

Balda v Tishman Constr. Corp.

2014 NY Slip Op 32085(U)

August 5, 2014

Sup Ct, New York County

Docket Number: 112528/09

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: DEBRA A. JAMES
Justice

PART 59

OTTO BALDA and MIRIAM BALDA,
Plaintiffs,

Index No.: 112528/09

Motion Date: 12/13/13

- v -

Motion Seq. No.: 03

TISHMAN CONSTRUCTION CORPORATION, NEW YORK
CONVENTION CENTER DEVELOPMENT CORPORATION
and NEW YORK CONVENTION CENTER OPERATING
CORPORATION,

Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

| | | |
|--|----------|----------|
| Notice of Motion/Order to Show Cause -Affidavits -Exhibits | No (s) . | <u>1</u> |
| Answering Affidavits - Exhibits | No (s) . | <u>2</u> |
| Replying Affidavits - Exhibits | No (s) . | <u>3</u> |

FILED

AUG 11 2014

Cross-Motion: Yes No

Upon the foregoing papers,

**COUNTY CLERK'S OFFICE
NEW YORK**

In this action for damages for injuries allegedly sustained in an accident at a construction site, defendants move for summary judgment dismissing plaintiffs' complaint, and for costs to be levied against plaintiffs for alleged frivolous activity with respect to their Labor Law § 241 (6) claim. Plaintiffs seek leave to file an untimely cross motion for summary judgment, and for summary judgment on the issue of defendants' liability under Labor Law § 240 (1).

This action arises from a fall at the Jacob K. Javits

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 IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Convention Center (Javits Center) during a Construction and Renovation Project at 608 West 40th Street, in Manhattan. On the day of the accident, April 25, 2009, plaintiff Otto Balda (plaintiff) was a carpenter employed by subcontractor John Civetta & Sons (Civetta). Defendant Tishman Construction Corporation (Tishman) was the construction manager on the site. Tishman was hired by defendant New York Convention Center Development Corporation (Development), which owned the Javits Center. Civetta subcontracted with Tishman to do excavation and foundation work during a very early stage of Phase One of the project to expand and construct a new building at the Javits Center.

On the day of the accident, plaintiff was installing steel DOKA frames which would serve as the framework of an exterior wall foundation. Plaintiff was locking DOKA panels together, one by one, while standing with one foot on the adjacent sidewalk, and one foot on a DOKA panel.

There was an excavation for the panels next to the sidewalk. The depth of the excavation is contested. Plaintiff alleges that the depth was approximately five feet. Defendants claim that the depth was 18 to 24 inches.

While he was stretching from one side to the other, plaintiff lost his balance and fell into the "indentation from the sidewalk level going down". Plaintiff twisted his right knee

as he fell into the excavation.

According to plaintiff, he was not given any kind of fall protection equipment by Civetta, but he also was not aware of any safety devices which would have prevented his fall. In the ten years he had worked for Civetta, he had not worn a harness or safety belt when he had installed DOKA panels at ground level, and no one had told him that he should wear a harness or safety belt when installing such metal panels at ground level. No scaffolding or ladder was involved in the accident.

Page 2 of 4 of Civetta's Safety Procedures requires fall protection for all workers "who are working on a platform more than 6'-0" above finished floor level." Those workers were required to "wear an ANSI approved full body harness which is tied to a substantial anchor." The Safety Procedures note that six feet is the maximum length of a lanyard. Thus, if, as plaintiff argues, he should have been provided with a harness or safety belt and lanyard, these safety devices would have been inappropriate and ineffective if, as plaintiff states, he fell five feet into the excavation.

In their initial complaint, plaintiffs brought an action against Tishman, alleging causes of action sounding in negligence and violations of Labor Law §§ 200, 240, 241, and 241 (a)¹. In

¹Plaintiffs bring a cause of action under Labor Law § 241 (a). There is no such statute. If, perhaps, plaintiffs mean to allege a violation of Labor Law § 241-a, that statute is patently

a second action, plaintiffs brought the same causes of action against the Javits Center entities, Development and New York Convention Center Operating Corporation (Operating). By stipulation dated June 28, 2010, both actions were consolidated.

