

Tomal v 225 Broadway Co.

2022 NY Slip Op 30019(U)

January 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 519088/2018

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of January, 2022.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

-----X
SHAMSUDDIN TOMAL,

Plaintiff,

-against-

Index No. 519088/2018

225 BROADWAY COMPANY, BRAUN
MANAGEMENT, INC. and GLOBAL DECORATING
CORP.,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____ 36-48, 51-63, 66-75

Opposing Affidavits (Affirmations) _____ 78-81, 83-86, 88-92, 94-96

Affidavits/ Affirmations in Reply _____ 105-106, 107-108, 109, 111

Other Papers: _____

Upon the foregoing papers, plaintiff Shamsuddin Tomal (plaintiff) moves, in motion sequence number 001, for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability on his claims arising under Labor Law §§ 240 (1) and 241 (6) against the defendants 225 Broadway Company (225 Broadway), Braun Management, Inc., (Braun) and Global Decorating Corp. (Global). Defendants 225 Broadway and Braun move, in motion sequence 002, for an order, pursuant to CPLR 3212,

granting summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims and the doctrine of res ipsa loquitur as asserted against 225 Broadway and Braun. Defendant Global moves, in motion sequence 003, for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as asserted against Global.

Background and Procedural History

225 Broadway is the owner of premises located at 225 Broadway in Manhattan. Braun was the building manager for the premises and hired Global to perform painting in relation to renovation work being performed on the 11th floor of the premises. It appears that Global hired non-party Pro Painting to perform work at the project. Plaintiff was employed by Pro Painting, and his job duties included performing painting, compounding and sheetrock work. On January 25, 2018, plaintiff was performing ceiling repair work while working on a 3' to 3-1/2' high scaffold which had four legs with wheels that locked. To perform this work, he was using compound, plaster, a hammer, a machine with a blade in front to cut the rods in the ceiling, netted wire, and a corner bead. Specifically, plaintiff used the hammer to break out the concrete ceiling beams and then attached wire netting to the beam with the hammer and nails. He then applied compound to the netting and attached sheetrock to the compound to make the underside of the beam the same level across the ceiling.

Plaintiff testified that the ceiling beams were approximately 10 feet from the floor and came down about 12 to 14 inches from the ceiling. At six feet tall, as he stood on top of the scaffold, plaintiff's head was just below the bottom portion of the ceiling beams.

Plaintiff was standing near the left side of the scaffold and was hitting the concrete ceiling beam with a hammer in his right hand when pieces of concrete from the beam fell and landed in his left eye. He then fell backwards landing on his left side on the scaffold. Plaintiff testified that as he fell, his neck hit the top of a bucket that was on the scaffold platform. He further testified that he was not provided with any protective headgear, hats, or goggles to perform his work. Plaintiff sustained various injuries to his left eye, left shoulder and back.

Plaintiff commenced the instant action with the filing of a summons and complaint on September 21, 2018, against 225 Broadway and Braun. On November 7, 2018, he filed an amended summons and complaint which added Global as a defendant. 225 Broadway and Braun served an answer on December 10, 2018, and Global served its answer on February 4, 2019. Plaintiff served his Bill of Particulars on or about May 30, 2019, and depositions were conducted and discovery was exchanged. Plaintiff filed his note of issue on January 26, 2021, and the following timely motions ensued.

Plaintiff's Motion

Plaintiff moves for partial summary judgment on the issue of liability on his claims arising under Labor Law §§ 240 (1) and 241 (6) against 225 Broadway, Braun and Global.

Labor Law § 240 (1)

Plaintiff argues that he is entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim as he was engaged in an enumerated activity protected under Labor Law § 240 (1). In this regard, he notes that he was required to work on a scaffold and was not provided with any safety devices such as a safety harness, safety belt, tail line,

lanyard or cable line or other safety device as required pursuant to the statute. Plaintiff contends that as a result of the effects of gravity, he was caused to fall backwards, land on the scaffold and strike his back and neck causing him to sustain various injuries. He maintains that if he had been provided with any of the listed safety devices, he would not have fallen backwards onto the scaffold.

In opposition to plaintiff's motion, and in support of their respective motions seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, 225 Broadway, Braun and Global (collectively, defendants) argue that plaintiff's motion should be denied as he did not fall from the scaffold at the time of the incident and that no violation of this statute proximately caused his accident. Specifically, defendants point to plaintiff's own testimony in this regard:

Q: When you fell backwards right after being struck by a piece of this concrete were you still standing on the scaffold?

A: Yes. I landed on the scaffold. Yes.

Q: So your back landed on top of the scaffold, correct?

A: Yes (NYSCEF Doc No. 44, plaintiff's tr. at p. 10, lines 16-25, and p. 11, lines 2-6).

Q: When you fell backwards you landed on the same platform that you had been standing on before you fell?

A: Yes. I landed on the scaffold where I was standing (NYSCEF Doc No. 44, plaintiff's tr. at p. 68, lines 6-10).

Q: Did your body remain on the platform without you falling down to the floor?

A: Yes, I was lying on the scaffold. I did not fall to the ground (NYSCEF Doc No. 44, plaintiff's tr. at p. 71, lines 24-25; p. 72, lines 2-4).

Defendants maintain that plaintiff has failed to establish that he is entitled to judgement as a matter of law as his injuries were not caused by the failure to provide a safety device and did not result from the application of the force of gravity to him.

In reply, plaintiff reiterates that neither 225 Broadway nor Braun provided him with any safety devices such as a safety belt, safety harness, tail lines, lanyard, safety lines or cable lines which would have allowed him to tie off while he was working on the scaffold. Moreover, he notes that the scaffold was not equipped with any safety or guard rails. He maintains that the failure to provide a safety device was the proximate cause of his fall onto the scaffold which resulted in his injuries.

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . .

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Runner*, 13 NY3d at 604; *Lemus v New York B Realty Corp.*, 186 AD3d 1351, 1352 [2d Dept 2020]). The statute is designed to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v*

DD 11th Ave., LLC, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501 “[T]he statutory requirement that workers be provided with proper protection extends not only to the hazards of building materials falling, but to the hazards of defective parts of safety devices ‘falling from an elevated level to the ground’” (*Barrios v 19-19 24th Ave. Co., LLC*, 169 AD3d 747, 748 [2d Dept 2019], citing *Castillo v 62-25 30th Ave. Realty, LLC*, 47 AD3d 865, 866 [2d Dept 2008]).

The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*). “A worker’s comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzón v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, “where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker’s conduct cannot be deemed solely to blame for it” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290).

“The fact that a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by section 240 (1) of the Labor Law” (*Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 977 [2003]). “In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, ‘the single decisive question is whether [the] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential’” (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021]).

Here, plaintiff’s Labor Law § 240 (1) claim arises out of his fall on the scaffold and does not implicate being struck by an object that needed securing for the purposes of the undertaking as plaintiff essentially concedes that the plaster that struck him in the eye was an integral part of the work he was performing. The court finds that, although plaintiff was performing his work on an elevated platform, located approximately three and a half feet above the ground, his accident and injuries did not result from an elevation related risk contemplated under Labor Law § 240 (1) where, as here, his fall occurred at the same level of his work site (*see Bonaparte v Niagara Mohawk Power Corp.*, 188 AD2d 853, 853 [3d Dept 1992] [no Labor Law § 240 (1) liability where “plaintiff only fell to the surface of the scaffold, and not from it, and his injuries were proximately caused by a walking surface which was cluttered” and not caused by “a failure to provide safety devices necessary to protect him from that risk”]; *Reyes v Magnetic Constr., Inc.*, 83 AD3d 512, 513 [1st Dept. 2011] [holding that Labor Law § 240 (1) was not violated where worker’s fall occurred at the same level as his work site]; *Cundy v New York State Elec. & Gas Corp.*, 273 AD2d

743, 744 [3d Dept 2000]; *Grant v Reconstruction Home, Inc.*, 267 AD2d 555, 556 [3d Dept 1999]; *Kauffman v New York City Sch. Constr. Auth.*, 55 Misc. 3d 1208 (A), 2017 NY Slip Op 50455 (U), [Sup Ct, Queens Cty, 2017][where plaintiff was working on a scaffold platform, tripped on a raised platform board, causing him to strike his head on an overhead structural beam and fall backward onto the scaffold platform, the court held that his injury was not a result of an elevation-related risk]; *Debowski v City of New York*, 3 Misc. 3d 1109 (A), 2004 NY Slip Op 50528 (U) [Sup Ct, Kings Cty, 2004][holding that “plaintiff’s accident was not gravity-related for the purposes of Labor Law § 240(1)” where he was working on a 10 foot high sidewalk bridge and slipped and fell on top of the platform but did not fall off of the platform]). Labor Law § 240 (1) does not apply to falls or trips on scaffolds (*Serrano v Consolidated Edison Co. or New York Inc.*, 146 AD3d 405 [1st Dept 2017]).

Accordingly, that branch of plaintiff’s motion seeking partial summary judgment in his favor on his Labor Law § 240 (1) claim is denied.

Labor Law § 241 (6)

Plaintiff also argues that he is entitled to partial summary judgment on his Labor Law § 241 (6) claim.

Labor Law § 241 (6), provides, in pertinent part, that:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 717-719 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

Plaintiff, in his bills of particulars, alleged the violation of multiple Industrial Code sections in support of his Labor Law § 241 (6) claim including Industrial Code §§ 23-1.7; 23-1.19; 23-2.6; 23-3.3; 23-1.20; 23-2.1; and 23-6.3. However, in support of the instant motion he asserts that his Labor Law § 241 (6) claim is predicated solely on defendants' violation of Industrial Code § 23-1.8 (a). Thus, plaintiff has abandoned all of the other Industrial Code sections as predicates for liability under this statute (*see Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other provisions of the Industrial Code by failing to address them in his brief]).

Plaintiff argues that Industrial Code § 23-1.8 (a) is sufficiently specific to support his Labor Law § 241 (6) claim and is applicable to the facts herein. Industrial Code § 23-1.8 (a) provides in pertinent part:

(a) Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or

cutting operations" or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

In support of his motion, plaintiff points to his deposition testimony that he was chipping away with his hammer at the concrete beam in the ceiling when the pieces of concrete and sand fell into his left eye (NYSCEF Doc No. 44 plaintiff's tr. at p. 9, lines 20-25; p. 10, lines 2-6). In addition, he testified that he was not provided with any protective eye wear of any kind (NYSCEF Doc No. 43, plaintiff's tr at p. 68, lines 4-17). He argues that the failure of defendants, as owner and contractors, to provide him with the necessary eye wear protection was the proximate cause of the severe injury to his left eye. Plaintiff asserts that Braun, as general contractor and the owner's agent, and Global, as a general contractor, had the authority to stop any unsafe work, including the work that plaintiff was performing without the requisite eye protection and that they failed to do so.

In opposition, 225 Broadway and Braun argue that plaintiff is not entitled to summary judgment on his Labor Law § 241 (6) claim as there is conflicting evidence in the record regarding whether plaintiff was provided with proper eye protection to perform his work prior to the subject incident. These defendants acknowledge that plaintiff testified that he was not provided with any eye protection while performing his work on the date of the subject incident. However, in opposition to plaintiff's motion, these defendants submit a sworn affidavit from Shiful Chowdhury, plaintiff's onsite supervisor. Mr. Chowdhury affirms that he was present in the area where plaintiff's accident occurred but did not witness it. He states that the work being performed in the area where plaintiff's accident occurred involved "scraping and plastering plaster surfaces, not working on concrete

beams” (NYSCEF Doc No.95, Chowdhury aff at ¶ 6). Mr. Chowdhury further affirms that:

Pro Painting had bought eye protection for the men to use when they did scraping work. I knew that Mr. Tomal was going to be scraping so I gave him eye protection to use before he began work on January 25, 2018. The photo (Exhibit A) shows eye protection belonging to Pro Painting that is the type I gave to him on January 25, 2018. I have known Mr. Tomal for more than 30 years, and he worked for Pro Painting for more than 10 years. He knew he was supposed to use the eye protection I had given him but he chose not to use it (NYSCEF Doc No. 95, Chowdhury aff at ¶ 8).

Defendants assert that Mr. Chowdhury’s affidavit establishes that plaintiff, an experienced worker in this field, knew he was supposed to wear safety goggles when performing this work and chose not to do so. Global also opposes this branch of plaintiff’s motions for the reasons stated by the other defendants.

In reply, plaintiff argues that the court should disregard Mr. Chowdhury’s affidavit as it is self-serving, vague, and replete with misrepresentations and patently false statements. Specifically, plaintiff contends that the court should disregard his statements as to how the accident occurred as Mr. Chowdhury admits that he did not witness the incident. Plaintiff further asserts that the affidavit fails to establish that plaintiff was aware the safety goggles were available at the site. In this regard, he states that Mr. Chowdhury’s affidavit does not specify whether he had any conversation with plaintiff on January 25, 2018 that demonstrate that plaintiff knew that Mr. Chowdhury had just brought safety goggles to the site or that he advised plaintiff where the goggles could be located and that he should use them.

At the outset, the court notes that Industrial Code § 23-1.8 (a) is sufficiently specific to support plaintiff's Labor Law § 241 (6) claim (*see Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]). Further this Industrial Code provision is applicable to the facts of this case. The court finds that plaintiff, through his sworn testimony that he was not provided with any protective eyewear to prevent injury to his eyes, has demonstrated his prima facie entitlement to judgment as a matter of law on the issue of defendant's liability under Labor Law § 241 (6), as predicated upon a violation of Industrial Code § 23-1.8 (a) and that such violation was a proximate cause of his injuries (*see Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940, 941-942 [2d Dept 2019]; *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 742 [2d Dept 2015]; *Grant v City of New York*, 109 AD3d 961, 963 [2d Dept 2013]). However, 225 Broadway and Braun's submission of an affirmation from plaintiff's supervisor, Mr. Chowdhury, who affirms that he provided plaintiff with appropriate eye protection prior to his commencement of the work he was performing at the time of the incident, raises an issue of fact regarding whether there was a violation of Industrial Code § 23-1.8 (a).

This court cannot disregard Mr. Chowdhury's affidavit nor summarily deem him incredible (*see Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 901 [2d Dept 2018] ["It is not the court's function on a motion for summary judgment to assess credibility"]). Accordingly, to the extent that plaintiff's sworn statements conflict with those of Mr. Chowdhury, a credibility issue exists which must be resolved by a jury. Accordingly, that branch of plaintiff's motion seeking partial summary judgment in his favor on his Labor Law § 241 (6) claim is denied.

Defendants 225 Broadway and Braun's Motion

Defendants 225 Broadway and Braun move for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims and the doctrine of res ipsa loquitur as asserted against 225 Broadway and Braun. For the reasons stated in detail above in relation to plaintiff's motion, that branch of 225 Broadway and Braun's motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted and said claim is dismissed.

Labor Law § 200 and Common-Law Negligence

225 Broadway and Braun argue that they are not liable under either Labor Law § 200 or common law negligence as they neither supervised nor controlled the method and manner of plaintiff's work, and did not provide any tools or equipment for him to perform his work. They also argue that they had no notice of any allegedly defective condition associated with the premises. At the outset, the court notes that plaintiff fails to raise any opposition to those branches of 225 Broadway and Braun's motion seeking dismissal of the common-law negligence and Labor Law § 200 claims, as well as a dismissal of the doctrine of res ipsa loquitur. Moreover, the record indicates that these defendants did not exercise the requisite degree of supervision or control over plaintiff's work, that his accident was not caused by a dangerous condition on the premises, and the doctrine of res ipsa loquitur was not implicated here. Accordingly, that branch of 225 Broadway and Braun's motion seeking dismissal of said claims is granted and said claims are dismissed.

Global's Motion

Global moves in motion sequence 003, for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's Labor Law § 240 (1) claim as asserted against Global. For the reasons discussed in detail above, Global's motion is granted and plaintiff's Labor Law § 240 (1) claim is dismissed.

Accordingly, it is

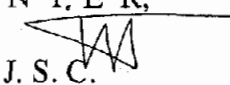
ORDERED that plaintiff's motion (motion sequence 001) for partial summary judgment in his favor on the issue of liability for his Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that 225 Broadway and Braun's motion (motion sequence 002) seeking summary dismissal of plaintiff's common-law negligence and Labor Law §§ 200 and 240 (1) claims and the doctrine of res ipsa loquitur as asserted against 225 Broadway and Braun is granted and said claims are dismissed; and it is further

ORDERED that Global's motion (motion sequence 003) seeking summary judgment dismissing plaintiff's Labor Law 240 (1) claim as asserted against Global is granted and said claim is dismissed; and it is further

ORDERED that the matter is to proceed to trial on the issue of liability for plaintiff's Labor Law § 241 (6) claim as against defendants 225 Broadway, Braun, and Global.

This constitutes the decision, order, and judgment of the court.

E N T E R,
J. S. C.

HON. WAVNY TOUSSAINT

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