Turner v Home Depot, U.S.A., Inc.
2014 NY Slip Op 32869(U)
November 12, 2014
Supreme Court, Kings County
Docket Number: 500968/12
Judge: David I. Schmidt
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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of November , 2014.

PRESENT:

HON. DAVID I. SCHMIDT,
Justice.

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DAVID C. TURNER AND DEBRA TURNER,

Plaintiffs,

- against -

Index No.500968/12

HOME DEPOT, U.S.A., INC., ROMAN CATHOLIC DIOCESE OF BROOKLYN AND NAZARETH REGIONAL HIGH SCHOOL,

Defendants.

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The following papers numbered 1 to 15 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 4-6 7-8
Opposing Affidavits (Affirmations)	9, 10, 11
Reply Affidavits (Affirmations)	12,13,14
Other Papers Memorandum of Law	15

Upon the foregoing papers, defendants Roman Catholic Diocese of Brooklyn and Nazareth Regional High School (Nazareth defendants) move for an order pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' Labor Law §§240 (1), 241(6), 200 and common law negligence claims. Defendant Home Depot U.S.A., Inc., (Home Depot) moves

pursuant to the same statute seeking the same relief. Plaintiffs move for partial summary judgment as against the Nazareth defendants on the issue of liability under Labor Law §§ 240 (1) and 241 (6) and as against Home Depot on the issue of liability based upon plaintiffs' common law negligence claim.

Background

On October 10, 2011, plaintiff was employed by Tacinelli Hardwood Flooring. Tacinelli was hired by Nazareth High School to perform renovation work in the school's gymnasium. This work entailed removing two wooden backboards on one of the side basketball courts and replacing them with two existing fiberglass backboards which would be removed from the main basketball court. Two new fiberglass backboards would then be installed on the main court.

On the morning of October 11th, defendant, his co-worker Greg Cimms and Charles Tacinelli went to Home Depot, where Mr. Tacinelli rented a baker's scaffold to be used to perform the work that was to be done at Nazareth that day. Plaintiff, Mr. Cimms and another worker arrived at the jobsite and erected the baker's scaffold. It was determined that additional equipment would be needed to safely lower the old backboards down and raise the new backboards up so Cimms and the other worker left the site to get additional equipment. The baker's scaffold was set up in front of the side basketball hoop, the first level of the scaffold was completely built and the end pieces for the second level were installed but the platform braces and second level had not yet been installed. There was a ladder set

up behind the basketball hoop. While his two co-workers were out retrieving the additional equipment, plaintiff climbed the ladder and loosened the bolts on the back of the backboard. He then climbed up the left side of the Baker's scaffold in order to access the front of the hoop. As plaintiff was stepping onto the platform from the end to its front side, the scaffold began to tip over. In an effort to avoid falling over with the scaffold and having it land on top of him, plaintiff took his right foot off of the platform, turned to his left and jumped approximately six feet to the floor from the tipping scaffold. He sustained various injuries. Photographs of the scaffold taken on the date of the accident which were shown to plaintiff during his deposition testimony indicate that there were no wheels or outriggers on the scaffold at the time of the incident.

Plaintiffs' Motion and The Nazareth Defendants' Motion

The Nazareth defendants move for an order pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' Labor Law §§240 (1), 241(6), 200 and common law negligence claims. At the outset, the court notes that plaintiffs do not oppose that branch of the Nazareth defendants motion seeking dismissal of the Labor Law 200 and common law negligence claims as asserted against these defendants. Accordingly, that branch of the motion seeking summary judgment dismissing these claims as against the Nazareth defendants is granted. Plaintiffs move for summary judgment on the issue of liability as against the Nazareth defendants based on plaintiffs' Labor Law §§240 (1) and 241 (6) claims.

Labor Law §240 (1)

The Nazareth defendants argue that plaintiff's Labor Law §240 (1) claim should be dismissed because his actions were the sole proximate cause of his accident. They contend that plaintiff made the unilateral decision to use the partially assembled scaffold to access the front of the hoop instead of the A-frame ladder that he had just used to access the back of the hoop. In support of their motion, the Nazareth defendants submit the affidavit of Robert L. Grunes, a professional engineer, who reviewed the pleadings, transcripts and photographs related to this matter. Mr. Grunes opined that plaintiff's unilateral, self directed choice to use the partially assembled scaffold rather than the 10 foot A-frame ladder, provided to him by his employer, which was readily available and appropriate for the task, given that he had just utilized it to access the back of the board, was the sole proximate cause of this accident.

In opposition, plaintiffs argue that the expert affidavit of Mr. Grunes should be disregarded as it was not properly disclosed. Although, they acknowledge that it is within the court's discretion to consider an untimely disclosure. In reply, the Nazareth defendants argue that the Second Department has recently held in *Rivers v Birnbaum*, (102 AD3d 26, 31 [2013]) that the failure to exchange expert information in a timely manner will not divest the trial court of its discretion to consider an expert affirmation in the context of a timely summary judgment motion (*see also Abreu v Metropolitan Transp. Auth.*, 117 AD3d 972, 974 [2014];*Salcedo v Weng Qu Ju*, 106 AD3d 977, 978 [2013]). Accordingly, the court will consider Mr. Grunes' affidavit.

[* 5]

Plaintiffs also oppose the motion arguing that he was not the sole proximate cause of the accident and that the Nazareth defendants have not proven that plaintiff was provided with adequate safety devices, and have not proven that anything other than the failure to provide those safety devices was the proximate cause of the accident. He argues that he was not provided with any safety devices, such as a proper scaffold, outriggers , or a scaffold equipped with outriggers in order to safely perform his work. Thus, he contends, his comparative negligence, if any, would not bar liability under Labor Law §240 (1) where defendants violated the statute. Plaintiff maintains that where, as here, the scaffold becomes unstable or tips over while being used it is an inadequate safety device that failed top provide proper protection warranting summary judgment in his favor on this claim.

Labor Law § 240 (1) states, in relevant 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."

This statute "imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *see also Hugo v*

Sarantakos, 108 AD3d 744, 744-745 [2013]; *Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 711 [2013]).

A §240 (1) plaintiff makes a prima facie showing of defendant's liability by demonstrating that the absence of proper safety equipment resulted in an elevation-related injury (*see Probst*, 106 AD3d at 711-712; *Durando v City of New York*, 105 AD3d 692, 695 [2013]; *Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646, 647 [2013]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 478-479 [2012]; *see also Ortega v City of New York*, 95 AD3d 125, 128 [2012]). "Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his [or her] injur[ies]" (*Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653-654 [2014]; *Gallagher v New York Post*, 14 NY3d 83, 88 [2010], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004] [emphasis added]; *see Robinson v East Med. Ctr., L.P.*, 6 NY3d 550, 553-555 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287[2003]). Here, there is no evidence that anyone instructed the plaintiff that he should use the scaffold to access the front of the hoop rather than the ladder as he had used to access the back of the hoop (*Gallagher*, 14 NY3d at 89; *see Cioffi v Target Corp.*, 114 AD3d 897, 898-899 [2014]).

Here, the court finds that there are questions of fact regarding whether plaintiff was

the sole proximate cause of his accident and whether the Nazareth defendants failed to provide an adequate safety device to perform the work at issue, thus that branch of the Nazareth defendants' motion seeking summary judgment dismissing plaintiffs' Labor Law §240 (1) this claim is denied, as is that branch of plaintiffs' motion seeking summary judgment in their favor on the Labor Law §240 (1) claim.

Labor Law §241 (6)

The Nazareth defendants also seek summary judgment dismissing plaintiff's Labor Law §241 (6) claim. Conversely, plaintiffs seek summary judgment on the issue of liability as against the Nazareth defendants on their Labor Law §241 (6) claim.

"Labor Law § 241(6) imposes a nondelegable duty upon an owner or general contractor to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Grant v City of New York*, 109 AD3d 961 [2013], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L. A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). Thus, "[a] plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific positive command, and is applicable to the facts of the case" (*Carey v Five Bros., Inc.*, 106 AD3d 938, 940 [2013]; *see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]; *Gasques v State*, 15 NY3d 869 [2010]; *Fusca v A & S Constr., LLC*, 84 AD3d 1155 [2011]; *Forschner v Jucca Co.*, 63 AD3d 996 [2009]). A violation of an Industrial Code provision

that both applies to the relevant facts and contains a specific command serves to establish vicarious liability of an owner or contractor under Labor Law § 241 (6) (*see Rizzuto*, 91 NY2d at 351; *see also Plass v Solotoff*, 5 AD3d 365, 367 [2004]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]; *Adams v Glass Fab*, 212 AD2d 972, 973 [1995]; *Ares v State*, 80 NY2d 959, 960 [1992]). Unlike the violation Labor Law §240(1), however, a violation of Labor Law § 241(6) does not result in absolute liability and the plaintiff's comparative negligence may be raised in defense to such claim (*see St. Louis v Town of North Elba*, 16 NY3d 411, 414 [2011]; *Long v Forest-Fehlhaber*, 55 NY2d 154 [1982]).

In support of this claim plaintiff alleges violation of Industrial Codes 12 NYCRR 23-5.1 (a), (b), (f) and (h) 23-5.3 (f) (g) (1) &(2) and 5.18 c, (e), and (g). The Nazareth defendants argue that none of these regulations apply here because the scaffold that plaintiff utilized was not fully assembled. They argue that these regulations apply to scaffolds which are fully constructed and here, the subject scaffold was not yet constructed within the meaning of the provision, and, thus, theses code provisions are not applicable. In support of this proposition, defendants point to Mr. Grunes' expert affidavit which concludes that the scaffold would not have tipped if it had been fully assembled and safe to use and points out that plaintiff's own testimony reveals that he was aware, that as assembled, the scaffold was not complete. At the outset the court notes that, 23-5.1 (f) does not support the cause of action alleging violations of Labor Law § 241 (6) because that Industrial Code provision sets forth a general, rather than a specific, safety standard (*Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2013] *see Moutray v Baron*, 244 AD2d 618, 619 [1997]).

Industrial Code § 23-5.1 (b) provides that the "footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used." In support of their claim that this Industrial Code provision was violated, plaintiffs submit the affidavit of their expert, Robert J. O'Connor, a licensed professional engineer, who reviewed all of the pleadings, testimony, exhibits, photographs, and performed a visual inspection of the scene. Mr. O'Connor opines that this provision was violated because the "scaffold footing or anchorage was not sound and properly secured from movement in any direction, including a sideways or tipping movement, as no braces or outriggers at the base or footing of the scaffold were present."

The Nazareth defendants also argue that the Industrial Code section 23-5.18 is inapplicable as it applies to manually propelled mobile scaffolds and inasmuch as it is undisputed that the baker scaffold that plaintiff utilized did not have wheels or casters, it does not fall under the protections of these Industrial Code provisions. In opposition, plaintiff argues that the fact that the baker scaffold was missing wheels does not make it something other than a manually propelled mobile scaffold under the statute. Plaintiffs point to the affidavit of Mr. O'Connor, wherein he who opined that these code provisions were violated by the failure to provide stable footing through the use of braces or outriggers. He specifically opines that Industrial Code §23-5.18 c which requires that a ladder or staircase

be provided for proper access to a manually propelled scaffold, was violated as there was no ladder provided to allow for the proper accessing of the scaffold and that such violation was a substantial factor in plaintiff's accident. In addition , Mr. O'Connor opines that 23-5.18 (g) was violated which relates to scaffold footing and requires that whenever a manually propelled scaffold is in use it shall rest upon stable footing and al casters and wheels must be locked in position. Mr. O'Connor opines that the scaffold was not on stable footing inasmuch as there were no braces or outriggers, and, thus, this provision was violated.

