Toro v Tishman Constr. Corp.
2021 NY Slip Op 33898(U)
February 22, 2021
Supreme Court, Bronx County
Docket Number: Index No. 27646/2017E
Judge: Lucindo Suarez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 2, 3[1]

JOSEPH TORO,

Plaintiff,

- against -

TISHMAN CONSTRUCTION CORPORATION, L&L HOLDING COMPANY, LLC, T-C 425 PARK AVENUE LLC, 425 PARK OWNER LLC, 425 PARK AVENUE GROUND LESSEE, L.P. and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

Index No.: 27646/2017E

DECISION and ORDER

JOSEPH TORO,

Plaintiff,

- against -

TISHMAN CONSTRUCTION CORPORATION, L&L HOLDING COMPANY, LLC, T-C 425 PARK AVENUE LLC, 425 PARK OWNER LLC, 425 PARK AVENUE GROUND LESSEE, L.P. and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

Index No.: 27247/2017E

	PAPERS NUMBERED
Plaintiff's Notice of Motion, Affirmation in Support, Exhibits	1, 2, 3
Defendants' Notice of Cross-Motion, Affirmation in Support/Opposition, Exhibits	4, 5, 6
Plaintiff's Reply/Opposition Affirmation, Exhibits	7, 8
Defendants' Reply Affirmation in Support of Cross-Motion	9

Upon the enumerated papers, Plaintiff's summary judgment motion seeking judgment as to liability with respect to his Labor Law §§240(1) and 241(6) claims is granted in part, and Defendants' cross-motion for summary judgment motion seeking to dismiss Plaintiff's complaint is granted in part, in accordance with the annexed decision and order.

Dated: **2/22/2021**

Hon. ______________________
LUCINDO SUAREZ, J.S.C.

[1] This action was joined for discovery purposes pursuant to CPLR §602(a) in an order issued by this court dated April 30, 2018, and each action retained its separate and independent caption and Index Number. Therefore, under Index No.: 27646/2017E, Plaintiff's summary judgment motion is marked as Motion Sequence # 2 and under Index No.: 27247/2017E the same motion is marked as Motion Sequence # 3.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 2, 3

JOSEPH TORO,

Plaintiff,

- against -

TISHMAN CONSTRUCTION CORPORATION, L&L HOLDING COMPANY, LLC, T-C 425 PARK AVENUE LLC, 425 PARK OWNER LLC, 425 PARK AVENUE GROUND LESSEE, L.P. and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

Index No.: 27646/2017E

DECISION and ORDER

JOSEPH TORO,

Plaintiff,

- against -

TISHMAN CONSTRUCTION CORPORATION, L&L HOLDING COMPANY, LLC, T-C 425 PARK AVENUE LLC, 425 PARK OWNER LLC, 425 PARK AVENUE GROUND LESSEE, L.P. and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

Index No.: 27247/2017E

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion is whether he is entitled to judgment on his Labor Law §§240(1) and 241(6) claims. This court finds that Plaintiff demonstrated his *prima facie* burden as to his Labor Law §240(1) claims regarding both his May and June 2017 accidents and Defendants failed to raise any triable issues of fact concerning same. This court further finds that Plaintiff established his *prima facie* burden as to his Labor Law §241(6) claims regarding his claims premised upon 12 NYCRR §§23-5.1(j)(2) and 23-1.7(d) and Defendants failed to raise any triable issues of fact concerning same. However, with respect to Plaintiff's Labor

Law §241(6) claims premised upon 12 NYCRR §23-2.1(a)(2) this court finds there are triable issues of fact that cannot be resolved on the instant motion for summary judgment. Lastly, this court finds that Defendants demonstrated their *prima facie* burden concerning the dismissal of Plaintiff's Labor Law §200 claims and Plaintiff failed to raise any issues of fact regarding same.

This action revolves around two separate accidents that occurred almost one month from one another and both accidents transpired at the same worksite and involve the identical parties. According to Plaintiff, in May 2017, he was employed by Rogers & Sons Concrete as a concrete stripper. Plaintiff testified that on the day of his accident, he was assigned to work with a partner to strip concrete forms off of columns. Plaintiff testified that he was instructed to work below a baker's scaffold and his coworker was assigned to work from the baker's scaffold's platform in order to dismantle a concrete column. Plaintiff alleges that the baker's scaffold's platform was approximately six feet from the ground below. Plaintiff claims he was injured while he was on the ground directly below the baker's scaffold removing nails and hardware from a concrete column, when he was struck from above by a stripping bar weighing approximately twenty pounds that fell from atop the baker's scaffold's platform rendering him injured.

Furthermore, approximately a month later in June 2017, Plaintiff was working at the same worksite where his previous injury occurred. According to Plaintiff, he was injured again while walking across a rebar cage when he slipped and fell four feet down through a hole in the rebar cage to a wooden deck below.

I. Labor Law §240(1)

Plaintiff seeks judgment on her Labor Law §240(1) claim. Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo 124 LLC,* 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must demonstrate that his injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

A. May 2017 Accident

As to the first May 2017 accident, Plaintiff argues he established his *prima facie* burden of a "falling object" case. Plaintiff relies upon the various accident reports generated by several parties, which some indicate that a tether should have been provided to prevent the stripping bar from falling. In addition, Plaintiff relies upon his expert witness a construction safety expert, Mr. Walter Konon, who opined: (1) The stripping bar should have been tethered; and (2) that the baker's scaffold should have been equipped with a mesh fencing around it sides to prevent objects from falling from its platform. Furthermore, Plaintiff argues that the stripping bar falling six feet cannot be viewed as *de minimis* considering the amount of force it could generate even of the course of a short distance.

In opposition, Defendants contend that they are not liable under Labor Law §240(1) because Plaintiff did not suffer a gravity-related injury due to the *de minimis* height the stripping bar fell from. Moreover, Defendants argue that Plaintiff did not establish a Labor Law §240(1) violation as he did not possess actual knowledge as to how the stripping bar fell. Therefore, Defendants contend that there are triable issues of fact as to the proximate cause of Plaintiff's injuries. Defendants posit that Plaintiff could not conclusively establish that by tethering the stripping bar it would have prevented his injuries nor did he testify that the subject baker's scaffold did not have the required wire mesh. Lastly, Defendants argue that they did not violate Labor Law §240(1) because the stripping bar was not being hoisted or secured at the time of Plaintiff's accident.

This court finds that Plaintiff established his *prima facie* burden of a Labor Law §240(1) violation. It was undisputed that Plaintiff's injury derived from the stripping bar striking him from above. Likewise, Plaintiff's affidavit that there was no netting to prevent objects from falling from the baker's scaffold's platform went factually unrefuted, and contrary to Defendants' contention, Plaintiff is not required to show exactly how the stripping bar fell, since he demonstrated that the lack of protective devices proximately cause of his injuries. *See Mercado v. Caithness Long Is. LLC,* 104 A.D.3d 576, 961 N.Y.S.2d 424 (1st Dep't 2013).

Furthermore, this court is unpersuaded by Defendants' argument that Plaintiff's injuries were not protected under Labor Law §240(1) as the elevation differential involved here (i.e., six feet) cannot be viewed as

de minimis, particularly when the stripping bar weighed approximately twenty pounds and the amount of force it was capable of generating, even over the course of a relatively short descent was significant. Therefore, Plaintiff showed that his injuries resulted directly from the application of the force of gravity, thereby, establishing that his accident fell within the protective purview of Labor Law §240(1). *See Runner v. NY Stock Exch., Inc.,* 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009). Furthermore, this court finds that the stripping bar was a "falling object" within the meaning of the Labor Law, even though it was not actually being hoisted or secured at the time of the accident, because it required securing for the purpose of Plaintiff's injury-producing work. *See Matthews v. 400 Fifth Realty LLC,* 111 A.D.3d 405, 974 N.Y.S.2d 370 (1st Dep't 2013); *see also Outar v. City of NY*, 5 N.Y.3d 731, 832 N.E.2d 1186, 799 N.Y.S.2d 770 (2005). Thus, Defendants failed to raise any triable issues of fact to preclude Plaintiff's entitlement to judgment as to his Labor Law §240(1) claim regarding his May 2017 accident.

B. June 2017 Accident

As to the June 2017 accident, Plaintiff argues that he established his *prima facie* burden that Defendants violated Labor Law §240(1) by allowing Plaintiff to fall four feet through a hole in a rebar cage. Plaintiff contends that a four-foot fall is a sufficient gravity-related risk to trigger the protections of Labor Law §240(1). In addition, Plaintiff claims that he was not provided any safety devices like wooden planks or plywood to safety cross the rebar cage. Moreover, Plaintiff argues that the rebar cage he was traversing at the time of his injury was the functional equivalent of a safety device. Plaintiff also claims that the Defendants' assertion that there is contradicting testimony as to the manner Plaintiff's injury occurred is based on hearsay evidence that does not raise triable issues of fact. Lastly, Plaintiff argues that the fact that this accident was unwitnessed poses no bar to summary judgment in Plaintiff's favor.

Defendants in opposition contend that there are still material issues of fact as to whether Plaintiff actually fell through the hole in the rebar cage. Defendants argue that Plaintiff's injury did not result from a fall through a hole in the rebar cage but rather his injuries derived from his attempts to prevent himself from falling through the hole in rebar cage. In addition, Defendants posit that Plaintiff cannot sustain his burden that his injuries were proximately caused by the failure or lack of safety devices. They also contest that Plaintiff's injury derived from

an elevated-related risk, therefore, they argue that Plaintiff's injury fall outside of the protective purview of Labor Law §240(1). Defendants lastly contend that since Plaintiff's accident was unwitnessed it creates triable issues of fact that should not be resolved on a summary judgment motion.

This court finds that Plaintiff demonstrated his *prima facie* burden of a Labor Law §240(1) violation under the "falling worker" theory of liability. Even if true that Plaintiff did not fall through a hole in the rebar cage and he in fact was injured due to his attempts not to fall therefrom, such an injury will nonetheless be protected under Labor Law §240(1) since it resulted from the direct application of gravity. *See Reavely v. Yonkers Raceway Programs, Inc.,* 88 A.D.3d 561, 931 N.Y.S.2d 579 (1st Dep't 2011); *see also Suwareh v. State of NY*, 24 A.D.3d 380, 806 N.Y.S.2d 524 (1st Dep't 2005).

This court further finds that Plaintiff made a *prima facie* showing that his fall was proximately caused by Defendants' failure to provide him with adequate protection or any safety devices from an elevated-related risk and Defendants failed created any triable material issues of fact concerning same. *See Augustyn v. City of NY*, 95 A.D.3d 683, 944 N.Y.S.2d 146 (1st Dep't 2012); *see also Vergara v. SS 133 W. 21, LLC*, 21 A.D.3d 279, 800 N.Y.S.2d 134 (1st Dep't 2005). Lastly, this court finds that Plaintiff's unwitnessed accident does not preclude summary judgment. *Casabianca v. Port Auth.,* 237 A.D.2d 112, 655 N.Y.S.2d 2 (1st Dep't 1997). Therefore, this court finds that Plaintiff is entitled to judgment as to his Labor Law §240(1) claim regarding his June 2017 accident.

II. <u>Labor Law §241(6)</u>

Defendants seek to dismiss Plaintiff's Labor Law §241(6) claim. 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 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law

§241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

A. May 2017 Accident

Plaintiff alleges that regarding his May 2017 accident, Defendants violated 12 NYCRR §§23-2.1(a)(2) and 23-5.1(j)(2). 12 NYCRR §23-2.1(a)(2) in relevant provides: "… Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." In addition, 12 NYCRR §23-5.1(j)(2) in relevant provides: "All scaffolds under which any person is likely to work or pass shall be provided with a wire mesh screen … with openings that will reject a one-inch diameter ball. Such wire mesh screen shall be installed between the toe board and the top guard rail on both ends and on the outboard side of the scaffold platform."

Plaintiff contends that Defendants violation of 12 NYCRR §23-2.1(a)(2) occurred because the stripping bar that fell was not actually being used by his co-worker, Divine Shabazz, but it fell from the position it was stored upon the baker's scaffold's platform. Therefore, Plaintiff argues that by the mere fact that the stripping bar fell and struck him demonstrates that he was endangered by the way the stripping bar was stored. Likewise, with respect to Defendants' purported violation of 12 NYCRR §23-5.1(j)(2) Plaintiff contends that it was uncontroverted that the subject baker's scaffold was not equipped with the required meshing. In addition, Plaintiff relies upon his expert witness, Mr. Konon, to establish that his resulting injures were proximately caused by Defendants' failure to comply with this Industrial Code.

In opposition, Defendants maintain that Plaintiff has no basis to allege that the stripping bar was stored in manner that violated 12 NYCRR §23-2.1(a)(2), because Plaintiff testified that he did not know whether his partner dropped the stripping bar or if it fell from the baker's scaffold's platform. Furthermore, Defendants contend that they did not violate 12 NYCRR §23-5.1(j)(2) because Plaintiff did not testify that the baker's scaffold lacked the required mesh and they further contend that even if the subject baker's scaffold lack the required mesh, Plaintiff could not establish a violation of this Industrial Code because he has no knowledge of how exactly the stripping bar fell.

This court finds that there are triable issues of fact as to Defendants' violation of 12 NYCRR §§23-2.1(a)(2). Plaintiff's testimony and affidavit concerning the placement and/or storage of the stripping bar was based on speculation. The fact that the stripping bar fell from the baker's scaffold's platform alone without more facts as to the exact positioning and/or storage of the stripping bar is insufficient to charge Defendants with violating this Industrial Code. *See Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dep't 2007).

As to 12 NYCRR §23-5.1(j)(2) this court finds that Plaintiff established his *prima facie* burden that Defendants violated this Industrial Code as his affidavit that the subject baker's scaffold lacked the required mesh went uncontroverted by Defendants. Further, this court finds that Defendants' violation of this Industrial Code proximately caused Plaintiff's injuries and Defendants failed to raise any triable issues of fact as to same.

B. June 2017 Accident

Plaintiff alleges that as to his June 2017 accident, Defendants violated 12 NYCRR §23-1.7(d), which provides in pertinent part: "Employers shall not … permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Plaintiff argues that he established his *prima facie* burden of a violation of this Industrial Code as he demonstrated that the rebar cage, he slipped and fell from at the time of his accident was slippery and wet due to a mix of oil and rainwater. Further, Plaintiff argues the subject rebar cage was the functional equivalent of a floor, walkway, platform or other elevated working surface. Moreover, Plaintiff contends that the oil mixed with rainwater constitutes "water" or "grease" as defined by this Industrial Code. Plaintiff further posits that the oil and rainwater mix was also a "foreign substance" as defined by the instant Industrial Code because it is not integral to his injury-producing work. In opposition, Defendants contend that they did not violate said Industrial Code as they argue Plaintiff did not establish by documentary evidence that corroborates his claims that the rebar cage was slippery due to a mix of oil and rainwater.

This court finds that Plaintiff demonstrated his *prima facie* burden that Defendants violated this Industrial Code, which proximately caused his accident. Plaintiff's testimony and affidavit as to slippery condition of the rebar cage at the time of his injury went unrefuted and it similarly established that the rebar cage's slippery condition caused him to slip and fall therefrom. Defendants in opposition failed to raise any triable issues of fact to preclude Plaintiff's entitlement to judgment as to this Industrial Code.[2]

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion is granted in part; and it is further

ORDERED, that Defendants' summary judgment motion is granted in part; and it is further

ORDERED, that Plaintiff's application for judgment as to his Labor Law §240(1) claim is granted regarding both his May and June 2017 accidents; and it is further

ORDERED, that Plaintiff's application for judgment as to his Labor Law §241(6) claims premised upon 12 NYCRR §23-2.1(a)(2) is denied; and it is further

ORDERED, that Plaintiff's application for judgment as to his Labor Law §241(6) claims premised upon 12 NYCRR §§23-5.1(j)(2) and 23-1.7(d) is granted; and it is further

ORDERED, that Defendants' application to dismiss Plaintiff's Labor Law §200 claim is granted; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: February 22, 2021

Lucindo Suarez

Digitally signed by Lucindo Suarez
DN: C=US, CN=Lucindo Suarez, E=jflores2@nycourts.gov
Reason: I am approving this document with my legally binding signature
Location: your signing location here
Date: 2021.03.29 12:26:11-04'00'
Foxit PhantomPDF Version: 10.1.0

Lucindo Suarez, J.S.C.

[2] Lastly, this court finds that Defendants' demonstrated their *prima facie* burden for a dismissal of Plaintiff's Labor Law §200 claim as Plaintiff failed to raise any triable issues of fact that Defendants created the dangerous condition that led to Plaintiff's injuries or that Defendants had actual or constructive notice of same. Moreover, Plaintiff failed to raise any triable issues of fact that Defendants controlled or supervised his injury-producing work. *See Matter of 91st St. Crane Collapse Litig.,* 133 A.D.3d 478, 20 N.Y.S.3d 24 (1st Dep't 2015).