

Martinez v 342 Property LLC

2014 NY Slip Op 30541(U)

January 22, 2014

Supreme Court, Bronx County

Docket Number: 309937/2009

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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JAIRO MARTINEZ,

Plaintiff,

- against -

342 PROPERTY LLC, FLINTLOCK CONSTRUCTION
SERVICES, LLC and SITE SAFETY LLC,

Defendants.

-----X

FLINTLOCK CONSTRUCTION SERVICES, LLC,

Third-Party Plaintiff,

- against -

US REINFORCED CONCRETE, LLC,

Third-Party Defendant.

-----X

342 PROPERTY LLC and FLINTLOCK
CONSTRUCTION SERVICES,

Second Third-Party Plaintiffs,

- against -

US REINFORCED CONCRETE, LLC and NEW YORK
HOIST LLC,

Second Third-Party Defendants.

-----X

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated June 26, 2013 of defendants/second-third party plaintiffs 342 Property LLC and Flintlock Construction Services, LLC and the affirmation, affidavit, exhibits, and memorandum of law submitted in support thereof; plaintiff's notice of cross-motion dated January 7,

DECISION AND ORDER

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83892/2010

Second Third-Party Index No.
83960/2010

2014 and the affidavits and exhibits submitted in support thereof; and due deliberation; the court finds:

Plaintiff commenced this Labor Law action to recover damages for injuries sustained when a hydraulic unit shifted and pinned plaintiff against a concrete column. The unit was part of a derrick that had been disassembled at a construction project at 342 West 40th Street, New York County. 342 Property LLC owned the property and Flintlock Construction Services, LLC ("Flintlock") (collectively "342/Flintlock") served as the general contractor. 342/Flintlock now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for partial summary judgment on the issue of 342/Flintlock's liability on his Labor Law § 241(6) cause of action. The cross-motion, although untimely, will be considered. *See Brill & Meisel v. Brown*, 2014 NY Slip Op 180 (App. Div. 1st Dep't Jan. 14, 2014).

Plaintiff testified that the accident occurred as he and five or six other colleagues were moving an eight thousand pound hydraulic unit, which formed part of the derrick, out of an elevator and onto an adjacent platform or ramp. The platform was elevated approximately three feet off the ground. Two of the four wheels which had been affixed to the base of the unit broke as they moved the unit on the platform. Using chains, they attempted to push the unit, which was sitting on the platform, onto the forks of a forklift. The wheels of the forklift were at ground level but the forks were elevated between three and four feet above the ground. The forks were "touching [the unit] a little bit about [a] half foot underneath the equipment. As they maneuvered the unit onto the forklift, the unit shifted, struck plaintiff's left side, and pinned him against a concrete column. He received all his instructions from Paul, the crane operator, and Osman Avila, the chief ironworker.

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers from risks inherent in elevated work sites. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 953 N.E.2d 794, 798, 929 N.Y.S.2d 556, 561 (2011). The statute applies to both falling worker and falling object cases. *Harris v. City of New York*, 83 A.D.3d 104, 108, 923 N.Y.S.2d

2, 5 (1st Dep't 2011). Plaintiff must demonstrate both a violation of the statute and that the violation was a proximate cause of the injury. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 761, 771 N.Y.S.2d 484, 488 (2003). Here, 342/Flintlock has not demonstrated its entitlement to summary judgment. It is not disputed that plaintiff and his co-workers were moving an eight thousand pound unit onto forks of a forklift about a half foot underneath the unit. The unit shifted "inches" and struck plaintiff's left side. Given the weight of the object, and the amount of force the unit was able to generate over a short distance, it cannot be said, as 342/Flintlock argues, that the accident did not involve the application of gravity. *See Marrero v. 2075 Holding Co. LLC*, 106 A.D.3d 408, 964 N.Y.S.2d 144 (1st Dep't 2013); *Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 938 N.Y.S.2d 288 (1st Dep't 2012).

"In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct." *Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 544, 923 N.Y.S.2d 74, 77 (1st Dep't 2011). Plaintiff identifies the following Industrial Code as statutory predicates: 12 NYCRR § 23-1.2(e) (finding of fact related to the movement of heavy material); 12 NYCRR § 23-1.5(a) (health and safety protection required); 12 NYCRR § 23-1.5(b) (general requirement of competency); 12 NYCRR § 23-1.7(a)(1) (overhead protection); 12 NYCRR § 23-6 (material hoisting); 12 NYCRR § 23-8 (mobile cranes, tower cranes and derricks); and 12 NYCRR § 23-9 (power-operated equipment). Plaintiff in opposition submits the affidavit of expert Robert J. O'Connor, P.E. Mr. O'Connor opined that 342/Flintlock violated 12 NYCRR §§ 23-1.5(b) and 23-6.1(c), (d) based on his review of the deposition testimony and the incident report. Plaintiff, it appears, has abandoned his reliance on the other Industrial Code provisions. *See Cardenas v. One State St., LLC*, 68 A.D.3d 436, 890 N.Y.S.2d 41 (1st Dep't 2009). In any event, the accident did not involve an overhead hazard or the operation of a crane, derrick or other power-operated equipment.

Contrary to plaintiff's contention, 12 NYCRR § 23-1.5(b) is too general support a Labor Law 241(6) claim. *See Carty v. Port Auth. of N.Y. & N.J.*, 32 A.D.3d 732, 821 N.Y.S.2d 178 (1st Dep't 2006), *leave denied*, 8 N.Y.3d 814, 870 N.E.2d 694, 839 N.Y.S.2d 453 (2007). 12 NYCRR § 23-6 is also too general to support a Labor Law § 241(6) claim, *see Brown v. New York City Economic Dev. Corp.*, 234 A.D.2d 33, 650 N.Y.S.2d 213 (1st Dep't 1996), and it has been determined that Section 23-6.1(c) is "unquestionably general." *Sharrow v. Dick Corp.*, 233 A.D.2d 858, 861, 649 N.Y.S.2d 281, 284 (4th Dep't 1996). However, Section 23-6.1(d) has been found sufficient to stand as a Labor Law § 241(6) predicate. *See Hayden v. 845 UN Ltd. P'ship*, 304 A.D.2d 499, 758 N.Y.S.2d 647 (1st Dep't 2003). That provision states that "material hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer" and that the load shall be "trimmed to prevent dislodgment of any portions of such loads during transit." The provision also requires that "suspended loads shall be securely slung and properly balanced before they are set in motion." Here, there is no indication that the unit was overloaded or that it had been suspended prior to the accident. Moreover, a material hoist is "essentially an elevator for materials." *McLaughlin v. Plaza Construction Corp.*, 2008 N.Y. Misc. LEXIS 9790, *at 25 (Sup. Ct. New York County Nov. 13, 2008) (internal citation omitted). Plaintiff has not shown that he was operating a material hoist at the time of the accident. *See Hawkins v. City of New York*, 275 A.D.2d 634, 713 N.Y.S.2d 311 (1st Dep't 2000).

To impose liability under Labor Law § 200, an owner or contractor must control the work that brought about plaintiff's injury or have actual or constructive notice of the defective condition. *See LaRose v. Resinick Eighth Ave. Assoc., LLC*, 26 A.D.3d 470, 810 N.Y.S.2d 493 (1st Dep't 2006). Where the defect arises from a contractor's methods over which the owner has no control, liability may not attach. *See Delaney v. City of New York*, 78 A.D.3d 540, 911 N.Y.S.2d 57 (1st Dep't 2010). Plaintiff's injury was not the result of a hazardous condition at the site, and he has submitted no opposition addressing the claim.

Accordingly, it is

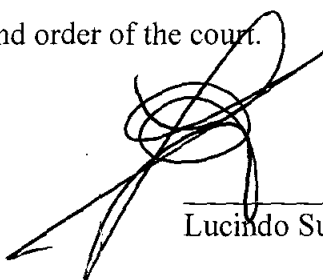
ORDERED, that the motion of defendants 342 Property LLC and Flintlock Construction Services, LLC for summary judgment dismissing the second third-party complaint is granted to the extent of dismissing plaintiff's Labor Law §§ 200, 241(6) and common law negligence claims; and it is further

ORDERED, that plaintiff's cross-motion for partial summary judgment on the issue of defendants' liability on his Labor Law § 241(6) claim is denied;

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants 342 Property, LLC and Flintlock Construction Services, LLC dismissing plaintiff's Labor Law §§ 200, 241(6) and common law negligence claims against them.

This constitutes the decision and order of the court.

Dated: January 22, 2014



Lucindo Suarez, J.S.C.