

Ombrellino v Navesink Prestige, LLC

2021 NY Slip Op 30616(U)

February 26, 2021

Supreme Court, Kings County

Docket Number: 511082/2017

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 511082/2017
Motion Date: 2-22-21
Mot. Seq. No.: 2-3

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MICHAEL OMBRELLINO,

Plaintiff,

-against-

DECISION/ORDER

NAVESINK PRESTIGE, LLC, LIRO GROUP, RJ
BRUNO, INC., MAXIMUM CONTRACTING, INC.,
BUILD IT BACK – BROOKLYN, CHRISTIAN
MAILLOUX, and JACQUELINE MAILLOUX,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 38-45, 47-55, 61-74, the motions are decided as follows:

Plaintiff commenced this action alleging claims pursuant to Labor Law 240(1), 241(6), 200(1) and in common law negligence seeking to recover damages for personal injuries sustained in a work-related accident that occurred on May 31, 2016. Defendants, NAVESINK PRESTIGE, LLC, LIRO GROUP, RJ BRUNO, INC., BUILD IT BACK – BROOKLYN, CHRISTIAN MAILLOUX and JACQUELINE MAILLOUX, now move for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint and all cross-claims (**Mot. Seq. No. 2**). By separate notice of motion, the defendant, MAXIMUM CONTRACTING, INC., moves for the same relief (**Mot. Seq. No. 3**). The two motions are consolidated for disposition.

Background:

At his deposition, the plaintiff testified that he was involved in a work-related accident on May 31, 2016, near a construction site at property located at 16 Beacon Court, Brooklyn, New York. The work taking place at the time of the accident was the pouring of a foundation for a home that was being raised. The plaintiff was employed as a driver for Stillwell ReadyMix and was responsible for operating a cement truck. Plaintiff arrived at the worksite at about 1:30 to 1:45 p.m. with his cement truck which contained a load of ready mixed cement. When he arrived at the site, a pump truck, which was not part of Stillwell’s operation, was already positioned in the street. The plaintiff positioned the rear of his cement truck, which he also parked on the

street, to the rear of the pump truck and proceed to transfer the cement from the chute of his truck into the hopper of the pump truck with the guidance of the operator of the pump truck. When this transfer was completed, the plaintiff started the wash out process, which involved washing out the cement chute, the blades, and the barrel of the truck.

Plaintiff explained that in the area where he transferred the cement from his truck to the pump truck, there was a six (6) foot by eight (8) foot plastic drop cloth, which was placed down by the pump driver with a wood bin on top of it. He explained that it was routine for pump truck operators to use a plastic cloth and bin to protect from the spillage of concrete during the transfer process. Plaintiff testified that while working on the drop cloth and engaged in the wash out process, he slipped and fell on the drop cloth due the presence of “diesel”, which he testified is typically sprayed on the back of the pump truck so the cement does not stick to it.

One of the arguments raised by the plaintiff in opposition to the motions is that the motions are premature. Plaintiff points out that to date, only the plaintiff and a witness for Navesink Prestige have been deposed.

Discussion:

A. The Labor Law § 240(1) Claim:

While there is significant discovery outstanding, those branches of defendants’ motions for summary judgment dismissing plaintiff’s claim pursuant to Labor Law §§ 240(1) and 241(6) are ripe for determination. Labor Law § 240(1) requires property owners and contractors to provide workers with “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 the workers (Labor Law § 240[1]). The purpose of the statute is to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82; *see Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 7, 935 N.Y.S.2d 551, 959 N.E.2d 488; *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 490, 634 N.Y.S.2d 35, 657 N.E.2d 1318). Here, the plaintiff neither fell from a height or was struck by a falling object that was improperly hoisted or inadequately secured. Labor Law § 240[1] is therefore inapplicable. Accordingly, those

branches of defendants' motion for summary judgment dismissing plaintiffs claim under Labor Law § 240(1) is **GRANTED**.

B. The Labor Law § 241(6) Claim:

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to “provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Lopez v. New York City Dept. of Env'tl. Protection*, 123 A.D.3d 982, 983, 999 N.Y.S.2d 848). As a predicate to a section 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 (*see Misicki v. Caradonna*, 12 N.Y.3d 511, 515, 882 N.Y.S.2d 375, 909 N.E.2d 1213; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 18 N.E.2d 82). Here, plaintiff alleges violations of Industrial Code § § 12 NYCRR 23-1.5(a)¹, 12

¹ 12 NYCRR 23-1.5(a) states:

(a) Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).

NYCRR 23- 1.5(c)² and 12 NYCRR 23-1.7(d)³. 12 NYCRR 23–1.5(a) merely sets forth a general standard of care for employers, and thus cannot serve as a predicate for liability pursuant to Labor Law § 241(6) (see *Ulrich v. Motor Parkway Properties, LLC*, 84 A.D.3d 1221, 1224, 924 N.Y.S.2d 493, 496 ; *Pereira v. Quogue Field Club of Quogue, Long Is.*, 71 A.D.3d 1104, 898 N.Y.S.2d 220; *Greenwood v. Shearson, Lehman & Hutton*, 238 A.D.2d 311, 656 N.Y.S.2d 295; *Gordineer v. County of Orange*, 205 A.D.2d 584, 613 N.Y.S.2d 247). Since plaintiff’s accident did not involve machinery, equipment, a safety device, or a safeguard, 2 NYCRR 23-1.5(c) does not apply. Finally, since the area where the plaintiff fell did not constitute a passageway, walkway, or other elevated working surface contemplated by 12 NYCRR 23–1.7(d), the provision is inapplicable (see *Porazzo v. City of New York*, 39 A.D.3d 731, 834 N.Y.S.2d 298, 299; *Roberts v. Worth Constr., Inc.*, 21 A.D.3d 1074, 1077, 802 N.Y.S.2d 177; *Morra v. White*, 276 A.D.2d 536, 714 N.Y.S.2d 510; *Lawyer v. Hoffman*, 275 A.D.2d 541, 542, 711 N.Y.S.2d 618; *Constantino v. Kreisler Borg Florman Gen. Constr. Co.*, 272 A.D.2d 361, 707 N.Y.S.2d 487). For the above reasons, those branches of defendants’ motions for summary judgment dismissing plaintiffs claim under Labor Law § 240(1) is **GRANTED**.

² 12 NYCRR 23- 1.5(c) states:

(c) Condition of equipment and safeguards. (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition. (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon. (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

³ 12 NYCRR 23-1.7(d) states:

Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

C. The Remaining Claims:

“CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated” (*Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d at 637, 815 N.Y.S.2d 183; *see Ruiz v. Griffin*, 50 A.D.3d at 1006, 856 N.Y.S.2d 641). “This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (*Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d at 793, 533 N.Y.S.2d 143). Here, the plaintiff raised issues warranting further discovery with respect to his claims under Labor Law 200 and in common law negligence. Accordingly, those branches of defendants’ motions for summary judgment dismissing plaintiff’s claims pursuant to Labor Law § 200 and in common law negligence are **DENIED**, without prejudice, to renewal once discovery has been completed .

Accordingly, it is hereby

ORDRED that those branches of defendants’ motion for summary judgment dismissing plaintiff’s claims pursuant to §§ 240(1) and 241(6) are **GRANTED**, and it is further

ORDERED that the remaining branches of defendants’ motions are **DENIED**, without prejudice to renewal, after discovery has been completed.

This constitutes the decision and order of the Court.

Dated: February 26, 2021



PETER P. SWEENEY, J.S.C.

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