Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RUDOLPH E. GRECO, JR.** IA PART 32
Justice

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JERROLD ADAMSKY,

Index No.: 7(
Motion Date:
Motion Cal. No.: 46
Motion Seq. No.: 4

Plaintiff,

-against-

GRACE INDUSTRIES, LLC, et al.,

Defendants.

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The following numbered papers read on this motion by plaintiff for summary judgment on the issue of liability, and defendants' cross-motion for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 47 - 65
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 67 - 82
Affirmation in Opposition.....	EF 83 - 84
Replying.....	EF 85

Upon the foregoing cited papers, it is ordered that this motion by plaintiff for partial summary judgment, and the cross-motion by defendants for summary judgment, are determined as follows:

Plaintiff Jerrold Adamsky commenced this action to recover for work-related injuries he allegedly sustained in accident on April 27, 2018, while working on a JFK Airport construction and renovation project, which was owned by defendant Port Authority of New York and New Jersey (Port Authority). Plaintiff alleges that he was walking over plywood, which was covering an open manhole, when the plywood suddenly cracked and broke, causing him to fall into said manhole. The manhole was approximately nine (9) feet deep. Plaintiff claims that at the time of the accident, he was carrying a pipe over his shoulder and when he fell, he extended his arms to stop his fall and the pipe fell onto his right hand causing a severe crushing injury.

At the time of the accident, plaintiff was a union electrician employed by nonparty Haugland Energy (Haugland). Haugland is a sister company of defendant Grace Industries, LLC (Grace). Port Authority hired Grace as the general contractor for the subject construction and renovation project. Grace subcontracted Haugland to work on said project.

Now, plaintiff moves for partial summary judgment and defendants Grace and Port Authority cross-move for summary judgment, pursuant to common-law negligence, Labor Law §§ 200, 240(1), and 241(6).

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]). Thus, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Labor Law §§ 240(1) and 241(6):

Labor Law §§ 240(1) and 241(6) imposes liability on owners, contractors, and their agents (*see Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 433 [2015]; *Holifield v Seraphim, LLC*, 92 AD3d 841, 842[2d Dept 2012]).

Pursuant to "Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work site" (*Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1023 [2d Dept 2018]). The hazard posed by working at an elevation is that a worker might be injured in a fall, in the absence of adequate safety devices (*see Narducci v Manhasset Bay Associates*, 96 NY2d 259, 268 [2001]).

Here, plaintiff's injuries were allegedly the result of a fall, however, such injuries did not arise in the context of the "special hazards" against which the statute is designed to protect, i.e., "the exceptionally dangerous conditions posed by elevation differentials at work sites" (*see Misseriti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 491 [1995]; *Carey v Five Bros., Inc.*, 106 AD3d 938, 940 [2d Dept 2013]; *Masullo v City of New York*, 253 AD2d 541, 542 [2d Dept 1998]). While the manhole may have been negligently and inadequately covered, this is not one of the gravity-related hazards or perils subject to the safeguards prescribed by Labor Law § 240(1) (*id.*).

Labor Law § 241(6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 878 [1993]), "even in the absence of control or supervision of the worksite" (*Rizzuto v Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). A plaintiff claiming a cause of action under Labor Law § 241(6) must demonstrate a violation of a rule or regulation of the Industrial Code, which gives a specific positive command, and is applicable to the facts of the case (*see Carey*, 106 AD3d at 940).

Here, plaintiff's cause of action under Labor Law § 241(6) is premised on a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1)(i), which provides that

"hazardous openings" or holes at construction sites "into which a person may step or fall shall be guarded by a substantial cover fastened in place" or fenced off (*see Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 809-10 [2d Dept 2010]).

The Court finds that plaintiff established his prima facie burden by demonstrating that he partially fell through a manhole that was not properly covered in violation of 12 NYCRR § 23-1.7(b)(1)(i) (*id.*). In opposition, defendants failed to demonstrate that the cited regulation is inapplicable to the extant circumstances, or that its violation was not a proximate cause of plaintiff's accident (*id.*)

Common-Law Negligence and Labor Law § 200:

The common-law duty of an owner or general contractor to provide workers with a safe place to work is codified in Labor Law § 200(1) (*see Turgeon v Vassar College*, 172 AD3d 1134, 1135-36 [2d Dept 2019]). "'Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed'" (*id.* at 1136, quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where, as here, the plaintiff alleges, inter alia, that a dangerous condition existed on the premises where the construction work was being performed, an owner or general contractor moving for summary judgment dismissing claims under common-law negligence and Labor Law § 200 must establish that it neither created the dangerous condition nor had actual or constructive notice of its existence (*see Costa v. Sterling Equipment, Inc.*, 123 AD3d 649, 650 [2d Dept 2014]).

The Court finds that defendants failed to meet their prima facie burden that they neither created the dangerous condition nor had actual or constructive notice of its existence (*id.*; *Carey*, 106 AD3d at 941). Nevertheless, plaintiff established his prima facie burden by demonstrating that his accident and alleged injuries were a result of dangerous or defective conditions at the subject worksite (*see Turgeon*, 172 AD3d at 1135-36; *Ortega*, 57 AD3d at 61). Furthermore, plaintiffs are not required to show an absence of comparative fault to be entitled to summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Marks v Rieckhoff*, 172 AD3d 847, 848 [2d Dept 2019]). There is a question of fact as to the issue of whether plaintiff was comparatively negligent and such issue will be determined at trial (*id.*).

Accordingly, this motion by plaintiff for summary judgment on the issue of liability is granted only on his causes of action premised on common-law negligence and Labor Law §§ 200 and 241(6), but is otherwise denied; defendants' cross-motion for summary judgment is granted only to the extent that plaintiff's cause of action premised in Labor Law § 240(1) is dismissed, but is otherwise denied; and it is further

ORDERED that plaintiff's cause of action premised in Labor Law § 240(1) is dismissed; and it is further

ORDERED that plaintiff Jerrold Adamsky shall serve a copy of this order with notice of entry upon defendants, within thirty (30) days of the date of entry.

This constitutes the decision and order of this Court.

Dated: September 9, 2020

RUDOLPH E. GRECO, JR., J.S.C.

FILED

9/10/2020
12:52 PM

COUNTY CLERK
QUEENS COUNTY