Gomez-Jimenez v 50 W. Dev. LLC
2020 NY Slip Op 33390(U)
September 28, 2020
Supreme Court, Kings County
Docket Number: 501099/2015
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 28th day of September 2020.

PRESENT:
Honorable Reginald A. Boddie, JSC

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LEONIDAS GOMEZ-JIMENEZ,

Plaintiff,

Against

50 WEST DEVELOPMENT LLC and HUNTER ROBERTS CONSTRUCTION GROUP, LLC,

Defendants.

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Index No. 501099/2015
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DECISION AND ORDER

Papers	Numbered
MS 5	Docs. # 48-62, 108
MS 6	Docs. # 64-72, 84, 99-100, 103-105

Upon the foregoing cited papers, the decision and order on defendants' motion and plaintiff's cross-motion for summary judgment, pursuant to CPLR 3212 and Labor Law §§ 240 (1), 241 (6) and 200 and common law negligence, is as follows:

Plaintiff, a laborer employed by nonparty Difama Concrete (Difama), commenced this action to recover for personal injuries allegedly sustained on a jobsite at 50 West Street, New York, New York on November 6, 2014. Defendant 50 West Development LLC (50 West) owned the subject premises and defendant Hunter Roberts Construction Group, LLC (Hunter) was the general contractor for the construction project. Hunter was responsible for the finances of the project and interacted with the subcontractors. Its senior project manager walked the site periodically, met with its subcontractors and discussed the progress of the job. Hunter also employed a site safety

manager with whom its senior project manager would meet. Hunter hired Difama as a subcontractor to perform stripping at the jobsite.

Stripping involves removing "concrete forms," or plywood, from a ceiling. Scaffolding was constructed at the jobsite so workers could access the concrete forms. One group of workers stripped the concrete forms from the ceiling and dropped them to the floor below where another group of workers removed nails, discarded the plywood and swept. It was plaintiff's job to clean up the stripped plywood and sweep the floor. Plaintiff testified he was sweeping when he was hit by a piece of falling plywood. Plaintiff testified that all the employees involved in the stripping work were Difama's employees, he received his work assignments and supervision from Difama employees each day, and Difama supplied the shovels, wheelbarrow and broom plaintiff used to complete his job.

Defendants moved for summary judgment on plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 and common law negligence claim. Plaintiff opposed and cross-moved for summary judgment against defendants on the same claims.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the

statute applies" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Liability under Labor Law § 240 (1) arises when the accident occurs because of a failure to use necessary and adequate hoisting or securing devices (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). There is no basis of liability pursuant to Labor Law § 240 (1) in "deliberate dropping" cases (*see e.g. Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002] [holding Labor Law § 240 (1) did not apply to injuries suffered by employee of asbestos removal contractor when piece of asbestos, which had been cut and deliberately dropped from a chemical tank 12 feet above the ground, fell on him]; *see also Fried v Always Green*, 77 AD3d 788, 789 [2d Dept 2010] [holding Labor Law § 240 (1) did not apply to injuries plaintiff sustained when he was struck by a bag of construction debris tossed from the roof of the building by a fellow laborer toward a dumpster plaintiff was standing near]).

Here, the record established the concrete forms were deliberately dropped to the floor below after the laborers on the scaffolding stripped them from the ceiling. Although plaintiff opposed the motion, he failed to raise a question of fact. Accordingly, the protections of Labor Law § 240 (1) do not apply in the case and this cause of action is dismissed.

Injuries caused by a dangerous or defective condition on the premises or a defect in the methods or materials of the work give rise to liability under Labor Law 200 and common law négligence (*see Green*, 77 AD3d at 789; citing *see Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 146–147 [1965]; *Ortega v Puccia*, 57 AD3d 54, 61 [2008] [citations omitted]). Here, plaintiff argued his injuries were caused by an unsafe condition on the premises, but failed to establish such. Rather, the record demonstrated that plaintiff's alleged injuries resulted from the method or manner in which the laborers discarded the stripped concrete forms. Specifically, the laborers on the scaffolding were throwing the stripped concrete forms to the floor below.

Where, as here, injuries arise out of alleged defects in the methods of the work, liability attaches where defendant had the authority to supervise or control the performance of the work (*see Green*, 77 AD3d at 789; citing *see Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 146–147 [1965]; *Ortega v Puccia*, 57 AD3d 54, 61-62 [2008] [opining, "[a] defendant has the authority to supervise or control the work . . . when that defendant bears the responsibility for the manner in which the work is performed"). ". . . [G]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (*Ortega*, 57 AD3d at 61-62, citing *see Natale v City of New York*, 33 AD3d 772, 773 [2006]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d at 683; *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2004]).

Defendants argued and the evidence established Difama, and not defendants, controlled the manner in which the stripping work was performed. Plaintiff proffered no evidence in opposition to raise a triable issue of fact. Rather, plaintiff argued his injuries stemmed from a dangerous condition on the premises, which the record does not support. Accordingly, plaintiff's claims pursuant to Labor Law § 200 and common law negligence are dismissed.

Defendant also moved for summary judgment on plaintiff's claims pursuant to Labor Law § 241 (6). Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to protect workers from injuries arising from violations of specific codes, rules, or regulations applicable to the circumstances of the accident and is not dependent on whether the owner or general contractor exercised control or supervision over the work (*e.g. Ortega*, 57 AD3d at 60, [citations omitted]). Here, plaintiff alleged defendants violated Industrial Code (12 NYCRR) Sections 23-1.5, 23-1.7, 23-1.7 (a) (1), 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-2.1, 23-2.2 and OSHA. Defendant moved to dismiss these claims on the grounds that they were either inapplicable to the

circumstances of the accident or were statutes of general applicability that do not give rise to a claim under Labor Law 241 § (6). Plaintiff argued for summary judgment on its claims pursuant to Sections 23-1.7 (a) (1) and 23-2.1 (b).

Defendant argued Section 23-1.7 (a) (1) was inapplicable on two grounds. First, defendants argued there was no evidence to support that the area where plaintiff was injured was one where workers were "normally exposed to falling objects." Second, citing *Banaczyk v 1425 Broadway, LLC*, 24 Misc3d 1213(A) (Queens Co 2009), defendants argued the Difama workers were stripping concrete forms from the roof of the first floor room, and regardless of whether the area where plaintiff's accident occurred was an area "normally exposed to falling objects," such overhead protection would have rendered the task at hand impossible to carry out.

Citing *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579 (2d Dept 2008), plaintiff argued for summary judgment on his claim pursuant to Section 23-1.7 (a) (1) on the grounds that area where plaintiff was working was normally exposed to falling hazards as planks were stripped from the ceiling and dropped down to where he was sweeping the floor below. Plaintiff testified that he was paying attention and was careful not to get hurt when he was working. He further argued there was no evidence that he was comparatively negligent.

Section 23-1.7 (a) (1) addresses overhead hazards and requires that "every place where persons are required to work or pass that [are] normally exposed to falling material or objects shall be provided with suitable overhead protection." The statute further provides, "[s]uch overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength . . . [and] shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

In *Banaczyk*, 24 Misc3d 1213(A), plaintiff was standing on scaffold installing a roof on the sixth floor of a six-story building. He had been assigned to cut sheets of metal and pass the cut pieces to a coworker who was also standing on the scaffold. Plaintiff alleged he cut a piece of sheet metal, passed it to his coworker on the scaffold, and was struck in his upper back and neck by a falling piece of sheet metal as he proceeded to get another piece of sheet metal. Citing *see German v City of New York*, 14 Misc 3d 1204 (A) [2006]), and the second sentence of 12 NYCRR 23-1.7 (a) (1), the Court concluded, "[r]egardless of whether the area where plaintiff's accident occurred was an area 'normally exposed to falling material or objects,' such overhead protection would have rendered the task at hand impossible to carry out."

In *Parrales*, 55 AD3d at 580-581, plaintiff was assisting in demolition work inside a building. An old elevator shaft, from which the car had been removed, was used as a chute for the disposal of debris removed by workers on upper floors. Plaintiff claimed that he was assigned to remove debris from the bottom of the shaft and was injured by a piece of wood that fell from the fifth floor. Defendant's project manager admitted that he understood workers had to walk into the shaft to remove debris and did not know whether overhead protection was in place on the date of the plaintiff's accident. Having also demonstrated plaintiff was free from comparative negligence, the Court in *Parrales* granted plaintiff summary judgment on his Labor Law 241 § (6) predicated on the alleged violation of 12 NYCRR 23-1.7 (a) (1).

For plaintiff to prevail on his Labor Law 241 § (6) claim for an alleged violation of 12 NYCRR 23-1.7 (a) (1), he must make a prima facie showing that the cited provisions were applicable to his case, that they were violated, and that their violation was a proximate cause of the accident (*Parrales*, 55 AD3d at 582, citing *see Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 562-563 [2006]). Plaintiff must also demonstrate that he was free from comparative negligence

(*Parrales*, 55 NY3d at 582, citing *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998] [comparative negligence is a viable defense under Labor Law § 241 (6)]).

Here, plaintiff alleged and the record demonstrated that the area where plaintiff was working was an area where stripped concrete forms were discarded by dropping them to the floor below. There is no evidence in the record showing there were overhead protections and plaintiff was injured by falling debris. Defendants' argument to the contrary does not comport with the facts of this case. Moreover, defendant failed to establish such overhead protection would have rendered the task of stripping the concrete forms from the ceiling impossible to carry out or that plaintiff was comparatively negligent. Plaintiff, having met his prima facie burden, is entitled to summary judgment on this claim.

Plaintiff also argued for summary judgment pursuant to Labor Law § 241 (6) on the grounds that defendants violated 12 NYCRR 23-2.1 (b), which provides, "[d]ebris shall be handled and disposed by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area" (12 NYCRR 23-2.1 [b]). Plaintiff argued 12 NYCRR 23-2.1 (b) is sufficiently specific to support liability under Section 241 (6), citing *Dipalma v State of New York*, 90 AD3d 1659, 1661 (4th Dept 2011). In Dipalma, the Fourth Department concluded, "[w]e have previously held that 12 NYCRR 23-2.1 (b) is sufficiently specific to support liability under section 241 (6)," citing *see Coleman v ISG Lackawanna Servs., LLC*, 74 AD3d 1825 (4th Dept 2010); *Kvandal v Westminster Presbyt. Socy. of Buffalo*, 254 AD2d 818 (4th Dept 1998).

Defendant argued 12 NYCRR 23-2.1 (b) lacks the specificity required to support a cause of action under Labor Law § 241 (6), citing *Parrales*, 55 AD3d at 582. In *Parrales*, the Second Department concluded, "[] we have previously held that 12 NYCRR 23-2.1 (b) lacks the specificity

required to support a cause of action under Labor Law § 241 (6)," citing *see Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 452 (2d Dept 2004); *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 (2d Dept 2003).

On the authority of the Second Department, the issue of whether 12 NYCRR 23-2.1 (b) is sufficiently specific to support liability under Labor Law § 241 (6) is resolved in favor of defendants. Accordingly, plaintiff's claim pursuant to 12 NYCRR 23-2.1 (b) is dismissed.

Therefore, it is ordered,

Defendants' motion for summary judgment is granted to the extent plaintiff's claims against them pursuant to common law negligence, Labor Law § 200, 240 (1) and 241 (6) are dismissed with exception of plaintiff's claim pursuant to Labor Law § 241 (6) for violation of 12 NYCRR 23-1.7 (a) (1). Plaintiff is granted summary judgment on the issue of liability against defendants on his claim pursuant to Labor Law § 241 (6) for violation of 12 NYCRR 23-1.7 (a) (1). The remainder of plaintiff's cross-motion is denied.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Honorable Reginald A. Boddie
Justice, Supreme Court

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