

Fischer v VNO 225 W. 58th St. LLC
2022 NY Slip Op 30886(U)
March 18, 2022
Supreme County, New York County
Docket Number: Index No. 152811/2018
Judge: William Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X
WILLIAM FISCHER, ANDREA FISCHER,
Plaintiffs,
- v -
VNO 225 WEST 58TH STREET LLC, VORNADO REALTY
TRUST, LENDLEASE (US) CONSTRUCTION INC.,
LENDLEASE (US) CONSTRUCTION LMB INC.
Defendants.
-----X

INDEX NO. 152811/2018
MOTION DATE 08/24/2021
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff William Fischer alleges that he sustained injuries on a construction site due to violations of Labor Law §§ 200, 240[1], and 241[6] by Defendants VNO 225 West 58th Street LLC, the building owner, and Lendlease, the construction manager.

In motion sequence 001, Defendants seek summary judgment dismissing Plaintiff's cause of action arising under Labor Law § 240[1], on the grounds that the plywood structure at issue in this case is not a safety device constructed to protect against a gravity-related hazard. (NYSCEF Doc No. 26, Defs.' Memo at ¶ 11.)

Plaintiff cross-moves for partial summary judgment on the issue of liability as against Defendants VNO and Lendlease on his causes of action arising under Labor Law §§ 200, 240[1], and 241[6]. (NYSCEF Doc No. 36, Cross-motion, at ¶ 2.)

Background

Defendant VNO is the owner of the premises located at 220 Central Park South, New York, NY, and hired Lendlease to manage the construction of a residential high-rise building. Lendlease hired R&R Mechanical as a subcontractor to perform mechanical, electrical, and plumbing work.

Plaintiff was employed as a steamfitter mechanic by R&R Mechanical. On January 16, 2018, the day of his accident, he alleges that he was working on the 49th floor of the building, which was accessed by a hoist that ran up the exterior of the building. Inside, a plywood structure ran from the hoist and through a mechanical room. The purpose of the plywood structure was to facilitate the transportation of workers and materials through the room and over the floor, which contained six-inch-high curbs intended to contain potential water leakage.

Plaintiff alleges that he stepped onto the plywood structure to take a measurement, but that the specific piece of plywood on which he stepped tipped over, causing him to fall to the concrete floor and sustain injuries. The parties' dispute the height of the plywood structure.

Defendants' position is that the plywood structure stood 10 inches above the floor. The basis for this measurement is from the deposition testimony of Michael Gottesman, Lendlease's superintendent. Gottesman was shown a photograph of the plywood structure and was asked to "estimate" the height of the structure. (NYSCEF Doc No. 32, Gottesman Transcript, at 29:24-30:02; NYSCEF Doc No. 44 at 10, Photograph.)

Plaintiff's position is that the plywood structure stood 1.5 to 2 feet above the floor. Defendants counter that Plaintiff initially testified that he was unable to state the height of the structure, and only provided the 1.5 to 2 feet estimate "at the prodding of his attorney." (NYSCEF Doc No. 26, Defs.' Memo, at ¶ 19.)

Plaintiff commenced this action on March 28, 2018, setting forth causes of action for violations of Labor Law §§ 200, 240[1], and 241[6]. (NYSCEF Doc No. 1, Complaint.) His wife, Andrea Fischer, sets forth a cause of action for loss of society, services, and consortium. After discovery proceedings, the note of issue was filed on December 2, 2020 and defendants' motion for summary judgment was timely filed.

Discussion

It is well settled that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) To defeat a motion for summary judgment, the opposing party must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]) by “producing evidentiary proof in admissible form.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Defendants' motion for summary judgment seeking dismissal of Plaintiff's Labor Law § 240[1] claim

Labor Law § 240(1) provides that:

All contractors and owners and their agents ... 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.

Section 240[1] “imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury ... [and] is to be construed as

liberally as may be for the accomplishment of the purpose for which it was thus framed.” (*Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993].) The list of safety devices enumerated in the provision “evinces a clear legislative intent to provide ‘exceptional protection’ for workers against ... 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.*” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500–01 [1993].) Notably, “[t]here is no bright-line minimum height differential that determines whether an elevation hazard exists.” (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011].)

Here, the plywood structure was used to facilitate the transportation of workers and materials from the hoist on the exterior of the building and throughout the mechanical room while avoiding the six-inch water containment curbs. (NYSCEF Doc No. 32, Gottesman Transcript, at 25-26; NYSCEF Doc No. 31, Pl.’s Transcript, at 47:13.) As such, the plywood structure that Plaintiff fell from is not a device which proved inadequate to shield him from harm directly flowing from the application of gravity. (See NYSCEF Doc No. 44, Pictures, at 10.)

Plaintiff “was not exposed to an elevation-related hazard as contemplated by § 240[1].” (*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009] [dismissing plaintiff’s §240(1) claim where injury occurred from a ramp resting on sidewalk curb and extending to street, with height differential of 12 to 18 inches], *compare with Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1st Dept 2011] [granting plaintiff summary judgment on §240(1) claim where injury occurred from descending a plank four-to-six feet to retrieve equipment as directed by foreman] *and McGarry v CVP 1 LLC*, 55 AD3d 4414 [1st Dept 2008] [granting plaintiff summary judgment on §240(1) claim where injury occurred from using cinderblocks as a makeshift staircase to access

“different levels of the work site”]; *see also Herrera v Kent Ave. Prop. III LLC*, 2022 NY Slip Op. 01738 [1st Dept, Mar 15, 2022] [finding Labor Law § 240(1) inapplicable where plaintiff was struck by an excavator while working on a ramp, as injury was not a “direct consequence of physically significant elevation differential”].) Thus, Defendants’ motion is granted and Plaintiff’s cause of action under Labor Law § 240[1] is dismissed.

Plaintiff’s cross-motion for summary judgment on liability

1. Labor Law § 200

Labor Law § 200 “is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work.” (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008].) “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed.” (*Id.* at 61.) Here, Plaintiff’s Labor Law § 200 claim is based on the allegedly dangerous condition of the plywood structure. (Cross-motion at ¶ 45.)

“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.” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012].)

Plaintiff argues that summary judgment is appropriate because Lendlease, as construction manager for the project, had control of the worksite and “supervised the work of the subcontractors, in addition to subcontractors supervising themselves.” (NYSCEF Doc No. 36, Cross-motion, at ¶ 48.) Gottesman, however, testified that he did not have conversations with R&R’s foreman, Nuri Outmazgine, about the work being performed on the 49th floor, and that he

did not know who supervised Woodworks Construction, the subcontractor who built the plywood structure. (Gottesman Affidavit at 24-28.)

Further, the record is inconclusive as to whether Lendlease had received complaints about the plywood structure. Plaintiff's affidavit states that he complained about the plywood structure to his foreman, Nuri Outmazgine (Pl.'s Affidavit at ¶ 17), who in turn avers that he complained "to individuals employed by Lend Lease[.]" (Outmazgine Affidavit at ¶ 10.) Gottesman, however, testified that he never personally received any complaints about the structure and that he was not in charge of the mechanical floors at the time. (Gottesman Affidavit at 40:14-41:10.)

As such, an issue of fact exists as to whether Lendlease had actual or constructive notice of the allegedly defective nature of the plywood structure, and Plaintiff's motion for summary judgment on his claim under Labor Law § 200 is denied as to Lendlease. Likewise, the motion is denied as to VNO as Plaintiff makes no allegations regarding VNO's liability.

2. Labor Law § 241[6]

"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 Contracting Co.*, 91 NY2d 343, 348 [1998].) The provision, however, "is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury." (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007].)

Here, Plaintiff alleges that Defendants violated Industrial Code §§ 23-1.1, 23-1.2[d], 23-1.2[a], 23-1.5[a & b], 23-1.7[b][1][i], 23-1.15[a – e], 23-1.22, and 23-5.1. (NYSCEF Doc No. 36, Cross-motion, at ¶¶ 37-42.) In support, Plaintiff relies on the affidavit of Vincent Ettari, a professional engineer (NYSCEF Doc No. 39, Ettari Affidavit), and the affidavits of Robert Roulston, who was Plaintiff's partner on the job site on the day of the accident (NYSCEF Doc No. 40, Roulston Affidavit), and Nuriel Outmazgine, the foreman. (NYSCEF Doc No. 41, Outmazgine Affidavit.)

In opposition, Defendants rely on the affidavit of their own expert, Bernard Lorenz, who states that each of the Industrial Code provisions listed above are inapplicable, for various reasons. (NYSCEF Doc No. 52, Defs.' Opp. to Cross-motion, at ¶¶ 26-36; NYSCEF Doc No. 53, Lorenz Affidavit, at ¶¶ 8-15.)

Preliminarily, the court finds that Defendants did not “violate” Industrial Code §§ 23-1.1 (“Title and Citation”) and 23-1.2[a], [d] (“Finding of fact”). Further, “[s]ection 23-1.5 of the Industrial Code has been determined to be a generic directive which is insufficient to support causes of action made pursuant to Labor Law § 241[6].” (*Mikeshina v Tishman Const. Corp.*, 2019 WL 1674157, at *8 [Sup Ct, NY County 2019].) Finally, § 23-5.1 [“General provisions for all scaffolds”] is inapplicable to this case, as the plywood structure from which Plaintiff fell is not a scaffold. (*See* NYSCEF Doc No. 44, Photos, at 10.)

Industrial Code §§ 23-1.7[b][1][i] provides that:

Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

(12 NYCRR §§ 23-1.7[b][1][i] [“Protection from general hazards – falling hazards – hazardous openings”].) Plaintiffs argue that Defendants' violation of this provision is evidenced by the

deposition testimony of Gottesman, who stated that the platform was built “[in order for workers] to get through the space to bring their material so they didn’t have to go over the curbs. Flat platform.” (NYSCEF Doc No. 55, Pls.’ Reply, at ¶¶ 24-27, *citing* Gottesman Transcript at 25-26; 46-47.)

“The term ‘hazardous opening’ is not defined in 12 NYCRR 23-1.7[b][1].” (*Paulino v Verizon New York, Inc.*, 2021 WL 127035, at *7 [Sup Ct, NY County 2021].) However, “[r]eading the regulation as a whole, it is clear that it was not intended to apply to the type of opening involved in this case. As its heading reflects, 12 NYCRR 23–1.7(b) establishes rules for protections against ‘falling hazards.’ The safety measures required ... all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit.” (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002].) Plaintiff fails to demonstrate that the six-inch curbs constitute “falling hazards” as envisioned by the statute.

Next, Plaintiff argues that Industrial Code § 23-1.15 [“Safety railing”] is applicable solely “[d]ue to the applicability of § 23-1.7[.]” (Pls.’ Reply at ¶ 28.) However, as the court has found that § 23-1.7 is not applicable to this case, the court finds § 23-1.15 inapplicable as well.

In his Bill of Particulars, Plaintiff alleges that Defendants violated Industrial Code §§ 23-1.22[b][1 – 4] and 1.22[c][1 – 2]. (NYSCEF Doc No. 30, Bill of Particulars, at ¶ 4.) However, their expert’s affidavit only attests to the applicability of §§ 23-1.22[b][1] & [2]. (NYSCEF Doc No. 39, Ettari Affidavit, at ¶¶ 39-40.) In any event, § 23-1.22[b] [“Runways and ramps”] provides that:

(1) All runways and ramps shall be substantially constructed and securely braced and supported. Runways and ramps constructed for use by motor trucks or heavier vehicles shall be not less than 12 feet wide for single lane traffic or 24 feet wide for two lane traffic. Such runways and ramps shall be provided with timber curbs not less than 10 inches by 10 inches, full size timber, placed parallel to, and secured to the sides of such runways and ramps. The flooring of such runways and ramps shall

be positively secured against movement and constructed of planking at least three inches thick full size or metal of equivalent strength.

(2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed.

(3) Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used on such runways and ramps, it shall be laid close, butt jointed and securely nailed. Such runways and ramps shall be provided with timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of such runways and ramps. Bracing for such runways and ramps shall be installed at a maximum of four foot intervals.

...

Defendants' expert states that section [b] is inapplicable because "the plywood surface from which the plaintiff allegedly fell was neither a runway nor a ramp, but rather was a platform."

(Lorenz Affidavit at ¶ 12.) Section 23-1.22[c] ["Platforms"] provides that:

(1) Any platform used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength. Platforms used for motor trucks or heavier vehicles shall be provided with floors of planking at least three inches thick full size or metal of equivalent strength.

(2) Every platform more than seven feet above the ground, grade, floor or equivalent surface shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on all sides ...

Defendants' expert then states that Defendants did not violate either [c][1] or [c][2], "as the plywood surface was 3/4 inches thick ... and no safety railing was required because the platform was not more than seven feet above the ground." (Lorenz Affidavit at ¶ 12.)

Preliminarily, the court finds that Industrial Code § 23-1.22[b][1] is inapplicable to the facts of this case. “Although the first sentence of this regulation refers to ‘all runways and ramps,’ reading 23–1.22[b][1] in its entirety, and viewing the regulation in the context of the succeeding subdivisions of 23–1.22, it is clear that this provision is intended to apply to runways and ramps *used by trucks and other heavy vehicles.*” (*Huether v New York Times Bldg., LLC*, 24 Misc 3d 634, 645 [Sup Ct, Kings County 2009] [emphasis added].)

However, the court finds that Plaintiffs have met their prima facie burden for summary judgment on their Labor Law § 241[6] claim based on the predicate violation of Industrial Code §23-1.22[b][2]. It is undisputed that the plywood structure from which Plaintiff fell was used for the transportation of workers and materials. (NYSCEF Doc No. 32, Gottesman Transcript at 25-26; NYSCEF Doc No. 38, Pl.’s Affidavit, at ¶ 7; NYSCEF Doc No. 40, Roulston Affidavit, at ¶ 6.) As demonstrated by Defendants’ own expert’s affidavit and witness testimony, it is also undisputed that the plywood used to construct the structure was “less than two inches thick full size” as required by the Code. (NYSCEF Doc No. 53, Lorenz Affidavit at ¶ 12 [“the plywood surface was 3/4 inches thick”]; NYSCEF Doc No. 32, Gottesman Transcript at 30:11 [“it would have been three quarters or five eighths”].) Plaintiffs also submit un rebutted evidence indicating that the specific piece of plywood on which Plaintiff stepped was not securely fastened to the supporting framework, causing him to fall. (NYSCEF Doc No. 38, Pl.’s Affidavit, at ¶ 12; NYSCEF Doc No. 39, Ettari Affidavit, at ¶ 39; NYSCEF Doc No. 40, Roulston Affidavit, at ¶ 13; NYSCEF Doc No. 41, Outmazgine Affidavit, at ¶ 13; *see also Rieckehoff v Extell West 57th Street, LLC*, 2016 WL 7423829, at *5 [Sup Ct, NY County 2016] [granting plaintiff summary judgment on liability on Labor Law § 241(6) claim based on predicate violation of Industrial Code § 23-1.22(b)(2) and (3) where “loose and unsecured plywood that was being used as a ramp for both a

person and hand carts and/or wheelbarrows ... should have been nailed down”]; *Huether*, 24 Misc 3d at 643; *Ocasio v Queens Fresh Meadows LLC*, 2013 WL 1808103 [Sup Ct, NY County 2013].)

In opposition, Defendants’ sole argument is that the plywood structure is not a runway or ramp, but that it is a “platform.” (NYSCEF Doc No. 52, Defs.’ Opposition to Cross-motion, at ¶29, citing NYSCEF Doc No. 53, Lorenz Affidavit, at ¶ 12.) This argument is conclusory, unsupported by evidence, and unpersuasive in the face of the plain language of the statute.

Finally, the portion of Plaintiff’s cross-motion to strike Defendants’ affirmative defense of comparative fault is not opposed by Defendants, and is therefore granted. As such, it is hereby

ORDERED that Defendants’ motion sequence 001 for summary judgment dismissal of Plaintiff’s cause of action arising under Labor Law § 240[1] is granted; and it is further

ORDERED that Plaintiff’s cross-motion for summary judgment on the issue of liability is granted solely on the cause of action arising under Labor Law § 241[6] for the predicate violation of Industrial Code § 23-1.22[b][2]; and it is further

ORDERED that all issues of damages will be decided at the time of trial; and it is further

ORDERED that Plaintiff’s cross-motion to strike Defendants’ affirmative defense of comparative fault is granted; and it is further

ORDERED that Plaintiff’s cross-motion for summary judgment on the issue of liability is otherwise denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/18/2022

DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE