

Simos v Hanac Inc.

2013 NY Slip Op 32709(U)

October 30, 2013

Supreme Court, Queens County

Docket Number: 10809/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

ANDREAS SIMOS,

Plaintiff,

-against-

HANAC INC., HANAC ASTORIA HOUSING
REDEVELOPMENT ASSOCIATES, L.P.,
GEORGE T. DOURIS TOWER HOUSING
DEVELOPMENT FUND CORP., SLCE
ARCHITECTS LLP, and MEGA CONTRACTING
COMPANY, INC.,

Defendant.

Index No: 10809/11

Motion Date: 8/7/13

Motion Seq. No.: 7

HANAC INC., HANAC ASTORIA HOUSING
REDEVELOPMENT ASSOCIATES, L.P.,
GEORGE T. DOURIS TOWER HOUSING
DEVELOPMENT FUND CORP., and MEGA
CONTRACTING COMPANY, INC.,

Third-party Plaintiff,

-against-

MC PAINTING OF NEW YORK CORP.,

Third-party Defendant.

The following papers numbered 1 to 25 read on the motion and cross-motions for an extension of time to move for summary judgment; and the motion of defendant, SLCE ARCHITECTS LLP, (hereinafter SLCE) for summary judgment dismissing the complaint and all cross-claims asserted against it; cross-motion of plaintiff for summary judgment as to liability on his Labor Law (LL) §240(1) and §241(6) causes of action as against the defendants/third-party plaintiffs the owners and general contractor, and for an immediate trial on damages; and cross-motion by defendants/third-party plaintiffs, HANAC INC., HANAC ASTORIA HOUSING REDEVELOPMENT ASSOCIATES, L.P., GEORGE T. DOURIS TOWER HOUSING DEVELOPMENT FUND CORP., and MEGA CONTRACTING COMPANY, INC., (collectively HANAC defendants) for summary judgment dismissing the plaintiff's common law negligence, Labor Law §200 and §241(6) causes of action and all cross-claims asserted against them

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Upon the foregoing papers it is ordered that this motion and cross-motions are determined as follows.

The branch of the motion and cross-motions for an extension of time to move for summary judgment is granted. The existence of relevant outstanding discovery or depositions constitutes "good cause" for the lateness (see Greenpoint Properties, Inc. v. Carter, 82 AD3d 1157 [2011]; Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 [2000]).

SLCE's motion for summary judgment dismissing the complaint and all cross-claims insofar as it is asserted against it is granted.

The branch of the HANAC defendant's cross-motion for summary judgment dismissing the plaintiff's Labor Law §200 and common law negligence claims is granted.

The plaintiff's cross-motion for summary judgment in his favor as to liability on his Labor Law §240(1) and §241(6) causes of action and the branch of the HANAC defendants' cross-motion for summary judgment dismissing the plaintiff's Labor Law §241(6) are denied.

This is an action to recover for personal injuries plaintiff allegedly sustained on May 28, 2008 while working for MC Painting of New York Corp. (hereinafter MC) as a painter/plaster during the construction of a 15 story apartment building owned by the HANAC defendants and located at 27-40 Hoyt Ave., Queens, N.Y. The HANAC defendants hired SLCE Architects LLP to design and draft the architectural plans and Mega Contracting Inc. (hereinafter Mega), as the general contractor. Mega hired several subcontractors, including MC to perform all paint/plaster/spackle work.

Plaintiff claims that while he was descending the scaffold

he used to plaster the ceiling, it moved causing him to fall to the floor, whereupon he was struck by a fifty pound bucket of compound which fell from the scaffold. Plaintiff commenced this action against the owners, the general contractor and SLCE to recover damages for alleged violations of Labor Law §§ 240, 241 and 200, and for common-law negligence.

Labor Law § 240(1) imposes a non-delegable duty upon owners and contractors, and their agents to provide construction workers with appropriate safety devices to protect them against gravity related accidents such as falling from a height or being struck by a falling object (see Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 [2003]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Novak v. Del Savio, 64 AD3d 636, 637-638 [2009]). A violation of this duty results in absolute liability without regard to plaintiff's possible comparative negligence (see Stolt v. General Foods, 81 NY2d 918 [1993]; Bland v. Manocherian, 66 NY2d 452 [1985]).

Labor Law § 241(6) imposes a non-delegable duty upon owners, general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (Ross v. Curtis Palmer Hydro-Electric Co., supra at 501; Rizzuto v. L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]). Unlike the violation Labor Law §240(1), however, a violation of Labor Law § 241(6) does not result in absolute liability and the plaintiff's comparative negligence may be raised in defense to such claim (see St. Louis v. Town of North Elba, 16 NY3d 411, 414 [2011]; Long v. Forest Fehlhaber, 55 NY2d 154 [1982]).

Labor Law §200 is a codification of the common-law duty imposed upon an owners and contractors to provide workers with a safe place to work (see Rizzuto v. L.A. Wenger Contr. Co., supra at 352; Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). "Where ... a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if [it] had 'the authority to supervise or control the performance of the work" ' (Gonzalez v. Perkan Concrete Corp. --- AD3d ---, 2013 WL 5732178 [2013] quoting Forssell v. Lerner, 101 AD3d 807, 808 [2012], quoting Ortega v. Puccia, 57 AD3d 54, 61 [2008]) even if they had notice of the sub-contractor's defective methods or the dangerous condition alleged (see Comes v. New York State electric and Gas Corporation, supra; Allen v. Cloutier Construction Corp., 44 NY2d 290, 299 [1978]; Ortega v. Puccia, supra at 61-62 [2008]).

General supervisory authority, including the authority to review or stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications and progress of work is insufficient to impose liability under Labor Law § 200 or for common-law negligence (see Torres v. Perry Street Development Corp., 104 AD3d 672, 676 [2013]; Harrison v. State, 88 AD3d 951, 953 [2011] Austin v. Consolidated Edison, Inc., 79 AD3d 682, 684 [2010]).

On a motion for summary judgment, the movant bears the initial burden of establishing, prima facie, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact. (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

SLCE's motion for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against it is granted.

Pursuant to Labor Law § 240[1] and § 241[9], architects, "who do not direct or control the work or activities other than planning and design", are expressly exempt from liability under Labor Law § 240 and § 241.

SLCE established, prima facie, its entitlement to summary judgment dismissing the complaint through the deposition testimonies of the plaintiff, and Saky Yakas, SLCE's managing partner, John Kaiteris for the owners, George Raptis for Mega as well as SLCE's contract with the Owner, which demonstrated that SLCE did not direct or control the plaintiff's work or any of the work at the construction site nor did it have the authority to do so (see Cody v. State, 82 AD3d 925, 927 [2011]; Gonzalez v. Pon Lin Realty Corp., 34 AD3d 638 [2006]) and that its authority was limited to ensuring compliance with the contract specifications (see Austin v. Consolidated Edison, Inc., supra at 684).

The plaintiff did not oppose the motion and the HANAC defendants have failed to raise a triable issue of fact. Contrary to HANAC's counsel's assertion, SLCE's presence for the purpose observing the stage and progress of the work and whether the work conformed to the plans is nothing more than general supervisory authority which is insufficient to impose liability under Labor Law § 200 or for common law negligence (see La Veglia v. St. Francis Hosp., 78 AD3d 1123, 1125 [2010]).

The branch of the HANAC defendant's cross-motion for summary judgment dismissing the plaintiff's Labor Law §200 and common law negligence claims is granted.

The HANAC defendant's relying upon the deposition testimony of the parties and the affidavits of George Poulon, Vice President of Mega and John Kaiteris, CUEO and Executive Director of HANAC Inc. established, prima facie, their entitlement to summary judgment by showing that they did not, nor did they have the authority to, direct or control the means and the manner of performance of plaintiff's work, that all equipment necessary for his work was provided by MC, including the scaffold, that they had no notice of any alleged defective condition of the scaffold and that plaintiff never complained to them about the condition of the scaffold.

In opposition, plaintiff failed to raise a triable issue of fact. Contrary to plaintiff's counsel's assertion, the authority to review and stop a contractor's work if a safety violation and to ensure compliance with safety regulations is insufficient to impose liability under Labor Law § 200 or common law negligence (see Harrison v. State, supra; Torres v. Perry Street Development Corp., supra).

The plaintiff's cross-motion for summary judgment in his favor as to liability on his Labor Law §240(1) is denied.

Although plaintiff's merely submitted his own affidavit which is inadmissible without a translator's affidavit (see CPLR 2102; Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901, 902 [2008]) SLCE submitted the plaintiff's deposition testimony in support of its motion which could be considered in determining the plaintiff's cross-motion.

The plaintiff testified at his deposition that when he arrived at 8:00 a.m. his boss, Kostas Kakarakis, the owner of MC, instructed him to work on the ceiling using a scaffold which was already in the room. Plaintiff stated that he placed a bucket of compound weighing about 40-50 lbs. on the second, the highest, platform where he would be working. He further testified that when he was on the second platform doing his work, the scaffold was unsteady and rolled because the clips on the wheels did not lock. He further testified that he complained to Kostas, but Kostas directed him to keep working. Plaintiff testified that he had gone up and down the scaffold to move it during the day, and that he knew how to operate a scaffold, but when he tried to lock the wheels they did not lock properly. He testified that at about 2:00 p.m. he was attempting to climb down from the scaffold and after he stepped down from the second platform to the lower first level platform which was about 3 feet from the ground, the scaffold rolled causing him to lose his balance and fall to the ground where he was struck by the unsecured bucket of compound which also fell when the scaffold rolled. Plaintiff claims that the scaffold rolled because the its wheels were defective in that

they could not be locked.

In opposition, the HANAC defendants submitted the affidavit of Kostas Kakarakis and contend that the accident couldn't have happened the way plaintiff described and, thus, issues of fact exist as to how the accident occurred and whether the plaintiff was the sole proximate cause of the accident. Kakarakis asserts that plaintiff was instructed to paint and seal coat the ceiling which was 8 feet high, using a baker's scaffold owned by MC, that the scaffold had a single deck at a height of about one foot with a full guard rail system around the deck. He further averred that the scaffold had four wheels with locks on each wheel that were operating and locking properly on the day of plaintiff's accident.

Not every fall of a worker or object gives rise to the extraordinary protections of Labor Law § 240(1) (see Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). To prevail on a Labor Law §240(1) claim with respect to a falling worker, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries sustained (see Bland v. Manocherian, supra; Tylman v. School Constr. Auth., 3 AD3d 488 [2004]). With respect to a falling object, insofar as it is relevant here, the plaintiff must demonstrate that, at the time the object fell, it required securing the for the purposes of the undertaking (see Quattrocchi v. F.J. Sciame Constr. Corp., 11 NY3d 757, 758 [2008]; Outar v. City of New York, 5 NY3d 731, 732 [2010]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (Narducci v. Manhasset Bay Assoc., supra at 268). An object requires securing where there exists "a significant risk inherent in * * * the relative elevation * * * at which materials or loads must be positioned or secured" (Narducci v. Manhasset Bay Associates, supra [2001] quoting Rocovich v. Consolidated Edison Co., 78 NY2d, 509, 514 [1991]).

Plaintiff contends that the fact that he fell and that the bucket also fell is sufficient to demonstrate that the scaffold did not provide proper protection. The fact that the plaintiff fell off the scaffolding, even if true, is insufficient, in and of itself to establish that the device did not provide proper protection (see Blake v. Neighborhood Housing Services of New York City, Inc., supra at 288; Nelson v. Ciba-Geigy, 268 AD2d 570, 571 [2000]; Beesimer v. Albany Ave./Rte. 9 Realty, 216 AD2d 853, 854 [1995]). The issue of whether the device provided proper protection is a generally a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials (see Duran v. Kijak Family Partners,

L.P., 63 AD3d 992, 994 [2009] quoting Nelson v. Ciba-Geigy, at 572).

Although the plaintiff testified, inter alia, that the scaffold rolled because the wheel locks were defective, the conflicting affidavit of Kakarakis is sufficient to raise issues of fact as to whether the scaffold provided proper protection, whether the bucket required securing, whether the plaintiff was the sole proximate cause of the accident and the credibility of the plaintiff which requires denial of the motion (see Narducci v. Manhasset Bay Assoc., supra; Martinez v. Ashley Apts Co., LLC, supra at 735).

The branch of the plaintiff's cross-motion for summary judgment in his favor as to liability on his Labor Law §241(6) claim and the branch of the HANAC defendant's cross-motion for summary judgment dismissing the plaintiff's Labor Law §241(6) claim are denied.

To prevail on a Labor Law § 241(6) claim, a plaintiff must establish a violation of a New York State Industrial Code which contains a specific, positive command applicable to the circumstances of the accident, that such violation was a proximate cause of his injuries (see St. Louis v. Town of North Elba, supra; Gasques v. State, 15 NY3d 869 [2010]; Fusca v. A & S Const., LLC, 84 AD3d 1155 [2011]; Forschner v. Jucca Co., 63 AD3d 996 [2009]) and the plaintiff's lack of comparative negligence (see Roman v. Al Limousine, Inc., 76 AD3d 552, 553 [2010]).

Although plaintiff listed numerous Industrial Codes in his bill of particulars and Memorandum of Law in support of the cross-motion, he addressed only the alleged violations of Industrial Codes 12 NYCRR § 23-1.16 and § 23-5.1(b) in support of his Labor Law § 241(6) cause of action and has apparently abandoned his claims with respect to the remaining violations. To the extent that plaintiff alleged in his reply the violation of Industrial Codes 12 NYCRR 23-1.7, 23-1.17, 23-1.21 and 23-1.24, he has failed to address how they are applicable to this case.

Plaintiff's reliance on Industrial Code §§ 23-1.7 is misplaced inasmuch as none of the subdivisions are applicable to the facts of this case. Subdivision (a) of § 23-1.7 [Overhead hazards] is inapplicable since the plaintiff not working in or passing in an area normally exposed to falling objects. Industrial Code § 23-1.7(b) (1) [falling hazards: hazardous openings], which mandates that holes or "hazardous openings" at construction sites into which a person may step or fall be guarded by a substantial cover or by a safety railing is inapplicable to the facts of this case since plaintiff did not

fall into a hole or through a hazardous opening (see Ortiz v. 164 Atlantic Avenue, LLC, 77 AD3d 807 [2010]; Pope v. Safety and Quality Plus, Inc., 74 AD3d 1040 [2010]; Garlow v. Chappaqua Central School Dist., 38 AD3d 712 [2007]).

Industrial Code § 23-1.24 [Work on roofs] is inapplicable since plaintiff was not working on a roof (see Bennion v. Goodyear Tire & Rubber Co., 229 AD2d 1003 [1996]).

Industrial Code § 23-1.16 [Safety Belts, Harnesses, Tail Lines and Lifelines] which does not state when these devices are to be used and merely sets the standards for safety belts, harnesses, life lines, tail lines and life nets and Industrial Code § 23-1.21 [Ladders and Ladderways] are inapplicable since none of these items were used in this case (see Smith v. Cari, LLC, 50 AD3d 879 [2008]; Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616 [2008]; Maldonado v. Townsend Avenue Enterprises, 294 AD2d 207 [2002]).

With respect to Industrial Code § 23.5-1(b) [Scaffold footing or anchorage] which provides in pertinent part that the footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, and shall be secure against movement in any direction is sufficient to support a Labor Law § 241[6] cause of action and is applicable to plaintiff's claim.

However, the conflicting facts alleged in the plaintiff's deposition testimony and the affidavit of Kakarakis submitted by the HANAC defendants is sufficient to raise triable issues of fact, inter alia, as to plaintiff's comparative negligence, and whether Industrial Code § 23.5-1(b) was violated, or that such violation, if any, was a proximate cause of the plaintiff's fall which requires denial of the plaintiff's and the HANAC defendant's motions for summary judgment with respect to plaintiff's Labor Law § 241[6] cause of action .

Dated: October 30, 2013
D#48

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J.S.C.