

Schulam v 56th & Park (NY) Owner LLC

2017 NY Slip Op 32152(U)

October 12, 2017

Supreme Court, New York County

Docket Number: 161120/2014

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ Justice

PART 13

MARK F. SCHULAM, Plaintiff,

INDEX NO. 161120/2014

- v -

MOTION DATE 10/04/17

MOTION SEQ. NO. 003

MOTION CAL. NO.

56TH AND PARK (NY) OWNER LLC and LEND LEASE (US) CONSTRUCTION, LMB, INC. F/K/A BOVIS LEND LEASE, LMB, INC., Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

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

Cross-Motion: [] Yes [X] No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendants 56th and Park (NY) Owner LLC ("56th and Park") and Lend Lease (US) Construction, LMB, Inc. F/K/A Bovis Lend Lease, LMB, Inc.'s ("Lend Lease") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Amended Verified Complaint is granted to the extent that Plaintiff's Labor Law §240[1] claim and §241[6] claim based on violations of Industrial Code sections (12 NYCRR) §23-1.5, §23-1.7, §23-1.7[b], §23-1.7[e], §23-1.7[e][1], §23-2.1, §23-2.1[a], §23-2.1[a][1], §23-2.1[a][2], §23-2.1[b], §23-2.2[a], §23-2.2[b], §23-2.4, §23-2.4[b][1] and §23-2.4[c] are dismissed. The remainder of Defendants motion is denied.

On November 7, 2014 Plaintiff commenced this action for personal injuries sustained in a construction accident. Plaintiff was employed by non-party Safeway Atlantic ("Safeway") to construct and install temporary elevators for a project located at 432/440 Park Avenue, New York, New York ("Construction Project"). On May 17, 2013 Plaintiff was descending from a hoist car when he tripped over a concrete waste bag on the floor causing him to fall.

Defendant 56th and Park owned the property. It hired Defendant Lend Lease as the general contractor for the Construction Project. Lend Lease contracted non-party Safeway as a subcontractor responsible for erecting exterior elevators.

Defendants now move for summary judgment pursuant to CPLR §3212, to dismiss the Amended Verified Complaint. Plaintiff opposes the motion.

To prevail on a motion for summary judgment, 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, 81 NY2d 833, 652 NYS2d 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 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept.

1997)). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). The drastic remedy of summary judgment should not be granted when there is any doubt as to the existence of a triable issue of fact or where such an issue is even arguable (Holender v Fred Cammann Productions, 78 AD2d 233, 434 NYS2d 226 [1st Dept. 1980]).

The "public policy [of] protection of workers requires that the [Labor Law] statutes in question be construed liberally to afford the appropriate protections to the worker" (Kosavick v Tishman Constr. Corp. of New York, 50 AD3d 287, 855 NYS2d 433 [1st Dept. 2008]). Labor Law §240[1] and §241[6] only applies to owners, general contractors and their agents (Russin v Picciano & Sons, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [1981]).

Labor Law §240[1] imposes absolute liability on owners, contractors and their agents for their failure to provide workers with safety devices that properly protect against elevator-related hazards while they are engaged in certain enumerated activities (Runner v New York Stock Exch., 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009]). A plaintiff is entitled to protection from the gravity-related risk under §240 when he demonstrates: (i) the injury was caused by the inadequacy or absence of a protective device of the kind enumerated in Labor Law §240[1] (*Id*); and (ii) the nature of the task being performed by the plaintiff at the time of his accident presented a foreseeable risk of a gravity-related injury (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 [2001]). Injuries caused by a trip and fall due to a routine hazard or defect "are not compensable under Labor Law §240[1] because they did not occur as the result of an elevation-related or gravity-related risk" (Reyes v Magnetic Constr., Inc., 83 AD3d 512, 922 NYS2d 291 [1st Dept. 2011]).

The Defendants make a prima facie showing of judgment as a matter of law as to Plaintiff's §240[1] claim. Plaintiff testified that the accident was because of the debris on the floor- completely unrelated to any elevation risk. He testified that no other safety equipment could have or should have been given (Moving Papers Ex. G). Plaintiff's accident was not "attributable to" a risk arising from construction work site elevation differentials (Runner, *supra*).

Plaintiff did not raise any argument as to the applicability of his Labor Law §240[1] claim. This claim has been abandoned and must be dismissed (Perez v Folio House, Inc., 123 AD3d 519, 999 NYS2d 29 [1st Dept. 2014]).

Labor Law §200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v L.A. Wenger Contracting Co., 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [1998]). In a §200 claim, liability is found if defendant exercised control or supervision over the work (Zak v UPS, 262 AD2d 252, 692 NYS2d 374 [1st Dept. 1999]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). "Even in the absence of supervision or control by the contractor, the statute applies, *inter alia*, to owners and contractors who either create or have actual or constructive notice of a dangerous condition" (Bradley v Morgan Stanley & Co., Inc., 21 AD3d 866, 800 NYS2d 620 [2nd Dept. 2005]). Constructive notice requires that a defect be visible and apparent and exist for a sufficient length of time prior to the incident to permit the defendant to discover and remedy it (Gordon v Am. Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [1986]). "If a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence (Colon v Bet Torah, Inc., 66 AD3d 731, 887 NYS2d 611 [2nd Dept. 2009]).

Defendants fail to make a prima facie showing to establish they had no control or authority over the work, or did not have actual or constructive notice of the unsafe working condition. Defendants failed to annex any contracts or work logs relating to the Construction Project to demonstrate the parties responsibilities and duties to maintain a safe construction site. Although Plaintiff testified that he only took orders from a Safeway employee, none of the Defendants established these orders did not originally derive from them. Defendant Lend Lease's safety manager, Patrick McAlarney, testified that Lend Lease was responsible for site safety of the Construction Project and if he had noticed the concrete waste bag that Plaintiff tripped over during his walkthrough, he would have "stopped all the work around it until it was removed" (Moving Papers Ex. H). Defendants fail to show they conducted a reasonable inspection to uncover and remedy the concrete bag laying on the floor as the accident occurred around 9:00am, three hours after safety manager McAlarney began his shift.

"Labor Law §241[6] imposes a nondelegable duty of reasonable care upon workers and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto, supra). Plaintiff's §241[6] claim rests on alleged violations of Industrial Code sections (12 NYCRR) §23-1.5, §23-1.7, §23-1.7[b], §23-1.7[e], §23-1.7[e][1], §23-1.7[e][2], §23-2.1, §23-2.1[a], §23-2.1[a][1], §23-2.1[a][2], §23-2.1[b], §23-2.2[a], §23-2.2[b], §23-2.4, §23-2.4[b][1] and §23-2.4[c]. Since issues of fact remain as to Moving Defendants control and authority, or whether they had actual or constructive notice of the unsafe working condition, this court addresses each individual alleged violation.

Defendants make a prima facie showing that Plaintiff's §241[6] claim based on violations of Industrial Code sections (12 NYCRR) §23-1.5, §23-1.7, §23-1.7[b], §23-1.7[e], §23-1.7[e][1], §23-2.1, §23-2.1[a], §23-2.1[a][1], §23-2.1[a][2], §23-2.1[b], §23-2.2[a], §23-2.2[b], §23-2.4, §23-2.4[b][1] and §23-2.4[c] must be dismissed. Violations based on these sections are either too general to support liability under Labor Law §241[6] (Kochman v City of New York, 110 AD3d 477, 973 NYS2d 114 [1st Dept. 2013]) or are inapplicable to the facts of this case and cannot form a basis for the claim (Gasques v State of New York, 15 NY3d 869, 937 NE2d 79, 910 NYS2d 415 [2010]).

Plaintiff did not raise any argument as to the applicability of his Labor Law §241[6] claim based on violations of Industrial Code sections (12 NYCRR) §23-1.5, §23-1.7, §23-1.7[b], §23-1.7[e], §23-1.7[e][1], §23-2.1, §23-2.1[a], §23-2.1[a][1], §23-2.1[a][2], §23-2.1[b], §23-2.2[a], §23-2.2[b], §23-2.4, §23-2.4[b][1] and §23-2.4[c]. Plaintiff's §241[6] claim based on these violations to the Industrial Code Section have been abandoned and are dismissed (Perez, supra).

The remaining Industrial Code section cited and relied upon is adequate and applicable to the Plaintiff's accident and Construction Project. Plaintiffs' reliance on §23-1.7[e][2] [Tripping and Other Hazards] is sufficiently specific to support his claim under Labor Law §241[6].

Accordingly, it is ORDERED, that Defendants 56th and Park (NY) Owner LLC and Lend Lease (US) Construction, LMB, Inc. F/K/A Bovis Lend Lease, LMB, Inc.'s motion for summary judgment is granted to the extent of dismissing Plaintiff's §240[1] cause of action and Plaintiff's Labor Law §241[6] cause of action based upon violations of Industrial Code sections (12 NYCRR) §23-1.5, §23-1.7, §23-1.7[b], §23-1.7[e], §23-1.7[e][1], §23-2.1, §23-2.1[a], §23-2.1[a][1], §23-2.1[a][2], §23-2.1[b], §23-2.2[a], §23-2.2[b], §23-2.4, §23-2.4[b][1] and §23-2.4[c], and it is further,

ORDERED, that Plaintiff's Labor Law §240[1] cause of action and Labor Law §241[6] cause of action based upon violations of Industrial Code sections (12 NYCRR) §23-1.5, §23-1.7, §23-1.7[b], §23-1.7[e], §23-1.7[e][1], §23-2.1, §23-2.1[a], §23-2.1[a][1], §23-2.1[a][2], §23-2.1[b], §23-2.2[a], §23-2.2[b], §23-2.4, §23-2.4[b][1] and §23-2.4[c] are hereby severed and dismissed, and it is further,


ORDERED, that the causes of action asserted in the Amended Verified Complaint under Labor Law Labor Law §200, common law negligence and §241[6] claim based on a violation of Industrial Code section (12 NYCRR) §23-1.7[e][2] remains in effect against the Defendants, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 12, 2017



Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE