DaSilva v Toll GC LLC
2022 NY Slip Op 30889(U)
March 18, 2022
Supreme Court, New York County
Docket Number: Index No. 156995/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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CLAUDENOR DASILVA,

Plaintiff,

- v -

TOLL GC LLC,353-357 BROADWAY, LLC,

Defendants.

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INDEX NO. 156995/2017

MOTION DATE 10/14/2021, 10/14/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

TOLL GC LLC, 353-357 BROADWAY, LLC

Plaintiffs,

-against-

ADVANCED CONTRACTING SOLUTIONS NY LLC

Defendant.

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Third-Party
Index No. 595011/2019

TOLL GC LLC, 353-357 BROADWAY, LLC

Plaintiffs,

-against-

MCCOY CONSULTING CORP.

Defendant.

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Second Third-Party
Index No. 595436/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 97

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 94, 95, 98, 99

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

Plaintiff Claudenor DaSilva, an employee of third-party defendant Advanced Contracting Solutions NY LLC, commenced this action after he fell while carrying a heavy cement mold up a

staircase at the construction site where he was working. Plaintiff testified that he was instructed to use the staircase, rather than the elevator, by his supervisor Robert Nardella. The construction site was owned by defendant 353-357 Broadway LLC and the general contractor was defendant Toll GC LLC.

Defendants 353-357 Broadway and Toll move pursuant to CPLR 3212 for summary judgement seeking dismissal of all claims asserted against them, or alternatively, for summary judgment against the third-party defendant Advanced Contracting Solutions for contractual and common law indemnification and contribution (MS # 1). Plaintiff opposes the motion and moves separately for summary judgment on this Labor Law 240(1) and 241(6) claims (MS # 2). The motions are consolidated for decision.

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant:

> "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."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a "falling

worker" or a "falling object" (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v NY Stock Exchange*, 13 NY3d 599, 603 [2009]). Therefore, in order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Here, plaintiff testified that while there was an elevator available in which he could have fit the mold and that he had previously used the elevator to move things, he was instructed by his supervisor to use the stairs and that it was his supervisor's decision to do so (DaSilva Dep. Tr. 86-87, 186-87). Accordingly, defendants and plaintiff's summary judgment motions must be

denied as to plaintiff's Labor Law § 240 (1) claim since there is an issue of fact as to whether there were alternative means available for plaintiff to move the mold.

Labor Law § 241 (6)

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

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a duty upon owners, contractors, and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Here, plaintiff does not oppose dismissal of this claim insofar as it is premised on violations of Industrial Code Sections 23-1.5, 23-1.15, 23-2.1, 23-2.2, 23-2.7, 23-3.3, and as such, those claims are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475, 938 N.Y.S.2d 288 [1st Dept 2012] [holding plaintiff abandoned reliance on certain Industrial Code sections by failing to address them in opposition to defendant's summary judgment motion]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on those abandoned provisions.

With regard to violations of Industrial Code Section 23-1.7(e) (slipping hazards) and (d) (tripping hazards), plaintiff is entitled to summary judgment on those claims as he submitted evidence to show that there was an accumulation of debris on the staircase which had been there for at least 2-3 days and which caused him to fall. Defendants' argument that the debris was an integral part of the worksite because it was created by the work lacks merit. With regard to violation of 23-1.7(f) (hazards in vertical passageways), there is an issue of fact as noted above as to whether there was another safe means of access available to plaintiff (*see Velasquez v. Port Auth. of NY & NJ*, 2014 WL 12863238, at *3 [Sup. Ct. N.Y. Cty. 2014]). Finally, with regard to the violation of Industrial Code Section 1.30 (illumination), plaintiff met his prima facie burden by submitting testimony that no artificial lighting was provided in the area of the accident, that it was dim and that in their expert's opinion, this was a substantial factor in causing plaintiff's accident, and defendants failed to raise an issue of fact with regard to this issue.

Accordingly, defendants' summary judgement motion with regard to plaintiff's Labor Law 241(6) claim will be granted to the extent that the claim is premised on violations of Industrial Code Sections 23-1.5, 23-1.15, 23-2.1, 23-2.2, 23-2.7, 23-3.3; and plaintiff's summary

judgment motion will be granted on his Labor Law 241(6) claim to the extent that it is premised on violations of Industrial Code Sections 23-1.7(e) and (d), and 23-1.30.

Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the circumstances of the accident: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see e.g., Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.,* 104 AD3d 446, 449 [1st Dept 2013]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, defendants failed to meet their prima facie burden to show that they lacked constructive notice of the allegedly defective condition, namely the debris on the stairway that plaintiff testified had been there for 2-3 days prior to the accident, and thus they are not entitled to dismissal of this claim. In light of this, defendants are not entitled to summary judgment on their contractual and common law indemnification claims given the issues of fact as to their negligence (*Vasquez v. City of New York*, 200 A.D.3d 482 [1st Dep't 2021]). Further, defendants

did not provide any evidence in support of their motion with respect to the failure to procure insurance claim against the third part defendant. Accordingly, defendants' summary judgment motion on plaintiff's Labor Law § 200 claim and on their third-party claims for contractual and common law indemnification, and breach of contract will be denied

Based on the foregoing, it is

ORDERED that the motions for summary judgment (MS #s 1 & 2) are denied with regard to plaintiff's Labor Law § 240(1) claim; and it is further

ORDERED that defendants' summary judgment motion (MS # 1) with regard to the Labor Law 241(6) claim is granted in part and the claim is dismissed insofar as it is premised on violations of Industrial Code Sections 23-1.5, 23-1.15, 23-2.1, 23-2.2, 23-2.7, 23-3.3 and is otherwise denied; and it is further

ORDERED that plaintiff's summary judgment motion (MS # 2) with regard to his Labor Law 241(6) claim is granted in part insofar as the claim is premised on violations of 23-1.7(e) and (d), and 23-1.30, and is otherwise denied; and it is further

ORDERED that defendants' summary judgment motion (MS # 1) on plaintiff's Labor Law § 200 claim and the claims against the third-party defendant is denied.

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3/18/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE