Pabon v BDG Gotham Residential, LLC
2022 NY Slip Op 31508(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 153339/2019
Judge: Richard Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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ANTIONETTE PABON,

Plaintiff,

- v -

BDG GOTHAM RESIDENTIAL, LLC,ZDG, LLC,BDG GOTHAM PLAZA, LLC,BDG GOTHAM AFFORDABLE, LLC,

Defendant.

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INDEX NO. 153339/2019

MOTION DATE 05/04/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

BDG GOTHAM RESIDENTIAL, LLC, ZDG, LLC

Plaintiff,

-against-

WESTERN WATERPROOFING COMPANY, INC. D/B/A WESTERN SPECIALITY CONTRACTORS

Defendant.

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Third-Party
Index No. 595296/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment on the issue of liability and defendants' cross motion for summary judgment, dismissing plaintiff's causes of action based on Labor Law §§ 200 and 241(6), are determined as follows:

As a preliminary matter, defendants did not oppose or cross-move with respect to plaintiff's Labor Law § 240(1) claim as it pertains to defendants BDG Gotham Residential, LLC, BDG Gotham Plaza, LLC, and BDG Gotham Affordable, LLC ("BDG"). Likewise, plaintiff did not oppose the dismissal of the negligence and Labor Law § 200 claim, or dismissal of any of the

multiple violations of the Industrial Code listed in the bill of particulars except for §23-1.16(b). As such, plaintiff is granted summary judgment on its Labor Law § 240(1) claim against the BDG defendants, and defendants' cross motion is granted to the extent that the common-law negligence and Labor Law §200 claims are dismissed, as are the Labor Law §241(6) claims predicated on those Industrial Code provisions that have been abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"].

This is an action to recover for damages for personal injuries sustained by an iron worker, Christopher Jackson, on June 25, 2018, when the boom of a falling Jekko Mini-Crane pulled plaintiff and propelled him off the side of building while working at a construction site located at 158th East 126th Street, New York, New York. The remainder of plaintiff's motion and defendants' cross motion, in controversy, pertain to whether plaintiff is entitled to summary judgment on its Labor Law § 240(1) claim against ZDG, LLC ("ZDG"), and whether anyone is entitled to summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code §23-1.16(b).

With respect to plaintiff's § 240(1) claim, it was undisputed that plaintiff's accident fell within the ambit of Labor Law § 240(1) and that plaintiff was entitled to summary judgment against the BDG defendants as owners of the subject premise. With its motion, plaintiff also seeks summary judgment against ZDG, the construction manager of the subject construction project.

Defendants argue that ZDG as construction manager is not a proper Labor Law defendant, such that it may not be liable to plaintiff under Labor Law § 240(1).

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those

> sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [internal citations omitted]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.,* 4 NY3d 861, 863-864 [2005]).

The construction management agreement between BDG and ZDG states in pertinent part, "1.3 Construction manager agrees to provide, perform and supervise all of the construction management services, labor, equipment and materials necessary for the construction and completion of the Project in accordance with this Agreement."

In further support of the motion, plaintiff submitted the deposition testimony of Kevin Hartney, construction superintendent for ZDG. Hartney averred that as construction superintendent he coordinated the trade contractors on site and their schedule of activities and would walk the site and observe the contractors. He verified that an apt description of ZDG's work would be safety, supervision, and quality control. However, he was unsure of if he was responsible for safety, supervision, and quality control with respect to Western Waterproofing Company d/b/a Western Specialty Contractors ("Western"), plaintiff's employer, as he stated it would be dependent on the operation since there are certain things for which ZDG is not qualified. For example, he stated that he is not a qualified rigger. With further respect to safety, he testified that ZDG hired a safety consultant. However, he confirmed that ZDG had the authority and would stop

work at the job site if they witnessed any work being performed in an unsafe manner or with an unsafe piece of equipment.

Thus, plaintiff established that despite the moniker of construction manager, ZDG was BDG's statutory agent and "possessed and exercised supervisory control and authority over the work being done (*Johnson v City of New York*, 120 AD3d 405 [1st Dept 2014] citing *Walls* at 863-864). The fact that the subcontractor agreement between ZDG and Western placed safety and supervision authority on the subcontractor is immaterial as once a defendant becomes the agent of the owner, it cannot "escape liability by delegating its work to another entity" (*see Tomyuk v Junefield Assoc.*, 57 AD3d 518 [2d Dept 2008]). Accordingly, plaintiff's motion for summary judgment pursuant to Labor Law § 240(1) is granted against all defendants.

Inasmuch as plaintiff is entitled to summary judgment pursuant to Labor Law § 240(1) it is irrelevant whether there was a violation of § 241(6) (*Jerez v Tishman Constr. Corp. of NY*, 118 AD3d 617 [1st Dept 2014]). Nevertheless, with respect to summary judgment on the Labor Law § 241(6) claim, § 241(6) provides, in pertinent part, as follows:

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 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 Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-*

Palmer Hydro-Electric Co., 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*see Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Industrial Code 12 NYCRR 23-1.16(b)

Industrial Code § 12 NYCRR 23-1.16(b) governs "Safety belts, harnesses, tail lines and lifelines." It is sufficiently specific to support a Labor Law § 241 (6) claim (*see Anderson v MSG Holdings, L.P.*, 146 AD3d 401 [1st Dept 2017]). Section 23-1.16(b) provides the following:

> "Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Here, plaintiff's counsel alleges that the plaintiff's harness was inadequate in that he fell approximately 30 feet (*see Stigall v State*, 189 AD3d 469 [1st Dept 2020]; *Jerez*, 118 AD3d 617). Defendants argues that no one has alleged that there was anything wrong with the condition of the harness that caused or contributed to the happening of the accident. They further state that no use of a non-defective harness could have prevented the incident at issue. Nevertheless, it is clear that the "attachments plaintiff was using were clearly not arranged to prevent him from falling more than five feet" (*see Jerez* at 618). Thus, plaintiff is entitled to summary judgment pursuant to Labor Law § 241 (6) with respect to Industrial Code §12 NYCRR 23-1.16(b), and that reciprocal aspect of defendants' cross motion is denied.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment on its Labor Law § 240(1) is granted as against all the defendants; and it is further

ORDERED that plaintiff is entitled to summary judgment with respect to violations of Labor Law § 241 (6) predicated on violations of Industrial Code §12 NYCRR 23-1.16(b); and it is further

ORDERED that defendants' cross motion is granted to the extent that the Labor Law § 241 (6) claims predicated on those Industrial Code provisions deemed abandoned (all but § 12 NYCRR 23-1.16[b]) are dismissed as against all defendants; and it is further

ORDERED that the common-law negligence and Labor Law § 200 claims against the defendants are likewise dismissed; and it is further

ORDERED that the motion and cross motion are otherwise denied; and it is further

ORDERED that the parties appear for a conference in Part 46 via Microsoft Teams on June 15, 2022 at 10:30 AM.

This constitutes the decision and order of this Court.

5/10/2022
DATE

RICHARD LATIN, 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