Singh v City of New York
2014 NY Slip Op 30246(U)
January 24, 2014
Supreme Court, Queens County
Docket Number: 25117/09
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

TARSEM SINGH

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITYDEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY andPRESTIGE CONSTRUCTION SERVICES

Defendants.

Index Number: 25117/09

Motion Date: 9/9/13

Motion Seq. No. 4

The following papers numbered 1 to 11 read on this motion by defendant City of New York, defendant New York City Department of Education, defendant New York City School Construction Authority, and defendant Prestige Construction Services, Inc. for summary judgment dismissing the complaint against them

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.......................................	1 - 6
Answering Affidavits - Exhibits..	7 - 8
Reply Affidavits..	9 - 11

Upon the foregoing papers it is ordered that:

The branch of the motion which is for summary judgment dismissing the complaint against defendant New York City Department of Education is granted.

The branch of the motion which is for summary judgment dismissing the complaint against defendant Prestige Construction Services, Inc. is granted.

Those branches of the motion which are for summary judgment dismissing the causes of action for common law negligence are granted.

Those branches of the motion which are for summary judgment dismissing the causes of action based on Labor Law §200 are granted.

Those branches of the motion which are for summary judgment dismissing the causes of action based on Labor Law §240 are denied.

Those branches of the motion which are for summary judgment dismissing the causes of action based on Labor Law §241(6) are denied.

I. The Facts

On November 7, 2008, plaintiff Tarsem Singh, a bricklayer employed by the Orba Construction Company, worked at PS 200 located at 70-10 164th Street, Fresh Meadows, New York. The plaintiff received his instructions exclusively from his foreman, who, on that day, told him and four other Orba employees to do pointing work starting on the second floor level. The workers did their work on a scaffold they constructed by moving planks on the piping, although Orba had ladders at the construction site. The workers eventually did pointing work on two wooden planks that were ten feet long and about a foot in width which formed a scaffold that was seven to eight feet above an alley. The support pipe upon which the planks rested "became dislodged," causing the planks and the plaintiff who was standing upon them to fall to the ground. The plaintiff sustained injury, including a fracture of the right calcaneus, which required surgery.

Defendant New York City Department of Education (DOE) operated the school. However, DOE did not own PS 200, nor did it contract for the work to be performed at PS 200. DOE did not supervise, direct, or control the construction activities at the school, and DOE did not act as the general contractor or construction manager.

Prestige Construction Services, Inc. was the scaffolding contractor.

II. The Complaint

The plaintiff began this action by the filing of a summons and a complaint on September 17, 2009. He asserted causes of action based on common law negligence and violations of Labor Law §§ 200, 240, and 241.

III. Defendant DOE

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Defendant DOE successfully carried this burden. For the purposes of the relevant Labor Law sections, "the term 'owner' encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit' ***." (*Allan v. DHL Exp. (USA), Inc.,* 99 AD3d 828, 830, quoting *Copertino v. Ward,* 100 AD2d 565, 566.) DOE denied without contradiction that it had an interest in the school or contracted for the work to be performed. Defendant DOE denied ownership of the school and denied responsibility for oversight of the construction activities. Absent control over the plaintiff's work, liability did not arise under Labor Law §§ 200, 240, and 241 (*see*, *Kosovrasti v. Epic [217] LLC*, 96 AD3d 695), nor did it arise under the common law as negligence. *(See, Lombardi v. Stout*, 80 NY2d 290.) In opposition, the plaintiff failed to raise a genuine issue of fact precluding summary judgment.

IV. Defendant Prestige

Defendant Prestige demonstrated its prima facie entitlement to judgment as a matter of law by submitting evidence that it was merely a subcontractor at the construction site which did not erect the scaffolding from which the plaintiff fell. "Labor Law §§ 200, 240, and 241 liability cannot be assessed against a subcontractor who did not control the work that caused the plaintiff's injury ***" (*Zervos v. City of New York* 8 AD3d 477, 481), nor can liability attach for common law negligence where the subcontractor did not create the dangerous condition which caused the injury. (*See*, *Giovanniello v. E.W. Howell, Co., LLC*, 104 AD3d 812.) In opposition, the plaintiff failed to submit evidence showing that there is a genuine issue of fact which must be tried.

V. The Cause of Action for Common Law Negligence

"To prove a prima facie case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff***." (*Gordon v Muchnik*, 180 AD2d 715.) The common law imposes a duty upon an owner and a general contractor to provide a worker with a safe place to work. (*See*, *Comes v New York State Electric and Gas Corp*.,82 NY2d 876; *Torres v. Perry Street Development Corp*., 104 AD3d 672.) This duty may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities. (*See*, *Smith v. Nestle Purina Petcare Co.,* 105 AD3d 1384.) In the case at bar, the defendant city and

defendant SCA made a prima facie showing that they did not create the dangerous condition which caused the plaintiff's injury (*see*, *Smith v. Nestle Purina Petcare Co.*, *supra*; *Thompson v. BFP 300 Madison II, LLC,* 95 AD3d 543) and did not have notice of the dangerous condition. (*See*, *Carty v. Port Authority of New York and New Jersey*, 32 AD3d 732.) The defendant city and defendant SCA also made a prima facie showing that they neither controlled nor supervised the plaintiff's work and had no responsibility for the danger arising from his work. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v. Stout*, 80 NY2d 290, 295; *see, Smith v. Nestle Purina Petcare Co.,* 105 AD3d 1384; *LaRosa v. Internap Network Services Corp.,* 83 AD3d 905.) The burden on this branch of the motion shifted to the plaintiff, requiring him to produce evidence showing that there is a genuine issue of fact which must be tried. (*See, Alvarez v. Prospect Hospital, supra*.) He failed to carry this burden.

VI. The Cause of Action Based on Labor Law §200

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Comes v New York State Electric and Gas Corp*., 82 NY2d 876, 877.) Where a defendant has not exercised supervisory control and an injury results from a contractor's methods, liability does not attach pursuant to Labor Law § 200. (*Comes v New York State Electric and Gas Corp., supra*.) In the case at bar, the defendant city and defendant SCA made a prima facie showing that they did not exercise supervisory authority over the activities of the plaintiff on the day of his accident and that his injury resulted from his improper erection of a construction scaffold. They also made a prima facie showing that they did not have notice of the defective scaffold. (*See*, *Carty v. Port Authority of New York and New Jersey, supra*.) The defendants made a prima facie showing of their entitlement to judgment as a matter of law (*see*, *Alvarez v. Prospect Hospital, supra*), and, in opposition, the plaintiff failed to submit evidence showing that summary judgment is precluded by an issue of fact.

VII. The Cause of Action Based on Labor Law §240(1)

Labor Law § 240(1) provides: "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

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to give proper protection to a person so employed." (*See, Blake v. Neighborhood Housing Services of New York City, Inc. 1 NY3d 280.)*

The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509), and a violation of the duty results in absolute liability. (*Wilinski v. 334 East 92nd Housing Development Fund,* 18 NY3d 1; *Bland v Manocherian*, 66 NY2d 452; *Jamindar v. Uniondale Union Free School Dist*., 90 AD3d 612; *Paz v. City of New York*, 85 AD3d 519.) "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense." (*Cahill v. Triborough Bridge and Tunnel Authority* 4 NY3d 35, 39.) Comparative negligence is not an issue which can be raised by a defendant in a claim based on Labor Law §240(1) . (*Dean v. City of Utica*, 75 AD3d 1130; *Gizowski v. State of New Y ork*, 66 AD3d 1348.)A defendant cannot avoid liability unless the plaintiff worker's own actions were the sole proximate cause of the accident. (*Cahill v. Triborough Bridge and Tunnel Authority, supra; Blake v. Neighborhood Housing Services of New York* , 1 NY3d 280.)

In the case at bar, the defendant City and defendant SCA argue that the plaintiff's own improper construction of a scaffold and failure to use available ladders were the sole proximate cause of the accident. The defendants submitted the affidavit of Daniel M. Paine, a construction safety and fall protection expert, who alleges that the plaintiff erected an improperly built and unsafe scaffold on his own and the affidavit of Mukesh Kumar, the plaintiff's foreman, who alleges that ladders were available at the site and could have been used by the plaintiff.

The court is mindful of cases which have found that a plaintiff's actions were the sole proximate cause of his fall from a scaffold or ladder. (See, e.g, *Montgomery v. Federal Express Corp*., 4 NY3d 805 [failure to use available ladder]; *Arnold v. Barry S. Barone Const. Corp.*, 46 AD3d 1390 [failure to use available ladder]; *Gittleson v. Cool Wind Ventilation Corp*.,46 AD3d 855 [injured plaintiff chose to use "an improperly-placed, unopened, and unsecured ladder rather than the one he had brought and used earlier that day"]; *Plass v. Solotoff*, 5 AD3d 365 [plaintiff "unilaterally made the determination to use only one plank on the scaffold he owned, despite having all three planks available to him for use"].)

However, the court finds that in the case at bar there is a triable issue of fact concerning whether the plaintiff's actions were the sole proximate cause of his injuries. (*See, e.g. Singh v. City of New York,* -AD3d-. -NYS2d -, 2014 WL 56112 [fall from ladder];*Corchado v. 5030 Broadway Properties, LLC,* 103 AD3d 768 [fall from ladder which allegedly "kicked out"]; (6) *Allan v. DHL Exp. (USA), Inc*., 99 AD3d 828 [fall from

scaffold]; *Schick v. 200 Blydenburgh, LLC*, 88 AD3d 684 [fall from ladder allegedly not placed properly by plaintiff]; *Berenson v. Jericho Water Dist.*, 33 AD3d 574 [fall from scaffold with an allegedly inadequate wooden plank placed by plaintiff or workers under his supervision]; *Heffernan v. Bais Corp.*, 294 AD2d 401 ["question of fact as to whether the failure of the scaffold to support the plaintiffs resulted solely from their own conduct in neglecting to replace the plywood over the 2 x 8 planks before stepping out into the elevator shaft"] *Styer v. Walter Vita Const., Inc.,*174 AD2d 662 [fall from scaffold partially dismantled by the plaintiff].) Plaintiff Singh submitted evidence that his company permitted workers to shift planks around on the scaffold, which, if true, would negate the defense that his actions were the sole proximate cause of the accident. (*See*, *Miraglia v. H & L Holding Corp.,* 36 AD3d 456; *Pichardo v. Aurora Contractors, Inc*., 29 AD3d 879.) There is also evidence that although he assisted in constructing the scaffold, he himself did not place the planks on the scaffold the time right before his fall. When asked at his pretrial deposition, "But you did not personally place the boards on the frame of the scaffold?", he replied, "No. Another person did that." (Deposition, page102.)

VIII. The Cause of Action Based on Labor Law §241(6)

Labor Law §241(6) provides, inter alia, that areas in which construction, excavation or demolition is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them. (*See, Rizzuto v. L.A. Wenger Contracting Co., Inc.,* 91 NY2d 343.) The duty imposed by Labor Law § 241(6) upon owners and contractors is nondelegable.(*Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; Comes v New York State Electric and Gas Corp.,* 82 NY2d 876)

A cause of action based on Labor Law § 241(6) "must refer to a violation of the specific standards set forth in the implementing regulations (12 NYCRR Part 23)." (*Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 317 [emphasis added]; *Vernieri v Empire Realty Co.*, 219 AD2d 593.) In order to prove a cause of action pursuant to Labor Law § 241(6), a plaintiff must show that the defendant " violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles ***." (*Adams v. Glass Fab, Inc.*, 212 AD2d 972, 973.) " [T]he particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles ***." (*Misicki v. Caradonna,* 12 NY3d 511, 515.)

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) In the case at bar, the defendants made a prima facie showing that the numerous provisions of the Industrial Code relied upon by the plaintiff do not support his cause of action based on Labor Law §241. The plaintiff specifically only chose to contest sections 23-5.1, and 23-5.2 of the Industrial Code. The court finds that Industrial Code sections 23-5.1 (c) , (e) (1), and (h) set forth specific, rather than general, safety standards, and are sufficient to support a Labor Law § 241(6) cause of action. (*See*, *Klimowicz v. Powell Cove Associates, LLC*, 111 AD3d 605.)

Dated: January 24, 2014

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J.S.C.