

Adkinson v Dormitory Auth. of the State of N.Y.

2014 NY Slip Op 32217(U)

April 9, 2014

Sup Ct, New York County

Docket Number: 100851/2011

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Index Number : 100851/2011
ADKISON, CARL
vs
DORMITORY AUTHORITY
Sequence Number : 004
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*MOTION is decided IN ACCORDANCE
with accompanying MEMORANDUM DECISION.*

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

FILED

APR 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/9/14

Luy, J.S.C.

LOUIS B. YORK
J.S.C. NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
CARL ADKINSON,

Plaintiff,

- against -

Index No. 100851/2011
DECISION AND ORDER

THE DORMITORY AUTHORITY OF THE
STATE OF NEW YORK, SKANSKA USA
BUILDING INC., SKANSKA USA INC.,
and DARCON CONSTRUCTION INC.,

FILED

APR 14 2014

Defendants.

-----X
LOUIS B. YORK, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 4 and 5 are consolidated for disposition and resolved as follows:

In this action, plaintiff alleges that he sustained injuries when he fell at a construction site related to a major project for The Dormitory Authority of New York ("The Dormitory Authority"). Skanska USA Building Incorporated and Skanska USA Incorporated (collectively, "Skanska") served as general contractors for the project. Darcon Construction, Incorporated ("Darcon"), the subcontractor that performed the concrete work at the site, had hired plaintiff's employer, Cambria Rubbish Removal ("Cambria"), to remove concrete washout¹ from the construction site. Plaintiff's job was to pick up open-top dumpsters once they were filled with debris and to replace them with empty dumpsters so the workers could put additional debris in them. He alleges that to load the full containers onto his truck, he had to park his truck next to the pile of rocks that would be used to construct the building.

¹When concrete is unloaded for use at the site, pieces of it remain in the chute. The debris is washed out of the chute, and the wet pieces of rock are referred to as the "washout." It appears undisputed that the washout generally lies along the bottom of the huge pile of concrete, which was several hundred feet long due to the scope of the project. The parties also seem to agree that the washout was around two inches high.

The concrete and washout did not remain in one location; instead, concrete was placed in the area or areas where Darcon worked on a particular day and the washout began to accrue at that time. When plaintiff arrived at the site on the date in question, he states, an employee of defendant Darcon directed him to the proper site. Darcon also allegedly instructed him to pull up his truck alongside the washout. Plaintiff states that when he walked to the back of his truck to load a full container of concrete debris onto his truck, he tripped and fell on the washout, landing underneath the truck. According to plaintiff, he sustained serious injuries to his left shoulder, including an ongoing limitation of mobility.

Subsequently, plaintiff initiated this lawsuit against The Dormitory Authority, Skanska, and Darcon. Plaintiff claims that defendant Skanska USA Incorporated (“Skanska”), the general contractor, and Darcon negligently maintained the washout areas, so that it became hazardous to the workers. For this reason, plaintiff asserts claims under common law negligence and Labor Law § 200. He asserts violations of the Scaffold Law, formally known as Labor Law § 240(1). In addition, he alleges that his accident was due to specific violations of the Industrial Code, and therefore defendants are also liable under Labor Law § 241(6). He contends that Skanska and Darcon exercised sufficient control over the work site to render them liable under those provisions in which ownership or control is a requirement.

Discovery is complete and plaintiff filed the Note of Issue on October 9, 2013. In addition, the Court notes, on January 9, 2013, the parties discontinued against The Dormitory Authority, leaving Skanska USA Building, Inc., Skanska USA Inc. (collectively, “Skanska”), and Darcon Construction Inc. (“Darcon”) as the sole defendants.² Currently, plaintiff seeks partial summary judgment on the issue of liability, and defendants seek summary judgment dismissing the action. Plaintiff and defendants oppose the motions of their adversaries.

²The parties have not amended the caption to reflect the discontinuance, so the Court will amend it at the end of this order.

Initially, the Court addresses a few ministerial problems. The motion folder contains an affirmation that opposes plaintiff's motion to consolidate. However, there is no motion to consolidate before the Court and no such motion is listed in the Supreme Court Records On-Line Library for this case. Therefore, the Court does not consider this document. In addition, the papers the parties submitted to the Court are in complete disarray. Defendants' affirmation in support of their motion is bound with a metal clasp not sufficient to hold the voluminous papers. Therefore, the clasp came loose almost as soon as the Court turned the pages, and now there are hundreds of unbound pages. Because the affirmations in support also are longer than the Part rules permit, the parties resubmitted them to comply with the Part rules, and therefore the Court has duplicates. In addition, the resubmitted documents do not contain the exhibits which are annexed to the nonconforming papers. All of this has complicated the Court's review of the papers.³

Now, the Court turns to the two motions at hand. Plaintiff seeks summary judgment on the issue of defendants' liability under Labor Law § 240(1) because, he argues, defendants did not provide plaintiff with a guardrail or tie off. The statute applies to contractors, and to owners and/or their agents who contract for and direct or control the work, but only when the injury occurs at an elevated height. Plaintiff asserts that Skanska, as "general manager," had the duties of a general contractor and is therefore liable. According to plaintiff, by contract Skanska assumed responsibility and liability for personal injury claims arising from the performance of negligent or allegedly negligent work. Also, plaintiff states, Richard Salario of Skanska testified at deposition that he was in charge of safety at the work site. As for Darcon, plaintiff argues, it was in charge of concrete work at the site and therefore had direct control of the activities in question – including, among

³The parties also appear to have played with the spacing of their briefs – switching to one-and-a-half spacing and/or including single-spaced block quotes that take up several pages – and one of these parties has complained of the other's violation. The Court will not sanction either party for this unprofessional conduct but admonishes both to adhere to the Part rules in the future.

other things, the concrete washout. A Darcon employee directed plaintiff to park his truck in the area where the accident subsequently occurred. In addition, plaintiff states that Darcon is liable as an agent of Skanska's, which plaintiff states had supervisory authority over the work.

Defendants oppose the motion and also move for summary judgment. With respect to Labor Law § 240(1), they argue, among other things, that neither defendant exercised sufficient control over plaintiff's activities to render it liable under this provision; that the fall in question was not related to elevation; that the concrete washout was there as part of the ordinary course of the job and therefore was not the type of risk contemplated by the statute; and that plaintiff was the sole proximate cause for the fall because he chose to walk on the washout rather than get out on the passenger side of the truck. With respect to Labor Law § 241(6), defendants raise several of the same arguments and also assert that none of the Industrial Code sections on which plaintiff relies applies to the situation at hand. As for Labor Law § 200 and common law negligence, in addition to challenging the allegations in general defendants claim they lacked sufficient control over plaintiff and his work to render them liable.

Labor Law § 240(1), also called the Scaffold Law, imposes a duty on contractors, owners and agents who have control over the work to provide "scaffolding, hoists, stays,, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall . . . give proper protection to a person" involved in erecting, demolishing, or other similar jobs. *Id.* This law exists to protect workers from any elevation-related injuries they may sustain while involved in an activity enumerated in the statute. *Panek v. County of Albany*, 99 N.Y.2d 452, 457, 758 N.Y.S.2d 267, 270 (2003). Labor Law § 240(1) only applies if there is an elevation-related risk, *Cabrera v. Sea Cliff Water Co.*, 6 A.D.3d 315, 776 N.Y.S.2d 541 (1st Dept. 2004), and the elevation is related directly to the fall. *See Whitehead v. City of New York*, 79 A.D.3d 858, 859-60, 913 N.Y.S.2d 697, 699-700 (2nd Dept. 2010). In addition, a central question is "whether a particular . . . task creates an elevation-related

risk of the kind that the safety devices in [Labor Law] 240(1) protect against.” *Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, (2007). Moreover, the plaintiff bears the burden of demonstrating that the risk is elevation-related and that a safety device could have prevented the injury. *See Kutzza v. Bovis Lend Lease LMB, Inc.*, 95 A.D.3d 590, 592, 944 N.Y.S.2d 99, 101 (1st Dept. 2012).

The initial inquiry is whether the law is applicable to the facts at hand. The Court concludes that, as defendants state, the Scaffold Law does not apply here. Plaintiff was only two feet above the ground when he slipped or tripped.⁴ Though, as plaintiff notes, there are situations in which a two- or three-foot elevation comprises a height-related risk, *see Jackson v. Heitman Funds/191 Colonie LLC*, 111 A.D.3d 1208, 1210-11, 976 N.Y.S.2d 283, 287 (3rd Dept. 2013)(where falling object fell only one-and-a-half feet, elevation-related risk existed because object weighed 600-800 pounds and generated powerful force when it fell), plaintiff has not presented any compelling circumstances justifying such a finding here. Plaintiff slipped or tripped while walking along the side of his truck. Plaintiff has not shown that he fell because of the elevation. *See DeRosa v. Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652, 654, 947 N.Y.S.2d 472, 474 (1st Dept. 2012). Also, plaintiff has not made a persuasive showing that a safety device listed in the law would have protected him. *See Slazar v. Novalex Contr. Corp.*, 18 N.Y.3d 134, 139, 936 N.Y.S.2d 624, 627 (2011). The conclusory statement of plaintiff's expert does not raise an issue of fact, as it does not explain how a tie-off or a guardrail could have prevented the accident and also does not explain how the washout constituted an elevation hazard. *See Rodriguez v. D&S Builders, LLC*, 98 A.D.3d 957, 958-59, 951 N.Y.S.2d 54, 56 (1st Dept. 2012); *Hartnett v. Chanel, Inc.*, 97 A.D.3d 416, 428, 948 N.Y.S.2d 282, 291-92 (1st Dept. 2012). Thus, the Court grants summary judgment dismissing this claim.

⁴ The parties debate whether plaintiff slipped or tripped on the concrete. For the purposes of this Order, the Court finds the distinction irrelevant. Though it seems more likely that he slipped and fell under the truck than that he tripped and fell under the truck, this would be a jury question if a valid claim otherwise existed.

Next, the Court turns to defendants' challenge to plaintiff's Labor Law § 241 (6) claims and plaintiff's arguments in support of his request for summary judgment granting this cause of action. To state a valid Labor Law § 241(6) cause of action, a plaintiff must show that the defendant or defendants violated a provision that specifically regulates work site conduct and safety; it is not enough to cite to general safety provisions. *See St. Louis v. Town of North Elba*, 16 N.Y.3d 411, 414, 923 N.Y.S.2d 391, 393 (2011). Initially, plaintiff relied on Industrial Code §§ 23-1.2, 23-1.5, 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), 23-2.1(a)(1), and 23-2.1(a)(2). As defendants note, in his motion and in his opposition to their motion, plaintiff relies exclusively on Section 23-1.7(d). Therefore, it appears that they no longer intend to rely on Industrial Code §§ 23-1.2, 23-1.5, 23-1.7(e)(1), 23-1.7(e)(2), 23-2.1(a)(1), and 23-2.1(a)(2), and the Court shall not consider their applicability.

Industrial Code § 23-1.7(d) refers to accidents in hallways, scaffolds, platforms, and the like, including elevated working surfaces, and plaintiff fell in an open working area. In *Jennings v. Lefcon Partnership*, 250 A.D.2d 388, 389, 673 N.Y.S.2d 85, 86 (1st Dept. 1998), the First Department concluded that an open area between two buildings under construction was not the type of walkway, passageway, or work area covered by this provision of the Industrial Code. In *Maza v. Univ. Ave. Dev. Corp.*, 13 A.D.3d 65, 66, 786 N.Y.S.2d 149, 151 (1st Dept. 2004), the First Department used this reasoning to conclude that Industrial Code § 23-1.7(d) does not apply to enclosed courtyards. Here, plaintiff fell in an open area at the construction site, near a pile of concrete and washout. Based on the reasoning in *Jennings*, *Maza* and countless other decisions, the Court agrees with defendants that plaintiff's Labor Law § 241(6) claims should be dismissed.

As for plaintiff's claims based on common law negligence and Labor Law § 200,⁵ the Court agrees with defendant that, although Skanska had notice of the condition – as evidenced by its safety reports – as general contractor, it did not “have the authority to control the activity bringing about

⁵Defendants have moved for summary judgment dismissing these claims. Plaintiff has not moved for partial summary judgment regarding these causes of action.

plaintiff's injury to enable them to avoid or correct an unsafe condition," and did not have responsibility for the maintenance of the area in question. *Stier v. One Bryant Park LLC*, 113 A.D.3d 551, –, 979 N.Y.S.2d 65, 67 (1st Dept. 2014), *see Koerner v. City of New York*, 111 A.D.3d 435, –, 974 N.Y.S.2d 407, 408 (1st Dept. 2013). Contrary to plaintiff's contentions, the facts that Skanska was general contractor and had the authority to perform safety inspections and stop any unsafe work are insufficient to establish Labor Law § 200 liability. *See Alonzo v. Safe Harbors of the Hudson Housing Devel. Fund Co.*, 104 A.D.3d 446, 449, 961 N.Y.S.2d 91, 94-95 (1st Dept. 2013); *Fiorentino v. Atlas Park, LLC*, 95 A.D.3d 424, 426, 944 N.Y.S.2d 60, 63 (1st Dept. 2012). Therefore, it cannot be guilty of negligence under the statute.

Darcon, on the other hand, poured the concrete and created the condition – that is, the washout – directed plaintiff to the part of the work site where he retrieved and dropped off the containers, and also told plaintiff where to park. It had notice about the condition from several of the safety reports. Based on the above, this Court concludes that there is an issue of fact with respect to Darcon's liability. *See Rodriguez v. Dormitory Auth. of the State of New York*, 104 A.D.3d 529, 962 N.Y.S.2d 102 (1st Dept. 2013). Questions also exist concerning the critical issue of whether “plaintiff's injury was caused by the way he performed his work, not by a dangerous condition of the work site” *Johnson v. 923 Fifth Ave. Condominium*, 102 A.D.3d 592, 593, 969 N.Y.S.2d 146, 147 (1st Dept. 2013). Moreover, defendants have not shown as a matter of law that plaintiff was the sole proximate cause of his accident, despite their contention to the contrary. If plaintiff was negligent and this contributed to his injury but did not cause it entirely, it will result in an apportionment of liability. *See Mazza*, 13 A.D.3d at 66, 786 N.Y.S.2d at 151 (1st Dept. 2004).

However, summary judgment is appropriate as it relates to Skanska. Its role as safety manager is insufficient to establish control over Darcon's work. *See Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 148, 950 N.Y.S.2d 35, 42 (1st Dept. 2012). This is true regardless of Skanska's

notice of the condition. *See id.* at 144-45, 950 N.Y.S.2d at 40. It is also true regardless of whether it could stop work if it determined that there was a safety violation. *See Fiorentino*, 95 A.D.3d at 426, 944 N.Y.S.2d at 63. Moreover, although plaintiff correctly notes that Skanska agreed in its contract with The Dormitory Authority to provide insurance, its contract with Darcon obliges it to obtain liability insurance through its Contractor Controlled Insurance Program (CCIP) or through another provider if the subcontractor is not part of the CCIP.

The Court has considered the parties' arguments in full, even if it does not address every one directly, and also has researched independently, as it does not grant dismissal lightly. In conclusion, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that defendants' motion to dismiss is granted to the extent that it relates to plaintiff's claims under Labor Law §§ 240(1) and 241(6), and to plaintiff's Labor Law and common law negligence claims against Skanska; and it is further

ORDERED that plaintiff's Labor Law §§ 240(1) and 241(6) claims are severed and dismissed; and it is further

ORDERED that defendant's motion is denied to the extent that it seeks dismissal of plaintiff's claims under Labor Law § 200 and common law negligence as against defendant Darcon, and those claims shall continue; and it is further

ORDERED that the caption is amended to read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
CARL ADKINSON,

Plaintiff,

Index No. 100851/2011

- against -

DARCON CONSTRUCTION INC.,

Defendant.
-----X

The County Clerk and Trial Support Clerk are directed to mark their records accordingly and the remaining parties are to use the amended caption in all future papers.

Dated: 4/9/14

FILED

APR 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

LY
Louis B. York, J.S.C

**LOUIS B. YORK
J.S.C.**