

Singh v 180 Varick LLC
2017 NY Slip Op 32218(U)
September 28, 2017
Supreme Court, Queens County
Docket Number: 21451/13
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

 HEMRAJ SINGH,

Index No. 21451/13

Plaintiff,

Motion

Date May 11, 2017

- against-

 180 VARICK LLC and OSTRAL CAPITAL
MANAGEMENT, LLC,

Motion

Cal. No. 133

Defendants.

Motion

Seq. No. 2

The following papers numbered 1 to 11 read on this motion by defendants for summary judgment dismissing the complaint pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-4
Affirmation in Opposition - Exhibits.....	5-8
Reply Affirmation.....	9-11

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

Plaintiff in this labor law action seeks damages for personal injuries sustained when plaintiff fell from a ladder while performing construction work at 180 Varick Street in New York City. The location is owned by defendant, 180 Varick LLC ("180 Varick"), and leased to defendant, Ostra Capital Management LLC ("Ostra Capital"). The record indicates that plaintiff had his own business and agreed to perform work consisting of relocating existing window air conditioners and proving new steel cradles in Ostra's office suite. Plaintiff brought a helper with him and all of his own equipment, including his ladder. Plaintiff alleges that as he was completing some work and was stepping down from the ladder when he fell. Plaintiff testified that he fell as he was walking down from the ladder and guesses that he lost his balance. Defendants move to dismiss the complaint on various grounds as discussed below. Plaintiff opposes the motion.

Facts

Plaintiff testified upon examination before trial, as follows: Plaintiff was self-employed with his own company named Ultimate HVAC Services, Inc. Plaintiff was the sole shareholder of this corporation. The company provided air conditioning and heating installation and servicing. Plaintiff had a helper. In June 2012, plaintiff entered into a contract with Ostra Capital, to work at the 180 Varick Street address, which work involved the relocation of existing window air conditioners and providing new steel cradles to keep the air conditioners from falling out. Plaintiff was going to do work on the tenth floor of the premises. Plaintiff arrived at the premises around 7:00 a.m., and brought equipment including a ladder, dollies, a hand truck, the steel cradles, drill, hand tools, a saw and caulk. Neither 180 Varick nor Ostra Capital provided plaintiff with any equipment. The ladder that plaintiff brought with him was a six foot fiberglass A-frame ladder with plastic feet on it. The job that plaintiff was doing was taking out old air conditioning units and setting up new cradles. Plaintiff's accident occurred when he was descending down from a ladder. Plaintiff testified that he had nothing in his hands when he was descending. He described the accident as "I was coming down the ladder and I just fell back onto my left side." He speculated that he lost his balance and fell from the second ladder rung, which was approximately two feet from the floor. He stated that he did not recall if before falling, the ladder teetered or moved. Plaintiff testified that "I fell because I was just off from the second rung thinking I might have just slipped." He stated that there was nothing on the sides of his shoes, and he did not feel either of his feet slipping. Plaintiff left the building without informing anyone of the accident. At some point, plaintiff called a person at Ostra Capital and informed him that he got hurt on Saturday and that did not know when he would be able to return to complete the work. Plaintiff further testified that, as owner of his company, he made the decision as to how he wanted to do the work that he was doing that day.

Plaintiff commenced the instant action seeking recovery based on claims of common-law negligence, and a violation of various sections of the New York State Labor Law. Defendants move to dismiss the complaint based, in large part, upon plaintiff's testimony that he "guesses he lost his balance." The motion is opposed by plaintiff. In support thereof, plaintiff submitted an affidavit indicating that he slipped due to an accumulation of dust on the floor and or on the ladder.

Labor Law §200

"Labor Law § 200(1) 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]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). Where, as here, a plaintiff's claim arises out of alleged defects or dangers in the methods or materials of the work, to prevail on a Labor Law § 200 cause of action, the plaintiff must show that the defendant "had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d at 61; see *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646 [2d Dept

2010]). “A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607–08 [2d Dept 2013], citing *Ortega v Puccia*, 57 AD3d at 62). “[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence” (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010] [internal quotation marks omitted]; see *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2d Dept 2008]).

Here, defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action by demonstrating that plaintiff's injury arose out of his method of operation, and they had no authority to supervise or control the work (see *Lombardi v Stout*, 80 NY2d 290 [1992]; *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 857 [2d Dept 2007]). Therefore, no liability attaches to them under Labor Law § 200 or common-law negligence. In opposition, plaintiff failed to raise a triable issue of fact.

Labor Law §240(1)

“ ‘Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites’ ” (*Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 711–12 [2d Dept 2013], quoting *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). “ ‘To prevail on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries’ ” (*Gaspar v Pace Univ.*, 101 AD3d 1073, 1074 [2d Dept 2012], quoting *Lopez–Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]). “The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided” (*Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2d Dept 2007]; see *Esteves–Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 803–804 [2d Dept 2013]) There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries (see *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 461 [2d Dept 2008]). Where a plaintiff falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240(1) does not attach (see *Gaspar v Pace Univ.*, 101 AD3d at 1074; *Chin–Sue v City of New York*, 83 AD3d 643, 644 [2d Dept 2011]).

Similarly, where the ladder indisputably neither collapsed nor malfunctioned, slipping due to an alleged unidentified substance, never observed prior to or at the time of the accident, is tantamount to a slipping “without more” scenario. Since the substance could not be identified, neither could its source. Under these circumstances, it would be impossible to ascribe fault to

any individual or entity. To impose liability under such circumstances would make a defendant an insurer of the workplace, a result which the Legislature never intended in enacting Labor Law § 240(1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *Molyneaux v City of New York*, 28 AD3d 438, 439 [2d Dept 2006]).

Defendants demonstrated their *prima facie* entitlement to judgment as a matter of law by submitting the plaintiff's own deposition testimony, which demonstrated that the ladder from which plaintiff fell was not defective or inadequate and that the ladder did not otherwise fail to provide protection; rather, the plaintiff fell because he lost his balance (*see Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]; *Gaspar v Pace Univ.*, 101 AD3d at 1074; *Chin-Sue v City of New York*, 83 AD3d at 644).

In opposition, plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In opposition, plaintiff submitted an affidavit in which he stated for the first time that he fell due to an accumulation of dust on the ladder and or on the floor of the construction site. Where, as here, a party submits an affidavit in opposition to a motion for summary judgment which is directly contrary to his or her deposition testimony, the affidavit will be rejected as a feigned attempt to avoid the consequences of the earlier admission (*see Gadonniex v Lombardi*, 277 AD2d 281, 282 [2d Dept 2000]; *Wright v South Nassau Communities Hosp.*, 254 AD2d 277 [2d Dept 1998]; *Gordon v May Dept. Stores Co.*, 254 AD2d 327 [2d Dept 1998]; *Fontana v Fortunoff*, 246 AD2d 626 [2d Dept 1998]; *Garvin v Rosenberg*, 204 AD2d 388 [2d Dept 1994]). Here, plaintiff's affidavit is directly contrary to his deposition testimony in which he stated several times that he fell because he lost his balance and did not slip. Accordingly, the court rejects plaintiff's claims in his affidavit.

Labor Law §241(6)

To prevail under Labor Law § 241(6), a plaintiff must establish violation of an Industrial Code provision which sets forth a specific standard of conduct (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]; *Paladino v Society of N.Y. Hosp.*, 308 AD2d 343 [2d Dept 2003]). Here, in his supplemental bill of particulars, plaintiff relies upon sufficiently specific Industrial Code regulations to form the predicate for his Labor Law § 241(6) claims (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). However, the specific provisions upon which he relies, which relate to ladder maintenance and slippery conditions, are inapplicable to the facts of this case (*see* 12 NYCRR 23-1.7[d], 23-1.21[b][3][ii], [iv], [4][ii]; [e] [3]). Indeed, plaintiff testified that he properly opened and set up the ladder and that the ladder had plastic footings. There is no evidence of a slippery floor or that there was a foreign substance that caused a slippery footing (*see Croussett v Chen*, 102 AD3d 448, 448 [1st Dept 2013]). Moreover, plaintiff testified repeatedly that he lost his balance and fell. Specifically, when asked during his deposition whether he slipped or lost his balance, plaintiff testified that "I guess it was a loss of balance because when I came down, I just went down." When further questioned as to whether there came a point before [he] just fell back, that [plaintiff] took his right hand off the ladder, plaintiff testified that "when I lost my

balance, when I was falling, I let go of the ladder.” When asked if the ladder moved in any way, plaintiff testified that “I don’t recall.” For clarification, plaintiff was asked, “right before you fell, did you feel one of your feet slip?”, to which plaintiff answered “no.”

Therefore, plaintiff's affidavit is contrary to his deposition testimony in which he stated several times that he fell because he lost his balance and did not slip. The court rejects plaintiff's claims in his affidavit.

Accordingly, defendants' motion for summary judgment is granted and plaintiff's complaint is hereby dismissed.

Dated: September 28, 2017

DARRELL L. GAVRIN, J.S.C.