Dlugaski v Port Auth. of NY & NJ
2015 NY Slip Op 30588(U)
March 27, 2015
Sup Ct, Bronx County
Docket Number: 307484/2009
Judge: Jr., Kenneth L. Thompson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
KENNETH DLUGASKI,

Plaintiff

-against-.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, 1 WORLD TRADE CENTER LLC and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants. X

Index No: **307484/2009**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **4** read on this motion **for summary judgment**

No On Calendar of **January 16, 2015**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 2**
Answering Affidavit and Exhibits	**3, 4**
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 3212 on the issue of liability for partial summary judgment on his Labor Law 240(1) claim on the issue of liability. Defendants' cross-move pursuant to CPLR 3212 for summary judgment dismissing the Labor Law 240(1), 241(6), 200 and common law negligence claims. This action arose as a result of personal injuries sustained by plaintiff employed in the construction of the Freedom Tower as a lather and ironworker. Defendant, Tishman Construction Corporation of New York was the construction manager for the construction of the Freedom Tower. Plaintiff was employed by non-party, Collavino Construction.

LABOR LAW 240(1)

Labor Law 240(1) provides:

> 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.

It is undisputed that plaintiff was struck by a bundle of rebar while he was walking under an I-beam. Rebar had just been hoisted to the I-beam and that rebar was being sorted. After being sorted it would be hoisted once again to where it was needed.

> Plaintiff established that his injuries were caused, at least in part, by the absence of proper protection required by the statute. The evidence demonstrates that plaintiff, a welder who was working at a power plant that was being constructed, was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 98 AD3d 864, 864-865 [1st Dept 2012]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [1st Dept 2007]). It is undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries (see *Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012]). Nor is plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law § 240 (1) (see *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757 [2008]; *Vargas v City of New York*, 59 AD3d 261 [1st Dept 2009]).
>
> (*Mercado v Caithness Long Is. LLC*, 104 A.D.3d 576, 576-577 [1st Dept 2013]).

There is no dispute that neither netting below the I-beam nor any barrier on the I-beam to prevent rebar from falling on the workers below was provided. The precedent relied upon by defendants, *Quattrocchi v F.J. Sciame Constr. Corp.*, 44 A.D.3d 377 [1st Dept 2007] *aff'd* Quattrocchi *v F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757 [2008], is factually inapposite. In *Quattrocchi*, plaintiff walked into one of the supports which created an issue of fact as to whether Quattrocchi was the sole proximate cause of his injuries. In the action at bar, plaintiff is clearly not the sole proximate cause of his injuries.

LABOR LAW 200

> Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury.

(Comes v. New York State Electric and Gas Corp., 82 N.Y.2d 876, 877 [1993]) (citations omitted).

> [M]ere oversight of the timing and quality of the work performed is not equivalent to direct supervision and control and is thus insufficient to support the imposition of liability under Labor Law 200. (*See Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210-211 [1998]; *Pacheco v South Bronx Mental Health Council*, 179 AD2d 550, 551 [1992], *lv denied* 80 NY2d 754 [1992]; *see also Brezinski v Olympia & York Water St. Co.*, 218 AD2d 633, 634-635 [1995]).

(Artiga v Century Management Co., 303 AD2d 280 [1st Dept 2003]).

There is no evidence that any of the defendants controlled the manner of the work that produced plaintiff's injuries.

LABOR LAW 241(6)

Labor Law 241(6) provides:

> 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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

While plaintiff alleged violation of numerous Industrial Codes underlying his Labor Law 241(6), plaintiff opposed defendants' motion to dismiss plaintiff's claims of violation of those codes for only two alleged code violations: Industrial Code 23-1.7(a), which relates to overhead hazards on construction sites and 23-2.1(a)(2), which relates to the storage of material and

equipment on floors, platforms or scaffolds.

Through the affidavits of Mr. Kearney and Mr. Hart, defendants have established, *prima facie*, that the area where plaintiff was injured is an area that is not "normally exposed to falling material or objects." Industrial Code 23-1.7(a). Plaintiff essentially argues that since plaintiff was struck by a falling object, the area where plaintiff was injured is an area "normally exposed to falling objects." However, an attorney's affirmation is not evidence. "Since there is no evidence that plaintiff was working in or frequenting an area that was "normally exposed to falling material or objects" the proposed claim based on 12 NYCRR 23-1.7 (a) is without merit and was properly rejected." (*Quinlan v City of New York,* 293 A.D.2d 262, 263 [1st Dept 2002]).

With respect to Industrial Code 23-2.1(a)(2) it is undisputed that the rebar that struck plaintiff was in the process of being sorted for further distribution at the work site. The rebar was not in storage, therefore, section 23-2.1(a)(2) is inapplicable to the facts of this case. "With regard to plaintiff's argument concerning a violation of the Industrial Code with respect to the storage of materials, suffice to say that we do not view the stacking of the blocks here as a matter of storage." (*McLaughlin v Malone & Tate Bldrs., Inc.,* 13 A.D.3d 859, 861 [3rd Dept 2004]).

CONCLUSION

Accordingly, plaintiff's motion for partial summary judgment on liability against defendants is granted on grounds of violation of Labor Law 240. Defendants' cross-motion is granted to the extent that plaintiffs Labor Law 200, 241(6) and common law negligence claims

are dismissed.

The foregoing shall constitute the decision, and order of the Court.

Dated: MAR 27 2015

KENNETH L. THOMPSON JR. J.S.C.