

**Quiroz v Memorial Hosp. for Cancer & Allied
Diseases**

2021 NY Slip Op 30496(U)

February 23, 2021

Supreme Court, New York County

Docket Number: 161136/2017

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

JOSE PEREZ QUIROZ,

Plaintiff,

- v -

MEMORIAL HOSPITAL FOR CANCER AND ALLIED
DISEASES, TURNER CONSTRUCTION COMPANY

Defendant.

-----X

INDEX NO. 161136/2017

MOTION DATE 01/04/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 53, 54, 56, 57, 58, 59, 60, 61, 62, 64, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 80

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

Plaintiff's motion for summary judgment is denied and defendants' cross-motion to dismiss is granted in part and denied in part.

Background

Plaintiff Jose Alfonso Perez Quiroz, a construction worker from Pinnacle Industries II, LLC ("Pinnacle"), was working on a scaffold without guardrails and fell off (NYSCEF Doc. No. 40). At approximately 9:10AM on September 20, 2017, Dan Labarbera (a mason foreman with Pinnacle), directed plaintiff to stand on a scaffold and use a chipping gun to flatten a wall (NYSCEF Doc. No. 43 at 82, 89). The scaffold was approximately 40-inches tall and was already erected when plaintiff was directed to work on it (*id.* at 70 and 84). After giving the direction, Mr. Labarbera went for a cup of coffee and did not see the incident (*id.* at 85).

Plaintiff testified that he began using the chipping gun and the scaffold started to sway (*id.* at 90). He took a step backwards to balance himself and stepped off the edge of the scaffold, landing on his back (*id.* at 98). Mr. Labarbera swears that he told plaintiff to attach safety rails to

the scaffold before beginning work (NYCSEF Doc. No. 54). Plaintiff testified that he did not know if there was any fall protection equipment in the shanty where masons kept their equipment on the site (NYSCEF Doc. No. 43 at 55).

Plaintiff moves for summary judgment under Labor Law § 240(1), claiming that the owner of a building is strictly liable under the statute.

Defendants cross-move for summary judgment to dismiss the complaint. Defendants claim that they did not supervise plaintiff on the day of the incident and so cannot be held liable under Labor Law § 200. Defendants also claim that because plaintiff is a recalcitrant worker who did not install the guard rails on the scaffold as instructed by Mr. Labarbera they cannot be held liable under Labor Law § 240(1). Defendants lastly claim that none of the Industrial Code sections cited by plaintiff are applicable to this matter and so they cannot be held liable under Labor Law § 241(6).

In reply to his motion and in opposition to defendants' cross-motion, plaintiff contends that defendants did not establish that they lacked notice of the dangerous condition of the scaffold under Labor Law § 200. Plaintiff further argues that the statements by Mr. Labarbera are inadmissible and, even if they could be considered, defendants have not met their burden to prove that plaintiff was a recalcitrant worker under Labor Law § 240. Lastly, plaintiff only opposes defendants' motion with respect to Industrial Code §§ 23-1.5(c)(3), 23-5.1(f), and 23-5.1(j). Therefore, the sections of the Industrial Code for which plaintiff did not offer opposition are dismissed.

In reply, defendants argue that the affidavits of Mr. Labarbera should be considered because plaintiff cannot claim surprise or prejudice and continues to support its previous arguments as outlined in its cross-motion.

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]).

Labarbera Affidavit

A court may consider a witness affidavit that is untimely disclosed if it does not surprise or prejudice the opposing party (*Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 580, 957 NYS2d 49 [1st Dept 2012]).

In *Palomo*, the First Department decided whether affidavits submitted with plaintiff’s opposition to defendants’ motion for summary judgment from three previously undisclosed notice

witnesses should be considered. Defendants argued that the affidavits were untimely disclosed and should not be considered. The First Department held that “defendants’ claim . . . is unpersuasive since one witness was a former employee of defendants, and the other two were identified by plaintiff or his mother at their deposition testimony. Thus, there can be no claim of prejudice or surprise” (*id.*).

Here, Mr. Labarbera was identified by *both* plaintiff and plaintiff’s counsel at plaintiff’s deposition (NYSCEF Doc. No. 43 at 46). As such, plaintiff cannot claim surprise or prejudice by the affidavit. The Court also notes that the first affidavit was filed on July 21, 2020 and the second was filed on August 14, 2020 (NYSCEF Doc. Nos. 58 and 59). The parties had two discovery conferences on September 17, 2020 and October 22, 2020, and the note of issue was not filed until December 23, 2020. Plaintiff had approximately four months prior to the note of issue and two conferences before this court to address the issue. If plaintiff wanted to pursue a deposition of Mr. Labarbera, he had ample opportunity to do so.

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 the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*id* at 144). “[S]ection 200 does not impose vicarious liability on owners and general contractors ... Liability under section 200 only attaches where the owner or contractor had the ‘authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition’” (*id* at 145-146).

In *Cappabianca*, plaintiff was using a malfunctioning wet saw that sprayed water “all over” the floor. (*Id* at 142). As a result of the water on the floor, plaintiff slipped and fell. (*Id* at 143). Plaintiff consistently maintained that his employer, a nonparty, exclusively supervised him and furnished him with the defective material that caused the dangerous condition. (*Id*). The First Department found that plaintiff’s injury arose from the “manner and means” in which he performed his work and held that since the defendants in the action “did not control the work that caused the accident, the section 200 and related negligence claims were properly dismissed” (*id*).

There is no dispute that Pinnacle (plaintiff’s employer) provided plaintiff with the scaffold and was supervising him on the date of the accident (NYSCEF Doc. No. 43 at 46). There is no evidence that defendants had supervisory control over plaintiff at the time of the accident. Plaintiff does not dispute this and only argues that defendants have not proven that they lacked notice of a dangerous condition. However, under Labor Law § 200, defendants need only show that they did not supervise plaintiff’s work – it is not their burden to show that they lacked notice of any condition. Because defendants had no supervisory control over the “manner and means” of which

plaintiff performed his work, defendants cannot be held liable under Labor Law § 200; these claims are severed and dismissed.

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]).

“Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff’s own negligence is the sole proximate cause of his injury” (*Gallagher v New York Post*, 14 NY3d 83, 88, 896 NYS2d 732, 734 [2010]).

Plaintiff contends that he fell from a scaffold without guard rails and was injured, which establishes his prima facie burden for a Labor Law § 240(1) claim. However, the conflicting statements between plaintiff and Mr. Labarbera raise an issue of fact as to whether plaintiff was a recalcitrant worker. Mr. Labarbera swears that before he left for his coffee break, he told plaintiff

to install the guard rails and that plaintiff knew where to find them (NYSCEF Doc. No.59). By contrast, plaintiff testified that he “wasn’t paying attention” as to whether there was fall protection equipment in the shanty where the masons kept their equipment. Although Mr. Labarbera was not an eyewitness to the incident, these conflicting statements raise an issue of fact sufficient to defeat this branch of plaintiff’s motion and defendant’s cross-motion. A jury could believe that plaintiff simply ignored the request to install the railings and that he was the sole proximate cause of his accident. Alternatively, a factfinder might discount Mr. Labarbera’s account and find that plaintiff was not provided with adequate safety protection.

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 specification and not simply declare general standard 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]).

Industrial Code 23-1.5(c)(3)

Industrial Code § 1.5(c)(3) provides, among other things, that “[n]o employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.” Plaintiff’s expert states that the scaffold frames were “not provided with base plates as required by §25-5.3(g)(2), the two scaffold ends moved back and forth on the concrete floor” and plaintiff fell as a result (NYSCEF Doc. No. 72). In other words, Plaintiff is asserting that there is something wrong with the scaffold. If the lack of base plates caused the scaffold to

sway, then the scaffolds were not in safe working condition and Industrial Code § 23-1.5(c)(3) applies. Therefore, this court denies the portion of defendants' cross motion that seeks to dismiss plaintiff's claims under Industrial Code § 23-1.5(c)(3).

Industrial Code 23-5.1(f)

Industrial Code § 23-5-1(f) does not constitute "a concrete or specific standard of conduct sufficient to support a Labor Law § 241(6) claim" (*Schiulaz v Arnell Constr. Corp*, 261 AD2d 247. 248, 690 NYS2d 226 [1st Dept 1999]). Therefore, this Court dismisses the claim to the extent that it is based on Industrial Code 23-5.1(f).

Industrial Code 23-5.1(j)

Subsection (j) speaks to safety railings on scaffolds and provides "Exceptions: Any scaffold platform with an elevation of not more than seven feet." According to plaintiff, the scaffold was approximately 40 inches tall whereas Industrial Code § 23-5.1(j) only pertains to scaffolds 7 feet (84 inches) or taller (NYSCEF Doc. No. 43 at 84). Therefore, this subsection is inapplicable and this claim is dismissed.

Accordingly, it is hereby

ORDERED that Plaintiff's motion and Defendants' cross-motion for summary judgment as to Labor Law § 240(1) are both denied as there are issues of fact as described above; and it is further

ORDERED that Defendant's cross-motion for summary judgment as to Labor Law § 200 is granted and those claims are severed and dismissed; and it is further

ORDERED that Defendant's cross-motion for summary judgment as to Labor Law § 241(6) is granted in part and denied in part as explained above (only the claim based on Industrial Code § 23-1.5(c)(3) survives).



2/23/2021

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE