

<b>Medina v 75-76 Third Ave. Assets II, LLC</b>
2018 NY Slip Op 30089(U)
January 17, 2018
Supreme Court, New York County
Docket Number: 155699/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

ERICK MEDINA a/k/a GUSTAVO AVILA, Plaintiff,
-against-

INDEX NO. 155699/13
MOTION DATE 12-06-2017
MOTION SEQ. NO. 004
MOTION CAL. NO.

75-76 THIRD AVENUE ASSETS II, LLC and DRYBAR HOLDINGS LLC, Defendants.

75-76 THIRD AVENUE ASSETS II, LLC and DRYBAR HOLDINGS LLC, Third-Party Plaintiffs,
-against-

CREATIVE INTERIORS PLUS INC., Third-Party Defendants.

The following papers, numbered 1 to 18 were read on this motion and cross-motion to/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: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion for summary judgment on liability under Labor Law §240[1], is denied. Drybar Holdings Inc.'s cross-motion seeking summary judgment dismissing all of the claims and cross-claims asserted against it, is granted only as to dismissing Labor Law §241[6] Industrial Code Violations as stated herein. The remainder of the relief sought is denied.

Plaintiff brought this Labor Law action for injuries sustained on August 24, 2012, when he fell through the first floor of the premises located at 209 East 76th Street, New York, N.Y. (hereinafter referred to as the premises). Plaintiff was working for third-party defendant Creative Interiors Plus, Inc. (hereinafter referred to as "CIP"), the general contractor for the project, during the remodeling of the space for a new Drybar location. Plaintiff alleges that while attempting to remove part of a wood and plywood floor supported by wooden beams by hitting it with a pry-bar, the part of the floor he was standing on collapsed, causing him to fall approximately ten (10) feet through a basement room to a cement floor, and land on his back.

Plaintiff claims that no safety equipment was provided. Plaintiff alleges his work was only directed by his CIP co-worker, non-party Jeffrey Sanders. Defendant/third-party plaintiff 75-76 Third Avenue Assets II, LLC (hereinafter referred to individually as "75-76 Third Avenue") is the owner of the premises. Defendant/third-party plaintiff Drybar Holdings, LLC (hereinafter individually referred to as "Drybar") is the lessee of the premises.

The third-party action asserts claims against CIP for contribution, common law indemnification, contractual indemnification, and individually on behalf of 75-76 Third Avenue for breach of contract and failure to procure insurance.

Plaintiff's motion seeks an Order granting summary judgment on liability pursuant to Labor Law §240[1].

Drybar opposes plaintiff's motion and cross-moves for summary judgment dismissing all of plaintiff's Labor Law §200, §240[1] and §241[6] claims against it.

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

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, 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*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 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 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1<sup>st</sup> Dept., 2015]). Inconsistent accounts and conflicting testimony raise credibility issues that cannot be resolved prior to trial and require denial of summary judgment (*Berman Brothers-Bloch Furs Inc. v. Fashion Vault Corp.*, 50 A.D. 3d 450, 856 N.Y.S. 2d 565 [1<sup>st</sup> Dept., 2008]).

Plaintiff argues that there are no issues of fact and pursuant to Labor Law §240[1], the defendants are strictly liable for his injuries because they failed to provide proper and adequate safety devices to protect him from the foreseeable risk of injury from having the floor he was removing collapse under him. Plaintiff claims that the higher position relative to the basement created a gravity related risk of falling to the floor below as a result of the ongoing removal of the floor and no protective devices were provided.

Labor Law §240[1] applies to a gravity related risk of the type enumerated in the statute, upon proof that "plaintiff's injuries result from an elevation related risk and the inadequacy of safety devices" (*Nicometi v. Vinyards of Freedomia*, 25 N.Y. 3d 90, 30 N.E. 3d 154, 7 N.Y.S. 3d 263 [2015]). Labor Law §240[1] is liberally construed to accomplish its purpose (*Hoyos v. NY-1095 Avenue of the Americas, LLC* 2017 N.Y. Slip Op. 08717 [1<sup>st</sup> Dept., 2017] citing to *Rocovich v. Consolidated Edison Co.*, 78 N.Y. 2d 509, 583 N.E. 2d 932, 577 N.Y.S. 2d 219 [1991]). Liability does not apply to an injury that occurs as a result of, "the usual and ordinary dangers to which the extraordinary protections of Labor Law §240[1] do not extend" (*Cohen v. Memorial Sloan-Kettering Cancer Center*, 11 N.Y. 3d 823, 897 N.E. 2d 1059, 868 N.Y.S. 2d 578 [2008]). The standard for liability under Labor Law §240[1] involving the collapse or failure of a permanent structure, is the presence of a foreseeable elevation related risk in light of the work being performed, such that safety devices should have been provided (*Vasquez v. Urbahn Associates, Inc.*, 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [1<sup>st</sup> Dept., 2010] citing to *Jones v. 414 Equities, LLC*, 57 A.D. 3d 65, 866 N.Y.S. 2d 165 [2008] and *Garcia v. Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 A.D. 3d 494, 980 N.Y.S. 2d 6 [1<sup>st</sup> Dept., 2014]).

75-76 Third Avenue and third-party defendant CIP raise issues of fact as to foreseeability due to the condition of the permanent floor. Plaintiff failed to provide sufficient evidence to obtain summary judgment pursuant to Labor Law §240[1]. There is conflicting testimony that the part of floor he was standing on had defects such that he needed to use safety devices and that this was foreseeable prior to the accident. 75-76 Third Avenue, relying on deposition testimony, also raises an issue of fact as to attempts made to demolish that section of permanent floor plaintiff was standing on before it collapsed.

Drybar opposes plaintiff's motion and cross-moves for summary judgment arguing: (i) plaintiff's accident does not fall within the definition of a gravity related injury as defined by Labor Law §240[1]; (ii) Drybar was not the owner, an agent of the owner or the general contractor for the project; (iii) CIP has conceded that it was the only general contractor for the project; (iv) plaintiff and CIP both admit that Drybar did not have any control over or supervise any aspect of the work including plaintiff's work; (v) Drybar did not perform any work at the project; and (vi) Drybar was not negligent.

Labor Law §240[1] only refers to "contractors and owners and their agents" but lessees can also be liable when they hire the contractor, and thus technically have the right to control the work being done. Lessees that hire the contractor "are owners within the meaning of the statute" (*Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y. 3d 316, 908 N.E. 2d 869, 880 N.Y.S. 2d 879 [2009]).

Drybar's argument that as a tenant it is not liable under Labor Law §240[1] because it is not an owner or contractor or an agent of an owner or contractor, is unavailing. On July 2, 2012 Drybar entered into a contract with CIP wherein Drybar is identified as the "Owner" and agreed to perform duties as an "Owner" under Article 8, that included the ability to "issue a written order to the Contractor (CIP) to stop the work" (NYSCEF Docket # 104). Drybar is potentially liable under Labor Law §240[1]. Drybar's argument that plaintiff's Labor Law §240[1] claims cannot be sustained because they involve a foreseeable risk, merely states the same argument as 75-76 Third Avenue and third-party defendant CIP, which were sufficient to raise issues of fact to defeat plaintiff's motion, but are not sufficient to grant Drybar summary judgment. Drybar has failed to establish that there was no gravity related risk.

Labor Law §200 applies to an existing dangerous defect on the premises requiring that the defendant have either actual or constructive notice of the unsafe condition that caused the accident (*Vasquez v. Urbahn Associates, Inc.*, 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [1<sup>st</sup> Dept., 2010], *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D. 3d 1, 919 N.Y.S. 2d 129 [1<sup>st</sup> Dept., 2011] and *Gory Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 A.D. 3d 550, 979 N.Y.S. 2d 314 [1<sup>st</sup> Dept., 2014]).

Plaintiff's reference to a letter sent by CIP to Drybar's architects, Lacina-Heitler Architects, stating "CO#2 Replacement of existing floor joists and underlayment: Tues 8/14 structural integrity of the existing floor joists was found to be deficient," is sufficient to raise an issue of fact as to whether Drybar had notice of an unsafe condition after the 8/14 inspection within an approximately nine days period before the floor collapsed (Plaintiff's Opp. to Cross-Mot. Exh. B). Drybar's argument that it is unclear which floor is being referenced in the letter ignores deposition testimony on behalf of CIP that the project was to remodel the first level and basement of the premises leased to Drybar (See Cross-Mot. Exh. 14, p. 20). Drybar contractually had employees from the architect keep Drybar informed about the progress and quality of the work. They took pictures and drew up the plans for Drybar's approval (NYSCEF Docket # 104, Articles 8 and 10). Drybar was contractually obligated to CIP to obtain permits for the work performed (Cross-Mot. Exh. 14 and NYSCEF Docket # 104 Article 8). Drybar conceded that it has a representative that would interact with all the contractors if needed, and does not deny interaction between CIP, and the architect, which acted as its agents (Cross-Mot. Exh. 13, p. 33). There remains an issue of fact as to the whether Drybar had actual or constructive notice of any pre-existing defects in the floor.

Labor Law § 200 is also applied to the duty to maintain a safe construction site by the manner in which the work is performed. This duty is applied to injuries caused by equipment that was used (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 A.D. 3d 476, 923 N.Y.S. 2d 57 [1<sup>st</sup> Dept., 2011]). An implicit precondition to the duty to maintain a safe construction site is that the party charged must have authority, or exercise direct supervisory control over the activity that resulted in the injury. Mere directions as to the time and quality of the work, or general supervision and coordination of the work, is not enough to impose liability (*O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D. 3d 225, 813 N.Y.S. 2d 373 [1<sup>st</sup> Dept. 2006] *aff'd* 7 N.Y. 3d 805, 855 N.E. 2d 1159, 822 N.Y.S. 2d 745 [2006] and *In re 91<sup>st</sup> Street Crane Collapse Litigation*, 133 A.D. 3d 478, 20 N.Y.S. 3d 24 [1<sup>st</sup> Dept. 2015]).

Drybar has established that it did not have authority to exercise direct supervision or control over the activity that is alleged to have resulted in plaintiff's injury. 75-76 Third Avenue's argument that Drybar had a Labor Law § 200 duty to maintain a safe construction site, fails to raise any issues of fact. Drybar's periodic visits together with the ability to issue stop work orders only amount to general supervision and coordination of the work.

Labor Law §241[6] establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (*Padilla v. Frances Schervier Housing Development Fund Corporation*, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [1<sup>st</sup> Dept., 2003]). Causes of action pursuant to Labor Law §241[6] are subject to valid defenses of contributory negligence and comparative negligence (*Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 [1993]). To establish liability the plaintiff is required to specifically plead and prove that violations of the Industrial Code regulations are the proximate cause of his injuries. The Industrial Code section cited must be a "positive command," and not a reiteration of common law negligence (*Buckley v. Columbia Grammar and Preparatory*, 44 A.D. 3d 263, 841 N.Y.S. 2d 249 [1<sup>st</sup> Dept., 2007]).

Drybar has made a prima facie case for summary judgment under Labor Law §241[6] dismissing plaintiff's alleged industrial code violations under 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5, which was unopposed.

Drybar's argument that it cannot be held liable under §241[6] because there was no supervisory control over plaintiff's work is unavailing because the duty is non-delegable. Drybar is liable by stepping into the shoes of the owner (O'Leary v. S & A Elec. Contracting Corp., 149 A.D. 3d 500, 53 N.Y.S. 3d 617 [1<sup>st</sup> Dept. 2017] citing to Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y. 2d 343, 693 N.E. 2d 1068, 670 N.Y.S. 2d 816 [1998]).

Plaintiff argues that the elements of Labor Law §241[6] are satisfied because there were violations of 12 N.Y.C.R.R. §23-1.7[b][1][iii] and 23-1.16. Plaintiff has raised an issue of fact to maintain his Labor Law §241[6] claim with 12 N.Y.C.R.R. §23-1.7[b][1][iii] applying to hazardous openings. Plaintiff argues that the effort to remove the entire floor he was working on created a hazardous opening that would only get worse, and the ten foot drop to the basement floor beneath warranted the safety devices stated in 12 N.Y.C.R.R. 23-1.7[b][1][iii]. Plaintiff's reference to devices enumerated in 12 N.Y.C.R.R. §23-1.7 [b][1] such as a lifeline tied from the ceiling of the room he was working in, or a safety net below where he was working, raises an issue of fact as to whether such a device would have provided adequate protection. 12 N.Y.C.R.R §.23-1.7 [b][1][iii] has been applied where employees are required to work close to the edge of a hazardous opening requiring that employers provide protection such as "...[c] An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage" (Luckern v. Lyonsdale Energy Ltd. Partnership, 281 A.D. 2d 884, 722 N.Y.S. 2d 632 [4<sup>th</sup> Dept., 2001]). Plaintiff's argument that safety devices were required of the type stated in 12 N.Y.C.R.R. 23-1.16 is unavailing. 12 N.Y.C.R.R. §23-1.16 only applies where the enumerated safety devices were provided and were defective. Plaintiff does not allege that any safety devices were provided to him at all (See Varona v. Brooks Shopping Centers, LLC, 151 A.D. 3d 459, 56 N.Y.S. 3d 87 [1<sup>st</sup> Dept. , 2017]).

Drybar fails to provide an evidentiary basis for the dismissal of the cross-claims asserted against it, warranting denial of that relief.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment on liability under Labor Law §240[1], is denied, and it is further,

ORDERED that Drybar Holdings Inc.'s cross-motion seeking summary judgment dismissing all of the claims and cross-claims asserted against it, is granted only as to dismissing the causes of action in the complaint pursuant to Labor Law §241[6] citing Industrial Code Violations under 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.16 , 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5, and it is further,

ORDERED that the portion of the cause of action in the complaint asserted against Drybar Holdings Inc. pursuant to Labor Law §241[6] citing Industrial Code Violations under 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.16 , 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5 are severed and dismissed, and it is further,

ORDERED that the remainder of the causes of action asserted in the complaint against Drybar Holdings Inc. and pursuant Labor Law §241[6] for violation of Industrial Code 12 N.Y.C.R.R. § 23-1.7[b][1][iii], remain in effect, and it is further,

ORDERED, that the remainder of Drybar Holdings Inc.'s motion is denied;  
MANUEL J. MENDEZ  
J.S.C.

ENTER:

  
MANUEL J. MENDEZ,  
J.S.C.

Dated: January 17, 2018

Check one:  FINAL DISPOSITION      X NON-FINAL DISPOSITION  
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