

<b>Gomez v 2395 FDB JV LLC</b>
2022 NY Slip Op 30744(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 151556/2018
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

MARIO GOMEZ,

Plaintiff,

- v -

2395 FDB JV LLC,HP 2395 FDB HOUSING
DEVELOPMENT FUND COMPANY INC.,SUMMIT JV LLC

Defendants.

-----X

INDEX NO. 151556/2018
MOTION DATE 03/29/2022
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 75, 76, 78, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 79, 80, 81, 82, 83, 84

were read on this motion to/for JUDGMENT - SUMMARY .

Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion (MS002) by defendants for summary judgment dismissing certain claims asserted by plaintiff is granted in part and denied in part. The motion (MS003) by plaintiff for summary judgment on its Labor Law § 240(1) claim is granted.

Background

This Labor Law action arises out of injuries plaintiff suffered while working at a construction site on February 6, 2018 when he was hit by piece of wood that weighed between twenty and fifty pounds. Plaintiff claims that the piece of wood fell from a height of between 18-20 feet and caused him serious injuries, resulting in a fusion surgery on his neck. Plaintiff was working for non-party Perimeter as a carpenter on the day of the accident. Plaintiff testified that

the accident happened around 7:30 a.m. and his supervisor told him to remove the walls that day (NYSCEF Doc. No. 65 at 30). He claimed he had been working for about 15 minutes when he “felt an impact on my neck. I looked up, and there was a guy and he said ‘I’m so sorry. I apologize.’ And I was feeling really bad so I sat down. Then Carlos came. He asked why I wasn’t working, and I told him what had happened. Then the safety manager came. He asked what happened. We were taken to an office” (*id.* at 41, 44-45).

Defendant 2395 FDB Development LLC is the property owner and defendant HP 2395 FDB Housing Development Fund Co. Inc. is the nominal owner of the property. Defendant Summit JV LLC was the general contractor for the project.

### **Defendants’ Motion (MS002)**

Defendants move for summary judgment to dismiss plaintiff’s claims brought under Labor Law §§ 240(2), 240(3), 241(6), 242(a) and 200. They claim that plaintiff did not establish a violation of an applicable Industrial Code section under 241(6) nor did plaintiff show that defendants had any control over the work site (a prerequisite for liability under Labor Law § 200). Defendants maintain that the other Labor Law sections are not applicable to this case and should therefore be dismissed.

In opposition, plaintiff voluntarily withdrew his claims based on Labor Law §§ 242(a), 240(2) and 240(3). With respect to Labor Law § 200, plaintiff claims that defendants submitted no evidence about their responsibilities with respect to work site safety and that there is an issue of fact with respect to defendant Summit’s obligation to ensure a safe workplace. Plaintiff argues that Summit controlled the means and methods of the subcontractors, including the one for which plaintiff worked. He also points out that Summit hired a site safety subcontractor for the site.

**Labor Law § 200**

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

Here, the Court dismisses the Labor Law §200 claims asserted against all defendants except Summit. The fact is that Summit admitted that it hired a site safety company for the job site (NYSCEF Doc. No. 57 at 15 [deposition of Summit’s witness]) and that a site safety manager was on the project on a daily basis (*id.* at 16). A fact finder could conclude that Summit undertook an obligation to ensure a safe work environment and that it should have stopped a worker from taking down a wall directly above where plaintiff was working or that adequate protective devices should have been utilized. In fact, plaintiff testified that right after the accident, the site safety manager came over to investigate (NYSCEF Doc. No. 65 at 44-45). In other words, there is an issue of fact with respect to how much control Summit exerted over the means and methods because it contracted for a site safety manager.

**Labor Law § 241(6)**

“The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law

principles” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). “The regulation must also be applicable to the facts and be the proximate cause of the plaintiff’s injury” (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Defendants point out that plaintiff sought relief under numerous Industrial Code sections, including 23-1.4; 23-1.5; 23-1.7; 23-1.22; 23-1.30; 23-1.32; 23-1.33; 23-2.2; 23-2.3; 23-2.4; 23-2.5; 23-2.6; 23-3.2; 23-3.3; 23-3.4; 23-5.1; 23-8.1; 23-8.2; and 23-8.5. And plaintiff also cited 23-2.1(b) in his supplemental bill of particulars.

Plaintiff only bothered to mention 23-2.2(a), (b) and (c) in his opposition. These provisions deal with concrete work, forms and their structural safety. However, as defendants point out, plaintiff was taking down the walls when the accident occurred. In other words, because the nature of the work performed by plaintiff and his co-workers involved taking down the walls, plaintiff cannot seek recovery based on Industrial Code sections that required defendants to maintain the structural integrity of the wall. The accident happened because someone dropped an object on plaintiff from above, not because the wall was not properly braced or tied together. These sections are therefore inapplicable.

#### **Plaintiff’s Motion: Labor Law § 240(1)**

Plaintiff moves for summary judgment on his Labor Law § 240(1) claim. He insists that a co-worker dropped a piece of wood from 18-20 feet above while trying to pass it to another worker. He claims this type of accident is covered under this statute and he is entitled to summary judgment on liability.

In opposition, defendants argue that there is evidence that the wood was deliberately dropped or thrown and this raises an issue of fact. They claim that their witness spoke with the

Perimeter workers responsible and found that the piece of wood was intentionally thrown over the wall by plaintiff's co-workers.

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). “Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*id.* at 501).

“[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough” (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

“Labor Law § 240(1) applies to both ‘falling worker’ and ‘falling object’ cases. 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, 727 NYS2d 259 [2001] [internal quotations and citations omitted]). “[F]alling object liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured” (*Quattrocchi v F.J. Sciame Const. Corp.*, 11 NY3d 757, 758-59, 866 NYS2d 592 [2008] [citations omitted]).

The Court finds that plaintiff is entitled to summary judgment on liability on his Labor Law § 240(1) claim (*Hill v Acies Group, LLC*, 122 AD3d 428, 429, 996 NYS2d 235 [1st Dept 2014] [granting an injured worker summary judgment on his Labor Law § 240(1) claim where he was hit by falling brick dropped by a masonry worker working several stories above]).

Although defendants are certainly correct that liability under this statute does not arise where an item is deliberately dropped (*Roberts v Gen. Elec. Co.*, 97 NY2d 737, 742 NYS2d 188 [2002]), there is no admissible evidence that plaintiff's co-workers were told to drop the wood 18-20 feet while other co-workers were standing below. Defendants' reliance on the accident investigation report does not create an issue of fact. As an initial matter, it is hearsay and while hearsay evidence can be used in a motion for summary judgment, it cannot be the only evidence cited to raise an issue of fact (*Fountain v Ferrara*, 118 AD3d 416, 987 NYS2d 55 [1st Dept 2014]). And, here, defendants did not point to any first-hand account regarding whether plaintiff's co-workers deliberately threw or dropped these pieces of wood. Moreover, the accident report claims that the co-worker "should have no[t] been throwing materials over wall" (NYSCEF Doc. No. 82). It does not claim that the co-workers' assigned task was to intentionally drop the pieces of wood. Plus, plaintiff testified that the co-worker apologized and told him right after the accident that he "dropped" the piece of wood (NYSCEF Doc. No. 65 at 44-45). In sum, defendants did not meet their burden to raise an issue of fact.

And this is exactly the type of injury Labor Law § 240(1) was supposed to prevent; a falling object hitting a worker without any safety devices or any steps taken whatsoever to avoid what clearly was a preventable accident. Even if the co-worker was supposed to throw pieces of wood over a wall and down multiple stories, that does not mean there is no obligation to make

sure plaintiff (working floors below) is protected either through protective netting or removing workers from the line of fire.

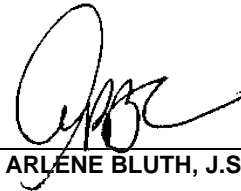
Accordingly, it is hereby

ORDERED that the motion (MS002) by defendants for summary judgment dismissing certain claims is granted to the extent that plaintiff's claims based on Labor Law §§ 240(2), 240(3), 241(6) and 242(a) are severed and dismissed, the Labor Law § 200 claim against defendants 2395 FDB JV LLC, HP 2395 FDB HOUSING DEVELOPMENT FUND COMPANY INC. is severed and dismissed and denied to the extent defendants sought to dismiss the Labor Law § 200 claim against Summit JV LLC; and it is further

ORDERED that the motion by plaintiff (MS003) for summary judgment on liability on his Labor Law § 240(1) claim is granted.

3/31/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE