

Peters v Structure Tone, Inc.
2020 NY Slip Op 33583(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 155065/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

NEDROY PETERS

INDEX NO. 155065/15

- v -

MOT. DATE

STRUCTURE TONE, INC. et al.

MOT. SEQ. NO. 005 and 006

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is a labor law action arising from personal injuries sustained on a construction site. Defendants now move for summary judgment in their favor. Plaintiff also moves for partial summary judgment on liability on his Labor Law § 240[1] and § 241[6] causes of action and to strike defendants' affirmative defenses. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Many of the relevant facts are not in dispute. Plaintiff's accident occurred on September 15, 2014. On that date, plaintiff was working in a shaftway on the 10th floor of a building located at 5 Madison Avenue, New York, New York (the "building") which was then undergoing demolition and reconstruction (the "project"). The building was 41 stories tall at the time of plaintiff's accident. Defendant MI NY Clock Tower, LLC ("Clock Tower") was the owner of the building and defendant Structure Tone, Inc. ("Structure Tone") was the general contractor for the project.

Plaintiff testified at a deposition as follows. Plaintiff worked as a union carpenter for New England Construction at the project for about nine months before his accident. On the date of the accident, plaintiff was extending a platform/plywood floor over the opening of a shaft on the tenth floor of the building. He was then going to enclose exposed piping on the wall with sheetrock. He testified that as he was preparing to put sheetrock and tape around exposed pipe, he felt material start to fall from above. Plaintiff claimed that he then looked up and "something fell right in [his] eye."

- A. And things start fell, and then I look up, something hit me in my eye (indicating). So I went to the bathroom, try to wash out my eye.
...
Q. Do you know where that material came from that you heard falling from above you?
A. From above.

Dated: 10/28/20

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

- Q. And that would be the shaftway for the pipes?
A. Yes.
Q. Do you know what caused that material to fall?
A. No.
...
Q. Could you describe for me what the materials were that were falling?
A. Small bits of concrete, chunks of concrete.
Q. Do you know how big when you say "small bits"?
A. Yeah, like pebbles.

Plaintiff claimed that stuff had fallen onto him when he worked in the shaftway before his accident.

- Q. When did you first notice that that material was falling?
A. Put it this way, when I just start, stuff used to rain down on me.
Q. When you were doing the platform?
A. No, when I just start.
Q. Started working at that site?
A. Yeah, the 2nd floor. Because I start from the 2nd floor.
...
Q. And did that happen at any other floors other than the 2nd floor.
A. It happened a few times. But never complained. But that incident, when it happened, something hit me in my back. A chunk of concrete hit me in my back (indicating), and then I speak to the foreman about it, and then he went upstairs and investigated and nobody take responsibility for it.

After plaintiff went to the bathroom to wash out his eye, he testified that his vision became "real blurry" and he told his supervisor "[i]t's getting real serious. I can't see." Plaintiff testified that he didn't know what fell into his eye. Nonetheless, despite multiple surgeries, plaintiff claims that his right eye is now non-functional.

Defendants argue that they did not violate the labor law. They point to a three-page witness statement dated September 20, 2014 which plaintiff signed. At his deposition, plaintiff explained that the witness statement was generated by an investigator who asked him a series of questions at his house and asked him to sign the statement. The statement provides in relevant part:

On Monday, September 15th at approximately 8AM, we were tasked by my super Sante with enclosing a duct and a pipe with core board, insulation, and then sheetrock. I was on my knees about to start to do some framing, when I heard a noise, it sounded like something was falling from above. My glasses were off, as I had removed them right before. As I heard the noise, I looked up, I instantly got something in my eye. It fell directly into my right eye.

...

I have no idea who was working on the 11th floor above me. I have had debris fall on me in that area before and no one would tell me who was working above me, as no one wanted to take responsibility. I was required to wear my glasses at all times per company rules.

Defendants point to Structure Tone's Site Specific Safety Plan which "sets forth the requirements for job safety." According to that plan, each subcontractor is required to procure, issue, use and maintain personal protective equipment including "ANSI-approved safety glasses with side shields [that] are required on all jobs at all times."

