Taylor v 100 W. 93 Condominium
2019 NY Slip Op 31389(U)
May 14, 2019
Supreme Court, New York County
Docket Number: 158206/2015
Judge: Kathryn E. Freed

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. 158206/2015

LARRY TAYLOR,

MOTION SEQ. NO. 003

Plaintiff,

- v -

THE 100 WEST 93 CONDOMINIUM, GRENADIER REALTY CORP., LEADER HOUSE ASSOCIATES, LEADER HOUSE ASSOCIATES, L.P., and LH COMMERCIAL OWNER LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion for PARTIAL SUMMARY JUDGMENT.

In this Labor Law action, plaintiff Larry Taylor ("Taylor") moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendant LH Commercial Owner, LLC ("LH Commercial"). In particular, plaintiff moves for summary judgment on his Labor Law §§ 240(1) and 241(6) causes of action. LH Commercial opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

Taylor was employed by nonparty McGowan Builders as a construction supervisor for a mixed-use commercial and residential development project at 100 West 93rd Street. (Docs. 72 at 3–4; 87 at 21.) LH Commercial, which owned the commercial units at the premises, had entered into a contract with McGowan Builders for the latter to act as the general contractor for the

construction of those units. (Doc. 72 at 3.) The board of the residential portion of the building had no involvement with the commercial units' construction. (*See id.* at 7.)

On the morning of January 19, 2015, Taylor met with two workers who had come to the premises to pick up steel. (Doc. 87 at 50–51.) He met the laborers outside the building on 93rd Street. (*Id.* at 51.) He began walking them through the building to show them what materials they could and could not take. (*Id.*) En route to an unoccupied space on the ground floor, Taylor descended on a twelve-foot long wooden ramp known as an OSHA plank. (Doc. 72 at 4–5.) After taking three steps, however, the left part of the plank broke, and he was injured when he fell approximately three to four feet to the ground. (*See id.* at 5.) Using his cellphone, Taylor took photographs of the plank after the accident. (*Id.* at 2; Doc. 88.) These photographs, submitted in NYSCEF Document 88, reflect that the plank had what appears to be multiple cuts along its length.[1] (Doc. 88.)

Taylor thereafter commenced the instant action on July 21, 2015, by filing a summons and complaint against defendants The 100 West 93 Condominium ("100 West 93"), Grenadier Realty Corp. ("Grenadier"), Leader House Associates ("Leader House"), Leader House Associates, L.P. ("Leader House L.P."), and LH Commercial. (Doc. 73.) In the complaint, he asserted four causes of action: (1) common law negligence (*id.* at 3); (2) breach of New York Labor Law § 200 (*id.* at 6); (3) breach of Labor Law § 240 (*id.*); and (4) breach of Labor Law § 241 (*id.* at 7). 100 West 93 filed an answer on September 10, 2015. (Doc. 74.) 100 West 93 filed an amended answer on December 31, 2015. (Doc. 75.) Grenadier joined in that answer. (*See id.*) Leader House, Leader House L.P., and LH Commercial filed their answer on January 21, 2016 (Doc. 23), and an amended answer on February 8, 2016 (Doc. 76).

[1] Plaintiff surmises that the cuts were "saw cuts." (Doc. 72 at 5.) He does not know how they got there. (*Id.*)

The following depositions were conducted during discovery: Taylor testified that the construction project was usually accessed through a gate on 93rd Street. (Doc. 87 at 34.) He further stated that, at the time, McGowan Builders had completed its part of the project, but that there were still other subcontractors on the site doing work. (*Id.* at 37–38.) He admitted that there were multiple ways to get into the unoccupied space where his accident occurred. Prior to his accident, he would access the space, which was located on the ground floor, using the stairs leading up from the basement. (*Id.* at 54.) There was also a door leading in from the street into the area. (*Id.* at 52–53.) Three days before the accident, Taylor used a stepladder that was there for several months. (*Id.* at 67.) However, the stepladder was gone by the date of the accident (*see id.* at 66–67), and Taylor did not know who installed the ramp in the interim (*id.* at 59–60). Taylor estimated that the height from the top of the ramp to the ground floor was over four feet. (*Id.* at 65.)

Joshua Segal ("Segal"), an officer of LH Commercial, testified that LH Commercial had hired McGowan Builders to act as the general contractor on the project. (*See* Doc. 83 at 8–11, 13.) John Caraccioli ("Caraccioli"), on behalf of 100 West 93, testified that the board for the residential units of the building had no involvement with the construction of the commercial units. (Doc. 89 at 4.) The note of issue was filed on April 23, 2018. (Doc. 80.)

Taylor now moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendant LH Commercial on his Labor Law §§ 240(1) and 241(6) causes of action. (Doc. 71.) With respect to Labor Law § 240(1), he cites a plethora of cases in which plaintiffs were granted summary judgment because they were injured by defective ramps or planks. (Doc. 72 at 8–13.) He maintains that, because the ramp collapsed, and because it lacked any rails that he could have used to arrest his fall, LH Commercial violated that provision. (*Id.* at 8–16.) He also argues that he cannot be held solely responsible for his accident because he was not provided

any safety devices to protect against the gravity-related hazard of traversing from an upper to lower level. (*Id.* at 16–17.) With respect to Labor Law § 241(6), Taylor relies on two provisions of the New York Industrial Code, §§ 23-1.22(b)(2) and (b)(4), which both pertain to runways and ramps at construction sites. (*Id.* at 20–21.)

In opposition, LH Commercial argues that it did not control or supervise plaintiff's work (Doc. 91 at 8), and that it did not install the ramp (*id.*). LH Commercial also asserts that Taylor's Labor Law § 240(1) claim is not viable because he was not involved in a gravity-related accident: "Plaintiff did not fall from a height nor was he working from a height at the time of his accident. Nor was plaintiff hit by a falling object. Plaintiff was injured when OSHA planks broke and caused his accident. He was not injured as a result of an elevation related accident." (*Id.* at 14.) Moreover, it argues that summary judgment should be denied because plaintiff's own actions were the "sole proximate cause" of his injuries, insofar as there were several other ways to access the ground floor besides the ramp. (*Id.* at 14–15.) With respect to the Labor Law § 241(6) cause of action, LH Commercial asserts that there are issues of fact precluding judgment on Industrial Code §§ 23-1.22(b)(2) and (b)(4). (*Id.* at 17–18.)

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 if 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. Summary Judgment on Plaintiff's Labor Law § 240(1) Cause of Action.

As a preliminary matter, this Court determines that LH Commercial is a proper Labor Law defendant. In essence, LH Commercial argues that it cannot be liable under the Labor Law because it did not control or supervise plaintiff's work (Doc. 91 at 8) and because it did not install the ramp (*id.*). However, these contentions directly contradict well-established caselaw. The Court of Appeals has held that Labor Law § 240(1) liability "does not require notice of a defect nor the exercise of supervisory control by the owner." (*Lombardi v Stout*, 80 NY2d 290, 295 [1992] ("Liability against the landowner under section 240[1] . . . is absolute and does not require notice of a defect nor the exercise of supervisory control by the owner.").)

Here, plaintiff has submitted sufficient evidence establishing that LH Commercial owned the premises where he was injured at the time of his accident (Doc. 72 at 3), a fact that LH Commercial does not deny (*see* Doc. 91). A deed dated September 20, 2012, reflects that LH Commercial obtained title to the commercial units of the building (Doc. 84) and, although LH Commercial deeded these units to 660 Columbus Retail Owner LLC on October 16, 2015 (Doc. 85), this transfer did not occur until after plaintiff's accident in January of that year (Doc. 87 at 46). LH Commercial is therefore a proper Labor Law defendant in this action. (*See Sanatass v Consol. Inv. Co.*, 10 NY3d 333, 340 [2008] ("[O]ur precedents make clear that so long as a violation of [§ 240(1)] proximately results in injury, the owner's lack of notice or control over the

work is not conclusive—this is precisely what is meant by absolute or strict liability in this context.").)

This Court further finds that plaintiff has established his prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim. That provision was meant to protect workers from, *inter alia*, the risk of falling from an elevated height. (*See Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005].) Indeed, the relevant inquiry for liability under § 240(1) is whether the hazard was one "directly flowing from the application of the force of gravity to an object or person." (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 5 [1st Dept. 2011] (internal citations omitted).) "To prevail on a motion for partial summary judgment on his cause of action under section 240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries." (*Id.* at 6.)

Here, plaintiff's testimony, as well as the photographs he took of the broken ramp after his accident, is sufficient to establish his prima facie case under § 240(1). (Docs. 87–88.) (*See Ageitos v Chatham Towers*, 256 AD2d 156, 156–57 [1st Dept. 1998] (plaintiff's testimony that a plywood board broke from underneath him was sufficient to establish his prima facie case under § 240[1]); *see also DeFreitas v Penta Painting & Decorating Corp.*, 146 AD3d 573, 573 [1st Dept. 2017] (same).) Moreover, it is "irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk." (*Ervin v Consol. Edison of N.Y.*, 93 AD3d 485, 485 [1st Dept. 2012].) The fact that the ramp at issue had multiple cuts along much of its length (*see* Doc. 88) only accentuates defendant's failure to afford plaintiff proper protection from a gravity-related risk. Thus, plaintiff has shown that § 240(1) was violated and that the violation proximately caused his injuries. (*See Auriemma*, 82 AD3d at 6.)

In opposition, LH Commercial failed to raise a triable issue of fact. It admits that it owned the subject premises at the time of the accident. (Doc. 91 at 1.) LH Commercial's statements that "[p]laintiff did not fall from a height nor was he working from at a height at the time of his accident" (*id.* at 14) and that "[h]e was not injured as a result of an elevation related accident" (*id.*) are disingenuous at best. At his deposition, plaintiff estimated that the height differential between the upper and lower levels was a "little over 4 feet." (Doc. 87 at 65.) In addition, although this Court is, of course, not in a position to make a precise measurement, the photographs of the area in NYSCEF Document 88 corroborate plaintiff's estimate. (*See* Doc. 88.) (*See Arrasti v HRH Constr. LLC*, 60 AD3d 582, 583 [1st Dept. 2009] (a height difference of eighteen inches constituted an elevation-related risk within the meaning of § 240[1]); *see also Ervin*, 93 AD3d at 485 (a height of three feet is a gravity-related risk).)

LH Commercial's assertion that plaintiff was the sole proximate cause of his accident because he did not inspect the ramp prior to using it (Doc. 91 at 15) and because "there were several . . . other ways to get into the construction area" (*id.* at 14) is also unavailing. A plaintiff is the sole proximate cause of his injuries only when it can be shown that he "knew or should have known that he was expected to employ some other device." (*Ervin*, 93 AD3d at 485.) Just because there were other ways to get to the ground floor—such as stairs leading up from the basement (Doc. 87 at 54)—does not mean that plaintiff was expected to use those means instead of the ramp, especially given the fact that the ramp was used to replace a stepladder which had been the means to access the space a mere three days prior. (*Id.* at 67.)

Plaintiff is thus entitled to partial summary judgment on his § 240(1) claim.

b. Summary Judgment on Plaintiff's Labor Law § 241(6) Cause of Action.

Because a breach of Labor Law § 240(1) establishes absolute liability against a defendant, (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 289 [2003]), a discussion of Labor Law § 241(6) is rendered academic. However, if this Court were to address plaintiff's Labor Law § 241(6) claim, this Court would find as follows: To support a cause of action under § 241(6), a plaintiff must demonstrate that his or her injuries "were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles." (*Labatto v Genting New York LLC*, 2014 WL 5844321, *8 [Sup Ct, NY County, Nov. 7, 2014, No. 150135/13]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501–02 [1993].)

Plaintiff relies on New York Industrial Code §§ 23-1.22(b)(2) and (b)(4). § 23-1.22(b)(2) provides that the surfaces of runways and ramps "shall be substantially supported," and the section has been held to "set forth specific standards of conduct sufficient to support [a] Labor Law § 241(6) cause of action." (*O'Hare v City of New York*, 280 AD2d 458, 458 [2d Dept. 2001].) The fact that the ramp broke while Taylor was traversing it establishes that it was not substantially supported. Plaintiff is therefore entitled to summary judgment on his Labor Law § 241(6) claim vis-à-vis Industrial Code § 23-1.22(b)(2). However, he has not established a violation of Industrial Code § 23-1.22(b)(4). That provision applies only to runways and ramps that extend to "a height of more than four feet above the ground . . . ." Because plaintiff merely estimated the height of the plank at his deposition (Doc. 87 at 65), there is a question of fact regarding whether the plank at issue falls within the scope of § 23-1.22(b)(4).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Larry Taylor for partial summary judgment on his Labor Law § 240(1) cause of action against defendant LH Commercial Owner, LLC is granted; and it is further

ORDERED that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), within 30 days after the entry of this order onto NYSCEF, and that the Clerk is directed to enter judgment accordingly; and it is further

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

ORDERED that the amount of damages shall be determined at trial; and it is further

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

5/14/2019
DATE

KATHRYN E. FREED, J.S.C.

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