

Williams v Hudson Meridian Constr. Group LLC

2019 NY Slip Op 31806(U)

June 21, 2019

Supreme Court, New York County

Docket Number: 158302/2016

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

THEODORE WILLIAMS,
Plaintiff,

INDEX NO. 158302/2016
MOTION DATE 06/12/2019
MOTION SEQ. NO. 001

- v -

HUDSON MERIDIAN CONSTRUCTION GROUP LLC et al.,
Defendants.

DECISION + ORDER ON MOTION

NYSCEF Doc Nos. 25-34, 36-43, and 45-48 were read on this motion for summary judgment.

Motion by defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted as to plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) causes of action and is otherwise denied. Plaintiff's cross motion pursuant to CPLR 3025 (b) for leave to amend the bill of particulars as to his Labor Law § 241 (6) cause of action is denied.

BACKGROUND

This is an action to recover damages for physical injuries allegedly sustained by a steamfitter on August 14, 2015, when, while working at a construction site located at 535 West 43rd Street, New York, New York (the Premises), he was pulled downward by a 300-pound pipe that he was helping to unload from a stack of pipes. Plaintiff also claims that he was not able to properly prevent the pipe from falling because oil and concrete debris in the area caused his foot to slip.

Defendants Hudson Meridian Construction Group LLC (Hudson), Cref 546 West 44th Street, LLC (Cref) and Patrinely Group LLC (Patrinely) (collectively, defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint against them in its entirety.

Plaintiff Theodore Williams cross-moves pursuant to CPLR 3025 (b) for an order granting him leave to amend/supplement his bill of particulars to allege the violation of Industrial Code 12 NYCRR 23-1.7 (d) as a predicate for his Labor Law § 241 (6) claim.

On the day of the accident, Cref was the owner of the Premises where the accident occurred, while Hudson was the general contractor on a project at the Premises (the Project), pursuant to a contract with Patrinely. The Project involved the new construction of twin buildings at that location. Hudson hired nonparty Hennick Lane (Hennick) to serve as the mechanical contractor for the Project. Hennick then hired Vivid Mechanical (Vivid), plaintiff's employer, to install the heating and air-conditioning for the Project. As a steamfitter, plaintiff's work involved installing various pipes for the heating and air-conditioning systems.

Plaintiff's Deposition Testimony

Plaintiff testified that he was working as a steamfitter for nonparty Vivid on the day of the accident. Vivid was a subcontractor for mechanical systems on the Project, and its work involved pipe fitting and welding tasks as part of the steam system installation. Specifically, plaintiff's duties included "[b]eveling the pipes, measuring the pipes, leveling the pipes, [and having them] ready for the welder to weld" (plaintiff's tr at 26–27). Plaintiff testified that he received all his work instructions from his Vivid foreman, Anson Barrow.

Plaintiff testified that, immediately before the accident, he and his crew were installing a pipe in a vertical shaft. The vertical shaft extended from the basement to a water tower. There was a delivery of forty-eight lengths of eight-inch, schedule forty black pipe, and everyone stopped their work and went to the flatbed trailer truck to unload it. Each of the pipes were ten feet and six inches in length and weighed approximately three-hundred pounds. The delivery company used a hoist to unload the pipes onto horizontal pieces of wood placed on the ground, which was within a fence surrounding the Premises at its main entrance. Specifically, the pipes were put down over a fence and "[r]ight in front of the entrance to the building. Inside the gate . . . they have the building fenced off, but inside of that front of the entrance" (*id.* at 39).

Plaintiff explained that when the pipes were unloaded, they were stacked in a pyramid-like fashion, with the bottom layer of the pipes placed on the wood. Shims were placed between the pipes to prevent them from rolling off the four-foot high pyramid. Plaintiff testified that the foreman, Barrow, directed the workers to "[p]ick up the pipe and take it into the building, take it down into the basement" (*id.* at 48).

Plaintiff testified that the accident occurred when his coworker, "Paul," grabbed one end of one of the pipes from the top of the stack and began to pull it off, as plaintiff "was standing on the other [end] trying to wait for him to get to the end and grab the pipe" (*id.* at 49). Plaintiff further explained:

"Paul did not stop with the pipe. He just kept going and the pipe went off the edge of the stack. I went to grab the pipe. I slipped. The shoulder hit. My left shoulder hits the stack of pipes. My right shoulder went right down into the ground and I felt the muscle tear."

(*Id.*) Plaintiff attempted to grab the pipe in order to protect Paul from injury. In doing so, the weight of the pipe pulled plaintiff down a distance of approximately six inches and into the stack of pipes. Plaintiff maintained that if Paul had properly "stopped at the edge, [he] would have grabbed [the pipe] and [they] would have secured the weight" (*id.* at 55).

Plaintiff described the ground that he was standing on at the time of the accident as being comprised of "uneven" dirt that had "little craters, holes" in it (*id.* at 52). Plaintiff opined that he slipped on oil from the pipes, although he did not notice any oil in the area prior to the accident. When asked to identify what he slipped on, plaintiff responded that "[i]t had to be a combination of things because you have people . . . doing cement work . . . [and] you have oil from the pipes dropping on it" (*id.* at 56).

Plaintiff's Affidavit

Plaintiff stated in his affidavit that he asked his supervisor for a hoist to assist him in moving the pipe, as he believed that the pipe was too heavy to manually carry into the building, and that “a Roust-A-Bout, which is a manual hoist,” could have supported the weight of the pipe as it was lifted off the stack” (plaintiff’s aff).

Deposition Testimony of Walter Buerle (Hudson’s Project Superintendent)

Walter Buerle testified that he was the project superintendent for Hudson on the day of the accident. He testified that Henrick-Lane, the Project’s mechanical contractor, had a subcontract with Vivid, plaintiff’s employer, whereby Vivid performed duct work on the Project. He explained that Vivid’s materials, such as pipes, were delivered to the site by truck and that Vivid’s employees unloaded them and carried them to where they were needed. He never observed any Vivid workers using any type of equipment to unload the pipes. Typically, two workers carried the pipe into the site. Buerle also testified that the Premises was surrounded by an eight-foot plywood fence.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

“All contractors and owners and their agents . . . 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.”

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

“Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein”

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Here, the Court finds that plaintiff has shown prima facie that he may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that pulled him down and caused his injury, i.e. the pipe, “was ‘a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]’” (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]; *Dedndreaq v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] [“[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants’ failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him”]).

Because plaintiff was working on an uneven and slippery ground at the time of the accident, it was foreseeable that his foothold might become compromised while unloading the 300-pound pipe. Human error on the part of plaintiff's coworker was also a foreseeable risk. Accordingly, given the nature of plaintiff's work, additional safety devices were necessary to secure the pipe in order to ensure the safety of plaintiff. “[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures” (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, “where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake”], quoting *Conway v New York State Teachers’ Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Dasilva v A.J. Contr. Co.*, 262 AD2d 214, 214 [1st Dept 1999] [where the plaintiff “was injured when the unsecured A-frame ladder he was standing on was struck by a section of pipe he had

cut, causing him to fall,” the Court found that “the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff’s fall and injury”).

As there were no protective devices in place, such as a manual hoist, hangers, nets or ropes, to secure the pipe from falling while it was being unloaded, Labor Law § 240 (1) is applicable, because plaintiff’s injuries were “the direct consequence of [defendants’] failure to provide adequate protection against [that] risk” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10 [2011] [citation omitted]).

In support of their motion and in opposition to plaintiff’s cross motion, defendants argue that the Labor Law § 240 (1) claim should be dismissed because the pipe that pulled plaintiff downward was not in the process of being hoisted or secured at the time that it fell. The Court finds this argument unavailing. It is well-settled law that a falling object need not be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240 (1). It is enough that said object simply needed securing “for the purposes of the undertaking” (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 286 AD2d 671, 673 [2d Dept 2001], *affd* 5 NY3d 731 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and thus, it was not in the process of being hoisted or secured at the time that it fell on the plaintiff (5 NY3d at 732)]; *see also Narducci v Manhasset Bay Assoc.* (96 NY2d at 268; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]; *Vargas v City of New York*, 59 AD3d 261, 261 [1st Dept 2009]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 421 [2d Dept 2006] [Labor Law § 240 (1) liability imposed where the steel beam that fell on plaintiff needed to be secured for the purposes of the undertaking]; *Bush v Gregory/Madison Ave., LLC*, 308 AD2d 360, 361 [1st Dept 2003] [issue of fact as to whether a security device would have been necessary to shield worker from falling iron angle that was inadequately secured]; *Orner v Port Auth. of N.Y. & N.Y.*, 293 AD2d 517, 518 [2d Dept 2002]).

Defendants further argue that Labor Law § 240 (1) does not apply because the hazard did not arise out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, plaintiff testified that the pipe had fallen approximately six inches when he reached to grab it.

In *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (*supra*), the Court of Appeals “decline[d] to adopt the ‘same level’ rule, which ignores the nuances of an appropriate section 240 (1) analysis” (*Wilinski*, 18 NY3d at 9). In *Wilinski*, the plaintiff was struck by metal pipes, which stood ten-foot tall and measured four inches in diameter. In that case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the “the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent” (*id.* at 10, quoting *Runner* at 605).

Applying *Wilinski* to the instant case, not only is plaintiff not barred from recovering simply because the pipe fell approximately six inches, but, given the significant amount of force that the 300-pound object generated during its fall, the Court finds that plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603; see also *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [in a case where the plaintiff was injured when two 500-pound steel beams fell "a short distance" off an A-frame cart and landed on his leg, Labor Law applied "[g]iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent"']).

In a similar case, *Villanueva v 114 Fifth Ave. Assoc. LLC* (162 AD3d 404 [1st Department 2018]), the plaintiff was injured while loading a 500-pound steel I-beam into a freight elevator. As the workers were trying to stand the beam on its end, the beam landed on the plaintiff's shoulder. The court held that "[t]he half foot that the steel I-beam dropped onto plaintiff's shoulder [was] not de minimis, given the I-beams' weight and since the hazard was one directly flowing from the application of the force of gravity to a person" (*id.* at 405).

Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citation omitted]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

As such, the Court finds that defendants are not entitled to dismissal of the Labor Law § 240 (1) claim against them. The court has considered defendants' remaining arguments on this issue and finds them unavailing.

The Labor Law § 241 (6) Claim

Defendants move for dismissal of the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

"All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .

"(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for

summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code, plaintiff does not oppose or even address those sections in his opposition to defendants' motion, and, thus, these sections are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). In addition, at oral argument held on June 12, 2019, plaintiff conceded that defendants are entitled to dismissal of said alleged Industrial Code violations.

Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on the unopposed Industrial Code sections.

Plaintiff's Cross Motion for Leave to Amend the Bill of Particulars

Plaintiff cross-moves for an order granting him leave to amend his bill of particulars to include an alleged violation of Industrial Code 12 NYCRR 23-1.7 (d) as a predicate for his Labor Law § 241 (6) claim.

“Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant[] [has] been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position.”

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted].) In seeking the amendment, a “plaintiff need not establish the merit[s] of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [internal citation omitted]).

Here, the Court finds that Plaintiff is not entitled to leave to amend its bill of particulars to include an alleged violation of section 23-1.7 (d) of the Industrial Code. Industrial Code 12 NYCRR 23-1.7 (d) provides:

“Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

In the first instance, the Court notes that Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Nevertheless, there is no merit to plaintiff's claim that section 23-1.7 (d) applies to the facts of this case. A review of the record reveals that plaintiff was standing outside in an open, unpaved area at the time of his accident (*see Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012] ["the open, unpaved area where plaintiff was walking when he fell" did not fall within the purview of section 23-1.7 (d)]; *Porazzo v City of New York*, 39 AD3d 731, 731 [2d Dept 2007] ["the open, ground level of the work site where the injured plaintiff fell did not constitute a passageway, walkway, or other elevated working surface contemplated by 12 NYCRR 23-1.7 (d)"]).

As such, the Court finds that plaintiff's argument on this issue fails on the merits, and plaintiff is not entitled to an order granting him leave to amend the bill of particulars to add an alleged violation of section 23-1.7 (d) of the Industrial Code. Accordingly, the entirety of plaintiff's Labor Law § 241 (6) cause of action must be dismissed.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. 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" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

"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. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

At oral argument held on June 12, 2019, plaintiff conceded that defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them. As such, the common-law negligence and Labor Law § 200 claims are dismissed.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Hudson Meridian Construction Group LLC, Cref 546 West 44th Street, LLC, and Patrinely Group LLC pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted as to plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) causes of action and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff Theodore Williams pursuant to CPLR 3025 (b) for leave to amend the bill of particulars as to his Labor Law § 241 (6) cause of action is denied.

The foregoing constitutes the decision and order of the Court.

6/21/2019
DATE


HON. ROBERT D. KALISH
ROBERT D. KALISH, J.S.C., J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE