

Messina v City of New York

2015 NY Slip Op 32551(U)

April 25, 2015

Supreme Court, New York County

Docket Number: 160843/13

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

MARC MESSINA,
Plaintiff,
-against-

INDEX NO. 160843/13
MOTION DATE 02-24-2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE SERVICES and NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,
Defendants.

The following papers, numbered 1 to 10 were read on this motion and cross-motion to/for Summary Judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion for summary judgment on liability under Labor Law §240[1], is denied. Defendants cross-motion seeking summary judgment dismissing the supplemental summons and amended complaint under Labor Law §240[1], §241[6] and §200, is granted as stated herein. The remainder of the cross-motion is denied.

Plaintiff brought this Labor Law §200, §240[1] and §241[6] action for injuries sustained on October 2, 2012, at approximately 8:00 a.m., while performing demolition work removing metal tracks that had supported acoustical tiles from the ceiling on the eighth floor of 100 Gold Street, New York, New York. Plaintiff alleges that his employer, non-party Ashnu International, Inc. (hereinafter referred to as "Ashnu"), provided the eight foot high fiberglass A-frame ladder he was standing on which lunged forward and twisted to the left when he forcefully attempted to pull down some track. He also alleges that he sustained injuries after grabbing the metal tracks he was working on while his lower body continued to twist with the ladder, but he did not fall off. Plaintiff claims that the ladder twisted again to the right and into its original position, eventually he was able to reposition himself on the rungs, getting down and off the ladder. There were no witnesses to the occurrence, as plaintiff was working alone in the room.

Plaintiff's employer non-party Ashnu International, is the general contractor for the project. The City of New York is the owner of the building and property where the accident occurred on. New York City Department of Citywide Services, and New York City Department of Housing Preservation and Development ("NYCHPD") are described in the amended complaint as jointly managing and controlling the property.

Plaintiff seeks an Order granting summary judgment on liability pursuant to Labor Law §240[1].

City of New York, New York City Department of Citywide Services and New York City Department of Housing Preservation and Development (hereinafter collectively referred

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

to as “defendants”) oppose plaintiff’s motion and cross-move for an Order granting summary judgment dismissing this action under Labor Law §240[1], §241[6] and §200.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that *prima facie* showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Plaintiff argues that there are no issues of fact and pursuant to Labor Law §240[1], the defendants are strictly liable for his injuries because they failed to provide proper and adequate safety devices to protect him and to secure the ladder.

The standard for liability under Labor Law §240[1], is the presence of a foreseeable elevation risk in light of the work being performed. “The fact that plaintiff did not actually fall from a ladder is irrelevant as long as the ‘harm directly flowed from the application of the force of gravity to an object or person (*Montalvo v. J. Petrocelli Const., Inc.*, 8 A.D. 3d 173, 780 N.Y.S. 2d 558 [1st Dept., 2004], *Lacey v. Turner Const. Co.*, 275 A.D. 2d 734, 713 N.Y.S. 2d 207 [2nd Dept., 2000] and *Striegel v. Hillcrest Hgts. Dev. Corp.*, 100 N.Y. 2d 974, 800 N.E. 2d 1093, 768 N.Y.S. 2d 1093 [2003]).

The defendants argument that there is no liability under Labor Law §240[1] because plaintiff did not completely fall off the ladder, is not sufficient to grant them summary judgment or raise an issue of fact. Plaintiff was performing an assigned task from an elevation, on a device enumerated under Labor Law §240[1], the fact that he did not completely fall does not avoid liability.

Defendants argue that plaintiff is the sole proximate cause of his injuries because he misused the ladder by applying an unreasonable amount of pressure in attempting to forcefully pull down the ceiling tracks. Defendants rely on plaintiff’s deposition testimony that he had used the ladder the day before the accident and repositioned it approximately thirty times with no problems (*Cross-Mot. Exh. E*, pg 26, lines 11-21). They also rely on plaintiff’s testimony that the ladder was in good condition with no apparent damage and rubber bottoms to prevent it from skidding and was on level ground on a carpeted floor on the day of the accident (*Cross-Mot. Exh. E*, pg 29, lines 18-25, pg. 30, lines 2, 34-35, and p. 52, lines 22-23).

Liability arises under Labor Law §240[1], upon proof that, “plaintiff’s injuries result from an elevation related risk and the inadequacy of safety devices” (*Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y. 3d 90, 30 N.E. 3d 154, 7 N.Y.S. 3d 263 [2015]). Liability attaches with proof that, “a ladder was defective, or that it slipped, tipped, was placed improperly or otherwise failed to provide support” (*Scekic v. SL Green Realty Corp.*, 132 A.D. 3d 563, 19 N.Y.S. 3d 563 [1st Dept., 2015]). Conflicting testimony concerning whether an inadequate safety device was provided, or plaintiff was the proximate cause of his injuries, is a basis to deny summary judgment (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004] and *Noor v. City of New York*, 130 A.D. 3d 536, 15 N.Y.S. 3d 13 [1st Dept., 2015]).

The ladder failed to properly function in supporting plaintiff, but he has failed to establish entitlement under the Labor Law §240[1] claims. Defendants have established that there remain issues of fact as to whether plaintiff was the sole proximate cause of the ladder twisting and his injuries, but have not established entitlement to summary judgment on the Labor Law §240[1] claims.

Defendants cross-move for summary judgment on plaintiff's claims asserted under Labor Law §241[6], arguing that the alleged Occupational Safety and Health Act (OSHA) violations are not a basis for liability and that they have not violated the Industrial Code Sections, 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7, 23-1.7[d], 23-1.7[e], 23-1.8, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.21[b][1], 23-1.21[b][3] (all sections), 23-1.21[b][4] (all sections); 23-1.30 and 23-1.32.

Labor Law §241[6], establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (*Padilla v. Frances Schervier Housing Development Fund Corporation*, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [1st Dept., 2003]). Causes of action pursuant to Labor Law §241[6], are subject to valid defenses of contributory negligence and comparative negligence (*Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 [1993]).

To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the injuries. The Industrial Code section cited must be a "positive command," and not a reiteration of common law negligence (*Buckley v. Columbia Grammar and Preparatory*, 44 A.D. 3d 263, 841 N.Y.S. 2d 249 [1st Dept., 2007]). OSHA violations do not provide a basis for liability under Labor Law §241[6] (*Schiulaz v. Arnel Const. Corp.*, 261 A.D. 2d 247, 690 N.Y.S. 2d 226 [1st Dept., 1999]).

Plaintiff argues that the elements of Labor Law §241[6] are satisfied because there were violations of 12 N.Y.C.R.R. 23-1.21[b][4][iv] and 12 N.Y.C.R.R. 23-1.21[e][2]. Plaintiff only objects to defendants arguments alleging that they violated Industrial Code Sections, 12 N.Y.C.R.R. §§ 23-1.21[b][4][iv] and 23-1.21[e][2]. He does not address the other alleged violations in opposition to the cross-motion.

12 N.Y.C.R.R. §23-1.21[e][2], applies to bracing necessary for the rigidity of every stepladder. 12 N.Y.C.R.R. §23-1.21[e][2], "is not sufficiently specific to support a Labor Law §241[6] claim" (*Lopez v. La Fonda Boricua, Inc.*, 136 A.D. 3d 588, 26 N.Y.S. 3d 267 [1st Dept., 2016]).

23 N.Y.C.R.R. 1.21[b][4][iv] requires ladders to be secured. Work performed at a height of between six and ten feet above the footing additionally requires that, "...the stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means." Defendants are required to establish that the facts applied to the case fail to create a predicate or that a violation of this provision is not the proximate cause of the accident to obtain summary judgment (*Torres v. Perry Street Development Corp.*, 104 3d 672, 960 N.Y.S. 2d 450 [2nd Dept., 2013] and *Hunter v. R.J.L. Development, LLC*, 44 A.D. 3d 822, 845 N.Y.S. 2d 352 [2nd Dept., 2007]).

Defendants have stated a basis for summary judgment on all but the Industrial Code 23 N.Y.C.R.R. 1.21[b][4][iv] claims asserted by plaintiff under Labor Law §241[6]. Plaintiff has raised issues of fact as to whether the defendants failed to comply with Industrial Code 23 N.Y.C.R.R. 1.21[b][4][iv] and that ladder needed to be secured to prevent his falling.

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site. An implicit precondition to the common law duty is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury, mere directions as to the time and quality of the work is not enough to impose liability (Esposito v. New York City Industrial Development Agency, 305 A.D. 2d 108, 760 N.Y.S. 18 [1st Dept., 2003] aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 [2003]). Labor Law §200 requires that the plaintiff establish that the defendant had either actual or constructive notice of the unsafe condition that caused the accident (Mitchell v. New York Univ., 12 A.D. 3d 200, 784 N.Y.S. 2d 104 [1st Dept. 2004] and Vasquez v. Urbahn Associates, Inc., 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [1st Dept., 2010]).

Defendants have met their initial burden of proof on the Labor Law §200 claims establishing that they did not exercise direct supervisory control over plaintiff's work or that they had either actual or constructive notice of the condition that cause the accident, the ladder which belonged to plaintiff's employer, Ashnu . Plaintiff failed to oppose or raise issues of fact to sustain the Labor Law §200 causes of action asserted in the amended complaint.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment on liability under Labor Law §240[1], is denied, and it is further,


ORDERED that, defendants' cross-motion for summary judgment, dismissing the supplemental summons and amended complaint, is granted, and it is further,

ORDERED, that the causes of action in the amended complaint asserted against the defendants under Labor Law §200, and the Labor Law §241[6] claims pertaining to OSHA Violations and Industrial Code Violations 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7, 23-1.7[d], 23-1.7[e], 23-1.8, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.21[b][1], 23-1.21[b][3] (all sections), 23-1.30, and 23-1.32, are severed and dismissed, and it is further,

ORDERED, that all causes of action asserted in the amended complaint against defendants under Labor Law §240[1] and under Labor Law §241[6] for violation of Industrial Code 12 N.Y.C.R.R. §§ 23-1.21[b][4][iv], remain in effect, and it is further,

ORDERED, that the remainder of the defendants' motion is denied.

ENTER:



MANUEL J. MENDEZ,
J.S.C. MANUEL J. MENDEZ
J.S.C

Dated: April 25, 2015

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE