

<b>Mayorga v Loketch Group, Inc.</b>
2022 NY Slip Op 31292(U)
April 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 519540/2017
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of April, 2022.

PRESENT:

HON. CAROLYN E. WADE,  
Justice.  
-----X  
JUNIOR MANUEL MAYORGA,  
Plaintiff,

DECISION AND ORDER

- against -

Index No. 519540/2017

THE LOKETCH GROUP, INC., 225 ROBELING, LLC AND  
COUNTYWIDE BUILDERS, INC.  
Defendants.

Mot. Seq. Nos. 2 & 3

-----X  
THE LOKETCH GROUP, INC. AND 225 ROEBLING  
LLC AND COUNTYWIDE BUILDERS, INC.  
Third-Party Plaintiffs,

-against-

MAGELLAN CONCRETE STRUCTURES CORP.  
Third-Party Defendants  
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Petition and Exhibits Annexed \_\_\_\_\_  
Affirmation (Affidavit) in Opposition and Exhibits Annexed \_\_\_\_\_  
Affirmation (Affidavit) in Reply \_\_\_\_\_

51-66, 69-86, 90  
87-89

Upon the foregoing cited papers, and after oral argument, 1) Plaintiff's Motion for Partial Summary Judgment against defendants on the issue of liability pursuant to Labor Law § 241(6) (motion seq. #2); and 2) Defendants The Loketch Group, 225 Roebing, LLC and Countywide Builders. Inc.'s cross-motion for Summary Judgment, and dismissal of any claims regarding alleged violations of Labor Law §§ 200 and 241(6) (motion seq. #3) are decided as follows:

The underlying Labor Law action was commenced by plaintiff JUNIOR MANUEL MAYORGA ("Plaintiff") who alleges that on September 8, 2017, he suffered injuries to his right eye when a nail he was hammering rebounded and struck his cornea. The construction project took place at 207 South 3<sup>rd</sup> Street, Brooklyn, New York, which was owned by defendant, 225 ROBELING, LLC ("Roebing"), a subsidiary of defendant, THE LOKETCH GROUP, INC. ("Loketch"). Plaintiff alleges that Loketch acted as the overall general contractor for the project with co-defendant COUNTYWIDE BUILDERS, INC. ("Countywide"), which acted as the on-site general contractor and construction manager. By Amended Complaint, Plaintiff attributed his accident to the defendants' alleged violations of Labor Law §§ 200, 240 and 241(6). At the time of the accident, he was employed as a carpenter by third-party defendant, MAGELLAN CONCRETE STRUCTURES CORP. ("Magellan"), a subcontractor hired to perform concrete work for the project.

**Plaintiff's Motion for Summary Judgment (motion seq. #2)**

"Labor Law 241(6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable" (*Fusca v. A&S Construction, LLC*, 84 AD3d 1155 [2d Dept 2011]).

In the instant case, Plaintiff alleges a violation of Industrial Code § 23-1.8(a), entitled "Personal Protective Equipment," as he claims that he was never told to wear safety goggles while working. However, Plaintiff acknowledged that Magellan gave him safety goggles when he was hired, and that he attended his employer's safety meetings. Plaintiff testified during his deposition, that at the time of the accident, he had safety goggles hooked to his belt, but that he did not wear them because a pin was loose on the

arm that was supposed to rest on his ear. On the other hand, Paulo Andre ("Andre"), plaintiff's supervisor at Magellan, testified that all employees were provided safety goggles, and that they were informed that they could obtain new goggles from the shanty. Andre recounted that he told Plaintiff on at least four prior occasions to wear safety goggles while working. Defendants further contend that Plaintiff was the sole proximate cause of the accident, as he could have worn the safety goggles to protect his eyes rather than having it hooked on his belt.

After a meticulous examination of the respective submissions, this Court finds that there are several questions of material fact, including whether Plaintiff was instructed on how to use the goggles; whether he was able to wear the safety goggles at issue and had access to new ones; as well as whether he was a recalcitrant worker that was the sole proximate cause of the accident. Consequently, Plaintiff's motion for partial summary judgment on liability pursuant to Labor Law § 241(6), for the failure to comply with Industrial Code § 23-1.8(a) is denied.

**Defendants The Loketch Group, 225 Roebling, LLC and Countywide Builders, Inc.'s Cross-Motion for Summary Judgment (motion seq. #3)**

As a preliminary matter, the branch of the defendants' cross-motion, which seeks dismissal of Plaintiff's Labor Law § 241(6) claim is denied for the reasons set forth above.


Turning to the remaining branch of the application, Labor Law § 200 codifies an owner's and general contractor's common law duty to maintain a safe work place (*Russin v. Louis N. Picciano & Son*, 54 NY2d 311 [1981]). The party against whom liability is sought must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v. Wenger Contracting Co.*, 91 NY2d

343, 352 [1998]). General instructions and oversight of the quality of the work performed is not enough to impose liability under the statute” (*Dalanna v. City of NY*, 308 AD2d 400 [1<sup>st</sup> Dept. 2003]).

In the instant case, Plaintiff did not refute the defendants’ contentions that Roebing and Loketch did not violate Labor Law § 200; therefore, the claim is **dismissed against them without opposition**. However, the Court finds that there is a triable issue of material fact as to whether Countywide violated the statute. Specifically, Abner Arshadnia (“Arshadnia”), Countywide’s licensed superintendent testified that he was at the construction site on a daily basis, conducted safety inspections, and was responsible for the safety of all workers. Arshadnia also noted that he could instruct an employee to stop working and put on goggles. Thus, the branch of the defendants’ motion which seeks dismissal of Plaintiff’s Labor Law § 200 claim against Countywide is **denied**.

This constitutes the Decision and Order of the court.

ENTER,

  
J. S. C.

HON CAROLYN E. WADE  
JUS ICE OF THE SUPREME COURT

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