

Flanagan v 610 Lexington Prop. LLC
2020 NY Slip Op 31744(U)
June 5, 2020
Supreme Court, New York County
Docket Number: 158959/2015
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

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INDEX NO. 158959/2015

RODNEY FLANAGAN,

11/27/2019,

Plaintiff,

MOTION DATE 11/27/2019

- v -

MOTION SEQ. NO. 004 005

610 LEXINGTON PROPERTY LLC, RFR REALTY LLC,
PAVARINI MCGOVERN, LLC

DECISION ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 200, 209, 210

were read on this motion to/for SUMMARY JUDGMENT / DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is hereby ordered that the above motions are granted in part and otherwise denied to the extent set forth herein.

Motion Sequence Nos. 004 and 005 are hereby consolidated for disposition.

In Motion Sequence No. 004, defendants 610 Lexington Property, LLC ("610 Lexington"), RFR Realty, LLC ("RFR"), and Pavarini McGovern, LLC ("Pavarini") move for an order, pursuant to CPLR 3211 and/or 3212, dismissing plaintiff Rodney Flanagan's complaint in its entirety. In Motion Sequence No. 005, plaintiff moves for an order (1), pursuant to CPLR 3212, granting partial summary judgment on the issue of liability on his causes of action under New York Labor Law ("Labor Law") Sections 240(1) and 241(6); (2), pursuant to CPLR 3212(c), for

an immediate trial on the issue of damages; and for leave to amend the bill of particulars to more specifically assert the violations of 22 NYCRR 23-1.7(a), 23-1.15, 23-2.1(a)(2), and 23-2.2(a) and (c)(1).

Plaintiff alleges that on June 29, 2015, at approximately 9:00 a.m., he sustained injuries at a construction site on the sixteenth floor of the building located at 610 Lexington Avenue/100 East 53rd Street in Manhattan (the “property”) when he was allegedly struck by a falling piece of lumber. The property was owned by defendants 610 Lexington and RFR. Pavarini was the general contractor at the construction site and agent of the property owners.¹ Plaintiff brings this action against defendants alleging violations of Labor Law Sections 240(1), 241(6) and 200, as well as a cause of action for common law negligence.

Plaintiff alleges that, while bent over and kneeling on one knee and holding a hammer to nail a 5' x 4' piece of plywood to cover a ladder hole, a ten-foot long, 40 to 50 pound 4" x 4" piece of lumber fell down and struck him on his back (the “first alleged accident”), fracturing five vertebrae and, *inter alia*, causing a bulging disc. Plaintiff further claims that ten to fifteen minutes later, after having returned to work and allegedly unaware of the fractures and disc injury, plaintiff was involved in a second accident in which plaintiff exacerbated his injured back by attempting to lift a heavy nine-foot metal panel off of the ground while on top of a ladder and, upon feeling the pain in his back, threw the panel down to the ground (the “second alleged accident”).

Plaintiff's Claims Under Labor Law Section 240(1)

Labor Law Section 240(1) imposes an absolute and nondelegable duty on owners and general contractors to provide proper protection against gravity-related accidents. Although

¹ To the extent that Pavarini contends that it was not the general contractor under the Labor Law, but rather was the “construction manager,” this Court concludes that Pavarini had the indicia of, and in fact was, the general contractor for the purposes of any Labor Law liability. *See Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 863-64 (2005); *Ajche v. Park Ave. Plaza Owner, LLC*, 171 A.D.3d 411, 413 (1st Dep’t 2019).

plaintiff is unable to identify with certainty the exact source of the 4" x 4" piece of lumber that struck him as he did not see it fall on him, especially in light of the fact that it hit his back while he was crouched on the ground, plaintiff provides evidence from which a reasonable inference can be made that, as he asserts, "[i]t is more likely than not that the accident was caused by the toppling of a 4" x 4" that had been in use as a leg or shore [stringer], supporting the plywood sheeting above." NYSCEF Doc. No. 199, at 12. Plaintiff testified that the 4" x 4" came "from the wall where I was walking besides, the elevator shaft wall, or maybe [it] fell off the top deck or could have been holding up the actual floor of the deck. I am not sure." NYSCEF Doc. No. 68, Tr. 46:9-15. After the 4" x 4" piece of lumber struck his back, plaintiff saw that the 4" x 4" that struck him was ten feet long. It is not disputed that the legs of the decks are composed of ten-foot long 4" x 4" planks. Additionally, consistent with plaintiff's allegations regarding the first alleged accident, is the deposition testimony of Anthony English, plaintiff's supervisor from non-party employer Navillus Contracting ("Navillus"), who testified as follows:

Q. How was it that you learned of the accident?

A. Mr. Flanagan approached me and told me his back -- he has sustained an injury on his back.

Q. Did he indicate how he hurt his back?

A. He said a leg had hit him in the back.

Q. What is a leg?

A. A leg would have been a four-by-four post supporting part of the deck structure.

NYSCEF Doc. No. 85, Tr. 16:22-17:6. Additionally, plaintiff has provided expert opinion evidence that each of the possible ways that the 4" x 4" could have fallen on plaintiff—the 4" x 4" was a leg or stringer and fell from the deck above, the 4" x 4" fell down through the ladder access

hole from the deck above, or the 4" x 4" was leaning vertically against a wall and toppled over— Labor Law Section 240(1) would have been violated. *See* NYSCEF Doc. No. 190. This Court also notes that defendants offer no evidence of an alternate explanation as to how a 4" x 4" piece of lumber could have fallen upon plaintiff that does not involve a violation of Labor Law Section 240(1).²

Defendants also argue that the Labor Law Section 240(1) claim should be dismissed because it was not until sometime after the accident, when plaintiff signed and submitted his undated Workers' Compensation Board ("WCB") Form C-3, "Employee Claim," did plaintiff claim that the first alleged accident occurred as asserted in his complaint. *See* NYSCEF Doc. No. 94, at 1 (describing the accident as "lifting up panel[] for doka panals [sic] and a form work [when] [a] 4x4 leg hit me on my [b]ack and I twisted my [b]ack so I can not [sic] work due to pain"). Contrary to defendants' claim, there is evidence in the record that plaintiff at, and soon after, the time of the accident, consistently described the accident similar to the allegations in his complaint. For example, on the "Injured Party Statement Form," which was completed and signed by plaintiff on the day of the alleged accidents, plaintiff wrote: "Hurt My Back Wen [sic] I was Lifting A Panal [sic] And Bang it off a 4 x 4." NYSCEF Doc. No. 60. Plaintiff later testified in his deposition that "banging [it] off a four by four" meant that a "four by four banged [him] on the back." NYSCEF Doc. No. 84, Tr. 69:8-11. Additionally, medical records from the morning of the accident from MedRite Urgent Care also state that plaintiff described the accident at the time as follows: "Pt reports a piece of wood was leaning against something and fell forward hitting him on the [l]ower mid back." NYSCEF Doc. No. 157, at 2. A "Patient Care Report" from June 30, 2015 similarly

² Further, this Court rejects defendants' argument that liability from a "falling object" under Labor Law Section 240(1) is limited to accidents in which the falling object was in the process of being hoisted or secured. *See Qattrocchi v. F.J. Sciamie Constr. Corp.*, 11 N.Y.3d 757, 758-59 (2008).

states: "Assessment: report for 6/29/2015. PT complaint of L/side - midline back discomfort. 7/10, reaching 10/10 with spasms. + history of static back pain. + low velocity impact by a piece of wood. - obvious trauma noted by exam." NYSCEF Doc. No. 66, at 1.

Taken together, and inferring all inferences in favor of the non-moving party, there are no genuine issues of material fact that exist as to whether the first alleged accident occurred in a manner giving rise to liability under Labor Law Section 240(1). It is evident that the first alleged accident occurred when plaintiff was struck in the back by a 4" x 4" piece of lumber that fell on plaintiff from above, which is the type of gravity-related risk that Labor Law Section 240(1) is designed to protect against. Accordingly, plaintiff's motion for partial summary judgment on the issue of liability as to his Labor Law Section 240(1) claim is granted as to the first alleged accident and the corresponding branch of defendants' motion seeking summary judgment is denied.

Plaintiff asserts that the second alleged accident is also covered under Labor Law Section 240(1) "[d]ue to the defendants' failure to provide [p]laintiff with a pulley, hoist or proper lifting device as required pursuant to Labor Law [Section] 240(1)." NYSCEF Doc. No. 199, at 23. Plaintiff was allegedly injured in the second alleged accident while lifting a nine-foot long section of doka by hand atop a doka wall that was ten feet above the floor. Plaintiff asserts that Labor Law Section 240(1) applies because plaintiff acted as a "human pulley." Plaintiff does not allege that he fell, nor does he allege that something fell on him, in relation to the second alleged accident. While it is possible that the second alleged accident as described by plaintiff could be a violation of Labor Law Section 241(6) to the extent that the lack of a hoist or other device constituted a violation of some applicable Industrial Code, this Court finds that the second alleged accident is not be the type of gravity-related risk subject to liability under Labor Law Section 240(1). Accordingly, that portion of plaintiff's motion seeking partial summary judgment on the issue of

liability as to his Labor Law Section 240(1) claim is denied with respect to the second alleged accident and the corresponding branch of defendants' motion seeking summary judgment dismissing the complaint is granted.

Plaintiff's Claims Under Labor Law Section 241(6)

Plaintiff did not oppose dismissal of his Labor Law Section 241(6) claims based upon the alleged violations of the Industrial Code sections stated in his bill of particulars. However, plaintiff moves to amend his bill of particulars to add new Industrial Code sections, which plaintiff asserts were violated and support his Labor Law Section 241(6) claim. Defendants oppose plaintiff's motion for leave to amend and ask for dismissal of his Labor Law Section 241(6) claim. Alternatively, defendants ask for an opportunity to file a motion for summary judgment on the amended bill of particulars concerning the Labor Law Section 241(6) claim.

This Court grants plaintiff's motion for leave to amend his bill of particulars with regard to the new Industrial Code sections in support of his Labor Law Section 241(6) claim. As such, this Court denies defendants' motion for summary judgment dismissing plaintiff's Labor Law Section 241(6) claim without prejudice to refile within 120 days of service of an amended bill of particulars.


Plaintiff's Claims Under Labor Law Section 200 and Common Law Negligence

The present action is not a case involving a defect inherent in the property causing the alleged accident and injuries. Even if it was, there is no evidence indicating actual or constructive notice of any defect or hazard. Instead, the injuries in this action are alleged to have arisen from the means and methods of the work. To be held liable under Labor Law Section 200, as well as common law negligence, for injuries arising from the means and manner of the work, there must be a showing that the owner and general contractor actually controlled or supervised the work. *See*

O'Sullivan v. IDI Constr. Co., Inc., 7 N.Y.3d 805, 806 (2006). General supervisory control, including overseeing the progress and inspecting the work, "in the absence of actual authority to control the activity bringing about the injury," is not enough to hold an owner or general contractor liable under the statute. Reilly v. Newireen Assocs., 303 A.D.2d 214, 221 (1st Dep't 2004); see Kocurek v. Home Depot, U.S.A.P., Inc., 286 A.D.2d 577, 580 (1st Dep't 2001). Plaintiff admits that he received all work-related instructions at the job from his Navillus supervisors and that he never received instructions as to the means and methods of his work from anyone other than his foremen. See NYSCEF Doc. No. 79, Tr. 31:5-34:18. As defendants did not direct, supervise, or control plaintiff's work, plaintiff's Labor Law Section 200 and common law negligence claims are dismissed and defendants' motion for summary judgment on those claims is granted. Accordingly, the corresponding branches of plaintiff's motion for partial summary judgment on the issue of liability for those claims is denied.

This constitutes the decision of this Court.

Settle order on notice.

<u>6/5/2020</u> DATE	 JAMES EDWARD D'AUGUSTE, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE