

Guinee v City of New York

2018 NY Slip Op 31358(U)

June 27, 2018

Supreme Court, New York County

Docket Number: 155776/15

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 35

-----X
 THOMAS GUINEE,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
 DEPARTMENT OF EDUCATION, and NEW YORK
 CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.
 -----X

CAROL R. EDMOND, J.S.C.:

In a Labor Law action, defendants The City of New York (the City), New York City Department of Education, and the New York City School Construction Authority (the School Construction Authority) move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

BACKGROUND

On August 7, 2014, plaintiff Thomas Guinee was working for nonparty WDF, Inc. (WDF) at New Park West High School located at 525 West 50th Street in Manhattan. Plaintiff was working alongside a colleague, Deryck Semper (Semper) on a scaffold when his foreman asked plaintiff and Semper to split up to expedite the work. The foreman, Grzegorz Wylaz (Wylaz), told plaintiff to get a ladder, while Semper retained the scaffold. Plaintiff got a ladder from the fifth floor of the school, and returned to installing the iron for the ceiling grid. Plaintiff was using a ladder to install iron for a ceiling grid when, he alleges, he fell after a wrung of the ladder broke.

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DECISION AND ORDER

Plaintiff filed the Complaint in this matter in June 2015, alleging that defendants are liable for his injuries pursuant to Labor Law §§ 240 (1), 241 (6), as well as Labor Law § 200 and common-law negligence.

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the “cause of action . . . has no merit” (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D’Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and the “issue must be shown to be real, not feigned since a sham or frivolous

issue will not preclude summary relief” (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

“All contractors and owners and their agents ... 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 Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff’s injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with “adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused plaintiff’s injuries, owners and general contractors are absolutely liable “even if they do not have a continuing duty to supervise the use of safety equipment” (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Defendants do not argue that plaintiff was not subject to a gravity risk that puts his accident outside the ambit of the statute. Instead, they argue that plaintiff’s recalcitrance was the sole proximate cause of his accident. Specifically, defendants contend that plaintiff was directed

to use one of WDF's fiberglass ladders, but, that, recalcitrantly, he elected to use a wooden ladder instead.

Defendants submit an affidavit from Eric Bove (Bove), WDF's project supervisor. Bove stated that "[a]ll WDF employees are explicitly instructed to use only tools and equipment belonging to WDF. The employees are told this during safety meetings, which are mandatory. Mr. Guinee attended the weekly safety meeting on the date he was hired[,] August 4, 2014" (Bove aff, ¶11). Bove further stated that the wooden ladder involved in the accident, which WDF has destroyed, belonged to another contractor on the jobsite:

Mr. Guinee showed me the ladder he was using at the time of the accident. The ladder was a wooden A-frame ladder which did not belong to WDF. The ladder said 'FPH' on it which I believe stands for Forsyth Plumbing & Heating, which did work on the project about a year prior to Mr. Guinee's accident. After he reported the accident, the wooden ladder was destroyed. Although the ladder did not belong to WDF, it was broken and I wanted to prevent further use and any other accidents on the jobsite. WDF supplied fiberglass ladders for use at the Park West High School project. In August 2014 WDF's ladders were stored in WDF's shanty on the fifth floor of the school building"

(*id.*, ¶¶ 7-10).

Defendants also submit an affidavit from Wylaz, plaintiff's foreman. Wylaz also stated that "WDF supplied only fiberglass ladders for use at the Park West High School" (Wylaz aff, ¶ 9), that the ladders were in WDF's shanty on the fifth floor (*id.*), and "[a]ll WDF employees are instructed to use only tools and equipment belonging to WDF" (*id.*, ¶ 10) This topic, Wylaz stated, "is covered during the safety meetings that all employees are required to attend" and that plaintiff "attended the weekly safety meeting on August 4, 2014" (*id.*).

Plaintiff, in opposition, submits testimony from his own 50-h hearing and his deposition, as well as affidavits from two of his coworkers. At the 50-h hearing, plaintiff testified as to how he came to use the subject ladder:

- Q: Did there come a point in time where you went to get a ladder?
A: Correct That was in the afternoon after the break.
Q: And why did you decide to get a ladder instead of working on the scaffold?
A: Well, because the foreman came up to us and said, 'Listen, you guys need to hurry up and get this job done, so why don't you just go on your separate ways.' I explained to him there's no other bakers [scaffolds] down here. He said, 'Go upstairs and grab a ladder.' And I said, 'All right.' So I went upstairs to the shanty, and there was the ladder next to the gang box, so I grabbed it and brought it down.
- ...
- Q: Did you notice if there was more than one there?
A: Again, I couldn't answer that question because I was just looking to grab the ladder that was at the gang box at the time. Where I grabbed it from, I believe that was the only ladder there because everybody was already working"

(plaintiff's 50-h tr at 309).

At his deposition, plaintiff testified similarly, except instead of testifying that "I believe that was the only ladder because everybody was already working," he testified more definitively that "[t]here was one ladder upstairs" (plaintiff's tr at 44). Defendants attempt to characterize this as a contradiction, although that is an overstatement, and the two accounts are better characterized as consistent, but expressed with greater certitude in the latter account. Plaintiff, in his affidavit, once again indicates that the wooden ladder involved in his accident "was the only ladder outside the shanty by the gang box" and adds that "it was my belief that this was the ladder Mr. Wylaz told me to get" (plaintiff aff, ¶ 2). As to the safety meetings, plaintiff states:

"Despite the contentions of Mr. Bove and Mr. Wylaz in their affidavits, there was never any instruction at safety meetings about using other trades equipment nor were we ever instructed to use only fiber glass ladders. I believed that the ladder I used that day that was outside WDF's shanty next to the gangbox belonged to my employer and I never noticed any other writing on that ladder that it belonged to another company"

(*id.* at 3).

Plaintiff submits an affidavit from Semper, who was working alongside plaintiff before Wylaz directed them to work separately. Semper stated that “a supervisor told [plaintiff] to go get a ladder so that he could work independently from the baker’s scaffold” (Semper aff, ¶ 1). Semper also testified that plaintiff was never told not to use the subject ladder:

“In terms of safety meetings at the job site, once in a while there would be a tool box talk and other times the workers would be given a sheet of paper to sign that indicated that we were at a safety meeting even though a safety discussion was not had. Prior to the incident of Thomas Guinee we were never informed to only use a fiber glass ladders nor were we told not to use wooden ladders at the job site. Further we were never told to only use equipment belonging to WDF”

(*id.* at 2).

Plaintiff also submits an affidavit from Michael Rebovich (Rebovich), another WDF employee who worked on the subject project. Rebovich stated that “[a]t no time were we ever told to only use fiberglass ladders on the job site. Additionally, there were never any formal safety meeting, rather we would be given a sheet to sign by WDF” (Rebovich aff, ¶ 2).

A worker is recalcitrant under the statute, and the sole proximate cause of his own injuries, when safety devices are “readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident” (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Moreover, the First Department has noted that “[i]t is well settled in this Department that an immediate instruction is a requirement of the ‘recalcitrant worker’ defense” (*Vacca v Landau Indus.*, 5 AD3d 119 [1st Dept 2004]).

Here, there is conflicting testimony as to whether plaintiff was instructed to only use a fiberglass WDF ladder. Moreover, there is a question of fact as to whether such a ladder was available. Accordingly, the branch of defendants motion that seeks dismissal of the section 240 (1) must be denied.

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

It is well settled that this statute requires owners and contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists “even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), “comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

Here, plaintiff abandons reliance on all Industrial Code regulations, except for 12 NYCRR 23-1.21 (b) (1) and 12 NYCRR 23-1.21 (b) (3).¹ 12 NYCRR 23-1.21, entitled “General requirements for ladders” provides, in its first subdivision, that “Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the

¹ Accordingly, the court will dismiss all allegations relating to other Industrial Code violations.

maximum load intended to be placed thereon.” Meanwhile, the third subdivision of 12 NYCRR

23-1.21 provides that:

“[a]ll ladders shall be maintained in good condition” and specifies that “[a] ladder shall not be used if any of the following conditions exist: (i) If it has a broken member or part. (ii) If it has any insecure joints between members or parts. (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness. (iv) If it has any flaw or defect of material that may cause ladder failure.

Here, defendants do not contest the specificity or applicability of these regulations.

Instead, they argue that they must be dismissed because plaintiff was the sole proximate cause of his accident. As discussed above, there are issues of fact as to whether plaintiff’s actions were a proximate cause of his accident. Thus, the branch of defendants’ motion seeking dismissal of the section 241 (6) claim must be denied.

III. Labor Law § 200 and Common-law Negligence

Labor Law § 200 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 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where, as here, the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). A general supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled

the manner in which the plaintiff performed his or her work, *i.e.*, how the injury producing work was performed (*id.*).

Defendants submit the agreement between the School Construction Authority and WDF, which provides generally that “the conduct and control of the Work shall be entirely [WDF’s] responsibility at all times” (the School Construction Authority/WDF agreement at 5). Moreover, defendants submit the testimony of Kishorchandra Patel (Patel). Patel, a consultant for the School Construction Authority, testified that the School Construction Authority does general quality inspections during the course of a construction project at a school in the city (Patel tr 33-35). Defendants also submit the deposition transcript of Gordon Kiernan (Kiernan), a managing inspector, for the School Construction Authority. Kiernan testified that the School Construction Authority typically does periodic unannounced inspections “looking for health and safety issues” and that he, as an inspector, has authority to stop any unsafe work (Kiernan tr at 23, 28).

In opposition, plaintiff points to Patel’s testimony that School Construction Authority inspectors have the authority to tell contractors, such as WDF, to destroy defective ladders (Patel tr at 58). However, Patel’s testimony only shows general supervisory authority, rather than actually exercised supervisory control. Thus, as plaintiff fails to rebut defendants’ *prima facie* showing that they lacked the supervisory control required for liability under the statute, the branch of defendants’ motion seeking dismissal of plaintiff’s Labor Law § 200 and common-law negligence claims must be granted.

CONCLUSION

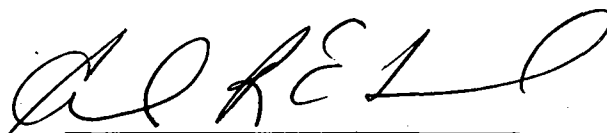
Accordingly, it is

ORDERED that defendants The City of New York, New York City Department of Education, and the New York City School Construction Authority's motion for summary judgment is granted only to the extent that plaintiff's Labor Law § 200 and common-law negligence claims, as well as any allegations of Industrial Code violations, except for those relating to 12 NYCRR 23-1.21 (b) (1) and 12 NYCRR 23-1.21 (b) (3), are dismissed; the remainder of the motion is denied; and it is further

ORDERED that counsel for defendants is to serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: June 27, 2018

ENTER:



Hon. CAROL R. EDMED, JSC