Sancino v Metropolitan Transp. Auth.
2019 NY Slip Op 30531(U)
February 28, 2019
Supreme Court, New York County
Docket Number: 159913/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 159913/2013

JOSEPH SANCINO,

MOTION SEQ. NO. 001

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, HUDSON YARDS DEVELOPMENT CORPORATION, THE RELATED COMPANIES, INC., and THE CITY OF NEW YORK,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this Labor Law action commenced by plaintiff Joseph Sancino ("Sancino"), defendants Metropolitan Transportation Authority ("the MTA"), New York City Transit Authority ("NYCTA"), MTA Capital Construction Company ("MTACC"), Hudson Yards Development Corporation ("Hudson Yards Development"), and the City of New York ("the City") (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Sancino opposes the motion in part. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises out of a construction project extending a subway line from Times Square to 34th Street-Hudson Yards in Manhattan. (Doc. 31 at 4.) Plaintiff Sancino was an ironworker

employed by Skanska USA Civil Northeast Inc./Railworks Corporation, a Joint Venture ("Skanska/Railworks"). (Doc. 51 at 2.) Sancino's duties on the project included the installation of metal plates above the subway tracks. (*Id.*) To install the plates, construction workers had to use a mobile manlift to reach the elevated portions of the tunnel above the tracks. (Docs. 31 at 4; 51 at 2.)

On the morning of September 4, 2013, Sancino was installing the plates with Richard Delfino ("Delfino"), another Skanska/Railworks employee. (Doc. 31 at 4.) They were using a manlift to access the area above the tracks. (*Id.*) Delfino operated the manlift. (Doc. 51 at 2.) The two men moved the manlift along the subway platform as necessary. (Doc. 31 at 4.) Delfino intended to move the manlift to an area on the platform underneath where the next metal plates were to be installed (Doc. 51 at 2), but was blocked by two dumpsters on the platform (*id.*). Delfino instructed Sancino to move them out of the way. (*Id.*)

In order to move the dumpsters, Sancino had to roll them over a piece of plywood[1] that was covering a divide in the unfinished concrete floor of the platform. (*Id.*) Sancino successfully pushed the first dumpster out of the way. (*Id.* at 3.) However, the second dumpster, which was heavier than the first one, was harder for him to move. (Docs. 31 at 7; 51 at 3.) While rolling the second dumpster over the piece of plywood, Sancino alleges that he "heard a crack" and that the dumpster became "off balance. Like the wheel was broken on it . . . ." (Doc. 43 at 40–41.) Once that happened, Sancino had to hold the dumpster in place: "I was holding it from tipping on me. It was going to tip over on me and I was trying to hold it." (*Id.* at 41.)

At that point, another worker came over to help Sancino. (*Id.* at 45.) Although Sancino was stuck behind the dumpster, the other worker began pushing it: "He was trying to help me. He didn't

[1] The evidence submitted indicates that the plywood form was on level flooring and not on an incline. Sancino testified at his deposition that the plywood was about a half inch thick. (Doc. 43 at 38.)

realize that I was stuck behind it, [he] came and pushed it and didn't realize I was stuck and the thing went over on top of me." (*Id.*) According to Sancino, as the dumpster tipped over, it hit his chest and body "a little bit" (*id.* at 49), "pulled [him] down on to the floor" (*id.*), and went over his right foot (*id.*).

On October 28, 2013, Sancino thereafter commenced the instant action against the MTA, NYCTA, MTACC, Hudson Yards Development, and The Related Companies, Inc.,[2] by filing a summons and complaint, alleging negligence and violations of New York Labor Law §§ 200, 240, and 241(6). (Doc. 32.) On February 5, 2014, he commenced a separate action against the City styled *Sancino v City of New York*, Supreme Court, New York County Index Number 151072/2014, alleging the same causes of action. (Doc. 35.) Pursuant to an order of this Court (Stallman, J.) dated January 22, 2015, the two actions were consolidated under the instant action's index number. (Doc. 37.)

In his bill of particulars and supplemental bill of particulars, Sancino alleged violations of Labor Law §§ 200, 240(1), and 241(6). (Doc. 31 at 3–4.) He also claimed violations of New York Industrial Code §§ 23-1.5, -1.7–1.8, -1.22–1.23, -1.28, -2.1, -1.33, -3, and -5–6. (Docs. 38–39.) Over the course of this litigation, several individuals were deposed, including: Sancino (Doc. 43); Delfino (Doc. 47); Michael Demonaco ("Demonaco"), who was the area superintendent for Skanska on the construction project on the date of plaintiff's accident (Doc. 45 at 9); and Allister Jimmy Ho ("Ho"), who was the construction manager for MTACC at the time of plaintiff's accident (Doc. 44 at 9).

[2] Pursuant to a stipulation dated December 19, 2013, Sancino has discontinued his claims against The Related Companies, Inc. (Doc. 34.)

Defendants MTA, NYCTA, MTACC, Hudson Yards Development, and the City now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Sancino opposes the motion in part.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Whether Defendants are Entitled to Summary Judgment Dismissing Plaintiff's Labor Law § 200 and Negligence Claims.

"Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work." (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012].) In construing this provision, our courts have reasoned that "[a]n implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (*Russin v Louis N. Picciano*

& Son, 54 NY2d 311, 317 [1981].) Thus, to prevail on a Labor Law § 200 claim, a plaintiff must prove either: (1) that the injury resulted from a defect or dangerous condition existing on the premises; or (2) that the injury resulted from the manner in which the work was performed. (*See Cappabianca*, 99 AD3d at 143–44.)

Here, this Court finds that defendants are entitled to summary judgment dismissing Sancino's negligence and Labor Law § 200 claims. In his complaints, plaintiff alleges that each of the moving defendants owned the premises at issue. (Docs. 32 at 5; 35 at 3.) An owner is liable under § 200 if the owner created the defective condition or had actual or constructive notice of it, (*see Cappabianca*, 99 AD3d at 144), or if the owner actually exercised supervisory control over the injury-producing work (*id.*). The depositions in this case make clear that none of the foregoing requirements were met. Indeed, MTACC's construction manager on the site, Ho, testified that, while MTACC oversaw Skanska/Railworks (Doc. 44 at 15), it was Skanska/Railworks that supervised Sancino's work: "The joint venture [Skanska/Railworks] controlled the whole entire site, from all the means, method[s] and everything they do." (*Id.* at 17.) Ho also testified that NYCTA was not involved in the construction work. (*Id.* at 18–19.)

Moreover, the area superintendent for Skanska on the construction project on the date of plaintiff's accident, Demonaco, testified that Skanska's supervising team—which consisted of area superintendents—was responsible for overseeing the ironworkers, such as Sancino, at the site. (Doc. 45 at 9, 12.) Further, it was Delfino, a Skanska/Railworks employee, who directed Sancino to move the dumpsters out of the way. At his deposition, Delfino testified as follows:

> Q: Did anyone tell Mr. Sancino to move that dumpster?
> A: I did.

(Doc. 47 at 37.) Thus, although defendants are alleged to have owned the premises at issue, and even though this Court acknowledges that defendant MTACC oversaw Skanska/Railworks (Doc.

44 at 15) and that defendant MTA hired Skanska/Railworks to perform the construction work (Doc. 45 at 11), there is no evidence that any of the moving defendants created a dangerous condition, that they had notice of a dangerous condition at the premises, or that they actually exercised supervisory control over Sancino's work. (*See Cappabianca*, 99 AD3d at 144; *see also Scott v Am. Museum of Natural History*, 3 AD3d 442, 443 [1st Dept 2004] (trial court properly granted summary judgment dismissing plaintiff's Labor Law § 200 claim where defendant "did not have the level of direct supervision and control . . . necessary to support a finding of liability for common-law negligence or violation of Labor Law § 200.").)

In his opposition papers, Sancino did not address defendants' arguments for summary judgment dismissing his negligence and Labor Law § 200 claims, and he has therefore failed to raise a genuine, triable issue of fact in response. (*See Mazurek*, 27 AD3d at 228.)

b. Whether Defendants are Entitled to Summary Judgment Dismissing Plaintiff's Labor Law § 240(1) Claim.

"Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases." (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001].) At the outset, this Court notes that Sancino does not allege that he fell; rather, he asserts that an object—the second dumpster—tipped over and fell on him. (Doc. 43 at 49.) In lawsuits based on a falling object, plaintiffs must demonstrate a violation of § 240(1) and show that such violation was a proximate cause of the injury. (*See Kupiec v Morgan Contr. Corp.*, 137 AD3d 872, 873 [2d Dept 2016].) In doing so, the plaintiff "must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute." (*Narducci v Manhasset Bay Assocs.*, 96 NY2d at 268 [2001]; *see also Doucoure v Atl. Dev. Group, LLC*, 18 AD3d 337, 338–39 [1st Dept 2005].)

Based on the evidence submitted, plaintiff cannot sustain a § 240(1) claim against the moving defendants. First, at the time of his injury, plaintiff was at the same elevation as the dumpster he was trying to move. (*See Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005] (the statute seeks to prevent injuries arising from elevation-related risks).) Second, there is no evidence that the dumpster tipped over "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute," (*Narducci*, 96 NY2d at 268), which, as listed in the statute, includes the following kinds of devices: "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices," (CPLR 240[1]). Instead, plaintiff's allegations and testimony reflect that the accident occurred due to the weight of the dumpster while he was pushing it across the plywood on the platform and when another worker began pushing the dumpster against him. (Doc. 43 at 40–41; 45.)

Since defendants have established their prima facie case of entitlement to summary judgment dismissing Sancino's Labor Law § 240(1) claim, and because Sancino's opposition papers do not oppose the motion insofar as it seeks such relief, this Court grants that branch of the motion seeking dismissal of this claim.

c. Whether Defendants are Entitled to Summary Judgment Dismissing Plaintiff's Labor Law § 241(6) Claim.

To establish liability under Labor Law § 241(6), a plaintiff "must specifically plead and prove the violation of an applicable Industrial Code regulation." (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012].) The specific Industrial Code provision relied on must mandate compliance with concrete specifications. (*See Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 218 [1st Dept 2003].)

In the instant action, Sancino alleged violations of a plethora of Industrial Code provisions, including §§ 23-1.5, -1.7–1.8, -1.22–1.23, -1.28, -2.1, -1.33, -3, and -5–6. (Docs. 38–39.) Although defendants' motion papers argued that summary judgment for dismissal should be granted as to all of those provisions (Doc. 31 at 17–32), plaintiff's opposition only addressed §§ 23-1.5(c)(3), -1.7(e)(1), -1.28(b), and -2.1(a)(2) (Doc. 51 at 5–11). Thus, this Court will therefore consider only those provisions of the Industrial Code. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ("Where a defendant so moves [for summary judgment], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section.").)

1. Industrial Code § 23-1.5(c)(3).

Industrial Code § 23-1.5(c)(3) provides: "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." In relying on this provision, Sancino argues that "the dumpster that [he] was relocating clearly was not kept sound and operable. The dumpster was meant to roll on its wheels, and the fact that the wheel on the dumpster was not functioning properly demonstrates that the dumpster was not kept in a sound and operable manner." (Doc. 51 at 6.)

This Court finds that plaintiff cannot avail himself of § 23-1.5(c)(3)'s protections. The First Department has held that it is sufficiently specific to support a Labor Law § 241(6) claim. (*See, e.g., Becerra v Promenade Apts. Inc.*, 126 AD3d 557 [1st Dept 2015]; *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666 [1st Dept 2018].) However, as the Second Department has recognized, the statute sets forth a time frame in which employers must take corrective measures

to remedy defective equipment. (*See Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept 2015] ("Sections 23-9.2[a] and 23-1.5[c][3] each set forth an action to be taken ('corrected by necessary repairs or replacement'; 'repaired or restored . . . [or] removed') and set forth the trigger or time frame for taking such action ('[u]pon discovery'; 'immediately . . . if damaged').").)

Further, at his deposition, Sancino testified:

> A: When I went to pull it over, I heard a crack. That's what I heard. Then the dumpster was off balance. Like the wheel was broken on it, I felt it. Like the wheel wasn't stable on it. So, I believe the plywood cracked and the wheel was broke on the dumpster, it had broken on the dumpster because it was overly full. It was heavy and it was filled over the brim of the dumpster.

(Doc. 43 at 40–41.) The inference from this testimony is that the dumpster's wheel broke, not because it was defective, but because the dumpster itself was "overly full" and "filled over the brim." (*Id.*)

Because there is no evidence that defendants knew of the alleged defective condition—indeed, there is not even any evidence that the wheel on the dumpster was actually defective (*see id.*)—defendants are thus entitled to summary judgment dismissing Sancino's claim premised upon § 23-1.5(c)(3).

2. Industrial Code § 23-1.7(e)(1).

Industrial Code § 23-1.7(e)(1) provides: "Tripping and other hazards: 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 provision is inapplicable to the instant action. Sancino does not allege that he tripped; rather, he alleges that the second dumpster tipped over on him as he was pushing it over the plywood form on the subway platform. (Doc. 43 at 49.) Further, neither the dumpster nor plywood form constitute "dirt," "debris," or "any other obstruction[] or condition[] which could cause tripping."

Plaintiff's reliance on *Picchione v Sweet Constr. Corp.*, 60 AD3d 510 (1st Dept 2009), is inapplicable. In that case, the plaintiff was injured while he was pushing a 300-to-400-pound cart when a wheel got caught in a groove in the unfinished floor. (*Id.* at 511–12.) The court in *Picchione* reasoned that, because there was testimony that the floor was defective due to holes and depressions, "the fact that there was neither debris nor loose pieces of concrete in the hallway where the alleged accident occurred is irrelevant." (*Id.* at 512.) Here, Sancino has not alleged that there were defective conditions existing on either the plywood form or the subway platform. Defendants are therefore entitled to summary judgment dismissing plaintiff's Industrial Code § 23-1.7(e)(1) claim.

3. Industrial Code § 23-1.28(b).

Industrial Code § 23-1.28(b) provides: "Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicle." Sancino relies on *Ahern v NYU Langone Med. Ctr.*, 147 AD3d 537 (1st Dept 2017), wherein the court allowed a plaintiff's § 23-1.28(b) claim to go forward because he had testified that the wheels on the cart he was pushing were "moving only 'intermittently,' and that it would 'start and stop.'" (*Id.* at 537.)

In the instant action, however, there is no evidence in the record to suggest that the wheels on the dumpster were not free-running before Sancino began pushing it:

Q: Before you moved the first dumpster, did you check it out at all, to see if the wheels were okay?
A: No.
Q: See if it was clear?
A: No, I didn't.
Q: How about before you moved the second one, did you check the wheels at all?
A: No, because it's sitting there, that's not a normal practice to go look at the wheels, you know.

(Doc. 43 at 43.) Defendants are therefore entitled to summary judgment dismissing any claim based on a violation of § 23-1.28(b). (*See Ruggiero v Cardella Trucking Co.*, 16 AD3d 342, 343 [1st Dept 2005] (holding that summary judgment dismissing a plaintiff's § 23-1.28[b] claim should have been granted "for lack of non-speculative evidence, in admissible form, that one of the cart's wheels was defective.").)

4. Industrial Code § 23-2.1(a)(2).

Finally, plaintiff relies on Industrial Code § 23-2.1(a)(2), which provides that: "Material or equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Although Sancino testified that the second dumpster was heavy and that it was "overly full" (Doc. 43 at 41), it is apparent from the record that no violation of this section occurred, since the dumpster was not being stored on the plywood form. Indeed, the only reason why the dumpsters happened to be on the plywood form was not because they were being stored there, but because Sancino himself was pushing them over the plywood. (Doc. 43 ta 40.) Summary judgment

dismissing plaintiff's Labor Law § 241(6) cause of action should therefore be granted to defendants.

In accordance with the foregoing, it is hereby:

ORDERED that that motion by defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Capital Construction Company, Hudson Yards Development Corporation, and the City of New York seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is granted; and it is further

ORDERED that counsel for the moving defendants is directed to serve, within 30 days from service of a copy of this order with notice of entry, the Clerk of the Court (60 Centre Street, Room 141B), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiff; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that, upon the timely filing of the foregoing, the Clerk of the Court shall enter judgment dismissing the action; and it is further

ORDERED that this constitutes the decision and order of this Court.

2/28/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE