West v Rector, Church-Wardens, & Vestrymen of Trinity Church in the City of N.Y.
2020 NY Slip Op 33639(U)
November 2, 2020
Supreme Court, New York County
Docket Number: 152288/2018
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

JOHN C. WEST

INDEX NO. 152288/2018

MOT. DATE

- v -

MOT. SEQ. NO. 003 & 004

THE RECTOR, CHURCH-WARDENS, AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW-YORK et al.

The following papers were read on this motion to/for sj and x-mot to amend BP

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).__________

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).__________

Replying Affidavits NYSCEF DOC No(s).__________

In this personal injury action, plaintiff seeks to recover for personal injuries he sustained when a scaffold he was working on tipped and fell backwards. Plaintiff has asserted causes of action for violations of Labor Law §§ 200, 240[1], 241[6] and common law negligence. Two motions are before the court, which are hereby consolidated for consideration and disposition in this single decision/order.

In motion sequence 3, plaintiff moves for partial summary judgment on his Labor Law § 240[1] claim. Defendants The Rector, Church-Wardens, and Vestrymen of Trinity Church in the City of New York ("Trinity") and City Winery New York, LLC ("City Winery" and collectively "defendants") oppose the motion and move in motion sequence 4 for summary judgment dismissing plaintiff's claims. Plaintiff partially opposes defendants' motion as to Sections 240[1] and 241[6] and cross-moves to amend his bill of particulars to assert the violation of Industrial Code § 23-5.18 as a predicate for his Section 241(6) cause of action. There is no opposition to plaintiff's cross-motion.

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

Many of the relevant facts are not in dispute. Plaintiff was injured on October 17, 2017 while performing construction work at the premises located at 143-155 Varick Street, New York, New York. Trinity owns the premises and City Winery was a tenant thereat. City Winery had hired plaintiff's employer, Surface Restoration Services ("Surface"), to renovate the second floor of the premises (the "project").

The following is based upon plaintiff's deposition testimony, where he testified through the use of a Spanish language interpreter. At this project, plaintiff was tasked with, *inter alia*, sandblasting the walls by his boss, the owner of Surface, Ralph Sabatelli.

Dated: 11/2/20

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

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Plaintiff maintained that he received all of his instructions and training on how to perform sandblasting from Sabatelli. In order to sandblast the walls, plaintiff testified that he and Sabatelli assembled an approximately 11 to 12-foot scaffold. Specifically, plaintiff stated that Sabatelli "would tell [plaintiff] how to put it together." Plaintiff claims that on the date of his accident, the scaffold was missing triangular pieces at the bottom. Plaintiff explained, when shown a photograph of a similar scaffold, that the one he used on the date of his accident was missing these triangular pieces which he thought were "for protection" … "[b]ecause [his] boss explained to [plaintiff] that those pieces could have avoided the accident." Notably, plaintiff claimed that when he and Sabetelli put the scaffold together, they installed the triangular pieces.

Plaintiff performed sandblasting on the scaffold for four to five hours before his accident occurred, while Sabatelli was on the floor. During that time, he claimed that he told Sabatelli the scaffold felt unsteady:

> Q. Did you feel any unsteadiness while you were standing on the scaffold for four or five hours before your accident on 6 October 17, 2017?
> A. Yes.
> Q. Did you complain to Ralph about the unsteadiness during those four or five hours before your accident occurred on October 17, 2017?
> A. Yes, yes.
> Q. What did he say in response to that?
> A. (Without the Interpreter's 16 translation in English) Work, (in Spanish) 17 work. (In English) Sorry.

As for how the accident occurred, plaintiff testified as follows:

> Q. At the time of your accident, did you fall off of the scaffold?
> A. No, I did not fall off. The (in English) scaffold (in Spanish) fell to the side, and I went with the (in English) scaffold (indicating).
> Q. Are you saying that the scaffold tipped over to the side?
> A. Yes. It fell backwards (indicating).
> Q. What caused the scaffold to tip backwards at the time of your accident?
> A. I don't know. I have no idea.
> Q. Can you describe for me exactly how your accident occurred?
> A. Yes. I was (in English) sandblasting (in Spanish) the wall (indicating), and the (in English) scaffold (in Spanish) tipped backwards (indicating) I wanted to hold on from the ladder, the side, the protection. So I wanted to hold on (indicating), and my arm twisted when I fell (indicating).
> …
> A. My right shoulder bent this way as I fell (indicating).
> …
> Q. In the five minutes before the scaffold tipped over, did you feel it tipping at all while you were in that stable location?
> A. No.
> Q. How long were you in a stable position on top of the scaffold sandblasting before your accident happened? A. I don't remember how long.
> Q. When was the last time that Ralph moved you from one position to the position where you were when the scaffold tipped over?
> A. I don't remember.
> Q. Was it more than ten minutes since Ralph had moved you?
> A. It's hard to remember.
> …
> Q. Did your body move at all on the scaffold in the moments before the scaffold tipped over?

A. The (in English) scaffold (in Spanish) moved, and then my body moved (indicating) .
Q. In the 20 seconds before the scaffold started to tip over, were you standing completely still?
A. Yes.

After the accident, Sabatelli took plaintiff to NY Presbyterian Hospital. Plaintiff claims that as a result of his fall, he "suffered a torn rotator cuff tear in his right shoulder which required surgical intervention, injury to his cervical spine requiring surgical intervention, a full thickness tear of his right biceps, and derangement and tendon tearing in the left knee." Nonetheless, plaintiff continued working at the project/premises until February 2018. As of his deposition, he has not worked since February 2018 "[b]ecause I have a lot of pain on my right shoulder (indicating), my neck (indicating), lower back (indicating), and my left knee (indicating), my left elbow 4 (indicating)." Plaintiff further explained:

Q. Did you have pain in those areas after the accident until February of 2018, when you continued to work?
A. Yes.
Q. But you were still able to do your job during that time; is that correct?
A. With limitations, and I have more pain now. The pain has increased (indicating).
Q. What limitations did you have between October of 2017 through February of 2018?
…
A. The pain I told you about. I was not able to lift my arm up because of my shoulder (indicating), and I'm still not able to do it and the pain I mentioned before.

City Winery's witness confirmed that Surface and/or Sabatelli directed and supervised all of plaintiff's injury-producing work and provided plaintiff with all of the tools and equipment for the work that plaintiff was performing.

In opposition to plaintiff's motion, defendant has provided a sworn affidavit by Sabatelli. He states that prior to plaintiff's accident, he observed plaintiff on a baker's scaffold owned by Surface in order to sandblast the walls at the premises. He claims that "[t]he scaffold that [plaintiff] used was in good working condition on October 17, 2017 and at all times prior to that date." Sabatelli further maintains that there were no issues or malfunctions with the scaffold at any point in time prior to plaintiff's accident, the scaffold "was equipped with all proper safety devices" and "the triangular brackets were in place" at the time of plaintiff's accident. Sabatelli does not state whether he observed plaintiff's accident or provide any other information regarding same, but he does claim that "Surface [] prohibits the use of the scaffold before the triangular brackets are engaged."

Discussion

At the outset, plaintiff does not dispute that the movants are entitled to summary judgment dismissing his Labor Law § 200 and common law negligence claims. Accordingly, those claims are severed and dismissed.

Since plaintiff's cross-motion to amend his bill of particulars to assert another Industrial Code violation bears on defendants' motion for summary judgment dismissing the Labor Law § 241[6] claim, the court will consider plaintiff's cross-motion first. Plaintiff's counsel asserts that "[d]ue to an error, likely due to reliance on forms and templates, paragraph 17, setting forth the sections of the Industrial Code upon which a violation of Labor Law 241(6) might be predicated, inadvertently omitted Industrial Code § [23-]5.18(e) and (g)". Plaintiff argues that he should be allowed to amend his bill of particulars at this stage because "it raises no new facts or concerns that were not explored during discovery."

Plaintiff may amend his bill of particulars, even if note of issue has already been filed, where the amendments "entail no new factual allegations, raise no new theories of liability and cause no prejudice (*Alacon v. UCAN White Plains Housing Development Fund Corp.*, 100 AD3d 431 [1st Dept 2012]; *see also Tuapante v. LG-39, LLC*, 151 AD3d 999 [2d Dept. 2017]). Since plaintiff's proposed amended bill of particulars asserts a new Industrial Code violation which arises from the same operative set of facts at issue in this case, the court will grant the cross-motion without opposition.

The court now turns to the parties' arguments as to Labor Law § 240[1]. 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]).

Labor Law § 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]).

Defendants argue that plaintiff was the sole proximate cause of his injuries. Meanwhile, plaintiff maintains that he was neither the sole proximate cause of his accident nor a recalcitrant worker and was otherwise provided with a defective and unsecured scaffold which caused his injuries.

Defendants have failed to establish that plaintiff was the sole proximate cause of his accident. This argument is based upon the fact that plaintiff "was the person that built the scaffold…" This is a mischaracterization of the testimony, since plaintiff stated that both he and Sabatelli put the scaffold to-

gether at Sabatelli's direction. Further, it is of no moment that plaintiff put the scaffold together, because he claims that the scaffold had the "triangular pieces" when he put it together and defendant has otherwise failed to show that plaintiff somehow misused the scaffold (*see generally Gallagher v. New York Post*, 14 NY3d 83 [2010]; *cf. Cherry v. Time Warner, Inc.*, 66 AD3d 233 [1st Dept 2009]). Defendants have certainly not shown that plaintiff himself removed the triangular brackets from the scaffold. Indeed, Sabatelli's affidavit, which defendants have submitted to the court, represents that the scaffold had the triangular brackets on when plaintiff's accident occurred. Accordingly, this argument is rejected.

Meanwhile, plaintiff has met his burden on his motion for partial summary judgment on liability with respect to Section 240[1]. A fall from a scaffold, in and of itself, does not mandate damages to an injured party (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]). Rather, such liability is contingent on a violation of Section 240[1]. *Id.* Specifically, a plaintiff must show that the failure to provide safety devices in conformance with Section 240[1] was a contributing cause of his or her fall. As is relevant here, plaintiff is entitled to a presumption in his favor when a scaffold collapses or malfunctions "for no apparent reason" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377 [1st Dept 2007] quoting *Blake, supra*). On this record, plaintiff has demonstrated that the scaffold he was working on suddenly failed, causing him to sustain personal injuries. Plaintiff does not know why the scaffold tipped over and fell, other than positing that the triangular brackets were missing through no fault of his own. Moreover, Sabatelli states that the scaffold was equipped with "all proper safety devices", including the triangular foot brackets. These undisputed facts demonstrate *prima facie* liability under Section 240[1].

In turn, defendants have failed to raise a triable issue of fact sufficient to defeat plaintiff's motion. They offer no explanation for why the scaffold failed. Therefore, the scaffold was an inadequate safety device for the work plaintiff was tasked to perform, thus constituting a violation of Labor Law § 240[1].

Accordingly, defendants' motion as to Section 240[1] is denied and plaintiff's motion for partial summary judgment on liability against the defendants is granted.

Turning to the balance of defendants' motion, they move for summary judgment dismissing plaintiff's Labor Law § 241[6] claims predicated upon all but the newly added Industrial Code § 5.18(e) and (g). Plaintiff has failed to argue that any of the other claimed violations should not be dismissed. Accordingly, defendants' motion is granted to the extent that the Labor Law § 241[6] claim predicated upon all but the violation of Industrial Code § 5.18[e] and [g] is severed and dismissed. Defendants' failure to oppose plaintiff's cross-motion to amend and assert a Section 23-5.18 based cause of action is deemed a declination to seek summary judgment relief with respect to that claim.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on liability as to Labor Law § 240[1] against Trinity and City Winery is granted; and it is further

ORDERED that Trinity and City Winery's motion for summary judgment is granted to the extent that they are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as well as his Labor Law § 241[6] premised upon all but the violation of Industrial Code § 23-5.18[e] and [g]; and it is further

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

ORDERED that plaintiff's cross-motion for leave to serve an amended bill of particulars is granted and the amended bill of particulars annexed thereto is deemed served and filed; and it is further

ORDERED that the parties are directed to meet and confer and set deadlines for all remaining outstanding discovery, to the extent that any remains, in a written stipulation and present the same to the court to be so ordered within 60 days; and it is further

ORDERED that plaintiff's deadline to file note of issue is extended to January 29, 2021.

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: 11/2/20
New York, New York

So Ordered:

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