Whitted v One Hudson Yards Owner, LLC
2021 NY Slip Op 32190(U)
November 5, 2021
Supreme Court, Kings County
Docket Number: Index No. 523998/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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RODNEY WHITTED,

Plaintiff,

- against -

ONE HUDSON YARDS OWNER, LLC and
GILBANE BUILDING COMPANY,

Defendants.

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Index No.: 523998/2018
Motion Date: 09/08/2021
Motion Seq.: 03, 04

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 03) 18-26, and (Motion 04) 32-51 and 53 were read on these motions for summary judgment.

The plaintiff moves for summary judgment (Motion 03), pursuant to CPLR § 3212, on the issue of liability against the defendants under Labor Law §§ 240(1) and 241(6). The defendants cross move for summary judgment (Motion 04), pursuant to CPLR § 3212, seeking dismissal of the complaint. After oral argument and upon consideration of the parties' submissions, the plaintiff's motion is granted, and the defendants' motion is denied.

This action arises out of personal injuries allegedly sustained by the plaintiff as a result of an accident that occurred on October 23, 2018, while the plaintiff was working at a construction project on a new high-rise building located at 55 Hudson Yards in the County, City and State of New York. The defendant, One Hudson Yards Owner, LLC (hereinafter Hudson) was the owner of the property, and defendant Gilbane Building Company (hereinafter Gilbane) was the general contractor on the project. The plaintiff's employer, Core Erectors, was the ironworker company, and worked on the core and shell of the building. In support of the motion the plaintiff submits the pleadings, the plaintiff's deposition transcript, the Incident Report and Summary of the accident prepared by defendant Gilbane, a copy of three New York City Department of Buildings summonses relating to the accident, with violation details, a link to the video depicting the accident, and the construction agreement between Related Construction LLC and Gilbane Building Company.

The plaintiff alleges that at the time of the accident he was working on a swing scaffold that was suspended approximately 38 stories high, repairing glass that was broken during construction. The plaintiff contends that his injury occurred after he and the other workers completed the window repair and the scaffold was ascending to the roof. According to the plaintiff, the scaffold was unsecured and susceptible to significant movement, and when the wind picked up the scaffold crashed into the building three times. On the third occasion, the scaffold spun around 360 degrees, swinging from the south side of the building to the east side, where it eventually broke through a glass window. The plaintiff alleges that the scaffold was swinging

approximately 20-25 minutes. The plaintiff's co-workers were able to evacuate him from the scaffold and into the building through the broken window.

The plaintiff states that during his employment as a glazier he used both suspended scaffolds and house rigs. At the time of the accident, the plaintiff was working on a double-decker suspended swing scaffold that was attached to the building from the roof with a rig system that controlled descent. According to the plaintiff, a double-decker scaffold has two open platforms, one on top of the other, with room for three workers on each platform. The plaintiff was working on the double-decker scaffold with two other people: an ironworker on the upper platform, and the plaintiff and another glazier on the bottom platform. Their task was to cut the outer portion of a glass window, and to accomplish this, they would use the scaffold to descend to the level of the window, cut the broken window out, place it in the garbage on the scaffold, and then ascend back up to the roof. Plaintiff states that the job required three people: two glaziers to cut the window, and one ironworker to watch the power cord to make sure it did not get tangled while the platform was descending or ascending.

The plaintiff claims that he checked the weather every morning, and sometimes used a wind meter. In the event of rain, windy conditions, or frigid temperatures, he and the other workers would not go out on the scaffold. On the day of the accident the plaintiff alleges that he checked the wind before going out, and observed that the weather was nice, with no rain or snow, and that it was relatively warm and sunny.

According to the Incident Report Summary dated October 23, 2018, a New York City Department of Buildings inspector reported to the scene, issued a stop-work order, and issued a summons to Greg Beeche, the owner of the scaffold, for "Infraction Code B109, Class 1 Violation, BC 3301.2 – Failure to Safeguard all Persons and Property Affected." *See* NYSCEF Doc. No. 22. The Department of Buildings also issued two violations as a result of the incident: one for not providing edge protection on the electrical cable that powers the monorail system, and another for failing to notify the Department of Buildings prior to installing the scaffold. *Id.*

The plaintiff argues that he has established his prima facie entitlement to summary judgment because the scaffold provided to him to perform his work as a glazier was inadequate, and failed to protect him from "harm directly flowing from the application of the force of gravity to an object or person," in violation of Labor Law § 240(1). *See Galvez v Columbus 95th Street, LLC*, 161 AD3d 530, 530-531 (1st Dept 2018). Further, the plaintiff seeks summary judgment pursuant to Labor Law § 241(6), based on a violation of Industrial Code 12 NYCRR § 23-5.8(g), which requires that "[e]very suspended scaffold shall be tied in to the building or other structure at every working level."

In opposition and in support of their cross motion, the defendants submit, inter alia, the pleadings, copies of weather forecasts from the date of the accident, an expert affidavit from Professional Engineer David B. Peraza, and statements from the other workers who were on the scaffold with the plaintiff at the time of the accident. The defendants argue that their cross motion should be granted because the subject accident occurred due to an unforeseeable and "rogue" gust of wind, not as the result of a violation of a statute, and that no safety devices could have prevented the accident. The defendants further contend that the cross motion should be

granted as to Labor Law § 200 and plaintiff's general negligence claims because the defendants did not supervise, control, or direct plaintiff's work, and the plaintiff cannot establish the existence of a dangerous or defective condition of which defendants had notice.

The defendants argue that the plaintiff's cause of action based on Labor Law § 240(1) must be dismissed because the accident occurred due to an unforeseeable "act of God." The defendants point out that the plaintiff testified at his deposition that the wind was the only cause of the accident. *See* NYSCEF Doc. No. 21, p. 88. The defendants rely upon the affidavits of plaintiff's foremen, James Robertson and Travaus Brown, averring that the scaffold was not defective. *See* NYSCEF Doc. Nos. 43 and 44. The defendants also rely upon the written statements of plaintiff's co-workers, Rocco Douso and William Halbach, which state, in sum and substance, that the accident could not have been prevented. *See* NYSCEF Doc. Nos. 46 and 47. The defendants contend that weather reports failed to indicate that any wind gusts were expected to occur at the time and place of the accident. *See* NYSCEF Doc. Nos. 39-43, 45. In support of their argument that an "act of God" caused the accident, the defendants cite to *Lofstad v S&R Fisheries, Inc.*, 45 AD3d 739 (2d Dept 2007). The defendants assert that a claim pursuant to Labor Law § 240(1) must fail because the plaintiff cannot establish that the defendants failed to take all safety precautions prior to the accident, and the plaintiff has not provided an expert affidavit or testimony that the subject scaffold was not tied to the building. The defendants rely upon the expert affidavit of David Peraza, P.E., which states:

> Based on Plaintiff's testimony and the records referenced above, the double decker scaffold was in working condition at the time of the accident and no defects in the scaffold caused the accident to occur. Plaintiff's accident did not occur due to any manufacturing defect or problem with the functionality of the suspended scaffold. In addition, by inspecting the scaffold, checking the wind and weather, utilizing safety ropes, and tying off to the scaffold, it is my professional opinion, within a reasonable degree of certainty, that all necessary steps were taken to ensure the workers were safe while utilizing the suspended scaffold. *See* NYSCEF Doc. No. 34, p. 7.

Mr. Peraza further opined that the plaintiff's "accident did not occur due to a violation of 12 NYCRR § 23-5.8(g), and that the suspended scaffold could not have been tied off to the building because it was in the process of ascending." NYSCEF Doc. No. 34, p. 8.

The proponent of a summary judgment motion must make a prima facie showing of entitlement as a matter of law, and submit sufficient admissible evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (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." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Labor Law § 240(1) imposes a nondelegable duty to protect workers from elevation-related hazards while they are conducting certain enumerated work activities. The statute provides in relevant 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 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 Court of Appeals has held that Labor Law § 240(1) must be construed liberally. *See Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). However, this principle is to be applied only after a violation of the statute has been established. *See Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 (2001). In order to impose absolute liability under Labor Law § 240(1), the plaintiff must show that the owner or general contractor's failure to provide proper protection to workers employed on a construction site proximately caused injury to a worker. *See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 (2011). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." *Id.* at 7.

The Appellate Division, Second Department has repeatedly held that a worker's fall from an unsecured safety device, which was caused to sway or move when a person was on it, constitutes a violation of Labor Law § 240(1). *See Whalen v Sciame Constr. Co.*, 198 AD2d 501 (2d Dept 1993); *see also Mejia v African M.E. Allen Church*, 271 AD2d 583 (2d Dept 2000) (holding that where a plaintiff demonstrates that a scaffold from which he fell moved, collapsed or otherwise failed to perform its function of supporting him, Labor Law § 240(1) is applicable). Further, it is not necessary to demonstrate that the scaffold or other safety device was defective for purposes of liability under Labor Law § 240(1). *See Zimmer v Chemung County Performing Arts*, 65 NY2d 513 (1985).

At the outset, the Court notes that although the doctrine of stare decisis requires trial courts to follow precedent in this department, a court may follow precedents set by the Appellate Division of another department until the Court of Appeals or the Second Department pronounces a contrary rule. *See Mountain View Coach Lines v Storms*, 102 AD2d 663 (2d Dept 1984). In *Harris v 170 East End Ave., LLC*, 71 AD3d 408 (1st Dept 2010), a bundle of wooden beams was dislodged by a crane cable, causing them to fall and injure the plaintiff, who was standing on the eighth floor during the construction of a 19-story condominium building. Relying on *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500-501, the Appellate Division, First Department held in *Harris* that even assuming arguendo that the wooden beams had been properly secured in accordance with industry practice, summary judgment was appropriate because "it is irrelevant that a safety device was provided if an accident that the device was intended to prevent still befalls the plaintiff." *Id.* at 409. The Court found that Labor Law § 240(1) "evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site either is itself elevated or is positioned below the level where materials or load [are] hoisted or secured." *Id.* (internal quotation marks omitted); *see also Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 (2015) (finding that Labor Law § 240(1) was applicable where plaintiff was caused to fall from a catwalk when a strong gust of wind caused loose vinyl material to strike him because the statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks").

The facts in the instant case are analogous to those presented in *Williams v 520 Madison Partnership*, 38 AD3d 464 (1st Dept 2007). The plaintiff in *Williams* was working on the roof of a 43-story building and was using a scaffold consisting of a basket that was lowered to provide workers with access to the sides of the building. To enter the basket, a worker would climb a four-step staircase leading from the roof to the loading platform, which stood five feet above the roof, and step over the railings of both the loading platform and the basket. As the plaintiff in *Williams* attempted to step out of the basket to the loading platform, a "heavy" gust of wind blew, causing the basket to move away from the platform causing the plaintiff to fall onto the roof. *Id.* at 464. The Appellate Division, First Department held that the plaintiff established a Labor Law § 240(1) violation because the scaffold provided by the defendants was "inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person." *Id.* at 465, quoting *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 561 (1993); *see also Galvez v Columbus 95th Street, LLC*, 161 AD3d 530 (holding that Labor Law § 240(1) was violated when a motorized suspended scaffold that swung into a recessed area of a building injured the plaintiff because the harm flowed directly from the application of the force of gravity).

Dominguez v Lafayette-Boynton Hous. Corp., 240 AD2d 310 (1st Dept 1997) is also instructive here. In *Dominguez*, the plaintiff was injured while working on a scaffold suspended from the roof of a building by ropes. Plaintiff was assigned to replace bricks on the 19th floor, which required plaintiff and his co-worker to raise the scaffold to that level. An air conditioning unit protruding from the building on the 5th floor obstructed the path of the scaffold so the plaintiff had to push the scaffold outward three feet in order to avoid the air conditioner. While attempting this, the scaffold swung back and smashed into the air conditioner, injuring the plaintiff's wrist. The *Dominguez* court held that "[s]ince the effects of gravity caused the scaffold to smash into the air conditioner, and the scaffold was not equipped with sufficient devices to prevent these injuries, plaintiffs' motion for summary judgment should have been granted." *Id.* at 312.

Notably, in *Curte v City of New York*, 21 AD3d 1050, 1050 (2d Dept 2005), the plaintiff was standing on a ladder, "chipping concrete" on a train trestle when a gust of wind caused by the passing of a nearby train caused a tarp to be pushed against the plaintiff's ladder. The ladder moved away from the wall on which it had been propped, and plaintiff fell from the ladder. *Id.* The Appellate Division, Second Department found that under these circumstances the plaintiff was entitled to summary judgment on the issue of liability under Labor Law §240(1). *Id.*

In order to establish an "act of God" defense, a defendant has the burden of proving that plaintiff's "losses and injuries were occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight." *Tel Oil Co., Inc. v City of Schenectady*, 303 AD2d 868, 871 (3d Dept 2003) (internal quotation marks omitted). The defendants must also "demonstrate that the act of God was the sole and immediate cause of the injury and that they were free from any contributory negligence." *Id.* at 873 (internal citations and quotation marks omitted); *see also Moore v Gottlieb*, 46 AD3d 775 (2d Dept 2007).

In the instant case, the scaffold involved in the plaintiff's accident did precipitously sway, move, and tip, proximately causing the plaintiff's fall, and therefore the plaintiff has

demonstrated his prima facie entitlement to judgment pursuant to Labor Law § 240(1). In opposition, the defendants have failed to raise a triable issue of fact. The defendants' argument that a gust of wind may be an "unforeseeable risk" with regard to this type of work is unavailing, especially in light of the statements of foremen James Robertson and Travaus Brown, and the plaintiff's co-workers that a critical component of determining whether to perform the job is to first check the wind speed. Further, the undisputed fact that the scaffold was blown away from the building and slammed into it at least three times in the course of 20 to 25 minutes, is evidence that the scaffold was insufficient for the purposes of safeguarding the plaintiff from a commonly known and guarded-against risk, i.e. gusts of wind.

The defendants' contention that the accident resulted from an "act of God" is without merit, as the defendants failed to show that this accident could not have been prevented by "human care, skill and foresight." *Tel Oil*, 303 AD2d at 871. In *Verdugo v Seven Thirty One Ltd. Partnership*, 70 AD3d 600 (1st Dept 2010), the Appellate Division, First Department held that "[t]he existence of 30 mph winds… was not an 'unusual, extraordinary and unprecedented event.'" *Id.* at 602, quoting *Prashant Enterprises Inc. v State*, 206 AD2d 729 (3d Dept 1994). The cases relied upon by the defendants in support of their argument that the events here were the result of an "act of God" are inapposite, as those cases involve general negligence claims and not a statutory violation of Labor Law § 240(1). Even assuming arguendo that the gust of wind could be classified as an "act of God," the defendants have failed to establish that they were free from contributory negligence. *See Tel Oil*, 303 AD2d at 873.

Moreover, the defendants' expert affidavit is insufficient to raise a triable issue of fact as it fails to address whether the suspended scaffold used by the workers was the proper device; whether the device provided proper protection to the workers; and/or whether any other safety device would have prevented the incident from occurring. As a result, the plaintiff has established the defendants' prima facie violation of Labor Law § 240(1), which was the proximate cause of his injuries. *See Marulanda v Vance Associates, LLC*, 160 AD3d 711 (2d Dept 2018). As such, the prong of the plaintiff's motion seeking summary judgment pursuant to Labor Law § 240(1) is granted.

