

Hui Zhang v 1815 Pac. LLC

2021 NY Slip Op 33872(U)

July 6, 2021

Supreme Court, Kings County

Docket Number: Index No. 507249/2018

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 507249/2018

Seq 002 & 003

Part 91

DECISION/ORDER

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

HUI ZHANG,

Plaintiff,

against

1815 PACIFIC LLC,

Defendant.

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2-5
Replying Affidavits.....	6
Exhibits.....	
Other	

1815 PACIFIC LLC ,

Third-Party Plaintiff,

against

TRIBOROUGH CONSTRUCTION SERVICES INC.,

Third-Party Defendant.

TRIBOROUGH CONSTRUCTION SERVICES INC.,

Second Third-Party Plaintiff,

against

CRJ BUILDER CORP.,

Second Third-Party Defendant.

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KINGS COUNTY CLERK
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Upon the foregoing papers,¹ plaintiff's motion for summary judgment against defendant 1815 Pacific LLC (Seq. 002) and defendant's cross-motion for summary judgment (Seq. 003) are decided as follows:

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

Factual Background

Plaintiff commenced this action against defendant for injuries he claims to have sustained as a result of an accident on January 30, 2018, which he contends was caused by defendant's negligence and its violations of New York Labor Law §§ 200, 240(1) and 241(6).

Plaintiff was an iron worker employed by third-party defendant Triborough Construction Services, Inc. ("Triborough"). Plaintiff testified that, on the day of the accident, at 10:00 a.m., he and his co-workers were manually transporting an iron plate measuring 20' x 3' and weighing 300 to 400 pounds, by carrying the plate on their shoulders (plaintiff's EBT at 44, 46-47). Plaintiff slipped on snow and ice, which caused the workers to lose control over the plate and caused the plate to fall approximately five feet and pin plaintiff's arm and hand to the ground (*id.* at 48-49). Plaintiff submits the affidavit of his co-worker, Shanian Zhang, who provides a similar account of the accident.

Plaintiff also submits the affidavit of Jesus Lopez, a certified OSHA Outreach Construction Safety Instructor and Construction Safety Specialist. Mr. Lopez states that, in general, manual hoisting is dangerous to workers because of the risk of being struck by the hoisted materials, and that this risk was present here (Lopez affidavit at ¶ 7). Mr. Lopez further states that hoisting equipment or a handling dolly should have been used to transport the plates (*id.* at ¶¶ 10-11). He opines that the failure to do so caused the accident (*id.* at ¶ 13). Likewise, Mr. Lopez opines that 1815 Pacific's failure to remove ice from the ground violated Industrial Code § 23-1.7(d) and with it, Labor Law § 241(6) (*id.* at ¶¶ 12-13).

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]).

As an initial matter, third-party defendant and second third-party plaintiff Triborough, the general contractor, and second third-party defendant CRJ Builder argue that the motion is premature because they have not had sufficient time to conduct discovery. While this court agrees that CRJ Builder was only brought into this action ten months ago (Triborough had already been in the action for several months before plaintiff moved), neither Triborough nor CRJ Builder explain what steps they have taken to secure depositions and any other discovery they might need to address the motion (*Haidhaqi v Metro. Transp. Auth.*, 153 AD3d 1328, 1329 [2d Dept 2017]).

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

Defendant moves for summary judgment to dismiss plaintiff's claims of negligence and violation of Labor Law § 200.² "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

² Triborough and CRJ Building also oppose plaintiff's motion. They make many of the same arguments as defendant, and so they do not require separate analysis.

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]). The accident here does not appear to be necessarily one or the other of these circumstances, and so both must be evaluated.

With regard to the first circumstance defendant argues that it is an out-of-possession landlord, and therefore not liable for any dangerous condition on the premises. Defendant submits the affidavit of Bhavin Maniar, who does not explain his relationship with defendant or how he has personal knowledge of any of the information in his affidavit. In any event, Mr. Maniar's statements about defendant's purported out-of-possession status, by themselves, are insufficient to prove that defendant had properly transferred its responsibility to keep the premises safe to another party.

Additionally, defendant argues that it is not liable for the ice because there was a storm in progress at the time of the accident (*Gorbatov v Gardens 75th St. Owners Corp.*, 283 AD2d 551, 552 [2d Dept 2001]). Pursuant to New York City Administrative Code § 16-123(a), owners and tenants of properties that abut sidewalks in New York City have four hours from the time precipitation ceases, excluding the period between 9:00 p.m. and 7:00 a.m., to clear ice and snow from the sidewalk (*Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660 [2d Dept 2014]).

Defendant provides certified weather records that show precipitation in Central Park, New York, on January 29 and 30, 2018. The records show that there was no rain or snow on January 29, but there was rain and snow that began on January 30, at 1:00 a.m., which lasted until 7:00 am. Plaintiff's testimony that there was snow the day before is not sufficient to rebut these records. Conversely, Shanian Zhang states in his affidavit that the ice was from the snow that occurred the "previous night". This testimony is in accordance with the weather records, which show that snow fell in the evening prior to the morning of the accident. In any event, although the accident did not occur until 10:00 a.m., defendant was still within the four-hour window allowed by New York City Administrative Code § 16-123(a).³ Accordingly, the storm-in-progress rule applies and defendant is not liable for the icy condition as an owner.

With regard to the second circumstance, there is no dispute that defendant did not supervise plaintiff (plaintiff's EBT at 30-32, 40). In the absence of such supervision, plaintiff's claims for negligence and violation of Labor Law § 200 are dismissed as against defendant (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018] [awarding summary judgment where the plaintiff testified the general contractor gave the plaintiff "no instructions where to work, what equipment to use, or the manner in which [to do the work]").

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 and from gravity-related work injuries (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374

³ Even if plaintiff is correct, and the snow ended at 6:30 the morning of the accident, the accident still occurred within the four-hour window.

[2011]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). 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*, 81 NY2d at 501).

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]).

As plaintiff testified, he was not provided with a safety device to transport the plate, but rather was required to carry the plate by hand. He further testified that the plate fell on him from a height. Additionally, plaintiff’s expert opined that the plate fell because plaintiff and his co-workers were not provided with a safety device suitable for transporting the plate. Because plaintiff has shown that this was an elevation risk and that the plate required securing for the purposes of transporting it, plaintiff has established a prima facie case for violation of Labor Law § 240(1).

In opposition, defendant argues that Labor Law § 240(1) does not apply because the

height from which the plate fell was de minimis. Plaintiff testified that the plate fell five feet, and defendant offers no contrary evidence. This height differential, combined with the weight of the plate, created a dangerous force (*see eg McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-29 [2d Dept 2012] [“Although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis.”]).

Defendant also argues that Labor Law § 240(1) does not apply because the accident was caused by plaintiff slipping on ice, and not by gravity. Defendant references *Jackson v Hunter Roberts Constr. Group, LLC* (161 AD3d 666 [1st Dept 2018]) and *Carrera v Westchester Triangle Hous. Dev. Fund Corp.* (116 AD3d 585 [1st Dept 2014]), both involving a plaintiff who lost control of a pipe while transporting it. In *Jackson*, the plaintiff lost his balance on an unstable ramp and, in *Carrera*, the plaintiff slipped on mud (*Jackson*, 161 AD3d at 667; *Carrera*, 116 AD3d at 585). The First Department held in both cases that the cause of the accident was not the force of gravity, but rather plaintiff’s loss of balance (*Jackson*, 161 AD3d at 667; *Carrera*, 116 AD3d at 585).

However, this does not appear to be a universally applicable rule to all cases involving a loss of balance. Plaintiff references *Aramburu v Midtown W. B, LLC* (126 AD3d 498 [1st Dept 2015]), in which plaintiff was guiding a heavy reel of wire to fall down a ramp and lost control over the reel when he slipped on ice. The court held that the failure to provide a safety device as required by Labor Law § 240(1) violated the statute (*Aramburu*, 126 AD3d at 499).

Neither party submits applicable governing authority from the Second Department on this issue. To the extent that this court is guided by the First Department, these cases show that the

determination of the proximate cause of the accident is fact-specific. Here, the plaintiff and his co-workers were carrying the plate on their shoulders. The plate fell when plaintiff slipped on ice. This case is similar to *Aramburu* where the reel fell on plaintiff and plaintiff slipped. This case is less like *Jackson* and *Carrera*, where the appears the pipe was jostled, rather than falling from a significant elevation. Furthermore, Mr. Lopez, plaintiff's expert, opines that defendant's failure to provide a safety device to transport the plate caused the accident (Lopez affidavit at ¶ 13). Accordingly, defendant has failed to rebut plaintiff's prima facie showing.

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

Plaintiff also seeks summary judgment on his 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 Env'tl. 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]).

Plaintiff asserts that defendant violated Industrial Code § 1.7(d), which states, in relevant part, that one cannot "use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition", and which requires the removal of any "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing." There is no dispute that the floor on which plaintiff slipped was slippery due to ice. Defendant argues that plaintiff has not established that he slipped on a floor. In fact, plaintiff testified that he slipped on a floor made from the plates he was transporting (plaintiff's EBT at 81). Accordingly,

plaintiff established that 1815 Pacific violated Industrial Code § 1.7(d), which supports a violation of Labor Law § 241(6).

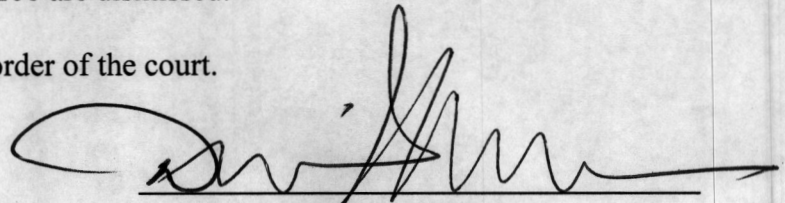
Defendant also seeks dismissal of this claim based on Industrial Code §§ 1.7(a), 1.7(b), 1.7(c), 1.7(e), 1.7(f), 1.7(g), 1.7(h), 8.1(a-f, k and l), 8.2(a-i), and 23-8.5, 23-9.8(a-l), and certain OSHA regulations. These arguments are moot because this court has already granted summary judgment based on Industrial Code § 1.7(d).

Conclusion

For the reasons stated above, plaintiff's motion for summary judgment against defendant (Seq. 002) is granted to the extent that plaintiff is awarded judgment on his claims for violation of Labor Law §§ 240(1) and 241(6) based on Industrial Code § 1.7(d), and defendant's cross-motion for summary judgment (Seq. 003) is granted to the extent that plaintiff's claims for negligence and violation of Labor Law § 200 are dismissed.

This constitutes the decision and order of the court.

July 6, 2021
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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