SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

LUIS RAMIREZ,

Plaintiff,

-against-

A.W. & S. CONSTRUCTION CO., INC., EMPIRE STATE BUILDING COMPANY, L.L.C., EMPIRE STATE BUILDING ASSOCIATES, L.L.C. and W5 GROUP L.L.C. d/b/a WALDORF DEMOLITION,

Defendants.

INDEX NO. 154988/13
MOTION DATE 03-14-2018
MOTION SEQ. NO. 006
MOTION CAL. NO.

A.W. & S. CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

W5 GROUP L.L.C. d/b/a WALDORF DEMOLITION,

Third-Party Defendant,

The following papers, numbered 1 to 6 were read on this motion for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits _____cross motion _____	4 - 5
Replying Affidavits _____	6

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion pursuant to CPLR §3212 for partial summary judgment on the issue of liability under Labor Law §240[1] against the defendants, is denied. Defendants' motion filed under Motion Sequence 007 pursuant to CPLR §3212, for summary judgment dismissing plaintiff's Labor Law § 240[1] and §241[6] causes of action asserted against them, and the Labor Law § 200 cause of action asserted against defendant, W5 Group L.L.C. d/b/a Waldorf, is granted only as to dismissing plaintiff's Labor Law § 241[6] claims relying on violations of Industrial Code Sections 12 N.Y.C.R.R. 23-3.4,and all 12 N.Y.C.R.R. 23-3.3 sub-sections except for 12 N.Y.C.R.R. 23-3.3 [b][3] and 12 N.Y.C.R.R. 23-3.3 [c]. The remainder of the relief sought in Motion Sequence 007, is denied.

Plaintiff brought this personal injury action for injuries sustained while employed as a laborer for non-party Calvin Maintenance, Inc., a subcontractor retained by W5 Group L.L.C. d/b/a Waldorf Demolition (hereinafter referred to individually as "Waldorf"). Plaintiff claims he was performing demolition as part of a gut renovation on the 73rd floor of the Empire State Building, located at 350 Fifth Avenue, New York, New York (hereinafter referred to as the "premises"). Plaintiff alleges that on May 13, 2013 he was attempting to cut wire to bring down the electrical lamps and the ceiling at the premises, when his co-workers tore down the neighboring wall causing him to be struck and injured by the falling sheetrock. Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. (hereinafter referred to jointly as the "Empire defendants") are the owner entities and A.W. & S Construction Co., Inc. (hereinafter referred to individually as A.W. & S.) is the construction manager and general contractor for the job site.

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

The complaint asserts causes of action for common law negligence, Labor Law §200, § 240[1] and §241[6] against the defendants. Empire Defendants and A.W. & S. were both granted summary judgment on plaintiff's common law negligence and Labor Law §200 causes of action under Motion Sequence 003 and Motion Sequence 005 (NYSCEF Docket # 84 and #169). By stipulation dated June 12, 2017 the defendants in this action discontinued without prejudice the cross-claims and the third-party action (NYSCEF Docket # 177).

Plaintiff's motion seeks an Order pursuant to CPLR §3212 for partial summary judgment on the issue of liability under Labor Law §240[1] against all of the defendants.

Defendants under Motion Sequence 007 pursuant to CPLR §3212 seek summary judgment dismissing the causes of action asserted against them under to Labor Law §240[1] and Labor Law § 241[6], Waldorf also seeks summary judgment dismissing plaintiff's common law negligence and Labor Law §200 causes of action asserted against it.

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 produce 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]).

Waldorf seeks summary judgment on the Labor Law §200 and common law negligence causes of action arguing that there was no supervisory control, or duty to provide instruction and direction to plaintiff or his co-employees. Waldorf claims that plaintiff's accident arises solely out of supervision by his foreman, Emilio Martinez and the activity of co-employees, all employed by Waldorf's subcontractor non-party Calvin Maintenance, Inc.

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site and requires satisfaction of common-law negligence standards. Claims are divided into two categories: (1) those arising from a defect or dangerous condition existing on the premises and (2) those arising from the manner and means that the work was performed (Mitchell v. New York University, 12 A.D. 3d 200, 784 N.Y.S. 2d 104 [1st Dept., 2004] and Prevost v. One City Block LLC, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept., 2017]). Liability exists for supervisory control over the manner and means of the injury producing work (Foley v. Consolidated Edison Co. of New York, Inc., 84 A.D. 3d 476, 923 N.Y.S. 2d 57 [1st Dept., 2011]).

Plaintiff relies on the deposition testimony of Joseph Marrone - on behalf of Waldorf - stating that: Waldorf created Calvin Maintenance, Inc.; that he was employed by both Waldorf and Calvin; that they are basically the same company; and that he directed Emilio Martinez - plaintiff's foreman at Calvin Maintenance, Inc.- as to the work performed (Mot. Seq. 007, Exh. X pgs. 77-79, 1, and 9-12), to show that the manner and means of the work performed was also controlled by Waldorf. Plaintiff has raised an issue of fact to maintain the Labor Law § 200 and common law negligence causes of action asserted against Waldorf, warranting denial of summary judgment.

Defendants under Motion Sequence 007 seek summary judgment dismissing plaintiff's Labor Law §241[6] cause of action, arguing that the cited Industrial Code violations, 12 N.Y.C.R.R. 23-3.3 and 12 N.Y.C.R.R. 23-3.4, do not apply to the facts of this case.

Labor Law §241[6] establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Garcia v. 225 East 57th Street Owners, Inc., 96 A.D. 3d 88, 942 N.Y.S. 2d 533 [1st Dept.,

2012]). To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the 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 [1st Dept., 2007]).

Plaintiff in opposition only address arguments applying to Industrial Code 12 N.Y.C.R.R. 23-3.3[b][1], 12 N.Y.C.R.R. 23-3.3[b][3], and 12 N.Y.C.R.R. 23-3.3[c] applying to demolition by hand. 12 N.Y.C.R.R. 23-3.3[b][1] requires that "all demolition work above each tier of floor beams be completed before any demolition work is performed on the supports of such floor beams" (See 12 N.Y.C.R.R. 23-3.3[b][1] and Kaminski v. 53rd Street and Madison Towner Development, LLC, 70 A.D. 3d 530, 895 N.Y.S. 2d 76 [1st Dept., 2010]).

Defendants have shown that Industrial Code 12 N.Y.C.R.R. 23-3.3[b][1],involving demolition work on floor beams does not apply to the fact of this case. Plaintiff fails to provide proof in support of the argument that work on walls and partitions are meant to be included in this provision of the Industrial Code, and fails to raise an issue of fact.

12 N.Y.C.R.R. 23-3.3[b][3] states "Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." A plaintiff is not required to show that the fall or collapse is actually caused by wind pressure or vibration to state a claim under this section of the industrial code (See 12 N.Y.C.R.R.23-3.3[b][3] and Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,18 N.Y. 3d 1, 959 N.E. 2d 488, 935 N.Y.S. 2d 51 [2011]). 12 N.Y.C.R.R. 23-3.3[b][3] applies to a structure being loosened or weakened as a result of the progress of demolition, it does not apply to a deliberate collapse (Garcia v. 225 East 57th Street Owners, Inc., 96 A.D. 3d 88, 942 N.Y.S. 2d 533 [1st Dept., 2012]).

Defendants reliance on hearsay testimony of multiple witnesses, that were not present at the time the accident occurred, stating the wall fell solely because it was knocked down by plaintiff's co-workers, fails to make a prima facie showing for summary judgment under Industrial Code 12 N.Y.C.R.R. 23-3.3[b][3]. In any event, plaintiff's argument that the structural integrity of the wall was weakened as a result of his tearing down of light fixtures and part of the ceiling, raises an issue of fact.

22 N.Y.C.R.R. 23-3.3[c] states:

> "During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring bracing or other effective means."

The defendants are required to fashion safeguards in the form of "continuing inspections" during the progress of the demolition. The failure to show compliance with the regulation, or that non-compliance did not cause plaintiff's accident warrants denial of summary judgment (Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,18 N.Y. 3d 1, supra at pg. 9). Plaintiff raises an issue of fact under Industrial Code 12 N.Y.C.R.R. 23-3.3[c], relying on deposition testimony that there had not been any continuing or contemporaneous inspections of the wall to determine whether it was weakened by the ongoing work (Mot. Seq. 007, Exh. BB p. 90, Exh. CC pgs. 26-27). The conflicting testimony as to whether plaintiff was pulling down the ceiling and light fixtures, or only clearing the floor and moving carpet further, warrants denial of summary judgment under Industrial Code 12 N.Y.C.R.R. 23-3.3[c].

Defendants are not entitled to summary judgment dismissing all of plaintiff's Labor Law §241[6] cause of action under Motion Sequence 007, there remain issues of

fact as to whether there were violations of Industrial Code sections 12 N.Y.C.R.R. 23-3.3[b][3] and 22 N.Y.C.R.R. 23-3.3[c].

Plaintiff on this motion and defendants under Motion Sequence 007 seek summary judgment on the Labor Law §240[1] cause of action. Defendants argue that plaintiff was only clearing the floor and moving carpet and, not as alleged, working on removing fixtures or demolition on the ceiling.

Liability arises under Labor Law §240[1], upon proof that, "plaintiff's injuries result from an elevation related risk and the inadequacy of safety devices." Liability attaches only where plaintiff's injuries are a direct consequence of inadequate safety devices and do not apply to "any and all perils that may be connected in some tangential way with the effects of gravity"(Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y. 3d 90, 30 N.E. 3d 154, 7 N.Y.S. 3d 263 [2015]). Labor Law §240[1] is applied to the gravity related risk of a falling object even when it is located on the same level as the plaintiff and was not being hoisted or secured, by relying the weight of the object and the amount of force it can generate while it falls (Rodriguez v. DRLD Development Corp., 109 A.D. 3d 409, 970 N.Y.S. 3d 213 [1st Dept. , 2013] citing to Runner v. New York Stock Exch., Inc., 13 N.Y. 3d 599, 922 N.E. 2d 865, 895 N.Y.S. 2d 279 [2009], and Natoli v. City of New York, 148 A.D. 3d 489, 49 N.Y.S. 3d 663 [1st Dept., 2017]).

Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004] and Lopez v. Bovis Lend Lease LMB, Inc., 26 A.D. 3d 192, 807 N.Y.S. 2d 873 [1st Dept., 2006]). Summary judgment on a Labor Law §240[1] should be denied where it cannot be determined whether the proximate cause of plaintiff's injuries was a result of the lack of safety devices of the kind required pursuant to Labor Law §240[1] (Rodriguez v. DRLD Development Corp., 109 A.D. 3d 409, supra at pg. 410).

Plaintiff's expert, Kathleen Hopkins - a certified site safety manager- relies on plaintiff's testimony that he was working on removing light fixtures and part of the ceiling. She states that the wall should have been secured with a six foot scaffold or stays, blocks, braces, irons or other similar devices erected next to the interior sheetrock to act as a support and prevent it from falling onto the plaintiff as he performed his work on the ceiling, and then removed after he was done doing the work (Mot. Seq. 007, Opp. Exh. 1). Plaintiff through his expert affidavit meets his burden of establishing that safety devices could have prevented the accident (Bonaerge v. Leighton House Condominium, 134 A.D. 3d 648, 22 N.Y.S. 3d 52 [1st Dept., 2015]). Kathleen Hopkins relies exclusively on plaintiff's allegations that he was removing lighting fixtures and part of the ceiling. The parties provide conflicting testimony as to whether plaintiff was actually removing light fixtures and part of the ceiling, or merely clearing the floor and moving carpeting, raising credibility issues that warrant denial of summary judgment to plaintiff under Labor Law §240[1].

Defendants are not entitled to summary judgment relief pursuant to Labor Law §240[1] under Motion Sequence 007. Although Labor Law §240[1] does not impose liability for failure to provide protective devices when the goal of the work is to cause a wall or object to fall. Securing the wall is required "where doing so is not contrary to the work plan" (Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,18 N.Y. 3d 1, supra at pg. 11). The collapse of a wall when plaintiff was merely sweeping the floor presents only the ordinary hazard of working on a construction site (Purcell v. Visiting Nurses Found. Inc., 127 A.D. 3d 572, 8 N.Y.S. 3d 279 [1st Dept., 2015] citing to Misseritti v. Mark IV Const. Co., 86 N.Y. 2d 487, 657 N.E. 2d 1318, 634 N.Y.S. 2d 35 [1995]).

Defendants' expert, David Paine - Construction Safety and Fall Prevention Expert and OSHA Expert - states that the wall did not come down because of issues with structural integrity, it was because plaintiff's co-workers demolished it. Mr. Paine states that there was no need for devices to protect plaintiff from elevated risks as required by

Labor Law §240[1] because using a device would be "illogical and impracticable" since demolition requires the walls to fall to the ground (Opp. Exh. 1).

There is no disagreement between the experts as to the adequacy of the safety device provided, only whether a device was required at all. "Expert opinion that a safety device was neither necessary nor customary is insufficient to establish the absence of a Labor Law §240[1] violation" (See Gonzalez v. Paramount Group, Inc., 157 A.D. 3d 427, 66 N.Y.S. 3d 122 [1st Dept., 2018] and Bonaerge v. Leighton House Condominium, 134 A.D. 3d 648, supra at pg. 649 citing to Zimmer v. Chemung County Performing Arts, 65 N.Y. 2d 513 at 523, 482 N.E. 2d 898, 493 N.Y.S. 2d 102 [1985]).

Defendants' expert affidavit fails to meet the burden under Labor Law §240[1]. To the extent it is determined that plaintiff was removing part of the ceiling and lighting fixtures, defendants are fully liable for failure to provide any protective devices. The conflicting testimony concerning the tasks being performed by the plaintiff and whether the neighboring wall was rendered unstable due to that work warrants denial of defendants' motion for summary judgment on the Labor Law §240[1] claim.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3212 for partial summary judgment on the issue of liability under Labor Law §240[1] against the defendants, is denied, and it is further,

ORDERED that defendants' motion filed under Motion Sequence 007 pursuant to CPLR §3212, for summary judgment dismissing plaintiff's Labor Law § 240[1] and §241[6] causes of action asserted against them, and the Labor Law § 200 cause of action asserted against defendant, W5 Group L.L.C. d/b/a Waldorf, is granted only as to dismissing the causes of action alleging violations of Industrial Code sections 12 N.Y.C.R.R. 23-3.4, and all 12 N.Y.C.R.R. 23-3.3 sections except for 12 N.Y.C.R.R. 23-3.3 [b][3] and 12 N.Y.C.R.R. 23-3.3 [c], relied on as part of plaintiff's Labor Law §241[6] cause of action, and it is further,

ORDERED, that Industrial Code sections 12 N.Y.C.R.R. 23-3.4, and all of the 12 N.Y.C.R.R. 23-3.3 sub-sections except for 12 N.Y.C.R.R. 23-3.3 [b][3] and 12 N.Y.C.R.R. 23-3.3 [c], relied on as part of plaintiff's Labor Law §241[6] cause of action, are severed and dismissed, and it is further,

ORDERED, that the remainder of the relief sought in defendants' motion filed under Motion Sequence 007, is denied.

ENTER :

Dated: March 26, 2018

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE