Smalls v New 56th & Park (NY) Owner, LLC
2019 NY Slip Op 30899(U)
April 1, 2019
Supreme Court, Kings County
Docket Number: 506155/13
Judge: Edgar G. Walker

At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the day of April 1, 2019.

PRESENT:

HON. EDGAR G. WALKER,
Justice.

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KENNETH SMALLS and PAULA SMALLS,

Plaintiffs,

- against -

Index No. 506155/13

NEW 56TH AND PARK (NY) OWNER, LLC, LEND LEASE (US) CONSTRUCTION LMB INC., LEND LEASE (US) CONSTRUCTION INC. and LEND LEASE (US) CONSTRUCTION HOLDINGS, INC.,

Defendants.

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The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	261-262, 274, 280-281, 300
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	308, 309
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiffs Kenneth Smalls and Paula Smalls move for an order, pursuant to CPLR 3212, granting them partial summary judgment with respect to liability on Kenneth Smalls's Labor Law §§ 240 (1), 241 (6) and 200 claims against defendants (motion sequence number 13). Defendants New 56th and Park (NY) Owner, LLC,

Lend Lease (US) Construction LMB Inc., Lend Lease (US) Construction Inc. and Lend lease (US) Construction Holdings Inc. cross-move for an order dismissing the complaint (motion sequence number 14).

Plaintiffs' motion (motion sequence number 13) is denied. Defendants' cross motion (motion sequence number 14) is granted to the extent that: (1) plaintiff Kenneth Small's Labor Law § 200 and common-law negligence causes of action are dismissed and (2) plaintiff Kenneth Small's Labor Law § 241 (6) cause of action is dismissed to the extent that plaintiff relies upon Industrial Code provisions contained at 12 NYCRR 23-1.5 (c) (3), 23-1.7 (a) (2), 23-1.8 (c) (1), 23-1.30, 23-1.32, 23-1.33 (a) (1) - (3), 23-2.1, 23-2.3, 23-5.1 (c), 23-5.1 (f), 23-5.1 (i), 23-5.2, 23-5.3, 23-5.4 (a) - (c), 23-5.5 (e), and 23-5.6.[1] Defendants' motion is otherwise denied.

Plaintiff Kenneth Smalls[2] alleges causes of action premised on common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) that are based on injuries he suffered on July 25, 2013 when a brace attached between two jacks supporting the deck of the floor above plaintiff fell or swung down and hit plaintiff in the head and other areas of his body. The accident happened during the erection of a new building owned by defendant New 56th and Park (NY) Owner, LLC, (New 56th). New 56th hired Lend Lease (US) Construction

[1] As such, the Labor Law § 241 (6) cause of action only survives to the extent that is premised on 12 NYCRR 23-1.7 (a) (1).

[2] The court notes that plaintiff Paula Small's claims are derivative only and that all singular references plaintiff relate to plaintiff Kenneth Smalls.

LMB Inc., Lend Lease (US) Construction Inc. or Lend lease (US) Construction Holdings Inc. (collectively referred to as Lend Lease) as the general contractor or construction manager for the project.[3] Non-party Rogers & Sons Concrete (Rogers & Sons), who employed plaintiff as a carpenter, was hired to perform concrete erection work for the project.

On the day of the accident, plaintiff's task was to clean metal forms used by Rogers & Sons in its concrete work. Plaintiff was performing this work on the 15th or 16th floor of the building. At that time, Rogers & Sons was in the process of erecting the deck for the floor above where plaintiff was working. The deck in the area above where plaintiff was working was approximately 20 feet above plaintiff's head and was supported by jacks that were placed by other Rogers & Sons' carpenters. Each jack had a three to five foot long rectangular aluminum brace that the connected the jack to another jack in order to make the jacks more stable. Plaintiff, in his deposition testimony, stated that each brace weighed approximately 50 to 80 pounds and that the bottom part of each of these braces was 8 to 10 feet off of the ground. On the other hand, Ricardo Lewin, a carpenter also employed by Rogers & Sons, testified at his deposition that each brace only weighed approximately two pounds and that the top of each brace was approximately six feet off of the ground and that the bottom of each brace was four feet off of the ground.

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[3] Although there is no dispute that one of the Lend Lease entities served as the general contractor or construction manager for the project, nothing in the record, including the testimony of the witness produced by Lend Lease, specifically identifies which of the Lend Lease entities served in that role.

Lewin also testified that generally four Rogers & Sons' workers would work as a team installing the jacks and braces. Lewin stated that two workers would hold the jacks in position, while the other two workers would hold the brace and bang the pins connecting the brace to the jack into position with hammers. Plaintiff testified that generally, once the carpenters had installed the jacks and braces, a Rogers & Sons' supervisor would inspect the braces by grabbing onto them. In his observations of this practice, plaintiff had never seen the supervisor find a brace to be insecure and plaintiff personally had not had any issues with the jacks or braces prior to the time of this accident.

With respect to the accident, plaintiff testified that shortly before it happened he observed a Rogers & Son coworker he knew as Ricky banging on a brace with a hammer.[4] While Ricky's back shielded plaintiff's view of exactly what Ricky was hitting with the hammer, given plaintiff's observations of workers erecting and/or disassembling the jacks and braces, he presumed that Ricky was removing the pins from the brace. After making this observation, plaintiff, who was bending over to perform his work, looked back down towards the form he was cleaning. Just after he looked back down, plaintiff heard someone say "oh," and looked up in time to see the brace on which Ricky had been working falling towards him. This brace hit plaintiff on his head, back, and the bottom portion of his knees.

Lewin, in his deposition testimony, stated that his work on the project primarily involved framing columns and generally did not include installing jacks and the braces. In

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[4] While plaintiff did not testify to "Ricky's" last name, there does not appear to be any real issue that "Ricky" is the name by which plaintiff knew Ricardo Lewin.

contrast to plaintiff's tesimony, Lewin stated that the accident happened while he was merely walking through the area near where plaintiff was working when he tripped and grabbed onto a brace in order to regain his balance. When Lewin grabbed onto this brace, it came loose and struck plaintiff in the head. Although Lewin initially testified at his deposition that plaintiff was standing up when the brace hit him, Lewin later testified at the same deposition that, in a written statement he had made shortly after the accident, he had said that plaintiff was kneeling and the brace fell approximately four feet before hitting plaintiff in the head. Lewin further testified that what he said in the written statement was what happened.

With respect plaintiff's Labor Law § 240 (1) cause of action, Labor Law § 240(1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).[5] For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct

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[5] As is relevant here, Labor Law § 240 (1) provides that,

> "All 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, 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."

consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016]; *see Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]; *cf. Fabrizi*, 22 NY3d at 663).

In applying these legal principles, the court finds that neither plaintiff nor defendants have established their prima facie entitlement to judgment as a matter of law with respect to the Labor Law § 240 (1) cause of action. Initially, plaintiff's testimony that the brace at issue was located 8 to 10 feet above the floor, that it weighed 50 to 80 pounds and that he was bending over at the time of the accident constitutes evidence that plaintiff was subject to a

"physically significant elevation differential" between him and the brace that fell (*see Wilinski*, 18 NY3d at 10; *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]; *Harrison v State of New York*, 88 AD3d 951, 951-952 [2d Dept 2011]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 730-731 [2d Dept 2011]). This same testimony, along with plaintiff's testimony that the brace swung down and hit him on the head, demonstrates that the accident did not simply involve the lateral swinging of the brace (*cf. Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1090 [2d Dept 2016]; *Tsatsakos v Citicorp.*, 295 AD2d 500, 501 [2d Dept 2002]).[6] Further, plaintiff's testimony that "Ricky" was working by himself and was banging on the brace with hammer, suggesting that he was either attaching or removing one of the pins attaching the brace to the jack, would allow a finding that there was a foreseeable risk inherent in "Ricky's" work on the brace such that the use of a section 240 safety device was required to prevent injury during the performance of the work (*see Barrios v 19-19 24th Ave. Co., LLC*, 169 AD3d 747, 748-749 [2d Dept 2019]; *Rutkowksi*, 146 AD3d at 686; *Harrison*, 88 AD3d at 951-952 [2d Dept 2011]; *Pritchard*, 82 AD3d at 730-731; *Mendoza v Bay Ridge Parkway Assoc., LLC*, 38 AD3d 505, 507 [2d Dept 2007]).

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[6] While Lewin's initial deposition testimony that plaintiff was standing up and that the brace only moved a few inches before it hit him in the head might support a lateral movement argument, Lewin essentially disowned this testimony when he thereafter testified that the version of the accident contained in his written statement, where he stated that the brace fell four feet onto plaintiff's head, is what happened.

Lewin's testimony, however, presents factual issues that preclude any finding of liability as a matter of law under Labor Law § 240 (1). Lewin's testimony that the brace only weighed a couple of pounds, and that it did not fall while he was working on it, but rather fell when he grabbed onto it after tripping and losing his balance presents a version of the accident significantly different from that described by plaintiff. If the accident occurred as testified to by Lewin, it was not the nature of the work at the time of the accident that caused the brace to fall (*see McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1095-1096 [2d Dept 2012]), there was no foreseeable risk that the brace would fall at the time of the accident, and there was thus no need to secure it for the purposes of the undertaking (*see Narducci*, 96 NY2d at 268; *Carlton*, 161 AD3d at 933; *Romero v 2200 N. Steel, LLC*, 148 AD3d 1066, 1067 [2d Dept 2017]; *Millette v Tishman Constr. Corp.*, 144 AD3d 1113, 1115 [2d Dept 2016]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]). Lewin's testimony suggests that the brace fell because the pins attaching that brace to the jacks were either defective or improperly installed. The pins themselves, however, are not safety devices within the purview of section 240 (1) (*see Fabrizi*, 22 NY3d at 663; *Carlton*, 161 AD3d at 933; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]; *McLean*, 98 AD3d at 1095-1096) and their failure to support the brace is thus not proof of a section 240 (1) violation. Moreover, once the braces were set up, it would be hardly foreseeable that an additional safety device would be needed to support the brace, particularly

in view of plaintiff's testimony that a Rogers & Sons' supervisor would generally check to see that the braces were properly attached after the jacks and braces had been set up.

While plaintiff and the defendants each submit, in addition to the deposition testimony of plaintiff and Lewin, expert affidavits that address the Labor Law § 240 (1) cause of action, the conclusory assertions of each expert fail to demonstrate the absence of factual issues for either party (*see Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 735 [2d Dept 2015]). Even if their opinions are not wholly conclusory, plaintiff's expert assumes plaintiff's testimony to be true without addressing Lewin's testimony, and defendants' expert assumes Lewin's testimony to be true without addressing plaintiff's testimony. Both plaintiff and defendants have failed to establish their initial summary judgment burden with respect to liability under section 240 (1), and their respective motions must be denied regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman*, 154 AD3d at 821).

With respect to the Industrial Code sections relied upon by plaintiff, 12 NYCRR 23-1.5 (c) (3), is not sufficiently specific to support a section 241 (6) cause of action (*see Opalinski v City of New York*, 164 AD3d 1354, 1355 [2d Dept 2018]). 12 NYCRR 23-1.8 (c) (1), requiring the provision of and wearing of safety hats when there is a danger of being struck by falling objects, states a specific standard applicable here (*see Seales*, 142 AD3d at 1157). However, plaintiff's own testimony demonstrates that he was provided with an adequate safety hat and that he was wearing a safety hat at the time of the accident. The testimony of Lewin and the Lend Lease safety officer suggesting that plaintiff may have removed the liner of his hard hat does not make a violation of 12 NYCRR 23-1.8 (c) (1) a proximate cause of the accident (*see Beshay v Eberhart, L.C. #1*, 69 AD3d 779, 781 [2d Dept 2010]; *McCormack v Universal Carpet & Upholstery Cleaners*, 29 AD3d 541, 544 [2d Dept 2006]; *McLoud v State of New York*, 237 AD2d 783, 785 [3d Dept 1997]). Defendants are thus entitled to dismissal of the Labor Law § 241 (6) cause of action with respect to 12 NYCRR 23-1.5 (c) (3) and 12 NYCRR 23-1.8 (c) (1), and also with respect to 12 NYCRR , 23-1.7 (a) (2), 23-1.30, 23-1.32, 23-1.33 (a) (1) - (3), 23-2.1, 23-2.3, 23-5.1 (c), 23-5.1 (f), 23-5.1 (i), 23-5.2, 23-5.3, 23-5.4 (a) - (c), 23-5.5 (e), and 23-5.6 because those latter sections are not specific, are not applicable to the facts, and/or because plaintiff has abandoned reliance on them by failing to address them in his opposition papers (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]).

On the other hand, 12 NYCRR 23-1.7 (a) (1), requiring overhead protection in areas where workers are required to work or pass when such areas are "normally exposed to falling material or objects," states a specific standard, and defendants have failed to submit evidentiary proof demonstrating, prima facie, that the area of the accident was not normally exposed to falling material or objects (*see Ginter v Flushing Terrace, LCC*, 121 AD3d 840, 843 [2d Dept 2014]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2d Dept 2011]). The conclusory assertion by defendants' expert that the area was not subject to falling objects fails to make out such a prima facie showing because the expert fails to identify an evidentiary basis for his assertion. Plaintiff, however, is similarly not entitled to summary judgment in his favor with respect to 12 NYCRR 23-1.7 (a) (1), as he has failed to submit evidentiary proof demonstrating that the area at issue was normally exposed to falling objects or demonstrating that the absence of the overhead protection contemplated by section 23-1.7 (a) (1) was a proximate cause of his injury.

Defendants, however, have demonstrated their prima facie entitlement to dismissal of plaintiffs' common-law negligence and Labor Law § 200 causes of action. As plaintiff's injuries were caused by the manner the work was performed rather than a dangerous property condition, defendants are entitled to dismissal based on the evidence showing that they did not exercise more than general supervisory authority over the injury producing work (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670-673 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2015]; *Sanchez v Metro Builders Corp.*, 136

AD3d 783, 787 [2d Dept 2016]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]). While there is deposition testimony that Lend Lease gave general safety instructions, and a Lend Lease employee may have given Lewin instructions regarding a safety railing, the testimony also shows that the decisions relating to the means and methods of setting up the jacks and braces were all made by Rogers & Sons personnel and that Rogers & Sons used its own equipment in performing that work. This testimony and plaintiff's assertions based on deposition testimony regarding the presence of Lend Lease safety personnel on the job site with authority to stop the work are insufficient to demonstrate the existence of a factual issue warranting denial of defendants' motions relating to the section 200 and common-law negligence causes of action (*see Messina*, 147 AD3d at 749-750; *Sanchez*, 136 AD3d at 787; *Gonzalez*, 110 AD3d at 959).

This constitutes the decision and order of the court.

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DATED: APRIL 1, 2019

J. S. C.

HON. EDGAR G. WALKER