Borden v Colicchio
2020 NY Slip Op 34097(U)
December 9, 2020
Supreme Court, Kings County
Docket Number: 521083/2017
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
---X
JORGE A. BORDEN,

Plaintiff,

-against-

THOMAS COLICCHIO and CPM BUILDERS, INC.,

Defendants.
---X

Index No.: 521083/2017
Motion Date: 12/9/20
Motion Seq.: 03 & 04

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 03, 04) 46-57, 59-71, 73, and 77-81 were read on this motion for summary judgment.

Plaintiff has moved for summary judgment, pursuant to CPLR § 3212, as to liability based on Labor Law § 240(1) against defendant CPM Builders, Inc. (hereinafter CPM). The defendants have cross-moved for summary judgment as to defendant CPM Builders, Inc., the general contractor, based on Labor Law §§200, 240, and 241(6) & common law negligence, and as to defendant Thomas Colicchio (hereinafter Colicchio) on Labor Law § 200 and common law negligence. For the reasons set forth below the plaintiff's motion is granted and the defendants' cross-motion is denied.

The accident occurred on October 16, 2017, when the plaintiff fell from the second floor through the space between the floor joists, and landed on the first floor level below.
At the time of the accident, the plaintiff was employed by Premier Drywall Group, Inc., a subcontractor who is not a defendant in this action. Plaintiff's job was to assist in removing and replacing beams supporting the floors on the second and third floors. Part of the process of removing the beams involved removing and replacing the plywood flooring. Some of the plywood which covered the beams on the second floor had been removed, however paths were left for the workers to walk on. The workers would screw into the floor additional, smaller pieces of plywood, moving to whichever area the workers needed so they would have sufficient space to move about.

On the date of the accident, the plaintiff walked up to the second floor to retrieve a circular saw. He testified that he stepped on an old piece of plywood, and the piece shifted, causing him to fall. It is alleged that the plywood was not properly fastened.

Plaintiff's Motion for Summary Judgment Pursuant to Labor Law § 240(1)

Pursuant to Labor Law § 240(1), all contractors and owners engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, except certain owners of one and two-family dwellings, 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." The statute "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." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

To prevail under Labor Law § 240(1), the plaintiff must prove a violation of the statute, i.e. that the owner or general contractor failed to provide adequate safety devices, and that the absence of that protection was the proximate cause of the injuries. *Allan v DHL Express [USA], Inc.*, 99 AD3d 828 (2d Dept 2012); *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003). The statute applies to risks related to elevation, and "are limited to such specific gravity-related accidents as falling from a height." *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 (2d Dept 2000) (holding that "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials"). Furthermore, the Appellate Division, Second Department has ruled that summary judgment on the issue of liability is warranted pursuant to Labor Law § 240(1) where plaintiff submitted evidence that he fell through an uncovered opening, that no safety device was in place to protect him from the uncovered opening and the violation of § 240(1) was the proximate cause for his injuries. *See Brandl v. Ram Builders*, 7 AD3d 655 (2d Dept 2004).

This is the precise situation in which § 240(1) applies, and plaintiff's fall is related to the risks of working at an elevation. As the plaintiff argues, he was given no safety devices whatsoever as he traversed the area where only plywood protected him from falling to the floor below. The type of work that he was performing required the use of some other safety device besides plywood. Although he fell while attempting to retrieve a circular saw, he still falls under the statute, as he is a protected worker that was engaged in the erection, demolition, or repairing of a building. According to the deposition testimony of CPM's project manager, Theodore Kilcommons, there had been scaffolding erected at one point, however during deconstruction areas of the "catwalk" were removed at the discretion of the subcontractor, and plywood was placed.

The defendants' arguments that Labor Law §240(1) is inapplicable as this fall does not involve a height differential, does not involve a scaffold, hoist, stay or ladder, or that the fall was caused by the failure of his co-workers to properly perform their job by properly securing the plywood, are without merit. Their argument that plaintiff's fall occurred as he was walking on a flat floor ignores the fact that his work required him to work at or near the top of exposed floor joists, without safety devices to prevent a fall such as the one that occurred here. *See Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693 (2d Dept 2006) (decedent was exposed to an elevation-related risk within the scope of Labor Law § 240(1) when he fell in close proximity to two openings covered only with unsecured plywood boards). The fact that the defendants previously had scaffolding erected with nets on the railing, and harnesses for the workers implies that the defendants' recognized the potential fall hazards of the work that was being performed.

Moreover, the duty under the statute is nondelegable, and imposes absolute liability for a breach which has proximately caused an injury, even though the work was performed by an independent contractor over which it exercised no supervision or control. *See Aversano v JWH Contr., LLC,* 37 AD3d 745 (2d Dept 2007). Contributory negligence is not a defense to a violation of Labor Law § 240(1). *Castillo v 62-25 30th Ave. Realty, LLC*, 47 AD3d 865 (2d Dept 2008).

As such, plaintiff has established his entitlement to judgment as a matter of law pursuant to Labor Law § 240(1).

Defendant's Cross-Motion for Summary Judgment

The prong of the motion seeking summary judgment as to CPM based on Labor Law § 240(1) is denied for the reasons set forth above.

The prong of the motion seeking summary judgment as to CPM based on Labor Law § 241(6) is also denied. Labor Law § 241(6), which applies to contractors and owners engaged in construction, excavation, and demolition activities, requires that the work be constructed, shored, equipped, guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to persons employed therein. *Ortega v Puccia*, 57 AD3d 54 (2d Dept 2008). The obligations of Labor Law § 241(6) are non-delegable. *Id.*; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 (1993); *Long v Forest-Fehlhaber,* 55 NY2d 154 (1982); *Allen v Cloutier Constr. Corp.,* 44 NY2d 290 (1982). Causes of action invoking that statute must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident. S*ee Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494*; Ares v State of New York,* 80 NY2d 959 (1992); *Adams v Glass Fab,* 212 AD2d 972 (1995). The nondelegable duty applies regardless of the general contractor's level of supervision or control of the work performed. *Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343 (1998). "As a

predicate to a § 241(6) cause of action a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code." *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 (2d Dept 2015); *see also Misicki v Caradonna*, 12 NY3d 511, 515 (2009).

Here, the plaintiff has alleged that CPM violated Industrial Code §§ 23-1.7(b)(1); 23-3.3(c); and 23-3.3(j), which relate to safety precautions and devices that must be employed by the general contractor based on falling hazards and hazardous openings on the work site. § 23-3.3(c) provides for continuous safety inspections at the site for possible hazards. Plaintiff has raised triable issues of fact as to whether CPM violated the enumerated sections of the Industrial Code.

Finally, the prong of the motion seeking summary judgment as to CPM and Colicchio based on Labor Law § 200 and common law negligence is denied. Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 (1998); *Chowdhury v Rodriguez*, 57 AD3d 121 (2d Dept 2008); *Ortega v Puccia*, 57 AD3d 54. "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 work site, and those involving the manner in which the work is performed." *Ortega v Puccia*, 57 AD3d at 61; *see Chowdhury*, 57 A.D.3d at 128. Where, as here, a plaintiff's injuries arise not from the manner in which the work was being performed, but rather from an allegedly dangerous condition on the property, a property owner will be liable under a theory of common-law negligence when the owner created the complained-of condition, or when the owner failed to remedy a dangerous or defective condition of which it had actual or constructive notice. *See Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543 (2d Dept 2010); *LaGiudice v Sleepy's Inc.*, 67 AD3d 969 (2d Dept 2009); *Bridges v Wyandanch Community Dev. Corp.,* 66 AD3d 938 (2d Dept 2009); *Chowdhury,* 57 AD3d 121; *Kerins v Vassar Coll.*, 15 AD3d 623 (2d Dept 2005). The same analysis applies to general contractors regardless of their lack of direction or control over the means and methods of the work performed. *See Wynne v B. Anthony Const. Corp.*, 53 AD3d 654 (2d Dept 2008). A general contractor has a duty to ensure that the construction site is safe for the workers.

CPM and the building owner, Colicchio have failed to eliminate questions of fact as to whether they created or had actual or constructive notice of the dangerous condition involving the improperly secured plywood which allegedly caused the plaintiff's fall. Although Colicchio is the building owner, who was not involved in the construction and did not oversee the work, his deposition testimony raises a question of fact as to whether he had actual or constructive knowledge of the dangerous condition.

Colicchio testified that he visited the work site at least two to three times per week, except in the summer months and when he was filming for months at a time, and that he alone, or sometimes with the project foreman, conducted a walk-through of the premises, floor-by-floor, to ascertain the progress of the construction. His testimony also made clear that he had familiarity with construction as displayed during the deposition, when he corrected the plaintiff's attorney's use of the word "beam," stating that it was not a beam but a "floor joist" that the

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attorney was referring to. He explained that a beam runs "this way" (indicating) and a floor joint runs "this way" (indicating). He said he was present when the floor joists between each level had been removed and the floor was open. He testified that when he saw the work being performed the workers were using the scaffolding that had been erected, and wearing harnesses and hard hats. The inside of the wooden railings of the scaffolding had "fluorescent netting" attached.

Colicchio observed that the floor joists were three to four feet apart, and opined that there is a "standard" for the distance between the joists, but he was not sure what it was. He testified that certain floor joists were in "worst" [sic] shape than others and had to be replaced. Although he was not directly involved with the work being done on the floor joists, he testified that he would discuss that "we've got to replace X amount of joists." He testified that he "may have" witnessed the subflooring being put down but that he was only looking at the progress of the work when he inspected the site. His frequent inspections of the site, along with clear knowledge concerning the nature of the work being done, particularly the removal and replacement of the flooring and floor joists, raises issues of fact about what he knew or should have known about the plywood placement, and whether it was properly installed.

Additionally, there are triable issues of fact as to whether the general contractor, CPM, knew or should have known of the dangerous condition regardless of whether it directed or controlled the means and methods of the work performed.

Accordingly, the plaintiff's motion for summary judgment (motion 3) is granted and the defendant's cross-motion for summary judgment (motion 4) is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted in its entirety and it is further;

ORDERED, that the defendants' cross-motion is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: December 9, 2020

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.