

Lagrippo v 95th & Third LLC
2022 NY Slip Op 32307(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 160806/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **12**

Justice

-----X

LOUIS LAGRIPPO,

Plaintiff,

- v -

95TH AND THIRD LLC,
GILBANE RESIDENTIAL CONSTRUCTION, LLC

Defendant.

-----X

INDEX NO. 160806/2018

MOTION DATE _____

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 72, 77, 78, 79, 80, 81, 83

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 82

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

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing plaintiff's Labor Law §§ 240(1), 241(6), and 200 and common law negligence claims. (Mot. seq. one). Plaintiff opposes.

By notice of motion, plaintiff moves for partial summary judgment on liability against defendants. (Mot. seq. two). Defendants oppose.

I. STATEMENTS OF MATERIAL FACTS (NYSCEF 62, 70)

The following pertinent facts are undisputed:

(1) On July 6, 2018, the accident date, plaintiff had been employed by Jantile, Inc., as a marble laborer for over one year;

(2) He had been working on the construction site at issue for approximately four months before the accident;

(3) On the accident date, plaintiff was working in an apartment at the building under construction, and he and his work partner were cutting a marble slab;

(4) The slab was going to be installed on the back wall of the bedroom behind the toilet area;

(5) The slab, which measured approximately four feet by three feet and weighed 130 pounds, had already been cut before the accident;

(6) After it was cut, plaintiff and his partner wheeled it into the master bedroom using a two-wheel dolly;

(7) Plaintiff's partner applied epoxy adhesive to the wall behind the toilet in order to adhere the slab to the wall;

(8) Plaintiff's tools that day consisted of a pry bar and two suction cups, and he was required to use pry bars, screwdrivers, and scrapers to install the slab, which equipment was provided to him by Jantile;

(9) On prior jobs, but not at this one, plaintiff had been given other tools to lift marble slabs, including chain blocks, baker scaffolds, and genie jacks;

(10) Plaintiff would not have been able to use a chain block for the particular task he was doing on the accident date as it would have wrecked the bathroom and there was no way to rig the block in the bathroom, and he had never used a genie jack that would have fit the bathroom's dimensions;

(11) According to plaintiff's foreperson, a Baker scaffold was not the proper device for use for installation of the marble at the premises, and the only appropriate way to install the slabs in the bathrooms was manually, using suction cups to lift the slab and place it on the wall;

(12) Without a scaffold or other equipment, plaintiff and his partner had to lift the slabs manually while standing on buckets;

(13) Plaintiff's foreperson never requested a scaffold from defendants as it was not the proper equipment needed for installing the slabs within the bathrooms' dimensions;

(14) Right before the accident, plaintiff and his partner had already affixed a slab to the lower portion of the wall behind the toilet space;

(15) Plaintiff and his partner took another slab from the dolly, placed it on the turned-over buckets on the ground, which were approximately 15 inches tall, and placed two suction cups on the slab;

(16) Plaintiff and his partner lifted the slab, with plaintiff lifting the left side; in order to affix it to the wall, it had to be lifted about two feet above the bucket; and

(17) While lifting it, plaintiff felt a strain his right arm/bicep; he later learned he had suffered a torn bicep muscle.

It is undisputed that the slab never came in contact with plaintiff, that nothing fell on him, and that he did not fall off of anything. It is also undisputed that defendant Gilbane Residential Construction LLC was the general contractor on the project, and that its superintendent had the authority to stop unsafe work practices, but only supervised Gilbane employees, and that defendant 95th and Third LLC was the premises owner.

II. LABOR LAW § 200 AND COMMON LAW NEGLIGENCE CLAIMS

Absent evidence that defendants supervised plaintiff's work at the premises, defendants establish that they are entitled to dismissal of plaintiff's Labor Law § 200 and common law negligence claims, and plaintiff raises no triable issue in opposition. To the extent that Gilbane's superintendent conclusorily testified that he supervised Gilbane workers, who in turn supervised

the subcontractors' employees, he clarified his testimony in his affidavit to provide that he never supervised Jantile employees or plaintiff's work, and plaintiff did not testify that he was supervised by anyone other than his Jantile foreperson. (*See e.g., Gonzalez v DOLP 205 Props. II, LLC*, AD3d , 2022 WL 2124862 [1st Dept 2022] [mere authority to supervise work insufficient; liability depends on actual supervision over injury-producing work]).

III. LABOR LAW § 241(6) CLAIM

Pursuant to section 241(6) of the Labor Law, owners and contractors bear a non-delegable duty to provide reasonable and adequate protection and safety to workers. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013]). Plaintiff relies on the following rules and regulations as the bases for his Labor Law § 241(6) claim: 12 NYCRR §§ 23-6.1 and 23-1.16. He is deemed to have waived his claims as to any other regulations.

As 12 NYCRR § 23-1.16 requires that safety belts or harnesses be used to ensure that an employee fall no more than five feet, and as plaintiff neither fell nor was at risk of falling more than five feet from the bucket, which stood approximately 15 inches tall, this provision is inapplicable. Section 23-6.1 is also inapplicable, as it relates generally to hoisting equipment, but does not require its use in any particular manner, and here, no hoisting equipment was being used or operated by plaintiff. (*See e.g., Martinez v 342 Prop. LLC*, 128 AD3d 408 [1st Dept 2015] [plaintiff's accident did not arise from operation or loading of hoisting equipment]).

IV. LABOR LAW § 240(1) CLAIM

Pursuant to Labor Law § 240(1):

All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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, 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.” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute protects workers against “‘special hazards’ that arise when the work site is either elevated or positioned below the level where ‘materials or load [are] hoisted or secured.’” The special hazards are “limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.” (*Ross*, 81 NY2d at 502).

Liability under Labor Law § 240(1) requires a showing that either safety equipment was provided but was defective or that no such equipment was provided and should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

That plaintiff’s injury occurred while he was lifting the slab a few feet from the ground does not establish that it resulted from an elevation-related danger. Plaintiff did not fall, nor did anything fall on him or even touch him. Rather, the risk of straining or tearing a muscle while lifting a heavy object constitutes the type of ordinary risk and injury that may occur at a

construction site. (*See e.g., Sawczyn v New York Univ.*, 158 AD3d 510 [1st Dept 2018] [Labor Law 240(1) claim should have been dismissed where plaintiff was injured when cart he was rolling slipped and descended several feet and pulled on plaintiff's arms, causing his injury; distance cart fell was insignificant and as plaintiff did not himself fall, injury was not caused by failure to protect him from elevation-related risk]).

The facts here are similar to those in *Schwab v A.J. Martini Inc.*, where the plaintiff was standing on a scaffold, when he reached down to grab a bucket of plaster from a worker below, and the worker let go of the bucket, causing the plaintiff's hands and upper body to jerk downward, injuring him. The plaintiff alleged that his injury resulted from a gravity-related hazard and the absence of a suitable hoist. The Court held that:

The fact that plaintiff was working at an elevation when the object allegedly "fell" is irrelevant to a "falling object" analysis, as the risk that plaintiff's co-worker might drop his end of the heavy bucket or that plaintiff's arm might be pulled down by the weight of the bucket existed regardless of whether plaintiff was standing on a scaffold or elevated site. Clearly, the bucket that plaintiff was grabbing from his co-worker below did not constitute a falling object as it could not be said that the bucket fell "up" onto plaintiff, and plaintiff's work site was not "positioned below the level where 'materials or load [are] hoisted or secured' Consequently, even if plaintiff's injuries were caused by the absence of a hoist or other safety device, they were not the result of the limited type of elevation-relation hazards encompassed by Labor Law 240(1), and there is no basis for liability under that statute. Rather, we find that plaintiff's injuries resulted from "the type of 'ordinary and usual' peril a worker is commonly exposed to at a construction site".

(288 AD2d 654, 65-656 [3d Dept 2001] [citations omitted]; *see also Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630 [1st Dept 2022] [Labor Law 240(1) claim dismissed where plaintiff was lifting lid of gang box when it fell suddenly, causing injury to his shoulders, although lid did not hit plaintiff; plaintiff was standing at same level as box when lid fell and it did not strike him, and lifting of lid represented usual and ordinary dangers of construction site]).

While plaintiff now claims that his injury occurred because the overturned bucket was an inadequate safety device and that it wobbled, thus causing him to tear his muscle, there is no evidence that the alleged wobbling caused him to strain his arm. That he was standing on the bucket when he attempted to lift the slab is unrelated to the mechanism of his injury, which occurred due to the slab’s weight. In *Portillo v DRMBRE-85 Fee LLC*, by contrast, the plaintiff was injured when the bucket on which he was standing, tipped over and caused him to fall. (191 AD3d 613 [1st Dept 2021]). In both *Ferguson v Durst Pyramid, LLC*, (178 AD3d 634 [1st Dept 2019]), and *Valdez v City of New York*, 189 AD3d 425 [1st Dept 2020]), the plaintiff also fell. Plaintiff cites no case on point.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ motion for summary judgment is granted (mot. seq. one), and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff’s motion for summary judgment is denied (mot. seq. two).

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 BARBARA JAFFE, J.S.C.

7/15/2022
 DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: