

Ross v 1510 Assoc. LLC
2012 NY Slip Op 31197(U)
April 30, 2012
Supreme Court, New York County
Docket Number: 103496/2010
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 103496/2010
ROSS, CHRISTOPHER
vs.
1510 ASSOCAITES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAY 07 2012

NEW YORK
COUNTY CLERK'S OFFICE



Dated: 4/30/12

_____, J.S.C.
HON. EILEEN A. RAKOWER

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

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
CHRISTOPHER ROSS,

Plaintiff,

Index No. 103496/10

- against -

Decision/Order
Mot. Seq.: 001

1510 ASSOCIATES LLC and GOTHAM
CONSTRUCTION COMPANY, LLC,

Defendants.
-----X

FILED

MAY 07 2012

HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Christopher Ross brings this action alleging violations of Labor Law Sections §§200, 240(1) and 241(6) as against defendants 1510 Associates LLC ("1510") and Gotham Construction Company, LLC ("Gotham"). Plaintiff, a carpenter and a member of the Local 926 Carpenters Union, alleges that while in the course of his employment as a "mechanic" for non-party subcontractor, Woodworks Construction Co., Inc. ("Woodworks"), he was injured when he fell from an A-Frame stepladder during new building construction at 1510 Lexington Avenue in New York, New York on August 13, 2009. Defendant 1510 is the owner of the property. Defendant Gotham is the construction manager/general contractor. Gotham subcontracted with Woodworks to perform the framing, insulation, sheetrock, wood trim, doors and drywall for the project.

Defendants 1510 and Gotham move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint and specifically plaintiff's claims under Labor Law §§200(1), 240(1) and 241(6). Plaintiff cross moves for summary judgment as to liability on his Labor Law §240(1) claim. Plaintiff does not oppose the portion of defendants' motion that seeks to dismiss his Labor §200 claim.

Defendants, in support of their motion, submit: the pleadings; plaintiff's verified bill of particulars; demand for oral examination before trial; and the deposition transcript of the plaintiff. Plaintiff, in support of his cross-motion, submits: the pleadings; plaintiff's verified bill of particulars; note of issue; the deposition transcript of Scott Slater, who was employed by Gotham as the project manager of the Project; and the Trade Subcontract between Gotham and Woodworks. Plaintiff also relies on his deposition testimony. Also submitted on behalf of plaintiff is an affidavit of Russell Ross and Herbert Heller, Jr., P.E.

Plaintiff testifies that on August 13, 2009, the date of his accident, he was working with a framing crew consisting of himself and four other employees. The crew was performing interior work, specifically, framing of the interior walls in a particular 13th floor apartment unit being constructed. Plaintiff testifies that after about an hour working on the 13th floor, he turned to the task

of installing a door header to frame a closet doorway. The procedure required the insertion of screws at the bottom and top of the studs with a screw gun. Due to their height, a ladder was required to reach the upper studs. The ladder provided to plaintiff was a wooden "A-frame" stepladder which had rungs of diminishing widths. While performing the framing work on the ladder and upon descending to get additional material, the ladder shifted to the right and tipped over, causing plaintiff to lose his balance and fall, with the ladder, to the concrete floor below. Plaintiff was injured as his right arm and lower body struck the concrete floor and his upper body came down on the tipped over ladder. Immediately after he fell, plaintiff looked at the floor and saw how the unfinished concrete area where the ladder had been was uneven. One rib was approximately a foot long, two inches wide, and approximately three inches higher than the adjacent area.

Other workers responded to the accident scene, including co-workers Russell Ross and another co-worker named Albert. Ross submitted an affidavit and stated that he observed that the area where plaintiff's ladder had been situated was uneven, with ribs or ridges in the concrete that were approximately 1-1/2 to 2 inches higher than the adjacent floor surface. Gotham's project manager, Scott Slater, testified "that prior to pouring 'Sonoflow,' which is a self-leveling top layer of concrete, the underlying concrete slab that is poured first remains in 'a rough stage' and is not perfectly smooth." As Slater testified, according to Gotham's daily reports for the week of the accident, the smooth Sonoflow top layer had not yet been poured at the location of the accident. Plaintiff also submits an expert affidavit of Herbert Heller, P.E. Heller states that the defendants failed to take steps to ensure that plaintiff was provided with a flat and safe surface upon which to place and operate the ladder from which he was caused to fall.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

A. Plaintiff's Labor Law §200 Claim

Plaintiff cross moves for summary judgment as to liability on his Labor Law §240(1) claim. He does not oppose the portion of defendants' motion that seeks to dismiss his Labor 200 claim.

B. Plaintiff's Labor Law §240(1) Claim

Plaintiff's Labor Law §240(1) states:

All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, 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.

Labor Law §240(1) imposes absolute liability on building owners with regard to elevation-related risks to workers at construction sites. (see *Rodriguez v. Forest City Jay St. Assoc.*, 234 A.D.2d 68 [1st Dept. 1996]). In order to prevail on a Labor Law 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries. *Kyle v City of New York*, 268 A.D.2d 192, 196 [1st Dept. 2000], *lv denied* 97 N.Y.2d 608, [2002]. “Labor Law § 240(1) requires that safety devices, such as ladders, be so constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 N.Y.2d 833, 834-835 [1996]). “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).” *Wasilewski v Museum of Modern Art*, 260 A.D.2d 271 [1999]) Notwithstanding that Section 240(1) is an absolute liability statute, if a plaintiff’s action were the sole proximate cause of the accident, there is no liability. *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39 [2004].

Citing to *Costello v. Hapco Realty, Inc.*, 305 A.D.2d 445, 447 (2003), defendants assert that they are entitled to summary judgment on plaintiff’s Labor Law 240(1) on the basis that “proof of a plaintiff’s fall from a ladder, without more, is not sufficient to establish liability under Labor Law §240(1).” Defendants contend that there is no evidence that the ladder was defective and that “plaintiff identified no specific hazard which was present and which could be said to have proximately cause the accident.” Defendants, however, concede that Gotham Project Manager Slater testified that the concrete floor upon which the ladder was placed was “not perfect.”

The Court finds that plaintiff has established a prima facie violation of Labor Law §240(1). According to plaintiff’s undisputed deposition testimony, the accident occurred when he fell from the A-frame step-ladder because it tipped over due to the uneven floor upon which plaintiff was required to work. Furthermore, it is unrefuted that no safety devices were provided to secure the ladder or protect plaintiff from the fall. Moreover, plaintiff is under no obligation to show that the ladder was defective in some manner (see *Klein v. City of New York*, 222 A.D.2d 351, 352 [1st Dept. 1995], *aff’d*, 89 N.Y.2d 833 [1996]). Defendants have failed to raise an issue of fact or a basis on which it is entitled to judgment as matter of law.

Accordingly, plaintiff’s motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted; and defendant’s motion for summary judgment on the Labor Law § 240(1) claim is denied.

C. Plaintiff’s Labor Law §241(6) Claim

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (see *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 N.Y.2d 343, 348 [1998]). Liability may be imposed under this section even where the owner or contractor

did not supervise or control the worksite (see *id.*). In order to establish a cause of action under § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a rule or regulation of the Commissioner of the Department of Labor (“Industrial Code”) that applies given the specific facts and circumstances of the accident, and that sets forth a concrete standard of conduct (see *Long v Forest-Fehlhaber*, 55 N.Y.2d 154, 160 [1982]. “[O]nce it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff’s injury.” (*Rizzuto*, 91 N.Y.2d at 350). If demonstrated, then the owner or contractor is vicariously liable without regard to his or her fault (see *id.*). The owner or contractor “may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence” (*id.*).

Defendants argues that plaintiff’s Labor Law 241(6) claim should be dismissed on the basis that none of the sections of the New York State Industrial Code that he alleges apply to the facts of this case. As per his bill of particulars and supplemental bill of particulars, plaintiff alleges violations of the following sections of the New York State Industrial Code: 23-1.5, 23-1.7(b)(1)(i)(ii)(iii)(d)(e)(1)(2); 2.1(a)(1)(b) and 23-1.21(e)(3). In his motion papers, plaintiff also contends that 23-1.21(b)(4)(ii) was also violated.

Plaintiff’s opposition and cross-motion only address his alleged violations under New York State Industrial Code: §§23-1.21(e)(3) and 23-1.21(b)(4)(ii). Plaintiff has alleged sufficient facts to support the applicability of these two sections. (See *Cevallos v. Morning Dum Realty, Corp.*, 78 AD3d 547 (1st Dept 2010); *Khan v. 1765 First Assoc. LLC*, 2011 N.Y. Misc. LEXIS 1668 (N.Y. Sup Ct. Apr. 4, 2011). Section 23-1.21 is entitled “Ladders and Ladderways.” Section 23-1.21(e)(3), which relates to stepladders, provides, in pertinent part, that “Standing stepladders shall be used only on firm, level footings.” Section 23-1.21(b)(4)(ii), which relates to general requirements for ladders, provides, in pertinent part, “All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.”

For the foregoing reasons, it is hereby:


ORDERED that defendants’ motion for summary judgment is: (1) granted dismissing plaintiff’s Labor Law §200 claim; (2) denied as to plaintiff’s Labor Law §240(1) claim; and (3) denied as to plaintiff’s Labor Law §241(6) claim; and it is further;

ORDERED that plaintiff’s cross-motion for partial summary judgment on the issue of liability under Labor Law §240(1) is granted; and it is further;

ORDERED that an assessment of damages be had regarding the Labor Law §240(1) claim at the time of the trial of the remainder of the action.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: 4/30/12
April 30, 2012


FILED

EILEEN A. RAKOWER, J.S.C.
MAY 07 2012

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