibits the use of stepladders with side rails longer than 20 feet. As for counsel's argument that this section does not apply because it was plaintiff himself who failed to open the ladder and who placed it against the wall in its closed position and, therefore, this section was violated by plaintiff, such argument assumes that plaintiff was the sole proximate cause of the accident. As heretofore stated, the deposition testimony of plaintiff is that his foreman handed him the ladder in its closed position and instructed him to place it on the scaffold and lean it against the wall. Patrick Cotter, the foreman, denies having given plaintiff any such instructions. Therefore, although §23-1.21(e)(2) does apply to the facts presented herein, there is a question of

fact as to whether there was a violation of said section.

The remaining provisions of the Industrial Code listed in plaintiff's bill of particulars, which plaintiff, through his expert, does not allege was violated, are clearly inapplicable or do not provide a basis for liability under §241(6). Section 23-1.15 does not provide a basis for liability under §§241(6) of the Labor Law since it merely sets forth a general safety standard (see Lin v Holy Family Monuments, 18 AD 3d 800 [2nd Dept 2005]). Section 23-1.16 relates to the requirement of approval, requirement of use and methods of attachment, instruction in use, length, inspection and maintenance, and storage of safety belts, harnesses, tail lines and lifelines when such devices are furnished to a worker. The remaining subsections of 1.21 are clearly inapplicable to this matter, and §23-5.8(a)(b)(c) and (g), relate only to suspended scaffolds and are, thus, also clearly inapplicable to the facts of this case.

Therefore, defendants are entitled to summary judgment dismissing plaintiff's cause of action under §241(6) of the Labor Law insofar as it is predicated upon all the aforementioned sections of the Industrial Code, except §23-1.21(e)(2).

Accordingly, plaintiff's motion for partial summary judgment is denied, and defendants' motion for summary judgment is granted solely to the extent that the complaint is dismissed in its entirety against the DOE, and, as to the remaining defendants, plaintiff's causes of action pursuant to §200 of the Labor Law and for common law negligence and pursuant to §241(6) of the Labor Law, except as predicated upon a violation of §23-1.21(e)(2) of the Industrial Code, are dismissed. In all other respects, defendants' motion is denied.

Dated: November 3, 2011

KEVIN J. KERRIGAN, J.S.C.