Greig v Realmuto
2021 NY Slip Op 33286(U)
July 29, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 600635/2018
Judge: William J. Condon
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SHORT FORM ORDER

INDEX No. 600635/2018
CAL. No. 202001107OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM J. CONDON
Justice of the Supreme Court

MOTION DATE 3/29/21 (002)
MOTION DATE 4/30/21 (003)
ADJ. DATE 6/8/21
Mot. Seq. # 002 MG
Mot. Seq. # 003 MD

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SCOTT GREIG,

Plaintiff,

- against -

JOSEPH REALMUTO, JOSEPH C. REALMUTO, NANCY REALMUTO, and ABC THROUGH XYZ CORPORATIONS,

Defendants.

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Upon the following e-filed papers read on these motions for summary judgment: Notice of Motion and supporting papers by plaintiff, dated March 12, 2021; Notice of Motion and supporting papers by defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto, dated March 31, 2021; Answering Affidavits and supporting papers by defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto, dated April 22, 2021; Answering Affidavits and supporting papers by plaintiff, dated May 5, 2021; Replying Affidavits and supporting papers by defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto, dated May 28, 2021; Replying Affidavits and supporting papers by plaintiff, dated May 4, 2021; it is

ORDERED that the motion (seq. 002) by plaintiff Scott Greig, and the motion (seq. 003) by defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto, are consolidated for purposes of this determination; and it is

ORDERED that the motion by plaintiff Scott Greig for partial summary judgment on the issue of defendants' liability is granted; and it is further

ORDERED that the motion by defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto for summary judgment dismissing the complaint against them is denied, as moot.

This action was commenced by plaintiff Scott Greig to recover damages for injuries he allegedly sustained on May 6, 2017, when he fell off of a ladder at a premises known as 18 Juniper Avenue, Ronkonkoma, New York. It is undisputed that defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto were the owners of the subject premises. By his bill of particulars, plaintiff asserts claims pursuant to Labor Law §§ 200, 240 (1), and 241 (6), as well as common law negligence. Attendant to his Labor Law § 241 (6) claim, plaintiff alleges violations of 12 NYCRR § 23-1.15, 12 NYCRR § 23-1.16, 12 NYCRR § 23-1.21 (b) (4), 12 NYCRR § 23-1.3, and 12 NYCRR § 23-1.5.

Plaintiff now moves for partial summary judgment in his favor on his Labor Law §§ 200, 240 (1), and 241 (6) claims. In support of his motion, plaintiff submits, among other things, transcripts of his own deposition testimony, a transcript of Joseph Charles Realmuto's deposition testimony, his own affidavit, and an unsworn and un-notarized letter from nonparty Nicholas A. Politis, P.E. The Court notes that Mr. Politis's letter was not considered, as it was not in admissible form (*see* ***1212 Ocean Ave. Hous. Dev. Corp. v Brunatti***, 50 AD3d 1110, 857 NYS2d 649 [2d Dept 2008]; CPLR 2106; 2309).

Defendants Joseph Realmuto, Joseph C. Realmuto, and Nancy Realmuto (the Realmuto defendants) also move for summary judgment in their favor, arguing that plaintiff cannot avail himself of the Labor Law, because he was a volunteer, not an employee, and that, in any event, he was the sole proximate cause of his own alleged injuries. In support of their motion, the Realmuto defendants submit, among other things, transcripts of plaintiff's deposition testimony and Joseph Charles Realmuto's deposition testimony.

Plaintiff testified that on the date in question, he had been renting an apartment at the subject premises for five to six years. He stated that there was a private house on the premises, consisting of a main living space and two accessory apartments. Plaintiff indicated that he is employed in the construction industry, working as a project manager for PCI Services, an "insurance restoration company," since 2007. Plaintiff testified that "[a] few days prior to the accident," Joseph Realmuto, whom he believed to be the owner of the subject premises, asked him to "use [his] rent money" to pick up roof shingles for him. He stated that Mr. Realmuto, who occupied the main, un-rented portion of the home, planned to perform roof repairs and told him that he was going to "have his upstairs tenant go for the rest of the materials, such as plywood, nails, [and] tar paper." Plaintiff testified that he purchased the shingles, as requested, for $700.00– an amount identical to his monthly rent payment to Mr. Realmuto. He explained that Mr. Realmuto wanted half of the home's roof replaced, including the plywood underlayment, because it was leaky. Asked if he had ever performed work for Mr. Realmuto in the past, plaintiff stated that he had once installed a hot water heater for him, and was paid for his services. Plaintiff further stated that he had done work involving the installation of roofs 8 to 10 times in the two years prior to the instant incident. He testified that he was "tired of doing roofs" due to his age, but that Mr. Realmuto coaxed him into doing the required work.

Plaintiff testified that at approximately 5:30 p.m. on the incident date, with the assistance of Mr. Realmuto, he propped his own 28-foot-long Werner aluminum extension ladder against the gutter of the subject roof. He stated that the ladder, despite not having been used for "[a] few years," had rubber footings which were in good condition. Plaintiff indicated that the gutter was approximately 9½ feet from the ground, that the ground was dry, and that the ladder was at its "closed" length of 14 feet. He testified that his plan for the day was to take measurements of the roof, using a tape measure, to determine how much plywood would be required to construct the roof. Plaintiff stated that while he scaled the ladder to the roof, Mr.

Realmuto placed his feet "in front of the feet of the ladder and held the sides." He indicated that he made his way up the ladder and onto the roof safely, then began taking measurements. When he was done, plaintiff walked across the roof and back to the ladder. He testified that Mr. Realmuto was no longer present at the base of the ladder, so he called his name and walked across the roof in an attempt to located him. Unable to summon Mr. Realmuto, plaintiff waited 5 to 10 minutes before attempting to descend the ladder without assistance. He stated that, facing the roof, he "cautiously" put both of his hands, and his right foot, on the ladder. However, as he lifted his left foot off of the roof, intending to place it on a rung of the ladder, the ladder slid out from under him, he "tried to jump off," and he fell to the ground. Upon questioning, plaintiff denied knowing the reason why the ladder slid out from under him.

In addition, by way of an affidavit submitted by him in support of his motion, plaintiff states that "[t]he patio on which the ladder feet were situated had a build up of mildew and/or algae and there were no safety devices to prevent the ladder from sliding out on the concrete patio." He further states that he "believe[s] that the mildew on the patio made it more slippery than it would have been otherwise."

Joseph Charles Realmuto testified that on the date in question he lived at the subject premises with his parents, who "owned the house," but that he "was on the deed." However, he later indicated that his parents did not reside in New York. Mr. Realmuto stated that the subject house had a leak in its roof which drained into the upstairs apartment rented by Christopher Kennard. He testified that he entered into an agreement with plaintiff whereby plaintiff would perform the roofing work in exchange for "some money off of the rent." Upon further questioning, Mr. Realmuto confirmed that he would credit plaintiff the fair cost of the roof repairs. Regarding the circumstances of plaintiff's fall, Mr. Realmuto testified that he held plaintiff's ladder while he was ascending it, but then received a phone call. He indicated that he stepped away from the ladder to answer the call, but denies hearing plaintiff call his name later. Mr. Realmuto stated, however, that he did hear plaintiff's screams after he fell.

A party moving for summary judgment "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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (***Orlando v New York Homes By J & J Corp.***, 128 AD3d 784, 785, 11 NYS3d 76 [2d Dept 2015], quoting ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 576, 934 NYS2d 43 [2011]). Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019]

[internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). A cause of action sounding in violation of Labor Law § 200 or common-law negligence "may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed" (***Pilato v 866 U.N. Plaza Assoc., LLC***, 77 AD3d 644, 645, 909 NYS2d 80 [2d Dept 2010]). "Where a plaintiff's injuries arise from a dangerous condition on the premises, an owner may be liable under Labor Law § 200 if it either created or had actual or constructive notice of the dangerous condition" (***Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius***, 192 AD3d 883, 886, 2021 NY Slip Op 08228 [2d Dept 2021]). Where a plaintiff's claims "implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (***Sullivan v New York Athletic Club of City of New York***, 162 AD3d 955, 958, 80 NYS3d 93 [2d Dept 2018]). "Mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient" (***Gomez v 670 Merrick Rd. Realty Corp.***, 189 AD3d 1187, 1191, 138 NYS3d 111 [2d Dept 2020] [citations omitted]).

Labor Law § 240 (1) provides, in relevant part, that "[a]ll 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 law "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" (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 124, 8 NYS3d 229 [2015]). "A building owner may be held liable for a violation of Labor Law § 240(1) even if it did not exercise supervision or control over the work" (***Jara v Costco Wholesale Corp.***, 178 AD3d 687, 690, 115 NYS3d 49 [2d Dept 2019]). However, the statute "does not apply to any and all perils connected in some tangential way with the effects of gravity, but rather only applies where the plaintiff's injuries result from an elevation-related risk and the inadequacy of a safety device" (***Lemus v New York B Realty Corp.***, 186 AD3d 1351, 1352, 128 NYS3d 878 [2d Dept 2020]). "To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (***Soczek v 8629 Bay Parkway***, 193 AD3d 1093, 1094, 2021 NY Slip Op 02554 [2d Dept 2021] [citations omitted]). "A plaintiff's comparative negligence is not a defense to a cause of action under Labor Law § 240 (1), [but,] where a plaintiff's actions are the sole proximate cause of his or her injuries, liability under Labor Law § 240 (1) does not attach" (***Debennedetto v Chetrit***, 190 AD3d 933, 935-936, 140 NYS3d 569 [2d Dept 2021]). "A plaintiff is the sole proximate cause of his or her own injuries and a defendant has no liability under Labor Law § 240 (1) when the plaintiff: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice" (***Cioffi v Target Corp.***, 188 AD3d 788, 791, 134 NYS3d 408 [2d Dept 2020]).

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, 670 NYS2d 816 [1998]). Labor Law § 241 (6) provides, in relevant part, that "[a]ll 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." To support a claim under this section, a plaintiff "must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (***Bianchi v New York City Tr. Auth.***, 192 AD3d 745, 748, 144 NYS3d 101 [2d Dept 2021]).

As to plaintiff's motion, the Court finds he has established a prima facie case of entitlement to partial summary judgment on his Labor Law §§ 200, 240 (1), and 241 (6) claims (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). For his Labor Law § 240 (1) claims, plaintiff demonstrated "that he was injured when he fell while using an unsecured ladder, which unexpectedly collapsed and caused his injuries, without the benefit of any safety devices to prevent such a fall" (***Jara v Costco Wholesale Corp.***, *supra* at 690). On his Labor Law § 200 claim, he demonstrated, prima facie, that the Realmuto defendants were the owners of the subject premises, that they had entered into a verbal agreement with him to secure his services in the repair of the subject roof, and that the condition of the patio may have contributed to the ladder's failure. Plaintiff further established, prima facie, his Labor Law § 241 (6) claim by demonstrating that the Realmuto defendants violated, at minimum, 12 NYCRR § 23-1.21 (b) (4) (iv), which provides that "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means." Plaintiff testified that the roof line was approximately 9½ feet above the ground, and it is undisputed that the ladder in question was unsecured at the time of his fall. The burden then shifted to defendants to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to plaintiff's motion, the Realmuto defendants argue that plaintiff was a volunteer, not an employee entitled to the protections of the Labor Law, and that his own negligence was the sole proximate cause of his accident. These arguments are unavailing (*see* ***Doskotch v Pisocki***, 168 AD3d 1174, 90 NYS3d 667 [3d Dept 2019]; ***Aloise v Saulo***, 51 AD3d 829, 858 NYS2d 355 [2d Dept 2008]; Labor Law § 2). While it is true that "[t]he strict liability provisions of Labor Law § 240 (1) apply to employees but not to persons who volunteer to work on a project" (***Stringer v Musacchia***, 11 NY3d 212, 213, 869 NYS2d 362 [2008]), Mr. Realmuto was a landlord who testified that he intended to compensate plaintiff for his services through rent reduction or abatement.

It is axiomatic that the measurement of a roof is an integral part of a roof repair or replacement project. The Realmuto defendants cite to no authority supporting their contention that, because plaintiff's incident occurred in the early stages of the project, he is not entitled to the protections of the Labor Law (*see generally* ***Saint v Syracuse Supply Co.***, 25 NY3d 117, 8 NYS3d 229 [2015]). Ultimately, the Realmuto defendants adduce no evidence that they provided plaintiff with proper protection, namely a mechanism to prevent the subject ladder from sliding out beneath him as he descended from the roof. Nor do they adduce

evidence, such as an affidavit of an expert, opining that the patio in question was not slippery due to the presence of moss or algae at the time of plaintiff's accident. Thus, the Realmuto defendants fail to raise a triable issue regarding plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims (*see* ***Von Hegel v Brixmor Sunshine Sq., LLC***, 180 AD3d 727, 115 NYS3d 712[2d Dept 2020]; *see generally* ***Luan Zholanji v 52 Wooster Holdings, LLC***, 188 AD3d 1300, 132 NYS3d 787 [2d Dept 2020]). Accordingly, plaintiff's motion for partial summary judgment on the issue of the Realmuto defendants' liability is granted.

In light of the Court's decision above, the Realmuto defendants' motion for summary judgment dismissing plaintiff's complaint is denied, as moot.

Dated: 7/29/21

William J. Condon
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION