Torres v Term Fulton Corp.
2020 NY Slip Op 32646(U)
August 14, 2020
Supreme Court, New York County
Docket Number: 162390/2015
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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JOSE TORRES,

Plaintiff,

- v -

TERM FULTON CORP., PARKLAND GROUP LLC,BRAVO BUILDERS LLC,56 FULTON STREET, LLC,ECD NY, INC.,

Defendant.

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INDEX NO. 162390/2015

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for SUMMARY JUDGMENT.

The motion for summary judgment by defendants is granted in part and denied in part. The cross-motion by plaintiff for summary judgment on its Labor Law § 240(1) cause of action and certain of his Industrial Code sections is granted in part and denied in part.

Background

This Labor Law action arises out of plaintiff's alleged injury suffered when his finger was caught in a Comacchio drilling machine during construction of a residential building in Lower Manhattan. Plaintiff claims that he was assigned to investigate why piling pipes were not fitting correctly and would tell the operator of the pile driver how to loosen the pipe and fit it into place. While looking at a pipe and standing on the machine, the pile diver operator suddenly raised the clamp package several feet, Torres lost his balance and he reached out to grab

something to hold. He got the top joint of his left fourth finger caught between parts of the pile driver.

He contends that he eventually got his finger free and jumped off the clamp package and fell seven feet, injuring his back in the process. Plaintiff argues he was not provided with the proper safety equipment to prevent his fall or from getting his finger caught int the pile driver.

Plaintiff alleges numerous violations of the Industrial Code, Labor Law §200 and 240(1).

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court will consider plaintiff's cross-motion. Although defendants point out that the stipulations of adjournment for this motion only contemplated opposition papers, the fact is that the parties entered into a stipulation which provided defendants time to respond to the cross-motion (NYSCEF Doc. No. 69). The Court prefers to decide cases on the merits rather than technicalities.

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) 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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Defendants argue that this claim should be dismissed because the purported accident was caused by the mechanical operation of the pile driver by his coworker. They insist that plaintiff

admits he did not fall off the clamp package, but instead jumped down. Defendants conclude that because the accident was solely mechanical it cannot support a claim under Labor Law § 240(1).

In opposition and in support of his cross-motion on this claim, plaintiff insists his injuries were gravity-related. He points out that a secured platform with a barricade, man-lift or cherry picker could have prevented the accident but instead he was told to stand on the clamp package.

In reply and in opposition to the cross-motion, defendants emphasize that plaintiff "was caused to lose his balance as a result of his co-worker's carelessness in operating the Comacchio machine that they were using" (NYSCEF Doc. No. 71). They maintain that there isn't any safety device that would have prevented plaintiff's accident.

The Court denies this branch of defendant's motion and grants this portion of plaintiff's cross-motion. The fact is that plaintiff contends he jumped off the clamp package in order to avoid being crushed by the machine operated by his coworker. That jump (which plaintiff says was about seven feet) allegedly injured plaintiff's back. That is a gravity-related injury and falls under this provision of the Labor Law.

Defendants' contention that it was only about the mechanical operation of the pile driver is too narrow a reading of the statute. This Court declines to hold that plaintiff should have waited to be crushed by the machine as it moved upwards and then potentially seek recovery under a separate statute. It is true that the accident was caused by the careless operation of the drill, but that carelessness forced plaintiff to jump off the clamp package after getting his finger caught. Defendants' contention that no safety devices could have prevented the accident is of no moment. Plaintiff was told to stand on an elevated platform to help the machine operator maneuver pipes and then step off when the machine was in use; defendants cannot avoid the obligations of the Labor Law where a worker is assigned to work on a platform without any

efforts made to protect him should he need to quickly avoid a massive machine. To hold otherwise would create an exception to the Labor Law permitting defendants to simply argue that there was nothing to be done to protect a worker and avoid responsibility. That is not a result contemplated under this statutory scheme.

Labor Law § 200

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*id.* at 144).

"Where an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

Defendants move to dismiss this cause of action on the ground that there is no evidence that defendants controlled or supervised the manner in which plaintiff did his work. They point out that plaintiff's employer ("ECD") instructed him how to complete his tasks. Defendants observe that there was no defective condition.

In opposition, plaintiff points out that there is an issue of fact because he was standing on the clamp package for the entire morning and these defendants had constructive notice of this clearly dangerous condition. Plaintiff asserts that the site safety manager ignored the dangers of this task.

In reply, defendants admit that defendant Bravo had safety responsibilities, was able to stop work if necessary and had general supervision on the work site but claim that this is not enough to demonstrate it had supervisory control over the manner of plaintiff's work.

The Court finds that there is an issue of fact with respect to this portion of defendants' motion. Plaintiff is correct that there is an issue of fact regarding whether there was constructive notice of a dangerous condition—namely that plaintiff was standing on an elevated surface of a drilling machine without any safety devices. A jury could find that there was ample time for a site safety supervisor to direct plaintiff to get off the drilling machine because it is dangerous to be stationed on top of a platform that could move.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the 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, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

As an initial matter, defendants correctly point out that plaintiff failed to contest the portion of defendants' motion that sought dismissal of the following Industrial Code Sections: 23-1.5, 23-1.7 (and all subsections), 1.8, 1.12(a) and (b), 1.30, 1.32, 1.33(a), 2.5(a) and (b), 23-2.6(a), 23-6, 8.1(b)(1) and (2). These claims are severed and dismissed.

The only remaining portions are 23-1.12(d),(e), (f) and (g), 23-6.1(b), (c), (e) and (g), 23-9.2(a), (b), (d), and 23-9.10.

23-1.12(d), (e), (f), (g)

Defendants move to dismiss these sections of the Industrial Code on the ground that they involve requirements for gears, sprockets, belts, pulleys, flywheels, friction disc drives and wire rope and there is nothing in the evidence submitted that shows plaintiff's accident was caused by any of these items.

Plaintiff opposes and cross-moves for summary judgment on these codes and claims he was endangered by defendants' violation of these provisions.

The Court grants this portion of defendants' motion. These Industrial Code sections mention efforts that should be made to guard power-driven machinery from accidental contact and direct that enclosures, band guards or railings should be used. But the facts here do not evidence that plaintiff had "accidental contact" with the machine; rather, he was standing on it as part of his work. In other words, these sections appear designed to prevent a worker from wandering onto the machine and getting hurt but, here, plaintiff was intentionally on a portion of the pile driver and reached out to grab it when he lost his balance. It was not accidental contact.

The Court finds that plaintiff's accident was not proximately caused by any purported violations of these sections.

23-6.1(b), (c), (e) and (g)

Defendants moves to dismiss these sections on the ground that they relate to material hoisting equipment and the machine here was used for drilling so these provisions are inapplicable.

Plaintiff claims that the accident reports involve 20-foot sections of pipe being hoisted and lowered to the ground.

The Court dismisses these claims because the accident did not occur while pipe was being hoisted. Rather, plaintiff claims it was his job to take a look and see why the piping was stuck and his co-worker suddenly started moving the machine while he was on it; in other words, plaintiff's alleged injuries were not caused while the hoisting was taking place.

23-9.2(a), (b) and (d)

Defendants move to dismiss the provisions asserted under these sections on the ground that they are inapplicable or not a sufficient predicate for liability. In opposition, plaintiff focuses only on section (d) and claims proper protection for moving parts was not provided.

The Court dismisses these claims; as defendants point out, the moving parts of the drilling machine were otherwise protected by their location or design. And, of course, the accident was not caused by the failure to provide protection from moving parts—plaintiff was on the machine and jumped off to save himself from getting crushed after it suddenly started

moving. The proximate cause was the co-worker's carelessness, not the failure to provide protection for moving parts.

23-9.10

The Court also dismisses claims brought pursuant to this section. This section deals with pile drivers but there is nothing in these subsections that might give rise to liability here. For instance, there is no claim that there was a failure to inspect or the operator was not protected (as provided for in sections [b] and [c]).

Summary

The facts in this care are not in serious dispute. Plaintiff was standing on a machine (a pile driver) when his co-worker absent-mindedly started moving the machine. That caused plaintiff to lose his balance, he grabbed at anything to regain his balance and got his left ring finger caught. Plaintiff was able to get his finger free (although his glove and a portion of his finger remained caught in the machine) and he decided to jump off the machine while it soared upwards and he potentially could have been crushed. That states a clear violation of Labor Law § 240(1).

Defendants' claim that it was not a gravity- related incident is belied by the fact that plaintiff jumped from a height to get to safety. Certainly, plaintiff decided to jump off rather than being thrown off or being hit by a falling object. But the Court declines to embrace such a narrow reading of the statute or to find that plaintiff should have waited, possibly get crushed and then sue under some other Labor Law provision. That is not realistic.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants is granted to the extent that the claims brought pursuant to the Industrial Code under Labor Law § 241(6) are severed and dismissed and denied to the extent it sought dismissal of plaintiff's remaining claims; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is granted only to the extent it sought summary judgment as to his Labor Law § 240(1) claim and denied to the extent it sought summary judgment on certain purported Industrial Code sections pursuant to Labor Law § 241(6).

8/14/2020
DATE

ARLENE P. BLUTH, J.S.C.

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