Supreme Court of the State of New York
County of Kings

Part 91

IAN ORTIZ-GROSS,

Plaintiff,

against

BSS 711 11TH AVENUE, LLC, LTS 711 11TH AVENUE, AND JRM CONSTRUCTION MANAGEMENT, LLC,

Defendants.

BSS 711 11TH AVENUE, LLC, LTS 711 11TH AVENUE, AND JRM CONSTRUCTION MANAGEMENT, LLC,

Third-Party Plaintiffs,

against

WIREWORKS BUSINESS SYSTEMS, INC.,

Third-Party Defendants.

Index Number 514431/2015
Seq # 011 & 012

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1, 2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	3, 4
Replying Affidavits.....	5, 6
Exhibits.....	
Other	

Upon the foregoing papers, plaintiff's summary judgment motion on its claim for violation of Labor Law § 240(1) only (Mot. Seq. 011) and defendants' motion for summary judgment (Mot. Seq. 012), are decided as follows:[1]

[1] In response to defendants' summary judgment motion, plaintiff filed an "Affirmation in Reply & in Opposition to Cross-Motion" (Dkt. No. 232). However, defendants' motion was not a cross-motion and it did not include a designated opposition to plaintiff's motion (though it did move for summary judgment to dismiss plaintiff's claim for violation of Labor Law § 240[1]). Thereafter, defendants filed an opposition to plaintiff's motion (Dkt. No. 233) , and plaintiff filed a reply to that opposition and in further support of his motion (Dkt. No. 237). Accordingly, this court will treat the "Affirmation in Reply & in Opposition to Cross-Motion" only as an opposition to defendants' motion, to which defendants replied (Dkt. No. 235).

Factual Background

Plaintiff brought this action against defendants for injuries he allegedly suffered while working on a construction project at a car dealership. There is no dispute that defendants BSS 711 11th Avenue, LLC and LTS 711 11th Avenue were the owners of the premises, and that JRM Construction Management, LLC was the general contractor for the project. Plaintiff asserts claims for negligence and violation of New York Labor Law §§ 200, 240(1) and 241(6).

Plaintiff, an employee of third-party defendant Wireworks, testified that, on the day of the accident, he was installing cable by guiding it along a vent. He testified that he was using an 8-foot A-frame ladder to install cable wire. He testified that he was standing on top of the ladder guiding cable, when a rolling garage door rolled up toward him. As plaintiff testified at his deposition, "So I'm on the ladder and this automated garage door rolls up. As it rolls, it expands, it hits me on the head, the ladder shifts, I fall and the ladder falls" (plaintiff's EBT at 41).

Plaintiff's foreman on the project site, Timothy J. Grubb, also a Wireworks employee, testified at his deposition that Wireworks was hired to "[build] out the voice and data and security cabling" for the dealership (Grubb's EBT at 10). He testified that he did not see the garage door hit plaintiff, but he did see plaintiff fall and heard him yell (*id.* at 26, 30). Mr. Grubb further testified that "[t]he garage door, it went up very fast. The next thing I know, I heard a big bang, and [plaintiff] was on the floor" (*id.* at 30-31). Mr. Grubb also authenticated the accident report prepared by defendant JRM Construction Management. The report states in relevant part that "[w]hile worker was working on an 8' ladder on the ground floor, the car roll up door opened and knocked him off the ladder. He fell onto his right side shoulder." Mr. Grubb also testified that Wireworks provided plaintiff with the ladder he used, and that there were no hydraulic lifts

or scaffolds available on the work site (Grubb's EBT at 29).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Negligence and Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). A property owner or contractor is liable in two circumstances: (1) if there is evidence that the property owner either created a dangerous condition, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]).

Defendants argue that there is no dangerous or defective condition present in this action. However, there been very little discussion of the danger posed by the garage door's proximity to plaintiff's work area. In addition, defendants do not establish lack of constructive notice, which requires, *inter alia*, evidence of the last time the area was inspected (*Lauture v Bd. of Managers at Vista at Kingsgate, Section II*, 172 AD3d 1351, 1352 [2d Dept 2019]; *Ryan v Beacon Hill Estates Coop., Inc.*, 170 AD3d 1215, 1215-16 [2d Dept 2019]).

Additionally, defendants offer little, if any, argument on the second circumstance for

Labor Law § 200 liability. At best, defendants make only passing reference to the lack of allegations concerning about "complaints about safety on the job site", and they claim "safety devices" were readily available, but they make no argument about the supervision of plaintiff in the context of a negligence or Labor Law § 200 claim.

Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). To prevail on a claim for violation of Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation proximately caused his or her injuries (*Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 887 [2d Dept 2019]). Plaintiff must also prove he was engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 [2d Dept 2017]).

Defendants argue that plaintiff was not engaged in activity protected under this statute. In similar cases, the installation of wire amounts to "alteration" of a building if the wiring requires the creation of holes or other physical changes to the structure itself, or if the wire or cable is affixed to the structure (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 971 [2d Dept 2009]; *Luthi v Long Is. Resource Corp.*, 251 AD2d 554, 556 [2d Dept 1998] [wiring must be attached or affixed to the structure]).

At his deposition on October 14, 2016, plaintiff testified that he was laying the cable on top of a vent. When asked if he was securing the cable to the vent plaintiff answered, "At that point, no." (Plaintiff's EBT Transcript at 35). Whether plaintiff was intended to affix the cable

later remains an issue of fact. If so, plaintiff's initial work to lay the cable would be integral to the overall project, and protected under the statute (*Prats v Port Auth. of New York and New Jersey*, 100 NY2d 878, 882 [2003]; *Bonilla-Reyes v Ribellino*, 169 AD3d 858, 860 [2d Dept 2019]).

In support of his contention that defendants violated Labor Law § 240(1), plaintiff submits an affidavit from Herbert Heller, a professional engineer. Mr. Heller opines that the ladder used by plaintiff was inadequate and improper for the task.[2] He opines that a Bakers scaffold, which has a safety railing, would have provided a steadier work platform for plaintiff to do his work, considering the risk of lateral forces.

In opposition and in support of their own motion, defendants submit an affidavit from Dr. William Marletta, who opines that the ladder was adequate for the task and that a scaffold of the appropriate height would not have prevented the accident because such scaffolds would not have safety rails. Dr. Marletta further opines that, even if a scaffold were used in the same position as the ladder, the garage door would have caused the scaffold to rotate to the right, causing the accident. These conflicting expert opinions manifest triable issues of fact that cannot be resolved on summary judgment (*see, e.g., Sozzi v Gramercy Realty Co. No. 2, L.P.*, 304 AD2d 555, 557 [2d Dept 2003]).

Defendant also contends that any purported violation of the statute did not cause the accident, but rather that plaintiff fell because he was hit in the head by a garage door. Plaintiff

---

[2] Defendants object to Mr. Heller's report because, they claim, plaintiff did not timely disclose him. Even if this were true, failure to previously disclose an expert would not prevent this court from considering the expert's report (*Cobham v 330 W. 34th SPE, LLC*, 164 AD3d 644, 645 [2d Dept 2018]).

contends that the initial contact between plaintiff and the door is irrelevant. Plaintiff argues that the proximate cause of the accident is, as plaintiff testified, when the ladder shifted and he and the ladder fell. Plaintiff is correct that an unsecured ladder may be the cause of a fall from a height, even when there is initial contact between an outside force and the plaintiff himself (*Gonzalez v AMCC Corp.*, 88 AD3d 945, 946 [2d Dept 2011] [finding a violation of Labor Law 240(1) where the "ladder was not secured to something stable and was not chocked or wedged in place"]; *DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515 [1st Dept 2013] [finding that a ladder was unsuitable for the task when plaintiff was struck by a live electrical wire, causing him to move away, and thereby causing the ladder to wobble and the plaintiff to lose his balance and fall]).

Defendants object to this application of Section 240(1). Defendants reference *Flossos v Waterside Redevelopment Co., L.P.* (108 AD3d 647 [2d Dept 2013]), in which plaintiff fell from a ladder when he was struck by a piece of the ceiling that fell on him, causing him and the ladder to fall to the ground. The court treated that case as a "falling objects" case, where Section 240(1) protects against "such specific gravity-related accidents as . . . being struck by a falling object that was improperly hoisted or inadequately secured" (*id.* at 649, citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Simply put, this is not a "falling objects" case.

In any event, causation analysis is highly fact specific and typically not appropriate for summary judgment (*Gurmendi v Perry St. Dev. Corp.*, 93 AD3d 635, 638 [2d Dept 2012]; *Billsborrow v Dow Chem., U.S.A.*, 177 AD2d 7, 17 [2d Dept 1992]). Accordingly, there are triable issue of fact that prevent summary judgment on this record.

Labor Law § 241(6)

Labor Law § 241(6) imposes on owners and contractors a non-delegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

What amounts to protected work under Section 241(6) is governed by Industrial Code § 23–1.4(b)(13), which defines protected work as "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (*see also Wass v County of Nassau*, 173 AD3d 933, 935 [2d Dept 2019]). As explained above, there are issues of fact as to whether plaintiff was engaged in protected work.

Assuming that plaintiff's work is protected, defendant establishes that plaintiff has not proven a violation of Labor Law § 241(6). Plaintiff alleges violations of Industrial Code §§ 23-1.7(d) and 23-1.7(e), which concerns slipping hazards and tripping hazards, respectively. Based upon the facts presented, neither section is applicable here. Plaintiff also alleges a violation of Industrial Code § 23-1.32, which requires elimination of a danger or warning of a danger once the Commissioner has notified the employer, owner, contractor or agent of the danger. There is no proof of any prior notice from the Commissioner here. Finally, plaintiff alleges violation of certain Building Code provisions, but a violation of the Building Code cannot form the basis of a claim for violation of Labor Law § 241(6) (*Dugandzic v New York City School Const. Auth.*, 174 Misc 2d 702, 707 [Sup Ct, Kings County 1997]).

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is denied, and defendant's motion for summary judgment is granted solely to the extent that plaintiff's claim for violation of Labor Law 241(6) is dismissed.

This constitutes the decision and order of the court.

October 5, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court