Cuji v 225 Fourth LLC
2019 NY Slip Op 35259(U)
September 20, 2019
Supreme Court, Queens County
Docket Number: Index No. 704101/2016
Judge: Rudolph E. Greco, Jr.
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE Rudolph E. Greco, Jr. IA Part 32
Justice

ESTALIN CUJI,

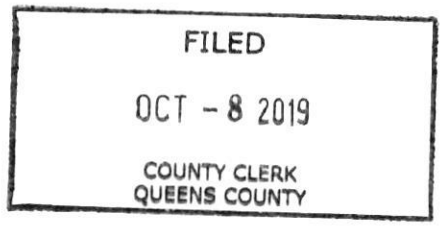
Plaintiff,

-against-

225 FOURTH LLC, JRM CONSTRUCTION MANAGEMENT, LLC,

Defendants.

Index Number 704101/2016
Motion Date: August 1, 2019
Motion Seq. Nos. 4 &5
Motion Cal. No.



The following papers EF numbered below read on (1) this motion (seq. No 4) by plaintiff Estalin Cuji for, inter alia, summary judgment against defendant 225 Fourth LLC and defendant JRM Construction Management, LLC on his cause of action arising under Labor Law § 240, (2) on this motion (seq. no. 5) by defendant JRM Construction Management, LLC for summary judgment dismissing the complaint against it, and (3) on this cross motion by defendant 225 Fourth LLC for summary judgment dismissing the complaint against it.

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Upon the foregoing papers it is ordered that: The branch of the cross motion by defendant 225 Fourth LLC which is for summary judgment dismissing the causes of action based on common law negligence and Labor Law §200 asserted against it is granted. The branch of the motion by defendant JRM which is for summary judgment dismissing the common law negligence and Labor Law §200 causes of action asserted against it is denied. Those branches of the motions and of the cross motion which pertain to the cause of action based on Labor Law §240 are denied. Those branches of the motions and of the cross motion which pertain to the cause of action based on Labor Law §241(6) are denied.

I. The Allegations of the Plaintiff

On March 21, 2016, plaintiff Estalin Cuji, an employee of Titan Construction Demolition, performed demolition work at premises known as 225 Park Avenue South, New York, New York. Defendant 225 Fourth LLC, the owner of the property, hired defendant JRM Construction Management, LLC to act as the general contractor for the project. The plaintiff worked on the roof above the nineteenth floor of the building. The plaintiff was directed to chip a hole in a five foot by eight foot area of the roof that had been sectioned off with spray paint. He used a chipping gun to do his work on the concrete roof, and, after approximately thirty minutes, he had chipped about a one and a half foot wide hole. The part of the roof that he was standing on suddenly collapsed, and he fell through the roof and onto the nineteenth floor of the building. He had not been provided with any safety devices.

II. The Deposition Testimony

A. John Moran

John Moran, the vice-president of operations for ORDA Management, the owner's managing agent, testified as follows: The owner hired defendant JRM to act as the general manager on the construction project, and JRM in turn had hired all of the subcontractor's, including the plaintiff's employer. JRM supervised the construction work, and its site supervisors monitored the job site on a daily basis.

B.George Huffman

George Huffman, the construction supervisor for JRM, testified as follows: JRM hired all of the subcontractors, and its employees walked through the job site to check the progress of the work, manpower, safety and cleanliness. He and other JRM employees were responsible for supervising and monitoring Titan's employees to ensure that they were chipping away the correct area of the roof. JRM had the authority to stop any work that was

not being done in a safe manner and also had the authority to shut down the job site. JRM never provided the plaintiff with any safety harnesses.

C. Joseph Consilgio

Joseph Consilgio, Titan's foreman, testified as follows: Wooden planks had been given to the plaintiff to use when working on the roof. Consilgio did not witness the plaintiff's accident, and he had no direct knowledge of it. On the day of the plaintiff's accident, Consilgio went up to the roof at 9:00 AM and again at 10:30 AM, each time for approximately twenty minutes, JRM had the responsibility for ensuring that everyone wore a safety harness while working at an elevated height. On the date of the accident, all employees were wearing personal protective equipment including yellow harnesses.

D.Wilson Landy Camas

Wilson Landy Camas, a laborer for Titan, testified as follows. He worked with the plaintiff on the day of the accident as they chipped away at an area of the roof, but he did not see the accident because he sometimes left the roof several times to get equipment or to use the bathroom located in the basement of the building. Only he and the plaintiff worked on the roof at the time of the accident. No one had provided him or the plaintiff with a harness on the date of the accident. There were no barriers or railings around the perimeter of the roof, nor were there any beams to tie a harness. The plaintiff complained about back pain at around 11:00 AM and left to buy pills for the pain. Camas could see that the plaintiff could not straighten up by the end of the day. Some time after the accident, the plaintiff told him that he had fallen through the roof , but did not want to say anything for fear of losing his job.

E. Plaintiff Estalin Cuji

At the time an area of the roof collapsed, he was working alone. JRM's employees were not present at the time of the accident and were not supervising his manner of work. The plaintiff had been standing inside the spray-painted area of the roof that he had been chipping away at when the area collapsed. Wilson Landy had given him wooden planks to use while he worked. Immediately after his fall, he got up, walked down the stairs to go to his locker which was in the basement, and then walked back up the stairs to the roof. He worked on the roof for the rest of the day, walked to a park where he sat for a while, and then, carrying his workbag, walked to his second job which also required physical labor about twenty blocks away.

II. Discussion

A. Labor Law §200 and Common Law Negligence

"To prove a prima facie case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff***." (*Gordon v Muchnik*, 180 AD2d 715 [2nd Dept, 1992]; *Zhili Wang v. Barr & Barr, Inc.*, 127 AD3d 964 [2nd Dept.2015].) The common law imposes a duty upon an owner and a general contractor to provide a worker with a safe place to work. (*See, Comes v New York State Electric and Gas Corp.*,82 NY2d 876 [1993]; *Torres v. Perry Street Development Corp.*, 104 AD3d 672 [2nd Dept 2013].) "Section 200 of the Labor Law 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." (*Comes v New York State Electric and Gas Corp.,, supra*, 877 ; *Chowdhury v. Rodriguez* , 57 AD3d 121 [2nd Dept 2008],) The principles of common law negligence determine liability under the statute. (*Chowdhury v. Rodriguez, supra.*) The duty owed may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities where a party has supervisory control. (*See, Smith v. Nestle Purina Petcare Co.,* 105 AD3d 1384 [4th Dept. 2013]; *Clavijo v. Universal Baptist Church,* 76 AD3d 990 [2nd Dept. 2013]; *LaGiudice v. Sleepy's Inc.*, 67 AD3d 969[2nd Dept. 2009] .))

The case at bar belongs in the " manner of the work" or "methods and means" category. In cases involving "manner of the work" or "methods and means," a defendant owner or contractor may be found liable only if he exercises a sufficient level of supervision and control over the plaintiff's work. (*See, Allan v. DHL Exp. (USA), Inc.* 99 AD3d 828 [2nd Dept 2012]; *LaRosa v. Internap Network Servs. Corp.*, 83 AD3d 905 [2nd Dept 2011]; *Ortega v. Puccia*, 57 AD3d 54 [2nd Dept 2008].)

In the case at bar, 225 Fourth LLC, is entitled to summary judgment in its favor because it did not exercise any supervisory control over the plaintiff's work. Where a defendant has not exercised supervisory control and an injury results from a contractor's methods, liability does not attach pursuant to Labor Law § 200. (*Comes v New York State Electric and Gas Corp., supra.*)

Defendant JRM argues that summary judgment in its favor is warranted because " the evidence from all of the non-party witnesses establishes that plaintiff did not have any accident at all" and that the plaintiff's "self-serving statements and testimony are not credible as a matter of law." However, summary judgment in the defendant's favor is not warranted merely because there were no eyewitnesses to the plaintiff's alleged accident,

and, indeed, plaintiffs have prevailed in Labor Law cases even though their accident was unwitnessed. (See, *Smith v. Pergament Enterprises of S.I.*, 271 AD2d 870 [3rd Dept 2000]; *Wittkopp v. ADF Const. Corp.*, 254 AD2d 775 [4th Dept 1998]; *Niles v. Shue Roofing Co.*, 219 AD2d 785 [3rd Dept 1995] .) Moreover, except for patent incredibility (*see, e.g., Citibank, N.A. v. Plagakis*, 8 AD3d 604 [2nd Dept 2004]), "[t]he function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist ***." (*Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731 [2nd Dept 2016].) Plaintiff Cuji's excuse for not immediately informing anyone about his accident – that he feared the loss of his job – is not patently incredible. There are issues of fact and credibility in this case which cannot be resolved on a motion for summary judgment.

The court finds in regard to defendant JRM that there is an issue of fact preclusive of summary judgment concerning the level of supervision and control it exercised over the plaintiff's means and methods of work. (*See, Wunderlich v. Turner Const. Co.*, 147 AD3d 598 [1st Dept. 2017]; *Tomyuk v. Junefield Ass'n*, 57 AD3d 518[2nd Dept 2008].) On the one hand, there is deposition testimony in the record that JRM's supervisors monitored the work site on a daily basis and that George Huffman and other JRM employees were responsible for supervising and monitoring Titan's employees to ensure that they were chipping away the correct area of the roof. JRM had the authority to stop any work being done in an unsafe manner. On the other hand, where a general contractor or construction manager just gives general instructions on what needs to be done, not how to do it, and just monitors and oversees the timing and quality of the work there is an insufficient basis for imposing liability for negligence or for a violation of Labor Law§ 200. (*See, Paz v. City of New York*, 85 AD3d 519 [1st Dept 2011];*Dalanna v. City of New York,* 308 AD2d 400 [1st Dept 2003].) The record permits the inference that JRM was such a general contractor. Moreover, the plaintiff testified that no one was around when his accident occurred, which would include any supervisors, and he allegedly admitted that JRM employees were not actually supervising the manner in which he performed his work.

B. Labor Law §240

Labor Law § 240(1) provides: "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." (*See, Blake v. Neighborhood Housing Services of New York City, Inc.* 1 NY3d 280 [2003].)

The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]), and a violation of the duty results in absolute liability. (*Wilinski v. 334 East 92nd Housing Development Fund,* 18 NY3d 1 [2011]; *Bland v Manocherian*, 66 NY2d 452 [1985]; *Jamindar v. Uniondale Union Free School Dist.*, 90 AD3d 612 [2nd Dept 2011] ; *Paz v. City of New York*, 85 AD3d 519 [1st Dept 2011].) "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense." (*Cahill v. Triborough Bridge and Tunnel Authority* 4 NY3d 35, 39 [2004].) Comparative negligence is not an issue which can be raised by a defendant in a claim based on Labor Law §240(1) . (*Dean v. City of Utica*, 75 AD3d 1130 [4th Dept 2010]; *Gizowski v. State of New Y ork*, 66 AD3d 1348 [4th Dept 2009].) A defendant cannot avoid liability unless the plaintiff worker's own actions were the sole proximate cause of the accident. (*Cahill v. Triborough Bridge and Tunnel Authority, supra; Blake v. Neighborhood Housing Services of New York* , 1 NY3d 280 [2003].)

"[W]here an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240(1) for injuries caused solely by his violation of those instructions ***." (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 37 [2004]; *see, Orellana v. 7 W. 34th St., LLC*, 173 AD3d 886 [2nd Dept. 2019].) According to defendant JRM, the plaintiff admits that Landy provided him with wooden planks to stand on while he performed his work and that Consiglio, his foreman, testified that wooden planks were provided to the plaintiff for his use in the work area. The plaintiff did not use them.

On the other hand, the plaintiff takes the position on this motion that he was not provided with any wooden planks, and, in any event, his task required him to stand near the edge of the hole that he was chipping into the roof. Landy allegedly testified that they were not provided with wooden planks or safety harnesses on the date of the accident.

The plaintiff's expert, John P. Coniglio, opines that the plaintiff "was not provided the required safety devices with railings not present, no safety line, harness, or anchorage provided for fall protection and without scaffolding under the roof he was demolishing ***. *** It is my opinion within a reasonable degree of Professional Safety Certainty that Mr. Cuji was assigned a dangerous task and not provided with the required safety equipment demanded under the circumstances."

No party is entitled to summary judgment on the cause of action based on Labor Law §240. There are issues of fact pertaining to (1) whether an accident even occurred without which there could not be a violation of Labor Law §240 which was the proximate

cause of an injury (*see*, *Nelson v. Ciba-Geigy*, 268 AD2d 570 [2nd Dept 2000]; *Walsh v. Baker*, 172 AD2d 1038 [4th Dept 1991]; *Heath v. Soloff Construction, Inc.*, 107 AD2d 507 [4th Dept 1985]), (2) whether the plaintiff was provided with a safety harness on the date of the accident, (3) whether the plaintiff refused to use the safety harness, (4) whether the plaintiff was provided with wooden planks to use on the date of the accident (the wooden planks would supposedly have landed on steel beams inside the structure and so would supposedly have prevented a fall all the way down to the next floor), (5) whether he refused to use wooden planks provided to him on the date of the accident, and (6) whether the wooden planks would have provided him with adequate protection from a fall. (*See, Kropp v. Town of Shandaken*, 91 AD3d 1087, 1090, [3rd Dept 2012] [issues of fact concerning whether the absence or inadequacy of a safety device proximately caused plaintiff's injuries].)

C. Labor Law §241(6)

" Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed ***." (*Lopez v. New York City Dep't of Envtl. Prot.*, 123 AD3d 982, 983 [2nd Dept 2014]; *Tamarez De Jesus v. Metro-N. Commuter R.R.*, 159 AD3d 951 [2nd Dept 2018.)

Labor Law §241(6) provides, inter alia, that areas in which construction, excavation or demolition is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them. (*See, Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998].) The duty imposed by Labor Law § 241(6) upon owners and contractors is nondelegable..(*Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; Comes v New York State Electric and Gas Corp.*, 82 NY2d 876 [1993]) Because an owner's or general contractor's liability under Labor Law § 241(6) is vicarious, notice of the hazardous condition is irrelevant. (*Burnett v. City of New York*, 104 AD3d 437 [1st Dept 2013].)

A cause of action based on Labor Law § 241(6) "must refer to a violation of the specific standards set forth in the implementing regulations (12 NYCRR Part 123)." (*Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 317 [3d Dept 1987)]; *Spence v. Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936 [2d Dept 2010].) *Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995].) In order to prove a cause of action pursuant to Labor Law § 241(6), a plaintiff must show that the defendant " violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of

conduct as opposed to a general reiteration of common-law principles ***." (*Adams v. Glass Fab, Inc.*, 212 AD2d 972, 973 [4th Dept 1995].) " [T]he particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles ***." (*Misicki v. Caradonna,* 12 NY3d 511, 515 [2009].)

An allegation of a violation of at least one provision of the Industrial Code which requires compliance with specific standards allows a cause of action based on Labor Law §241(6) to withstand a motion for summary judgment. (*Ciraolo v. Melville Court Associates*, 221 AD2d 582 [2nd Dept 1995].)

In the case at bar, the plaintiff asserts that the defendants violated 12 NYCRR 23-1.7(b)(1)(iii)(c) which provides that " [w]here employees are required to work close to the edge of a [hazardous]opening, such employees shall be protected" with " [a]n approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage." This section of the Industrial Code is sufficiently specific to support a Labor Law §241 cause of action. (*See, Norero v. 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2012].) The plaintiff also asserts that the defendants violated 12 NYCRR 23-3.3(c) which provides : "Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means. " (*See, Quishpi v. 80 WEA Owner, LLC*, 145 AD3d 521, 522 [1st Dept. 2016].)This section of the Industrial Code will support a cause of action based on Labor Law §241(6). (*See, Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d [2011].) The plaintiff has adequately alleged violations of the Industrial Code which require compliance with specific standards, and the defendants are not entitled to summary judgment dismissing the cause of action based on Labor Law §241(6) on the ground of an inadequate basis in the Industrial Code. (See, (*Ciraolo v. Melville Court Associates*, *supra*.)

The plaintiff is also not entitled to summary judgment on the Labor Law §241(6) cause of action. A cause of action based on Labor Law §241(6) is subject to the defense of comparative negligence. (*Siragusa v. State*, 117 AD2d 986 [4th Dept 1986].) In the case at bar, there are issues of fact concerning the plaintiff's own comparative negligence which preclude summary judgment. (*See, Fazekas v. Time Warner Cable, Inc.*, 132 AD3d 1401 [4th Dept 2015].) There is evidence in the record sufficient to create triable issues of fact about the plaintiff's own alleged comparative negligence in standing in the very area that he had been chipping away and in not using wooden planks or a harness that

had allegedly been provided to him, The record also permits conflicting inferences to be drawn concerning whether the plaintiff actually experienced the alleged accident.

Dated: Sept. 30, 2019

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