

Guaman v 178 Ct. St., LLC

2019 NY Slip Op 34721(U)

April 25, 2019

Supreme Court, Queens County

Docket Number: Index No. 713607/16

Judge: Rudolph E. Greco, Jr.

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.
Justice

IAS Part 32

-----x Index No. 713607/16
FAUSTO GUAMAN,

Plaintiff,

Motion Date: 2/28/19

-against-

Motion Seq. No. 2

178 COURT STREET, LLC and DYNATEC
CONTRACTING INC.,

Defendants.
-----x

The following papers read on this motion by plaintiff Fausto Guaman for partial summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action against defendants 178 Court Street, LLC (178 Court) and Dynatec Contracting Inc. (Dynatec) and seeking leave to amend the complaint, and upon the grant of such leave, to add a cause of action under Labor Law § 241-a, and a cross motion by 178 Court and Dynatec for summary judgment dismissing the Labor Law §§ 241(6), 241-a and 200 as well as common-law negligence causes of action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 47-61
Notice of Cross Motion - Affidavits - Exhibits...	EF 62-77
Answering Affidavits - Exhibits.....	EF 78-82; EF 83
Reply Affidavits.....	EF 84-86

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained during the course of employment on June 30, 2016 when he fell through an uncovered opening in the unfinished second floor while working on a construction project located at 178 Court Street in Brooklyn, New York (the subject

premises). The subject premises was owned by 178 Court and the general contractor on the job was Dynatec, who retained subcontractor Safetx Contracting Corp. (Safetx)¹ to perform structural steel and iron work on this project to construct a new two-story commercial building. Plaintiff was employed by Safetx as a construction laborer on the project.

Christou Stavrou (Stavrou), the "site superintendent" from Dynatec, was charge of work on the project, and was present on site daily. According to him, Dynatec was not responsible for providing workers with safety equipment, but Stavrou testified that he would discuss worker safety and use of personal protective equipment with the foreman from Safetx, Sheik Shakur (Shakur).

Safetx's job included erecting steel beams, steel columns, decking and stairs. After installing the structural steel and pouring the concrete for the first floor, it began installing the structural steel for the second floor, which involved setting up vertical columns and horizontal beams, and the metal decking. At the same time the metal decking was installed, Safetx also installed safety cables around the perimeter of the building by attaching them to steel columns; they were intended to prevent falls when safety harness lanyards were hooked onto them. The cables were one-quarter inch in diameter and installed at three levels around the second floor's perimeter: the bottommost at 4-6" above the floor, the middle level at 24" above the floor, and the top cables at 42-48" above the floor.

Plaintiff wore his own harness on the job, with a lanyard six feet long for securing to anchoring points. According to plaintiff, prior to the accident, Shakur, his supervisor, had generally instructed him to latch his harness to the safety cables around the perimeter wherever he could. However, he alleges that the way the cables were set up did not allow him to keep his harness constantly secured to the cables.

Plaintiff testified that on the day of the accident, he was instructed to work on the second floor to finish installing the metal decking that was used for forming the building's concrete floor. At the time of the accident, he was in the process of moving pieces of metal decking from where it was stored on the second floor to where he was going to install it. After receiving instructions from Shakur, plaintiff began measuring the hole while secured to a safety cable by his harness and lanyard. He then

¹ Defendants have since discontinued the action against Safetx.

walked over to where Safetx stored the metal decking materials, about 20 feet away, in between two floor openings where future staircases were intended to be installed. The uncovered staircase openings had a one-quarter inch safety cable surrounding the perimeter as well. To reach the storage area, plaintiff had to unhook his lanyard, as it was impossible to reach the materials while tethered. As he was pulling the piece of metal decking backwards with both hands, he tripped, causing him to fall 16 feet from the second floor through the uncovered 10 by 15 foot opening down to the ground floor. He testified that as he was dragging the metal decking material, there was nowhere he could tie off his harness, thus his harness lanyard was not hooked to any cables at the time of his accident.

As a preliminary matter, the court notes that, contrary to defendants' assertions, plaintiff's motion is sufficiently supported. Even if the affidavits annexed in support of the motion from non-party witnesses Jackson Pinos (Pinos), his coworker, and Shakur, his foreman from Safetx, were not considered proof from persons with knowledge of the facts under CPLR 3212(b), plaintiff's motion is not defective, as plaintiff submits other proof such as his own deposition testimony along with an attorney affirmation (see *Vetrano v J, Kokolakis Contr., Inc.*, 100 AD3d 984 [2012], *Maragos v Sakurai*, 92 AD3d 922 [2012]).

LABOR LAW § 240(1)

Labor Law § 240 (1) protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" (*Ross v Curtis Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). The statute imposes a non-delegable duty upon owners, contractors, and their agents to provide adequate safety measures at the work site and is liberally construed to accomplish its purpose of placing the ultimate responsibility for safety practices on the owner and general contractor rather than on individual workers who are "scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985] [internal quotation marks and citation omitted], *rearg denied* 65 NY2d 1054 [1985]). Building owners and contractors under this provision are absolutely liable when a violation of Section 240 (1) proximately causes a worker's injuries attributable to falls from ladders, scaffolding, or other elevation devices that do not provide proper protection against such "harm directly flowing from the application of the force of gravity to an object

or person" (Ross, 81 NY2d at 501 [internal quotation marks and citation omitted]).

Thus, 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 *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658, 662-663 [2014]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-288 [2003]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653 [2014]). Further, a plaintiff's alleged comparative negligence is not a defense to absolute liability under Labor Law § 240 (1) (see *Zimmer*, 65 NY2d at 521; *Garzon v Viola*, 124 AD3d 715, 716-717 [2015]). Thus, a plaintiff must prove only that the statute was violated and that the violation was a proximate cause of the injuries sustained (see *Moran v 200 Varick St. Assoc., LLC*, 80 AD3d 581, 582 [2011]; *Camilca v Hansson*, 40 AD3d 796, 797 [2007]; *Zimmer*, 65 NY2d at 519). Where there is no statutory violation, or where the plaintiff's own actions were the sole proximate cause of the injuries, there can be no recovery under Labor Law § 240 (1) (see *Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646, 647-648 [2013]; *Treu v Cappelletti*, 71 AD3d 994, 997 [2010]; see also *Blake*, 1 NY3d at 290).

In moving for summary judgment, plaintiff argues that he was not provided with adequate safety devices to protect him from the elevation-related risk to which he was exposed while performing the metal decking installation work on the second floor. He testified that there was nowhere near the pile of metal decking he could tie off his safety harness, and no lifelines, cables nor other safety devices were installed in the work area to prevent his fall into the opening. Plaintiff contends that defendants' failure to provide adequate safety devices for his work on the construction site, in violation of Section 240(1), proximately caused the injuries he sustained in his accident. In opposition, defendants contend that triable issues remain regarding whether plaintiff's own conduct of unhooking his harness was the sole proximate cause of the accident.

In support of his motion, plaintiff proffers the affidavits of Jackson Pinos (Pinos), his coworker, as well as the affidavit of Shakur. Pinos stated that plaintiff had to unhook his harness in order to obtain the materials to perform the work because the lanyard could not reach, and there was nowhere to tie off the harness while getting the additional materials. Shakur stated that plaintiff's harness was tied off while measuring the space where he was about to install metal decking, but he had to unhook his harness in order to walk over to where the metal decking materials

were located. Shakur added that plaintiff had followed all safety instructions. Both affiants stated that they did not witness the accident.

In support of defendants' opposition papers, however, Pinos and Shakur submitted affidavits as well, which were contradictory to their original ones. Pinos therein stated that while plaintiff was finishing the metal decking installation work for the second floor, before Pinos packed up his tools and headed to the truck, he observed plaintiff attempting to cut decking into the opening, and his harness was not tied off at that point. However, he added, plaintiff could have tied off to a cable that was located about two feet away. He also stated that plaintiff fell through the same hole where he was placing the decking. According to Shakur's affidavit, he saw plaintiff before and after his accident wearing a safety harness. He stated that metal safety cables surrounded the perimeter of each of the two stairway openings on the second floor, and that there were posts for harnesses and lanyards to be latched onto. He noted that before the accident, these areas were less than three feet from where plaintiff was working, and that plaintiff could have latched and secured his harness onto any of those cables. He averred that the area where plaintiff was working did not require him to untie his harness because the steel materials needed were located within a safe distance of an anchoring point. Stavrou similarly testified that safety cables were installed at the opening of the staircase as well.

Where a worker is provided with a safety device, the issue of whether the particular safety device provided proper protection is generally a question of fact for the jury (see *Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865, 866 [2016]; *Carrion v City of New York*, 111 AD3d 872, 873 [2013]). In light of the conflicting affidavits from Pinos and Shakur, and furthermore, the statements regarding the existence of safety cables around the perimeter of the stairway openings, triable issues remain regarding whether the safety devices provided by defendants were adequate or sufficient for the performance of plaintiff's metal decking work on the second floor, and if not, whether additional safety devices should have been provided, and whether the absence of such safety devices was a proximate cause of the accident (see *Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 Ad3d 720, 722 [2010]; *Soltes v Brentwood Union Free School Dist.*, 47 AD3d 804, 805 [2008]; *Lofaso v J.P. Murphy Assoc.*, 37 AD3d 769, 771 [2007]; see also *Silva v FC Beekman Assocs., LLC.*, 92 AD3d 754, 755-756 [2012] [conflicting evidence about whether safety devices were in fact provided]). As it cannot be said as a matter of law that defendants violated Labor Law § 240(1) by failing to provide proper protection for plaintiff's work, or that such violation was a proximate cause of plaintiff's

accident, plaintiff fails to meet his prima facie burden of establishing entitlement to judgment as a matter of law, and summary judgment must be denied (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ramsey*, 79 Ad3d 720).

LABOR LAW § 241(6)

Labor Law § 241 (6) provides in pertinent part:

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

The statute, enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a non-delegable duty upon owners and contractors to comply with the specific safety regulations set forth in the New York State Industrial Code regulations (12 NYCRR § 23 et seq) (*Ross*, 81 NY2d at 501-502). Thus, a plaintiff supports a Labor Law § 241 (6) cause of action by demonstrating that his or her injuries were proximately caused by a violation of an Industrial Code rule applicable to the circumstances of the accident and setting forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*Ross*, 81 NY2d at 502; see also *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 868 [2017]).

In his bill of particulars, plaintiff alleges a litany of Industrial Code violations as predicates for his Labor Law § 241(6) cause of action. However, on the branch of his motion seeking summary judgment on the Section 241(6) cause of action, as well as in opposition to defendants' cross motion to dismiss same, plaintiff relies only on violations 12 NYCRR 23-1.7(b)(1)(i) and 23-1.16(b), thereby effectively abandoning those remaining violations by failing to demonstrate the applicability of such regulations to the facts herein, and that they were violated (see *Harsch v City of New York*, 78 AD3d 781, 783 [2010]).

The court turns first to Industrial Code section 23-1.7(b)(1)(i), which provides that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." This section is undisputedly sufficiently specific and applicable

to the instant facts, and plaintiff testified that there was no covering at all on the staircase opening through which he fell, nor were there safety railings or netting, and the absence of such safety devices was a proximate cause of his accident. Nevertheless, triable issues remain whether the safety cable surrounding the staircase opening constituted a compliant safety device pursuant to this regulation (see generally *Ortiz v 164 Atlantic Ave., LLC*, 77 AD3d 807, 809-810 [2010]; *Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2005]).

Turning to Industrial Code section 23-1.16(b), which requires, in relevant part, that safety belts and harnesses be properly attached to a tail line or lifeline so that "if the user should fall such fall shall not exceed five feet," the court finds that triable issues remain regarding whether defendants provided sufficient anchoring points at which to tie off, and whether plaintiff could have tied off his harness at all times while working on the second floor (see *Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924 [2017], citing *Giordano v Tishman Constr. Corp.*, 152 AD3d 470, 471 [1st Dept 2017]).

Therefore, outstanding triable issues preclude the grant of summary judgment in favor of either party on the Section 241(6) cause of action, as predicated on violations of Industrial Code sections 23-1.7(b)(1)(i) and 1.16(b).

LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE

Next, the court turns to the branch of defendants' cross motion seeking summary judgment dismissal of the Labor Law § 200 and common-law negligence causes of action. Labor Law § 200 codifies a common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Imposing liability on an owner or contractor under a Labor Law § 200 and/or a common-law negligence cause of action requires evidence that the owner or contractor either had authority to control and supervise the manner in which the underlying work was performed, or that the owner or contractor created or had actual or constructive notice of the alleged dangerous condition which caused the accident (see *DiMaggio v Cataletto*, 117 AD3d 984, 986 [2014]; *Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 814 [2013]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 62 [2008]).

In cross-moving for summary judgment, defendants demonstrate, prima facie, that they did not supervise or control the manner or method of the work, based on plaintiff's deposition testimony stating that the only person who supervised his work was Shakur,

his foreman from Safetx, as well as Stavrou's deposition testimony that although he coordinated the project and was present on the work site everyday, he did not manage Safetx's work on the site or provide Safetx's workers with materials or safety equipment.

However, insofar as this action concerns an allegedly dangerous condition on the work site, the court finds that 178 Court, as owner, and Dynatec, as general contractor, both fail to make the requisite showing that they did not create, or have actual or constructive notice of the subject condition (see *Vita v New York Law Sch.*, 163 AD3d 605, 607-608 [2018]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2015]; *Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938 [2009]). In this regard, defendants rely on the deposition testimony of Stavrou stating that he was aware of safety cables surrounding the perimeter of the building as well as the staircase openings, which is insufficient to eliminate all questions of fact as to whether they had control over the premises where the accident occurred and whether they created or had actual or constructive notice of the dangerous condition, particularly in light of the triable issues regarding the sufficiency of the safety devices (see *Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046 [2012]; *Reilly-Geiger v Dougherty*, 85 AD3d 1000 [2011]; *Chowdhury v Rodriguez*, 57 AD3d 121, 132 [2008]). Thus, summary judgment for defendants on the Section 200 and common-law negligence causes of action is not appropriate at this juncture.

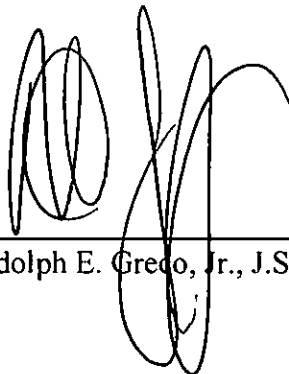
AMENDMENT TO INCLUDE LABOR LAW § 241-a

Finally, the court denies plaintiff's request for leave to amend the complaint to include a claim under Labor Law § 241-a, which provides that persons working in elevator shaftways, hatchways and stairwells must be protected by planking laid not more than two floors above and not more than one floor below the level on which the individual is working (see *Brownrigg v New York City Hous. Auth.*, 70 AD3d 619, 621 [2010]). Insofar as plaintiff undisputedly did not fall more than two stories, such statute is inapplicable to the circumstances herein and the proposed amendment is therefore meritless or palpably insufficient as a matter of law (CPLR 3025[b]; see generally *Calamari v Panos*, 131 AD3d 1088, 1089 [2015]; see *Nevins v Essex Owners, Corp.*, 259 AD2d 384 [1st Dept 1999]; *Riley v Stickl Constr. Co.*, 242 AD2d 936, 936-937 [4th Dept 1997]; *Marcellino v Nigro*, 149 AD2d 775 [3d Dept 1989][1989]).

Accordingly, plaintiff's motion for partial summary judgment under Labor Law §§ 240(1) and 241(6) is denied, as is its application seeking leave to amend the complaint to add a cause of action under Labor Law § 241-a. Defendants' cross motion is granted only with respect to summary judgment dismissal of the Labor Law § 241(6) cause of action as predicated on all alleged violations except 12 NYCRR 23-1.7(b)(1)(i) and 23-1.16(b) and denial of plaintiff's request for leave to amend his complaint; the

cross motion is denied with respect to the causes of action under Labor Law §§ 241(6) (as predicated on violations of 12 NYCRR 23-1.7[b][1][i] and 23-1.16[b]) and 200 as well as common-law negligence, which survive dismissal.

Dated: April 25, 2019



Rudolph E. Greco, Jr., J.S.C.

FILED
MAY -8 2019
COUNTY CLERK
QUEENS COUNTY