

Dunlap v Durst Org. Inc.
2020 NY Slip Op 33887(U)
November 24, 2020
Supreme Court, New York County
Docket Number: 155224/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

MATTHEW DUNLAP

Plaintiff,

- v -

THE DURST ORGANIZATION INC.,

Defendant.

-----X

INDEX NO. 155224/2018

MOTION DATE 11/20/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendant for summary judgment dismissing this case is granted in part and denied in part.

Background

This Labor Law case arises out of plaintiff's work as an elevator mechanic for non-party Thyssenkrupp Elevator at One World Trade Center. While diagnosing the problem with the elevator, plaintiff stood on top of the elevator car and on top of permanent cages, or boxes, that enclosed the lighting fixtures for the elevator. Plaintiff claims that when he tried to open the malfunctioning door, his foot slipped off the box and he fell.

Defendant moves for summary judgment on the ground that it contracted with plaintiff's employer for elevator maintenance and that it had no role in the repair of the subject elevator. It claims it had no notice of any defective or dangerous condition that might have caused plaintiff's accident. With respect to Labor Law § 240(1), defendant claims that this was not an elevation-

related accident and plaintiff fell on the same level as he was working. The box on which plaintiff decided to stand was only five to six inches high.

Defendant also claims that plaintiff cannot state a claim under the Industrial Code Sections pled in connection with plaintiff's 241(6) cause of action or under Labor Law § 241-a (which relates to planking over opening in shaft-ways). Defendant emphasized that plaintiff acted as his own supervisor on the day of his accident.

In opposition, plaintiff claims that there are issues of fact that compel denial of the motion. He claims that the accident arose from the unsafe condition of the workspace and that he had no place to stand. Plaintiff argues that defendant did not meet its prima facie burden to dismiss plaintiff's claims although plaintiff withdrew its 241-a claim.

In reply, defendant there is no statutory or common-law violation that caused plaintiff's injury.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 240(1)

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). “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” (*id.* at 501).

“[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough” (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Plaintiff explains that the accident occurred when he was on top of the elevator assessing the malfunctioning door (NYSCEF Doc. No. 25 at 53). He testified that “when I was standing on them to perform my assessment of what the problem was or what had to be happened and when I went to go push the door open and—I turned to get something, and when I pushed it open my weight went that way (indicating) and my foot slipped off the edge of the box and kind of got tangled as when I – when I fell, it went under the side of the box, and that’s when I fell and my whole knee buckled” (*id.* at 54). “[T]hose boxes – I have a rather big foot, so it was uncomfortable to be on that box as it is, and it’s right where you need to work” (*id.* at 55).

The Court finds that this is not the type of elevation-related incident that falls under Labor Law § 240(1). Plaintiff was standing on boxes that were “about 5, 6 inches high” when his foot slipped off (*id.* at 54). Plaintiff’s account of the accident suggests it occurred because his foot was too big for the boxes upon which he was standing (the permanent boxes that housed the elevator cab’s lighting) and he simply lost his balance.

“The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and the decisive question as to whether the statute applies to a particular accident is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person” (*Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508, 922 NYS2d 292 [1st Dept 2011]).

Plaintiff did not identify what protection should have been provided to him or what safety devices might have prevented his fall. Moreover, while there is no bright-line rule regarding the necessary elevation required to state a 240(1) claim (*Megna v Tishman Const. Corp. of Manhattan*, 306 AD2d 163, 164, 762 NYS2d 63 [1st Dept 2003] [observing that even a two-foot

drop could fall under Labor Law § 24091)), the fact is that, here, the box was only a few inches high. The Court is unable to conclude that the elevation of the working surface contributed to his accident.

Instead, it appears that plaintiff simply lost his balance while trying to open the malfunctioning door and his foot slipped off the box. Simply, put this is not a case where plaintiff fell from a height and should have been provided with a safety device, like a harness, that could have prevented the fall. The account provided by plaintiff suggests that the surface he was working on was not big enough to allow plaintiff to push open the door. The accident may have been caused by a lack of traction but there is no indication it was a gravity-related incident. Not every trip or slip and fall provides the basis for a Labor Law § 240(1) claim, and this claim is dismissed.

Labor Law § 200

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

“Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska*

USA Bldg. Inc., 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). “Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*id.* at 144).

“Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

The Court also dismisses this cause of action. Plaintiff does not dispute the fact that he was on the jobsite because defendant hired his employer to fix elevators and that defendant had no role in supervising the elevator maintenance (*see* NYSCEF Doc. No. 27 [contract for elevator maintenance with plaintiff’s employer]). Moreover, the Court finds that there was no dangerous or defective condition. Plaintiff testified that he was standing on the boxes that housed the elevator lighting when he slipped on them. He did not claim that these boxes were defective or that there was some dangerous condition with the boxes that defendant should have remedied. Rather, it appears that plaintiff was standing on the elevator and slipped. Simply because he slipped does not mean that there was a dangerous condition; the testimony indicates he lost his balance while pushing the door. Because plaintiff did not sufficiently articulate what was defective with the elevator or how that defect caused his accident, the Court is compelled to dismiss this claim.

Labor Law § 241(6)

“The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) .


. . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). “The regulation must also be applicable to the facts and be the proximate cause of the plaintiff’s injury” (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Defendant claims that Labor Law § 241(6) is inapplicable but does not specifically address the Industrial Code sections upon which plaintiff relies. Therefore the Court denies this branch of the motion because defendant has not met its prima facie burden. The Court cannot simply grant this branch of the motion based on a generalized argument. In reply, defendant appears to attempt to shift the burden to plaintiff to justify why this claim should remain. But that is incorrect and its references to particular Industrial Code Sections in reply are improper and will not be considered.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is granted only to the extent that plaintiff’s Labor Law §§ 240(1), 200 and 241-a (plaintiff withdrew this claim) causes of action are severed and dismissed and denied to the extent it sought dismissal of the 241(6) claim.

11/24/2020
DATE


ABLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE