Polito v SLG 100 Park LLC
2014 NY Slip Op 31344(U)
May 22, 2014
Sup Ct, New York County
Docket Number: 150726/2012
Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

POLITO, MICHAEL

- v -

SLG 100 PARK LLC and TISHMAN CONSTRUCTION CORPORATION

INDEX NO. 150726-2012

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 6, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits----------	No(s). 1, 2
Notice of Cross-Motion — Affirmation — Affidavit(s) — Exhibits----------	No(s). 3, 4
Affirmation in Reply on Plaintiff'S Motion and in Opposition to Defendants' Cross-Motion — Exhibits----------	No(s). 5
Replying Affirmation in Further Support of Defendants Cross-Motion----------	No(s). 6

Upon the foregoing papers, it is hereby:

Plaintiff Michael Polito ("plaintiff") moves by notice of motion dated January 18, 2013 for an order granting him summary judgment under Labor Law §§ 240 [1] and 241 [6] against defendants SLG 100 Park LLC ("SLG") and Tishman Construction Corporation ("Tishman"). Defendants cross-move pursuant for an order granting them summary judgment and dismissing plaintiff Labor Law §§ 240 [1] and 241 [6] claims.

In support of the motion, plaintiff avers that on May 18, 2011 he was working on the 18th floor of a construction site located at 100 Park Avenue in New York County. Plaintiff claims he was pulling heavy electrical wire with a pull rope that was being fed to him by one of his co-workers in an air shaft accessible through a small access hatch door. Plaintiff claims he was working pursuant to instructions given to him by his employer, Michael Mazzeo Electric Corp. ("Mazzeo"). Plaintiff avers that he was standing on an elevated floor comprised of multiple steel grates, approximately two inches thick, which were resting on I -beams that framed the floor of the air shaft. The air shaft was utilized exclusively for construction and renovation purposes. The floor was approximately 20 feet wide by 20 feet long and plaintiff claims he was not provided with a protective device to prevent him from falling. Plaintiff claims that as he was pulling the electrical wire the steel grate he was standing on shifted suddenly off the horizontal I-beam it was resting on and collapsed underneath him. The grate fell approximately 30 feet to the floor below. Plaintiff's body fell approximately 4 feet through the opening created by the missing grate. Plaintiff claims that when he fell through the floor he was holding onto the electrical wire he had been pulling through the shaft. Plaintiff claims his hip, back and legs bounced off the I-beams as he fell through the floor and he ended up suspended in mid-air. As he was suspended, plaintiff's co-workers pulled him back up to safety. After he was pulled to safety plaintiff noticed that the grating was not secured to the I-beams. Plaintiff claims that the grate flooring would normally be welded or clamped to the I-beams so that the grates would not move.

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Robert Flanagan ("Flanagan"), plaintiff's co-worker, avers that he and plaintiff were working as part of a four man team on the 18th floor of the construction project located at 100 Park Avenue. According to Flanagan, as plaintiff was pulling electrical wire toward a junction box on the opposite side of the air shaft the steel grate plaintiff was standing on shifted off the horizontal I-beams and fell. Flanagan saw plaintiff's midsection slam into the I-beam supporting the grate as plaintiff was holding the electrical wire and was suspended in midair. Flanagan and another co-worker pulled plaintiff to safety. Like plaintiff, Flanagan also saw that the grates he and plaintiff were working on were not secured to the I-beams[1].

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 240 [1] claim because the steel grate upon which he was standing at the time of his accident constitutes a permanent scaffold, he fell due to defendants' failure to provide adequate safety equipment to protect him from the gravity-related risks created by the unsecured steel grate flooring, and defendants' violation of the Labor Law caused, at least in part, his injuries. Plaintiff also argues that he is entitled to summary judgment on his Labor Law § 241 [6] claim because defendants violated Industrial Code 12 NYCRR § 23-1.7 [b] [1].

In opposition to the motion and in support of the cross-motion, defendants argue that plaintiff's motion is premature and should be denied pursuant to CPLR § 3212 [f] as neither plaintiff nor any of the non-party witnesses to plaintiff's accident have been deposed. Defendants also contend that plaintiff's Labor Law §240 [1] claim must be dismissed because the steel grate floor where plaintiff was working was a permanent or normal appurtenance of the building and neither plaintiff's affidavit nor that of his co-worker establishes that there was a foreseeable elevation-related hazard in the area where plaintiff was working prior to the accident.

Defendants further contend that plaintiff's Labor Law § 241 [6] claim must be dismissed because the renovation project at issue herein and plaintiff's task of pulling electrical wire did not involve the structural integrity of the building. Defendants also argue that even if the Labor Law § 241 [6] is deemed to apply herein, the issue of causation and percentages of fault are questions of fact for a jury to resolve.

John Falherty ("Flaherty"), the property manager for SLG, avers that the work being done at 100 Park Avenue on the date of plaintiff's accident was not construction, excavation or demolition. Flaherty describes the work being done as remodeling and that Mazzeo's work as an electrical subcontractor did not involve the building as a whole or the structural integrity of the building. Flaherty also avers that the area where plaintiff was working immediately prior to his accident was a permanent, structural part of the building which served not only as a functional air shaft but is also used as an access point for conduits which run vertically to different tenant spaces on various floors of the building. According to Flaherty, the air shaft is often accessed by various maintenance personnel and contractors for the purposes of routine maintenance and to provide services such as electrical power, internet and telephone service to tenants. Thus, according to Flaherty, contrary to plaintiff's assertion, the area is not utilized exclusively for construction and renovation purposes.

Flaherty also avers that the permanent floor of the catwalk consists of a series of metal grates of various sizes placed tightly together to create a continuous appurtenance. Flaherty avers that the structure has been in place for the entire five years he has managed building and claims that it is not a temporary platform, scaffold or other device that was present only for construction purposes. Flaherty avers that the grates that make up the catwalk floor are made of heavy gauge, galvanized steel and that for as long as he has worked at the building the catwalk had provided a solid, strong surface on which to walk, stand and sit when inside the air shaft. Flaherty claims that there has not been a single report of any problem or instability with the floor of the catwalk during his tenure as property manager and no one has ever suggested a need to wear fall protection while using the catwalk.

Bernard Lorenz ("Lorenz"), a professional engineer, opines that the setup for the catwalk was not

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[1] The statement of Thomas Harrison, which was not notarized, was not considered by the court.

unsafe or unusual and contends that the setup of the steel grate floor was such that it could withstand a significant amount of weight and lateral force. Lorenz also opines that there was no need or cause to secure the grates with clamps or any other devices prior to plaintiff's accident.

Discussion

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*id.*). "On a motion for summary judgment, the court should accept as true the evidence submitted by the opposing party" (*Pellegrini v Brock*, 2009 NY Slip Op 6721 [1st Dept]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Plaintiff's Motion

Labor Law § 240 [1] states that: "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 to give proper protection to a person so employed." Labor Law § 240 [1] imposes a nondelegable duty upon the owner and contractor to provide proper and adequate safety devices to protect workers at an elevation from falling (*Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [1st Dept 2005]). To establish a cause of action under section 240 [1], a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 803 NE2d 757, 771 NYS2d 484 [2003]). The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one (*Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 [1]. Rather, liability is contingent upon the existence of a hazard contemplated in section 240 [1] and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 750 NE2d 1085, 727 NYS2d 37 [2001]). "[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, 922 NE2d 865, 895 NYS2d 279 [2009]).

A plaintiff is entitled to recover under section Labor Law § 240 [1] even if he or she was injured as a result of the collapse of a permanent structure (*Ortega v City of New York*, 95 AD3d 125 [1st Dept 2012]; *Jones v 414 Equities LLC* 57 AD3d 65 [1st Dept 2008]). However, in order to do so, a plaintiff is required to demonstrate not only that he or she was injured while engaged in a covered activity and that the defendant's failure to provide adequate safety devices of the type listed in Labor Law § 240 [1] resulted in a lack of protection, but also that the injury was foreseeable (*id.*). Put another way, "[w]here injury results from the failure of a completed and permanent structure within a building . . . a necessary element of a cause of action under Labor Law § 240 [1] is a showing that there was a foreseeable need for a protective device of the kind enumerated by the statute" (*Espinoza v Azure Holdings II, LP* 58 AD3d 287 [1st Dept 2008]). There does not appear to be a dispute among the parties as to whether the structure from which plaintiff fell is permanent or not. Defendants, through Flaherty's affidavit, contend that the steel grate floor or catwalk is a permanent appurtenance to the building, while plaintiff's counsel argues that the structure is a permanent scaffold. Whether the structure is a permanent catwalk

appurtenant to the building or the permanent, functional equivalent of a scaffold, under settled Appellate Division, First Department case law the question of whether the collapse or failure of a permanent structure gives rise to liability under Labor Law § 240 [1] turns on whether the risk of injury from an elevation-related hazard is foreseeable (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493 [1st Dept 2010]). Labor Law § 240 [1] applies when there is an inherent risk in the task being performed "because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 583 NE2d 932, 577 NYS2d 219 [1991]). Thus, "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*id.*). Since permanent structures are normally not expected to collapse or fail, work being performed thereon, much like work performed at ground level and not involving the hoisting or securing of materials, does not usually expose a worker to a gravity-related hazard (*Vasquez*, 79 AD3d at 496). Accordingly, only if a defendant has reason to foresee that the permanent structure is likely to collapse does it then have to comply with the mandates of Labor Law § 240 [1] by providing the safety devices enumerated therein (*id.*). Since plaintiff's claim that the steel grates were not secured to the I-beams does not, in and of itself, establish that the collapse of the grate floor was foreseeable, and therefore, that defendants should have provided plaintiff with safety devices, plaintiff has failed to meet his prima facie burden of demonstrating his entitlement to judgment as a matter of law (*Martins v Board of Educ. of City of New York*, 82 AD3d 1062 [1st Dept 2011]).

Defendants' Cross-Motion

Defendants, in cross-moving to dismiss plaintiff's Labor Law § 240 [1] claim, have failed to satisfy their prima facie burden of establishing that plaintiff's injuries were not foreseeable. Lorenz's opinion that the setup of the grate floor was not unusual or unsafe and that it could withstand a significant amount of weight and lateral force lacks any probative value in light of his admission that he could not determine the precise gauge of the steel or the exact finish of the grates from his review of photographs. Flaherty's affidavit offers only self-serving assertions, all of which should be addressed at a deposition (*see Ocasio v Town of Greenburgh*, 79 AD3d 426 [1st Dept 2010]).

Labor Law § 241 [6], which imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350, 693 NE2d 1068, 670 NYS2d 816 [1998]), is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263 [1st Dept 2007]). The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence (*id.*). The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury. Moreover, to be entitled to the protection of Labor Law § 241 [6], a worker must establish that the injury occurred in an area "in which construction, excavation or demolition work is being performed" (Labor Law § 240 [6]).

Industrial Code section 23-1.7 [b] applies to hazardous openings, not elevated hazards such as the one in this case (*Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799 [2d Dept 2013] [Industrial Code section 23-1.7 [b] does not apply where plaintiff fell through a broken plank on a catwalk]; *Allen v DHL Express (USA), Inc.*, 99 AD3d 828 [2d Dept 2012]). Plaintiff did not fall through a hazardous opening but allegedly through a collapsed section of the steel grate floor itself (*see Kochman v City of New York*, 110 AD3d 477 [1st Dept 2013] *citing Ramirez*, 106 AD3d at 801). Plaintiff's Labor Law § 241 [6] claim is, therefore, dismissed.

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted solely to the extent that plaintiff's Labor Law § 241 [6] claim, as predicated upon Industrial Code § 23-1.7 [b], is dismissed; and it is further

ORDERED that the parties are to appear for a status conference on June 17, 2014 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that plaintiff movant is to serve a copy of this order, with notice of entry, upon defendants within 20 days of entry.

George J. Silver J.S.C.

Dated: MAY 22 2014
New York County

GEORGE J. SILVER