As noted above, defendants move for summary judgment dismissing the complaint and for an award of costs for plaintiffs' alleged frivolous claims with respect to violations of Industrial Code sections. In their proposed cross motion, plaintiffs seek summary judgment in their favor on their Labor Law § 240 (1) cause of action.

"A cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion'" (Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 AD3d 446, 448-449 [1st Dept 2013], quoting Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006])).

Plaintiffs claim that defendants moved exactly 120 days after the filing of the note of issue, thereby ensuring that plaintiffs' cross motion would be untimely.

inapplicable, as section 241-a deals with "Protection of workmen in or at elevator shaftways, hatchways and stairwells."

"Moreover, the exception discussed in Filannino [34 AD3d 280 (1st Dept 2006)] allowing the courts to consider proper but untimely cross motions, at least as to issues shared with the original motion, addresses the dissent's concern that a cross-moving party might be caused to file its motion late because it had insufficient time before the deadline occurred. Of course, it must be pointed out that the cross movant would have good cause for its late motion in that situation, and the cross motion would be evaluated on its merits"

(Kershaw v Hospital for Special Surgery, 114 AD3d 75, 88 [1st Dept 2013]).

As the moving papers in this matter fall within these precedents, the court grants leave to file the proposed cross motion, and will consider the cross motion on its merits, along with defendants' timely motion.

"Summary judgment must be granted if the proponent makes 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, and the opponent fails to rebut that showing [internal quotation marks and citation omitted]"

(VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 58 [1st Dept 2013]). "[S]ummary judgment is the equivalent of a trial" (Ostrov v Rozbruch, 91 AD3d 147, 152 [1st Dept 2012]), but "[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (Meridian Mgt. Corp.

v Cristi Cleaning Serv. Corp., 70 AD3d 508, 510-511 [1st Dept 2010])).

Plaintiffs assert, in their March 14, 2011 bill of particulars, that defendants violated subsections 2 and 3 of section 240 of the Labor Law. These subsections pertain to scaffolding, and are patently inapplicable in this matter. Since plaintiffs have failed to address these statutes in their papers, the court considers these claims abandoned (see Musillo v Marist Coll., 306 AD2d 782, 784 n [3d Dept 2003])).

Labor Law § 240 (1) provides, in pertinent part:

"All contractors and owners and their agents . . . 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."

The statute provides "exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal quotation marks and citation omitted]" (Jamindar v Uniondale Union Free School Dist., 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to

'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011], quoting Misseritti v Mark IV Constr. Co., 86 NY2d 487, 490 [1995]).

Under Labor Law § 240 (1), "owners, general contractors and their agents have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites [internal quotation marks and citation omitted]" (Naughton v City of New York, 94 AD3d 1, 7 [1st Dept 2012]), and under both sections 240 (1) and 241 (6), the duty is imposed "regardless of the absence of control, supervision, or direction of the work" (Romero v J & S Simcha, Inc., 39 AD3d 838, 839 [2d Dept 2007]).

In addition, "[l]iability under Labor Law § 240 (1) depends on whether the injured worker's 'task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (Salazar v Novalex Contr. Corp., 18 NY3d 134, 139 [2011], quoting Broggy v Rockefeller Group, Inc., 8 NY3d 675, 681 [2007]). To establish liability under the statute, "a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (Herrera v Union Mech. of NY Corp., 80 AD3d 564, 565 [2d Dept 2011]). "[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 [2009]).

Plaintiff alleges that the excavation was five feet deep, and that he lost his balance and fell. Defendant Tishman's Supervisors' Accident Investigation Report records that the depth of the excavation was " 18" - 24" below grade," and again, "Man's foot slipped off DOKA form & he fell down approx. 18" to 24" from sidewalk".

Plaintiffs object to the court considering Tishman's accident report because it is undated, unsigned and makes no mention of any investigation or measurements.

"A report is admissible as an ordinary business record if it is prepared in the regular course of business" (Application of Rhodes (Motor Veh. Acc. Indem. Corp.-Biggs), 203 AD2d 46, 48 [1st Dept 1994]; see also Van Alstyne v Magique Discotheque Corp., 180 AD2d 453, 453 [1st Dept 1992] ["(A)n accident report would ordinarily be made and preserved as part of its regular course of business"])). In addition, the report may be admissible as a business record if certain information supports it (e.g. Petrocelli v Tishman Constr. Co., 19 AD3d 145, 146 [1st Dept 2005] [accident report was prepared by foreman on project, in regular course of business, based on injured plaintiff's account]; Bradley v IBEX Constr., LLC, 54 AD3d 626, 627 [1st Dept 2008] [quoting Petrocelli]).

However, in order to consider an accident report admissible under the business record exception to the hearsay rule, that report must have a proper foundation (Matter of Leon RR, 48 NY2d 117, 122-123 [1979] [no foundation provided that report was prepared in ordinary course of business]; Zuluaga v P.P.C. Constr., LLC, 45 AD3d 479, 480 [1st Dept 2007] [accident report inadmissible; no foundation provided]; Capasso v Kleen All of Am., Inc., 43 AD3d 1346, 1347 [4th Dept 2007] [accident report was inadmissible; authors of report had no firsthand knowledge, and there was no indication that authors had received information from someone within business who was under business duty to report the event]).

Since Tishman's Supervisors' Accident Investigation Report is unsigned, undated and makes no mention of the source of the information concerning the measurements and contains inadmissible hearsay from the foreman/superintendent, a foundation for its admissibility as a business record exception to the hearsay rule is lacking, and the court will not consider this document in its deliberations on these motions.

Defendants attempt to fill this void with the affidavit of Sean McKay, who, at the time of plaintiff's accident, was an employee of the Velez Group, which was part of a joint venture with Tishman. For the Javits Center project, McKay was Tishman's Site Safety Manager. However, the court will not consider this

affidavit. In its initial supporting papers, defendants raise McKay's information only by way of parts of the deposition testimony of Kevin Taylor, Tischman vice president's, in which he referred to McKay's title and responsibilities, including the rendering of daily reports, but only that he "believed that the site safety manager" generated the Supervisor's Accident Investigation Report. Such is insufficient to provide a foundation for the admissibility of the report. The affidavit cannot be considered, in any event, because it was appended to defendants' reply papers (see e.g. GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc., 35 AD3d 535, 535 [2d Dept 2006] ["The plaintiffs could not rely in support of their motion on evidence submitted for the first time in their reply papers"]).

As such, plaintiff's assertion that the excavation was five feet deep is uncontroverted. However, that alone is insufficient to prevail on a Labor Law § 240 (1) claim. Plaintiff has not established that the statute was violated, or that such a violation was a proximate cause of his injuries. Plaintiff himself has testified that his injury to his right knee was not the result of his fall. Rather, he twisted his knee when he slipped. In addition, plaintiff's work, at ground level, was not of the kind that "creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against

[internal quotation marks and citation omitted]" (Salazar, 18 NY3d at 139). In addition,

"[N]ot 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 [2001]). The circumstances of plaintiff's accident do not fall within the intentment of the statute, and do not warrant the "extraordinary protections" of section 240 (1).

Accordingly, the part of plaintiffs' cross motion which seeks summary judgment on their Labor Law § 240 (1) claim must be denied. The part of defendants' motion which seeks summary judgment dismissing plaintiffs' section 240 (1) cause of action is granted.

Plaintiffs' March 14, 2011 bill of particulars alleges that defendants violated these sections of the Labor Law. Labor Law §§ 241 (1) through (4) pertain to floors. Section 241 (5) governs elevators, elevating machines and hod-hoisting apparatus. These sections are obviously inapplicable and irrelevant. Plaintiffs did not address these sections in their papers. Thus, these claims are deemed abandoned (see Musillo v Marist Coll., 306 AD2d at 784 n).

Labor Law § 241 (6) provides, in relevant part:

"All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

"6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23.

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under section 241 (6), a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications' [internal citations omitted]"

(Capuano v Tishman Constr. Corp., 98 AD3d 848, 850 [1st Dept 2012]). The Industrial Code provision relied upon must be applicable, as well as specific and concrete (Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043, 1047 [2d Dept 2012]).

In addition, "[t]o establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (Cappabianca v Skanska US Bldg. Inc., 99 AD3d 139, 146 [1st Dept 2012]).

Plaintiffs have asserted an onerous number of allegedly applicable and specific Industrial Code provisions, all but two of which plaintiffs eventually conceded do not apply in this matter.

In this matter, Development was the owner of the premises. Tishman was the construction manager for the project. Plaintiffs rely on sections 23-1.7 (b) (1) (iii) © and 23-4.3 as bases for their section 241 (6) claim.

12 NYCRR 23-1.7 (b) (1) (iii) © follows:

"Section 23-1.7. Protection from general hazards

* * *

(b) Falling hazards.

(1) Hazardous openings.

* * *

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

* * *

© An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

There are questions of fact which preclude summary judgment on this claim, among which concern whether the safety devices set forth in this rule were required, or whether they would have

prevented plaintiff from performing his tasks (see e.g. Luckern v Lyonsdale Energy Ltd. Partnership, 281 AD2d 884, 887 [4th Dept 2001] [defendants "failed to meet their initial burden of establishing that a safety belt would not have prevented plaintiff from being drawn into the . . . hole . . ."]).

Section 23-4.3 provides:

"Section 23-4.3. Access to excavations

Ladders, stairways or ramps constructed in compliance with this Part (rule) shall be provided in every excavation more than three feet in depth for safe access and egress. Such ladders, stairways or ramps shall be installed in sufficient number and in such locations as to be readily accessible to any person wishing to enter or leave such excavation without more than 25 feet of lateral travel."

Section 23-4.3 does not apply in this matter. Plaintiff was not entering or leaving the trench (see e.g. Gielow v Rosa Coplon Home, 251 AD2d 970, 972 [4th Dept 1998]).

In addition, sections 240 (1) and 241 (6) only govern "[a]ll contractors and owners and their agents" (Labor Law ¶ 241 [6]). It is undisputed that Development was the owner of the premises. What is not known is whether Operating was an agent of Development, and whether Tishman, the construction manager, acted as a general contractor, or whether it acted as Development's agent. Until these questions are answered, it cannot be determined whether Operating and/or Tishman fall within these

statutes.

Accordingly, the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is denied.

Labor Law § 200 (1) provides, in relevant part:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

"It is well established that Labor Law § 200 is a codification of the common-law duty imposed on an owner or general contractor to maintain a safe construction site. In other words, a claim arising pursuant to the provision is 'tantamount to a common-law negligence claim in a workplace context' [internal citations omitted]" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d at 149). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*id.* at 143-144).

This claim does not arise from a dangerous condition in the

workplace. Rather, it arises out of the means and methods by which plaintiff performed his work.

Supervision and control are preconditions to liability under Labor Law § 200 when the accident arises from the contractor's means and methods of performing the work. "In other words, the party against whom liability is sought must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [interior quotation marks and citation omitted]" (Griffin v Clinton Green S., LLC, 98 AD3d 41, 48 [1st Dept 2012]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e. how the injury-producing work was performed" (Hughes v Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007]).

"[P]laintiffs concede that the defendants did not direct or control the work plaintiff was performing at the time of his accident". Therefore, the part of defendants' motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims is granted.

Part of defendants' motion seeks sanctions against plaintiffs for alleged frivolous activity (see 22 NYCRR 130-1.1 [c]). This part of defendants' motion is denied. While plaintiffs' attorney acted in a slipshod manner with respect to

citing inapplicable provisions of the Industrial Code, his conduct not so egregious as to warrant sanctions.

Accordingly, it is

ORDERED that the part of plaintiffs' cross motion that seeks leave to file an untimely cross motion is granted; and it is further

ORDERED that the part of plaintiffs' cross motion which seeks summary judgment in their favor on their Labor Law § 240 (1) claim is denied; and it is further

ORDERED that the parts of defendants' motion that seek summary judgment dismissing plaintiffs' Labor Law §§ 200, 240 (1) and common-law negligence claims is granted; and it is further

ORDERED that the part of defendants' motion that seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is denied; and it is further

ORDERED that the part of defendants' motion that seeks sanctions against plaintiffs is denied.

This is the decision and order of the court.

Dated: August 5, 2014

ENTER:

FILED

AUG 11 2014

COUNTY CLERK'S OFFICE
NEW YORK

Debra A. James
J.S.C.

DEBRA A. JAMES