Roldan v Minister, Elders & Deacons of the Refm. Prot. Dutch Church of the City of N.Y.
2018 NY Slip Op 31639(U)
March 8, 2018
Supreme Court, New York County
Docket Number: 161931/2013
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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CARLOS ROLDAN and MARIA DOLORES CRIOLLO GUACHA,

Plaintiffs,

- against -

THE MINISTER, ELDERS AND DEACONS OF THE REFORMED PROTESTANT DUTCH CHURCH OF THE CITY OF NEW YORK and COLLEGIATE SCHOOL, INC.,

Defendants.

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DECISION AND ORDER

Index No. 161931/2013
Mot. Seq. 002

KELLY O'NEILL LEVY, J.:

This is an action arising from an accident where a construction worker fell from a temporary stairway and consequently suffered personal injuries.

Defendant The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of The City of New York (hereinafter, the Church) moves, pursuant to CPLR § 3212, for summary judgment in its favor and dismissal of Plaintiffs Carlos Roldan and Maria Dolores Criollo Guacha's claims as to liability on Labor Law §§ 200, 240(1), and 241(6). Plaintiffs oppose.

Plaintiffs Carlos Roldan and Maria Dolores Criollo Guacha cross-move for partial summary judgment in their favor as to Labor Law §§ 240(1) and 241(6) claims. Defendants oppose.

BACKGROUND

On the date of the accident, May 16, 2013, plaintiff Carlos Roldan (hereinafter, Roldan) was employed by Cavan Corp. as a full-time laborer at a site located at 245 West 77th Street,

New York, NY, owned by the Church [Roldan tr. (ex. F to the Sears aff.) at 18-22]. Roldan had worked at the site for almost two months prior to the accident (*id.* at 22). His work involved remodeling the existing structure of the first and second floors of the Church, which consisted of helping with everything at the site, cutting wood, holding up sheetrock, and cleaning debris (*id.* at 20-23).

Roldan used a wooden temporary stairway to get from the first floor to the second floor (*id.* at 33, 35). The height from the first floor to the second floor is approximately ten feet (*id.* at 37). The stairway was held up by a vertical pole that went from the first floor to about halfway up the stairway, and had a handrail along the left side of the stairs, approximately three feet high above the steps, beginning mid-way up the stairs to the second floor (*id.* at 35-36). Roldan asserts that the handrail was held in place at the top by a board that was nailed to the ceiling and a two-by-four inch piece of wood that held the railing to that board (*id.* at 59-62). Roldan alleges that there was a three to five-inch separation between the top step of the stairway and the second floor (*id.* at 57). The top step was supported by a two-by-four inch piece of wood and was not directly attached to the building (*id.* at 57-58).

Roldan felt the stairway move every time he used it; he spoke to the foreman one week after he started working at the Church and told him that the stairs moved from side to side and that they could fall at any time (*id.* at 63-64). Roldan complained to the foreman about the stairway approximately three to four times each week (*id.* at 65). Frank Malensek, the Vice President of Real Estate Operations and Sacred Properties for the Church (hereinafter, Malensek), testified that he used the stairway about eight to twelve times during the project; he did not recall if the stairs ever moved but he asserts that there were never any problems with the stairway [Malensek tr. (ex. G to the Sears aff.) at 26-28].

On the day of the accident, Roldan was told by his foreman to cut wood on the second floor [Roldan tr. (ex. F to the Sears aff.) at 47]. He was carrying two pieces of wood that he had cut down to the first floor; when he took two steps onto the stairway, it shifted from side-to-side; he lost his balance and rolled forward, tumbling down and hitting his body on the stairs and landing on the floor (*id.* at 57, 69-70).

The Church asserts that it never provided any equipment, tools, never supervised, or directed any of Roldan's employers, including Roldan [Malensek tr. (ex. G to the Sears aff.) at 17]. Roldan asserts that he never saw anybody from the Church at the site, except for a security guard [Roldan tr. (ex. F to the Sears aff.) at 66-67].

Bernard P. Lorenz, an engineering consultant and expert for the defendants (hereinafter, Lorenz), asserts that, within a reasonable degree of engineering and construction safety certainty, the temporary stairway was constructed in accordance with good and acceptable construction practice [Expert Report (ex. H to the Sears aff.)]. Robert J. O'Connor, P.E., a safety expert, forensic engineer, and expert for the plaintiffs (hereinafter, O'Connor), asserts that, within a reasonable degree of certainty, the accident at issue occurred as a result of an inadequately constructed and unstable temporary stairway that was not substantially constructed and rigidly braced such that it would not shift or move in a side to side direction while it was used (O'Connor Affidavit at 11).

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that

showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Labor Law § 200 Claim

The Church moves, pursuant to CPLR § 3212, for summary judgment in its favor on the Labor Law § 200 claim. 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' [citation omitted]." *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep't 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317 [1981]). Labor Law § 200(1) states, in pertinent part, as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to Labor Law § 200 cases, depending on whether the accident is the result of the means and methods used by the contractor to do its work, or whether the accident is the result of a dangerous condition. *See McLeod v. Corporation of*

Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 A.D.3d 796, 797-798 (2d Dep't 2007).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dep't 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dep't 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]). To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

To find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (199) (no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved); *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep't 2008). Mere presence at the job site and the ability to perform general supervisory control over a job site is insufficient to impose liability. *See Orellana v. Dutcher Ave. Bldrs., Inc.*, 58 A.D.3d 612, 614 (2d Dep't 2009).

Here, the Church did not create the alleged dangerous condition that plaintiffs claim caused Roldan's accident. There is no evidence that the Church had any actual or constructive

notice of the temporary stairway moving at any time. The Church never provided any equipment, tools, never supervised, or directed Roldan's employers or Roldan himself. Roldan alleges that the only person at the job site that he complained to about the stairway was the foreman of his employer. The foreman at the job site was responsible for supervising and controlling Roldan's work.

Plaintiffs assert that the Church was aware of the inadequately secured and hazardous temporary wooden stairway on the job site since it was there for two months. Plaintiffs argue that Malensek's deposition testimony did not dispute that the stairway moved, as he did not recall whether it moved when he used it, and thus the Church failed to establish that the stairway did not move and that it did not know of the hazardous condition. There is no evidence proffered that the Church had actual or constructive notice of the hazardous condition, and therefore the court rejects this argument.

Thus, defendants are entitled to summary judgment in their favor on the Labor Law § 200 claim.

Labor Law § 240(1) Claim

The Church moves for summary judgment in its favor as to liability on the Labor Law § 240(1) claim. Plaintiffs cross-move for partial summary judgment in their favor on the claim. 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."

"'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'" *John v. Baharestani*, 281 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."

Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001); *See Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008), *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007).

To prevail on a § 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

A makeshift stairway used as a means of access to different levels of a work site serves as the functional equivalent of a ladder and constitutes a device for the purposes of a Labor Law § 240(1) claim. *See McGarry v. CVP 1 LLC*, 55 A.D.3d 441, 441 (1st Dep't 2008); *see also Wescott v. Shear*, 161 A.D.2d 925, 925 (3d Dep't 1990).

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1).'" *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d 173, 174 (1st Dep't 2004) (where plaintiff was

injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240(1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent) (quoting *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 [1st Dep't 1998]); *Klein v. City of New York*, 89 N.Y.2d 833, 835 (1996); *Hart v. Turner Constr. Co.*, 30 A.D.3d 213, 214 (1st Dep't 2006) (plaintiff met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground).

"Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials." *Nelson v. Ciba-Geigy*, 268 A.D.2d 570, 572 (2d Dep't 2000); *Cuentas v. Sephora USA, Inc.*, 102 A.D.3d 504, 504 (1st Dep't 2013); *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616, 618 (defendant not entitled to dismissal of Labor Law § 240(1) claim where it failed to establish that the ladder, which had slipped out from underneath the plaintiff, provided proper protection); *Peralta v. American Tel. and Tel. Co.*, 29 A.D.3d 493, 494 (1st Dep't 2006) (unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240(1)); *Chlap v. 43rd St.-Second Ave. Corp.*, 18 A.D.3d 598, 598 (2d Dep't 2005); *Sinzieri v. Expositions, Inc.*, 270 A.D.2d 332, 333 (2d Dep't 2000) (Labor Law § 240(1) liability where the plaintiff "presented undisputed evidence that, while dismantling the . . . exhibit, he fell when an unsecured ladder upon which he was standing and which had no protective rubber skids, slipped from underneath him").

Here, the temporary wooden stairway shifted from side to side because it was inadequately secured and had failed to prevent Roldan's fall and injury. Roldan's work activities

were at an elevated height and were related to his performance of the construction work, as he was cutting wood on the second floor and carrying it down the stairs to the first floor. Thus, Roldan was engaged in protected activity under Labor Law § 240(1). The Church, as the owner of the site, is responsible for safety at the site. The inadequate shifting of the temporary stairway caused Roldan to fall from the top of the stairway, approximately ten feet, to the ground. There is a violation of Labor Law § 240(1) and that violation proximately caused Roldan's injuries.

The Church asserts that the fact that Roldan fell does not, in and of itself, establish a violation of Labor Law § 240(1) as there was nothing wrong with the temporary stairway, citing the Expert Affidavit of Lorenz. "[W]here 'the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation ... the opinion should be given no probative force and is insufficient to withstand summary judgment." *Park v. Kovachevich*, 116 A.D.3d 182, 191 (1st Dep't 2014) (quoting *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]). Lorenz's expert opinion is speculative and lacks evidentiary value, as it fails to consider Roldan's testimony, Lorenz did not himself inspect the staircase, and the opinion is based on Malensek's testimony, which failed to establish that the temporary stairway did not move, as he testified that he did not recall whether the stairway moved in any manner when he utilized it [Malensek tr. (ex. G to the Sears aff.) at 27]. While the fall in and of itself does not establish a violation, the facts that the stairway was not properly secured to the second floor, that Roldan noticed the stairway moving and had on numerous occasions informed his foreman about it, and that the shifting of the stairway caused him to fall, are enough evidence of a violation.

Therefore, the court denies the Church's motion for summary judgment on the Labor Law § 240(1) claim and grants plaintiffs' cross-motion for partial summary judgment on the claim.

Labor Law § 241(6) Claim

The Church also moves for summary judgment in its favor on the Labor Law § 241(6) claim. Plaintiffs cross-move for partial summary judgment in their favor on the claim. Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Initially, although plaintiffs allege violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.7(d), 23-1.7(e)(2), 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.30, 23-2.4, 23-3.2, 23-3.3 in their bill of particulars, they do not address those alleged Industrial Code violations in their cross-motion for partial summary judgment, and, thus, they are deemed abandoned. *See Genovese v. Gambino*, 309 A.D.2d 832, 833 (2d Dep't 2003) (where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of

action, his claim that he was wrongfully terminated was deemed abandoned). As such, defendants are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241(6) claim predicated on those abandoned provisions.

Plaintiffs seek partial summary judgment on their Labor Law § 241(6) claim predicated on violations of Industrial Code §§ 23-1.7(e)(1), 23-1.7(f), and 23-2.7(b), and the Church seeks summary judgment in its favor on this claim. The court will consider each alleged code violation in turn.

§ 23-1.7 Protection from general hazards.

...

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

This section of the Industrial Code does not apply because Roldan did not trip and fall. Also, there is no evidence that any dirt, debris, or any other obstructions or conditions caused Roldan to trip. Accordingly, the branch of plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(1) is dismissed.

§ 23-1.7 Protection from general hazards.

...

(f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Industrial Code § 23-1.7(f) is sufficiently specific to maintain a Labor Law § 241(6) cause of action, as it is not a generalized requirement for worker safety. *See McGarry v. CVP 1 LLC*, 55 A.D.3d 441, 441-442 (1st Dep't 2008) (plaintiff awarded summary judgment due to

violation of Industrial Code § 23-1.7[f]). Here, although the temporary stairway was provided as a means of access between working levels, it did not provide Roldan with reasonable and adequate protection and a safe means of access because it shifted from side-to-side, causing Roldan to fall. Therefore, plaintiffs are entitled to partial summary judgment on the branch of their Labor Law §241(6) claim predicated on Industrial Code § 23-1.7(f) and the branch of the Church's motion for summary judgment in its favor on the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(f) is dismissed.

§ 23-2.7 Stairway requirements during the construction of buildings.

...

(b) Stairway construction. Temporary stairways shall have treads constructed of wood planks not less than two inches by 10 inches in size, or metal not less than two inches in depth of equivalent strength. Such temporary stairways shall be not less than three feet in width and shall be substantially constructed and rigidly braced. Such stairways more than five feet in width shall be provided with intermediate or center stringers. Stairways with steel treads and landings which are to be subsequently filled in with concrete or provided with other permanent tread surfacing shall be provided temporary wooden treads carefully fitted in place and extending to the edges of the metal nosing and over the full width of the treads and landings.

Industrial Code § 23-2.7(b) is sufficiently specific to maintain a Labor Law § 241(6) cause of action, as it is not a generalized requirement for worker safety. *See Ramputi v. Ryder Const. Co.*, 12 A.D.3d 260, 260-261 (1st Dep't 2004) (liability predicated on violation of Industrial Code § 23-2.7[b]). This section requires that temporary stairways be "substantially constructed and rigidly braced." Here, the temporary stairway was not substantially constructed and rigidly braced, as it shifted from side-to-side, causing Roldan to fall. Accordingly, plaintiffs are entitled to partial summary judgment on the branch of their Labor Law §241(6) claim predicated on Industrial Code § 23-2.7(b) and the branch of the Church's motion for summary

judgment in its favor on the Labor Law § 241(6) claim predicated on Industrial Code § 23-2.7(b) is dismissed.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of The City of New York's motion, pursuant to CPLR § 3212, for summary judgment on plaintiffs Carlos Roldan and Maria Dolores Criollo Guacha's Labor Law § 200 claim is granted; and it is further

ORDERED that defendant The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of The City of New York's motion, pursuant to CPLR § 3212, for summary judgment on plaintiffs Carlos Roldan and Maria Dolores Criollo Guacha's Labor Law § 240(1) claim is dismissed; and it is further

ORDERED that plaintiffs Carlos Roldan and Maria Dolores Criollo Guacha's cross-motion for partial summary judgment on their Labor Law § 240(1) claim is granted;

ORDERED that the branch of defendant The Minister, Elders and Deacons of the Reformed Protestant Dutch Church of The City of New York's motion, pursuant to CPLR § 3212, for summary judgment in its favor as to liability on the Labor Law § 241(6) claim is granted as to the branches predicated on violation of Industrial Code §§ 23-1.5, 23-1.7, 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.30, 23-2.4, 23-3.2, 23-3.3 and otherwise denied; and it is further

ORDERED that the branch of plaintiffs Carlos Roldan and Maria Dolores Criollo Guacha's cross-motion for partial summary judgment in their favor as to liability on the Labor Law § 241(6) claim is granted as to the branches predicated on violation of Industrial Code §§ 23-1.7(f) and 23-2.7(b) and otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

3/8/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
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APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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