Gory v Neighborhood Partnershlp Hous. Dev. Fund Co., Inc.
2013 NY Slip Op 34252(U)
January 11, 2013
Supreme Court, Bronx County
Docket Number: 303856/2007
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
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MAHAMADOU GORY,

Plaintiff,

- against -

NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., A ALEEM CONSTRUCTION , INC., WEST 132ND STREET, LLC and NEW YORK RESIDENTIAL WORKS, INC.

Defendants.
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DECISION AND ORDER

Index No. 303856/2007

WEST 132ND STREET, LLC,

Third-Party Plaintiff,

- against -

A. ALEEM CONSTRUCTION INC., EVEREST NATIONAL INSURANCE COMPANY, and MT. HAWLEY INSURANCE COMPANY,

Third-Party Defendants.
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Third-Party Index No. 84146/2009

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated December 15, 2011 of defendant Neighborhood Partnership Housing Development Fund Company, Inc. and the affirmation, affidavit and exhibits submitted in support thereof (Motion Sequence # 7); plaintiff's affirmation in opposition dated May 4, 2012 and the exhibits annexed thereto; the affirmation in opposition dated May 9, 2012 of defendant A. Aleem Construction Inc.; the reply affirmation dated June 25, 2012 of defendant Neighborhood Partnership Housing Development Fund Company, Inc. and the affidavit and exhibits annexed thereto; plaintiff's notice of motion dated December 20, 2011 and the affirmation and exhibits submitted in support thereof (Motion Sequence # 8); the affirmation in opposition dated May 17, 2012 of defendant Neighborhood

Partnership Housing Development Fund Company, Inc. and the affidavit and exhibits annexed thereto; plaintiff's reply affirmation dated June 26, 2012 and the affidavit annexed thereto; and due deliberation; the court finds:

In this Labor Law action, plaintiff Mahamadou Gory, a laborer employed by third-party defendant general contractor A. Aleem Construction, Inc. ("Aleem"), sustained injuries when the staircase on which he was working collapsed. Defendant owner Neighborhood Partnership Housing Development Fund Company, Inc. ("Neighborhood") now moves for summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), 241(6) and 241-a causes of action and for summary judgment on its cross-claim for indemnification against defendant West 132nd Street, LLC ("West"), the manager/developer of the property. Plaintiff moves for partial summary judgment on the issue of defendants' liability on his Labor Law §§ 200, 240(1)and 241(6) claims. The motions (Motion Sequences # 7 and # 8) are consolidated for decision as they involve common questions of law and fact.

In support of the motions, the parties have submitted copies of the pleadings; an affidavit from Alex S. Avitabile ("Avitabile"), Assistant Secretary and attorney for Neighborhood; the Amended and Restated Site Development and Management Agreement dated June 19, 2007 between Neighborhood and West; and the Contract of Construction dated June 19, 2007 between West and Aleem. The following deposition transcripts were also submitted: plaintiff; Kareem Abdul/Linton Frank ("Linton"), Aleem's project manager; Abdul Aleem/Mervyn Frank ("Mervyn"), Aleem's president; Stephanie Becker ("Becker"), a program officer working with Neighborhood; Francis Synmoie ("Synmoie"), West's managing partner and principal; Isabel Gomez-Aulestia ("Gomez-Aulestia"), construction representative for non-party Enterprise Community Partners, Inc.; and Leo Baez ("Baez"), director of construction management for non-party Enterprise Community Partners, Inc. It does not appear from the submissions that Aleem answered plaintiff's complaint.

Plaintiff testified he was in the process of removing a marble tread from a staircase in a partially-

demolished building when the staircase collapsed. He could not estimate the distance he fell but recalled that the staircase landed on top of his leg. He denied seeing any type of wood beams underneath the staircase.

Linton, Aleem's project manager, testified the staircase was affixed to the building by bolts attached to wood joists. After seeing a "belly" on the underside of the staircase between the fourth and fifth floors, Aleem braced the subject staircase with two four-by-four wood beams and spike nails before commencing any work. Linton did not witness the accident but noted that the staircase was "down" and "wasn't connected to the fifth floor" when he arrived at the scene. The project involved a gut renovation of a number of buildings and included the complete removal of all staircases.

Neighborhood contends that the staircase served as a permanent passageway and does not constitute a safety device within the meaning of Labor Law § 240(1). Plaintiff, though, was not utilizing the staircase as a means of access to a different floor. Rather, the staircase served as the functional equivalent of an elevated platform which collapsed. *See Berrios v. 735 Ave. of the Ams., LLC*, 82 A.D.3d 552, 919 N.Y.S.2d 16 (1st Dep't 2011); *McDonald v. UICC Holding, LLC*, 79 A.D.3d 1220, 912 N.Y.S.2d 710 (3d Dep't 2010), *leave denied*, 17 N.Y.3d 769, 952 N.E.2d 1066, 929 N.Y.S.2d 72 (2011). Other than a hard hat, plaintiff was provided with no other safety devices. While the parties dispute whether braces had been installed, it is evident that the braces provided, if any, failed.

Neighborhood also contends that the accident did not occur as plaintiff described. It submits uncertified records from Harlem Hospital containing two statements purportedly attributed to plaintiff that he "twisted his ankle while stepping down" and that his "left foot got stuck and twisted between two metal blocks." Plaintiff, though, testified he does not speak English and he spoke to hospital staff through a hospital staff member and his brother. At his deposition, plaintiff denied making the statements attributed to him, *see Preldakaj v. Alps Realty of NY Corp.*, 69 A.D.3d 455, 894 N.Y.S.2d 21 (1st Dep't 2010), and Neighborhood has presented no proof that the "translation was provided by

a competent, objective interpreter." *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95, 96, 698 N.Y.S.2d 652, 653 (1st Dep't 1999). Plaintiff has demonstrated his entitlement to summary judgment on his Labor Law § 240(1) claim. Liability against West is also warranted as Neighborhood's statutory agent. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981).

Plaintiff cites 12 NYCRR §§ 23-1.7, 23-1.11 and 23-2.7 and provisions of the Occupational Safety and Health Act ("OSHA") as predicates for his Labor Law § 241(6) cause of action. OSHA standards, though, are insufficient to serve as a basis for a Labor Law § 241(6) liability. *See Shaw v. RPA Assoc., LLC*, 75 A.D.3d 634, 906 N.Y.S.2d 574 (2d Dep't 2010); *Schulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247, 690 N.Y.S.2d 226 (1st Dep't 1999).

Neighborhood has shown that 12 NYCRR §§ 23-1.7(a) (overhead hazards), 23-1.7(b) (falling hazard), 23-1.7(c) (drowning hazards), 23-1.7(d) (slipping hazards), 23-1.7(e) (tripping and other hazards), 23-1.7(g) (contaminated air), and 23-1.7(h) (corrosive substance) are inapplicable. Plaintiff has abandoned his reliance on those provisions as he has not addressed them in his opposition. *See Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 938 N.Y.S.2d 288 (1st Dep't 2012). As to 12 NYCRR § 23-1.7(f) (vertical passage), plaintiff was not using the staircase as a means of access to working levels above or below ground. *See Francescon v. Gucci America, Inc.*, 2012 N.Y. Misc. LEXIS 3387 (Sup. Ct. New York County July 17, 2012). While 12 NYCRR § 23-1.11 (lumber and nail fastenings) is sufficient to support a Labor Law § 241(6) claim, *see Skudlarek v. Bethlehem Steel Corp.*, 251 A.D.2d 973, 673 N.Y.S.2d 344 (4th Dep't 1998), plaintiff submitted no evidence that the materials used to secure the staircase contained the defects enumerated in the section. Regarding 12 NYCRR § 23-2.7, that provision is inapplicable as it addresses temporary stairway requirements during the construction of buildings, *see Morris v. City of New* York, 87 A.D.3d 918, 929 N.Y.S.2d 585 (1st Dep't 2011), and plaintiff was in the process of removing portions of an existing staircase.

Plaintiff did not identify a violation of 12 NYCRR § 23-3.3(c) until he served, without leave of

court, a second supplemental verified bill of particulars one week after Neighborhood served the instant motion and nearly four months after plaintiff filed his note of issue. Neighborhood objects to the belated identification of an additional statutory predicate. The failure to identify the violation, though, is not fatal. *See Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp.*, 271 A.D.2d 231, 705 N.Y.S.2d 577 (1st Dep't 2000). There is no discernible prejudice to defendant as plaintiff's original bill of particulars includes the allegation that defendant failed to make inspections and/or adequate inspection to assure the safety of the plaintiff's work site and to prevent the development of defective conditions." The allegation raises no new facts or theories of liability and amplifies the claims set forth in the original bill. *See Scherrer v. Time Equities, Inc.*, 27 A.D.3d 208, 810 N.Y.S.2d 454 (1st Dep't 2006).

The section requires that a designated person perform continuing inspections to detect hazards resulting from weakened or deteriorated floors or walls during hand demolition operations. It is sufficient to support a Labor Law § 241(6) claim. *See Cardenas v. One State St., LLC*, 68 A.D.3d 436, 890 N.Y.S.2d 41 (1st Dep't 2009). Plaintiff, though, has submitted no admissible proof demonstrating whether the staircase had been weakened by the progress of demolition. *See e.g. Garcia v. 225 E. 57th St. Owners, Inc.*, 96 A.D.3d 88, 942 N.Y.S.2d 533 (1st Dep't 2012). Linton testified he could not recall when the bolts affixing the staircase were removed, and plaintiff's work did not involve removing any structural components.

Neighborhood has demonstrated that plaintiff was not working within an open shaft or stairwell, *see e.g. Sharp v. Scandic Wall Ltd. P'ship*, 306 A.D.2d 39, 760 N.Y.S.2d 478 (1st Dep't 2003), and plaintiff has not responded to the dismissal of his Labor Law § 241-a cause of action.

In moving on plaintiff's Labor Law § 200 claim, Neighborhood contends that plaintiff is unable to identify a specific defective condition that caused the accident. Avitabile states Neighborhood had no notice of a defect or dangerous condition. A party moving for summary judgment, though, may not succeed by merely pointing to gaps in plaintiff's proof. *See Alvarez v. 21st Century Renovations Ltd.*,

66 A.D.3d 524, 887 N.Y.S.2d 64 (1st Dep't 2009). It must affirmatively demonstrate the absence of triable issues of fact. *Id.* Here, triable issues of fact preclude granting summary judgment for either plaintiff or Neighborhood. Generally, an owner will not be held liable on a Labor Law § 200 cause of action unless it had the authority to supervise and control the work or had notice of or created a dangerous condition that caused the accident. *See Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 950 N.Y.S.2d 35 (1st Dep't 2012). While it is be possible to attribute the collapse to a structural defect in the staircase, for which Neighborhood may be liable, the staircase had been altered from its original state. Plaintiff testified that the walls adjacent to the staircase had been removed prior to the accident, and Linton testified that braces had been installed. It is, therefore, also possible that Aleem's work in and around the staircase, over which Neighborhood exercised no control, created a dangerous condition. Neither party submits any expert proof identifying the dangerous condition.

Neighborhood also moves for summary judgment on its cross-claims for contractual and common law indemnification against West. Although the agreement between Neighborhood and West contains an indemnification provision, the provision includes no language limiting indemnification. *See Picaso v. 345 E. 73 Owners Corp.*, 2012 NY Slip Op 8654 (App. Div. 1st Dep't 2012). Questions of fact exist concerning Neighborhood's liability on plaintiff's Labor Law § 200 claim preclude granting Neighborhood summary judgment at this juncture. *Id.*

Accordingly, it is

ORDERED, that the motion by defendant Neighborhood Partnership Housing Development Fund Company, Inc. seeking summary judgment dismissing plaintiff's complaint (Motion Sequence # 7) is granted to the extent of dismissing plaintiff's Labor Law § 241-a cause of action and Labor Law § 241(6) cause of action predicated upon violations of OSHA and 12 NYCRR §§ 23-1.7, 1.11, and 2.7; and it is further

ORDERED, that the motion by defendant Neighborhood Partnership Housing Development

Fund Company, Inc. seeking summary judgment on its cross-claim for contractual and common law indemnification against defendant West 132nd Street, LLC is denied as premature; and it is further

ORDERED, that plaintiff's motion for partial summary judgment on the issue of the liability of defendants Neighborhood Partnership Housing Development Fund Company, Inc. and West 132nd Street, LLC (Motion Sequence # 8) is granted to the extent of granting judgment on liability against defendants Neighborhood Partnership Housing Development Fund Company, Inc. and West 132nd Street, LLC on his Labor Law § 240(1) cause of action; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Neighborhood Partnership Housing Development Fund Company, Inc. dismissing plaintiff's Labor Law § 241-a cause of action and Labor Law § 241(6) cause of action predicated upon violations of OSHA and 12 NYCRR §§ 23-1.7, 1.11, and 2.7; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff on the issue of the liability of defendants Neighborhood Partnership Housing Development Fund Company, Inc. and West 132nd Street, LLC on his Labor Law § 240(1) cause of action.

This constitutes the decision and order of the court.

Dated: January 11, 2013

Lucindo Suarez, J.S.C.