

Garcia v Port Auth. of N.Y. & N.J.
2016 NY Slip Op 31353(U)
June 29, 2016
Supreme Court, Bronx County
Docket Number: 300545/11
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2
JOSE GARCIA,

Plaintiff,

Index No. 300545/11

- against -

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

PORT AUTHORITY OF NEW YORK
AND NEW JERSEY and
TISHMAN CONSTRUCTION CORPORATION,
Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No. On Calendar of _____	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
Answering Affidavit and Exhibits-----	3-4
Replying Affidavit and Exhibits-----	5
Affidavit-----	_____
Pleadings -- Exhibit-----	_____
Stipulation -- Referee's Report --Minutes-----	_____
Filed papers-----	_____

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

(This motion was referred to this court as Justice Friedlander has retired)

Motion for an order granting summary judgment dismissing the complaint, is decided as follows.

It is noted that plaintiff filed a motion for summary judgment which was denied with leave to renew, pursuant to the order of Justice Friedlander dated March 26, 2015. Therefore, this court declines to address plaintiff's motion for summary judgment.

Plaintiff commenced this personal injury action seeking damages allegedly sustained on September 24, 2010. The undisputed facts are as follows. Defendant Port Authority of New York and New Jersey contracted with defendant Tishman Construction Corporation to perform construction work at the World Trade Center starting in approximately 2009. Tishman subcontracted construction work to non-party

Collavino Construction to build the "concrete superstructure" of Tower One. Plaintiff was an employee of Collavino and worked at Tower One.

Plaintiff alleges that defendants are liable for common law and pursuant Labor Law 200, 240 (1), and 241 (6). Plaintiff contends that on September 24, 2010, he was working in cell six on the 20th floor, building "cells" for areas including the elevator shaft and hallways. Plaintiff claims that directly above him the "core" of the building was being constructed with the use of an "EFCO system" which forms the molds for concrete walls and is then jumped to the next level. Plaintiff alleges he was "nailing pipe," when a five - pound "wing nut" from the "EFCO system" struck him in the right shoulder.

Defendants move for summary judgment dismissing the complaint alleging: 1) the Labor Law 200 and common law claims must be dismissed as defendants did not exercise supervision or control over the device that caused plaintiff's injuries; 2) the Labor Law 240 (1) claims must be dismissed as the "wing nut" that struck the plaintiff is not a falling object; and 3) the labor law 241 (6) claims must be dismissed as the Industrial Codes alleged by plaintiff are either insufficient predicates or are inapplicable to this matter.

The branch of the motion to dismiss the Labor Law 200 and common law negligence claims, is granted.

To establish entitlement to dismissal of the Labor Law 200 and common law negligence claims, defendants must establish that it did not exercise supervision and control over the work (*see Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 550 [1st Dept 2013]; *Singh v Black Diamonds LLC*, 24 AD3d 138 [1st Dept 2005]).

In support, defendants submit the deposition transcripts of Brian Walton, Superintendent of Collavino, Edwin Garcia, site safety manager of Tishman and plaintiff. Defendants establish through the testimony of plaintiff, Mr. Walton and Mr. Garcia that they did not exercise supervision and control over the "EFCO system" or Collavino's workers. Plaintiff testified that he was employed by Collavino and only received assignments and safety training from Collavino. Additionally, Mr. Walton averred that Collavino had a safety plan for the daily supervision of its workers including the operation of the "EFCO system." Additionally, Mr. Garcia testified that Tishman did not directly supervise or control the "EFCO system" or Collavino's workers. Mr. Garcia further testified that the EFCO system was used by Collavino and under its control. Plaintiff's contention that Mr. Garcia's testimony establishes that Tishman supervised Collavino's workers and the "EFCO system," is without merit. Mr. Garcia's testimony that he did daily "walk-throughs" to observe unsafe conditions, and that he had the authority to correct and, if necessary, to stop work, is merely general supervision and worksite coordination, which is insufficient to "trigger liability" (*see Singh*, 24 AD3d 138).

Based upon the foregoing, defendants have met their initial burden of establishing entitlement to dismissal of the Labor Law 200 and negligence claims, therefore, the burden shifts to plaintiff to raise an issue of fact.

However, in opposition, plaintiff merely submits the affirmation of counsel who lacks personal knowledge which is, alone, insufficient to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Accordingly, the Labor Law 200 and common law negligence claims are dismissed.

The branch of the motion for an order granting summary judgment dismissing the Labor Law 240 (1) claim, is denied.

To dismiss a Labor Law § 240 (1) claim, defendants must establish that “plaintiff’s injuries were [not] the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662 [2014] [citations omitted]; see *Gualpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416 [1st Dept 2014]).

In the instant matter, defendants fail to establish entitlement to dismissal of the Labor Law 240 (1) claim. Mr. Walton testified that while work was being performed on the EFCO system, safety devices were used as there was the potential “for something to fall.” Mr. Walton further testified that there was “orange netting” horizontally installed however, he could not remember if it was in every cell. Additionally, Mr. Garcia testified that at the time of the use of the EFCO system, safety devices, including plywood and orange debris netting, were used to prevent material from falling. Mr. Walton also testified that not every cell had “orange netting installed.” Additionally, the attached “Collavino Construction Accident /Incident Investigation Report” indicates that “it was determined that the object that fell was a wing nut used to close up the EFCO forms above.”

Based upon the foregoing, defendants fail to establish that “plaintiff’s injuries were [not] the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (see *Fabrizi*, 22 NY3d 658, 663).

As defendants failed to meet their initial burden, this court does not need to address plaintiff's opposition.

The branch of the motion for an order granting summary judgment dismissing the Labor Law 241 (6) claim, is denied.

Labor Law 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" for workers, circumscribed by the specific safety rules in the Industrial Code (*Garcia v 225 East 57th Street Owners, Inc.*, 96 AD3d 88 [1st Dept 2012]). To establish entitlement to summary judgment dismissing the Labor Law 241 (6) claim, defendants must establish that they did not violate any of the Industrial Code sections alleged by plaintiff (*id.*).

Plaintiff contends that defendants violated Article 1926 of the Occupational Safety and Health Act (OSHA) and the following Industrial Code sections: (a) 12 NYCRR 23-1.5; (b) 12 NYCRR 23-1.7; (c) 12 NYCRR 23-1.18; (d) 12 NYCRR 23-1.19; (e) 12 NYCRR 23-2.1, *et seq.*; (f) 12 NYCRR 23-2.2, (g) 12 NYCRR 23-2.3, (h) 12 NYCRR 23-4, *et seq.*; (i) 12 NYCRR 23-5, (j) 12 NYCRR 23-6, *et seq.*; (k) 12 NYCRR 23-7, *et seq.*; (l) 12 NYCRR 23-8 *et seq.*; (m) 12 NYCRR 23-9, *et seq.*

It is well settled that the alleged OSHA violation may not serve as a predicate for a Labor Law 241 (6) claim and that Industrial Code 12 NYCRR 23-1.5 is a general safety standards which is an insufficient predicate for liability under Labor Law 241(6) (*Martinez v 342 Property LLC*, 128 AD3d 408, 409 [1st Dept 2015]; *Schiulaz v Arnell Const. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]).

Additionally, this court finds that defendants have established that the following Industrial Codes are inapplicable to the alleged facts in this matter: 12 NYCRR 23-1.18

(Sidewalk Sheds and Barricades); 12 NYCRR 23-1.19 (Catch platforms); 12 NYCRR 23-2.1 (Maintenance and Housekeeping); 12 NYCRR 23-2.2 (Concrete Work), 12 NYCRR 23-2.3 (Structural Steel Assembly), 12 NYCRR 23-4 (Excavation Operations); 12 NYCRR 23-5 (Scaffolding); 12 NYCRR 23-6 (Material Hoisting); 12 NYCRR 23-7 (Personal Hoist); 12 NYCRR 23-8 (Mobile Cranes, Tower Cranes and Derricks); and 12 NYCRR 23-9 (Power Operated Equipment).

However, in light of the testimony of plaintiff, Mr. Walton, and Mr. Garcia relating to how the accident occurred, the risk of falling materials, and the use of safety devices, this court finds that defendants fail to establish they did not violate Industrial Code 12 NYCRR 23-1.7.

Based upon the foregoing, defendants failed to establish entitlement to dismissal of the Industrial Code 12 NYCRR 23-1.7 claim.

As a result, defendants have established entitlement to dismissal of the OSHA claim and the following Industrial Codes: 12 NYCRR 23-1.5; 12 NYCRR 23-1.18; 12 NYCRR 23-1.19; 12 NYCRR 23-2.1, *et seq.*; 12 NYCRR 23-2.2, 12 NYCRR 23-2.3, 12 NYCRR 23-4, *et seq.*; 12 NYCRR 23-5, 12 NYCRR 23-6, *et seq.*; 12 NYCRR 23-7, *et seq.*; 12 NYCRR 23-8 *et seq.*; 12 NYCRR 23-9, *et seq.*

In opposition, plaintiff merely submits the affirmation of counsel; and therefore, fails to raise an issue of fact.

Accordingly, the claims that defendants violated OSHA and the following Industrial Code sections are dismissed: 12 NYCRR 23-1.5; 12 NYCRR 23-1.18; 12 NYCRR 23-1.19; 12 NYCRR 23-2.1, *et seq.*; 12 NYCRR 23-2.2, 12 NYCRR 23-2.3, (h)

12 NYCRR 23-4, *et seq.*; 12 NYCRR 23-5, 12 NYCRR 23-6, *et seq.*; 12 NYCRR 23-8 *et seq.*; 12 NYCRR 23-9, *et seq.*

The foregoing shall constitute the decision and order of this court.

Dated: JUN 29 2016



Elizabeth A. Taylor A.J.S.C.