

Medina v CBP 441 Ninth Ave. Owner, LLC.
2022 NY Slip Op 30316(U)
February 1, 2022
Supreme Court, New York County
Docket Number: Index No. 151026/2019
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES D'AUGUSTE PART 55

Justice

-----X

MELVIN CHEVEZ MEDINA,

Plaintiff,

- v -

CBP 441 NINTH AVENUE OWNER, LLC., PAVARINI
MCGOVERN, LLC,

Defendant.

-----X

CBP 441 NINTH AVENUE OWNER, LLC., PAVARINI
MCGOVERN, LLC

Plaintiff,

-against-

REGULATOR CONSTRUCTION, INC., CITY SAFETY
COMPLIANCE CORPORATION

Defendant.

-----X

CBP 441 NINTH AVENUE OWNER, LLC., PAVARINI
MCGOVERN, LLC

Plaintiff,

-against-

REGULATOR CONSTRUCTION CORP.

Defendant.

-----X

INDEX NO. 151026/2019

MOTION DATE 09/17/2021,
09/17/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595766/2019

Second Third-Party
Index No. 595146/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 112, 121, 123, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 182, 183

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 115, 116, 117, 118, 119, 120, 122, 124, 170, 181

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

The plaintiff's motion for summary judgment (MS002) and the defendant's motion for summary judgment (MS003) have been consolidated for this decision.

Plaintiff Melvin Bartolo Chevez Medina was employed as a laborer by Regulator Construction Corp., who was hired by defendant CBP 441 Ninth Avenue Owner LLC, who owned, operated, maintained and controlled the premises where he was employed. In an amended complaint, Medina claims Pavarini McGovern LLC directed, controlled and managed all construction and renovation of the subject premises. Medina asserts Pavarini, as the general contractor, entered into a contract with CBP to provide Pavarini labor, material and services regarding certain construction work at the premises.

Medina argues that he was seriously injured when he fell from an elevated height while performing his work, alleging CBP and Pavarini violated the New York State Labor Law §200, 240(1), and 241(6), and the Industrial Code, violating non-delegable duties by failing to cure all defective or dangerous conditions or provide him with proper safety devices. Medina alleges such violations resulted in his severe and permanent personal injuries and prevent him from participating in his usual vocation and duties, requiring medical care and treatment potentially for the remainder of his life due solely to defendants' negligence.

CBP and Pavarini deny all allegations within Medina's complaint, asserting that any personal injuries that Medina alleges were sustained were primarily a result of his own culpable conduct. CBP and Pavarini assert numerous affirmative defenses, including claiming any injuries to Medina arose from open and obvious risks and dangers known to Medina. Defendants allege

Medina's own conduct was the sole proximate cause of his accident and injuries, thus, they are not liable under any Labor Law or Industrial Code provisions.

Medina, in Motion Sequence 002, moves for summary judgment on the issue of liability against defendants CBP and Pavarini on the Labor Law §240(1) claim, and §241(6) cause of action based on 12 NYCRR §23-1.7(b). Plaintiff alleges that he sustained serious injuries after falling through an uncovered and unguarded floor opening from one level to the level below. His fall occurred while performing cleaning work on the top level of a hi-rise building during a project that included construction of a new building stories above an existing structure. Medina states that it was raining on the day of the accident and the top floor where he was working was open and exposed – resulting in the floor being wet. He stated that a ladder placed over an uncovered opening was removed by someone and there were no railings around this opening. Moreover, the parties have provided no evidence of any adequate anchors nor any directives from a supervisor that the plaintiff was supposed to “tie off” while cleaning.

Medina states that his foot slid near the opening while he worked and he fell into the opening to the lower level, demonstrating that no evidence supports a recalcitrant worker or sole proximate cause defense to liability. Medina recounts that when a ladder was in place in the opening, there was a railing around three sides. However, when the ladder was removed prior to the accident, the railings were also removed. Accordingly, Medina argues summary judgment on the issue of liability is appropriate and should be granted against defendants on the Labor Law §240(1) and §241(6) causes of action.

Pavarini's superintendent, McFadden, testified he walked the site several times a day noting if he saw Regulator employees working near an opening, such as the one Medina fell through, with no ladder or railing, he immediately stopped them and instructed the to cover the

hole and tie-off with a harness or create a controlled-access area so no one may walk in that location. McFadden also stated that a slippery floor is considered a safety issue on the site, as Medina alleges occurred on the date of the subject accident from the rain. In addition, site safety manager, Cavaliere, employed by City Safety, testified that, if there is an uncovered floor opening without railings, this would be considered a safety issue and a danger. He states that if a ladder was removed from the subject opening “to pass materials down,” workers must be tied off to a secure anchor. Cavaliere admits that he has no knowledge if there were any appropriate anchors for tying off in the area of the accident, noting it was unlikely there were any as it was the top floor without a ceiling.

In Motion Sequence 003, defendants move to dismiss, with prejudice, Medina’s common law negligence claims, and Labor Law §§200, 240(1) and 241(6) causes of action. Defendants argue Medina’s claim he fell 17 feet, was helped by several unidentified, un-deposed individuals, who assisted him down several sets of ladders, then took a hoist to the ground level, is patently not credible and cannot be believed. Defendants highlight that Medina did not call an ambulance and took a train home from Manhattan to Long Island, stating his unreported accident cannot be substantiated.

The Court rejects defendants’ argument that Medina’s assertions are patently not credible as the accident could not have occurred in the manner Medina described. There is no admissible evidence supporting this contention. There is also no evidence supporting the assertion that the accident did not occur because Medina fell through an uncovered opening. It is not inherently implausible that a person may fall from approximately one floor in height and depart the accident scene without immediate medical attention. Defendants failed to submit any expert evidence supporting this contention of inherent implausibility.

Next, defendants argue that Medina's claims should be dismissed as Pavarini was a construction manager, not an owner or general contractor, and neither CBP nor Pavarini controlled, supervised or directed Medina's work at the time of the alleged accident. In addition, defendants argue that there were adequate safety devices available at the jobsite with places to securely tie off, and Medina's accident occurred as he improperly descended down a ladder. Therefore, Medina would be the sole proximate cause of the alleged incident.

Contrary to defendants' claims, the testimony of Pavarini's own witnesses support the conclusion that Pavarini is subject to potential liability under Labor Law §240(1) pursuant to a *Walls v. Turner Construction Co.* analysis. Here, defendants as are the owner and a contractor of the subject site with supervisory and safety authority. Yet, they failed to adequately protect Medina from a hazardous condition, to wit, the opening in the premises of the top floor of the building in which he worked. The Court also finds Medina is not a recalcitrant worker nor the sole proximate cause of his accident wherein he sustained serious injuries, ruling such defense unavailable to §240(1). There is no evidence Medina received "immediate or active direction" not to use a device, as required to establish a recalcitrant worker defense, nor is he the sole proximate cause of his accident as no evidence establishes that he misused, removed or failed to use any available safety device or chose to use an inadequate device.

Additionally, the Court finds Medina is entitled to summary judgment against defendants on his Labor Law §241(6) cause of action predicated on 12 NYCRR §23-1.7(b)(1), "hazardous openings," because the subject opening was not covered nor guarded. The subject opening through which Medina fell was wholly uncovered, unguarded and no proper protections provided to prevent Medina from falling into it as he performed his cleaning work, such as adequate anchors. Defendants' conclusory assertions there was a railing in place at the time of accident

simply because undisclosed witnesses allege there was a railing in place at other times is pure conjecture. There is no evidence is proffered that railings were in place at the time of Medina’s accident. As such, such allegations are insufficient to raise any issue of fact. In the end, Medina has demonstrated defendants’ liability under Labor Law §240(1) because they failed to provide him with adequate safety devices, which is the proximate cause of the accident, he is entitled to summary judgment on the issue of liability.

The Court concludes defendants fail to raise any issues of fact precluding summary judgment to Medina on the issue of liability on his Labor Law §§200, 240(1) and 241(6) causes of action. Accordingly, it is,

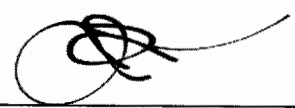
ORDERED that plaintiff’s application seeking summary judgment against defendants, CBP 441 Ninth Avenue Owner, LLC and Pavarini McGovern, LLC, on the Labor Law §240(1) cause of action; and the Labor Law §241(6) cause of action, and it is further,

ORDERED that CBP 441 Ninth Avenue Owner, LLC and Pavarini McGovern, LLC’s application seeking dismissal of plaintiff’s common law negligence claims, as well as Labor Law §§ 200, 240, and 241(6) claims is denied, and it is further,

ORDERED that CBP 441 Ninth Avenue Owner, LLC and Pavarini McGovern, LLC’s application seeking summary judgment is denied.

This constitutes the decision and order of the Court.

2/01/2022
DATE


JAMES D'AUGUSTE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE