Ortiz v Age 680 Madison LLC
2021 NY Slip Op 31000(U)
March 30, 2021
Supreme Court, New York County
Docket Number: 160550/2013
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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LUIS ORTIZ,

Plaintiff,

- v -

AGE 680 MADISON LLC, EXTELL DEVELOPMENT COMPANY, ANGELO, GORDON & CO., L.P., LEND LEASE (US) CONSTRUCTION LMB, INC.,SPRING SCAFFOLDING LLC, OUTDOOR INSTALLATIONS, LLC

Defendant.

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INDEX NO. 160550/2013

MOTION DATE 11/24/2020, 11/24/2020, 11/24/2020

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 194, 195, 196, 197, 198, 199, 200, 204, 206, 207

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 202, 213, 214, 215, 216, 227, 228, 229, 230

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 203, 208, 209, 210, 223, 224, 225, 226

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

BACKGROUND

Plaintiff commenced this action pursuant to a summons and complaint filed in November 2013, seeking damages under the labor law for injuries suffered in the course of his employment.

PENDING MOTIONS

Defendant Spring Scaffolding, LLC moves for summary judgment seeking dismissal of all claims and cross-claims asserted against it (Motion Seq No 4). Defendants AGE 680 Madison LLC, Extell Development Company, and Lend Lease (US) Construction LMB, Inc. move for

summary judgment dismissing plaintiff's complaint with respect to Labor Law § 200, common law negligence, and Labor Law § 241(6), and defendant Angelo Gordon & Co., L.P. moves for summary judgment seeking dismissal of all claims against it (Motion Seq No 5). Plaintiff moves for partial summary judgment on the issue of liability under Labor Law §240(1) as against defendants AGE 680 Madison LLC and Lend Lease (US) Construction LMB, Inc. (Motion Seq No 6). These motions are consolidated herein for determination.

ALLEGED FACTS

Plaintiff was injured on June 18, 2012, at 680 Madison Avenue, New York, New York (subject premises) during his employment with Mastercraft Masonry, Inc. (Mastercraft). Plaintiff had worked at this construction site for approximately eight months prior to the accident.

AGE 680 MADISON LLC (AGE 680) was the owner of subject premises at the time of the accident. LEND LEASE (US) CONSTRUCTION LMB, INC. (Lend Lease) was the construction manager. The construction project consisted of the renovation and alteration of an existing hotel into a residential condominium.

On November 30, 2010, AGE 680 hired Outdoor Installations LLC d/b/a Spring Scaffolding to install a sidewalk shed at the subject premises. The sidewalk bridge was installed on January 14, 2011. In July 2011, Spring Scaffolding, LLC purchased Outdoor Installations's assets. Pursuant to the Asset Purchase Agreement, Spring Scaffolding assumed all obligations and liabilities of Outdoor Installations. Spring Scaffolding modified the bridge on February 24, 2012.

Lend Lease hired all subcontractors and had a superintendent on site who was responsible for scheduling and coordinating the work of the subcontractors, as well as scheduling and delivery of material and equipment. Lend Lease also had a site safety manager.

Mastercraft was retained to work on the facade of the building, which necessitated them accessing a sidewalk bridge. To get to the sidewalk bridge, the workers went inside the building and up to the second floor, and through window openings. Several windows were removed from the second floor to provide said access.

Plaintiff asserts that a plank was in place to reach the platform covering the railings from which the workers stepped down to the bridge platform. The plank was covering terrace railings that were to be preserved and refinished, and therefore had plywood protection placed around them.

Defendants allege that Mastercraft constructed a plywood set of steps on either side of the window in order to facilitate access to the sidewalk bridge, and that said steps remained at the window for the duration of Mastercraft's work at the premises. Plaintiff testified there were no such steps outside the window, and that workers had to jump down about four feet to get to the sidewalk bridge. Plaintiff asserts that on the day of the accident, plaintiff went through the second floor window to access the sidewalk bridge, and when he stepped onto the plywood plank directly outside the window, the plywood came apart and plaintiff fell onto the sidewalk bridge, fracturing his knee.

DISCUSSION

Summary judgment is an extreme remedy and should only be granted when there is a complete absence of a triable issue of fact. *Stillman v Twentieth Century-Fox Film Corp* 3 NY2d 395 (1957). "The proponent of a summary judgment motion 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." *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). "Once this showing has been made... the burden shifts to the party opposing the

motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Zuckerman v. City of New York* 49 N.Y.2d 557, 562 (1980).

Plaintiff's Motion for Summary Judgment on Labor Law §240(1) Claim

Labor Law §240(1) provides in pertinent part:

> All contractors and owners and their agents .... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure 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.

N.Y. Lab. Law § 240 (McKinney).

The intent of this provision is to provide protection to workers and the provision is to be liberally construed. The objective is to require owners to provide a safe workplace or face damages. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286-87 (2003). The statute has been interpreted as creating a presumption of employer liability and is not subject to a defense of contributory negligence. *Id*. However, liability is dependent on a statutory violation and proximate cause. Absent a violation, or where the worker's actions are the sole proximate cause of the injury, there is no liability under 240(1). *Id* at 289-90.

In the case at bar, there is a factual dispute between the parties that requires denial of plaintiff's motion. Plaintiff asserts that "while trying to move from one elevation level to another, he was caused to fall when the device being used to facilitate that move between levels [which plaintiff asserts was the plywood planks covering the bannisters] was caused to break when plaintiff stepped on it," and, therefore, a violation of 24(1). If there was no other evidence submitted, plaintiff would be correct in his conclusion. However, defendant has provided

testimony that the plywood bannister was not the device intended to be used to facilitate the move between levels, but rather, the plywood was only meant to protect the terrace railing covers, and there had been erected and in place at the time of the accident a small set of steps on either side of the window that was intended for this purpose. Although plaintiff testified there were no stairs and the plank or plywood that he stepped on to access the sidewalk bridge was the only device provided to access it, and although plaintiff provides evidence and argument that defendants claims in this regard ae not credible, there still remains an issue of fact as to whether there was no safety device, or an inadequate safety device, in place to protect plaintiff from the elevation hazard. *See, Giordano v. Tishman Const. Corp.*, 152 A.D.3d 470, 470–71 (1st Dept. 2017), *citing O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 (2017) ("[T]he fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1)," and when "there are questions of fact as to whether the [structure] provided adequate protection," summary judgment is not warranted).[1] Based on the foregoing, plaintiff's motion for partial summary judgment is denied.

Defendants' Motions to Dismiss the Labor Law §200 and Common Law Negligence Claims

Defendants move for dismissal of the claims asserted under labor Law §200 and common law negligence. The common-law duty of property owners and contractors to provide workers with a safe workplace is codified in Labor Law §200, which is titled "General duty to protect health and safety of employees" and provides in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to

[1] The Court rejects defendants' contention that there was no elevation hazard against which defendants were required to protect as the two-foot height differential required to be traversed when exiting the window is sufficient to invoke Labor Law § 240(1). *See, McGarry v. CVP 1 LLC*, 55 A.D.3d 441 (1st Dept. 2008).

> all such persons. The board may make rules to carry into effect the provisions of this section.

N.Y. Lab. Law § 200 (McKinney). To establish liability on this claim, plaintiff must establish that defendants exercised supervision or control over the work performed, or had actual or constructive notice of the unsafe condition that allegedly caused the accident. *Custer v. Cortland Hous. Auth.*, 266 A.D.2d 619, 620 (3rd Dept. 1999).

There appears to be a question of fact as to who constructed the plywood or plank through which the plaintiff fell. All of the defendants deny having constructed it. Additionally, there is a question of fact as to whether the plank constituted an unsafe condition. Finally, there are questions of fact as to whether the defendants knew or should have known of the alleged dangerous condition. Plaintiff provides photographs of the area to assert that anyone who observed the area would have seen that access from the window onto the plank was unsafe. Plaintiff's claim is further supported by the affidavit of Walter Konon, a Professional Engineer who opines that good and accepted construction site safety practices were not followed and were violated by the set up depicted in the photographs and described by plaintiff. Mr. Konon further states that if the plank was not to be used to access the bridge then some barrier or cautionary measure should have indicated to workers it was not safe to step on.

Defendants deny any knowledge of any unsafe condition. However, defendants cannot meet their burden on summary judgment merely by pointing to gaps in plaintiff's proof [*Kolakowski v 10839 Associates* 185 AD3d 427 (1st Dept. 2020)], and they have not otherwise met their burden to warrant judgment as a matter of law. Based on the foregoing the motions of defendants to dismiss the claims under Labor Law §200 and common law negligence are denied.

Defendants' Motions to Dismiss the Labor Law §241(6) Claims

Defendants move for dismissal of the claims asserted under labor Law §241(6). Labor Law §241 provides additional requirements for construction, excavation and demolition work. Subsection 6 provides in pertinent part:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

N.Y. Lab. Law § 241 (McKinney).

Labor Law § 241(6) combines the general common-law standard of care with the establishment of specific detailed rules through the Labor Commissioner's rulemaking authority (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 503).

While plaintiff recited a number of alleged violations in its bill of particulars, in the opposition papers plaintiff argues only as to the viability of the alleged violations under 12 NYCRR 23-1.7(f) and 23-1.11(a).

12 NYCRR 23-1.7(f) is titled "vertical passage" and provides:

> Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7. The Court finds there is a question of fact as to whether defendants violated this provision. Defendants allege that stairs were provided to access the sidewalk bridge which constituted an above ground working level. Plaintiff alleges no stairs were provided.

12 NYCRR 23-1.11(a) governs lumber and provides "(t)he lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not

contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used." This provision is not applicable to the case at bar. The plank was not used in the construction of any temporary structure required by Part 23 (*DePaul v NY Brush LLC* 120 AD3d 1046, 1047-48).

Based on the foregoing, defendants' motions for summary judgment as to liability under Labor Law §241(6) are granted as to all provisions except 12 NYCRR 23-1.7(f) which remains a question of fact for trial.

Spring Scaffolding's Motion for Summary Judgment

Courts have held that a subcontractor may be held liable for negligence where it performed work that created the condition that caused the injury, even if it lacked authority to supervise or control the work area. *Sledge v SMS Gen. Contrs., Inc.* 151 AD3d 782 (2nd Dept. 2017).

In this case, there is a question of fact as to whether Spring Scaffolding, or its predecessor in interest, created the plywood protection that caused plaintiff to fall. For example, this question is addressed in the affidavit of Kenneth Buettner, who opines that it is possible that Spring Scaffolding constructed the plywood protective cover as an extension of the sidewalk bridge protection, and that it would not have been uncommon for them to do so under these circumstances. As Spring Scaffolding has failed to establish that they did not create the condition, they have failed to make a *prima facie* showing of entitlement to judgment as a matter of law.

Defendant Angelo Gordon & Co LP's Motion for Summary Judgment

Defendants seek dismissal of the entire action as against Angelo Gordon & Co LP (Gordon). Defendants allege that the entity is neither an owner nor general contractor, and owed plaintiff no duty of care. It is undisputed that AGE 680 is the owner of the subject premises. Gordon never held any ownership in the subject premises, but rather, they advised and managed

several funds that came to hold an indirect ownership interest in AGE 680 Madison. Gordon did not supervise the work or have actual notice of the alleged conditions. Additionally, plaintiff did not specifically oppose dismissal as against Gordon. Based on the foregoing, the motion for summary judgment seeking dismissal of all claims as against Gordon is granted.

This constitutes the decision and order of the court.

03/30/2021
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE