Torres v 1375 Broadway Prop. Invs. II, LLC
2016 NY Slip Op 32088(U)
August 4, 2016
Supreme Court, Queens County
Docket Number: 14275/12
Judge: Darrell L. Gavrin

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

DARWIN TORRES,	Index No. 14275/12
Plaintiff,	Motion Date April 21, 2016
- against-	
1375 BROADWAY PROPERTY INVESTORS II, LLC, RALLY RESTORATION CORP. and COLLIERS INTERNATIONAL, NY, LLC,	Motion Cal. No. 171
Defendants.	Motion Seq. No. 3

The following papers numbered 1 to 16 read on this motion by defendants, 1375 Broadway Property Investors II, LLC, Rally Restoration Corp., and Colliers International, NY, LLC (collectively referred to as defendants), to vacate the note of issue and certificate of readiness, to compel disclosure, and to extend the time to move for summary judgment after the completion of disclosure; and by separate notice of cross motion by plaintiff, Darwin Torres (plaintiff), for partial summary judgment on the issue of liability on his claims brought under Labor Law §§ 200, 240 (1) and 241 (6), and for common-law negligence.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-5
Notice of Cross Motion - Affirmation - Exhibits.....	6-9
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Reply Affirmation.....	12-16

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for personal injuries that plaintiff sustained due to defendants' alleged violation of Labor Law §§ 200, 240 (1) and 241 (6), and common-law negligence. Plaintiff has alleged that on September 20, 2011, he was working at premises located at 1375 Broadway, in New York County, when he was caused to fall from a scaffold. Plaintiff was an employee of third-party defendant, Lagos Construction Corp. (Lagos), at the time of the accident. Rally Restoration Corp. (Rally), allegedly hired Lagos to perform certain construction work at the premises. Plaintiff has alleged that defendants owned, leased,

operated, managed, maintained, controlled, supervised, and inspected the subject premises. Following commencement of the main action, Rally commenced a third-party action against Lagos. While both defendants and plaintiff have moved for relief, the court will first address plaintiff's cross motion.

Labor Law § 240 (1)

Plaintiff has cross-moved for partial summary judgment on the issue of liability on his claim brought pursuant to Labor Law § 240 (1), and contends that defendants failed to provide him with adequate protection which proximately caused his alleged injuries. Labor Law § 240 (1), provides that:

> "[a]ll 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."

On a summary judgment motion, the movant has the initial burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect them against elevation-related hazards (*see Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2d Dept 2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2d Dept 2009]). In order for a plaintiff to recover under Labor Law § 240 (1), a violation of that section must be shown to be a proximate cause of his injuries (*see Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]; *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 856 [2d Dept 2007]). "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 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 injury" (*Gallagher v New York Post,* 14 NY3d 83, 88 [2010]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

The record contains, among other things, plaintiff's deposition testimony, the testimony of non-party testimony of Alex Martin (Martin), an employee of Rally, and the affidavit of non-party Ronald Torres, plaintiff's brother and an employee of Lagos. Plaintiff testified that he was working with his supervisor from Lagos, non-party Rafael Sanchez (Sanchez), on the date of the accident, that plaintiff received his tools and equipment from Lagos, that he used a yellow scaffold which contained a platform on the date of the accident, that the scaffold was

approximately 13 or 14 feet in height, and that he did not know who owned said scaffold. He further testified that the yellow scaffold was present for the entire time he was working at this work site, that the yellow scaffold was already in position for him to do his work, that it had no bar, piping or other type of protection running behind him while he used the scaffold, and that after the scaffold was moved and he climbed back onto it to continue his work, the platform of the scaffold moved, slid and he fell.

Martin testified that he was a project manager for Rally, and that Rally provided a blue scaffold to Lagos for their use in the performance of their work on the roof, which was the appropriate safety device. Ronald Torres stated in his affidavit that there was only a yellow scaffold, the one involved in the subject accident, available on the roof at the time of the accident, and that he observed Lagos workers come in and set up a blue scaffold after the accident took place. In light of the conflicting evidence in the record, an issue of fact exists, at least, as to whether there were, in fact, adequate safety devices provided to plaintiff that were readily available for him to use to perform his work at the work site on the date of the accident (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Accordingly, this branch of plaintiff's cross motion on the issue of summary judgment on liability is denied.

Labor Law § 241 (6)

Plaintiff has cross-moved for partial summary judgment on the issue of liability on his claim, pursuant to Labor Law § 241 (6), and avers that defendants failed to provide him with proper protection, in violation of said section. "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that ... defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2d Dept 2007]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). In his bill of particulars, plaintiff has alleged violation of various sections of the Industrial Code, including 12 NYCRR 23-1.15, 1.16, 5.1, 5.2,. 5.3, 5.4, and 5.18.

However, in his motion papers, plaintiff has failed to adequately address these alleged code violations. In light of his failure to satisfy his *prima facie* burden on this branch of his cross motion, plaintiff is not entitled to the relief sought (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Labor Law § 200 and Common-Law Negligence

Plaintiff has cross-moved for partial summary judgment on the issue of liability on his claims brought, pursuant to Labor Law § 200 and for common-law negligence. Plaintiff avers that defendants' negligence and failure to adequately supervise the work site proximately caused his alleged injuries. Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). Labor Law § 200 provides that owners and contractors may

be liable for injuries to workers where they supervised or controlled the work which caused the injury (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Claims brought under § 200 are generally brought in two possible categories; those claims where workers were injured as a result of dangerous or defective conditions on a work site and those claims involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.,* 67 AD3d 969, 972 [2d Dept 2009]*; Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Where a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is shown that he had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.,* 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63). Plaintiff's claim under this section appears to be based on both categories.

Plaintiff testified that he did not know who 1375 Broadway Properties Investors II LLC, or Colliers International NY LLC, were, that he knew that Rally provided Lagos with work, and that he never spoke to anyone from Rally about his work. He also testified that he only received instructions on how to perform his work from Lagos employees. Martin testified that if he observed unsafe work at the work site, he had the authority to stop the work, while John Impoco (Impoco), a property manager for 1375 Broadway Property Investors II, LLC/Colliers International, NY, LLC, testified that he oversaw the projects at the premises and could have stopped work he felt was unsafe, but that he did not participate in the coordination of any trades.

Plaintiff's testimony, along with the testimony of Impoco and Martin, demonstrated that defendants had a "[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product," which was "insufficient to impose liability for common-law negligence and under Labor Law § 200" (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2d Dept 2004], *lv denied* 4 NY3d 702 [2004]; *see Perri v Gilbert Johnson Enter., Ltd.*, 14 AD3d 681, 683 [2d Dept 2005]). Plaintiff's submissions have also failed to satisfy his *prima facie* burden as to his contention that defendants created the alleged condition or had actual or constructive notice of it (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, plaintiff is not entitled to the relief sought on this branch of his cross motion.

Defendants' Motion

Defendants have moved, pursuant to 22 NYCRR 202.21 (e), to vacate the note of issue and certificate of readiness, pursuant to CPLR 3124, to compel disclosure relating to a Notice for Discovery & Inspection and Notice to Produce dated August 11, 2015, and to extend their time to move for summary judgment. Plaintiff responded to defendants' notice dated August 11, 2015, and defendants have alleged that plaintiff's response was improper.

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."

IT IS ORDERED that plaintiff shall respond only to paragraphs 6 and 7 of defendants'

Notice for Discovery & Inspection dated August 11, 2015, within 30 days of service of a copy of this order with notice of entry, it is

ORDERED the parties are hereby directed to expeditiously complete all outstanding discovery disclosure.

In the interest of judicial economy and the resolution of this matter, the court will not vacate the note of issue or certificate of readiness, nor will it extend the time to move for summary judgment.

Accordingly, defendants' motion is granted to the extent discussed herein and is denied in all other respects. Plaintiff's cross motion is denied in its entirety.

Dated: August 4, 2016

DARRELL L. GAVRIN, J.S.C.