Fong v Memorial Hosp. for Cancer & Allied Diseases
2022 NY Slip Op 31596(U)
May 18, 2022
Supreme Court, New York County
Docket Number: Index No. 155114/2019
Judge: Lori Sattler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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RAFAEL FONG,

Plaintiff,

- v -

MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES, MEMORIAL SLOAN-KETTERING CANCER CENTER, TURNER CONSTRUCTION COMPANY

Defendant.

INDEX NO. 155114/2019

MOTION DATE 03/09/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44
were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages from a fall from a ladder on a construction site pursuant to Labor Law §§ 240(1), 241(6), and 200, Plaintiff Rafael Fong ("Plaintiff") moves for summary judgment as to liability on his claims against Defendants Memorial Hospital for Cancer and Allied Diseases, Memorial Sloan-Kettering Cancer Center (collectively "Sloan-Kettering"), and Turner Construction Company ("Turner") (collectively "Defendants") and setting the matter down for an assessment of damages. Defendants oppose the motion.

BACKGROUND

This action arises out of an incident that occurred on March 5, 2019, at 530 East 74th Street, New York, New York ("Premises") in which Plaintiff fell from a ladder and sustained injuries while working on the Premises' HVAC system. Sloan-Kettering was the owner of the Premises and had hired Turner to build a new medical facility there. Turner, as general contractor and construction manager for the project, subcontracted Plaintiff's employer, nonparty Heritage Mechanical ("Heritage"), to perform work on the facility's HVAC system. As

construction manager, Turner was responsible for supervising subcontractors and for all "construction means, methods, techniques, and procedures" within the work's scope (NYSCEF Doc. No. 27, Master Agreement, at 27). Nonparty Joshua Clarke ("Clarke") was employed by Turner as an engineer at the time of the incident and was responsible for ensuring that the subcontractors' work complied with the contract. Clarke was also responsible for ensuring that adequate safety devices were provided to Heritage workers working at an elevation (NYSCEF Doc. No. 26, Turner EBT, at 87). Plaintiff was employed as a sheet metal worker for Heritage.

On March 5, 2019, Plaintiff was tasked with sealing the inside of duct work on the second floor of the Premises along with his coworker, nonparty Shantae McBride ("McBride"). The area in which Plaintiff and McBride worked was a chamber within the duct work known as a plenum. Plaintiff stated in his examination before trial that he was responsible for sealing the seams in the upper parts of the plenum and that he used an A-frame ladder to reach the elevation required to perform this task (NYSCEF Doc No. 24, Plaintiff EBT, at 46). Plaintiff testified that the ladder was eight feet tall and that its joints and treads appeared used and that the ladder appeared to be old but not slippery (Plaintiff EBT at 109, 103). He further testified that he did not attempt to use the ladder prior to climbing on it in the plenum (Plaintiff EBT at 103). Plaintiff was unable to recall whether there were rubber feet on the ladder (*id.*).

Plaintiff avers that there was a fire stop – a gap in the concrete floor approximately four inches wide and filled with insulation – along the floor on the side of the plenum where he placed the ladder and that the material inside the fire stop was the same color as the surrounding concrete floor (*id.* at 46, 109). Clarke also testified about the presence of a fire stop inside the plenum but disagrees with Plaintiff about its location within the plenum (Turner EBT at 101). Plaintiff testified that the interior of the plenum was unlit, the only light in the space came from

outside through the louvers, and that "the light coming from the louvers was minimum" (Plaintiff EBT at 214-216). Plaintiff maintains that he inadvertently positioned the back left leg of the ladder over the fire stop as he set up the ladder (*id.* at 115). McBride was not holding the ladder while Plaintiff used it and no bracing device was used on the ladder (NYSCEF Doc. No. 23). Plaintiff testified that a man lift was typically used to allow work at elevations when constructing a fresh air plenum (Plaintiff EBT at 219). He further maintains that a scaffold would normally have been provided to work at elevations in areas with uneven surfaces (*id.*; *see also* Turner EBT at 103).

Plaintiff testified that the accident occurred in the following manner:

> I placed an eight-foot ladder on the narrow side of the plenum, which I was able to reach the side of the plenum where they had to be sealed. As I was climbing the ladder, the rear left leg of the ladder sunked [sic] into the fire stop, causing me and the ladder to fall on my left side. The color of the fire stop blend in with the concrete floor and I had no way of seeing if I had placed the ladder on concrete or fire stop.

(Plaintiff EBT at 109). As a result of his fall, Plaintiff landed on his side and sustained injuries to his elbow and knee (*id.* at 118-119).

DISCUSSION

The party moving for summary judgment bears the initial burden to present sufficient evidence demonstrating the absence of any dispute of material facts to show entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A motion for summary judgment must be denied where the movant fails to make this prima facie showing (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503, *quoting Alvarez* at 324). If the movant makes its prima facie showing, the opposing party bears the burden of producing admissible evidentiary proof to establish the existence of issues of material fact (*Alvarez* at 324; *Tillmon v New York City Hous. Auth.*, 203 AD2d 19, 20-21 [1st Dept 1994]). A court hearing a summary judgment

motion must view the facts in the light most favorable to the nonmoving party (*U.S. Bank Nat'l Ass'n v DLJ Mortg. Cap., Inc.*, 2022 NY Slip Op 01866 [2022], *quoting Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

Labor Law § 240(1)

Labor Law § 240(1) was enacted to protect workers from gravity-related hazards stemming from differences in elevation on worksites (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Section 240(1) requires contractors, owners, and agents who contract for the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" to furnish scaffolding, ladders, and other devices to give proper protection to persons employed in such tasks. Labor Law § 240(1) "places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 (1st Dept 2016). "The single decisive question is whether 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 New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009).

Failure to properly secure a ladder to "ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Montalvo v J. Petorcelli Constr.*, Inc., 8 AD3d 173, 174 [1st Dept 2004], *quoting Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998] [internal quotation marks omitted]; *Fernandez v MHP Land Assocs.*, 188 AD2d 417, 418 [1st Dept 1992]). A violation of Labor Law § 240(1) will be found as a matter of law where the "uncontradicted evidence establishes that [plaintiff] was injured, at least in part, due to the failure of [defendant] to provide adequate safety devices to secure the ladder on which he was working . . ." (*see Montalvo* at 175). Summary judgment is properly granted where

plaintiff establishes through testimony that an injury occurred due to an unsecured ladder suddenly moved (*Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]).

The deposition testimony of Plaintiff, corroborated by his partner McBride, shows that Plaintiff was injured in a fall from an A-frame ladder during the course of his employment related duties. Although there are differences in testimony as to the reason the ladder may have been unstable centering around whether a leg was in the fire stop, it is undisputed that the ladder was not secured by someone holding it and it was not secured to the wall. Both Plaintiff and Clarke acknowledged that a scaffold or a man lift might have been used for this type of elevation work in a plenum thus indicating that there may have been additional safety devices that could have prevented the injury.

Defendants do not show the existence of an issue of material of fact with respect to the adequacy of the ladder or the accident's causation. They do not dispute that Plaintiff fell from the ladder or that the ladder was unsecured (*cf. Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437, 438 [1st Dept 2022] ["there is nothing in the record that contradicts plaintiff's version of the accident or raises an issue as to his credibility."]).

Defendants further fail to raise an issue of as to whether that Plaintiff was the sole proximate cause of his accident. They merely speculate without providing proof that Plaintiff fell because he lost his balance, misused the ladder, or placed the ladder negligently (*see, e.g.*, *White v 31-01 Steinway, LLC*, 165 AD3d 449, 451 ["The manner in which plaintiff set up and used the ladder does not constitute evidence that plaintiff was the sole proximate cause of the accident as there is no dispute that the ladder was unsecured and that no other safety devices were provided to plaintiff."]; *Lopez v Melidis*, 31 AD3d 351 [holding that plaintiff was entitled

to summary judgment where "[d]efendants adduced no evidence to support their argument that plaintiff's conduct was the sole proximate cause of his accident."]).

Additionally, Defendants' assertion that Plaintiff contributed to his fall and injury is unable to defeat Plaintiff's Section 240(1) claim as contributory negligence is not a defense to a Labor Law §240(1) claim (*Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]).

That branch Plaintiff's motion seeking summary judgment based on Labor Law § 240(1) is granted as Plaintiff has submitted sufficient evidence to demonstrate the absence of any dispute of material facts.

Labor Law § 241(6)

Plaintiff's motion for summary judgment as to his Labor Law § 241(6) cause of action is denied. Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection' to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a claim under § 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-02 [1993]). Furthermore, the applicable rule or regulation must be a "specific, positive command . . . rather than a reiteration of common-law standards . . . ." (*Rizzuto* at 349, *quoting Ross* at 504 [internal citations and quotation marks omitted]).

Here, Plaintiff alleges that Defendants violated Industrial Code Section 23-1.21 due to their purported failure to secure the ladder and Section 23-1.30 due to their failure to provide adequate lighting (12 NYCRR 23-1.21(b)(1), (b)(3), (b)(4)(iv), (e)(2), (e)(3) and 12 NYCRR 23-

1.30, respectively). Only Defendants' purported violations of 12 NYCRR 23-1.21(e)(3) and 23-1.30 can support a Section 241(6) claim in this case. However, there are disputes of material issues of fact about whether Defendants violated these regulations that make summary judgment inappropriate.

The Court finds that Plaintiff fails to make a prima facie showing that Defendants' purported violation of Industrial Code Sections 23-1.21(b)(1), (b)(3), (b)(4)(iv), or (e)(2) proximately caused the accident. Plaintiff does not allege that the ladder or its components broke because of their inability to support his weight in violation of 12 NYCRR 23-1.21(b)(1). He also does not allege that there was a broken member or part of the ladder that caused or contributed to his accident in violation of Section 23-1.21(b)(3) (*see* Plaintiff EBT at 103). Plaintiff fell from an A-frame ladder, not a "leaning ladder" regulated by Section 23-1.21(b)(4)(iv), rendering this section inapplicable (Plaintiff EBT at 79). Finally, the requirement in Section 23-1.21(e)(2) that standing stepladders have proper bracing and be used in an open position cannot support a finding that Defendants violated Section 241(6) because the rule "does not set forth a concrete regulatory violation sufficient to sustain a cause of action under Labor Law § 241(6)" (*Fairchild v Servidone Constr. Corp.*, 288 AD2d 665, 667 [1st Dept 2001]).

Plaintiff further contends that Defendant is liable under Section 241(6) because they violated Section 23-1.21(e)(3) of the Industrial Code. This rule provides, in relevant part, that "[s]tanding stepladders shall be used only on firm, level footings" (12 NYCRR 23-1.21[e][3]). The Court finds that Plaintiff is unable to show the absence of a dispute of material fact with respect to the condition of the ladder's footings. Although Plaintiff testified that he used the ladder on uneven footings, specifically the fire stop, Clarke's testimony disagrees with Plaintiff about the precise location of the fire stop inside the plenum (*see* Turner EBT at 101 ["The

fireproofing would have been between the concrete and the vertical wall towards the left area"]). Defendants can show a dispute of material fact as to whether the ladder was placed on uneven footings. Summary judgment is therefore denied as to this branch of Plaintiff's motion based on Defendants' purported violation of 12 NYCRR 23-1.21(e)(3).

The Court finds that Plaintiff fails to make a prima facie showing as to whether the level of light in the plenum fell below the statutory minimum in violation of Industrial Code Section 23-1.30. Section 23-1.30 requires that work spaces have "[i]llumination sufficient for safe working conditions" with a minimum level of light of "10 foot candles in any area where persons are required to work . . . ." Although Plaintiff testified that there was no light source within the plenum, he also maintained that some light entered the plenum from outside (NYSCEF Doc. No. 23, Plaintiff EBT at 215 ["the light coming from the louvers was minimum"]). His testimony does not indicate whether the level of light fell below the regulation's requirement of at least 10 foot candles and he presents no other evidence that would tend to show a regulatory violation (*see Cahill v Tribolroguh Bridge & Tunnel Auth.*, 31 AD3d 347, 350 ["vague testimony was insufficient to create an inference that the amount of lighting fell below the specific statutory standard"]). Plaintiff's motion for summary judgment on his Section 241(6) cause of action based on Defendants' alleged violation of 12 NYCRR 23-1.30 is denied.

Labor Law § 200

Plaintiff argues that Defendants are liable under Labor Law § 200 and common law negligence because they caused dangerous premises conditions in Plaintiff's workspace, specifically a lack of lighting and dangerous flooring. Plaintiff further contends that Defendants are liable because they exercised control over the manners and means of Plaintiff's work.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where a dangerous premises condition or existing defect causes an injury, "liability attaches if the owner or general contractor created the condition . . . ." (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012]). Plaintiff fails to set forth a sufficient factual basis to demonstrate that Turner or Sloan-Kettering caused the allegedly dangerous conditions or that they had actual or constructive notice of a dangerous or defective condition.

It is well settled that "[w]here the injury as caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca* at 144). An owner or general contractor will not be liable under a method and means theory where they "at most exercised general supervisory powers over [the] plaintiff" (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). The "mere presence" of an owner or general contractor's personal on a work site is "insufficient to infer supervisory control" (*id.*; *Philbin v A.C. & S., Inc.*, 25 AD3d 374 [1st Dept 2006]).

Plaintiff fails to show that Sloan-Kettering exercised control over the method and means of his work. He does not demonstrate that Sloan-Kettering employees exercised this level of supervision over work at the Premises. Clarke's testimony that Sloan-Kettering personnel visited the job site periodically and that they possibly discussed Heritage's work is insufficient to show anything more than Sloan-Kettering's exercise of general supervisory control. Summary judgment on Plaintiff's Section 200 and common law claims are therefore denied against Sloan Kettering.

The branch of Plaintiff's motion seeking summary judgment against Turner on his Section 200 cause of action is granted. Plaintiff demonstrates that Turner, as general contractor, exercised control over the manner and means of Plaintiff's work. Turner was responsible for supervision and direction of subcontractors. The Master Agreement between Turner and Sloan-Kettering provides that the "Construction Manager shall supervise and direct the Work using the skill and attention of a highly experienced, expert construction manager . . . . be responsible for all construction means, methods, techniques, and procedures within the Scope of the Work . . . ." (NYSCEF Doc. No. 27 at 27). Specifically, Clarke testified that he and other Turner personnel were responsible for ensuring that Heritage employees were provided with safety equipment for working at heights on the day of the incident (Turner EBT at 87). Additionally, Clarke was the "first point of contact" for Heritage employees seeking to employ ladders and that he was responsible for issuing permits for the use of ladders along with other Turner employees (*id*. at 82-86).

Turner argues that it did not exercise supervisory control or input into Plaintiff's work (NYSCEF Doc. No. 35 at 13). In support of its position, Turner cites Clarke's testimony that he was responsible for ensuring that Turner's subcontractors were performing work in conformity with the contract requirements (*id*; Turner EBT at 30-33). Turner further maintains that Clarke only undertook informal inspections of Heritage's work, that Turner expected Heritage to ensure that its work area was safe, and that adequate elevation safety equipment was in place (NYSCEF Doc. No. 35, *citing* Turner EBT at 66-68).

However, Turner fails to present sufficient evidence to rebut Plaintiff's showing that Turner exercised supervisory control over Plaintiff's injury-causing work. Specifically, their own engineer testified that he was responsible for ensuring that Heritage employees had

elevation safety equipment and that he was the "point of contact" for approving the use of ladders by Heritage employees. Turner cites no evidence that contradicts Clarke's statements. Plaintiff therefore shows the absence of an issue of material fact as to whether Turner exercised more than "general supervisory powers" over Heritage employees and is entitled to summary judgment on his Section 200 cause of action against Turner (*Foley* at 477).

CONCLUSION

Accordingly, it is hereby:

ORDERED that the branch of Plaintiff's motion that seeks summary judgment in Plaintiff's favor as to liability on Plaintiff's Labor Law § 240(1) cause of action against Defendants Memorial Hospital for Cancer and Allied Diseases, Memorial Sloan-Kettering Cancer Center, and Turner Construction Company is granted; and it is further

ORDERED that the branch of Plaintiff's motion that seeks summary judgment in Plaintiff's favor as to liability on Plaintiff's Labor Law § 241(6) cause of action against Defendants Memorial Hospital for Cancer and Allied Diseases, Memorial Sloan-Kettering Cancer Center, and Turner Construction Company is denied; and it is further

ORDERED that the branch of Plaintiff's motion that seeks summary judgment in Plaintiff's favor as to liability on Plaintiff's Labor Law § 200 and common law causes of action against Defendants Memorial Hospital for Cancer and Allied Diseases and Memorial Sloan-Kettering Cancer Center is denied; and it is further

ORDERED that the branch of Plaintiff's motion that seeks summary judgment in Plaintiff's favor as to liability on Plaintiff's Labor Law § 200 and common law causes of action against Defendant Turner Construction Company is granted; and it is further

ORDERED that Plaintiff shall file the Note of Issue by June 17, 2022; and it is further

ORDERED that counsel shall contact the Court to address any unresolved discovery issues or to request a settlement conference.

This constitutes the Decision and Order of the Court.

5/18/2022
DATE

LORI SATTLER, 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