

Torres v Eastchester Union Free Sch. Dist.
2020 NY Slip Op 34901(U)
November 10, 2020
Supreme Court, Westchester County
Docket Number: 61636/2018
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JAVIER E. TORRES and ANA B. TORRES,

Plaintiffs,

-against-

DECISION AND ORDER
Motion Sequence Nos. 3 - 4
Index No. 61636/2018

EASTCHESTER UNION FREE SCHOOL DISTRICT
and THE EASTCHESTER BOARD OF EDUCATION,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with plaintiffs’ amended motion for an order granting summary judgment and leave to file and serve an amended bill of particulars (sequence 3); and defendants’ cross-motion for an order granting summary judgment dismissing plaintiffs’ complaint (sequence 4):

<u>Papers</u>	<u>Numbered</u>
Amended Notice of Motion, Affidavit, Affirmation, Exhibits 1 - 8	
Supplemental Affidavit, Supplemental Affirmation, Exhibit 9	1
Notice of Cross-Motion, Affirmation in Support, Exhibits A - K	2
Affidavit and Affirmation in Reply and in Opposition to Cross-Motion	3
Reply Affirmation	4

This labor law action arises out of an incident that occurred on August 2, 2017, in which plaintiff Javier E. Torres¹ fell from a ladder and was injured while working as a member of a demolition crew at Eastchester High School (EHS). At the time of the incident, plaintiff was an employee of non-party Piazza, Inc., a general contractor actively engaged in the renovation and reconstruction of EHS. Defendants Eastchester Union Free School District and The Eastchester Board of Education own EHS.

Plaintiff alleges that immediately before the accident, he was standing on the fourth rung of a six-foot A-frame ladder using a sledgehammer to demolish a 10-foot cinder block wall that separated a classroom from the hallway. He further alleges that he raised the sledgehammer above

¹ Plaintiff Ana B. Torres is suing derivatively. All references to “plaintiff” throughout refer to the injured plaintiff, Javier E. Torres.

his head with both arms and swung at the wall, causing several rows of cinder block to fall and strike him and the ladder he was standing on, pushing him to the ground.

Plaintiff's original motion sought summary judgment on the issue of liability on his cause of action under Labor Law § 240 (1). Subsequently, plaintiff amended his notice of motion to seek an order granting leave to file and serve an amended bill of particulars in order to assert additional claims under Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.4 (b) (16) and 23-3.3 (b) (3) and (c), and granting summary judgment on both his Labor Law §§ 240 (1) and 241 (6) claims.

In support of his motion, plaintiff submitted his own February 28, 2020 affidavit in which he asserted that, before the accident in question, he had suggested using a scaffold to demolish the upper portion of the wall, however, the demolition team supervisor, Victor Tabon, instructed plaintiff to use the six-foot A-frame ladder because retrieving the scaffold from a lower level of the building would take too much time. Plaintiff further explained that he had worked for approximately two hours to demolish the wall from top to bottom, moving the ladder after finishing each section, and that during that time no one was holding the ladder and it was not otherwise secured to its location. Plaintiff indicated that he was starting to demolish the final section of the wall when the accident occurred.

Plaintiff argues that defendants are liable for his injuries under Labor Law § 240 (1) because plaintiff was subjected to an elevation-related risk and they failed to provide a sufficient protective device, such as a scaffold with guardrails, to prevent him from falling. It is plaintiff's position that a scaffold would have allowed plaintiff to reposition his feet to maintain his balance and also provided guard rails to prevent his fall, and using the ladder instead created an unnecessarily increased risk.

With the amended motion, plaintiff submitted a supplemental affidavit dated May 4, 2020, in which he added that while he was demolishing the top of the wall, Tabon assigned another co-worker to remove the lower rows of cinder block starting at the opposite end of the wall. Plaintiff further indicated that, when he reached the final section of the wall, the upper rows he was preparing to demolish were hanging without any support from below, since the lower rows had already been removed. He also added that no one was assigned to inspect the condition of the wall during demolition.

Plaintiff takes the position that leave to file and serve an amended bill of particulars is proper, despite his filing of a note of issue, because no additional facts need to be alleged to make out the Labor Law § 241 (6) claim. Therefore, plaintiff asserts that the addition of such claim would neither prejudice defendants nor require additional discovery. Finally, plaintiff contends that he is entitled to summary judgment under Labor Law § 241 (6) because defendants failed to designate an individual to conduct the required inspections during demolition, and such failure was a proximate cause in plaintiff's injuries.

Defendants oppose plaintiff's motion by taking the position that plaintiff did not properly raise an argument in favor of his Labor Law § 240 (1) claim. Defendants argue that the amended notice of motion superseded the original motion and all supporting papers as a matter of law, and therefore they treat his initial affidavit and affirmation as nullities. Since the supplemental affidavit and affirmation submitted along with the amended notice of motion did not make arguments or cite evidence in reference to § 240 (1), defendants contend that the branch of plaintiff's motion seeking summary judgment under § 240 (1) is unsupported and must be denied.

In support of their cross-motion for summary judgment, defendants argue that Labor Law § 240 (1) is inapplicable to plaintiff's accident because the cinder blocks that allegedly fell and struck plaintiff were an integral part of the demolition work he was performing, as opposed to objects that fell because they were inadequately secured. Additionally, defendants cite the deposition testimony of John Piazza, vice president of Piazza, Inc., who testified that approximately five minutes before the accident, he instructed plaintiff to use a scaffold rather than the A-frame ladder, and that plaintiff nodded his head in acknowledgement but nevertheless continued to use the ladder. Therefore, defendants contend that they are also entitled to summary judgment under the "recalcitrant worker" defense. Defendants also seek dismissal of plaintiff's Labor Law § 200 (1) claim, on the ground that they did not supervise or control the relevant work.

Finally, with respect to plaintiff's proposed additional Industrial Code claims in support of his Labor Law § 241 (6) cause of action, defendants argue that plaintiff failed to establish a basis for the late amendment to his bill of particulars and that the amendment would result in surprise and prejudice because they did not have an opportunity to explore such claims during discovery. Defendants also assert that plaintiff did not offer a reasonable excuse for the delayed motion to amend, which is required here because the note of issue has already been filed. Additionally, defendants contend that the Industrial Code sections plaintiff relies on in support of the amendment

fail to support a viable claim. Specifically, defendants maintain that 12 NYCRR 23-1.4 (b) (16) does not serve as a predicate to liability because it merely defines the term “demolition work” under the labor law, and that 12 NYCRR 23-3.3 (b) (3) and (c) are inapplicable because the hazard arose from plaintiff’s actual performance of the demolition work rather than structural instability caused by the progress of demolition. Alternatively, if plaintiff is permitted to amend his bill of particulars, defendants take the position that the note of issue should be vacated to allow for additional discovery.

In opposition to the cross-motion, plaintiff contends that Labor Law § 240 (1) is directly applicable due to the nature of the work he was engaged in at the time of the accident, since he was working at an elevated height on an unsecured ladder and fell from such height during the course of the demolition. He also challenges Piazza’s assertion that he instructed plaintiff to use a scaffold instead of a ladder, highlighting Piazza’s accident report which makes no reference of such conversation. To the contrary, plaintiff again indicates that he suggested using the scaffold as opposed to the ladder, but Tabon instructed him to use the ladder in the interest of time. Therefore, plaintiff argues that even if Piazza had instructed him to use a scaffold, which he denies, the recalcitrant worker defense would still not apply because such directive would have been superseded by the subsequent instruction from Tabon to use the ladder. Moreover, plaintiff argues that the recalcitrant worker defense should also be rejected because the closest scaffold was in the basement of the building, and therefore was neither available nor visibly in place at plaintiff’s worksite on the second floor.

With respect to the motion to amend the bill of particulars, plaintiff argues that the amendment would not surprise or prejudice defendants because they already questioned plaintiff about the manner in which the wall became destabilized during his deposition. He also suggests that no additional facts are necessary to prove the newly-proposed Industrial Code violations in support of his Labor Law § 241 (6) claim. Plaintiff does not offer any excuse for the delay in seeking the amendment of his bill of particulars, nor does he oppose defendants’ arguments with respect to Labor Law § 200 (1).

Analysis

Initially, this Court rejects defendants’ argument that plaintiff’s Labor Law § 240 (1) claim is unsupported, in that the argument made in plaintiff’s original moving papers was not repeated in the papers submitted with the amended motion. Notably, defendants have not challenged

plaintiff's submission of an amended motion. They merely imply that by doing so, plaintiff nullified the original affidavit and affirmation. However, by identifying the newly filed affidavit and affirmation as "supplemental" rather than "amended," plaintiff indicated that, although the original notice of motion had been amended, the originally submitted supporting papers were not superseded, but merely supplemented. Therefore, the arguments relating to the Labor Law § 240 (1) claim that were contained in the original supporting papers remain for the Court's consideration, and are sufficient to establish plaintiff's prima facie case for summary judgment.

Defendants have not established a right to judgment based on their argument that Labor Law § 240 (1) is inapplicable to the falling cinder blocks, because they were an integral part of the demolition work and could not be secured. "Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors, and their agents, to provide safety devices necessary to protect workers from the risks inherent in elevated work sites" (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 925 [2d Dept 2017]). 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis omitted], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). This matter involves not only falling objects, but also a worker's fall from an elevated surface. Defendants focus exclusively on the statute's application to falling objects, and ignore plaintiff's contention that he was harmed when he himself fell from the ladder.

Plaintiff alleges that the unsecured A-frame ladder proved to be insufficient to shield him from harm when he fell from that ladder during the course of his employment. Indeed, plaintiff further alleges that his request for an adequate protective device – the scaffold – was denied prior to the accident. Therefore, the allegations of this case fit squarely within the protections afforded by Labor Law § 240 (1).

Defendants are also not entitled to judgment based on the recalcitrant worker defense, as questions of fact remain regarding its applicability to the instant case. "The defense is premised upon the principle that the statutory protection [of Labor Law § 240 (1)] does not extend to workers who have adequate and safe equipment available to them but refuse to use it" (*Lozada v State*, 267 AD2d 215, 215 [2d Dept 1999] [internal quotation marks and citation omitted]).

Piazza's deposition testimony that he instructed plaintiff to use a scaffold rather than the A-frame ladder conflicts with plaintiff's testimony. Additionally, Piazza and plaintiff also offered differing accounts regarding the location of the nearest scaffold, and they disagree as to whether Tabon contradicted Piazza's directive and told plaintiff that there was no time to retrieve a scaffold. Therefore, questions of fact remain as to whether the recalcitrant worker defense is applicable, which requires denial of the branch of plaintiff's motion seeking summary judgment under Labor Law § 240 (1). The same issues of fact require denial of defendants' cross-motion for summary judgment dismissing this claim.

With respect to the branch of plaintiff's motion seeking to amend his bill of particulars, leave "may properly be granted after the note of issue has been filed, provided that the plaintiffs make a showing of merit and that the amendment involve[s] no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants" (*Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007] [internal citation and quotation marks omitted]). "Moreover, where there has been an inordinate delay in seeking leave the plaintiff must establish a reasonable excuse for the delay, and submit an affidavit to establish the merits of the proposed amendment" (*Delahaye v Saint Anns School*, 40 AD3d 679, 685 [2d Dept 2007] [internal citation and quotation marks omitted]).

Here, plaintiff's amended motion was filed after the note of issue, and defendants correctly argued that plaintiff did not offer a reasonable excuse for delay in support of his proposed amendment to his bill of particulars. Nor does plaintiff offer such an excuse in opposition to defendants' cross-motion. Additionally, defendants did not have an opportunity to question witnesses with respect to the newly-raised Industrial Code claims during depositions. Despite plaintiff's assertion that no new factual allegations are necessary for the proposed claim, 12 NYCRR 23-3.3 (c) raises a question as to whether the subject wall was being properly inspected during demolition, which was not fully explored during discovery.

Moreover, plaintiff has not established the merits of the proposed new claims. "It is well established that, in a Labor Law § 241 (6) claim, the rule or regulation alleged to have been breached must be a specific, positive command (*Gasques v State of New York*, 15 NY3d 869, 870 [2010] [internal citations and quotation marks omitted]). Therefore, the definitions section 12 NYCRR 23-1.4 (b) (16) cannot serve as a predicate to liability because it is not a specific, positive command (*see Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014]).

The other newly relied on Code provisions, 12 NYCRR 23-3.3 (b) (3) and (c), are inapplicable as well, because the cinder blocks that struck plaintiff fell as a result of the performance of the demolition work when plaintiff struck the wall with the sledgehammer, not from structural instability cause by the progress of the demolition (*see Maldonado v AMMM Props. Co*, 107 AD3d 954 [2d Dept 2013]). For all the foregoing reasons, the branch of plaintiff's amended motion seeking leave to amend his bill of particulars is denied.

Finally, the branch of defendants' cross-motion seeking summary judgment dismissing plaintiff's Labor Law § 200 (1) claim is granted as unopposed.

Based upon the foregoing, it is hereby,

ORDERED that plaintiffs' motion (sequence 3) is denied; and it is further

ORDERED that defendants' cross-motion (sequence 4) is granted only to the extent that all claims arising out of Labor Law § 200 (1) are dismissed, and is otherwise denied; and it is further

ORDERED that the parties shall appear in the Settlement Conference Part of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, on a date and in a manner directed by that Part, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

November 10, 2020



HON. TERRY JANE RUDERMAN, J.S.C.