

Quintero v 520 Madison Owners LLC

2021 NY Slip Op 32146(U)

October 26, 2021

Supreme Court, New York County

Docket Number: Index No. 159128/2016

Judge: Shawn T. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----X

TEO QUINTERO,

Plaintiff,

- v -

520 MADISON OWNERS LLC, 520 MADISON VENTURE,

Defendant.

INDEX NO. 159128/2016

MOTION DATE N/A

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

-----X

520 MADISON OWNERS LLC

Plaintiff,

-against-

PAL ENVIRONMENTAL SERVICES, INC.

Defendant.

Third-Party
Index No. 595118/2017

-----X

HON. SHAWN KELLY:

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, 194, 195, 198, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Defendant 520 Madison Owners LLC moves for summary judgment contending that Plaintiff's misuse of scaffolding caused his accident and thus, Plaintiff's Labor Law §240(1), §200 and §241(6) claims must be dismissed.

This Labor Law action stems from serious injuries allegedly sustained by Plaintiff on July 8, 2016, while in the course of his employment removing asbestos at 520 Madison Avenue, New York, NY. Plaintiff contends that he was caused to fall approximately eight (8) feet when

the scaffold upon which he was laboring tipped as he attempted to disembark from it. As a result, Plaintiff alleges that he sustained serious and permanent personal injuries, including but not limited to herniations of his lumbar spine which required a surgical fusion. Plaintiff alleges violations of New York Labor Law §200, §240(1), §240(2) and §241(6).

Factual Evidence

Factual allegations are herein adopted as recited at length in this court's April 30, 2021 decision under Motion Sequence 005.

Analysis

“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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Further, issues of credibility are not to be resolved on summary judgment (see *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

Second Cause of Action, New York Labor Law §240(1) and §240(2)

New York Labor Law §240(1) states as follows:

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.

“The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one” (*Jones v 414 Equities LLC*, 2008 NY Slip Op 08197WL 4707496 [1st Dept 2008] (citations omitted)). Thus, pursuant to Labor Law §240(1), owners and contractors have the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the work site (*Drew v Correct Manufacturing Corp.*, 149 AD2d 893, 540 NYS2d 575 [3d Dept 1989]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 618 NE2d 82 [1993] [“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]).

Defendant contends that the accident would not have happened if Plaintiff did not misuse the scaffold. However, the evidence raises material questions of fact as to how the accident occurred as well as significant issues of credibility. Accordingly, Defendant’s motion as to the §240(1) claim is denied.

Though Plaintiff lists Labor Law §240(2) in his Complaint, he does not provide any factual allegations in support of a violation of this statute. To establish liability pursuant to Labor

Law §240(2), there must be proof that “the subject scaffolding was more than 20 feet above the ground and lacked properly secured safety rails, and that the failure to provide such protection was a proximate cause of plaintiff’s injuries” (*Tama v Gargiulo Bros., Inc.*, 61 AD3d 958, 960, 878 NYS2d 128 [2009]). Plaintiff does not dispute Defendant’s *prima facie* entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(2) and accordingly, this claim is dismissed (*Viera v WFJ Realty Corp.*, 140 AD3d 737, 739, 31 NYS3d 613, 615 [2016]).

Third Cause of Action, New York Labor Law §241(6)

Labor Law §241(6) provides, in pertinent part, as follows:

“All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors “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” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [emphasis added]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

Further, to sustain a Labor Law §241(6) claim, it must be shown that the defendant violated a specific, “concrete” implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff’s injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]; *Rossi v 140 W. JV Manager LLC*, 58 Misc3d 1215(A),

95 NYS3d 126 [NY Sup Ct 2018], *aff'd*, 171 AD3d 668, 99 NYS3d 38 [2019]). Plaintiff's Bill of Particulars alleges that Defendant violated Industrial Code §§ 23-1.5(a), 23-1.5(c)1, 23-1.5(c)2, 23-1.5(c)3; 23-1.6; 23-1.7; 23-5.1(b), 23-5.1(c), 23-5.1(d), 23-5.1(f), 23-5.1(j); 23-5.2; 23-5.3; 23-5.4; 23-5.5; 23-5.6; 23-5.7; 23-5.8; 23-5.9; 23-5.10; 23-5.13(a), 23-5.13(b), 23-5.13(c), 23-5.13(d); 23-5.18(b), 23-5.18(f), 23-5.18(g); and Part 23 Section 13-1.21 and OSHA sections 29 CFR 1926.501 and 1926.502 (NYSCEF Doc. No. 194).

Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 at 503-505 [1993]).

In opposition, Plaintiff only argues that "Defendants cannot say that no section of Industrial Code section 23-5.18 was violated, as it is clear that the scaffold failed" (NYSCEF Doc. No. 202). Although Plaintiff asserts multiple alleged Industrial Code violations in his Bill of Particulars, Plaintiff's failure to oppose the dismissal of all of the specific provisions asserted therein, with the exception of §23-5.18, leads to the dismissal of the cited provisions as abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["(w)here a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]; *see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *Gonzalez v Broadway 371, LLC*, No. 153536/2018, 2021 WL 4776212, at *3 [2021]).

To the extent that Plaintiff's Labor Law §241(6) claim is predicated on alleged violations of Industrial Code §23-5.18, mandating that manually propelled, mobile scaffolds be equipped

with a safety railing and properly designed casters, this regulation is sufficiently specific to support a claim under §241(6) (*see Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281, 800 NYS2d 134 [2005]; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 412–13, 871 NYS2d 26, 27 [2008]).

First Cause of Action, New York Labor Law §200

Labor Law §200 is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a reasonably safe place to work (*see Comes v NY State Elec. & Gas Coro.*, 82 NY2d 876 [1993]; *Lorabardi v. Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 [1992]). Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323, 329 [2008]).

A general contractor may be held liable under Labor Law §200 where they have control over the work site and the general contractor either created or had actual notice of the dangerous condition that caused the plaintiff to fall (*see Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938 [2d Dept 2009]; *Murphy v Columbia University*, 4 AD3d 200 [1st Dept 2004]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). “The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken” (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). However, a “‘general awareness’ is legally insufficient to charge defendants with

constructive notice of the specific condition that resulted in plaintiff's injuries" (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 736 [1st Dept 2005], *aff'd* 6 NY3d 734 [2005]).

Defendant contends that the evidence in the record establishes that they had no control over the means or methods of Plaintiff's work, which was exclusively within the control of Third-Party Defendant PAL Environmental Services. Plaintiff testified that he took all direction from his PAL supervisor Bryan Pilgrim, including on the accident date. (NYSCEF Doc. No. 158, p. 156). Further, Plaintiff testified that no one besides his PAL supervisor instructed him on how to perform his work. (*Id.* at p. 158). This testimony was corroborated by Bryan Pilgrim's testimony (NYSCEF Doc. No. 171).

Defendant has demonstrated their *prima facie* entitlement to judgment as a matter of law under Labor Law §200 and Plaintiff has not sufficiently raised a question of fact in opposition. Accordingly, Plaintiff's claims under Labor Law §200 are dismissed.

Fourth Cause of Action, Negligence

Similarly, Plaintiff's cause of action for common-law negligence is dismissed for the same reasons that Plaintiff's claim under Labor Law §200 is dismissed (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d 625, 627 [2007]; *Ortega v Puccia*, 57 AD3d 54, 63 [2008]).

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is granted and the first and fourth causes of action of the complaint are dismissed; and it is further

ORDERED that Defendant's motion for summary judgment is granted to the extent that under the second cause of action violations of Labor Law §240(2) are dismissed, and under the third cause of action under Labor Law §241(6) as it relates to violations of Industrial Code §§

23-1.5(a), 23-1.5(c)1, 23-1.5(c)2, 23-1.5(c)3; 23-1.6; 23-1.7; 23-5.1(b), 23-5.1(c), 23-5.1(d), 23-5.1(f), 23-5.1(j); 23-5.2; 23-5.3; 23-5.4; 23-5.5; 23-5.6; 23-5.7; 23-5.8; 23-5.9; 23-5.10; 23-5.13(a), 23-5.13(b), 23-5.13(c), 23-5.13(d); and Part 23 Section 13-1.21 and OSHA sections 29 CFR 1926.501 and 1926.502 are dismissed; and it is further

ORDERED that the remaining causes of action are severed, and the balance of the claims are continued.

10/26/2021
DATE


SHAWN KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: