

Domingues v Pace Univ.
2021 NY Slip Op 33526(U)
October 12, 2021
Supreme Court, Orange County
Docket Number: Index No. EF008067-2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street
Goshen, New York 10924 on the 12th day of October, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

VICTOR DOMINGUES,

Plaintiff,

-against-

PACE UNIVERSITY, CONSIGLI CONSTRUCTION
CO., INC., and CONSIGLI CONSTRUCTION NY,
LLC,

Defendants.

CONSIGLI CONSTRUCTION, CO., INC. and
CONSIGLI CONSTRUCTION NY, LLC,

Third-Party Plaintiffs,

-against-

SENTRALE CONSTRUCTION CORPORATION,

Third-Party Defendant.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for
appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of
this order, with notice of entry, on all
parties.

DECISION & ORDER

INDEX #EF008067-2018

Motion date: 5/28/2021

Motion Seq. #1

The following papers were read on this motion by defendants Pace University and

Consigli Construction, NY, LLC for summary judgment, dismissing the plaintiff's complaint:

Notice of Motion/Statement of Material Fact/Affirmation in Support/Memorandum of
Law/Exhibits A - P;

Affirmation in Opposition/Response to Statement of Material Facts/Affidavit;

Affirmation in Reply;

This action arises from injuries plaintiff sustained on May 31, 2016 while working for
third-party defendant Sentrale, attempting to stop a roll of plastic grid from rolling in a courtyard
owned by defendant Pace University located at 861 Bedford Road in Pleasantville, New York.

On October 4, 2013, Pace University as owner entered into an Agreement with Kirchhoff-

Consigli Construction Management (known as Consigli) as construction manager for construction work (Exhibit L). Consigli entered into a Subcontract with Centrale to perform “Sitework, Site Concrete, Site Masonry” on May 28, 2014 (Exhibit N). Plaintiff alleges against defendants common-law negligence and violation of Labor Law §§ 200, 240(1), and 241(6). As for the latter claim, plaintiff maintains defendants violated the New York State Industrial Code, specifically 12 NYCRR §§ 23-1.5, 23-1.31, 23-9.8, 23-1.2(e), and 23-1.3.

Plaintiff commenced this action by the filing of a Summons and Verified Complaint on July 31, 2018. The Consigli defendants filed an Answer on September 7, 2018. Defendant Pace University filed a Verified Answer on November 8, 2018. The Consigli defendants filed a Notice of Impleader on January 4, 2019 against third-party defendant Centrale Construction, who thereafter filed a Third-Party Answer on April 8, 2019. A Stipulation of Discontinuance of the third-party action and against Consigli Construction Co., Inc. was filed on October 21, 2020. A Stipulation of Discontinuance of all Cross-claims between Pace University, Consigli, and Consigli Construction Co., Inc., was filed on November 5, 2020. Defendants Pace University and Consigli Construction, NY, LLC move here for summary judgment against plaintiff.

Labor Law §240(1)

“Labor Law §240(1) imposes upon owners and general contractors, and their agents, a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369 374 [2011]). 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 the his injuries (*see Blake v Neighborhood Hous. Servs. On N.Y. City*, 1 NY3d 280, 287-289 [2003]). This statute is “to be

construed as liberally as may be” for the accomplishment of its purpose, which is to place the ultimate responsibility for safe construction practices on the owner and general contractor (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). As such, § 240(1) imposes absolute liability for a violation of the statute that proximately causes an injury (*Blake v. Neighborhood Hous. Serv. of N.Y.C., Inc.*, 1 NY3d at 280; *Rocovich*, 78 NY2d at 513) The purpose of this statute is not to protect workers from routine workplace risks, but “from the pronounced risks arising from construction work site elevation differentials” (*Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Cohen v. Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823 [2008]).

Defendant argues that plaintiff was not engaged in the work provided under Labor Law §240(1), which enumerates “the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” Plaintiff was not performing work on a building or structure, but instead at the outdoor quad courtyard, laying grid to prevent erosion, promote grass growth, and preserve grass and top soil. Plaintiff avers that the exterior site work was ongoing, as dormitories and buildings were also under construction on the date of the accident. In addition, the roll of grid constituted a falling object, in that plaintiff testified to rolling down the hill, which broke free at the top of the hill. According to plaintiff’s expert affidavit by Joseph J. McHugh, dated May 20, 2021, a civil engineer, safety devices should have been provided to plaintiff.

Plaintiff’s argument that the dormitory was still being constructed at the time of plaintiff’s accident is unavailing. “While the reach of section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must

have been performed during ‘the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure’” (*Martinez v. City of New York*, 93 NY2d 322 [1999]).

Plaintiff testified that he was working in the courtyard on the date of the accident, and was told he would be doing work on the sidewalks and laying out the grid (Exhibit K, p 33). Although Michael H. Walters, superintendent for Consigli Construction, testified that the last dormitory was an ongoing site work on the date of the accident, plaintiff was rolling fabric paper to place on the soil to stop erosion and grow grass ((Exhibit O, p 10 & 19). Plaintiff indicated he was laying down grid made of plastic at the time (Exhibit K, p 24). “Plaintiff was ‘not a person ‘employed’ to carry out the repairs as that term is used’ in section 240(1)” (*Martinez*, 93 NY2d at 326; see *Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108 [1991]). Thus, plaintiff’s Labor Law §240(1) claim is dismissed.

Labor Law §200

Plaintiff also alleges violations of common law negligence against the defendants. His alleged injuries stem not from the manner in which the work was being performed but rather from an alleged dangerous condition on the premises. Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Yong Ju Kim v. Herbert Constr. Co.*, 275 A.D.2d 709, 712 [2d Dept. 2000]). Liability for causes of action sounding in common-law negligence will attach where a plaintiff’s injuries were sustained as the result of a defective or dangerous condition at a work site, only if the owner or general contractor exercised supervision and control over the work performed at the site or had actual or constructive notice of the defective condition causing the accident (*Gatto v Turano*, 6 AD3d 390 [2d Dept 2004]; *Pirrotta v EklecCo.*, 292 AD2d 362 [2d Dept. 2002]).

“Furthermore, ‘when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work’” (*Orellana v. Dutcher Ave. Builders, Inc.*, 58 AD3d 612 [2d Dept 2009]). 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 v. Puccia*, 57 AD3d 54 [2D Dept 2008]). Defendant Consigli’s superintendent testified that typically a machine, such as a bucket loader, backhoe, skid lower, would be used to position or move the rolls, and not a forklift. (Exhibit O, p 21). Plaintiff responded, “No” when asked, “Was there any discussion about how this was going to be placed other than just rolling it? Was there ever a discussion about using a lull or using a forklift?” (Exhibit K, p 42). It is unclear from the record whether plaintiff was provided with any of the machines Mr. Walters had indicated would generally be used to position the rolls. Mr. Walters also stated that Ed Robinson, the safety person of Consigli, had authority over safety concerns, and that Consigli would coordinate with the campus the work to be done (Exhibit O, p 33 & 37). Thus, plaintiff’s claim under Labor Law §200 survives.

Labor Law §241(6)

Labor Law §241(6) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To prevail on a

cause of action alleging a violation of Labor Law 241(6) a plaintiff must establish the violation of an Industrial Code provision that sets forth specific applicable safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 503-505). Plaintiff argues that Industrial Code §§23-1.3 and 23-9.8 remain applicable since, respectively, defendants as owner and contractor should have provided a forklift when working with the grid material (N.Y. Comp. Codes R. & Regs. tit. 12, §§ 23-1.3 & 23-9.8). However, the regulation does not indicate workers must be equipped with a forklift under plaintiff's circumstances. As to plaintiff's claims regarding the remaining regulations, plaintiff failed to address such in its opposition, and raise a triable issue of fact (*see Garcia-Rosales v. Bais Rochel Resort*, 100 A.D.3d 687 [2d Dept 2012]). Thus, plaintiff's claim under Labor Law §241(6) is denied in its entirety.


Upon view of the foregoing,

ORDERED that defendants motion for summary judgment is **GRANTED** on the issue of liability on Labor Law §240(1) and §241(6), and **DENIED** on Labor Law §200.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 12th, 2021
Goshen, New York

ENTER,


Hon. Maria S. Vazquez-Poles, J.S.C.