Collazo v CBW Uniondale Hotel, LLC

2016 NY Slip Op 31419(U)

July 25, 2016

Supreme Court, New York County

Docket Number: 156644/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JOSE COLLAZO, Index No.: 156644/13

Plaintiff,

-against-

CBW UNIONDALE HOTEL, LLC and
MARRIOTT HOTEL SERVICES, INC,

Defendants,

---X

Joan A. Madden, J.

In this action arising out of a workplace accident, plaintiff moves for summary judgment as to liability on his Labor Law § 240(1) claim. Defendants oppose the motion, and cross move for summary judgment dismissing the complaint. For the reasons below, plaintiff is granted summary judgment as to liability on his Labor Law § 240(1) claim, and defendants' cross motion is denied in part and granted in part.

Background

Plaintiff was injured on July 18, 2013, when he fell off a scaffold at the Marriott Hotel ("the hotel") located at 101 James Doolittle Boulevard in Uniondale, ("the job site"), which is owned by defendants. At the time of the accident, plaintiff was employed by Nation's Roofing Inc. ("Nation's Roofing")[1] as a laborer.

Plaintiff testified that on the date of the accident, he and six other workers and a foreman were moved from the central location of Nation's Roofing in Yonkers to the job site where they were to replace the Hotel's whole roof (Pl. Dep. at 23, 25). Plaintiff testified that one of the six workers was named Carlos Velez ("Velez") and the foreman was Frank Rodriguez ("Rodriguez) (Id. at 25, 26). Plaintiff was wearing work boots with steel toes, helmet, and tool belt provided

[1]Defendants commenced a third-party action against Nation's Roofing which was discontinued by stipulation dated January 7, 2014, after Nation's Roofing, agreed to defend and indemnify defendants.

by Nation's Roof (Id. at 28, 29). He was also given a harness, however, the harness did not have any clamper rings or other mechanism that would allow plaintiff to secure himself while on the roof (Id. at 30). He testified that the harness hadn't been "taken up to the roof yet" when he was working on the scaffold (Id. at 32).

After arriving at the job site, plaintiff was instructed to go up on the roof (Id at 15). Plaintiff testified that he had no previous training working at a height or on scaffolds, but had worked on the roof two days before the accident without using a scaffold (Id at 15-16, 32, 34). According to plaintiff, on the day of the accident he was working on the "outside of the roof and close to wall." (Id. at 33).

According to plaintiff, the scaffold,which "was already built when he arrived at work," and was "made of metal" with boards (Id. at 35-36). While plaintiff initially testified that there were "boards" on top of the scaffold he later clarified that there was only one board, on the scaffold (Id. at 53). He described the metal portion of the scaffold as two legs which were about ten or twelve feet apart (Id. at 37-38). Plaintiff testified that the board was eight inches wide and one-inch thick and was on top of the two metal legs (Id. at 39). To get up to the board, plaintiff used "a frame ladder." (Id. at 39). There were four wheels attached to each of two the legs of the scaffold (Id. at 41). Plaintiff testified that before going on the board, he checked the wheels to make sure they locked to make sure the scaffold did not move (Id. at 41). Plaintiff also testified that the board on the scaffold was not "tightened up with some wires," "tied in", or secured in any way (Id. at 42, 54).

On the date of the accident, plaintiff was working on the scaffold with Velez, his co-worker (Id. at 55). Before he fell, plaintiff had been on the scaffold for approximately two and a half hours, and the scaffold was being moved every half an hour (Id. at 56). Plaintiff testified that ten minutes before the accident, Velez got off the scaffold but was still on the roof (Id. at 58).

Just before he fell, plaintiff was placing screws on the edge of the roof and was standing on the end of the board and, more specifically, on the portion of the board which extended about one and a half feet beyond one of the metal legs of the scaffold (Id. at 59-61). Plaintiff testified that during the time leading up to the accident, the board and scaffold had not moved (Id. at 59). Plaintiff testified that the accident happened when "I exerted myself to put in the screw and that's when [the board] gave way" (Id. at 60). He testified that the accident was related to the loss of Velez's weight on the other side of the scaffold (Id. at 59). Plaintiff also testified that he fell to the side onto "the tube," which plaintiff described as metal bars connecting the legs of the scaffold "hurting his back, right shoulder and elbow" (Id. at 55, 63-64).

Plaintiff commenced this action against defendants asserting claims pursuant to Labor Law §§ 200, 240(1), 241(6), and for common law negligence. Discovery is complete.

Plaintiff now moves for summary judgment as to liability on his Labor Law § 240(1) claim against defendants, arguing that the uncontroverted record shows that plaintiff fell when the top plank of the scaffold collapsed and that defendants' failure to provide proper safety devices required under the statute to protect him from an elevated risk, and was a proximate cause of his injuries.

Defendants oppose the motion, and cross-move for summary judgment dsmissing the complaint in its entirety. With respect to the Labor Law § 240(1) claim, defendants argue that the summary judgment in their favor is warranted as the record shows that the scaffold provided proper protection under the statute. In addition, they argue that plaintiff's negligence in climbing on to the outer part of the scaffold the sole proximate cause of his injuries, or at the very least, there are issues of fact in this regarding defendants.

In support of their position, defendants submit an affidavit from Frank Brazoban ("Brazoban"), a foreman who was employed by the Nations Roof, who was at the job site when the accident occurred, did not witness it. (Brazoban Aff., ¶'s 1, 2). According to Brazoban,

plaintiff fell from "4 [foot] high pipe scaffold," (Id. ¶1), Brazoban states that after the incident he checked the scaffold, and "saw no defects in the scaffold nor did any of the platform planks within the body of the scaffold appear loose, broken, or defective" (Id. ¶2). He further states that prior to the incident there were safety meetings, where the topics discussed involved employees were told not to "walk on the outside of a scaffold" on any extension planking according to Brazoban, "[t]hese instructions were relayed to [plaintiff]" (Id. ¶3).

Defendants also submit an affidavit from Velez, who is a roofer and laborer for Nations Roof, and was the co-worker on the scaffold with plaintiff before the accident[2] (Velez Aff., ¶'s 1, 3). Velez states that both he and plaintiff were working at the location approximately for two weeks before the incident and that "[d]uring that time frame both [plaintiff] and he attended safety meetings conducted by Nation's Roof on how to properly work on scaffolding" (Id. ¶3). He also states that plaintiff had "made it clear that he was experienced working on scaffoling (Id. Velez further states that on the date of the accident:

> [Plaintiff] and I were working on the main roof putting EPM rubber strips over wood siding that ran along the roof's brick wall… In order to install the rubber strips were required to use a 4-5' high pipe scaffolding. The scaffolding had been previously erected by the other employees of Nations Roof. There were no other contractors working on the roof at the time of the incident and no one other than Nation's Roof's employees had access to the scaffolding. This scaffold was 8' long. It had 4 wheels on its base that were locked into place making it stationary and secure. The scaffold also had three (3) 12' long planks utilized as a platform. These planks were tied into the pipes making it secure. Two of the wooden planks were used to stand and walk on within the framework of the scaffold while a [third] plank was utilized for storing material, outside the scaffold railings. The [third] plank was not always secured and both [plaintiff] and myself knew this and avoided stepping on it while gaining access to and from the scaffold. (Id. ¶'s 5,6).

[2] Before discovery was complete, defendants tried to obtain Velez's deposition by serving him a copy of a non-party deposition notice, but Velez did not appear. Defendants then moved to compel Velez's deposition and by order dated July 9, 2015, the court granted the motion to the extent of directing Velez to appear for deposition within 60 days with respect to his knowledge of the circumstances of the accident, and permitted plaintiff to file his note of issue. Velez did not obey the court's order, and defendants subsequently obtained Velez affidavit which is submitted with this motion.

Velez also states that "[a]t all times while we were using the scaffold [on the accident date] the internal scaffolding planks did not move or shift. Moreover, the ground and surface area of thereof upon which the scaffold had been placed was level and free of debris." (Id. ¶ 7). According to Velez, at the time of the accident, plaintiff was working approximately one foot away from him and although he did not witness the accident, it was his belief from observing plaintiff fall that plaintiff "had stepped onto the exterior, wooden plank utilized for supplies. In this regard [plaintiff] had nothing in his hands and railings were present to prevent his fall. Accordingly, the only way he could have fallen was to have stepped over the railing, onto the supply plank. Moreover, as [plaintiff] fell he … reached and pulled the supply plank down with him." (Id. ¶ 8). According to Velez, "[a]t no time after [plaintiff's] fall did the main scaffold move or shift and the planks that were used inside the railings did not shift and the planks that were utilized inside the railings did not shift, collapse, or change position." (Id. ¶'s 9, 10).

With respect to plaintiff's claim under Labor Law § 241(6), defendants argue that such claim should be dismissed as the violations of the New York State Industrial Code relied upon by plaintiff, that is Section 23-1.5, 23-1.33, 23-5.1, and 23-5.22, do not apply to the manner in which he was injured and thus do not provide a basis for liability. As for the Labor Law § 200 and common law negligence claims, defendants argue plaintiff's accident occurred as a result of the means and methods of his work, as opposed to a defective condition at the job site, and therefore they cannot be held liable since they did not exercise any supervision or control over pliantiff's work. Alternatively, defendants argue that there is no evidence that it caused or created any unsafe condition on the work site or had notice of such condition.

In opposition to the cross motion, plaintiff argues that summary judgment is warranted on his Labor Law § 240(1) claim as defendants have failed to controvert his showing that defendants' failure to provide plaintiff with adequate safety equipment was a proximate cause of

his injuries. Plaintiff submits an incident report[3] written and reviewed by a Marriott employee which he argues shows that the plank was not secure. Specifically, it states that the accident happened when "one crew member removed a plank from the scaffold (unsecured it, that is removed from the tie) passed a gypsum board to the work location while no worker was on the scaffold. The plank was put back on...but Jose (i.e. plaintiff) did not re-secure it before getting on the scaffold, [h]e stepped on the edge of the unsecured plank, [i]t seasawed and fell." Plaintiff further argues that Velez's affidavit is insufficient to raise a triable issue of fact, since Velez admitted in his affidavit that the "supply plank" (i.e the external plank) was not always secure.

In support of this argument, plaintiff submits an affidavit from Velez and a translation from Carlos Berrios ("Berrios"), a translator who is certified by the State of New York as a Spanish interpreter and translator (Barrios aff. at ¶1). According to the translation, Velez stated that he only signed the affidavit attached to the defendants' motion because "they would always call me on the cell phone, so then I asked them which are the papers I have to sign, and I told them to come to my house to sign them, and they told me that they were the same papers, just that they were only translated to English and I said to them that if they put down more information that I did not say that there is going to be a problem with me. I do not read nor write English."

With respect to defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim, plaintiff argues that he has a potential claim based on a violation of Section 23-5.1 (e)(1) which provides that scaffold planking shall be laid tight and securely fastened. the job site, and that he has cited provisions of the State Industrial Code that provide a basis for liability under section 241(6). Plaintiff does not oppose that part of the motion seeking to dismiss its claims under Labor Law § 200 and for common law negligence.

[3] The accident report states that the incident was reported on July 23, 2013, which is 16 days after the accident, and written eight days later on August 1, 2013.

In reply and in further support of their cross motion, defendants submit an affidavit from Steven Wall ("Wall") an investigator employed by E.R. Quinn Co. who was hired by defendants to obtain affidavits from Velez and Barozoban (Wall Aff., ¶ 1). He states that "[t]o my knowledge the affidavits were prepared by the defense counsel pursuant to prior statements" (Id.) He further states that on that day when they went to Velez's home with the affidavit, that Velez was provided with the signed statement, translated to him by his wife, "so he could see that [defendants] were only looking to verify the facts as he previously recounted" (Id. ¶ 3). He also states that there was no "threats about employment or on any other basis" toward Velez from the defendants, and all the instructions needed for the necessary affidavits[4] (Id. ¶ 4).

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Labor Law § 240 Claims

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows: "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,

[4]Notably, in several places in the affidavit, Mr. Wall uses the name of plaintiff (Collazo) instead of Velez (see ¶'s 1, 2, and 4).

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."

The purpose of the statute is "to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." Rocovich v. Consolidated Edison Co., 78 NY2d 509, 513 (1991) (internal quotation marks and citations omitted). The statute imposes a nondelegable duty and absolute liability on owners and contractors for failing to provide adequate safety devices to workers who sustain gravity-related injuries. Jock v. Fien, 80 NY2d 965, 967 (1992); Rocovich, 78 NY2d at 513. Labor Law § 240 (1) applies to "risks related to elevation differentials," including "those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" Rocovich, 78 NY2d at 514.

To impose liability under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries. Blake v. Neighborhood Hous. Servs. of New York City, 1 NY3d 280, 290 (2003); Ramos v. Port Authority of New York and New Jersey , 306 AD2d 147, 148 (1st Dept 2003). Proximate cause is demonstrated based on a showing that a "defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury.'" Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993)(citation omitted). It is not necessary for plaintiff to demonstrate that the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable. Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 (1st Dept. 1996), citing Public Administrator of Bronx County v. Trump Village Construction Corp., 177 AD2d 258 (1st Dept 1991). Comparative negligence is not a defense. See Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 289-290 (2003).

However, "a defendant is not liable under Labor Law § 240 (1) [when a] plaintiff's own negligence was the sole proximate cause of the accident." Id. at 290.

Here, plaintiff has made a prima facie showing entitling him to summary judgment based on his testimony that he was injured when he fell from an unsecured plank on a scaffold.

Defendants have failed to controvert this showing as neither the statements in the affidavit of Velez, plaintiff's co-worker, nor those in the affidavit of Brazoban, a foreman on the job site are sufficient to raise an issue of fact as to defendants' liablity under the Labor Law. With respect to the reliability of the statements in the Velez affidavit, issues exist as the record shows that it was prepared by defendants' attorney. In this connection, Velez's affidavit may not be considered, based on proof that Velez does not read or write English, and defendants' failure to submit a translator's affidavit as required under CPLR 2101(b).[5] See Raza v. Gunik, 129 AD3d 700, 700 (2d Dept.2015)(finding that defendant failed to raise a triable issue fact where defendant stated in his opposition affidavit that "the affidavit had been translated from English to Russian for him so that he could understand it, but the affidavit was not accompanied by a translator's affidavit setting forth the translator's qualifications and stating that the translation was accurate"); Reyes v. Arco Wentworth Mgt. Corp., 83 AD3d 47, 54 (2d Dept 2011)(holding that "plaintiff's English-language affidavit, without a corresponding affidavit from a qualified translator, cannot be considered in opposition to [defendant's] motion'); see also Yoshida Print Co. v. Aiba, 240 A.D.2d 233 (1st Dept 1997)(motion for protective order denied in the absnece of an affidavit of translator).

In any event, even if the court were to consider Velez's affidavit, it supports plaintiff's statement that a loose plank caused him to fall. Under these circumstances, any differences in

[5]CPLR 2101 (b) provides that "[e]ach paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate."

the version of the accident described in plaintiff's testimony and in Velez's affidavit are insufficient to raise an issue of fact as to whether the lack of a proper safety device was a proxmiate cause of plaintiff's injuries and thus plaintiff is entitled to summary judgment as to liability under section 240(1). See Nerney v. 1 World Trade Center, 140 ad2d 459 (1st Dept 2016)(holding that "[i]n light of the lack of safety devices provided, plaintiff is entitled to recovery under any version of the accident"); Lipari v. At Spring, LLC, 92 AD3d 502 (1st Dept 2012)(plaintiff entitled to summary judgment on 240(1) claim despite different versions of how plaintiff was injured, where "the accident occurred because plaintiff was not given proper protection to prevent his fall");Nascimento v. Bridgehampton Constr. Corp., 86 AD3d 189 (1st Dept 2011)(finding that "the difference between the witnesses' factual recitations does not create a material issue of fact as to whether Labor Law § 240 (1) was violated [since] [a] violation of Labor Law § 240 (1) is stated whether plaintiff's fall was caused by an unsecured extension ladder that slipped or malfunctioned ...or whether it happened because [plaintiff] was required to work on rafters without safety devices protecting him from a fall through the open space to the basement area below").

Brazoban's affidavit is also insufficient to raise a triable issue of fact since he admitted that he did not witness the accident and failed to indicate when after the incident he checked the scaffold, and, thus, his affidavit lacks probative value. Moreover, to the extent that it can be said that Brazoban's affidavit raises factual questions as to how the accident happened, such argument is unavailing for the same reasons stated in connection with the Velez's affidavit. In this connection, while he states that none of the planking within the *body* of scaffold appeared loose, broken or defective, he does not he does not address the third plank described in Velez's affidavit which was outside the scaffold railings, and which Velez stated was loose.

Nor does Brazoban's statement that there were safety meetings at which workers were told not to walk on any extension planking raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident To show that a plaintiff's negligence was the sole

proximate cause of an injury, a defendant must establish that the plaintiff "had adequate safety devices available: that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 (2004)(noting that the recalcitrant worker defense examplifies the rule that "where a plaintiff's own actions are the sole proximate cause of his injuries there can be no liability"); see also, Kosavick v. Tishman Construction Corp. of New York, 50 AD3d 287 (1st Dept 2008). Here, the record shows that defendants failed to provide a safe scaffold with all planks secured and thus violated the statutory requirement to provide safety devices to protect against elevated related risks. Thus, even accepting defendants' contentation that the accident occurred when plaintiff walked on the exterior plank, such conduct constituted, at most, evidence of comparative negligence which does not provide a defense to a claim under Labor Law § 240(1). See Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d at 289-290.

Accordingly, plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim.

As for plaintiff's Labor Law § 241(6) claim,[6] the statute requires owners, contractors, and their agents to "provide adequate protection and safety" for workers performing the inherently

[6] Labor Law § 241(6), provides that:

> All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
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> 6. All areas in which construction, excavation or demolition work is being performed shall be 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.

dangerous activities of construction, excavation and demolition work. This statute is a "'hybrid provision' since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority." Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 503 (1993). To recover under Labor Law § 241 (6), the plaintiff must prove the violation of a concrete specification of a New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standard. Id., at 503-504). In Ross, the Court of Appeals wrote that:

> for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not.

Id, at 505. "[S]ection 241 (6) imposes liability upon a general contractor *for the negligence of a subcontractor*, even in the absence of control or supervision of the worksite." Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348-349 (1998). In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident. Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 146 (1st Dept 2012).

Section 23-5.1 (e)(1), entitled "Scaffold planking," which plaintiff argues is a proper predicate for its 241(6) claim, provides, in relevant, part that "[s]caffold planks shall be laid tight and inclined planking shall be securely fastened in place." Contrary to defendants' position, this provision is arguably applicable to the facts of this case and has been held to be sufficiently specific to provide a predicate to liability under Labor Law § 241(6). See Klimowicz v Powell Cove Associates, LLC, 111 AD3d 605, 607 (2d Dept 2013)(holding that 23-5.1(e) sets forth a specific safety standard sufficient to support a section 241(6) cause of action); Harris v. Hueber-

Breuer Constr. Co., 67 AD3d 1351, 1353 (4th Dept 2009)(holding that plaintiff's Labor Law § 241(6) claim was viable to the extent it was based on alleged violation of, *inter alia*, 23-5.1 (e) (1)).

Accordingly, defendants' motion to dismiss plaintiff's Labor Law § 241(6) claim is denied.

Finally, with respect to the claims under Labor Law § 200 and for common law negligence, such claims are dismissed, without opposition, and on the ground that there is no evidence that defendants controlled the means and methods of plaintiff's work. See Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 (1st Dept 2012).

Conclusion

In the view of above, it is

ORDERED that the motion by plaintiff Jose Collazo for summary judgment as to liability on his Labor Law § 240(1) claim is granted; and it is further

ORDERED the cross motion for summary judgment by defendants CBW Uniondale Hotel, LLC and Marriott Hotel Services, Inc. is granted only to the extent of dismissing planitiff's claims under Labor Law § 200 and for common law negligence and is otherwise denied.

Dated: ~~July 2016~~ July 25, 2016

J.S.C.

HON. JOAN A. MADDEN
J.S.C.