Laliashvili v Kadima Tenth Ave. SPE LLC
2021 NY Slip Op 33841(U)
April 1, 2021
Supreme Court, Kings County
Docket Number: Index No. 522660/2017
Judge: Devin P. Cohen

Supreme Court of the State of New York
County of Kings

Part 91

ZVIADI LALIASHVILI,

Plaintiff,

against

KADIMA TENTH AVENUE SPE LLC, MAESTRO WEST CHELSEA LLC, T.G. NICKEL & ASSOCIATES, LLC AND T.G. NICKEL CONSTRUCTION GROUP, LLC,

Defendants.

KADIMA TENTH AVENUE SPE LLC, MAESTRO WEST CHELSEA LLC, T.G. NICKEL & ASSOCIATES, LLC AND T.G. NICKEL CONSTRUCTION GROUP, LLC,

Third-Party Plaintiffs,

against

ALL CITY GLASS & MIRROR CORP.,

Third-Party Defendant.

Index Number 522660/2017

SEQ #003 & 004

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1-2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2-3
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers[1], defendants Kadima Tenth Avenue SPE LLC's ("Kadima"), Maestro West Chelsea LLC's ("Maestro"), T.G. Nickel & Associates, LLC's ("T.G. Nickel & Associates"), and T.G. Nickel Construction Group, LLC's ("T.G. Nickel Construction") motion for summary judgment (Seq. 003) and plaintiff's cross-motion for partial summary judgment and to amend his bill of particulars (Seq 004) are decided as follows:

[1] This court will not consider plaintiff's reply papers in further support of his cross-motion, as such papers are not authorized by CPLR 2214.

Introduction

Plaintiff commenced this action against defendants for injuries he claims to have sustained as a result of an accident on May 8, 2017, allegedly caused by defendants' negligence and violations of New York Labor Law §§ 200, 240(1), and 241(6). Defendants also commenced a third-party action that is not the subject of these motions.

Factual Background

David Sani, an employee of Lalezarian Developers, Inc., appeared for a deposition in this action (Sani EBT at 8). He testified as follows: He served as controller of Lalezarian Developers, as well as controller for Kadima (*id.* at 8-14). Kadima and Maestro each owned certain lots located at 507 West 28th Street, New York, New York (*id.* at 16). In May 2017, this property was undergoing construction of "a multifamily residential tower with mercantile on the ground floor" (*id.* at 17). Kadima and Maestro hired TG Nickel to be the construction manager for this project (*id.* at 18). Nobody from Kadima or Maestro directed or managed any of the work during the construction (*id.* at 44).

Joe Kehl, a project manager or project engineer for TG Nickel, testified that he was on site almost every day from the beginning of the project (Kehl EBT at 23, 27-28). Mr. Kehl also testified as follows: TG Nickel hired between 20 to 30 subcontractors at the site (*id.* at 28). All City Glass & Mirror Corp. ("All City Glass") was hired to deliver and install glass for the project (*id.* at 61-62). TG Nickel did not provide any materials at the job site and specifically did not provide any equipment to All City Glass (*id.* at 94).

Plaintiff testified that, on the date of the accident, he was employed by All City Glass (plaintiff EBT, dated December 6, 2018, at 14). Plaintiff further testified as follows: On May 8, 2017, he was tasked with delivering 14-15 pieces of glass to the work site (*id.* at 17-21). Each

pane of glass was approximately 2 to 2.5 meters in height, 1.7 meters in length, and 6 millimeters thick (*id.* at 19). Each sheet weighed 40 to 50 kilograms (*id.* at 32-33). Plaintiff placed the glass pieces on to a cart which had four wheels and a wall against which he leaned the glass (*id.* at 24). He loaded four pieces of glass on the cart at one time (*id.* at 28). Plaintiff was not provided with anything to secure the glass to the cart on the day of the accident (*id.* at 34-36). However, as explained below, Abdullo Rakham, plaintiff's coworker, testified that All City Glass customarily used belts to secure glass on the carts (Rakham EBT at 32-33).

Plaintiff testified that, during one of the times he was transporting glass on the cart, he was pushing the cart from the rear, and Mr. Rakham was in front directing the cart (*id.* at 38). Plaintiff contends that the cart "suddenly stopped" because the cart got "stuck on something", causing the glass to fall off (*id.* at 39). He claims that all of the glass pieces fell, hit his head, and shattered, causing him to fall down and lose consciousness (*id.* at 41-42, 48). He testified that the cart also fell on him (*id.* at 52). Plaintiff claims that, prior to the accident, he did not see anything on the ground that might have caused the wheel to get stuck (*id.* at 47).

Mr. Rakham testified that he worked with plaintiff at All City Glass at the time of the accident (Rakham EBT at 10). He further testified as follows: He, plaintiff, "Albert", and another helper were transporting the glass just prior to the accident (*id.* at 33). The glass was loaded only on one side of the cart (*id.* at 22 and 50-51). The belts provided by All City Glass were not large enough to secure these large sheets of glass (*id.* at 32-33). As they were transporting the glass, they may have turned the cart too quickly, one of the wheels of the cart did not turn, and possibly locked (*id.* at 33 and 55). When the cart stalled, the glass and the cart fell on plaintiff (*id.* at 33, 57-58). He did not see any debris on the ground during their route prior to the accident (*id.* at 34). Albert was the only person who gave instructions to plaintiff and Mr.

Rakham about how to do their work (*id.* at 82-83).

Plaintiff submits the affidavit of Kathleen Hopkins, a Certified Site Safety Manager. Ms. Hopkins opines that the cart was overloaded and that glass pieces "should have been secured with straps or ropes" so that, when the cart wheel locked up, the glass "would not have fallen on the plaintiff from above" (Hopkins affidavit at ¶ 11). Ms. Hopkins also opines that the cart should have been counterbalanced to compensate for the overweight load (*id.* at ¶ 12).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's Claims for Negligence and Violation of Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 and negligence in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of

the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991-92 [2d Dept 2016], *lv to appeal denied*, 28 NY3d 911 [2016]).

To the extent that this action involves a dangerous condition on the property, defendants correctly argue that they are not liable in negligence or for violation of Section 200 because plaintiff has not identified the condition (*Goldberg v Village of Mount Kisco*, 125 AD3d 929, 929 [2d Dept 2015]; *Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827 [2d Dept 2014]). To the extent this action involves defective equipment, defendants correctly argue that they are not liable because they did not supervise plaintiff (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Plaintiff does not oppose this portion of defendants' motion. Accordingly, plaintiff's claims for negligence and violation of Labor Law § 200 are dismissed as against Kadima, Maestro and TG Nickel.

Plaintiff's Claim for Violation of Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners and general contractors 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]). The purpose of the statute is to safeguard workers from "gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]).

To prevail on his Labor Law § 240(1) claim, plaintiff must prove that defendants violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]). "With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (*Narducci v Manhasset*

Bay Assoc., 96 NY2d 259, 267-68 [2001], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991] [alteration in original]). In that regard "[A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking" (*Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2d Dept 2013]).

Defendants argue that this case does not present a violation of Section 240(1) because no safety device would have prevented the glass from falling (Mr. Rakham EBT at 31-32). However, defendants' contention is directly contradicted by Ms. Hopkins, who opines that the glass would not have fallen if the glass had been secured with belts (Hopkins affidavit at ¶ 11 and at page 7). Furthermore, defendants do not deny that they customarily secured glass on carts with straps of sufficient length.

Defendants also argue that this action is similar to *Simmons v City of New York* (165 AD3d 725 [2d Dept 2018]), in which plaintiff and others loaded a 600-pound air compressor onto a pallet jack. The pallet jack was "secured' by two pieces of scrap wood and the blades of the pallet jack were raised approximately three to six inches from the floor (*id.* at 726). As the plaintiff and others moved the pallet jack and the compressor horizontally across the floor, the wheel of the pallet jack became stuck on debris and the compressor rolled off the pallet jack and onto the plaintiff's ankle (*id.*). The Second Department found that "plaintiff's injuries were not caused by the elevation or gravity-related risks encompassed by Labor Law § 240(1)" and dismissed plaintiff's Section 240(1) claims on summary judgment (*id.* at 727).

An explanation of the application of gravity on an elevation differential is necessary for any case involving a Section 240(1) claim (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). In this case, the role gravity played in this accident is unclear. Ms. Hopkins,

plaintiff's expert, characterizes this accident as a fall "from above" that was "gravity related", but she does not explain the basis for her description (*id.* at ¶ 11 and at page 8). Indeed, other forces might be involved here, such as the momentum of the glass and cart, which, as Mr. Rakham testified, may have been going too fast as they were being turned (Rakham EBT at 33), raising the question of whether this was a speed or torque-related, rather than gravity-related, accident. That said, defendants do not appear to deny that they normally used straps or belts to secure glass on carts, nor that they did not provide straps large enough to secure the glass in this instance.

Under the circumstances, there are issues of fact concerning whether this was a gravity-related accident, and whether the use of appropriately-sized belts would have prevented the accident. These questions prevent an award of summary judgment either dismissing or granting plaintiff's Section 240(1) claim.

Plaintiff's Claim for Violation of Labor Law § 241(6)

Labor Law § 241(6) imposes on owners and contractors a non-delegable duty 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" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Defendants first seek dismissal on summary judgment of plaintiff's Section 241(6) claim based on Industrial Code 23-1.7(e)(2). This code provision directs that "parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed". Defendants contend that this provision does not

apply because plaintiff contends the wheel locked due to a malfunction and not due to debris. Plaintiff does not oppose this portion of defendants' motion.

Next, defendants seek dismissal of plaintiff's Section 241(6) claim based on Industrial Code 23-1.28, which states:

> (a) Maintenance. Hand-propelled vehicles shall be maintained in good repair. Hand-propelled vehicles having damaged handles or any loose parts shall not be used.
>
> (b) Wheels and handles. Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles. Buggy handles shall not extend beyond the wheels on either side.
>
> (c) Buggy counterbalance. Loose weights shall not be hung on buggy handles as counterbalances. When counterbalance weights are used, they shall be fastened securely to the buggy handles.
>
> (d) Curbing. Curbing at least six inches in height shall be provided along edges over which material or debris is dumped from a hand-propelled vehicle to a lower level.
>
> (e) Storage. When not in use, hand-propelled vehicles shall be stored in locations away from passageways and work areas.

Defendants argue that this provision does not apply because they did not own the cart. However, none of the sub-sections require that the owner of the cart must maintain it, only that the cart be maintained as directed by the code provision. Furthermore, the duties imposed by Labor Law 241(6) are nondelegable (*Lopez*, 123 AD3d at 983).

Defendants also argue that the plaintiff was the sole proximate cause of the accident. However, there is not evidence that plaintiff refused to use a safety device which was provided or was otherwise a "recalcitrant worker" (*Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 887 [2d Dept 2019]).

In addition, defendants argue that code section 23-1.28(a) is too general to support

liability (*see, e.g., Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413 [1st Dept 2014]). Even were I to assume, arguendo, the Second Department would follow this lead, defendants impermissibly make this argument for the first time on reply (*Emigrant Funding Corp. v Kensington Realty Group Corp.*, 178 AD3d 1020, 1023 [2d Dept 2019]).

In support of his own cross-motion, plaintiff first seeks to amend his bill of particulars to include allegations that defendants violated Labor Law § 241(6) based on Industrial Code 23-1.28. Generally speaking, leave to amend the bill of particulars is freely given absent prejudice or surprise to the opposing party, or unless the proposed amendment is devoid of merit (*Richer v JQ II Assoc., LLC*, 166 AD3d 692, 695 [2d Dept 2018]). Such latitude is more restricted in this action because it has been certified for trial (*Tabak v Shaw Indus., Inc.*, 149 AD3d 1132, 1133 [2d Dept 2017]). However, defendants do not oppose this portion of plaintiff's cross-motion and so the application to amend is granted.

Plaintiff argues that defendants violated Code section 1.28(a) and (b) because the cart's wheel malfunctioned. However, there is not sufficient evidence that the wheel malfunctioned or was not free-running. Plaintiff and Mr. Rakham testified that the wheel "locked" when they were turning the cart quickly. However, it does not appear that Ms. Hopkins inspected the cart's wheel after the accident, and Mr. Rakham admitted that he did not do so (Rakham EBT at 57).

Plaintiff's contention that defendants violated Section 23-1.28(c) is not supported by the evidence. The section does not require counter-balances to be used, only that loose weights will not be used and that weights must be secured. Defendants first make this argument in their reply. Accordingly, the court fill not consider the argument on defendants' summary judgment motion (*Emigrant Funding Corp. v Kensington Realty Group Corp.*, 178 AD3d 1020, 1023 [2d Dept 2019]).

Lastly, plaintiffs argue that the court should dismiss defendants' defenses of comparative fault and assumption of risk. Although defendants do not appear to oppose plaintiff's arguments, the court is not prepared to dismiss defendants' defense of comparative fault, considering that Mr. Rakham testified that he and plaintiff were pushing the cart perhaps too fast. Conversely, the court will dismiss defendants' assumption of risk defense. "Workers do not assume the risk of injury caused by a statutory violation" (*Lucas v KD Dev. Const. Corp.*, 300 AD2d 634, 635 [2d Dept 2002]). Accordingly, to the extent any of the defendants assert such a defense, the defense is stricken.

Conclusion

For the reasons stated above, the motions are decided as follows:

(a) Defendants' motion for summary judgment (Seq. 003) is granted to the extent that plaintiff's claims against them for negligence and violation of Labor Law § 200, and for violation of Labor Law § 241(6) based on Industrial Code § 23-1.7(e)(2) is granted. The remainder of the motion is denied.

(b) Plaintiff's cross-motion for partial summary judgment and to amend (Seq. 004) is granted only to the extent that plaintiff may serve an amended bill of particulars to include claims for violation of Industrial Code § 23-1.28, and that defendants' assumption of risk defense is stricken. The remainder of the motion is denied.

This constitutes the decision and order of the court.

April 1, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court