

Calle v WBB Constr., Inc.

2022 NY Slip Op 32457(U)

January 28, 2022

Supreme Court, Queens County

Docket Number: Index No. 712605/2015

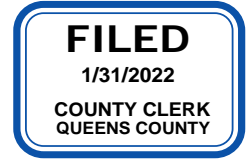
Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101



P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

HERNAN CEVALLOS CALLE,

Index No.: 712605/2015

Plaintiff,

Motion Date: 1/27/22

- against -

Motion No.: 8

WBB CONSTRUCTION, INC. and MADISON 33
OWNER LLC,

Motion Seq.: 5

Defendants.

- - - - - x

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR § 3212, granting plaintiff summary judgment against defendants on his Labor Law § 240(1) cause of action; and on this cross-motion by defendants for an Order pursuant to CPLR § 3212, dismissing plaintiff's Labor Law §§ 241(6) and 200 causes of action:

	Papers Numbered
Notice of Motion-Affirmation-Memo. of Law-Exhibits....EF	47 - 59
Notice of Cross-Motion-Affirmation-Exhibits- Memo. of Law.....EF	61 - 66
Reply Affirmation.....EF	69 - 71

This personal injury action arises out of a construction accident that occurred on October 21, 2015 at the premises located at 172 Madison Avenue, New York, New York. At the time of the accident, defendant Madison 33 Owner LLC (Madison 33) was the owner of the premises. WBB Construction, Inc. (WBB Construction) was the general contractor.

Plaintiff commenced this action by filing a summons and complaint on December 7, 2015. Defendants joined issue by service of an answer on February 2, 2016. Plaintiff now moves for summary judgment on his Labor Law § 240(1) claim. Defendants cross-move to dismiss plaintiff's Labor Law §§ 241(6) and 200 claims.

At his examination before trial, plaintiff testified that he was involved in an accident on October 21, 2015 while working on a construction project located at 31st Street and Madison Avenue. He was employed by Sky Materials as a carpenter and welder's assistant. On the day of the accident, he was instructed to work on the eleventh floor of the building. His foreman instructed him to cut down a piece of wood that was attached to a wall. The piece of wood was approximately three meters above the floor. He needed a ladder to perform the task. He set up a six-foot tall aluminum A-frame ladder below the piece of wood. Prior to ascending the ladder, he asked his foreman to hold the ladder. His foreman said to cut down the wood, nothing is going to happen. He climbed to the fourth rung of the five-rung ladder. He cut the piece of wood with a sawzall. After he cut the wood, the wood fell, struck him in the leg, and then struck the ladder. The ladder moved and both he and the ladder fell to the ground.

Joshua Jacobson, who worked as an assistant project manager for WBB Construction at the subject premises in October 2015, testified that WBB Construction was the general contractor. WBB Construction's role was to supervise all the subcontractors and oversee the project. WBB Construction hired all the subcontractors. A site safety company, Safety and Quality Plus, Inc., was hired by WBB Construction to ensure safety on the jobsite. A representative from Safety and Quality Plus, Inc. would walk the jobsite daily and had the authority to stop the work of the subcontractors if that work was being performed in an unsafe manner. Sky Materials was one of the subcontractors on the site. Sky Materials was to perform excavation, pour concrete, and build out the floors of the building. He had no knowledge of the subject accident.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "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 v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]).

Here, plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) by submitting evidence that he was standing on a ladder, cutting a piece of wood, the wood fell, striking him and the ladder, and causing him and the ladder to fall to the ground. Thus, plaintiff submitted evidence demonstrating that he was caused to sustain injuries due to the absence of adequate safety devices to protect him from falling (see Churaman v C&B Elec., Plumbing & Heating, Inc., 142 AD3d 485 [2d Dept. 2016][plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim when he cut a vertical beam, the ceiling joist fell, striking him on the head and shoulder, causing him to fall off the ladder]; Robinson v Bond St. Levy, LLC, 115 AD3d 928 [2d Dept. 2014][plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim when he was removing duct work from the ceiling, the metal duct work struck him in the back, knocking both him and the ladder to the ground]).

In opposition, defendants submit the deposition testimony of Victor Calle, an employee of Sky Materials. Mr. Calle testified that he gave plaintiff the instruction to cut the piece of wood. he first testified that the piece of wood was six feet off the ground and did not require a ladder to reach. He then testified that he could not estimate how high off the ground the wood was. There were no ladders on the floor on which plaintiff was working at the time he was instructed to cut the wood. He was not observing plaintiff cut the subject piece of wood. He did not see the accident occur.

Based on Mr. Calle's testimony, defendants contend that summary judgment must be denied as Mr. Calle's testimony contradicts plaintiff's testimony. However, as Mr. Calle did not witness the accident, defendants failed to raise an issue of fact. Thus, no evidence has been submitting contradicting plaintiff's account of the accident, and plaintiff is entitled to summary judgment on his Labor Law § 240(1).

Regarding the cross-motion, Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the

work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]; Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]; Miranda v City of New York, 281 AD2d 403 [2d Dept. 2001]). To support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation that is both concrete and applicable given the circumstances surrounding the incident (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]). Plaintiff only opposes that branch of the cross-motion seeking to dismiss violations of Industrial Code §§ 23-1.21(b) (3) (iv) and (b) (4) (ii).

12 NYCRR § 23-1.21(b) (3) (iv) provides that a "ladder shall not be used if. . . it has any flaw or defect of material that may cause ladder failure". 12 NYCRR § 23-1.21(b) (4) (ii) provides that "[a]ll ladder surfaces shall be firm. Slippery surfaces and insecure objects. . . shall not be used as ladder footings."

Here, there is no evidence that the ladder was broken, loose, old or worn. Plaintiff merely testified that he did not know if the ladder had feet or any type of rubber pads or footing on the bottom. Additionally, there is no evidence that the ladder was placed on a slippery surface or insecure object. Accordingly, plaintiff's Labor Law Labor Law § 241(6) shall be dismissed.

It is well-settled that liability for negligence will attach pursuant to common-law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of defects or dangers in the methods or materials of the work, and only if the owner, contractor or agent exercised supervision and control over the work performed at the site (see Pirotta v EklecCo., 292 AD2d 362 [2d Dept. 2002]; Kobeszko v Lyden Realty Investors, 289 AD2d 535 [2d Dept. 2001]; Giambalvo v Chemical Bank, 260 AD2d 432 [2d Dept. 1999]).

Here, defendants established that they did not exercise supervision and control over the work performed (see Ortega v Puccia, 57 AD3d 54, 61 [2d Dept. 2008] ["when the manner of work is at issue, no liability will attach to the owner solely because he or she may have had notice of the allegedly unsafe manner in which the work was performed"] [internal quotation marks omitted]). Mr. Jacobson testified that he did not provide any instructions to Sky Materials workers. Plaintiff admitted upon examination before trial that he was given instructions regarding his work at the subject premises solely by Mr. Calle, a fellow employee of Sky Materials. Plaintiff's testimony alone

unequivocally demonstrates that none of the defendants directed, controlled or supervised his work. Moreover, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (see Ortega v Puccia, 57 AD3d 54 [2d Dept. 2008]). As such, plaintiff's Labor Law § 200 claim shall also be dismissed.

Accordingly, for the reasons stated above, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim is granted; and it is further

ORDERED, that defendants' motion for summary judgment, dismissing plaintiff's Labor Law §§ 240(1) and 200 claims is granted.

Dated: Long Island City, NY
January 28, 2022

Robert J. McDonald

ROBERT J. McDONALD
J.S.C.

