

Von Hegel v Brixmor Sunshine Sq. LLC

2018 NY Slip Op 34439(U)

June 13, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 15-603137

Judge: Joseph Farneti

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ORIGINAL

SHORT FORM ORDER

INDEX No. 15-603137
CAL. No. 17-00904OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-12-17 (001)
MOTION DATE 11-30-17 (002)
ADJ. DATE 12-21-17
Mot. Seq. # 001 - MotD
002 - MotD

-----X
WILLIAM VON HEGEL and ROSE MARIE
VON HEGEL,

Plaintiffs,

- against -

BRIXMOR SUNSHINE SQUARE LLC and RT
LONG ISLAND FRANCHISE LLC d/b/a RUBY
TUESDAY,

Defendant.
-----X

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Upon the following papers numbered 1 to 16, read on these motions for summary judgment; Notice of Motion and supporting papers 1-9; Notice of Cross Motion and supporting papers 10-13; Answering Affidavits and supporting papers 14; Replying Affidavits and supporting papers 15-16; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them is granted to the extent specified herein, and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiffs for partial summary judgment in their favor on the question of defendants' liability is granted to the extent specified herein, and is otherwise denied.

This action was commenced by plaintiff William Von Hegel to recover damages for injuries he allegedly sustained on October 24, 2013, while in the employ of nonparty RFE, Inc. Plaintiff allegedly was injured when he fell off of a ladder while performing repair work at defendants' premises. Defendant Brixmor Sunshine Square LLC ("Brixmor") is alleged to be the owner of the subject premises, while defendant RT Long Island Franchise LLC d/b/a Ruby Tuesday ("Ruby Tuesday") is

Von Hegel v Brixmor
Index No. 15-603137
Page 2

alleged to have been a lessee of that premises. Plaintiff asserts claims under Labor Law §§ 200 (1), 240 (1), and 241 (6). Plaintiff's wife, Rose Marie Von Hegel, asserts a derivative claim for loss of services. Brixmor asserts cross-claims against Ruby Tuesday for contribution, indemnification, and breach of contract.

Defendants now move for summary judgment in their favor, arguing that they had no notice of any dangerous condition on the premises, that they had no authority to supervise or control plaintiff's work, and that plaintiff's own actions were the sole proximate cause of his alleged injuries. In support of their motion, defendants submit copies of the pleadings, a transcript of William Von Hegel's deposition testimony, and a transcript of Ruby Tuesday's deposition testimony.

Plaintiffs oppose defendants' motion, and cross-move for partial summary judgment in their favor, alleging defendants violated the aforementioned Labor Law provisions. In support of their cross motion, and in opposition to defendants' motion, plaintiffs submit an affidavit of William Von Hegel.

William Von Hegel testified that he was employed as a senior tech by RFE, Incorporated ("RFE"), and that he had been in their employ for approximately 15 years at the time of his deposition. He stated his job duties at RFE included basic repairs on concrete, flooring, Sheetrock, spackling, painting, and roofing. Mr. Von Hegel indicated that on the day before his incident, he was working alone in the basement of the Medford, New York, Ruby Tuesday restaurant, attempting to locate the source of water leaking in from the building's exterior. Plaintiff described the basement as "[p]lain cement," with a cement floor and a "nine to ten [foot]" ceiling. Plaintiff stated that he performed an inspection of the basement, noting puddles of water on the floor, spread over a 300 to 400 square foot area, and one wet wall. For the purposes of that inspection, he sought, and was granted, permission from a manager of Ruby Tuesday to use a 10-foot ladder, of unknown ownership, stored in the basement. Mr. Von Hegel described the manager as "a young man, about five-feet-ten, [with] black hair, [and a] dark complexion." He testified that performed some repairs to the exterior of the restaurant, then departed for the day. He indicated he returned to Ruby Tuesday in late morning of the next day, informed the same manager that he would be addressing the water leak, and carried the tools necessary for concrete repair into the basement.

Plaintiff testified that upon his arrival in the basement, he conducted an inspection of the area, and located a probable leak source near the top of the east wall. He indicated that he then picked up the ladder he had used on the previous day, inspected it, found it to be in good condition, and set it up near the suspected leak. Asked to describe the ladder, plaintiff stated that it was composed of two, 10-foot sections that could slide past each other to extend its overall length. He testified that he used it in its 10-foot-long, non-extended configuration, by leaning it against the basement wall at an approximately 20 degree angle, and with its feet on the wet floor. He explained that, in relation to the manner in which he used the ladder on the previous day, its "angle of incident" was "a little bit less." He stated he climbed up two steps of the ladder to test its stability, descended back down to the floor, climbed five or six steps up the ladder, and began working. Plaintiff indicated that he was alone in the basement, that his head was approximately eight feet in the air, and that he was using his hands to clear "a sandy area at the junction of the basement and the upper wall." He testified that shortly thereafter, the ladder's bottom

Von Hegel v Brixmor
Index No. 15-603137
Page 3

feet slipped away from the wall, causing it to fall to the ground, and that he “went down with it.” When questioned as to the degree of interaction with Ruby Tuesday employees prior to his accident, plaintiff testified that no one accompanied him to the basement, and that no one came down to check on him until after his fall.

Faheem Memon, deposed on behalf of Ruby Tuesday, testified that at the time of Mr. Von Hegel’s accident, he was the general manager of the Medford, New York, Ruby Tuesday restaurant. He indicated that the Medford Ruby Tuesday restaurant leased its building from Brixmor Properties. Questioned regarding the water leak in the restaurant, Mr. Memon stated that it merely dampened the basement floor in a foot-wide strip, approximately five to six feet long, directly below the leak. He testified that as soon as he saw the condition, he called Universal Service Management (“USM”), a company that would arrange repairs at the premises by subcontracting the work to other agencies. Mr. Memon indicated that USM sent one worker to repair the water leak, whom he greeted in the front of the restaurant, led into the basement, and then left alone to commence his work.

Mr. Memon testified that there was a 10-foot aluminum extension ladder, owned by Ruby Tuesday, stored in the subject restaurant’s basement, often used by Ruby Tuesday employees to access the restaurant’s roof. He stated that he had used the ladder himself, multiple times, and never noticed any problems with it. Mr. Memon indicated that approximately 15 to 20 minutes after leaving the repairman alone in the basement, he heard a “loud crash” and returned to investigate. He testified that he found Mr. Von Hegel laying on the ground, sounding like he had “gotten the wind knocked out of him,” and the ladder laying nearby. Upon questioning, Mr. Memon denied Mr. Von Hegel asking permission to use the aforementioned ladder, denied seeing Mr. Von Hegel using it prior to his fall, and denied seeing any wet condition on the basement floor in the area of Mr. Von Hegel’s fall.

A party moving for summary judgment “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O’Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Haider v Davis*, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site,

Von Hegel v Brixmor
Index No. 15-603137
Page 4

and those involving the manner in which the work is performed” (*Messina v City of New York*, 147 AD3d 748, 749, 46 NYS3d 174 [2d Dept 2017], quoting *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged “had the authority to supervise or control the performance of the work” (*id.*). General supervisory authority at a work-site is not enough; rather, a defendant must have had the responsibility for the manner in which the plaintiff’s work is performed (*see Messina v City of New York, supra*).

Labor Law §§ 240 and 241 apply to “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith.” Labor Law § 240 (1) provides, in relevant part, that “[a]ll 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) is “an exception to CPLR 1411, which recognizes contributory negligence as a defense in personal injury actions” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]). It has been long held that Labor Law § 240 (1) imposes liability even on contractors and owners who had nothing to do with a plaintiff’s accident (*see Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31 [2012]). The law “imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124, 8 NYS3d 229 [2015]). A “lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law” (*Seferovic v Atl. Real Estate Holdings, LLC*, 127 AD3d 1058, 1059-1060, 7 NYS3d 458 [2d Dept 2015]). The hazards intended to be mitigated by Labor Law § 240 (1) “are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49 [1993]).

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, 670 NYS2d 816 [1998]). It imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite (*id.*). However, an owner or general contractor may raise any valid defense to the imposition of vicarious liability, including contributory and comparative negligence (*id.*). To support a claim under this section, “a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (*Aragona v State of New York*, 147 AD3d 808, 809, 47 NYS3d 115 [2d Dept 2017]).

Von Hegel v Brixmor
Index No. 15-603137
Page 5

As to plaintiff's Labor Law § 241 (6) claim, defendants established a *prima facie* case of entitlement to summary judgment (*see generally Alvarez v Prospect Hosp., supra*). Industrial Code § 23-1.21 (b) sets forth physical requirements for ladders used in industrial settings providing, in relevant part, that "[e]very ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon," and that "[a]ll ladders shall be maintained in good condition [and] shall not be used if . . . it has a broken member or part, [i]f it has any insecure joints between members or parts, [or] [i]f it has any flaw or defect of material that may cause ladder failure." As to the use of ladders, Industrial Code § 23-1.21 (b) (4) requires that "[a]ll ladder footings shall be firm," that "[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings," that "[a] leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions," and that "[t]he upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder." Here, Mr. Von Hegel testified that the ladder in question lacked any mechanical defects and that he tested the firmness of its footings before scaling it. Despite noting the presence of water on the floor of the basement, he did not testify that such water rendered that floor "slippery."

As to plaintiff's claims in common law negligence and under Labor Law § 200, defendants have similarly established a *prima facie* case of entitlement to summary judgment. Mr. Von Hegel failed to state that any dangerous condition existed at the subject premises, or that any such condition was a proximate cause of his alleged fall. Significantly, while testifying that there were puddles of water in the subject basement, Mr. Von Hegel did not testify that such puddles caused the floor to be slippery, or that they contributed to his accident. Nor, did Mr. Von Hegel testify that the ladder in question was defective (*cf. Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). In addition, Mr. Von Hegel's testimony established that defendants neither directed or controlled the manner of his work (*see Messina v City of New York, supra*).

However, as to plaintiff's Labor Law § 240 (1) claim, the Court finds defendants have failed to establish a *prima facie* case. Here, Mr. Von Hegel testified that the subject ladder's feet "slipped" away from the wall, causing him to fall. Defendants have not demonstrated that plaintiff's alleged injuries "did not result from a gravity-related or elevation-related hazard" (*Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848, 851, 63 NYS3d 681 [2d Dept 2017]), that they provided adequate protection to Mr. Von Hegel (*see Dirschnneider v Rolex Realty Co. LLC*, 157 AD3d 538, 69 NYS3d 40 [1st Dept 2018]), or that Mr. Von Hegel was the sole proximate cause of his alleged injuries (*see Munzon v Victor at Fifth, LLC*, ___ AD3d ___, 2018 NY Slip Op 03852 [2d Dept 2018]). Thus, the Court need not address plaintiffs' opposition to defendants' motion regarding the Labor Law § 240 (1) claim (*see Winegrad v New York Univ. Med. Ctr., supra*).

The burden, therefore, shifted to plaintiffs to raise a triable issue as to their Labor Law §§ 200 and 241 (6) claims (*see generally Vega v Restani Constr. Corp., supra*). Plaintiffs failed to raise a triable issue in opposition to defendants' motion as to Labor Law § 200 and common law negligence claims. Neither a damp concrete floor, nor puddles of water on such a floor, is an inherently dangerous condition (*see Bluth v Bias Yaakov Academy for Girls*, 123 AD3d 866, 999 NYS2d 840 [2d Dept

Von Hegel v Brixmor
Index No. 15-603137
Page 6

2014)). In any event, both conditions were open and obvious – being the condition for which Mr. Von Hegel was hired to remedy. Absent some evidence that a wet condition was a proximate cause of Mr. Von Hegel's alleged injuries, rather than the manner in which the work was performed, plaintiffs' claim under Labor Law § 200 and common law negligence must fail (*see Ortega v Puccia, supra*). Accordingly, defendants' application for summary judgment dismissing plaintiffs' claims under common law negligence and Labor Law § 200 is granted.

In his opposition to defendants' application regarding Labor Law § 241 (6), plaintiffs' counsel makes several conclusory allegations, principally that the ladder was in violation of Industrial Code § 23-1.21 by being "unstable," having "insufficient footings," and being "prone to slipping." However, plaintiffs fail to identify any specific physical deficiency in the subject ladder, or which violation of the Industrial Code which was a proximate cause of Mr. Von Hegel's alleged fall (*see Blake v Neighborhood Hous. Servs. of N.Y. City, supra*). Therefore, plaintiffs have failed to raise a triable issue. Accordingly, that portion of defendants' motion for summary judgment dismissing plaintiffs' claim under Labor Law § 241 (6) is granted.

The Court now turns to plaintiffs' cross-motion. With respect to their sole remaining claim, asserted pursuant to Labor Law § 240 (1), plaintiffs have established a *prima facie* case of entitlement to summary judgment in their favor on the issue of defendants' liability (*see Tuzzolino v Consol. Edison Co. of New York*, 160 AD3d 568, 2018 NY Slip Op 02755 [1st Dept 2018]; *Merino v Cont. Towers Condominium*, 159 AD3d 471, 72 NYS3d 59 [1st Dept 2018]; *Podacín v Mall Props., Inc.*, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; *Pacheco v Halsted Communications, Ltd.*, 144 AD3d 768, 40 NYS3d 568 [2d Dept 2016]; *see generally Alvarez v Prospect Hosp., supra*). To prevail on a Labor Law § 240 (1) cause of action, a plaintiff "must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 833, 952 NYS2d 275 [2d Dept 2012]). Prevailing on a Labor Law § 240 (1) cause of action also requires that the plaintiff not be the sole proximate cause of his or her alleged injuries. "The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided, and whether a particular safety device provided proper protection is generally a question of fact for a jury" (*Yao Zong Wu v Zhen Jia Yang*, ___ AD3d ___, 2018 NY Slip Op 03169, *2 [2d Dept 2018]). As the Court of Appeals has stated, "[t]he point of Labor Law § 240 (1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so" (*Blake v Neighborhood Hous. Servs. of N.Y. City, supra* at 286).


However, prior opinions in similar matters support summary judgment in a plaintiff's favor when a ladder fails for any reason not solely attributable to plaintiff. Specifically, the Appellate Division, Second Department, has stated that "[w]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials" (*Melchor v Singh*, 90 AD3d 866, 868, 935 NYS2d 106 [2d Dept 2011]). First, Mr. Von Hegel "was provided only with an unsecured ladder and no safety devices, [and, therefore, he] cannot be held solely at fault for his injuries" (*Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 964, 953 NYS2d 150 [2d Dept 2012]; *see Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 33 NYS3d 472 [2d Dept 2016]; *Pacheco v Halsted Communications, Ltd., supra*).

Von Hegel v Brixmor
 Index No. 15-603137
 Page 7

Further, Mr. Von Hegel testified that the subject ladder's feet inexplicably slid out from under him, establishing a prima facie case under Labor Law § 240 (1) (*see Alvarez v Vingsan LP*, 150 AD3d 1177, 57 NYS3d 160 [2d Dept 2017]; *Melchor v Singh*, *supra*; *cf. Bonczar v Am. Multi-Cinema, Inc.*, 158 AD3d 1114, 70 NYS3d 305 [4th Dept 2018]). The question of whether Mr. Von Hegel was granted permission to use the subject ladder is irrelevant here because, pursuant to Labor Law § 240 (1), "owners and their agents . . . shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders" or similar devices for a worker's protection (*see Sarata v Metro. Transp. Auth.*, 134 AD3d 1089, 23 NYS3d 281 [2d Dept 2015] [emphasis added]). Even though plaintiff was "furnished" a ladder, "[t]he availability of a particular safety device will not preclude liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Munzon v Victor at Fifth, LLC*, *supra* at *2 [internal quotation omitted]).

In opposition, defendants failed to raise a triable issue (*see Alvarez v Vingsan LP*, *supra*; (*Seferovic v Atl. Real Estate Holdings, LLC*, *supra*). They adduced no evidence, through expert affidavit or otherwise, that raises an issue as to whether Mr. Von Hegel's own actions were the sole proximate cause of his alleged injuries (*see Batista v Manhattanville Coll.*, 28 NY3d 1093, 45 NYS3d 357 [2016]; *Munzon v Victor at Fifth, LLC*, *supra*; *Rom v Eurostruct, Inc.*, 158 AD3d 570, 71 NYS3d 57 [1st Dept 2018]; *Poalacin v Mall Props., Inc.*, *supra*; *cf. Nalvarte v Long Is. Univ.*, 153 AD3d 712, 59 NYS3d 786 [2d Dept 2017]; *Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 15 NYS3d 399 [2d Dept 2015]; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 944 NYS2d 630 [2d Dept 2012]). "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Nacewicz v R.C. Church of the Holy Cross*, 105 AD3d 402, 402-403, 963 NYS2d 14 [1st Dept 2013]; *see Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Gutierrez v 451 Lexington Realty LLC*, 156 AD3d 418, 66 NYS3d 463 [1st Dept 2017]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 [2d Dept 2014]). Accordingly, plaintiffs' cross-motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is granted.

Dated: June 13, 2018


 Hon. Joseph Farneti
 Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION