

Mendoza v Prestige Bay Plaza Dev. Corp.
2019 NY Slip Op 31142(U)
April 22, 2019
Supreme Court, New York County
Docket Number: 159281/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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NICOLAS MENDOZA,

Index No. 159281/2015

Plaintiff

- against -

PRESTIGE BAY PLAZA DEVELOPMENT CORP.,
SP CENTER, LLC, BAY PLAZA COMMUNITY
CENTER, LLC, PRESTIGE PROPERTIES &
DEVELOPMENT CO. INC., and BAY PLAZA
APPLE, LLC,

Defendants

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PRESTIGE BAY PLAZA DEVELOPMENT CORP.,
SP CENTER, LLC, BAY PLAZA COMMUNITY
CENTER, LLC, and PRESTIGE PROPERTIES &
DEVELOPMENT CO. INC.,

Third Party Plaintiffs

- against -

CCM ROOFING, LLC,

Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, an employee of third party defendant CCM Roofing, LLC, sues to recover damages for personal injuries sustained August 6, 2015, while working at a shopping center at 2100 Bartow Avenue, Bronx County, owned and managed by defendants. Plaintiff presents a certified copy of a deed dated March 29, 2006, showing

that Bay Plaza Community Center, LLC, transferred the premises to defendant SP Center, LLC, yet defendants maintain that Bay Plaza Community Center still owned the premises in August 2015. Defendant Bay Plaza Apple LLC never answered the complaint, but plaintiff has never moved for a default judgment against this defendant. Defendants other than the defaulting defendant discontinued their third party action against CCM Roofing via a stipulation dated June 8, 2018.

These defendants move for summary judgment dismissing plaintiff's claims under the New York Labor Law. C.P.L.R. § 3212(b). Plaintiff cross-moves to amend his bill of particulars to add to his negligence claim and to add violations of specific regulations to support his Labor Law § 241(6) claim. C.P.L.R. §§ 3025(b), 3043(a)(3). See C.P.L.R. § 3042(b). Plaintiff also separately moves for summary judgment on defendants' liability based on his Labor Law § 240(1) claim. C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court grants defendants' motion in part, grants plaintiff's cross-motion in part, and denies his separate motion.

II. PLAINTIFF'S LABOR LAW CLAIMS

Defendants contend that the inspection plaintiff was performing when he was injured is not work covered under the Labor Law, which plaintiff does not dispute. Defendants concede, however, that repair work is covered under the Labor Law.

A. Labor Law § 200 Claim

Consistent with their contention, defendants seek dismissal of only plaintiff's Labor Law claims, not any negligence claims. Labor Law § 200(1) provides that:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.

Mordkofsky v. V.C.V. Dev. Corp., 76 N.Y.2d 573, 575 n.1 (1990). Since Labor Law § 200 is not limited to construction work, Jock v. Fein, 80 N.Y.2d 965, 967 (1992); Paradise v. Lehrer, McGovern & Bovis, 267 A.D.2d 132, 134 (1st Dep't 1999), and instead applies to employees, Jock v. Fein, 80 N.Y.2d at 967; Mordkofsky v. V.C.V. Dev. Corp., 76 N.Y.2d at 577; Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 299 (1978), even if plaintiff performed no repair or construction work and only an inspection, it does not dictate dismissal of his Labor Law § 200 claim. Jock v. Fein, 80 N.Y.2d at 967.

B. Labor Law § 240 Claims

By a stipulation dated January 25, 2019, plaintiff discontinued his claims pursuant to Labor Law § 240(2) and (3). Plaintiff claims that defendants violated Labor Law § 240(1) because the stairway he ascended to inspect and repair the roof of defendants' building lacked lighting, was narrow, concealed a beam that caused his fall and injury, and therefore required the use of a harness, lanyard, or other protection against falling.

Permanent stairs that provide the sole means of access to a

work area constitute a safety device under Labor Law § 240(1). Conlon v. Carnegie Hall Socy., Inc., 159 A.D.3d 655, 655 (1st Dep't 2018); Gory v. Neighborhood Partnership Hous. Dev. Fund Co., Inc., 113 A.D.3d 550, 550 (1st Dep't 2014); Stallone v. Plaza Constr. Corp., 95 A.D.3d 633, 634 (1st Dep't 2012); Priestly v. Montefiore Med. Center/Einstein Med. Ctr., 10 A.D.3d 493, 494 (1st Dep't 2004). While defendants point to the deposition testimony by Leandro Montano, employed by defendant Prestige Properties & Development Co. Inc. as a maintenance worker, that another larger stairway afforded access to the roof, he also testified that the owner of the commercial unit where the other stairway was located did not allow access to it.

Although the beam against which plaintiff struck his head, causing him to fall, was not part of the stairs, plaintiff's injury remains subject to Labor Law § 240(1). Conlon v. Carnegie Hall Socy., Inc., 159 A.D.3d 655. Plaintiff suggests further that, had defendants warned him of the beam, he would have worn a hard hat, but it is not a safety device under Labor Law § 240(1). Mercado v. Caithness Long Is. LLC, 104 A.D.3d 576, 577 (1st Dep't 2013); Singh v. 49 E. 96 Realty Corp., 291 A.D.2d 216, 216 (1st Dep't 2002). The beam concealed in the dark and narrow stairway in any event contributed to the stairs' failure to provide adequate protection from an elevation related hazard and was at least one proximate cause of plaintiff's injury when he struck his head and fell over the handrails to the floor below. Therefore plaintiff has established that his injuries resulted

from an inadequate safety device in violation of Labor Law § 240(1). Conlon v. Carnegie Hall Socy., Inc., 159 A.D.3d 655; Stallone v. Plaza Constr. Corp., 95 A.D.3d at 634.

Defendants' sole opposition to plaintiff's Labor Law claims, including § 240(1), is that plaintiff was not engaged in work covered by the Labor Law. Labor Law § 240(1) applies to roof repairs, Kolenovic v. 56th Realty, LLC, 139 A.D.3d 588, 589 (1st Dep't 2016); Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d 1, 10 (1st Dep't 2011); Hamill v. Mutual of Am. Inv. Corp., 79 A.D.3d 478, 479 (1st Dep't 2010), and must be interpreted to include essential preparatory work at the site. Saint v. Syracuse Supply Co., 25 N.Y.3d 117, 125 (2015); Prats v. Port Auth. of N.Y. & N.J., 100 N.Y.2d 878, 882 (2003); Saguicaray v. Consolidated Edison Co. of N.Y., Inc., ___ A.D.3d ___, 2019 WL 1442038, at *1 (1st Dep't Apr. 2, 2019); Ortiz-Cruz v. Evers, 150 A.D.3d 622, 623 (1st Dep't 2017).

Defendants ask the court to disregard plaintiff's affidavit regarding his assigned work because the affidavit lacks an attestation by the translator of her qualifications and the translation's accuracy. C.P.L.R. § 2101(b); Sylla v. Condominium Bd. of the Kips Bay Towers Condominium, Inc., 159 A.D.3d 430, 430 (1st Dep't 2018); Peralta-Santos v. 350 W. 49th St. Corp., 139 A.D.3d 536, 537 (1st Dep't 2016); Eustaquio v. 860 Cortlandt Holdings, Inc., 95 A.D.3d 548, 548 (1st Dep't 2012). Even if the translator's qualifications were insufficient under C.P.L.R. § 2101(b), which does not specify any required qualifications,

defendants do not point to any error in plaintiff's translated affidavit. National Puerto Rican Day Parade, Inc. v. Casa Pubs., Inc., 79 A.D.3d 592, 594 (1st Dep't 2010). In any event, it only supports with greater detail his deposition testimony that his task was to repair the roof after inspecting it. His co-worker, Ricardo Calderon, corroborated plaintiff's testimony that they were to repair the roof.

Although uncertainty regarding plaintiff's responsibility for the roof repair may not undermine the applicability of Labor Law § 240(1), particularly when his injury prevented him from performing the repair, Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d at 10, Warren Pavon, CCM Roofing's owner, testified at his deposition unequivocally that plaintiff was not to perform any repair. He was only to assess the leak for Pavon to provide an estimate of the repair cost. This testimony directly contradicts the testimony by plaintiff and Calderon, leaving factual issues whether Labor Law § 240(1) covers plaintiff's work. Roth v. Lenox Terrace Assoc., 146 A.D.3d 608, 608 (1st Dep't 2017); Kircher v. City of New York, 122 A.D.3d 486, 486 (1st Dep't 2014); Montalvo v. New York Presbyt. Hosp., 82 A.D.3d 580, 581 (1st Dep't 2011); Hamill v. Mutual of Am. Inv. Corp., 79 A.D.3d at 479.

Plaintiff presents CCM Roofing's C-2 Report that he was to inspect and repair the roof, but no witness lays a foundation for the report's admissibility as a business record or other exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a);

People v. Ramos, 13 N.Y.3d 914, 915 (2010); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); O'Connor v. Restani Constr. Corp., 137 A.D.3d 672, 673 (1st Dep't 2016); People v. Vargas, 99 A.D.3d 481, 481 (1st Dep't 2012). The report is not a party admission by CCM Roofing because plaintiff does not claim against CCM Roofing. Moskowwitz v. Tory Burch LLC, 161 A.D.3d 525, 526 (1st Dep't 2018). See, e.g., DeSimone v. City of New York, 121 A.D.3d 420, 422 (1st Dep't 2014); Candela v. New York City Sch. Constr. Auth., 97 A.D.3d 507, 510 (1st Dep't 2012); Buckley v. J.A. Jones/GMO, 38 A.D.3d 461, 463 (1st Dep't 2007).

C. Labor Law § 241(6) Claim

Labor Law § 241(6) provides that:

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.

This statute protects workers engaged in the hazardous work of construction, excavation, or demolition. Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 101 (2002), and does not apply to work outside that context. Esposito v. New York City Indus. Dev. Agency, 1 N.Y.3d 526, 528 (2003); Caban v. Maria Estela Houses I Assoc., L.P., 63 A.D.3d 639, 640 (1st Dep't 2009); Cordero v. SL Green Realty Corp., 38 A.D.3d 202, 202 (1st Dep't 2007). The definition of "Construction work" in the regulations under the statute includes "repair." 12 N.Y.C.R.R. 23-1.4(b)(13). See Caban v. Maria Estela Houses I Assoc., L.P., 63 A.D.3d at 640; Gary v. Flair Beverage Corp., 60 A.D.3d 413, 414 (1st Dep't

2009). Nevertheless, to be covered by Labor Law § 241(6), the repair or other particular work covered by the regulations must be performed in the context of construction, excavation, or demolition. Nagel v. D & R Realty Corp., 99 N.Y.2d at 103; Bautista v. 165 W. End Ave. Assoc., L.P., 137 A.D.3d 714, 715 (1st Dep't 2016); Caban v. Maria Estela Houses I Assoc., L.P., 63 A.D.3d at 640.

Since the only work to be performed on the premises was the roof repair and its preparatory inspection, plaintiff was not working on a site where construction, excavation, or demolition was being performed. Flores v. ERC Holding LLC, 87 A.D.3d 419, 420 (1st Dep't 2011); Montalvo v. New York Presbyt. Hosp., 82 A.D.3d at 581; Coyago v. Mapa Props., Inc., 73 A.D.3d 664, 664 (1st Dep't 2010); Caban v. Maria Estela Houses I Assoc., L.P., 63 A.D.3d at 640. This factual record therefore fails to support plaintiff's claim under Labor Law § 241(6).

III. PLAINTIFF'S CROSS-MOTION TO AMEND HIS BILL OF PARTICULARS

Plaintiff seeks to amend his bill of particulars to add violations of 12 N.Y.C.R.R. §§ 23-1.8(c)(1) and 23-1.30 to support his Labor Law 241(6) claim. Since the record does not support plaintiff's Labor Law § 241(6) claim, as discussed above, his cross-motion to amend his bill of particulars to add these regulations is academic. Lopez v. Dagan, 98 A.D.3d 436, 437 (1st Dep't 2012); Luciano v. Deco Towers Assoc. LLC, 92 A.D.3d 606, 606 (1st Dep't 2012).

Insofar as plaintiff's cross-motion seeks to add inadequate

lighting to support his negligence claim, defendants do not oppose this relief, just as they do not seek dismissal of his Labor Law § 200 claim based on his failure to demonstrate their negligence, but based only on their contention that his work was not covered under Labor Law § 200. Particularly since the court sustains plaintiff's claim under Labor Law § 200, which is the codification of defendants' duty of care to protect employees' safety at defendants' work place, the court permits plaintiff to amend the bill of particulars to add inadequate lighting to his negligence claim. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993).

IV. CONCLUSION

Consequently, the court grants defendants' motion for summary judgment to the extent of dismissing plaintiff's Labor Law § 241(6) claim and also dismisses his claims against defendant Bay Plaza Apple LLC, but otherwise denies the other defendants' motion. C.P.L.R. §§ 3212(b) and (e), 3215(c). The court also grants plaintiff's cross-motion to the extent of permitting amendment of his bill of particulars to add inadequate lighting to his negligence claim, but otherwise denies his cross-motion, C.P.L.R. §§ 3025(b), 3042(b), 3043(a)(3), and denies his separate motion for summary judgment on his Labor Law § 240(1) claim. C.P.L.R. § 3212(b) and (e). The Clerk shall enter a judgment in accordance with this decision.

DATED: April 22, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.