

**Willis v 171 N. 10th Partners LLC**

2020 NY Slip Op 33456(U)

October 13, 2020

Supreme Court, Kings County

Docket Number: 511143/2015

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 13th day of October 2020.

PRESENT:

Honorable Reginald A. Boddie, JSC

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MARC ANTHONY WILLIS,

Plaintiff,

Against

171 NORTH 10th PARTNERS LLC and  
TITAN REALTY & CONSTRUCTION LLC,

Defendants.

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171 NORTH 10th PARTNERS LLC and  
TITAN REALTY & CONSTRUCTION LLC,

Third-Party Plaintiffs,

Against

EUROPA CONSTRUCTION CORPORATION,

Third-Party Defendant.

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<u>Papers</u>	<u>Numbered</u>
MS 9	Docs. # 91-121, 125-126
MS 10	Docs. # 113-118, 122-124

Upon the foregoing cited papers, the decision and order on defendants' motions for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this action to recover for personal injuries he allegedly sustained when he fell on a jobsite at 171 North 10<sup>th</sup> Street, Brooklyn, New York, on November 26, 2013. At the time of the accident, plaintiff was employed by Europa Construction Corporation (Europa) as a laborer. The premises was owned by 171 North 10<sup>th</sup> Partners (171 North) and Titan Realty &

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Construction LLC (Titan) was the construction manager of the project. Titan hired Europa to provide concrete work.

Plaintiff alleged he and his co-workers were directed to lift “top heavy,” eight-foot-long, 25-pound “metal jacks” or poles from the first floor to higher floors. A coworker would retrieve a metal jack from the first floor and carry it up to the second floor using a wooden ladder that was leaned against the edge or ledge of the second floor. Plaintiff would receive the metal jack from the co-worker below and pass it along to a co-worker on the third floor through a hole in the ceiling. Plaintiff alleged he was standing near the ledge of the second floor receiving a metal jack, when it started to lean over the edge. Plaintiff alleged he and it started falling forward into the unguarded opening to the floor below, he struggled to prevent himself from falling over the edge, and ended up falling backwards on to the floor behind him, the metal jack fell onto the ground beside him, and he was injured.

Plaintiff alleged there was nothing in place and no safety devices provided to prevent someone or something from falling over the edge. Alcides Rodriguez, the Vice President of Europa, testified Europa installed tie offs and safety railings at the edge of the second floor where plaintiff’s accident occurred and that they were in place at the time plaintiff was working. Plaintiff argued Mr. Rodriguez testified no railings were in place where the ladder was located in the area where plaintiff was assigned to work and that a boom truck or crane was available for use in transferring the metal jacks, but plaintiff was not informed or directed to use it. Upon review of the transcript of Mr. Rodriguez’s testimony, the Court finds these arguments mischaracterize the testimony. Mr. Rodriguez testified that no railing was installed at the top of the ladder because it would close off access to the second floor and defeat the purpose of having a ladder there. As to

the boom truck or crane, Mr. Rodriguez testified that it was used once a week to deliver the materials to the location where the work would be staged for the week.

Defendants Titan and 171 North sought summary judgment on plaintiff's claims pursuant to Labor Law §§ 240, 241 (6) and 200 and common law negligence. They argued plaintiff never actually fell from a height, but fell backwards on the same level where he was working, and that plaintiff was the sole proximate cause of his accident. 171 North and Titan also sought summary judgment or, in the alternative, a conditional order on their contractual indemnification claims against Europa. Europa cross-moved seeking summary judgment on Titan and 171 North's claims for common law and contractual indemnification and contribution/apportionment on the grounds that it was not negligent.

Plaintiff opposed the motions arguing his assigned work involved an elevation hazard of which defendants were statutorily required to guard against, and the failure to guard against this hazard was a proximate cause of his injuries. Plaintiff also argued in opposition to summary judgment on his Labor Law 241 (6) claim on the grounds that the record presents triable issues of fact as to whether defendants' violation of Industrial Code §§ 23-1.7 (b) (1) and 23-1.15 were a proximate cause of his injuries.

Labor Law § 200 codifies the common-law duty of an owner or general contractor to maintain a safe worksite (*Jock v Fien*, 80 NY2d 965, 967 [1992] [citations omitted]). Claims arising under Labor Law § 200 fall into two categories, "namely those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is

performed, a defendant must have authority to supervise or control the methods or materials of the injured plaintiff's work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]).

Defendants argued they had no control over the manner or methods, and are therefore entitled to summary judgment. Keith Zenobio, Titan's Principal and Alcides Rodriguez, Europa's Vice President testified that Titan oversaw the progress of the project, but did not tell Europa's workers how to do their jobs. Rather, Orlando Rodas, Europa's foreman was in charge of supervising Europa's workers and instructed plaintiff and his coworkers to transfer the metal jacks to the third floor as they were doing when plaintiff fell.

Europa argued it had no role in the creation of the dangerous condition and Titan and 171 North controlled the manner in which plaintiff's work was performed. However, this accident occurred as plaintiff and his coworkers were executing the task Mr. Rodas assigned, in the manner Mr. Rodas allegedly instructed, and not as a result of a dangerous condition (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *cf. Wynne v State of New York*, 53 AD3d 656, 657 [2d Dept 2008]). Moreover, Mr. Rodriguez testified metal jacks could be transferred between floors, including from the ground, by passing them through a hole in the floor or pulling them up with a crane, and that its not done from the perimeters.

Accordingly, there are questions of fact as to whether Europa was negligent and its cross-motion for summary judgment seeking dismissal of Titan and 171 North's claims against it is denied. Neither plaintiff nor Europa raised a triable issue of fact as to whether Titan and 171 North controlled the manner in which plaintiff's work was performed, and therefore their motion for summary judgment on this claim is granted.

Labor Law § 240 (1) imposes a nondelegable on an owner or contractor to protect workers from elevation-related hazards, and may give rise to liability regardless of whether an owner or

contractor has actually exercised supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993] [citations omitted]). “The contemplated hazards [of Labor Law § 240 (1)] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). “In other words, 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*” (*Ross*, 81 NY2d at 501 [emphasis in original]). “A plaintiff must show that the object fell, while being hoisted or secured, *because of the absence or inadequacy of a safety device of the kind enumerated in the statute*” (*Francis v Foremost Contr. Corp.*, 47 AD3d 672, 674 [2d Dept 2008], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] [emphasis in original]; see *Keaney v City of New York*, 24 AD3d 615, 617 [2005]; *Turczynski v City of New York*, 17 AD3d 450 [2005]; *Sierzputowski v City of New York*, 14 AD3d 606, 607 [2005]).

Here, plaintiff and the metal jack fell on the same level where plaintiff was working. Thus, it could not be said that Labor Law § 240 (1) was implicated “. . . either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker [was] positioned and the higher level of the materials or load being hoisted or secured” (see *Rocovich*, 78 NY2d at 514). Accordingly, defendants are granted summary judgment on plaintiff’s Labor Law § 240 (1) claim.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to “provide reasonable and adequate protection and safety” for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor regardless of whether defendants exercised supervision or control over the worksite (*Ross*, 81 NY2d at 501-502). Here, plaintiff alleged violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.18 (b), 23-1.22, 23-2.7, 23-5.3, 23-5.5 and 23-5.6. Defendants argued for dismissal of these claims on the grounds that these Industrial Code provisions are either not applicable to this action or are not a proximate cause of plaintiff’s alleged injuries. Plaintiff, in opposition, argued only that defendants failed to establish their entitlement to summary judgment on plaintiff’s claims alleging violations of Industrial Code §§ to 23-1.7 (b) (1) (Hazardous Openings) and 23-1.15 (Safety Railings). Therefore, defendant is granted summary judgment, without opposition, on plaintiff’s claims alleging violations of Industrial Code §§ 23-1.5, 23-1.16, 23-1.18 (b), 23-1.22, 23-2.7, 23-5.3, 23-5.5 and 23-5.6.

Industrial Code § to 23-1.7 (b) (1) requires that every hazardous opening be protected by substantial covers or safety railings to protect workers from stepping or falling into them. Even assuming that the opening at the top of the ladder here constituted a “hazardous opening,” 12 NYCRR 23-1.7 (b) (1) (i) cannot be reasonably interpreted to apply where barricading the opening in question would have been inconsistent with passing metal jacks through it, an integral part of the job plaintiff was assigned to do (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). Therefore, defendants are entitled to summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim.

Accordingly, Titan and 171 North’s motion for summary judgment (MS 9) is granted to the extent plaintiff’s Labor Law §§ 240 (1), 241 (6), 200 and common law negligence claims

against it are dismissed. The remainder of the motion seeking indemnification and contribution against Europa is denied as moot. Europa's cross-motion (MS 10) is denied.

ENTER:

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

Honorable Reginald A. Boddie  
Justice, Supreme Court

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