Structure Tone produced Matthew Victor, its superintendent, for a deposition. He testified that non-party Total Safety was responsible for safety at the project. Structure Tone required that all workers wear goggles at all times on the job, which was explained at a site safety orientation held for all workers. Victor claimed that if a worker was not wearing his or her goggles, they would be warned.

The investigator that met with plaintiff and generated the witness statement plaintiff signed appeared for a non-party deposition. He identified other statements he took in connection with plaintiff's accident. He recalled interviewing plaintiff.

Finally, Patrick Byrne appeared for a non-party deposition on behalf of Total Safety, the project's site safety manager. When asked about eye protection at the project, Byrne testified:

Q. ... Do you recall specifically you personally having discussions with any of the men or women on the job site in regard to eyewear?

A. I don't recall.

...

Q. Have you ever seen any rules from any entity you described in regards to eye protection?

A. Yes.

Q. What was your understanding or what have you seen?

A. I have seen various pieces of eye protection depending upon the work being done.

Q. Can you describe what you mean by that last statement?

A. If you're grinding, they want to see a face shield. Otherwise, certain times you want at least glasses or goggles. Usually its dependent upon the act that's going on.

Q. Okay. Can you be more specific to me what you mean by depending on the act?

A. Depends upon the tools you're using will dictate what type of eye protection you need.

Q. I need you to be more specific in your knowledge and experience of 35 years?

A. In my knowledge and experience of 35 years if you're using a grinder, you want a full face shield. If you're just cutting, eye protection. Any type of cutting, but I have also seen that as certain jobs in the City are a hundred percent eye protection. Some are only when you're working with certain tools and some are only when you're working.

Q. Do you know what that varies by, three contingencies?

A. No.

Q. This particular job, do you know which of those three it was?

A. I don't know.

...

Q. Is it reasonable for somebody to not be wearing eye protection if they are not chipping, cutting, welding, burning or grinding?

A. Yes.

...

Q. Do you ever specifically recall at any point in time you were on that job in 2014 of giving a specific direction that everyone on the job must wear eye protection?

A. No.

Byrne did not recall any specific protections from falling debris above a worker at the project. In relation to eye protection and falling debris, Byrne testified:

- Q. Was there ever any specific training that you had that if it's possible debris could fall from above where someone is working, that they should be wearing eye protection?
- A. I would be concerned with debris falling on people. I wouldn't be looking to protect their eyes. I would be looking to protect their heads. I would ensure that nobody was working over anybody's head.
- Q. Okay. You would be more concerned about debris falling and giving someone a head injury?
- A. Yes.

Byrne further testified that wearing eye protection at all times is not "practical" because "they will fog up" and "[t]hey can be a hindrance at times." He agreed when asked if there were times when there is good cause or reason not to wear goggles on the job, even if the job was 100% eyewear.

Plaintiff has asserted causes of action for violation of Labor Law § 200, 240[1] and 241[6] as well as for common law negligence. According to his bill of particulars, the Section 241[6] claim is premised upon violations of Industrial Code §§ 23-1.7[a][1], 23-1.8[a], 23-1.19, and 23-2.5[a][1]. Defendants assert affirmative defense for contribution and/or comparative fault, collateral source setoff and apportionment under CPLR Article 16.

In support of his motion, plaintiff has provided a sworn affidavit which his counsel explains is offered "to supplement the testimony given by [p]laintiff as [d]efense counsel did not ask [p]laintiff questions regarding certain issues." Plaintiff therein states that the shaft he was in when his accident occurred was approximately eight by ten feet and "[t]here was no overhead protection above [him] in the shaft to prevent objects from falling on [him] from above." He further states:

I was not using power tools, or doing any drilling, welding, cutting, grinding, or any other activity which would produce sparks or cause objects to ricochet.

Workers were working on various floors above me. Each floor above the tenth floor terminated at the edge of the shaft such that anyone on any higher floor could look out from the edge of any higher floor and see straight down the shaft to the area where I was working since there was no overhead protection in place above me that would prevent me from being exposed to the higher floors of the shaft. As a result, if workers working on the various higher levels of the building were working with construction materials, those materials would be able to fall off the edge of the floor where the workers were working above, and into the shaft where I was working, so that such materials could fall on me below.

... If one were to stand with me on the tenth floor in the shaft and look up one would not see overhead protection of any sort. One would see open space.

Additionally, I was never instructed to wear goggles or safety glasses at all times. In fact, there would have been no reason to wear goggles at the moment of my accident since I was not working with anything that would cause sparks or objects to ricochet. Additionally, due to the heat in the shaft while I was working it would not have been possible to wear eyewear at all times in the shaft anyway as the heat in the shaft would cause my goggles to fog up so that I could not see as I was working. I have been advised that the site safety officer, Patrick Byrne has testified that he never instructed me to wear safety goggles at all times and I can confirm I was never told to do so.

Defendants now move for summary judgment dismissing plaintiff's claims. Meanwhile, plaintiff moves for partial summary judgment on liability as to Labor Law §§ 240[1] and 241[6], the latter premised upon Industrial Code §§ 23-1.7[a][1] and 23-2.5[a][1].

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Section 240[1]

Defendants argue that plaintiff's Labor Law § 240[1] claim should be dismissed because his accident does not fall within the ambit of that statute. Section 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "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 [1991]).

Contrary to defendants' contention, it is well settled that falling objects do not need to be in the process of being hoisted or secured to give rise to liability under Section 240[1] (*see i.e. Sarata v. Metropolitan Transp. Auth.*, 134 AD3d 1089 [2d Dept 2015] quoting *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757 [2008]). This is not a case where an object "simply... fell and injured a worker". Rather,

plaintiff claims that as a direct consequence of not providing any overhead protection, he was injured when unknown debris fell down the shaft of a 41-story building that plaintiff was working in.

On this record, the court finds that plaintiff is entitled to summary judgment as there is no legitimate dispute that the absence of overhead protection in the shaft plaintiff was working in was a proximate cause of plaintiff's accident. The court rejects defense counsel's assertion that "the only personal protection item which could have prevented this unique injury from coming to pass was the safety glasses..." Indeed, plaintiff's expert, Scott M. Silberman, P.E., opines in an affidavit that "[d]efendants should have installed tightly laid sound planks at least two inches thick full size with three-quarter inch exterior grade plywood laid upon the planks (or other material of equivalent strength) above Plaintiff across the entire cross sectional area in the shaft so that he would not have been exposed to the falling debris which struck him in the eye causing severe damage."

Meanwhile, defendants' expert, Bernard P. Lorezn, P.E., does not even mention Labor Law § 240[1] in his affidavit. Therefore, defendants have failed to raise a triable issue of fact as to whether Section 240[1] was violated.

Accordingly, plaintiff's motion on Labor Law § 240[1] is granted and defendants' motion as to this claim is denied.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code §§ 23-1.7[a][1] and 23-2.5[a][1] was violated as a matter of law.

At the outset, plaintiff's silence as to Industrial Code §§ 23-1.8[a] and 23-1.19 is deemed an abandonment of those claims. Accordingly, defendants' motion is granted as to those claims.

Industrial Code § 23-1.7[a][1] states in pertinent part as follows:

§ 23-1.7 Protection from general hazards

(a) Overhead hazards.

(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such 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. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

Plaintiff testified that debris had previously fallen on him when he worked in the shaft. Plaintiff further claims that people were working on the floors above him. There can be no legitimate dispute that working in a shaft in the middle of a 41-story building poses a risk of falling objects onto the worker. Moreover, plaintiff further testified that he had made complaints about falling debris to his employer. Plaintiff unequivocally states in his affidavit that there was no overhead protection shielding him from debris falling onto him while he was in the shaft. Finally, plaintiff's expert opines that this provision was violated because overhead protection consisting of "tightly laid three-quarter inch exterior grade plywood" should have been installed above plaintiff. This showing is sufficient to demonstrate *prima facie* liability for violation of Section 241[6] premised upon Industrial Code § 23-1.7[a][1].

Meanwhile, defendants' expert asserts that "New York Industrial Code §23-1.7 was not violated as suitable overhead protection consisting of tightly laid planks was in place in accordance with the code as depicted in Exhibit 'D'." Annexed to defendants' expert affidavit as Exhibit "D" are four photographs which Lorenz claims are "photographs taken on September 23, 2014 of the 11th floor at the pipe penetration location." As plaintiff's counsel correctly points out, these photographs are not properly before the court since they are not authenticated by the person that took them nor have the defendants established that they are fair and accurate depictions of the area above where plaintiff's accident occurred. As such, the photographs are not admissible evidence capable of rising a triable issue of fact.

Accordingly, plaintiff is also granted summary judgment against the defendants on liability as to Section 241[6] premised upon Industrial Code § 23-1.7[a][1].

Industrial Code § 23-2.5[a][1] provides in relevant part:

23-2.5 Protection of persons in shafts

(a) General. Persons required to perform work in or at shafts, other than elevator shafts, shall be provided with the following protection:

(1) Protection from falling material. A tight covering consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed so as to cover the entire cross-sectional area of the shaft. Such cover shall be located at a point in the shaft not more than two stories or 30 feet, whichever is less, above the level where persons are working.

Defendants' expert inexplicably argues that this provision of the Industrial Code was not violated because "small bits of concrete constitute falling debris, not falling material." The court further rejects defense counsel's attempt to characterize the debris that fell onto plaintiff as mere "dust". Plaintiff asserts that defendants' arguments on this point would "permit Defendants to wait to see what might fall and then decide whether to cover the shaft with a tight covering of planks covering the entire cross-sectional area." Based upon the foregoing, plaintiff's motion is granted as to this provision of the Industrial Code as well.

Section 200 and common law negligence

Defendants have moved to dismiss plaintiff's Labor Law § 200 and common law negligence claims. They assert that these claims fail because defendants did not direct, supervise or control plaintiff's work at the time of his accident, nor did plaintiff's accident arise from an inherently dangerous condition and alternatively they did not have notice of same.

While plaintiff did not move with respect to these claims, his counsel erroneously asserts in opposition to defendant's motion that his motion for summary judgment as to Section 200 should be granted. In any event, plaintiff's counsel argues that there is a triable issue of fact which precludes summary

judgment in favor of defendants on Section 200 because plaintiff complained of falling debris in the shaft prior to his accident.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

On this record, there can be no legitimate dispute that plaintiff's injury arose from the manner or means in which the work was performed and further, plaintiff was only supervised by his employer. Therefore, defendants' motion for summary judgment dismissing the Section 200 and common law negligence claims must be granted.

Affirmative defenses

Plaintiff's motion to dismiss defendants' affirmative defenses is denied. The issue of whether plaintiff shares some portion of the liability for causing his own accident is a triable issue of fact. Plaintiff testified that he had goggles and didn't have them on when he looked up. Plaintiff heard the sound of debris falling, which caused him to look up, and he had previously had debris fall on him before. While he offers an explanation for why he didn't have his goggles on, it remains for a jury to determine whether he was also negligent in connection with his accident.

The court declines to dismiss defendants' affirmative defense for a collateral source setoff or apportionment under CPLR Article 16 as plaintiff has not met his burden and established entitlement to judgment as a matter of law on these defenses.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion (sequence 5) is granted to the extent that he is entitled to partial summary judgment on liability as to his Labor Law § 240[1] and Labor Law § 241[6] claim premised upon Industrial Code §§ 23-1.7[a][1] and 23-2.5[a][1]; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiff's Labor Law § 200, common law negligence claim and Labor Law § 241[6] claim premised upon Industrial Code §§ 23-1.8[a] and 23-1.19 are severed and dismissed; and it is further

ORDERED that defendants' motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/28/20
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.