

Vidal v Reliable Plumbing Supply of NYC, LLC

2014 NY Slip Op 31995(U)

June 17, 2014

Sup Ct, Bronx County

Docket Number: 305624/2011

Judge: Mary Ann Brigantti-Hughes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Briganti-Hughes

-----X
JOSE LUIS VIDAL,

Plaintiff,

-against-

DECISION / ORDER

Index No. 305624/2011

RELIABLE PLUMBING SUPPLY OF NYC, LLC.,
and ROBERT JOHNSON,

Defendants.
-----X

The following papers numbered 1 to 12 read on the below motions noticed on October 30, 2013 and duly submitted on the Part IA15 Motion calendar of **January 31, 2014:**

<u>Papers Submitted</u>	<u>Numbered</u>
Pl. Notice of Motion, Exhibits	1,2
Reliable Cross-Motion, Aff., Exhibits	3,4,5
RJ Cross-Motion, Aff., Exhibits	6,7
Pl. Aff. In Reply and in Opp. to Reliable, Exh.	8,9
Pl. Aff. In Reply and in Opp. To RJ, Exh.	10,11
RJ Aff. In Reply and further support, Exh.	12

Upon the foregoing papers, the plaintiff Jose Luis Vidal ("Plaintiff") moves for summary judgment on the issue of liability against the defendants Reliable Plumbing Supply of NYC, LLC ("Reliable"), and Robert Johnson ("RJ") on Plaintiff's claims under Labor Law §§240(1) and 241(6). The defendants oppose the motion, and both cross-move for summary judgment dismissing Plaintiff's complaint in its entirety. Plaintiff opposes the cross-motions to the extent they seek dismissal of his Labor Law §§240(1) and 241(6) claims. Plaintiff does not oppose dismissal of his Labor Law §200 and common law negligence claims.

I. Background

This matter arises out of an alleged construction site accident that occurred on January 22, 2011, inside of a building located at 38-16 Skillman Ave., Queens, New York. At relevant times, the building was owned by defendant RJ. RJ leased a portion of the premises to commercial tenant Reliable. Plaintiff alleges that he was involved in the remodeling of the commercial

space. At the time of the accident, Plaintiff alleges that he was doing "taping work," which involved taping the seams between two pieces of newly constructed drywall. In order to reach upper portions of his work area, Plaintiff was allegedly provided with a scaffold with an "A-frame" ladder on top of it. Plaintiff placed the ladder on top of the scaffold, and rested it against a wall in his work area. He climbed up the ladder to perform his work. Plaintiff explains that after some time, the scaffolding "moved" and caused him to fall to the floor. Plaintiff testified that when the scaffold moved, he "fainted" and fell. Plaintiff also testified that he suffers from constant headaches, as well as diabetes, and was on medication at the time of his accident.

Plaintiff testified that he was hired by Paul LaPierre to perform the work, and was supervised by an individual he knew as "Gabriel." At the time of his accident, Plaintiff was working with another man, Julio Alacantha. Plaintiff explained that he was unaware of the existence of Reliable, as Gabriel did not tell him about the company.

In opposition and in support of its cross-motion, Reliable submits that it was the commercial tenant at the property's ground floor. Reliable is comprised of three individuals - Sean O'Connor, John Frederico, and Alex Frederico. Reliable argues that it knew nothing of the Plaintiff, and did not contract for the work that he was allegedly performing at the time of this incident. Reliable had only contracted with Paul LaPierre to perform certain work at the premises. The work only consisted of the installation of shelving and cabinetry. Paul LaPierre testified that he did not know Plaintiff. He was contacted by Reliable to install a counter and bookshelves. That job required no sheet rock or taping, and he required no assistance. Mr. LaPierre testified that he hired no employees for the work. He testified that other "trade" workers were there at the time, including electricians, HVAC, carpenters, and tapers. He didn't need any ladder or scaffolding to install the counter and bookcases. He was not familiar with Julio Arcentales. He was aware of a "Gabriel" and believed that he was a "taper on one of B&V's jobs." He did not know if Gabriel was there or not. John Frederico testified that he never contracted for the type of work that Plaintiff was allegedly performing, did not know Plaintiff, and never saw scaffolds or ladders around the premises at relevant times.

RJ acknowledged that it owned the premises, but explains that upon visiting the premises on January 28, 2011, he observed no sheet rock or divider walls, or evidence that any such walls

or partitions had been recently erected. RJ never contracted for such work. Plaintiff was a “complete stranger” to RJ and RJ did not expressly or implicitly permit Plaintiff to come onto the premises for any purpose.

Following a Workers’ Compensation proceeding, the judge found, *inter alia*, that RJ was not Plaintiff’s employer, but that an employer-employee relationship existed between Plaintiff and Paul LaPierre/Changes Home Improvements and Renovations, and that Reliable was liable as the general contractor pursuant to Workers’ Compensation Law §56. This decision was later affirmed by a Workers’ Compensation Board panel decision.

As noted above, the respective parties now move and cross-move for summary judgment.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “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 from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

Plaintiff's Motion for Summary Judgment

Labor Law §240(1) imposes a duty of protection of employees upon owners, contractors and their agents “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The duty consists in providing “scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices.” The foregoing devices are to be furnished in a manner sufficient to give “proper protection” to the workers. Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 [1993]). Specifically, the statute imposes liability in situations where a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 [1991]). The two elements of a 240(1) cause of action are that the statute was violated and that the violation was a proximate cause of the injury (*Blake, supra*; *Bland v. Manocherian*, 66 N.Y.2d 452 [1985]), *Chacha v. Glickenhauz Doynow Sutton Farm Development, LLC*, 69 A.D.3d 896).

To prevail on a motion for partial summary judgment on a cause of action under Labor Law §240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries. (*Auriemma v. Biltmore Theatre, LLC.*, 82 A.D.3d 1 [1st Dept. 2011][internal citations omitted]).

Here, Plaintiff's motion for summary judgment on its Labor Law §§240(1) and 241(6) claims cannot be granted because there is a genuine issue of fact as to whether this accident occurred in the manner he describes. Where an injured workers' version of the accident is inconsistent with either his own previous account or that of another witness, a triable issue of fact may be presented (*Rodriguez v. New York City Housing Auth.*, 194 A.D.2d 460 [1st Dept. 1993][internal citations omitted]; *Urrea v. Sedgwick Ave. Assoc.*, 191 A.D.2d 319 [1st Dept. 1993]). While “minor, immaterial inconsistencies” in the plaintiff's testimony will not preclude entry of summary judgment in his favor (*Rodriguez v. Forest City Jay Street Assoc.*, 234 A.D.2d 68 [1st Dept. 1996]), “if the evidence suggests that the injury was caused by some cause other

than defendants' violation of the Labor Law, a fact issue is presented (*see e.g. Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958.). In this matter, John Frederico testified that he saw no scaffolding or ladders on the premises when he visited during the time in question. No one had ever requested that a worker use a scaffold or ladder to perform work. Paul LaPierre, who Plaintiff claims hired him, testified that he never employed any workers and that none of the work he was doing at the site required ladders or scaffolding. RJ testified that upon visiting the premises, he never saw anyone performing sheetrocking or taping, and didn't see any walls or partitions added. This conflicting testimony is sufficient to raise a "bona fide credibility issue" regarding plaintiff's testimony (*Wasilewski v. Museu of Modern Art*, 260 A.D.2d 271 [1st Dept. 1999]). Even assuming, as urged by Plaintiff, that Reliable was the general contractor for this alleged construction project, the above contradictory evidence as to the facts and circumstances surrounding this accident requires denial of Plaintiff's motion for summary judgment on both his Labor Law §240 and §241(6) claims (*see Maldonado v. Townsend Ave. Enterprises*, 294 A.D.2d 207 [1st Dept. 2002]; *Eitner v. 119 W. 71st St. Owners Corp.*, 253 A.D.2d 641 [1st Dept. 1998]).

Defendants' Cross-Motion for Summary Judgment

First, both Reliable and RJ argue that this matter must be dismissed because Plaintiff fainted before he fell, and was therefore the sole proximate cause of this accident. A reasonable reading of the testimony, however, belies the contention. Plaintiff consistently testified throughout his Workers' Compensation hearing and at his examination before trial that a movement of the scaffolding caused him to fall. At the Workers' Compensation hearing, he testified "...I was on the scaffold on the ladder. I only fell when the scaffold moved and I fell down..." He was later questioned "...after you fell from the scaffolding, what's the first thing you remember?" and responded "I don't remember anything because when I fell down I fainted." At his deposition, Plaintiff testified that as he was working, "the scaffold moved, and when that happened, that movement happened, I couldn't get down" (Pl. EBT at 123)... "The scaffold opened up, it opened up, and I fell" (*Id.* at 127).. and "Once it opened, I fainted" (*Id.* at 236). A plain reading of the testimony reveals that Plaintiff fell because the scaffold "moved" and created an opening. Plaintiff unequivocally testified that he only fainted once the scaffold moved. This

leads to the conclusion that the safety equipment in use did not provide the proper protection for plaintiff to effectuate his work. As explained *supra*, however, other credibility issues regarding the Plaintiff preclude entry of summary judgment in his favor on his Labor Law §240(1) claims.

Reliable

Reliable also argues that it is entitled to dismissal of Plaintiff's complaint because there is no nexus between the injured plaintiff and Reliable. Reliable argues that there is no evidence that Reliable retained Paul LaPierre (who allegedly hired Plaintiff) or "Gabriel" to perform the work that Plaintiff was engaged in when he was allegedly injured. A review of the record, however, reveals factual discrepancies that cannot be resolved on a motion for summary judgment. Plaintiff contradicts Paul LaPierre's testimony, and he alleges that he was in fact hired by Mr. LaPierre to perform the sheetrock work. Plaintiff's co-worker, Julio Alacantha, corroborates Plaintiff's testimony. Mr. LaPierre acknowledges that he knew Mr. Alacantha and "Gabriel" as "tapers," even though he did not recall whether they were on the premises when he was there. Contrary to the moving papers, there is at least some evidence on the record that Reliable retained Mr. LaPierre to perform renovation work on the premises during the relevant time period. Deciding whether or not that project actually involved hiring "tapers" such as Plaintiff and his alleged co-workers would require a resolution of credibility issues, which this Court cannot do on a motion for summary judgment.

This Court agrees that the Workers' Compensation Board determination that Reliable was a "general contractor" is not barred from "re-litigation" by the doctrine of collateral estoppel, since Plaintiff did not establish an identity of the issues presented in the workers compensation proceeding (*Toukara v. Ferincola*, 63 A.D.3d 648 [1st Dept. 2009]). The Board only decided whether Reliable was a "general contractor" in the context of Workers' Compensation Law §56, and not in the context of New York Labor Law. Further, the Board only found that LaPierre "may have acted in a supervisory capacity at the work site on behalf of Reliable" and based its decision largely upon the absence of any testimony of Sean O'Connor. This does not, however, conclusively resolve the issue of liability under Labor Law in favor of Reliable, and thus the motion to dismiss Plaintiff's Labor Law §240(1) claims must be denied.

RJ

RJ argues that it is entitled to dismissal of Plaintiff's Labor Law §240(1) claim. First, RJ contends that there is insufficient evidence that Plaintiff even had an accident at 38-16 Skillman Avenue. As noted above, however, this issue is unresolved and would require credibility determinations.

RJ next argues that it is entitled to dismissal of the Labor Law §240 claim because there is no nexus between Plaintiff and RJ, an out of possession landlord (citing, among others, *Abbateiello v. Lancaster Studio Assoc., et al.*, 3 N.Y.3d 46 [2004]). The Court of Appeals has held, however, that an owner of a property may be liable for a violation of Labor Law even though the job was performed by an independent contractor over which the owner exercised no supervision or control (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 [1991]). The Court has further held that "an owner's lack of notice or control over the work is non-conclusive" on the issue of whether it is liable for a Labor Law violation (*Sanatass v. Consolidated Investing Co., Inc.*, 10 N.Y.3d 333 [2008]). In *Abbateiello*, the Court concluded that a worker is not entitled to Labor Law §240 protection where there is no nexus between the worker and the property. Such a "nexus" may be established by lease, easement, or some other property interest. In *Abbateiello*, the worker-cable technician was not entitled to Labor Law protection against the owner of the property, since he was only permitted to be on the property by virtue of Public Service Law §228, which establishes mandatory access for cable repair work. Without that statute, the Court recognized that the worker "would be a trespasser.." on the defendant's land. In *Santass*, however, the Court distinguished *Abbateiello*, finding a nexus between the worker and the owner where the owner had leased the property to a commercial tenant, who in turn hired plaintiff's employer to perform work in the owner's building. Contrary to the assertions in RJ's moving papers, the instant matter appears indistinguishable from *Santass* - it is not disputed that RJ leased the premises to Reliable, and that Reliable hired LaPierre to perform work within the building. This demonstrates a sufficient nexus between RJ and the Plaintiff, since there are triable issues of fact as to whether LaPierre or Reliable, thereafter, hired Plaintiff to perform the injury-producing work. Accordingly, RJ's motion to dismiss Plaintiff's Labor Law §240(1)

claims on these grounds is denied.

Plaintiff's Claims under Labor Law §241(6)

Both defendants seek dismissal of Plaintiff's claims of a violation of Labor Law §241(6). To the extent that a plaintiff asserts a viable claim under this section, the plaintiff must demonstrate that his injuries were proximately caused by a violation of an applicable Industrial Code regulation. (*Penta v. Related Cos., L.P.*, 286 A.D.2d 674 [2nd Dept 2001]). The regulation(s) relied on must be "concrete specifications" as opposed to general safety standards. (*Ross v. Curtis-Palmer Hydro Electric, et. al.*, 81 N.Y. 2d 494 [1993]).

Regarding Industrial Code 12 NYRR 23-1.21(b), this Court agrees with defendants that there are disputed issues of fact regarding the alleged use of ladders here. The regulation requires a leaning ladder to be held in place by a person station at its foot when work is being performed "between 6-10 feet above the ladder footing..." Here, accepting Plaintiff's testimony, there is evidence that he was using an unsecured ladder on top of a scaffolding, at least 6 feet above its footing. An alleged violation under this Industrial Code is therefore applicable and must remain.

Industrial Code 12 NYRR 23-1.16 is inapplicable here, since this Rule only sets forth the standard for use of a safety belt, life line, or harness. Here, it is undisputed that Plaintiff was not provided with any such device (*see Phillip v. 525 E. 80th St. Condo.*, 93 A.D.3d 578 [1st Dept. 2012]).

The remaining Industrial Code violation claim addressed in the cross-moving papers is 12 NYRR 23-5.1(f), that requires scaffolds to be kept in good repair and free from defects. Defendants assert that there is no evidence to support a contention that the scaffolding was defective. Plaintiff did not address the arguments regarding this Industrial Code violation in his opposition papers. Any claims as to that section of the Industrial Code are therefore dismissed as abandoned (*Rodriguez v. Dormitory Authority of State*, 104 A.D.3d 529 [1st Dept. 2013]).

Plaintiff's claims that the Defendants violated Occupational Safety and Health Rules and Regulations ("OSHA"), as they pertain to construction, must be dismissed since violation of OSHA standards do not provide a basis for liability under §241(6) (*Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247 [1st Dept. 1999]).

Defendants' Cross-Motion regarding Plaintiff's claims under Labor Law §200 and Common Law Negligence

Plaintiff does not oppose either Reliable or RJ's motion to dismiss Plaintiff's Labor Law §200 and common law negligence claims. Defendants' motion for summary judgment regarding those claims are, therefore, granted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability is denied, and it is further,


ORDERED, that Defendants' motion for summary judgment, dismissing Plaintiff's Labor Law §240(1) claims, is denied, and it is further,

ORDERED, that Defendants' motion for summary judgment, dismissing Plaintiff's Labor Law §241(6) claims, is granted only to the extent of dismissing claims predicated on violations of 12 NYRR 23-1.16, 5.1(f), and the Occupational Safety and Health Rules and Regulations, and it is further,

ORDERED, that Defendants' motion for summary judgment, dismissing Plaintiff's Labor Law §200 and common law negligence claims, is granted, and those claims are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: June 17, 2014


Hon. Mary Ann Brigantti-Hughes, J.S.C.