The plaintiff also seeks summary judgment based on Labor Law § 241(6), predicated on a violation of the Industrial Code 12 NYCRR § 23-5.8(g), which states:

> Tie-ins. Every suspended scaffold shall be tied in to the building or other structure at every working level. Window cleaners' anchors shall not be used for such tie-ins and other means shall be provided.

The plaintiff contends that the Industrial Code was violated because the scaffold provided to the plaintiff was not tied into the building at any level except the roof, and the lack of tie-ins was the proximate cause of plaintiff's injury, as evidenced by the fact that the scaffold moved away from the building and slammed back into it several times.

The plaintiff has failed to meet his prima facie burden establishing his entitlement to summary judgment on the Labor Law § 241(6) claim. Labor Law § 241(6) imposes a nondelegable duty on 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." *See Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 (2d Dept 2014); *see also Perez v 286 Scholes St. Corp*., 134 AD3d 1085, 1086 (2d Dept 2015). To prevail on a Labor Law § 241(6) cause of action, a plaintiff must allege and prove a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. *See Misicki v Caradonna*, 12 NY3d 511 (2009); *Ross v Curtis-Palmer Hydro-Elec*. Co., 81 NY2d 494. However, even if a plaintiff establishes as a matter of law that the defendant violated a concrete specification of the Industrial Code, granting summary judgment on that claim is not appropriate. In *Rizzuto v L.A. Wenger Contr. Co*., 91 NY2d 343, 351 (1998), the Court of Appeals held that a violation of the Industrial Code is not conclusive with respect to defendant's liability, and merely constitutes "some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances." *See also Seaman v Bellmore Fire Dist*., 59 AD3d 515 (2d Dept 2009); *Chrisman v Syracuse SOMA Project, LLC*, 192 AD3d 1594 (4th Dept 2021). Accordingly, the branch of the plaintiff's summary judgment motion based on a violation of Labor Law § 241(6) must be denied.

Turning to the plaintiff's Labor Law § 200 claim, § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343; *Chowdhury v Rodriguez*, 57 AD3d 121 (2d Dept 2008); *Ortega v Puccia*, 57 AD3d 54 (2d Dept 2008). "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*, 57 AD3d at 61; *see also Chowdhury*, 57 AD3d at 128. When a Labor Law § 200 and/or common-law negligence claim involves injuries allegedly arising from the use of dangerous or defective equipment at the job site, an owner will be liable only if it "had the authority to supervise or control the performance of the work." *See Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646 (2d Dept 2010), quoting *Ortega*, 57 AD3d at 61 (internal quotation marks omitted). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." *Ortega*, 57 AD3d at 62. "Where the alleged defect or dangerous condition arises from the subcontractor's methods, and the owner and general contractor exert no supervisory control over the work, no liability attaches to the owner or general contractor under the common-law or pursuant to Labor Law § 200." *Ruccolo v City of New York*, 278 AD2d 472, 474 (2d Dept 2000); *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 (1993).

As noted by the plaintiff, this prong of the defendants' motion is premature as no defense witnesses have been deposed. Moreover, the contract with Gilbane, the general contractor, states that Gilbane was retained to "perform construction related services and to arrange for, monitor, supervise, administer and contract for the construction (collectively the "Work") of all or any portion of the Project, including entering into Trade Contracts for the performance of the Work, all as more particularly set forth in Article II hereof…" *See* NYSCEF Doc. No. 25, p. 3. This creates an issue of fact as to whether Gilbane or the owner directed and controlled the work. As such, the branch of the defendants' summary judgment motion seeking dismissal of the plaintiff's Labor Law § 200 claim is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1) (Motion 03) is GRANTED; the motion is denied in all other respects; and it is further

ORDERED, that the defendants' motion for summary judgment (Motion 04) is DENIED.

This constitutes the decision and order of the Court.

DATED: November 5, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

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