Valbuena v Snowplow LH LLC
2020 NY Slip Op 32073(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 157625/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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HENRY VALBUENA,

Plaintiff,

- v -

SNOWPLOW LH LLC, SNOWPLOW LH 2 LLC, LENDLEASE (US) CONSTRUCTION, INC., THE CITY OF NEW YORK, THE NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, and WORLDWIDE GROUP, LTD,

Defendants.

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SNOWPLOW LH LLC, SNOWPLOW LH 2 LLC, and LENDLEASE (US) CONSTRUCTION, INC.,

Third-party Plaintiffs,

-against-

L & L PAINTING CO., INC.,

Third-party Defendant.

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INDEX NO. 157625/2017

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595976/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52-85, 87-99, 104-108

were read on this motion for summary judgment.

By notice of motion, defendants Snowplow LH LLC, Lendlease (US) Construction, Inc., The City of New York, and The New York City Educational Construction Fund (Fund) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and awarding them summary judgment on their third-party contractual indemnification claim. Plaintiff opposes.

Defendant Worldwide Group, LTD has not appeared in the action and is in default.

By stipulation of discontinuance dated January 23, 2020, the third-party complaint against L&L Painting Co., Inc. was discontinued. (NYSCEF 103). Thus, L&L's opposition and cross motion need not be addressed.

I. BACKGROUND

By contract dated December 3, 2013, Snowplow, as owner of the premises located at 252 East 57th Street in Manhattan, hired Lendlease to serve as the general contractor for a construction project there. (NYSCEF 71). On July 2, 2015, Lendlease hired L&L to paint the premises. (NYSCEF 65-69).

Pursuant to a memorandum of severance ground lease dated February 1, 2017, Fund, as landlord, and Snowplow, as tenant, are parties to a ground lease covering the property at 252 East 57th Street. (NYSCEF 99). By verified response to plaintiff's notice to admit dated February 1, 2019, movants admit that Fund is the fee owner of the property located at 252 East 57th Street in Manhattan. (NYSCEF 98).

A Workers' Compensation Board injury report written by an L&L foreperson, dated July 20, 2017, reflects that plaintiff, employed by L&L as a painter, was injured when he fell from a ladder while painting a ceiling at the premises, having missed the last step of the ladder. (NYSCEF 76).

At a hearing held pursuant to Gen. Mun. Law § 50-h and at his deposition, plaintiff testified that he was injured while he was employed as a painter by L&L. His sole supervisor was his foreperson. While L&L had provided him with equipment, including ladders, it gave him no safety harness or belt. On July 20, 2017, plaintiff set up a seven or eight foot A-frame ladder on the 56th or 57th floor of the premises. He did not check to see if the ladder had rubber footings.

The wooden floor was covered with brown paper, which had caused him no previous problems. When painting an area, plaintiff would climb the ladder, and after completing an area, descend the ladder, move it to the next location, and repeat. At approximately 9:30 am, as he stepped from the third to the second step, the ladder moved and he lost his balance and he fell. He does not know why or how far the ladder moved, had descended the ladder without problem some five minutes before the accident, and had experienced no problems with the ladder that morning. (NYSCEF 72, 73).

At his deposition, plaintiff's foreperson testified that he was employed by L&L and that at the time of plaintiff's accident, he was responsible for directing and supervising L&L employees and giving them their daily assignments. According to him, L&L provided the equipment necessary to perform the work, including ladders.

After plaintiff's accident, plaintiff told the foreperson that while descending the ladder, he had missed the last step. He did not recall plaintiff saying that the ladder had moved or slipped and did not know on which floor plaintiff was working. He confirms that he prepared the accident report from the information given to him by plaintiff. In July 2017, either he or the workers would check if the ladders were safe and had rubber footings. He received no complaints from plaintiff about the ladder the morning of his accident. (NYSCEF 75).

At his deposition, Lendlease's senior superintendent for the premises testified that he maintained an office at the site and was responsible for coordinating the activities of the architect, owner, and contractors. On a typical day, he walked the job site to monitor the progress. If he observed a dangerous condition, he had the authority to stop the work. According to him, City had no connection to the project. (NYSCEF 74).

II. LABOR LAW § 240(1)

A. Contentions

1. Movants (NYSCEF 52-81)

Movants contend that there is no evidence that plaintiff's injury was proximately caused by the ladder or by their alleged failure to provide plaintiff with a proper safety device, and observe that plaintiff's foreperson testified that plaintiff had told him that he missed the last step when descending the ladder. They argue that they cannot be held liable absent any allegation that the ladder collapsed or broke, and although plaintiff testified that it moved, he was unable to explain how or why it did so.

2. Plaintiff (NYSCEF 97-99)

Plaintiff contends that even if the ladder was not defective, because it was unsecured and did not remain steady, a *prima facie* violation of Labor Law § 240(1) is demonstrated. He relies on his unequivocal testimony that he fell because the ladder moved during his descent.

3. Reply (NYSCEF 107)

Movants assert that there must be evidence that the ladder was defective for them to be liable, and here, they argue, no such evidence exists.

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB*

AG, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

This statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). It is intended to protect workers from "special hazards" arising when, *inter alia*, the work site is elevated and prone to gravity-related accidents such as falling from a height. (*Runner*, 13 NY3d at 604).

Contractors and owners bear a non-delegable duty under the statute to ensure that workers are provided with adequate protection from these special hazards, and absolute liability will be imposed where a plaintiff's injury is proximately caused by a failure to provide such protection, regardless of a plaintiff's negligence. (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). Thus, in seeking summary judgment based on a violation of Labor Law § 240(1), the defendant must prove, *prima facie*, that the accident was not proximately caused by a violation of the statute, which may be demonstrated if the "plaintiff's own negligent conduct in

failing to use an available and adequate safety device was the sole proximate cause of the accident." (*Santo v Scro*, 43 AD3d 897, 898 [2d Dept 2007]; *Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

Here, as movants do not demonstrate-that safety devices were available to plaintiff or that the ladder was secured, and notwithstanding plaintiff's testimony that the ladder was not defective, his alleged negligence in losing his balance as he descended the ladder does not constitute a defense to a violation of Labor Law § 240(1). (*See Nieto v CLDN NY LLC*, 170 AD3d 431, 432 [1st Dept 2019] [when plaintiff injured by fall from ladder after losing balance, absence of defect irrelevant if ladder unsecured]; *Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018] [well-settled that failure to secure ladder to ensure steadiness while used constitutes violation of Labor Law § 240(1)]; *Hill v City of New York*, 140 AD3d 568, 569-70 [1st Dept 2016] [liability established where unsecured ladder wobbled, causing plaintiff to fall; irrelevant whether he lost balance by losing hold of wrench]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [worker injured when ladder fell not required to demonstrate ladder defective]).

In any event, although the accident report reflects only that plaintiff fell because he had missed the last step of the ladder, whereas he testified that the ladder had moved, a factual issue of credibility exists, which cannot be resolved on summary judgment. (*See In re New York Asbestos Litig.*, 180 AD3d 620 [1st Dept 2020] [while husband's testimony not entirely clear, apparent inconsistencies merely create credibility issues that cannot be resolved on summary judgment]).

Moreover, plaintiff's inability to explain how or why the ladder moved is immaterial.

(*See Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] [plaintiff's description of how or why he fell off ladder irrelevant absent dispute that injuries caused by fall]).

III. LABOR LAW § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating that the defendant violated a regulation setting forth a specific standard of conduct, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Plaintiff opposes only to the extent that movants seek to dismiss his Labor Law § 241(6) claim premised on 12 NYCRR § 23-1.21(b)(4)(ii), which provides that "[a]ll ladder footings shall be firm."

Movants contend that section 23-1.21(b)(4)(i) is inapplicable because plaintiff's

foreperson testified that he would set up the ladders and ensure that they were not defective and had rubber footings. (NYSCEF 52-81). In opposition, plaintiff argues that absent testimony by the foreperson that he set up the ladder that plaintiff had used and ensured that it was not defective and had rubber footings, and given his testimony that he did not investigate the accident, the section applies. (NYSCEF 97-99). In reply, movants reiterate their earlier contentions. (NYSCEF 107).

Evidence that plaintiff's foreperson or the workers routinely check if the on-site ladders are in adequate condition and have rubber footings is insufficient absent evidence that the ladder plaintiff used that day had such rubber footings. Thus, movants fail to sustain their *prima facie* burden that they complied with the regulation. (*See Estrella v GIT Indus., Inc.*, 105 AD3d 555, 555–56 [1st Dept 2013] [failure to affirmatively show that plaintiff's ladder, which allegedly "suddenly moved," complied with firm-footing requirement fatal to summary judgment motion]). In any event, plaintiff raises a triable issue of fact as to "whether the lack of rubber footings constituted a violation of the Industrial Code provision, causing him to fall." (*Id.* at 556).

IV. CITY

As it is undisputed that City neither owned nor managed the construction site, was neither an agent of the owner or contractor, and maintained no control over any of the work, including plaintiff's, it may not be held liable under Labor Law §§ 240(1) or 241(6). (*See Oseguera v Lincoln Properties LLC*, 147 AD3d 704, 704 [1st Dept 2017] [defendant not liable where it was neither owner nor general contractor nor agent thereof and did not supervise or control work]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's claims under Labor Law §§ 200, 240(2), and 240(3) and Labor Law § 241(6), but only as to 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21(b)(1)(3)(i), 23-1.21(b)(4)(iv)(e), 23-5, and 23-9.6, and 29 CFR §§ 1926.1053, 1926.501, 1926.502 1926.451, 1926.452, and 1926.453, are severed and dismissed without opposition, it is further

ORDERED, that the motion for summary judgment of defendants Snowplow LH LLC, Lendlease (US) Construction, Inc., The City of New York's, and The New York City Educational Construction Fund is granted to the extent that plaintiff's causes of action against The City of New York are severed and dismissed, and is otherwise denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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6/29/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE