

Lemus v Nassau Bldrs., Inc.
2020 NY Slip Op 34738(U)
December 21, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 618882/2016
Judge: Vincent J. Martorana
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SHORT FORM ORDER

INDEX No. 618882/2016
CAL. No. 2020001830T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 7/9/20
ADJ. DATE 8/13/20
Mot. Seq. # 003 - MotD

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JUAN JOSE LEMUS,

Plaintiff,

SIBEN & SIBEN, LLP
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11706

- against -

BAXTER SMITH TASSAN & SHAPIRO
Attorney for Defendant Nassau Builders, Inc.
and Nassau Builders Corp.
99 North Broadway
Hicksville, New York 00801

NASSAU BUILDERS, INC., NASSAU
BUILDERS CORP., ELITE DEVELOPERS
LLC,

Defendants.

HOGAN & CASSELL, LLP
Attorney for Defendant Elite Developers, LLC
500 North Broadway, Suite 153
Jericho, New York 11753

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Upon the following e-filed papers read on this motion for summary judgment; Notice of Motion and supporting papers by defendant Nassau Builders, Inc., dated June 1, 2020; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff, dated August 10, 2020; Repeating Affidavits and supporting papers by defendant, dated August 12, 2020 __; Other __; it is

ORDERED that the motion by defendant Nassau Builders, Inc. for summary judgment dismissing the complaint is decided as set forth herein.

Plaintiff commenced this action seeking to recover damages for personal injuries he allegedly sustained on May 26, 2010, when he fell from a ladder while working in the basement of a house being constructed at 17 Lorraine Street in Syosset, New York. Defendant Elite Developers, LLC ("Elite") hired Nassau Builders, Inc. d/b/a Nassau Builders Corp. ("Nassau Builders") to perform concrete work and hired nonparty American Plumbing Solutions to install the plumbing. Plaintiff was employed by American Plumbing Solutions ("American Plumbing"), and at the time of the accident was drilling holes in the basement ceiling for the installation of pipes.

In his complaint, plaintiff alleges causes of action against defendants for violations of Labor Law §§ 240, 241 and 200, and for common-law negligence. After issued was joined by defendants, Elite's counsel withdrew as counsel. Although directed by this court to obtain new counsel, Elite has failed to do so and has not appeared at multiple court-ordered conferences. By order of this court dated September 19, 2018, a default judgment was granted in favor of plaintiff and against Elite on the issue of liability. Discovery has been otherwise completed and the note of issue filed.

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Nassau Builders now moves for summary judgment dismissing the complaint on the ground that it was neither an owner, general contractor or an agent for the work plaintiff was performing. Nassau Builders also seeks summary judgment on the grounds that Labor Law § 240 (1) does not apply to the circumstances surrounding the accident, the Industrial Code (12 NYCRR) violations alleged are either inapplicable or insufficiently specific/concrete and, thus, may not serve to support the Labor Law § 241(6) cause of action, and that it cannot be held liable under Labor Law § 200 or for common-law negligence as it did not direct, control or supervise the injury-producing work.

Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a reasonably safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1993]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 35 NYS3d 700 [2d Dept 2016]; *Rojas v Schwartz*, 74 AD3d 1046, 1046, 903 NYS2d 484 [2d Dept 2010]). A cause of action sounding in a violation of Labor Law § 200 or common-law negligence may arise from a dangerous or defective condition on the premises, or the manner in which the work was performed (see *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Where, as here, the claim arises out of the means and methods used to perform the work, Nassau Builders may be held liable for common-law negligence or a violation of Labor Law § 200 only if it had “the authority to supervise or control the performance of the work” (*Pilato v 866 U.N. Plaza Assoc., LLC*, *supra* at 646; *Ortega v Puccia*, *supra* at 61).

Serafino Paletta, the vice president and secretary, and Alain Paletta, the president of Nassau Builders were deposed. Serafino and Alain Paletta (hereinafter the “Palettas” when referred to collectively) testified that Nassau Builders installed concrete floors in the basement and installed the stoop, driveway, sidewalks, stone facade, in-ground sprinkler system and the lawn. They testified that Nassau Builders did not perform any other work at the subject construction site, that no ladders or scaffolding was needed for its work, and that it did not subcontract out any of its work or supervise any other trades. Plaintiff testified he only received directions and instructions from American Plumbing employees and did not receive instructions from anyone else and only used tools and equipment provided by his employer. This testimony establishes that Nassau Builders did not exercise supervision or control over the performance of the work giving rise to plaintiff’s accident. Thus, Nassau Builders is entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action (see *Pchelka v Southcroft, LLC*, 178 AD3d 836, 115 NYS3d 382 [2d Dept 2019]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 56 NYS3d 187 [2d Dept 2017]). Plaintiff’s opposition does not address these arguments. Therefore, the second cause of action alleging a violation of Labor Law § 200 and common law negligence is hereby severed and dismissed as to Nassau Builders.

Labor Law § 241 (6) requires compliance with the safety rules and regulations promulgated by the Commissioner of the Labor Department and found in the Industrial Code (see *Rizzuto v L.A. Wenger Constr. Co.*, *supra*; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). To sustain a cause of action under Labor Law § 241 (6), a plaintiff must allege a breach of an Industrial Code regulation which sets forth specific, concrete safety standards applicable to the circumstances of the accident (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 45 NYS3d 179 [2d Dept 2017]).

Here, plaintiff alleges violations of the Industrial Code, 12 NYCRR, § 23-1.5, § 23-1.7, § 23-1.21 and § 23-1.21(b)(4)(ii). 12 NYCRR § 23-1.5 relates to general safety standards and, accordingly, will not provide a basis for a claim under Labor Law § 241 (6) (*Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept

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2005]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]). 12 NYCRR § 23-1.7 is sufficiently concrete (see *Jicheng Liu v Sanford Tower Condominiums, Inc.*, 35 AD3d 378, 828 NYS2d 101 [2d Dept 2006]), but is inapplicable to the facts herein. Plaintiff was not struck by a falling object, was not exposed to an overhead hazard, did not fall into a hazardous opening and was not subject to a slipping hazard, or any other hazard covered in the subsections of 12 NYCRR § 23-1.7. The requirements for ladder use and maintenance set forth in the several subsections of § 23-1.21 are either inapplicable to the facts or insufficiently concrete (see *Lopez v La Fonda Boricua, Inc.*, 136 AD3d 588, 26 NYS3d 267 [1st Dept 2016]; see *Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 988 NYS2d 1 [1st Dept 2014]). Thus, Nassau Builders also established its entitlement to summary judgment dismissing the Labor Law § 241(6) cause of action. Plaintiff's opposition also does not address these arguments. Therefore, the fourth cause of action alleging violations of Labor Law § 241(6) is hereby severed and dismissed as to Nassau Builders.

Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners and general contractors for failing to provide safety equipment and devices necessary to protect workers from risks inherent in elevated work sites (see *Ross v Curtis-Palmer Hydro Elec. Co.*, *supra*; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]; *Cannon v Putnam*, 76 NY2d 644, 563 NYS2d 16 [1990]; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 132 NYS3d 787 [2d Dept 2020]). "Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials" (*Zholanji v 52 Wooster Holdings, LLC*, *supra* at 1300; *Melchor v Singh*, 90 AD3d 866, 868, 935 NYS2d 106 [2d Dept 2011]).

Plaintiff testified that at the time of the accident he was using an eight-foot, A-frame ladder and erected it below the area in the ceiling where he was instructed to drill a hole. He ascended the ladder to the fifth step with a drill in hand without incident, and completed the task of drilling a hole in the approximately fourteen-foot high ceiling. When he began to step down from the fifth to the fourth step the ladder moved from side to side, causing the ladder and plaintiff to fall to the floor.

"It is well settled that [the] failure to properly secure a ladder, to ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Hill v City of New York*, 140 AD3d 568, 569, 35 NYS3d 37 [1st Dept 2016]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174, 780 NYS2d 558 [1st Dept 2004]). Plaintiff's testimony that the ladder moved from side to side during its use precludes the grant of summary judgment dismissing this cause of action (see e.g. *Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 54 NYS3d 387 [1st Dept 2017]; *Hill v City of New York*, *supra*; *Kozlowski v Ripin*, 60 AD3d 638, 874 NYS2d 241 [2d Dept 2009]). That plaintiff could not identify any defect in the ladder is not a bar to recovery under this section of the Labor Law (*Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 577, 3 NYS3d 582 [1st Dept 2015]).

Nassau Builders also argues that it cannot be held liable under Labor Law § 240 (1) as it was not an owner or general contractor. A defendant is not liable on a Labor Law § 240 (1) cause of action unless it is an owner, general contractor or an agent of an owner or general contractor (see *Bennett v Hucke*, 131 AD3d 993, 995, 16 NYS3d 261 [2d Dept. 2015], *affd* 28 NY3d 964, 38 NYS3d 834 [2016]).

The Palettas testified that Nassau Builders does not own the property and was not the general contractor on the construction site. They also testified that Nassau Builders does not do business under any other name and that it has no relationship with Nassau Builders Corp. The Palettas explained that the building permit and the certificate of occupancy obtained from the Town of Oyster Bay incorrectly list Nassau Builders as Nassau Builders Corporation, and incorrectly indicate that it is the owner and general contractor. The Palettas believed that Elite was

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the owner and general contractor as it hired Nassau Builders and American Plumbing. However, Alain Paletta acknowledged during his deposition that his notarized signature appears on the building permit on behalf Nassau Builders as owner. The documents raise an issue of fact and create an issue of credibility which should not be decided by the court but left for the trier of facts (see *Ferrante v American Lung Assn.*, 90 NY2d 623, 665 NYS2d 25 [1997]; *Sacher v Long Is. Jewish-Hillside Med. Ctr.*, 142 AD2d 567, 568, 530 NYS2d 232 [2d Dept 1088]). Therefore, Nassau Builders is not entitled to summary judgment dismissing the Labor Law § 240 cause of action.

Accordingly, the motion is granted only to the extent of severing and dismissing the second and fourth causes of action in the complaint as asserted against Nassau Builders, and is otherwise denied.

Dated: Riverhead, New York
December 21, 2020



VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION