Munro v Turner Constr.
2013 NY Slip Op 30804(U)
April 18, 2013
Sup Ct, New York County
Docket Number: 104237/10
Judge: Doris Ling-Cohan
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 4/22/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUSTICE DORIS LING-COHAN

PRESENT: _____ PART 36

Justice

Index Number : 104237/2010
MUNRO, GREGORY
vs.
TURNER CONSTRUCTION
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

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

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 5

Replying Affidavits _____ No(s). 6

Notice of cross-Motion

Upon the foregoing papers, it is ordered that this motion is + cross-motion for 3, 4

Summary judgment summary judgment are decided in accordance with the attached memorandum decision.

Case referred to Trial/Mediation.

FILED
APR 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ~~to~~ the Trial Support Office
FOR THE FOLLOWING REASON(S): ~~to~~ schedule for trial/mediation, as appropriate, as not all issues has been fully and may are no pending motions.

Dated: 4/18/13

_____, J.S.C.
JUSTICE DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. 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: IAS PART 36

----------X

GREGORY MUNRO,

Plaintiff,

Index No.: 104237/10
DECISION/ORDER

-against-

Motion Seq. No.: 001

TURNER CONSTRUCTION, ARE-EAST RIVER SCIENCE PARK, LLC and ALEXANDRIA REAL ESTATE EQUITIES, INC.,

Defendants.

FILED
APR 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

----------X

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, plaintiff Gregory Munro (Munro) moves for partial summary judgment on the complaint, and defendants Turner Construction (Turner) and ARE-East River Science Park, LLC (ARE-East) cross-move for summary judgment to dismiss the complaint. For the following reasons, the motion is granted, and the cross motion is denied.

BACKGROUND

On April 27, 2009, Munro was injured during the course of his employment as a steam fitter by non party WDF Plumbing and Mechanical (WDF), while working at a building (the building), located at 450 East 29th Street in the County, City and State of New York. *See* Notice of Motion, McRorie Affirmation, ¶ 4. ARE-East owns the building, and Turner was the general contractor that ARE-East had engaged to conduct the work there, and that, in turn, had hired WDF. *Id.* On April 30, 2010, Munro discontinued this action against defendant Alexandria Real Estate Equities, Inc. (Alexandria). *Id.*; Exhibit 1-B.

At his deposition, Munro specifically stated that, on the day of his accident, while he was in the building's basement engaged in installing a high-pressure steam line, he descended (through what he described as a "trench") an unsecured, six-foot wooden ladder with no "skids"

on its feet, into the sub-basement "high-pressure steam meter room", to see where the steam pipes were to be installed, and the ladder shifted and he fell backwards to the ground and injured his shoulder. *See* Notice of Motion, Exhibit 2, at 29-30, 40-43, 45-46, 55-56. Munro further stated that WDF had a tool shanty in the building's basement, as well as its own supply of ladders, but that the ladder he fell from was not a WDF ladder. *Id.* at 43-44. Munro also stated that the lighting in the portion of the basement where the "trench" was located was temporary lighting and dim, and that he had complained to his superintendent about the working conditions in the basement, in general on the morning of April 27, 2009. *Id.* at 34-38, 47-48, 57.

Munro has also presented an affidavit from his WDF co-worker, George Cirolli (Cirolli), who was present at the time of Munro's injury, and who states that the ladder was "sticking out of a hole leading down into a steam access room," and that the ladder and "was not tied off or secured or braced in any way." *See* Notice of Motion, Exhibit 5.

Turner was deposed by one of its mechanical superintendents, Michael Maybaum (Maybaum), who stated that Munro was injured in an area of the basement that was being constructed to afford access to the building's high pressure steam meter room. *See* Notice of Motion, Exhibit 3, at 25-27. Maybaum also stated that he had the authority to stop work at the job site if he observed any unsafe conditions or practices there. *Id.* at 33. Maybaum further stated that he had not observed the ladder leading down into the steam meter room prior to Munro's accident, despite having regularly inspected the area. *Id.* at 41. Maybaum finally stated that Munro's job did not require him to enter the steam meter room, and that he was not supposed to be in there at the time he was injured. *Id.* at 42.

Defendants have also presented an affidavit from WDF supervisor Janusz Maziarz (Maziarz), who states that "at this jobsite, all WDF employees were instructed to use WDF

equipment and tools, and not to borrow them from other trades," and that "if ... Munro needed a ladder ... he should have taken an appropriate size ladder from the WDF shanty." *See* Notice of Cross Motion, Exhibit A.

Munro commenced this action on March 29, 2010 by serving a summons and complaint that sets forth causes of action for: 1) common-law negligence; 2) violation of Labor Law § 200; 3) violation of Labor Law § 240 (1); and 4) violation of Labor Law § 241 (6); as well as various provisions of the Industrial Code. *See* Notice of Motion, Exhibit 1-A. Turner and ARE-East filed a joint answer on April 30, 2010. *Id.*; Exhibit 1-C. As previously mentioned, on the same day, Munro discontinued this action against defendant Alexandria Real Estate Equities, Inc. (Alexandria). *Id.*; Exhibit 1-B. Now before this court are Munro's motion for partial summary judgment on that portion of his complaint that claims that defendants violated Labor Law § 240 (1), and defendants' cross motion to dismiss the complaint.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003).

Here, as previously mentioned, Munro seeks summary judgment on so much of his claim that asserts that defendants violated Labor Law § 240 (1), which provides, in pertinent part, that:

> 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.

The Court of Appeals has held that the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991). This statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 342 (2008). To be successful, a plaintiff must show that the statute was violated and that the violation proximately caused his/her injury." *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39 (2004). Comparative negligence is not a defense to a Labor Law § 240 (1) claim. *See e.g. Williams v 520 Madison Partnership*, 38 AD3d 464, 465 n 2 (1st Dept 2007), citing *Samuel v Simone Dev. Co.*, 13 AD3d 112 (1st Dept 2004).

Here, Munro specifically argues that he has stated "a prima facie case under Labor Law § 240 (1) against [defendants] by establishing that the ladder he was using to perform construction work shifted, causing him to fall, because [of] the failure to have said ladder braced or secured." *See* Notice of Motion, McCrorie Affirmation, ¶ 38. Munro notes that well settled New York law holds that "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent." *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 (1st Dept 2002). The court agrees. A

plaintiff construction worker who has fallen from an unsecured ladder has clearly stated a prima facie case of liability under Labor Law § 240 (1). *See e.g., Ranieri v Holt Constr. Corp.*, 33 AD3d 425 (1st Dept 2006). Nevertheless, in their cross motion, defendants raise several arguments in opposition.

First, defendants contend that there is "an issue of fact as to whether plaintiff's accident occurred in the manner in which he alleges." *See* Notice of Cross Motion, Gizzo Affirmation, ¶ 32. Defendants argue that, according to Maziarz's affidavit, Munro should have taken a ladder from the WDF shanty instead of using the one located in the high-pressure steam meter room if he needed one to do his work. *Id.*, ¶ 33. However, this argument is essentially a claim that Munro's own negligence caused his injuries, and, as previously noted, comparative negligence is not a defense to a Labor Law § 240 (1) claim. *Williams v 520 Madison Partnership*, 38 AD3d at 465; *see also Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 (1993) ("it is well settled that an injured worker's contributory negligence is not a defense to a Labor Law § 240 (1) claim"). Therefore, the court rejects this argument.

Defendants also contend that an issue of fact is disclosed by the claim in Maziarz's affidavit that "the area where [Munro's] alleged accident occurred was not staged for work, no temporary lighting was installed and access into the tunnel had not yet been set up." *See* Notice of Cross Motion, Gizzo Affirmation, ¶ 34. However, the court notes that the claims set forth in Maziarz's subsequently prepared, self-serving affidavit, contradict the statements that Maybaum made, under oath, at his deposition that there *was* temporary lighting at the high pressure steam meter room, and that the ladder was one of *several* means of accessing that room. *See* Notice of Motion, Exhibit 3, at 58, 61-62, 71-72. The court believes that this apparent contradiction in defendants' own evidentiary submissions is in the nature of a feigned issue of fact, which is

insufficient to overcome a motion for summary judgment. *See e.g. Garber v Stevens*, 94 AD3d 426, 427 (1st Dept 2012). Therefore, the court again rejects defendants' argument.

Finally, defendants contend that Munro's motion should be denied because "liability pursuant to the Labor Law will not be imposed where the worker's actions are the sole proximate cause of his injuries." *See* Notice of Cross Motion, Gizzo Affirmation, ¶ 40. Defendants specifically argue that "since there is no direct evidence of how the plaintiff fell and whether the plaintiff voluntarily took it upon himself to enter an area in which he was not supposed to be in, issues of fact [exist] as to how the accident occurred and whether plaintiff can be classified as a recalcitrant worker whose own actions were the sole and proximate cause of his fall." *Id.*, ¶ 43. Munro responds that both of defendants' contentions are inaccurate. After reviewing the record, the court agrees.

Firstly, Munro has submitted his own deposition testimony and Cirolli's affidavit, both of which constitute eyewitness testimony as to the circumstances of Munro's fall. Defendants have presented no factual evidence to rebut this testimony. Therefore, defendants have failed to meet their burden of proving that a triable issue of fact exists on this point.

Secondly, with respect to the "recalcitrant worker doctrine," New York law provides that a worker who is given "specific instructions" about how to perform his work, but chooses to disregard those instructions, may not recover under the Labor Law. *See e.g. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 (2004). However, defendants do not provide any evidence that Maybaum specifically instructed Munro not to work in or near the high-pressure steam meter room or that Munro disregarded such instructions. Therefore, the recalcitrant worker doctrine does not apply here. Instead, defendants cite several cases in which a plaintiff's Labor Law claims were dismissed because the plaintiff's own actions were found to be the "sole proximate

cause of his injuries." *See e.g. Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 (1st Dept 2007); *Taglioni v Harbor Cove Assoc.*, 308 AD2d 441. 442 (2d Dept 2003); *Chan v Bed Bath & Beyond*, 284 AD2d 290, 290-91 (2d Dept 2001). However, all of those cases are readily distinguishable because they involved ladders that were properly erected and otherwise non-defective. Here, by contrast, Munro has testified that the ladder that he fell from was unsecured, and lacked "skids" on its feet. Therefore, defendants' case law is inapposite. As a result, the court concludes that "[t]here is no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injury, nor is there a triable question of fact as to whether he was solely to blame." *Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 (1st Dept 2006). Therefore, the court rejects defendants' final opposition argument and reiterates that Munro has established a prima facie case on his Labor Law § 240 (1) claim. Accordingly, Munro's motion is granted to the extent that he is awarded summary judgment on the issue of liability as to his third cause of action for violation of that statute.

The balance of defendants' cross motion seeks summary judgment dismissing Munro's claims for violation of Labor Law §§ 200 and 241 (6). With respect to the former, in *Ortega v Puccia* (57 AD3d 54, 60-61 [2d Dept 2008]), the Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 as follows:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...
>
> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the

dangerous condition that caused the accident.

> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, defendants argue that Munro's claim is of the "means and manner" variety, and that it must fail, as a matter of law, because there is no evidence that defendants controlled or supervised his work. *See* Notice of Cross Motion, Gizzo Affirmation, ¶ 48. Munro responds that his claim is actually of the "dangerous condition" variety, and argues that it should not be dismissed because there is evidence that defendants had either actual or constructive notice of the presence of the unsecured ladder in the high-pressure steam meter room in the form of Maybaum's deposition testimony that he conducted daily walk-through inspections of that portion of the premises. *See* McRorie Affirmation in Further Support, ¶ 52. After reviewing that testimony, the court agrees with Munro. Therefore, the court rejects defendants' argument, and finds that the portion of their motion that seeks dismissal of Munro's Labor Law § 200 claim should be denied.

With respect to Munro's remaining cause of action, Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers and 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). In order to prevail on a claim under Labor Law § 241 (6), it is incumbent on a plaintiff to demonstrate the that defendant violated a regulation containing "concrete specifications" applicable to the facts of the case. *Id.* at 505. Here, Munro's complaint cites several Industrial Code provisions to support his Labor Law § 241 (6) claim, including 12

NYCRR § 23-1.5, 23-1.7, 23-1.8, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.21 (b) (1), 23-1.21 (b) (3), 23-1.21 (b) (4), 23-1.21 (b) (5), 23-1.22, 23-1.30 and 23-1.32. See Notice of Motion, Exhibit 1. Defendants argue that all of the foregoing provisions are either too non-specific to support a Labor Law § 241 (6) claim, as a matter of law, or that they are inapposite to the facts of this case. *See* Notice of Cross Motion, Gizzo Affirmation, ¶¶ 50-69. Munro replies that one of the cited provisions, 12 NYCRR 23-1.21 (b), both applies to the facts of this case, and has been held sufficiently specific to support a Labor Law § 241 (6) claim. *See* McRorie Affirmation in Further Support, ¶¶ 38-41. Upon review, Munro is correct. 12 NYCRR 23-1.21 (b) provides, in relevant part as follows:

> (b) General requirements for ladders.
>
> ***
>
> (4) Installation and use.
>
> (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.
>
> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
>
> (iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.
>
> (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work

> is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.
> (v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.
>
> (5) Wooden ladder rungs.
> (I) Round ladder rungs shall be not less than one and one-eighth inches in diameter and oval rungs shall be of equal strength. The tenons of rungs shall be not less than seven-eighths inch in diameter. All tenons shall fit tightly into holes which shall either extend through the side rails or be bored so as to give at least thirteen-sixteenths inch of bearing to the tenons. In through-bore construction, the tenons shall be flush with the outside rail surface of the ladder. All tenon holes shall be located on the center lines of the wide faces of the side rails. The shoulders of each rung shall fit firmly against the side rails and the tenons secured in place with nails or the equivalent to prevent the tenons from turning.
> (ii) Rung spacing shall be uniform and shall be not less than 12 inches nor more than 14 inches, center to center.

Here, Munro has alleged that the ladder that shifted under him was unsecured and lacked "skids" on its feet. This allegation is clearly within the ambit of subparagraphs (i), (ii) and (iv) of 12 NYCRR 23-1.21 (b) (4). Further, in *Sopha v Combustion Engineering, Inc.* (261 AD2d 911 [4th Dept 1999]), the Appellate Division, Fourth Department, held that 12 NYCRR 23-1.21 (b) (4) is sufficiently specific to support a Labor Law § 241 (6) claim. Therefore, the court rejects defendants' argument, and the portion of their motion that seeks dismissal of Munro's Labor Law § 241 (6) claim is denied, because it is adequately support by his allegation that defendants'

violated 12 NYCRR 23-1.21 (b) (4) by their use of the ladder that he fell from. Based upon the above, the court need not consider defendants' arguments that are directed at the other Industrial Code provisions cited in Munro's complaint. Accordingly, the court concludes that defendants' cross motion is denied.

DECISION

Accordingly, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Gregory Munro is granted as to liability on his third cause of action for violation of Labor Law § 240 (1), with the issue of damages to be determined at trial; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Turner Construction and ARE-East River Science Park, LLC is denied; and it is further

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

Dated: New York, New York
April 18, 2013

FILED
APR 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

J:\Summary Judgment\munrovturner.dlc.lane.wpd