

Muco v Board of Educ. of the City of N.Y.

2021 NY Slip Op 33998(U)

April 30, 2021

Supreme Court, Bronx County

Docket Number: Index No. 20375/2019E

Judge: Lucindo Suarez

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

Index No. 20375/2019E

LADI MUCO,

Plaintiff,

- against -

DECISION and ORDER

BOARD OF EDUCATION OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, THE CITY OF NEW YORK and J & N CONSTRUCTION GROUP CORP.

Defendants.

Lucindo Suarez, J.

In Motion Sequence No. 2, Plaintiff moves pursuant to CPLR §3212 for partial summary judgment on liability as to his cause of action under Labor Law §240(1).

In Motion Sequence No. 3, Defendants move pursuant to CPLR §3212 for summary judgment dismissing Plaintiff’s complaint.

Plaintiff Ladi Muco alleges causes of action based on Labor Law §§240(1), 241(6), and 200 for an accident that occurred on December 21, 2017, at P.S. 3 Raul Julia Micros Society School, located in Bronx County (“construction site”). Plaintiff, a roofer, was descending an exterior scaffolding stairway when he fell to the landing below. Plaintiff asserts that his fall was due to the scaffold’s sudden movement and missing safety rails.

I. Labor Law §240(1)

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).

Plaintiff's sworn testimony and the sworn statement of Plaintiff's co-worker Feim Kolari, allege that the scaffold was used as the sole means of access to the worksite, which was the roof of the construction site. Further, they assert that the scaffold itself was wobbly or shaky, and further, that sections of the scaffold were missing handrails. Plaintiff alleges that these violations establish his *prima facie* burden that Defendants violated Labor Law §240(1) because Plaintiff, a roofer, was descending an exterior pipe scaffolding stairway without safety railings, and the scaffold shifted, causing him to fall down an entire level and suffer permanent injuries. Plaintiff argues that Defendants' violation of Labor Law §240(1) is two-fold because Plaintiff was injured when the scaffolding shifted and caused him to fall, and there were no safety railings or guardrails to prevent his fall.

Defendants submit the affidavit of Kumar Bhupinder, a Project Superintendent for J&N Construction Group Corp. Bhupinder affirms that on December 21, 2017, he was contacted via telephone regarding an incident at the base of the stair-tower. He arrived at the scene, and observed Plaintiff being attended to by EMS. He also observed that there were no visible defects on the scaffold or the ground, that it was secured and fastened, that handrails were in place, and the scaffold was clean and clear of debris. A similar affidavit is submitted by Florim Gagica, an employee of Dimitri Enterprises, Inc., who was also present on the day of the accident, and observed the scaffold to be stable, with handrails in place. Further evidence, including expert inspection reports, indicate that there were no defects in the scaffold.

This court finds that a Plaintiff under a Labor Law §240(1) claim need not demonstrate that the scaffold was defective or that it failed to comply with any applicable safety regulations. *Id.* Rather, the determining legal question for this court to resolve is whether the subject scaffold proved inadequate to shield Plaintiff from harm directly flowing from the application of the force of gravity to an object or person.

Therefore, this court finds that Plaintiff established his *prima facie* burden of a Labor Law §240(1) violation in that the subject scaffold provided by Defendants was inadequate to protect him from a gravity related injury, which was the proximate cause of his accident. *Williams v. 520 Madison Partnership*, 38 A.D.3d 464, 834 N.Y.S.2d 32 (1st Dep't 2007). Defendants' arguments and affidavits regarding their observations of the subject scaffold prior or post Plaintiff's accident are of no avail and fail to raise triable issues of fact regarding their violation of Labor Law §240(1).

II. Labor Law §241(6)

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).

Plaintiff alleges that Defendants violated 12 NYCRR §§23-1.15, 1.30, 5.1(b)(c)(2)(f)(j),

5.3(e)(g)(h), 5.4(a)-(e), 5.5(a)-(h).¹

A. Railings Industrial Codes

Plaintiff claims that Defendants violated 12 NYCRR §§23-1.15, 23-5.1(j), and 23-5.3(e), which sets standards for safety railings and makes the installation of railings a requirement for all scaffold platforms and metal scaffolds. See *Macedo v. J.D. Posillico, Inc.*, 68 A.D.3d 508, 891 N.Y.S.2d 46 (1st Dep't 2009).

Defendants argue that the subject scaffold had the required railings two days prior to Plaintiff's accident. In addition, they rely upon the photographs taken two hours after Plaintiff's accident, which displayed that the subject scaffold had the required railings. In addition, Defendants rely upon the affidavits of Kumar Bhupinder and Florim Gagica who averred that on the day of Plaintiff's accident they observed the subject scaffold with the required railings. Thus, they contend that there was no violation of said Industrial Codes.

In opposition, Plaintiff argues that this Industrial Code was violated based on his testimony and the sworn statement of his coworker Mr. Kolari that the subject scaffold was missing the required railings in the area of the scaffold where Plaintiff fell from.

This court finds that there are triable issues of fact whether the subject scaffold possessed the required railings as there is conflicting evidence regarding Defendants' compliance with the instant Industrial Codes.

B. Scaffolding Industrial Codes

Plaintiff alleges that Defendant violated 12 NYCRR §§23-5.1(b)(c)(2)(f), 5.4(a)-(e), and 5.5(a)-(h), which concern various regulations as to a scaffold's footing or anchorage, a scaffold's structure, a scaffold's maintenance and repair, the footings for metal scaffolds, the tie-ins for a metal

¹ Plaintiff abandoned all other predicates, and the claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); see also *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

scaffolds, and regulations concerning tubular welded frame scaffolds and a coupler metal scaffolds.

Defendants argue that based on the inspection of subject scaffold two days prior to Plaintiff's accident and the photographs taken approximately two hours after his accident there is no evidence to suggest that the subject scaffold did not have the proper footing or anchorage as required by 12 NYCRR §23-5.1(b). In addition, Defendants relies upon the same evidence to argue that 12 NYCRR §23-5.1(c)(2) was not violated as the inspection and the photographs taken show that the subject scaffold possessed the adequate horizontal and diagonal bracing to prevent any lateral movement. Moreover, Defendants claim that there is no evidence to suggest that the subject scaffold was not maintained in good repair as required by 12 NYCRR §23-5.1(f).

Regarding 12 NYCRR §23-5.4(a)-(e), Defendants contend that there is no evidence that the subject scaffold was not constructed in accordance with said Industrial Code. Lastly, as to 12 NYCRR §23-5.5(a)-(h) Defendant argues that said Industrial code does not apply since there is no evidence that Plaintiff's accident occurred on a tube or coupler metal scaffold.

In opposition, Plaintiff contends that regarding the above Industrial Codes that Defendants do not submit any evidence that demonstrates that the scaffold had been completed at the time it was inspected. Moreover, Plaintiff claims that the above Industrial Codes were violated because his fall was caused by the scaffold shifting.

This court finds that Defendants established their *prima facie* burden for a dismissal of Plaintiff's Labor Law §241(6) claim premised upon 12 NYCRR §§23-5.1(b)(c)(2)(f), 5.4(a)-(e), and 5.5(a)-(h). Defendants demonstrated that either they did not violate said Industrial Codes or that the Industrial Codes were not applicable to the facts at bar and Plaintiff failed to raise any triable issues of fact to preclude a dismissal of these Industrial Codes.

C. Illumination Industrial Code

Plaintiff claims that Defendants violated 12 NYCRR §23-1.30, which in pertinent part provides:

“Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction ... but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.”

Defendants argue that because the subject scaffold was equipped with artificial light sources that it complied with the instant Industrial Code. Further, Defendants contend that the proximate cause of Plaintiff’s accident was not due to insufficient light. In opposition, Plaintiff argues that he testified that the work area where his accident occurred was poorly lit. In addition, Plaintiff relies Defendant J&N Construction Group, Corp.’s (“J&N”) Daily Reports, which he claims confirms that the subject scaffold had failed a prior inspection due to inadequate lighting and that J&N was installing lights on the subject scaffold on the day Plaintiff fell.

This court finds the record presents triable issues of fact as to whether there was adequate lighting at the subject work area in accordance with Industrial Code 12 NYCRR §23-1.30 and whether insufficient lighting proximately caused Plaintiff’s accident. *See Boggs v. City of NY*, 135 A.D.3d 583, 22 N.Y.S.3d 858 (1st Dep’t 2016).

III. Labor Law §200

Defendants seek the dismissal of Plaintiff’s Labor Law §200 claim. Labor Law §200 codifies an owner’s and/or general contractor’s common-law duty of care to provide construction site workers with a safe place to work. *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 950 N.Y.S.2d 35 (1st Dep’t 2012). Claims for personal injury under Labor Law §200 and common law fall into two broad categories: (1) those arising from an alleged defect or dangerous condition existing on the premises; and (2) those arising from the manner in which the work was performed. *Id.*

Where an existing defect or dangerous condition caused the injury, liability attaches if the owner

or general contractor created the condition or had actual or constructive notice of it. *Id.* Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work. *Id.*

Defendants argue that they are entitled to a dismissal of Plaintiff's Labor Law §200 claim because they did not supervise the means or methods of Plaintiff's injury-producing work. Defendants rely upon Plaintiff's testimony that he only received instruction for his work from his employer, non-party Dimitri Enterprises Inc. ("DEI"), and that he further testified that he never received instruction for his work from Defendants. Further, Defendants rely upon Plaintiff's testimony to establish that Plaintiff had no knowledge of Defendants or Defendants' role at the construction site. Moreover, Defendants rely upon the contract entered into between J&N and DEI to demonstrate that contractually DEI was solely responsible for the methods of its work as well as providing all necessary labor, materials, and equipment.

Defendants further contends that it had no notice of the alleged condition that led to Plaintiff's accident. Defendants argue that there is no evidence to indicate that there were any defects or any issues relating to the subject scaffold prior to or on the day of Plaintiff's accident. Defendants rely upon their expert affidavit and the affidavit of nonparty Professional Engineer who inspected the subject scaffold approximately 72 hours prior to Plaintiff's accident to establish that there were no observable conditions to suggest that the scaffold was defective.

Moreover, Defendants rely upon the affidavits of Defendants J&N, Board of Education of the City of New York, and New York City Department of Education to demonstrate that they did not have any notice that the subject scaffold was unsecured or that there was any dangerous conditions with respect to the scaffold.

In opposition, Plaintiff relies upon Defendants' records and inspection of the subject scaffold to

demonstrate that Defendants were on notice that the subject scaffold required additional support and lighting.

This court finds that Defendants established their *prima facie* burden for a dismissal of Plaintiff's Labor Law §200 claim and that Plaintiff failed to raise any triable issues of fact. It went undisputed that Defendants did not supervise or control the means or methods of Plaintiff's injury-producing work. Likewise, it went undisputed that Defendants did not create the conditions that led to Plaintiff's accident. In addition, this court finds that Defendants demonstrated through multiple affidavits and evidence they presented that they did not have actual or constructive notice of any dangerous condition of the subject scaffold prior to Plaintiff's accident to subject them to liability under Labor Law §200.

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion seeking partial liability as to his Labor Law §240(1) claim is granted; and it is further

ORDERED, that Defendants' summary judgment seeking the dismissal of Plaintiff's complaint is granted in part; and it is further

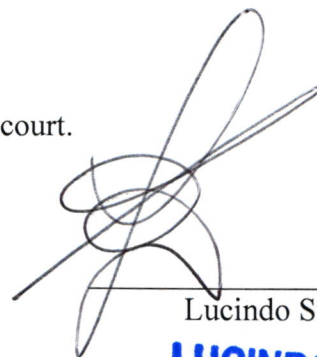
ORDERED, that Defendants' application to dismiss Plaintiff's Labor Law 241(6) claim premised upon 12 NYCRR §§23-5.1(b)(c)(2)(f), 5.4(a)-(e), and 5.5(a)-(h) is granted; and it is further

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

ORDERED, that Defendants' application to dismiss Plaintiff's Labor Law §240(1) claim is denied.

This constitutes the decision and order of the court.

Dated: April 30, 2021



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.