Alam v Southern Blvd. IV Assoc., L.P.
2019 NY Slip Op 32558(U)
August 19, 2019
Supreme Court, Kings County
Docket Number: 518623/2016
Judge: Peter P. Sweeney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 518623/2016
Return Date: 5-6-19
Calendar No.: 5

----------x

MOHAMMED K. ALAM and UMME HAYETS,

Plaintiffs,

-against-

SOUTHERN BOULEVARD IV ASSOCIATES, L.P.,

Defendant,

----------x

DECISION/ORDER

SOUTHERN BOULEVARD IV ASSOCIATES, L.P.,

Third-Party-Plaintiff,

-against-

JAHIN CONSTRUCTION CORP.,

Third-Party-Defendant,

----------x

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion Affidavits/Affirmations/Exhibits	1
Answering Affirmations/Affidavits/Exhibits	2
Reply Affirmations/Affidavits/Exhibits	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, defendant, SOUTHERN BOULEVARD IV ASSOCIATES, L.P., moves pursuant to CPLR § 3212 for an order awarding

MS #05
MGEXT

it summary judgment dismissing plaintiff's complaint.[1]

The plaintiff, MOHAMMED K. ALAM , commenced this action claiming that he suffered personal injuries on August 12, 2016, as a result of falling from a scaffold. At the time of the accident, he was performing work on the exterior of a building located at 647 Fox Street, Bronx, New York which was owned by the defendant. In his complaint, plaintiff alleged causes of action pursuant to Labor Law §§ 240(1), 241(6) and 200 and the common law. His wife, UMME HAYETS, alleged a derivative cause of action for loss of services.

That Accident:

On the day of the accident, the plaintiff was repairing cracks on one of the exterior walls of the building and replacing window sills. The work required him to use a hanging scaffold which was raised and lowered by a pulley system. Plaintiff's employer, third-party-defendant, JAHIN CONSTRUCTION CORP. ("Jahin"), provided the scaffold, as well as all the tools and equipment plaintiff used that day, including a safety harness and life line. While working that day, plaintiff tied his safety harness onto the scaffold. When he began working on the scaffold on the day of the accident, it was clean and clear of debris.

The accident occurred near the end of plaintiff's work day. At his deposition, plaintiff testified that pursuant to company policy, at the end of the day, the scaffold had to be left approximately 12-13 feet above the ground and that Jahin employees would exit the scaffold via

---

[1]On the return date of the motion, three other motions were before the Court; plaintiff's motion for summary judgment on his Labor Law 240(1) claim, which was denied by short form order, defendant's motion to add a party to the caption and defendant's motion to strike the note of issue. This latter two motions were granted by the same short form order. In deciding this motion, the Court has considered the papers submitted on plaintiff's motion for summary judgment.

an extension ladder. He testified that before exiting the scaffold on any given day, Jahin employees were instructed to disengage their safety lines from their harnesses, fold them up and tie them onto the ropes of the scaffold and then lower their tools to the ground in a bucket attached to a pulley system. In accordance with these instructions, plaintiff testified that shortly before the accident, he removed his safety line from his harness and began the process of lowering his tools to the ground in the bucket. While lowering his tools, he leaned over the side of the scaffold, which did not have a railing, slipped on debris on the platform of the scaffold that was created by the work he performed earlier that day and fell to the ground.

The record contains an affidavit from Mdjoynal Abedin, Jahin's foreman, who was an eye witness to the accident. Abedin gave significantly different version of how the accident occurred. He averred that at the time of the accident, plaintiff was trying to exit the scaffold by lowing himself and swinging from one of the ropes attached to the pulley system. According to Abedin, while plaintiff was doing this, plaintiff yelled "I am Tarzan." Abedin also averred that the accident occurred after plaintiff had completed lowering his tools to the ground.

Tony Skevas's deposition is also part of the record before the Court. Skevas is a licensed engineer employed by CDC Management Corp., defendant's managing agent for the subject building. He testified that the day after the accident, someone from Jahin called and told him that plaintiff was injured while trying to slide down to the ground on a rope from the scaffold and that he was not able to hold on to the rope. He further testified that he was the only one from his company who visited that job site and that he was there only two or three times before the accident to monitor the progress of the work. He saw the scaffold on only one occasion and was not responsible for supervising the work or monitoring job site safety.

Defendant contends that plaintiff's claims under Labor Law § 240(1) and 241(6) should be dismissed because plaintiff was the sole proximate cause of the accident and acted as a recalcitrant worker by unhooking his safety harness from his lifeline. Defendant further contends that plaintiff does not have a viable claim under Labor Law § 241(6) because he cited no actionable violations of the Industrial Code. Finally, defendant claims that plaintiff's claim under Labor Law § 200 should be dismissed because the defendant did not supervise of control plaintiff's work and lacked actual or constructive notice of any defective conditions or work practices that allegedly caused the accident.

The Labor Law § 240(1) Claim:

Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see Barreto v. Metropolitan Transp. Auth.,* 25 N.Y.3d 426, 433, 13 N.Y.S.3d 305, 34 N.E.3d 815; *McCarthy v. Turner Constr., Inc.,* 17 N.Y.3d 369, 374, 929 N.Y.S.2d 556, 953 N.E.2d 794; *Probst v. 11 W. 42 Realty Invs., LLC,* 106 A.D.3d 711, 711, 965 N.Y.S.2d 513). To succeed on a cause of action under Labor Law § 240(1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries (*see Barreto v. Metropolitan Transp. Auth.,* 25 N.Y.3d at 433, 13 N.Y.S.3d 305, 34 N.E.3d 815; *Vivar v. 441 Realty, LLC,* 128 A.D.3d 810, 810, 9 N.Y.S.3d 159). A worker's comparative negligence is not a defense to a cause of action under Labor Law § 240(1) and does not effect a reduction in liability (*see Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280, 286, 771 N.Y.S.2d 484, 803 N.E.2d 757; *Cano v. Mid–Valley Oil Co., Inc.,* 151 A.D.3d 685, 690, 57 N.Y.S.3d 494; *Robinson v. National Grid Energy Mgt., LLC,* 150 A.D.3d 910, 912, 57 N.Y.S.3d

48; *Garzon v. Viola,* 124 A.D.3d 715, 716–717, 2 N.Y.S.3d 522). Recovery under Labor Law § 240(1), however, is not available when a worker's own conduct is the sole proximate cause of the accident (*see Robinson v. East Med. Ctr., LP,* 6 N.Y.3d 550, 554, 814 N.Y.S.2d 589, 847 N.E.2d 1162; *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d at 290, 771 N.Y.S.2d 484, 803 N.E.2d 757).

The proponent of a motion for summary judgment has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient proof eliminating any material issues of fact (see, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404). If the proponent meets this burden, the burden shifts to any party opposing the motion to come forward with proof in admissible form raising a triable issue of fact (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324; *Zuckerman,* 49 N.Y.2d at 562; *Friends of Animals v. Associated Fur Mfrs.,* 46 N.Y.2d at 1068). If the proponent fails to meet its initial burden, the Court must deny the motion regardless of the sufficiency of the opposition papers (*see Winegrad,* 64 N.Y.2d at 853; *New York & Presbyt. Hosp. v. Allstate Ins. Co.,* 29 A.D.3d 547).

Here, the defendant did not establish, *prima facie* that plaintiff was provided with necessary protection from the gravity-related risk of his construction work, or that the absence of the necessary protection was not a proximate cause of his injuries (*see Cruz v. Cablevision Sys. Corp.,* 120 A.D.3d 744, 746, 992 N.Y.S.2d 281; *Chabla v. 72 Greenpoint, LLC,* 101 A.D.3d 928, 928, 957 N.Y.S.2d 226; *Campbell v. 111 Chelsea Commerce, L.P.,* 80 A.D.3d 721, 721–722, 915 N.Y.S.2d 619). Defendant readily admits that had plaintiff's safety harness been tied in, the

accident would not have happened. Further, viewing the evidence in the light most favorable to the plaintiffs and resolving all reasonable inferences in their favor, as the Court must do on this motion (*see Cerniglia v. Loza Rest. Corp.*, 98 A.D.3d 933, 934, 951 N.Y.S.2d 57, 58–59; *Pearson v. Dix McBride, LLC,* 63 A.D.3d 895, 883 N.Y.S.2d 53; *Boyd v. Rome Realty Leasing Ltd. Partnership,* 21 A.D.3d 920, 801 N.Y.S.2d 340), defendant did not establish as a matter of law that plaintiff's conduct was the sole proximate cause of the accident. The evidence did not demonstrate as a matter of law that the plaintiff was recalcitrant in the sense that he deliberately refused to tie in his safety harness (*see Gordon v. Eastern Ry. Supply,* 82 N.Y.2d 555, 562–63, 606 N.Y.S.2d 127, 626 N.E.2d 912; *Moniuszko v. Chatham Green, Inc.*, 24 A.D.3d 638, 638, 808 N.Y.S.2d 696, 697). Indeed, plaintiff testified that he was following company policy when he disconnected his safety harness from the safety line a the end of the day before while lowing his tools to the ground (see *Rapalo v. MJRB Kings Highway Realty, LLC*, 163 A.D.3d 1023, 1024, 82 N.Y.S.3d 63, 65, *Durmiaki v. International Bus. Machs. Corp.,* 85 A.D.3d 960, 961, 925 N.Y.S.2d 628; *Milewski v. Caiola,* 236 A.D.2d 320, 654 N.Y.S.2d 738). Since the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 240(1) claim, its motion for this relief must be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Plaintiff's motion to dismiss the Labor Law § 241(6) claim on the ground that plaintiff's conduct was the sole proximate cause of the accident must also be denied.

Plaintiff's Labor Law § 241(6) Claim:

To state a claim under Labor Law § 241(6) ,a plaintiff must identify and establish a

violation of a specific Industrial Code provision mandating compliance with "concrete specifications" as opposed to "general safety standards" which proximately caused his or her injuries (*Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505; *Biszick v. Ninnie Constr. Corp.*, 209 A.D.2d 661). Plaintiff contends that defendant violated Industrial Code § 23-5.1(j)(1) which provides that "[t]he open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule)." This provision constitutes a concrete specification as opposed to a general safety standard and there has been no showing that any of the exceptions to this provision apply. Since plaintiff testified that there was no railing on the side of the scaffold that he fell from, defendant is not entitled to summary judgment dismissing the Labor Law § 241(6) claim.

Plaintiff's Labor Law § 200 Claim:

Defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not have authority to exercise supervision or control over the performance of the plaintiff's work (*see Kretowski v. Braender Condominium,* 57 A.D.3d at 952, 871 N.Y.S.2d 304; *Ortega v. Puccia,* 57 A.D.3d at 62–63, 866 N.Y.S.2d 323) and lacked actual or constructive notice of the alleged defective or dangerous conditions or unsafe work practices that plaintiff claims caused his accident (*see Wynne v. B. Anthony Constr. Corp.,* 53 A.D.3d 654, 656, 862 N.Y.S.2d 379; *Payne v. 100 Motor Parkway Assoc., LLC,* 45 A.D.3d 550, 553, 846 N.Y.S.2d 211). In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, defendant's motion insofar as it seeks to dismiss plaintiff's claims under the common law and Labor Law § 200 is **GRANTED.**

Accordingly, it is hereby

ORDERED that defendant's motion is **GRANTED** solely to the extent that plaintiff's Labor Law § 200 claim is dismissed. The motion is in all other respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: August 19, 2019

PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C

KINGS COUNTY CLERK
FILED
2019 AUG 27 AM 9:03