SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANTHONY MILE, Index No. 155909/2016

Plaintiff

- against - DECISION AND ORDER

MARANGOS CONSTRUCTION CORP. and
93 READE STREET ASSOCIATES, LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained July 10, 2015, as he descended temporary stairs on premises owned by defendant 93 Reade Street Associates, LLC, on a renovation project at 93 Reade Street, New York County, where defendant Marangos Construction Corp. was the general contractor and constructed the temporary stairs. Plaintiff was an employee of 93 Reade Street Associates' property manager, a nonparty. Plaintiff moves for summary judgment on defendants' liability for his claim under New York Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). 93 Reade Street Associates separately moves for summary judgment on the owner's cross-claim for contractual

indemnification against Marangos Construction. Id. Marangos Construction separately moves for summary judgment dismissing the complaint and all cross-claims. Id. For the reasons explained below, the court grants Marangos Construction's motion in part and otherwise denies the motions.

II. PLAINTIFF'S MOTION

Plaintiff claims that defendants violated Labor Law § 240(1) because the temporary stairs failed to protect him against falling from an elevation. Marangos Construction contends that plaintiff's injury never occurred because work was not permitted on the site on the date plaintiff claims injury and, in any event, that Labor Law § 240(1) did not apply to the temporary staircase because it was not a safety device, but was a passageway. 93 Reade Street Associates contends that whether the temporary staircase was a safety device or passageway is a factual issue.

A. The Worksite Closure

Marangos Construction presents its notice to admit to plaintiff, to which he failed to respond, to support its contention that his injury never occurred because the worksite was closed. Plaintiff's objection to the notice to admit because Marangos Construction served the disclosure request after

plaintiff filed the note of issue lacks merit, as parties may serve notices to admit until 20 days before trial. C.P.L.R. § 3123(a); Hodes v. City of New York, 165 A.D.2d 168, 170 (1st Dep't 1991); Firmes v. Chase Manhattan Auto. Fin. Corp., 50 A.D.3d 18, 36 (2d Dep't 2008). Nevertheless, while plaintiff's failure to respond to Marangos Construction's notice to admit that plaintiff received an email from his employer about the site closure constitutes an admission, C.P.L.R. 3123(a); Hernandez v. City of New York, 95 A.D.3d 793, 794 (1st Dep't 2012), his receipt of the email does not establish that his work conducting a walkthrough inside the premises was prohibited on the date of his injury.

Even disregarding that the notice Marangos Construction presents from the New York City Department of Transportation (DOT) of the worksite closure for a parade is inadmissible hearsay, the notice excepted emergency work where an emergency number was provided to DOT. Marangos Construction fails to show that plaintiff's work did not fall within this exception.

Marangos Construction also fails to show that plaintiff was outside the class of persons entitled to protection under Labor Law § 240(1). Unlike the plaintiff in Morton v. State of New York, 15 N.Y.3d 50, 58-59 (2010), on which Marangos Construction

relies, plaintiff's employer, 93 Reade Street Associates' property manager, was permitted on 93 Reade Street Associates' premises, where plaintiff was assigned specifically to ensure performance of the renovation according to the plans and all applicable requirements. Finally, while the DOT notice also suspended permits, nothing establishes that plaintiff's work required a permit.

In any event, the conflicting admissible evidence regarding the status of the worksite raises factual and credibility issues. Evans v. Acosta, 169 A.D.3d 438, 439 (1st Dep't 2019); Prevost v. One City Block LLC, 155 A.D.3d 531, 535 (1st Dep't 2017); Medrano v. Port Auth. of N.Y. & N.J., 154 A.D.3d 521, 522 (1st Dep't 2017); Ellerbe v. Port Auth. of N.Y. & N.J., 91 A.D.3d 441, 442 (1st Dep't 2012). Plaintiff testified at his deposition that the worksite was open July 10, 2015, and that he observed Marangos Construction and subcontractors working at the site. In contradiction, Nikolaos Ntatidis, Marangos Construction's project manager, testified at his deposition, and Charles Marangoudakis, Marangos Construction's owner, and Peter Burgess, a nonparty sprinkler subcontractor's project manager, attest in affidavits that work was prohibited at the site July 10, 2015. Even if their testimony and affidavits to that effect derive from the

inadmissible notices, Burgess specifically attests that his employees were turned away from the site, and Ntatidis further testified that it was closed that day, raising the inference that plaintiff could not have gained access, or at least there was no reason for him to have conducted any walkthrough.

B. The Safety Device

A failure to provide adequate safety devices to protect against construction work's elevation related hazards, as required by Labor Law § 240(1), imposes absolute liability on the owner and general contractor, if that failure proximately caused plaintiff's injury. Saint v. Syracuse Supply Co., 25 N.Y.3d 117, 124 (2015); Fabrizi v. 1095 Ave. of the Ams., L.L.C., 22 N.Y.3d 658, 662 (2014); Soto v. J. Crew Inc., 21 N.Y.3d 562, 566 (2013); Wilinski v. 334 E. 92nd Hous Dev. Fund Corp., 18 N.Y.3d 1, 7 (2011). Liability depends on an elevation related hazard and the absence of an adequate safety device or the safety device's failure to provide protection. Berg v. Albany Ladder Co., Inc., 10 N.Y.3d 902, 904 (2008); Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267-68 (2001); Ervin v. Consolidated Edison of N.Y., 93 A.D.3d 485, 485 (1st Dep't 2012); Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 9-10 (1st Dep't 2011).

Contrary to Marangos Construction's contention, Labor Law §

240(1) covers temporary stairs, and therefore its protections apply to falls from temporary stairs. O'Brien v. Port Auth. of N.Y. & N.J., 29 N.Y.3d 27, 40 (2017); McGarry v. CVP 1 LLC, 55 A.D.3d 441, 441 (1st Dep't 2008); Stephens v. Triborough Bridge & Tunnel Auth., 55 A.D.3d 410, 411 (1st Dep't 2008); Megna v. Tishman Constr. Corp. of Manhattan, 306 A.D.2d 163, 164 (1st Dep't 2003). See Morris v. City of New York, 87 A.D.3d 918, 919 (1st Dep't 2011). The fact that plaintiff fell only a few steps instead of all the way down the staircase does not affect defendants' liability under Labor Law § 240(1). Reavely v. Yonkers Raceway Programs, Inc., 88 A.D.3d 561, 563 (1st Dep't 2011); Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d 1, 12 (1st Dep't 2011); Stephens v. Triborough Bridge & Tunnel Auth., 55 A.D.3d at 411; Suwareh v. State of New York, 24 A.D.3d 380, 381 (1st Dep't 2005).

Regarding the adequacy of the stairs for plaintiff's safe descent, however, again Ntatidis's testimony raises factual and credibility issues precluding summary judgment regarding plaintiff's Labor Law § 240(1) claim. O'Brien v. Port Auth. of N.Y.& N.J., 29 N.Y.3d at 33; Medrano v. Port Auth. of N.Y. & N.J., 154 A.D.3d at 522; Ellerbe v. Port Auth. of N.Y. & N.J., 91 A.D.3d at 442. Both plaintiff and Jordan Krauss, the president

and sole shareholder of the property manager and a member of 93 Reade Street Associates, testified at their depositions that the tread of the first step, on which plaintiff fell, was shorter from back to front as he descended than the other treads. Plaintiff further testified that he complained repeatedly to Ntatidis about this condition before plaintiff was injured. Yet Ntatidis insisted that the stairs' treads were uniformly 9.5 inches from back to front and denied that plaintiff complained to Ntatidis about the temporary stairs before plaintiff was injured.

Plaintiff's expert, Robert Frien, moreover, did not inspect the treads. His conclusions regarding the treads' dimensions based only on his examination of photographs of the temporary stairs, absent any comparative fixed measurement, lack a foundation to provide accurate measurements. See Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66, 82 (2015); Jones v. 3417 Broadway LLC, 172 A.D.3d 551, 551 (1st Dep't 2019); Pitt v. New York City Tr. Auth., 146 A.D.3d 826, 828 (1st Dep't 2017); Garcia v. DPA Wallace Ave. I, LLC, 101 A.D.3d 415, 416 (1st Dep't 2012).

III. 93 READE STREET ASSOCIATES' MOTION

93 Reade Street Associates seeks contractual indemnification against Marangos Construction because plaintiff's injury arose from Marangos Construction's work. Marangos Construction

contends that, for the reasons that plaintiff's claim lacks merit, his injury did not arise from Marangos Construction's work and that, even it his injury did arise from unsafe temporary stairs, 93 Reade Street Associates is liable because it received notice of the hazard.

The parties stipulated at oral argument that the contract between 93 Reade Street Associates and Marangos Construction dated December 11, 2013, was authenticated and admissible for purposes of the parties' motions for summary judgment. Sections 9.1.1 and 9.1.5 of the contract obligate Marangos Construction to indemnify 93 Reade Street Associates for claims arising from Marangos Construction's work. Plaintiff's injury on temporary stairs constructed by Marangos Construction thus would trigger its duty of contractual indemnification. Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Guzman v. 170 W. End Ave. Assoc., 115 A.D.3d 462, 463 (1st Dep't 2014); Fiorentino v. Atlas Park LLC, 95 A.D.3d 424, 426-27 (1st Dep't 2012).

The conflicting evidence delineated at the outset regarding whether plaintiff in fact was injured at Marangos Construction's worksite also precludes summary judgment on 93 Reade Street Associates' cross-claim for contractual indemnification. Evans

v. Acosta, 169 A.D.3d at 439; Prevost v. One City Block LLC, 155 A.D.3d at 535; Medrano v. Port Auth. of N.Y. & N.J., 154 A.D.3d at 522; Ellerbe v. Port Auth. of N.Y. & N.J., 91 A.D.3d at 442. Marangos Construction's failure to deny its inspection of the temporary stairs before plaintiff's injury or, after his injury, to question his presence at the site if it was in fact closed merely raises further credibility issues. Krauss did not question plaintiff about his presence at the site either, but Krauss testified that no one advised him the site was closed.

IV. MARANGOS CONSTRUCTION'S MOTION

For the reasons explained above above, factual and credibility issues preclude summary judgment in favor of any party, including Marangos Construction, on plaintiff's Labor Law § 240(1) claim and 93 Reade Street Associates' contractual indemnification cross-claim. Contrary to Marangos Construction's contention, plaintiff's motion for summary judgment on only his Labor Law § 240(1) claim does not constitute an abandonment of his other claims. Kempisty v. 246 Spring St., LLC, 92 A.D.3d 474, 475 (1st Dep't 2012). Plaintiff's limitation of his motion to a particular claim is distinguishable from a failure to address all the claims that Marangos Construction's motion for summary judgment seeks to dismiss. Id. See Rodriguez v.

Dormitory Auth. of the State of N.Y., 104 A.D.3d 529, 530-31 (1st Dep't 2013); Cardenas v. One State St., LLC, 68 A.D.3d 436, 438 (1st Dep't 2009).

In opposition to Marangos Construction's motion plaintiff nevertheless conceded at oral argument that he relied only on 12 N.Y.C.R.R. §§ 23-1.7(f) and 23-2.7 to support his claim under Labor Law § 241(6). Marangos Construction maintains that 12 N.Y.C.R.R. § 23-1.7(f) does not apply because it provided a staircase. 12 N.Y.C.R.R. § 23-1.7(f) supports plaintiff's Labor Law § 241(6) claim, however, because the regulation requires means of access above ground that is safe and free of defects, a condition that Marangos Construction fails to establish. Garcia v. Neighborhood Partnership Hous. Dev. Fund Co., Inc., 113 A.D.3d 494, 496 (1st Dep't 2014); Vasquez v. Urbahn Assoc. Inc., 79 A.D.3d 493, 493 (1st Dep't 2010); McGarry v. CVP 1 LLC, 55 A.D.3d at 442; Conklin v. Triborough Bridge & Tunnel Auth., 49 A.D.3d 320, 321 (1st Dep't 2008).

Contrary to Marangos Construction's contention, 12 N.Y.C.R.R. § 23-2.7(b) is sufficiently specific to support plaintiff's Labor Law § 241(6) claim. Ramputi v. Ryder Constr. Co., 12 A.D.3d 260, 260-61 (1st Dep't 2004). See Morris v. City of New York, 87 A.D.3d at 919. This regulation requires

temporary stairways' treads to be at least 10 inches from back to front. 12 N.Y.C.R.R. § 23-2.7(b). Plaintiff's and Krauss' testimony that the first step's tread was shorter than the other treads, plus Ntatidis's testimony that the treads were only 9.5 inches, not at least 10 inches, from back to front, precludes a finding that Marangos Construction complied with this regulation, thus supporting plaintiff's Labor Law § 241(6) claim. Contreras v. 3335 Decatur Ave. Corp., 173 A.D.3d 496, 497 (1st Dep't 2019); Urquiza v. Park & 76th St., Inc., 172 A.D.3d 518, 519 (1st Dep't 2019); DeMercurio v. 605 W. 42nd Owner LLC, 172 A.D.3d 467, 467 (1st Dep't 2019); Garcia v. Neighborhood Partnership Hous. Dev. Fund Co., Inc., 113 A.D.3d at 496. See Bellucia v. CF 620, 172 A.D.3d 520, 522-23 (1st Dep't 2019). Based on plaintiff's concession, the court nevertheless dismisses so much of plaintiff's Labor Law § 241(6) claim as relied on 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7(d) and (e)(2), 23-2.1(b), and 23-3.3(f).

Finally, Marangos Construction maintains that it is not liable for plaintiff's injury based on Labor Law § 200 or ordinary negligence because Marangos Construction did not control or supervise plaintiff. Since his claims arise from a dangerous condition on the premises, however, Marangos Construction's liability depends on its creation or actual or constructive

notice of the condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). Both plaintiff and Ntatidis testified that Marangos Construction constructed the stairs. The testimony by plaintiff and Krauss regarding the first tread's size and irregularity leaves factual issues whether Marangos Construction created a dangerous condition. Orofino v. 388 Realty Owners, LLC, 146 A.D.3d 532, 534 (1st Dep't 2017); Sanchez v. Irun, 83 A.D.3d 611, 612 (1st Dep't 2011); Gutierrez v. New York City Tr. Auth., 59 A.D.3d 260, 260 (1st Dep't 2009); Vila v. Cablevision of NYC, 28 A.D.3d 248, 249 (1st Dep't 2006). In light of the factual issues regarding Marangos Construction liability, dismissal of 93 Reade Street Associates' cross-claims for implied indemnification and contribution also is premature. Stimmel v. Osherow, 133 A.D.3d 483, 485 (1st Dep't 2015); McCullough v. One Bryant Park, 132 A.D.3d 491, 492-93 (1st Dep't 2015); Greater N.Y. Mut. Ins. Co. v. ERE LLP, 125 A.D.3d 417, 418 (1st Dep't 2015); Tamhane v. Citibank, N.A., 61 A.D.3d 571, 573 (1st Dep't 2009).

V. CONCLUSION

In sum, as set forth above, the court grants defendant Marangos Construction Corp.'s motion for summary judgment only to

the extent of dismissing plaintiff's Labor Law § 241(6) claim insofar as it is based on violations of 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7(d) and (e)(2), 23-2.1(b), and 23-3.3(f), but otherwise denies Marangos Construction's motion. C.P.L.R. § 3212(b) and (e). The court also denies the separate motions by plaintiff and defendant 93 Reade Street Associates, LLC, for partial summary judgment. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: September 5, 2019

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.