

Gomez v 10 W. End Ave. Dev. Co.
2013 NY Slip Op 33391(U)
December 5, 2013
Supreme Court, New York County
Docket Number: 105883/10
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

NELSON GOMEZ,
Plaintiff,

Index No.: 105883/10

Motion Date: 02/26/13

- v -

Motion Seq. No.: 04

10 WEST END AVENUE DEVELOPMENT CO., TEN
WEST END AVENUE HOLDINGS, LLC, CAMBRIDGE
DEVELOPMENT & CONSTRUCTION CORP., 10 WEST
END AVENUE CONDOMINIUM, DOPER SQUARE
REALTY, INC., and WEST REAL ESTATE USA,
INC.,

Defendants.

FILED

DEC 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

No (s) . 1

Answering Affidavits - Exhibits

No (s) . 2

Replying Affidavits - Exhibits

No (s) . 3

Cross-Motion: ☐ Yes ☒ No

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

In this action which arises from a work site accident, West
Real Estate USA, Inc. is the sole remaining defendant.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment
on his complaint. The complaint alleges two causes of action,
sounding in common-law negligence, and violations of Labor Law §§
200, 240, 241, and 242-a.

On the day of plaintiff's accident, July 1, 2009, plaintiff,

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

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

then a general laborer in the employ of nonparty Two Tiers Design and Construction, LLC (Two Tiers), was attempting to peel some plastic off windows in a unit on the ground floor of the building located at 10 West End Avenue, in Manhattan. Construction was proceeding in the unit, readying it to be a commercial retail space.

Defendant was the owner of the premises. Plaintiff's employer, Two Tiers, had been retained to build all the walls, floors, ceilings, lighting and interior fittings. There were windows at the front of the unit, resting on a base three feet above the floor, and rising to the ceiling, about 10 feet up. In order to remove the plastic, plaintiff stood on the base and pulled hard on the plastic with both hands. One part of the plastic came off easier than another, and plaintiff lost his balance and fell backwards, to the floor.

Before plaintiff began pulling on the plastic, he asked his boss, Jesse Milton (Milton), for a ladder, but the only ladder there that day was being used by the air-conditioning contractor, and was unavailable to plaintiff. Since people were coming to see the store, and the plastic had to be removed before they came, Milton told plaintiff to do what he could, without a ladder.

Vittorio Giordano was a supervisor for defendant. Giordano would go check on the progress of the work about twice a week,

spending one to three hours each time, to ensure that the work was on schedule. Otherwise, defendant was not involved in the project.

"Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law"

(Ostrov v Rozbruch, 91 AD3d 147, 152 [1st Dept 2012]). A movant on a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. The failure to make such showing requires denial of the summary judgment motion regardless of the sufficiency of the opposing papers (Komonaj v Curanovic, 90 AD3d 505, 505 [1st Dept 2011]).

Labor Law § 240 (1) provides, in pertinent 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."

"Labor Law § 240 (1) provides exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal

quotation marks and citation omitted]" (Jamindar v Uniondale Union Free School Dist., 90 AD3d 612, 615 [2d Dept 2011])). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011], quoting Misseritti v Mark IV Constr. Co., 86 NY2d 487, 490 [1995])). To establish liability under the statute, "a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (Herrera v Union Mech. of NY Corp., 80 AD3d 564, 565 [2d Dept 2011])). In addition, "[l]iability under Labor Law § 240 (1) depends on whether the injured worker's 'task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (Salazar v Novalex Contr. Corp., 18 NY3d 134, 139 [2011], quoting Broggy v Rockefeller Group, Inc., 8 NY3d 675, 681 [2007])). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009])).

Plaintiff has established his prima facie case that defendant is liable under section 240 (1). Plaintiff asked for a

ladder, but none was provided. His working on the base, which was three feet high, constituted an elevation-related risk. Defendant's failure to ensure that proper protective devices were provided at the workplace was a violation of section 240 (1), and was a proximate cause of plaintiff's injuries. The part of plaintiff's motion which seeks summary judgment on the issue of defendant's liability under Labor Law § 240 (1) is granted.

Labor Law § 241 (6) provides:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

"6. 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."

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23. "Labor Law § 241 (6) imposes a *nondelegable* duty ... upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers] [internal quotation marks and citations omitted]" (Forschner v Jucca Co., 63 AD3d 996, 998 [2d Dept 2009]). "To recover under Labor Law § 241 (6), a plaintiff must establish that, in

connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific applicable safety standards" (Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043, 1047 [2d Dept 2012]).

The sole Industrial Code section on which plaintiff relies is Industrial Code § 23-1.7 (f), which states:

"Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Section 23-1.7 (f) "is sufficiently specific to support a claim under Labor Law § 241 (6)" (Baker v City of Buffalo, 90 AD3d 1684, 1685 [4th Dept 2011]). However, the regulation is inapplicable here. The assertion that a stairway, ramp or runway should have been provided to get to the three-foot high window ledge is unpersuasive.

Labor Law § 200 (1) provides, in relevant part:

"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."

It is well established that:

"Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. ... Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work [internal citations omitted]"

(Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143-144 [1st Dept 2012]).

Two Tiers' Jesse Milton was the only one who told plaintiff what to do. Defendant exercised no supervision or control over plaintiff or his work. Thus, the part of plaintiff's motion which seeks summary judgment on his section 200 and common-law negligence claims is denied.

Accordingly, it is

ORDERED that the part of plaintiff's motion which seeks summary judgment on the issue of defendant West Real Estate USA, Inc.'s liability under Labor Law § 240 (1) is granted, with the determination of the amount of damages to await trial; and it is further

ORDERED that the parts of plaintiff's motion which seek summary judgment under common-law negligence and Labor Law §§ 200 and 241 (6) are denied.

This is the decision and order of the court.

Dated: December 5, 2013

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES

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