Villa v East 85th Realty LLC
2018 NY Slip Op 31126(U)
April 3, 2018
Supreme Court, Queens County
Docket Number: 708319/2014
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

LUIS VILLA,

Plaintiff,

- against -

EAST 85TH REALTY LLC,

Defendant.

Index No.: 708319/2014

Motion Date: 10/16/17

Motion No.: 178

Motion Seq.: 3

- x

EAST 85TH REALTY LLC,

Third-Party Plaintiff,

- against -

CAPITAL CRAFTSMAN, INC.,

Third-Party Defendant.

- x

The following papers numbered 50 to 72 read on this motion by defendant/third-party plaintiff East 85th Realty, LLC (East 85th) pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint in its entirety, and on this cross motion by plaintiff pursuant to CPLR 3212 for summary judgment in his favor and against defendant/third-party plaintiff East 85th on the cause of action under Labor Law § 240 (1) on the basis that as a matter of law, its violation of this labor law constituted its negligence and failure to use reasonable care under the circumstances, and was a substantial factor and proximate cause of plaintiff's injuries and pursuant to CPLR 3212 for summary judgment in his favor and against defendant/third-party plaintiff East 85th on the cause of action under Labor Law § 241 (6) through violation of Industrial Code Regulation § 23-1.7 (d) on the basis that as a matter of law, its violation of this

labor law constituted its negligence and failure to use reasonable care under the circumstances, and was a substantial factor and proximate cause of plaintiff's injuries.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	50-54
Notice of Cross Motion - Affidavits - Exhibits	55-58
Reply Affidavits	68-69; 71-72

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

Plaintiff commenced the instant action to recover damages for personal injuries allegedly sustained on June 26, 2014, at approximately 3:00 P.M., while performing tile work in the bathroom of an apartment in a building located at 500 East 85th Street, New York, New York, owned by defendant/third-party plaintiff East 85th. Defendant/third-party plaintiff East 85th, in turn, commenced a third-party action against third-party defendant Capital Craftsman, Inc. (Capital), which was plaintiff's employer at the time of his accident. Third-party defendant Capital had been hired by defendant/third-party plaintiff East 85th's property manager, nonparty Glenwood Management Corp. (Glenwood), to perform renovations to vacated apartments at the subject premises. These renovations included installation of bathroom tiles and fixtures, as well as, painting.

Plaintiff testified to the following:

> On the subject date, he was installing marble tiles in the bathroom of one of the apartments. He began working at approximately 8:00 A.M. and used his own tools and/or tools provided by his employer, third-party defendant Capital. The equipment and materials for the job were supplied by third-party defendant Capital. Instructions for plaintiff's work were only given by third-party defendant Capital. A co-worker named Carlos had taught him

to use "steps," that is, a step stool, when installing marble tiles on walls. Ladders were rarely used because they would not always fit in the bathrooms. If a step stool was used, it would be placed on plywood on the bathtub. He once used a step stool while working in a bathroom at this building a few years earlier. On the subject date, there were ladders and step stools available at the job site which were shared by the workers. On that day, he was cutting marble tiles outside the bathroom and then installing them on the bathroom walls. The tiles were one foot by one foot square in size and he was installing them in rows from the bathtub up to the ceiling, which was approximately eight feet high. The heights of the ceilings of the bathrooms in the building's apartments were not the same, nor were the sizes of the bathrooms. He was five feet seven inches tall. It would be about seven rows of tiles from the bathtub level up to the ceiling and at the time of the subject accident, there were at least two more rows to complete his work on the wall near the bathtub up to the ceiling. He would first install full tiles and then he would install smaller cut pieces to finish. He was coming and going, cutting and installing. He was walking, while holding a cut piece of the marble tile in both hands, which he was going to install above the bathtub. At the time of the accident, he was attempting to step into the bathtub. He had been in the bathtub working that day, but could not say how many times before the accident. He lifted his left leg to get into the tub and put his left foot on the top of the side of the tub. His right foot was on the floor outside the tub. While making an effort to step into the bathtub, his left foot slipped forward on the side of the bathtub and he fell backwards to the floor and was injured. He did not see anything on top of the tub that his foot slipped on. He doesn't know if the inside of the tub or the top of the tub where he stepped were wet. He never put his hand on the top of the bathtub.

Defendant/third-party plaintiff East 85th now seeks

summary judgment dismissing plaintiff's entire complaint which is predicated on claims of negligence and pursuant to Labor Law § § 200, 240 (1) and § 241 (6). In support thereof, defendant/third-party plaintiff East 85th submits, among other things, plaintiff's examination before trial testimony and the affidavit of Lisa Guida, a management representative of nonparty Glenwood, the managing agent of the subject premises. Plaintiff cross-moves for partial summary judgment in his favor and against defendant/third-party plaintiff East 85th on the issue of liability on his Labor Law § 240 (1), Labor Law § 200 and negligence claims. In his cross motion papers, plaintiff also opposes defendant/third-party plaintiff East 85th's motion for summary judgment.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law. (*See Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, *supra*.)

To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident. (*See Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003].) Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].) Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute, a claim under Labor Law § 240 (1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries. (*See Blake v Neighborhood Hous. Servs. of New York City, Inc.*, *supra*.)

In this case, based upon the evidence presented, defendant/third-party plaintiff East 85th satisfied its prima facie burden of demonstrating that the subject accident did not result
from the type of elevation-related hazard to which Labor Law § 240 (1) applies (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833 [2017]), but was "rather, one of the usual and ordinary dangers of a construction site" (*Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 21 [2016]; *see Toefer v Long Is. R.R.*, 4 NY3d 399 [2005].) Plaintiff was not working in an elevated work site, and his work did not constitute an elevation-related risk. There is no indication from the evidence submitted, including plaintiff's examination before trial testimony, that plaintiff needed to stand on the bathtub to perform his work of installing the tiles, or that at the time of the accident, he was standing on the side of the bathtub to perform such work. Rather, plaintiff testified that at the time of the accident, he was walking and attempting to step into the bathtub. In addition, at the time plaintiff's left foot slipped while on the top of the side of the bathtub, his right foot was still on the ground and he fell on the same level he was, prior to falling. Thus, there was no elevation differential between plaintiff and where he landed. Moreover, the protective equipment envisioned by the statute is not designed to avert the hazard plaintiff encountered here (*See Berg v Albany Ladder Co.*, 10 NY3d 902 [2008].) Defendant/third-party plaintiff East 85th further demonstrated that there is no causal nexus between plaintiff's injuries and the lack of any prescribed safety device.

In opposition to this branch of the summary judgment motion of defendant/third-party plaintiff East 85th and in support of his own cross motion for partial summary judgment on the Labor Law § 240 (1) cause of action, plaintiff argues he was exposed to an elevation-related risk and was not given a proper safety device, such as a ladder or step stool.
To recover under Labor Law § 240 (1), plaintiff must establish that he stood on the side of the bathtub because he was obliged to work at an elevation in order to tile the bathroom. (*See Broggy v Rockefeller Group, Inc.*, 8 NY3d 675 [2007].) As noted, however, plaintiff testified that he

stepped on the side of the tub while getting into the bathtub. There is no indication that plaintiff was unable to step over the side of the bathtub. In addition, there is no evidence that plaintiff had to step on the side of the bathtub in order to install the tile he was holding at the time of the accident. Contrary to plaintiff's assertions, the bathtub was not a safety device, nor was it being used as a safety device.

Accordingly, the branch of defendant/third-party plaintiff East 85th's motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action is granted.

Turning to the cause of action under Labor Law § 241 (6), this statutory provision imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co., supra*; *Miranda v City of New York*, 281 AD2d 403 [2001].) In order to support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation (12 NYCRR 23-1.1 et seq.) that is both concrete and applicable given the circumstances surrounding the accident. (*See Rizzuto v L.A. Wenger Contracting Co., Inc., supra*.)

In his bill of particulars, plaintiff alleges violations of the following Industrial Code provisions: 12 NYCRR 23-1.5; 23-1.7 (a), (d), (e) and (f); 23-1.8 (c); 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.22 (c); 23-1.30; 23-1.31; 23-1.32; 23-2.1; 23-2.2; 23-2.3; 23-2.5 (a); 23-2.7; 23-3.1; 23-3.2; 23-3.3 (c), (e), and (f); 23-5 et seq. Plaintiff also alleges OSHA violations. In opposition to the branch of the motion of defendant/third-party plaintiff East 85th for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, however, plaintiff only alleges a violation of Industrial Code provision 12 NYCRR 23-1.7 (d). Since plaintiff, in his opposition/cross motion papers, does not address the other sections of the Industrial Code previously cited by him, this Court deems the Labor Law § 241 (6) claim as premised upon those sections abandoned. (*See Genovese v Gambino*, 309 AD2d 832 [2003].) Plaintiff also does not address previously cited OSHA regulations, and, in any event, alleged violations of OSHA cannot support a Labor Law § 241 (6) claim. (*See Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311 [1997]; *see also Ciraolo v Melville Court Assocs.*, 221 AD2d 582 [1995]; *Vernieri v Empire Realty Co.*, 219 AD2d 593 [1995].)

Section 23-1.7 (d) pertains to "Slipping hazards" and

provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." (12 NYCRR § 23-1.7 [d].)

Although this provision has been held to be sufficiently specific (*see Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378 [2006]), it is inapplicable here as there was no evidence of a slippery condition. (*See Guercio v Metlife Inc.*, 15 AD3d 153 [2005].) Plaintiff failed to identify any "foreign substance" which may have caused his foot to slip. Thus, although plaintiff testified that his foot slipped, he also testified that he did not see anything on top of the tub and did not know whether it was wet.

Plaintiff, in opposition to this branch of the motion of defendant/third-party plaintiff East 85th, failed to raise a triable issue of fact. Plaintiff's claim that a triable issue of fact exists concerning whether he slipped on water is speculative and without merit.

Accordingly, the branch of the motion of defendant/third-party plaintiff East 85th seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is granted.

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work. (*See Rizzuto v L.A. Wenger Contr. Co., Inc.*, *supra; see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Yong Ju Kim v Herbert Constr. Co., Inc.*, 275 AD2d 709 [2000].) Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 may be imposed on those who exercise control or supervision over the means and methods that the plaintiff employs in his or her work (*see Rizzuto v L.A. Wenger Contr. Co., Inc., supra; see also Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Cabrera v Revere Condominium*, 91 AD3d 695 [2012]), or who have actual or constructive notice of an unsafe condition that causes an accident. (*See Gray v City of New York*, 87 AD3d 679 [2011].) General supervisory authority to oversee the progress of the work is insufficient to impose liability. (*See Cabrera v Revere Condominium*, 91 AD3d 695 [2012].)

On this issue, defendant/third-party plaintiff East 85th established its prima facie entitlement to judgment as a matter of

law. Defendant/third-party plaintiff East 85th demonstrated through the affidavit of managing representative Lisa Guida, and plaintiff's examination before trial testimony that it did not have the authority to supervise or control the performance of plaintiff's work (*see Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644 [2010]; *see also Jenkins v Walter Realty, Inc.*, 71 AD3d 954 [2010]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]), and that it did not exercise any supervision or control over plaintiff's work. Defendant/third-party plaintiff East 85th further demonstrated that plaintiff did not know what caused him to slip and fall. (*See Izaguirre v New York City Tr. Auth.*, 106 AD3d 878 [2013]; *see also Mallen v Farmingdale Lanes, LLC*, 89 AD3d 996 [2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810 [2010].) A plaintiff's inability to identify the cause of his or her fall is fatal to a claim of negligence in a slip-and-fall case because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation. (*See Deputron v A & J Tours, Inc.*, 106 AD3d 944 [2013]; *see also Izaguirre v New York City Tr. Auth., supra; Racines v Lebowitz*, 105 AD3d 934 [2013].) Since plaintiff was unable to identify what it was exactly that caused him to slip and fall, he failed to show that defendant/third-party plaintiff created or had actual or constructive notice of the alleged slippery condition. (*See Vazquez v Takara Condominium*, 145 AD3d 627 [2016].)

Plaintiff, in opposition to this branch of defendant/third-party plaintiff East 85th's motion, failed to present any competent evidence sufficient to raise a triable issue of fact. (*See Zuckerman v City of New York, supra*.)

Accordingly, that branches of the motion of defendant/third-party plaintiff East 85th seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action are granted.

In light of the foregoing dismissal of plaintiff's complaint in its entirety, plaintiff's cross motion seeking partial summary judgment in his favor and against defendant/third-party plaintiff East 85th on his negligence, Labor Law § 200 and Labor Law § 240 (1) causes of action is denied as academic.

Dated: April 3, 2018
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C.