Here it is undisputed that the scaffold was not complete in that it was missing the wheels, outriggers and second deck. Accordingly, the court finds that there are questions of fact regarding whether these provisions are even applicable given the fact that it is undisputed that the scaffold at issue was not fully assembled and was missing vital components yet plaintiff knowingly utilized it despite its incompleteness. Finally, the court finds that Industrial Code §23-5.3 is inapplicable to the facts of the instant case.

The court finds that here, in support of the branches of their respective motions for summary judgment with respect to so much of the complaint as alleged a violation of Labor Law § 241 (6), neither plaintiffs nor the Nazareth defendants established their prima facie entitlement to judgment as a matter of law (*see Fusca v A & S Constr., LLC*, 84 AD3d 1155, 1156-1157 [2011]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Accordingly, the branches of the respective motions seeking summary judgment on the Labor Law §241 (6) claim is denied.

Home Depot's Motion

Home Depot moves for summary judgment dismissing plaintiffs' common law negligence claim as asserted against Home Depot. Conversely, plaintiffs move for summary judgment in their favor on their common law negligence claim as against Home Depot. Home Depot argues that it did not owe any duty to plaintiff and thus liability cannot be imposed upon it for the happening of this accident. Home Depot points out that it entered into a contract with plaintiff's employer, Mr. Tacinelli, in relation to the rental of the scaffold and did not even know who the intended user of the equipment was. They argue that inasmuch as plaintiff was not a party to the agreement there was no duty owed to him by Home Depot and thus no liability can be imposed upon it for the happening of plaintiff's accident.

In opposition and in support of their own motion, plaintiffs argue that Home Depot provided an incomplete scaffold which lacked the proper outriggers and other equipment needed to stabilize the scaffold to prevent it from tipping over. Thus, plaintiffs contend that the defective and inadequate scaffold provided by Home Depot was the proximate cause of plaintiff's injuries.

A cause of action for common-law negligence requires plaintiff establish that a duty is owed by the defendant, a breach of the duty owed and that the breach of the duty is the proximate cause of injury (*Turcotte v Fell*, 68 NY 2d 432 [1986]). A duty of reasonable care owed to an injured party is a basic requirement of any recovery in negligence (*Palka v Servicemaster Mgmt. Services Corp.*, 83 NY2d 579 [1994]).

In support of their position that Home Depot should be liable on their common law negligence claim, plaintiffs point to the court's holding in *Gonzalez v Perkan Concrete Corp.*, (110 AD3d 955, 959 [2013]) which stated "[u]nder Labor Law §200, when a defendant lends allegedly dangerous or defective equipment to a worker that causes injury during its use, that defendant, in moving for summary judgment, must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" (*see Navarro v City of New York*, 75 AD3d 590, 591-592 [2010]; *Chowdhury v Rodriguez*, 57 AD3d 121, 131-132 [2008]; *Wein v Amato Props., LLC*, 30 AD3d 506, 507-508 [2006]). However, the court notes that these cases are distinguishable inasmuch as the defendants that lent equipment in those cases were also involved in the construction project at issue, either as a subcontractor or building owner. In the instant case, Home Depot is not in any of those categories.

Home Depot further contends that the documentary evidence, in the form of the rental agreement entered into between Tacinelli and Home Depot, demonstrates that the scaffold was rented with outriggers and casters and was returned with outriggers and casters. Thus, it did not have notice that the scaffold was missing pieces when it was rented by Tacinelli. However, there has been testimony by plaintiff and Mr. Cimms that there were no outriggers or casters provided and it is undisputed that plaintiff used the scaffold with the knowledge that it was missing the outriggers and wheels.

Based upon the foregoing, the court finds that Home Depot has demonstrated that it did not breach a duty of reasonable care which proximately caused plaintiff's accident and

is thus entitled to summary judgment dismissing plaintiffs' claims as asserted against Home Depot. That branch of plaintiffs' motion seeking summary judgment on the issue of liability as against Home Depot on their Labor Law §200 claim is denied..

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT