SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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BAYRON MARTINEZ, Index No.: 162968/2015

Plaintiff,

-against-

TURNER CONSTRUCTION COMPANY and WEST VILLAGE RESIDENCES, LLC,

Defendants.

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Robert R. Reed, J.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on October 10, 2014, when he was struck in the head by a wood plank while working at a construction site located at the former Saint Vincent Medical Campus in Manhattan (the Premises).

Plaintiff Bayron Martinez moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants Turner Construction Company (Turner) and West Village Residences, LLC (West Village) (together, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.[1]

[1] During oral argument on May 3, 2018, plaintiff conceded the causes of action for common-law negligence and Labor Law § 200. Plaintiff also conceded the cause of action for Labor Law § 241 (6), except with respect to the claim premised on an alleged violation of Industrial Code section 23-1.7 (a) (1).

BACKGROUND

On the day of the accident, West Village owned the Premises where the accident occurred. West Village hired Turner as the construction manager for a project underway at the Premises, which entailed the demolition and/or renovation of several hospital buildings and their conversion into apartment buildings. In turn, Turner subcontracted the masonry work at the Project to nonparty GEM Roofing and Waterproofing (GEM). Plaintiff was employed by GEM as a pointer, caulker, cleaner (a PCC).

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by GEM as a PCC. His duties included the pointing, caulking and cleaning of masonry. GEM provided most of his tools and safety equipment. His direct supervisor was a GEM foreman.

Plaintiff explained that the Premises had an exterior scaffold system around it, that was built as the work progressed up the building. On the day of the accident, the eighth floor had a complete set of scaffolding around the exterior of the building, but the ninth floor did not. That day, plaintiff's foreman assigned him the job of repairing some pointing on the exterior of the eighth floor. Plaintiff, while wearing his hard hat, rode the hoist elevator to the eighth floor. As he was exiting the elevator to the eighth-floor landing, he was struck in the head by a heavy nine-or-ten foot-long, nine-inch wide, two-inch thick board that a worker on the ninth floor had lost control of.

Immediately after the accident, a GEM worker named Piotr Pekula came to help plaintiff. Pekula and another GEM worker, Joel Guerrero had been assigned to set planks for scaffolding on the ninth floor. Plaintiff testified that he later learned that the accident was caused when either Pekula or Guerrero mishandled the plank, causing it to hit him in the head.

Deposition Testimony of Joel Guerrero (GEM Laborer)

Guerrero testified that on the day of the accident, he was employed by GEM as a laborer. That day, he was tasked with placing scaffolding planks on a metal scaffold frame. The scaffold frame consisted of two parallel metal pipes, approximately eight or nine feet apart. His job entailed laying the planks crosswise on the pipes to create the walking surface of the scaffold, which would also serve as the overhead protection for the eighth floor. To lay the plank, Guerrero would hold one end and "send it" across the gap from one pipe to another (Guerrero tr at 24).

Guerrero also testified that he was aware that plaintiff was below him at the time that he decided to "send" the plank. In addition, he testified that, before he began installing the plank, he told plaintiff "be careful. I am sending the plank," but he was unsure whether plaintiff heard him (*id.* at 22). He saw plaintiff backing up, and, thinking that he was moving out of the area, Guerrero maneuvered the plank towards the far side scaffold rail. However, "it missed [by] like three inches," and "[i]t flopped down" approximately "four or five feet" before the end of the board hit plaintiff in the head (*id.* at 33, 41). Guerrero also testified that he was still holding on to the other end of the plank after it hit plaintiff.

Deposition Testimony of Piotr Pekula (GEM Employee)

Pekula testified that on the day of the accident, he was a PCC employed by GEM, and that he, Joel and plaintiff were a team. Pekula and Guerrero were tasked with setting up planks for a scaffold so as to provide access to a work area on the ninth floor of the Premises.

Pekula explained that he and Guerrero went to the ninth floor and began setting up. He clipped his safety line to the scaffold, and Joel picked up one of the ten-foot planks, which was not secured or tied off. Before Pekula got into position, "[Guerrero] was trying to set the plank

and he missed the [rail]" and "[Guerrero] missed the pipe and the plank went down" striking plaintiff (Pekula deposition tr at 23-24). Pekula stated that Guerrero tried to lay the ten-foot plank by himself, instead of waiting for help. Pekula also testified that Guerrero never lost his grip on the plank, and that "he was still holding onto the plank" even after it hit plaintiff (*id.* at 28).

According to Pekula, the way Guerrero placed the plank is acceptable when there is no one working below, but when there is someone working below, two people are needed to safely control the plank.

After the accident, a Turner safety consultant interviewed Pekula and prepared a statement for him to review and sign.

Deposition Testimony of Rick Faustini (Turner's Senior Project Superintendent)

Rick Faustini testified that on the day of the accident, he was Turner's senior project superintendent at the Project. He explained that Turner was the construction manager at the Project, and, as such, it directly hired all the subcontractors for the Project, as well as the safety consultant. Turner also directed and supervised the work of its employees and of its subcontractors and monitored site safety.

The C2 Accident Report

The Employer's Report of Work-Related Injury (the C2 Report), dated October 10, 2014, was prepared by GEM's safety manager. It states, in pertinent part, that "[plaintiff] was entering scaffolding B-3 8th fl. when Joel Guerrero lost control of a plank on B-3 9th fl. striking [plaintiff] in the head."

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 240 (1) claim against defendants. Defendants cross-move for summary judgment dismissing said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who is struck by a falling object at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). 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 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).[2]

In order to recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, a plaintiff must demonstrate that the object that fell – i.e., the scaffold plank – was in the process of being hoisted or secured at the time of the accident, or that it "was a load that required

[2] As the owner of the Premises where the accident occurred, West Village may be liable for plaintiff's injuries under Labor Law § 240 (1). In addition, Turner does not challenge that it is a proper Labor Law defendant in either its opposition to plaintiff's motion, or in its cross motion.

securing for the purposes of the undertaking at the time it fell" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; *see also Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758-59 [2008]["falling object" liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured]).

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim as against defendants, because he has sufficiently established that the plank that struck him in the head was a load that needed securing in order to prevent it from falling on him when it was mishandled during installation (*see Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 405 [1st Dept 2013] [iron grate that the plaintiff's foreman was in the process of installing that fell on the plaintiff "was part of the work of the construction project . . . and was required to be secured for the purposes of the undertaking"], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see also Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011] [plank being maneuvered between floors was an object that required securing, and its fall from above onto plaintiff was within the ambit of Labor Law § 240 (1)]; *Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1166-1167 [4th Dept 2013] [the failure to secure a scaffold plank that was dropped and struck plaintiff was a violation of Labor Law § 240 [1]).

In addition, "the scaffold frame[] was not 'so constructed, placed and operated as to give proper protection' to plaintiff, inasmuch as it was inadequate to protect him from the foreseeable risk that his coworker might drop the plank[] onto him" (*Miles*, 103 AD3d at 1167, citing Labor Law § 240 [1]). To that effect, at the time of the accident, the scaffold was not equipped with a safety device, such as netting, which would have protected plaintiff on the eighth floor, during

the installation of the scaffold planks on the ninth floor. This failure is also a violation of Labor Law § 240 (1).

In opposition to plaintiff's motion and in support of their cross motion, defendants argue that Labor Law § 240 (1) is inapplicable because the plank did not fall from a height and was not material that needed to be hoisted or secured. Also, plaintiff's injuries were the result of the usual and ordinary dangers of a construction site. In addition, defendants argue that the plank was deliberately dropped and, therefore, outside the scope of section 240 (1).

Specifically, defendants argue that section 240 (1) will not apply to a falling object, like the plank, unless that object fell while being hoisted or secured because of the absence or inadequacy of a safety device. Such argument is unavailing. A falling object does not need to be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240 (1). It is enough that said object simply "required securing for the purposes of the undertaking at the time it fell" (*Cammon* 21 AD3d at 200 [internal quotation marks and citations omitted]; *accord Banscher v Actus Lend Lease, LLC,* 103 AD3d 823, 824 [2d Dept 2013]).

Therefore, as the plank was not secured for the purposes of the undertaking, it constituted a falling object under the Labor Law (*see Matthews* 111 AD3d at 405, 406 [a grate that fell while in the process of being installed was a falling object as contemplated by Labor Law § 240 (1) and "not an inherent risk involved in working at a construction site"]; *see also Arnaud,* 83 AD3d at 508).

In addition, defendants argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because the hazard must have arisen from a "physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]).

Defendants claim that a two- to five-foot drop is not a significant elevation differential, as contemplated by the statute.

However, a minor elevation differential "'[could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating even over the course of a relatively short descent'" (*Wilinski v 334 E. 92nd Hous. Dev. Fung Corp.*, 18 NY3d 1, 10 [2011], quoting *Runner*, 13 NY3d at 605). Applying *Wilinski*, not only is plaintiff not precluded from recovery because the plank that struck him was only two-to-five-feet above him, but, given the fact that the 10-foot-long, 9-inch-wide, 2-inch thick plank was located above him, and, given the significant force that such a large plank could generate during its fall, plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.*).

Defendants also argue that Labor Law 240 (1) does not apply, as a matter of law, to an object that is carried by hand. This argument is also unavailing (*Gutierrez v Harco Consultants Corp.*, 157 AD3d 537, 537 [1st Dept 2018] ["We reject defendants' contention that the rebar being passed to plaintiff did not require a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand"]; *accord Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]).

Finally, defendants argue that the plank was deliberately dropped and, therefore, was not an object that requires securing pursuant to Labor Law § 240 (1). However, there is no testimony, or any other evidence, supporting defendants' claim that the plank was deliberately dropped from the ninth floor to the eighth floor, so the court need not address this issue.

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to summary judgment dismissing said claim against them.

The Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 241 (6) claim against defendants. Defendants cross-move for summary judgment dismissing said claim against them.

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:
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> * * *
>
> (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."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

In his motion, plaintiff only addresses that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code section 23-1.7 (a) (1), and, at oral argument on May 3, 2018, he conceded that those parts of his section 241 (6) claim premised on all other

Industrial Code provisions alleged in the complaint do not apply to the facts of this case. Accordingly, defendants are entitled to dismissal of those claims conceded at oral argument.

Initially, Industrial Code section 23-1.7 (a) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998]). Section 23-1.7 (a) (1) provides, in pertinent part, the following:

> "(a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection."

Here, however, neither party has addressed a principal issue of this provision, i.e., whether the area where plaintiff was working was an area normally exposed to falling material. Instead, plaintiff argues only that overhead protection was not in place, while defendants argue that, because plaintiff was working on a scaffold, he was, as a matter of law, provided with proper protection. Accordingly, a question of fact remains as to whether the area where plaintiff was working was normally exposed to falling material.

Thus, plaintiff is not entitled to partial summary judgment in his favor as to liability on that part of the Labor Law § 241 (1) claim premised on an alleged violation of Industrial Code § 23-1.7 (a) (1) as against defendants, and defendants are not entitled to dismissal of said claim against them.

The court has considered the parties' remaining arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Bayron Martinez's motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against

defendants Turner Construction Company and West Village Residences, LLC (together, defendants) is granted, and the motion is otherwise denied; and it is further

ORDERED that defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code provisions that plaintiff conceded at oral argument do not apply (other than Industrial Code section 23-1.7 [a] [1]), and the motion is otherwise denied; and it is further

ORDERED that the remainder of this action shall continue.

Dated: October 29, 2018

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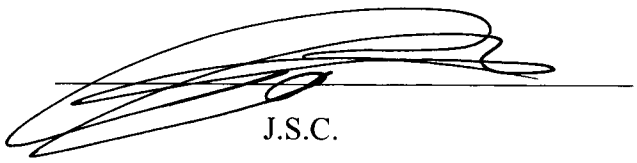

J.S.C.