

Gonzalez v City of New York
2016 NY Slip Op 32631(U)
December 22, 2016
Supreme Court, Bronx County
Docket Number: 301423/2014
Judge: Kenneth L. Thompson, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

FRANKLIN GONZALEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,
H.E.L.P.-BRONX, L.P. a/k/a H.E.L.P.-BRONX,
H.E.L.P. DEVELOPMENT CORP., and H.E.L.P.
PROPERTY MANAGEMENT COMPANY, INC.,

Defendants

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DECISION AND ORDER

Present:

HON. KENNETH L. THOMPSON, JR.

_____ X

The following papers numbered 1 to 5 read on this **motion for summary judgment**

No	On Calendar of October 14, 2016	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____	<u>1, 2</u>
Answering Affidavit and Exhibits-----	_____	<u>3, 4</u>
Replying Affidavit and Exhibits-----	_____	<u>5</u>
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 for summary judgment against defendant, H.E.L.P.-Bronx, L.P., on grounds of violation of Labor Law 240(1) and 241(6). Defendants, H.E.L.P.-Bronx, L.P. a/k/a H.E.L.P.-Bronx, H.E.L.P. Development Corp. and H.E.L.P. Property Management Company, Inc., (Help), move pursuant to CPLR 3212 for summary judgment dismissing the complaint as against them. The herein motions are consolidated for purposes of decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff when a plank fell off a scaffold when plaintiff was in the process of moving the scaffold horizontally, with co-workers.

SOLE PROXIMATE CAUSE DEFENSE

Help argues that plaintiff is the sole proximate cause of his injuries because he moved the scaffold horizontally. Plaintiff's expert opines that to move a pipe scaffold horizontally was a violation of industry practices.

However, there is no evidence that plaintiff was ever told that the scaffold had to be disassembled prior to moving it. (Garcia, transcript, p. 49-50). Without such explicit instructions, plaintiff was not the sole proximate cause of his injuries nor a recalcitrant worker. *Gallagher v. N.Y. Post*, 14 N.Y.3d 83 [2010]). Moreover, plaintiff did not move the scaffold himself, but did so in concert with three co-workers. *Olea v. Overlook Towers Corp.*, 106 A.D.3d 431 [1st Dept 2013]).

LABOR LAW 200 AND COMMON LAW NEGLIGENCE

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).

There is no evidence that Help had any authority with regards to plaintiff's work activity.

Accordingly, Help's motion to dismiss plaintiff's common law negligence claim and Labor Law 200 claim is granted.

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.

The facts of this case are covered by Labor Law § 240 (1), which “applies to both ‘falling worker’ and ‘falling object’ cases” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]). This Court has held that “[t]he statutory requirement that workers be provided with proper protection extends not only to the hazards of building materials falling,” but to the hazards of defective parts of safety devices “falling from an elevated level to the ground” (*Jiron v China Buddhist Assn.*, 266 AD2d 347, 349 [1999] [injury caused by a falling piece of a hoist would be covered by the statute]; *see Smith v Jesus People*, 113 AD2d 980, 983 [1985] [injury caused by a plank falling from a scaffold was covered by the statute]). Moreover, if the accident was caused by a piece of the scaffold falling from a height of 10 or 12 feet, “proper construction . . . of the [scaffold], which is one of the safety devices enumerated in the statute, could have prevented it” (*Jiron v China Buddhist Assn.*, 266 AD2d at 349).”

Castillo v. 62-25 30th Ave. Realty, LLC, 47 A.D.3d 865, 866 [2nd Dept 2008]).

Accordingly, plaintiff’s summary judgment motion is granted to the extent that H.E.L.P.-Bronx, L.P is found liable on plaintiff’s Labor Law 240(1) claim.

That branch of Help’s motion that seeks to dismiss plaintiff’s Labor Law 240(1)

cause of action, is denied.

LABOR LAW 241(6)

Section 241 (6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein.

(Rizzuto v L.A. Wenger Contr. Co., 91 N.Y.2d 343, 344 [1998].

In order to prevail in a Labor Law 241(6) claim, a plaintiff must establish that a regulation setting forth a specific standard of conduct was violated.

Plaintiff alleges violation of the following provisions of 12 NYCRR 23-5.1:

(e)(1) Except on needle beam and pole scaffolds, scaffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place.

(h) Scaffold erection and removal. Every scaffold shall be erected and removed under the supervision of a designated person.

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-5.1.

With respect to the length of the overhang of the planks, there is conflicting evidence and thus an issue of fact as to whether the overhang was in excess of 18 inches and therefore violating 12 NYCRR 23-5.1(e)(1). There is also an issue of fact as to whether the planks were laid tightly. There is an issue of fact as to whether 12 NYCRR 23-5.1(h) was violated. There was supervisor on the job site,

Nelson Garcia, however he testified that he did not instruct plaintiff to disassemble the scaffold prior to moving it. (Transcript p. 49-50).

Accordingly, that branch of plaintiff's motion that seeks summary judgment on its Labor Law 241(6) cause of action is denied. That branch of Help's motion that seeks summary judgment dismissing plaintiff's Labor Law 241(6) cause of action is granted except insofar as it is predicated upon alleged violations of Industrial Code (12 NYCRR) § 23-5.1(e) and (h). The other Industrial Code provisions plaintiff alleges were violated, are either insufficiently specific to sustain a Labor Law § 241(6) claim or inapplicable to the facts of this case.

CONCLUSION

Help's motion to dismiss plaintiff's common law negligence claim and Labor Law 200 claim is granted. That branch of Help's motion that seeks summary judgment dismissing plaintiff's Labor Law 241(6) cause of action is granted except insofar as it is predicated upon alleged violations of Industrial Code (12 NYCRR) § 23-5.1(e) and (h). The other Industrial Code provisions plaintiff alleges were violated, are either insufficiently specific to sustain a Labor Law § 241(6) claim or inapplicable to the facts of this case. That branch of Help's motion that seeks to dismiss plaintiff's Labor Law 240(1) cause of action, is denied.


Plaintiff's summary judgment motion is granted to the extent that

H.E.L.P Bronx L.P is found liable on plaintiff's Labor Law 240(1) claim.

Plaintiff's motion is otherwise denied.

The foregoing constitutes the decision, order and of the Court.

Dated: 12/22/2016



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