

Torres-Martillo v 375 Park Fee, LLC
2019 NY Slip Op 32327(U)
July 29, 2019
Supreme Court, Kings County
Docket Number: 508417/2016
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of July, 2019.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

-----X

JESUS TORRES-MARTILLO,
Plaintiff,

- against -

375 PARK FEE, LLC, RFR HOLDING LLC,
TRI-STAR CONSTRUCTION CORP. AND
ALL STATE INTERIOR DEMOLITION INC.,

Defendants.

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DECISION/ORDER

Index No. 508417/2016

Motion Seq. No. 6

<u>The following papers numbered 137 to 176 read herein:</u>	<u>NYCEF Numbered</u>
Notice of Motion, Affidavits (Affirmations) Annexed _____	<u>137 - 160</u>
Opposing Affidavits (Affirmations) _____	<u>161 - 174</u>
Reply Affidavits (Affirmations) _____	<u>176</u>

Upon the foregoing papers, the defendants move, in this timely motion, for summary judgment dismissing the complaint. All prior motions were related to discovery. This is an action which arises from a work-related accident on November 20, 2015. Plaintiff has asserted causes of action for Labor Law §200, 240 (1) and 241 (6), as well as common law negligence. Defendant 375 Park Fee LLC (hereafter “375 Park”) is the property owner. Defendant Tri-Star Construction Corp. (hereafter “Tri-Star”) was the

construction manager. Defendant RFR Realty LLC (hereafter “RFR”) was the building manager, and defendant All State Interior Demolition Inc. (hereafter “All State”) contracted with plaintiff’s employer for the demolition work and provided, *inter alia*, the refuse containers. All of the defendants are represented by one law firm and have discontinued their cross claims against each other. For the reasons which follow, the motion is granted and the complaint is dismissed.

Plaintiff was working, at the time of the accident, at 375 Park Avenue, a large iconic Manhattan office building known as the Seagram Building. He was assigned to move wheeled refuse containers brought down to the lobby in the freight elevator to the curb. The containers were full of construction debris, which needed to be pushed to the curb, where a truck was waiting. The container was then attached to the truck with a hook, the truck mechanism was turned on and it raised the container, emptied it into the truck, and returned the empty container to plaintiff to bring back into the lobby for re-use.¹ Between the area of the lobby where the freight elevators were located, and the curb where the truck was waiting, was a long hallway and a sloped driveway. The refuse containers were supplied by defendant All State Interior Demolition Inc., and state so on their sides. Plaintiff was employed by United Interior Renovations, LLC, a non-party (the third party actions against it were previously discontinued).

Defendants support their motion with an attorney’s affirmation; the pleadings; an

¹These trucks are generally known as “Dempsey Dumpsters.”

affidavit from Steven Srnica, the owner of United Interior Renovations, LLC, the company plaintiff worked for; plaintiff's Bill of Particulars and Supplemental Bill of Particulars; the EBT transcripts of plaintiff, Jaclyn Popkin for defendant RFR, Ethem DeMiro for Tri-Star, and Frank Rullo for All State; the construction contract with 375 Park; the contract between Tri-Star and All State; photos shown to plaintiff at his EBT; and various discovery orders.

Plaintiff testified at his EBT, with the assistance of a Spanish interpreter, (Exhibits L and M²) that he was fifty-eight years old on the date of the accident. He lives in Queens with his wife and two children. He is from Ecuador. He has a green card, and came to the United States in 1999. He has not gone to school other than elementary school. He was a mason in Ecuador. He testified that he had been at the job site for three days before his accident. His foreman's name was Hernan, and he thought they both worked for All State. He arrived at 6:00 p.m. to begin work on the day of the accident. He went in at the loading dock/freight entrance and signed in. There were about a dozen workers there, waiting for Hernan to tell them what to do. Hernan assigned him and two others to push the refuse containers from the lobby elevator to the truck, and gave him gloves and a mask [Pages 35-36]. This was not the first day he was assigned to this task [Page 38]. He had to wait about twenty minutes and then the containers began coming down to the lobby. All of the approximately fifty containers were identical and had three wheels, two

²On 2/15/18 and 6/25/18.

on one side and one on the other [Page 45]. He had brought approximately thirty to forty containers to the truck before the accident occurred [Page 47]. The other two workers did not help him to the curb, but they moved the containers through the long hallway until they reached the security guard near the exit [Page 48]. Plaintiff had some difficulty with vocabulary during his testimony. It seems he stayed in the area between the security guard and the curb and the other workers brought the containers from the freight elevator to the area near the security guard. But this is not totally clear, nor is it particularly important. At the end of the hallway, there was an open doorway with a security guard in a booth [Pages 52-53]. After some distance, perhaps thirty feet, you reach the sidewalk [Page 54]. Plaintiff did not know which street this sidewalk was located on. The containers were not emptied into the truck as they were brought outside, but were left in a parking space next to the truck until there were twenty or so of them. Then, they were emptied into the truck. The truck then left to bring the debris to a dump, and returned empty. While the truck was gone, plaintiff placed a few empty containers in the truck's parking space so when the truck returned, he could move the containers and the truck could park in the same space.

Finally, at Page 70 of the EBT transcript, plaintiff was asked about the accident. He testified that he was pushing a container from behind, with the side with one wheel in front and the side with two wheels closest to him [Page 73]. He was pushing a full container on the sidewalk toward the curb [Page 75]. When plaintiff was asked what

happened, he said [Page 76] “it pulled me, hit my arm.” Then, “it seems like the wheel where I was pushing it got stuck and it pulled me to the other side.” Perplexed, the attorneys attempted to clarify plaintiff’s answer. Plaintiff then said “when I wanted to hold it, I felt the pain here (indicating), I cut myself here (indicating), the container went to the other side.” Plaintiff then was asked if he had experienced any problems with the containers that day or on a prior day, and he said “no.” He was then asked “did you see what you believe the front wheel of the container got stuck on?” Plaintiff replied “I didn’t notice.” He then testified that nobody has told him what the wheel may have been stuck on. After many more questions, plaintiff testified that he was at the curb when the wheel got stuck, and the container “flipped” and fell into the street, with the debris falling out of it. Plaintiff was cut on his right wrist and bleeding, and his foreman called for an ambulance [Pages 85-87]. Asked “any time after the accident happened, did you look at the front wheel of the container?” [Page 95] plaintiff said “no.” He testified that he was cut by debris that was protruding from the container [Page 95]. He was not sure if it was sheetrock, a piece of metal, or something else. Shown the accident report, plaintiff said he did not fill it out, that Hernan did, and he signed it. Hernan speaks Spanish. When asked “Did you ever tell Mr. Hernan that the front wheel of the container got stuck, which caused the container to flip over?” plaintiff responded “I am not sure” [Page 103]. At the second EBT, which is mostly related to plaintiff’s medical care and treatment, plaintiff acknowledges that nobody witnessed his accident, and that he had not complained about

any problems with the containers before his accident [Page 202].

The affidavit of Steven Sronic, dated November 26, 2018 states that he owns the company plaintiff worked for, confirmed that plaintiff worked for his company, and states that there were no complaints about the containers/carts provided by All State. "United Interior workers continued to use the demolition carts after the plaintiff's accident, for the balance of that evening, including the one that the plaintiff utilized at the time of his accident, without any issues."

The witness provided by All State was its comptroller on the date of plaintiff's accident, a man with an accounting degree. He had no personal knowledge about the accident. He knew, from the paperwork, that Tri-Star hired All State, who hired plaintiff's employer.

Mr. DeMiro was deposed on behalf of Tri-State. He was a construction foreman. Tri-State has been regularly engaged by the property owner for jobs at the building over the years, some small, some larger. He testified that demolition was done after work hours so the tenants did not complain about noise, and that he was not present for the demolition phase of the work. His labor foreman would have been instructed to remain on the floor where the demolition was taking place, to make sure nothing was damaged and no water lines were broken. This worker was the only Tri-Star employee present during the demolition phase. Until he arrived for his deposition, Mr. DeMiro was unaware of plaintiff's accident.

Ms. Popkin testified she is the property manager for 375 Park Avenue. On the day of plaintiff's accident, she was the assistant property manager. She leaves work at 6:00 p.m. Monday through Friday. Her office is in the building. She has weekly meetings with Tri-Star, as they are regularly doing work at the building, to discuss the status of the projects. She did not learn of plaintiff's accident until she was asked to attend the deposition.

Defendants' counsel avers at page 13 of his affirmation that summary judgment dismissing the complaint should be granted because "plaintiff is unable to identify the cause of his accident or what caused the cart to become stuck. In fact, the area where his cart became stuck is free of any defects. Finally, there is no evidence to support a claim that the plaintiff was injured as a result of a fall from a height . . . He did not fall from a height, nor was he struck by an object that was being hoisted . . . There is no evidence to support a claim pursuant to Labor Law §241 (6) as none of the code sections plaintiff cites are applicable."

Labor Law 200 and common law negligence

With regard to Labor Law 200 and common law negligence, such claims exist in two categories: those claims where the manner of work employed allegedly led to the accident, and those where a hazardous premises condition allegedly led to the accident. The court agrees that plaintiff has failed to allege that there was a defect in the sidewalk or a hazardous condition of the premises. As plaintiff does not allege in his testimony

that there was a dangerous premises condition, although plaintiff's counsel attempts to do so in the Bill of Particulars, the defendants are not subject to a premises liability claim. For the defendants to be vicariously liable for an accident that arose from the means and methods of plaintiff's work, it must be established that they or their agents either supervised or controlled plaintiff's work. Defendants' witnesses aver that they did not do so. In fact, the defendants argue, plaintiff's sworn testimony indicates that he only received instructions from his employer's foreman, Hernan. Accordingly, the defendants conclude, plaintiff has no viable Labor Law § 200 or common-law negligence claims against them.

Labor Law §240 (1)

With regard to plaintiff's Labor Law 240 (1) claim, which states, in relevant part, 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 . . .”

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Rocovich v Consolidated Edison*

Co., 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required “proper protection” against elevation-related risks is non-delegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both “a violation of the statute and that the violation was a proximate cause of his injuries” (*Skalko v Marshall’s Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer*, 65 NY2d at 524]).

Defendants contend that since plaintiff did not fall from a height, was not working at a height, nor did an object fall from a height on him, plaintiff is not entitled to the protections offered by Labor Law § 240 (1). Stated differently, defendants argue that the plaintiff's accident does not fall within the ambit of Labor Law § 240 (1) because he was not injured as a result of a gravity-related incident.

Here, the court, in considering the defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, must view the record in the manner most favorable to plaintiff (*Pierre-Louis*, 66 AD3d at 862). The "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, 13 NY3d at 603). Here, plaintiff has not brought an action for products liability against the manufacturer of the containers, also referred to as "demolition carts" because they were constructed with three wheels instead of four. He has instead brought a Labor Law §240 (1) claim, but does not state that any of the enumerated protective devices in the statute were called for. Thus, the court must agree that defendants have made a prima facie case that there was no violation of this statute.

For a cause of action based on Labor Law § 240 (1), "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski v 334 East*

92nd Housing Development Fund, 18 NY 3d 1 [2011]). Plaintiff does not claim that he was not provided with proper protection, nor does he state what equipment or device was needed.

If the proximate cause of the accident was not the absence or inadequacy of a safety device of the kind enumerated in the statute, Labor Law 240 (1) is inapplicable (*see Maldonado v AMM Props. Co.*, 107 AD3d 954 [2d Dept 2013]). Plaintiff is required to establish that the injury was a direct consequence of the defendant's failure to provide adequate protection against a risk; and that the risk required one of the devices listed in the statute (*Wilinski v 334 East 92nd Street Housing Development Fund*, 18 NY3d 1 [2011]). Defendants claim this accident is not covered by this statute, nor has plaintiff properly pled that it is.

Labor Law §241 (6)

Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross*, 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*,

101 AD3d 768, 770 [2d Dept 2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto*, 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the plaintiff to allege that defendants violated a provision of the Industrial Code that contains “concrete specifications” (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; see also *Ross*, 81 NY2d 494 [1993]) and “mandates a distinct standard of conduct, rather than a general reiteration of common-law principles” (*Rizzuto*, 91 NY2d at 351). “To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident” (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

To successfully move for summary judgment dismissing a plaintiff’s Labor Law § 241 (6) claims, a defendant must demonstrate “that the Industrial Code provisions cited were inapplicable to the facts, or that the alleged violation of the same was not a proximate cause of the damages alleged” (*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009], citing *Ross*, 81 NY2d 494; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550 [2d Dept 2007]; *Rivera v Santos*, 35 AD3d 700 [2d Dept

2006]). In order to successfully oppose a motion for summary judgment dismissing Labor Law § 241 (6) claims, a plaintiff is required to cite a violation of an applicable provision of the Industrial Code that contains concrete specifications with which owners and contractors must comply (*Donovan v S & L Concrete Constr. Corp., Inc.*, 234 AD2d 336, 337 [2d Dept 1996]; *see also Ross*, 81 NY2d 494). Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, "where such a violation is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the work site was reasonable and adequate under the particular circumstances" (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]).

Plaintiff avers in his Bill of Particulars that the following Industrial Code sections were violated: 23-1.7; 23-2.1; 23-3.2; 23-3.3; and 23-3.4. Defendants argue that all of the cited Industrial Code sections are inapplicable to the facts herein.

Plaintiff first claims that violations of Industrial Code § 23-1.7 ("Protection from General Hazards") occurred; that provision states, in applicable part, as follows:

(d) 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.

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Appellate courts have stated that these provisions are sufficiently specific to support a claim pursuant to Labor Law § 241(6) (*see e.g. Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450-451 [1st Dept 2013]; *McDonagh v Victoria's Secret, Inc.*, 9 AD3d 395 [2d Dept 2004]; *Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000]; *Fox v Westchester Resco*, 229 AD2d 466 [2d Dept 1996]; *Ciraolo v Melville Ct. Assocs.*, 221 AD2d 582 [2d Dept 1995]; *Colucci v Equitable Life Assur. Socy.*, 218 AD2d 513 [1st Dept 1995]; *Hammond v International Paper Co.*, 178 AD2d 798 [3d Dept 1991]). However, plaintiff's Labor Law § 241 (6) cause of action here makes no reference to a slipping or tripping hazard which would be a violation of this section. In fact, in his affirmation in opposition, plaintiff's counsel does not mention this section, thereby abandoning it.

Next, plaintiff claims there was a violation of Industrial Code Section 23-2.1.

However, there are no facts alleged to support the claim of a violation. It states

[subsection (b)]:

“Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.” As the method employed by plaintiff’s employer and carried out by plaintiff was a standard method of disposing of debris, with refuse carts commonly used, there is no violation of this section asserted, and as such, it is not applicable.

Next, plaintiff claims there was a violation of Section 23-3.2, which is also inapplicable, as it addresses preparation of property for demolition, by determining that all gas, electric, water and steam lines are shut off, adjacent buildings are protected, and the like.

Industrial Code Section 23-3.3, which plaintiff omits any mention of in opposition, describes the requirements for “hand demolition” but plaintiff was not engaged in such work, and as such, this section is not applicable.

Industrial Code Section 23-3.4, the final section mentioned in plaintiff’s bill of particulars, addresses the requirements for “mechanical demolition.” This section too is inapplicable.

Conclusions of Law

The court does not conclude that plaintiff could not have had a sustainable cause

of action, but that he has not asserted one. In *Freitas v New York City Transit Auth.*, 249 AD2d 184 [1st Dept 1998], a case very similar to the one at bar, the court found the plaintiff's claim of a violation of Labor Law 241 (6) predicated on a violation of Industrial Code Section (12 NYCRR) 23-1.28 (b) to be sustainable when the wheels of the refuse container plaintiff was pushing "got stuck" and the dumpster tipped over. That provision states in relevant part "Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles." Here, there is no claim by plaintiff that there was anything wrong with the wheels on the container, and defendants have provided an affidavit from plaintiff's employer to that effect, which states that the cart continued to be used after the plaintiff's accident. See also *Picchione v Sweet Constr. Corp.*, 60 AD3d 510 [1st Dept 2009], where the plaintiff alleged that the floor had a defect which caused the wheel to get stuck. Here, there is no claim that there was a defect in the sidewalk which caused the wheel to get stuck.

In conclusion, as the mechanism of plaintiff's injury was not a premises condition, and as movants were not supervising the plaintiff's work, the plaintiff's Labor Law 200 and common law negligence claims must be dismissed.

The branch of defendants' motion seeking to dismiss plaintiffs' Labor Law section 240 (1) claim is granted. Defendants have established that plaintiff was not engaged in an elevation-related activity, nor was he injured as a result of the force of gravity due to the failure to provide him with one of the devices enumerated in the statute.

The branch of defendants' motion seeking to dismiss plaintiff's Labor Law section 241 (6) claim is also granted. Said claim is predicated upon alleged violations of Industrial Code sections 23-1.7; 23-2.1; 23-3.2; 23-3.3; and 23-3.4. None of these sections are applicable to the accident herein.

This shall constitute the decision, order and judgment of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**