

Arasim v 38 Co. LLC
2019 NY Slip Op 30981(U)
April 1, 2019
Supreme Court, New York County
Docket Number: 108427/2010
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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KEVIN ARASIM, SANDRA ARASIM,
Plaintiffs,

INDEX NO. 108427/2010

MOTION DATE 01/23/2019,

MOTION SEQ. NO. 012 013

- v -

38 COMPANY LLC, CB RICHARD ELLIS REAL ESTATE, LLC, VII
444 MADISON LESSEE LLC, ALL-SAFE, LLC, RESIDENTIAL
MANAGEMENT GROUP, LLC D/B/A DOUGLAS ELLIMAN
PROPERTY MANAGEMENT, THE LAUREL CONDOMINIUM,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346

were read on this motion to/for DISMISSAL

This is an action pursuant to the Labor Law. In motion sequence 012, plaintiff Kevin Arasim and co-plaintiff Sandra Arasim, move pursuant to CPLR 3212 for summary judgment of their claims under Labor Law §§ 240(1) and 241(6), based on Industrial Code § 12 NYCRR 23-1.7(f) against defendants 38 Company LLC, CB Richard Ellis Real Estate, VII, and 444 Madison Lessee LLC (Owner defendants). Owner defendants now cross-move pursuant to CPLR 3212 for summary dismissal of those claims. Defendants All-Safe, LLC (All Safe) cross-moves pursuant to CPLR 3212 for summary dismissal of those claims against the Owner defendants, and pursuant to CPLR §§ 3124 and 3126 to strike plaintiffs' most recent bill of particulars or, in the alternative, precluding plaintiffs from submitting evidence related to a ramp related claim or further discovery regarding plaintiffs' claim under section Industrial Code 23-1.7(f). Owner defendants and All-Safe oppose Plaintiffs' motion and Plaintiff opposes the cross-motions.

In motion sequence 013, Owner defendants move pursuant to CPLR 3212 for summary dismissal of plaintiffs' claims under Labor Law §§200 and common law negligence and 241(6), under Industrial Code §§ 12 NYCRR 23-1.5(a-c); 1.7(b)(1)(i-iii); 1.7(e); 1.8; 2.1; 2.4; and 5.4, and the violation of OSHA standards. Plaintiff does

not oppose the Owner defendants' cross-motion. Motion sequences 012 and 013 are consolidated for joint disposition.¹

Factual Background

Arasim claims that he was injured on July 13, 2009, while working at a construction site located at 444 Madison Avenue, New York, New York (premises). Arasim was employed by non-party Hunter Roberts Construction Group (Hunter) at the time of the incident and was working as the night supervisor overseeing the work performed at the work site (NYSCEF doc no 335, 71:13-15). Arasim testified that on the date of his accident, demolition workers created a gap in the curtain wall located on the second floor by removing a façade. Arasim testified that he walked through the newly created opening onto a concrete slab and stepped down from a concrete slab onto overlapped wooden scaffold plank below when his ankle "gave out and folded over" (*id.*, 88:11-89:24; 100:5-101:25).

The complaint alleges, *inter alia*, that the Owner defendants were responsible for ensuring that the scaffolding at the premises was erected in a safe manner, and that they were negligent in their operation, maintenance, control, management and erection of said scaffolding (NYSCEF doc no 333, ¶¶29, 30, 35).

Discussion

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Labor Law § 200 and Common-Law Negligence

The Owner defendants argue that they are entitled to dismissal of plaintiffs' Labor Law 200/common law negligence, as they did not have supervisory control over the manner in which Arasim performed his work and since there is no evidence that Owner defendants created or had knowledge of the alleged defective condition,

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases

¹ The court notes that All Safe recently filed a notice of motion seeking dismissal of plaintiffs' claims against it and of the Owner defendants' indemnification, contribution and contractual claims (mot. seq. 14), currently returnable on April 14, 2019.

under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, “liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). “General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed” (*id.* [emphasis in original]).

Owner defendants demonstrate that they did not have supervisory control over Arasim’s work. Owner defendants submit Arasim’s deposition testimony, wherein he testified that he received instruction how to perform work at the premises from Hunter— his employer (NYSCEF doc no 336, 134:3-12). Further, Charles Lester, a Senior Project Manager for defendant CB Richard Ellis Real Estate, testified that it was Hunter’s responsibility to ensure proper safety precautions were followed during the demolition portion of the construction project (NYSCEF doc no 337, 82:18-83:14). Debra Fechter, defendant 38 Company LLC’ manager, averred that 38 Company did not have any involvement in the construction at the premises (NYSCEF doc no 344, ¶17). Owner defendants also submitted the affidavit of Diego Rico, the Vice President of VII 444 Madison Lessee LLC, wherein he affirmed that it did not have control over Arasim’s work (NYSCEF doc no 345, ¶¶22-23).

Further, there is no evidence that Owner defendants created or had knowledge of the alleged defective condition, since the opening in the façade was created on the night of Arasim’s accident. Where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by Arasim and his employer, an owner or contractor “is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc, IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth, of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]).

Arasim fails to oppose the Owner defendants’ *prima facie* showing that it is entitled to dismissal of those claims under Labor Law § 200 and common law negligence, and thus, those claims are dismissed as to the Owner defendants.

Labor Law §240(1)

Arasim argues that he was required to ascend and descend a height of two-and-a-half to four feet between the second-story concrete floor and wooden planking below, without a safety device, including a ladder, steps or ramp.

To prevail on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries (*see Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287–288 [2003]). “Liability may . . . be imposed under [Labor Law § 240 (1)] only where the ‘plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential’” and protective devices were not afforded to protect against these risks (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 33 [2017], quoting *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal citations omitted]). The fact that a construction worker fell at a construction site does not in itself trigger the protections under Labor Law § 240(1). No liability exists under section 240(1) where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place (*Reyes v Magnetic Const., Inc.*, 83 AD3d 512, 513 [1st Dept 2011]); *Cohen v Mem’l Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008]; *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]).

In a recent case factually analogous to the circumstances here, the court found no liability under Labor Law 240(1) where plaintiff was stepping down two feet from a grate to the ground when he stepped on a loose pipe laying on the ground, causing him to fall (*Ortiz v Bove Lend Lease, Inc.*, 2018 WL 1672746, *4 [Sup Ct N.Y. County 2018]). The court determined that the risk of stepping down onto a pipe on the ground was not an elevation-related hazard that the statute was designed to protect (*id.*; *see also Prosky v Peter Scalera Const. Services, LLC*, 2013 WL 1562171, at *3 [Sup Ct N.Y. County 2013] [“A worker injured while stepping down onto debris, or other hazard, may not invoke the protections afforded by Labor Law § 240 (1)”]).

Here, Arasim’s accident was not the direct consequence of the height differential from the wooden planks to the second-floor concrete slab. Instead, his accident was a result of stepping down onto the uneven planks, causing his right foot to give out, a risk unrelated to the need for the ladder. Specifically, Arasim testified that he stepped out from the façade and his right foot landed on the edge of overlapping wooden planks, causing his ankle to roll. Thus, the overlapped wooden

planks which caused Arasim ankle to roll, was unrelated to the height differential hazard that brought about the need for a safety device. (*see Toefer v Long Island R.R.*, 4 NY3d 399, 408-049 [2011]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]; *Lombardo v Park Tower Mgt. Ltd*, 76 AD3d 497 [1st Dept 2010]).

Arasim's expert report does nothing to change this conclusion as he fails to explain how the height differential, and not the overlapped planking, was the cause of Arasim's injury (NYSCEF doc no 303, ¶¶7-10). Thus, plaintiffs' claim under Labor Law § 240(1) is dismissed as to the Owner defendants herein.

Labor Law § 241(6)

Labor Law § 241 (6) provides, in relevant part:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

It is well settled that this statute requires owners and contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 146 [1st Dept 2012]; *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

At the outset, the Owner defendants and All Safe demonstrate that Plaintiff's application for summary judgment of its new claim under 12 NYCRR 23-1.7(f) is premature since discovery has not taken place on that claim. On May 9, 2018, plaintiffs submitted the “5th Supplemental Verified Bill of Particulars,” wherein they allege, for the first time, that defendants violated Industrial Code 23-1.7(f) by “failing to provide a stairway, ramp, ladder or other safe means for [Arasim] to move from the concrete floor to the planking below” (NYSCEF doc no 276). On June

6, 2018, the Owner defendants served a “Notice of Deposition” upon plaintiffs. No further deposition of Arasim was taken.²

While Arasim was deposed several occasions, it appears that he was not questioned in detail regarding his claim under Industrial Code 23-1.7(f). All Safe presents a number of questions that it would ask Arasim related to that claim (Reply Affirmation, NYSCEF doc no 322, ¶25) (*see Bailey v New York City Transit Authority*, 270 AD2d 156, 157 [1st Dept 2000]). Arasim even concedes in his affidavit in his opposition to Owner defendants’ cross-motion that he was never questioned about where the ramp in another section of the premises was positioned on the planking relative to the overlap (NYSCEF doc no 302, ¶5).

In any event, plaintiffs’ claim under Industrial Code 23-1.7(f) is dismissed on other grounds. Industrial Code 23-1.7(f) provides that “[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground.” While plaintiffs demonstrate that the Owner defendants failed to provide a ramp for Arasim to traverse from the concrete slab and wooden scaffold, he fails to show that their failure to provide a ramp under Industrial Code 23-1.7(f) was a proximate cause of his injury. As discussed above, Arasim testified that his ankle rolled when he stepped down onto the uneven planking. Thus, Arasim’s injury was caused by his foot coming into contact with the uneven planking, not the Owner defendants’ failure to provide a ramp.

Plaintiffs’ remaining claims under section 241(6) are dismissed. “Where a defendant so moves [for dismissal of a plaintiff’s claim under Labor Law § 241(6)], 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” (*Kempisly v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]). Here, plaintiffs fail to oppose the Owner defendants’ motion to dismiss plaintiffs’ claims under Industrial Codes §§ 12 NYCRR 23-1.5(a-c); 1.7(b)(1)(i-iii); 1.7(e); 1.8; 2.1; -2.4; 5.4, and the alleged violation of OSHA standards, and thus those claims are dismissed.

Loss of Consortium

Plaintiff Sandra Arasim’s claim for loss of consortium claim is also dismissed, since the Owner defendants are found to not be negligent (*Buckley v Nat’l Freight, Inc.*, 90 NY2d 210, 214 [1997] [“Where, however, the husband’s cause of action has been terminated either by judgment, settlement or otherwise, that should operate to bar the wife’s cause of action for consortium”] [internal citations omitted]).

² The court notes that plaintiffs never, as they were required to, moved for leave to amend their pleadings to add its claim under Industrial Code 23-1.7(f) (CPLR 3025).

Conclusion

Accordingly, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 3212 for summary judgment of its claims under Labor Law 240(1) and 241(6), under Industrial Code 12 NYCRR 23-1.7(f) (mot. seq. 012), is denied; it is further

ORDERED that defendants 38 Company LLC, CB Richard Ellis Real Estate, VII, and 444 Madison Lessee LLC cross-motion to dismiss plaintiffs' claims under Labor Law §§ 240(1) and 241(6), under Industrial Code §§ 12 NYCRR 23-1.7(f) (mot. seq 012); 1.5(a-c); 1.7(b)(1)(i-iii); 1.7(e)(1-2); 1.8; 2.1; 2.4; and 5.4, and plaintiffs' claims under Labor Law §§ 200/common law negligence (mot. seq. 013), is granted, and those claims are dismissed;

ORDERED that plaintiff Sandra Arasim's claim for loss of consortium is dismissed; it is further

ORDERED that the Clerk shall enter judgment accordingly; it is further

ORDERED that defendant All-Safe, Inc.'s cross-motion under CPLR 3212 for summary dismissal of plaintiffs' claims under Labor Law 240(1) and 241(6), under Industrial Code 12 NYCRR 23-1.7(f) (mot. seq. 012), is moot; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice entry, on all parties within fifteen (15) days of entry.

This constitutes the decision and order of the Court.

4/1/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: