

Patterson v W2005/Hines W. Fifty Third Realty LLC

2022 NY Slip Op 32680(U)

August 8, 2022

Supreme Court, New York County

Docket Number: Index No. 156402/2017

Judge: Alexander Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

-----X

CARL PATTERSON, LATASHA PATTERSON,

Plaintiff,

- v -

W2005/HINES WEST FIFTY THIRD REALTY LLC,
LENDLEASE (US) CONSTRUCTION LB INC., UNIVERSAL
BUILDERS SUPPLY, INC.

Defendants.

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INDEX NO. 156402/2017
MOTION DATE 11/09/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

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

Upon the foregoing papers, plaintiff moves for partial summary judgment on his Labor Law § 240 (1) and § 241 (6) claims. Defendants cross move for summary judgment dismissing the complaint in its entirety. For the reasons set forth below both applications are granted and denied in part.

BACKGROUND

Plaintiff commenced the instant action seeking damages for personal injuries allegedly sustained on January 5, 2017, at a construction site while employed as a shop steward by non-party Exterior Wall and Buildings (NYSCEF Doc. No. 49 [plaintiff’s deposition transcript] page 34, 3-5).

In support of plaintiff’s motion, plaintiff submits his affidavit, his examination before trial (EBT) testimony, and the EBT testimony of Matthew Ross, the environmental health and safety operations manager of defendant Lendlease Construction.

Plaintiff's EBT Testimony

Plaintiff testified that he was involved in an accident on January 5, 2017, while working at a construction site located at 53 West 53rd Street, as a shop steward employed by Exterior Wall and Buildings (NYSCEF Doc. No. 49 [plaintiff's deposition transcript] page 34, 3-5). Exterior was employed to clean up the construction site – “total demolition, total janitorial from all trades” (*id.* at 34, 13-16). Plaintiff's duties as a shop steward were to clean the bathrooms which spanned from the 65th floor to the sub-cellar of the building (*id.* at 32, 12-22). On the day of the accident plaintiff boarded one of the two hoists on the job site to travel to the 8th floor (*id.* at 33, 20-25). The hoist stopped on the 8th floor and plaintiff proceeded to exit as he lifted the hoist gate door, however, a cable holding the hoist gate door popped, causing the gate door to release and fall on plaintiff (*id.* at 42-43, 25-20). The hoist gate door knocked-off plaintiff's helmet and hit his back and neck area, before sending him to the ground (*id.* at 45, 9-22). Plaintiff testified that he rode the hoists about ten, fifteen, to twenty times a day, and he never noticed anything irregular concerning the cable or the hoist, and he never made any complaints about the hoists prior to his accident.

Matthew Ross EBT Testimony

Matthew Ross testified that he was employed by Lendlease Construction as the environmental health and safety operations manager and served as such for 19 years (NYSCEF Doc. No. 50 [Ross deposition transcript] page 7-8, 11-2). Ross testified that Lendlease was the construction manager for the 53 West 53rd Street project and Lendlease oversaw the day-to-day operations and schedules for the project and hired the subcontractors (*id.* at 10, 9-22). Ross further testified that there were 2 friction hoists on the job site and these hoists were provided by subcontractor Universal Builders Supply, Inc. (UBS) (*id.* at 12-14, 23-10). As the provider of the

hoists, UBS provided monthly maintenance and inspected the hoists every morning before they were run. If any issues were noticed, the defective hoist would not be used until it was fixed (id. at 16, 4-17). Ross was first made aware of plaintiff's accident when he watched a metal plate from the hoist door fall about 8 stories and land near the loading deck where Ross was waiting for a hoist car to travel upstairs, on the date of the accident (id. at 20, 3-16). Ross testified the hoist company closed off the mesh on the hoist door for winter protection and this made the door heavier (id. at 22, 6-21). As the door was heavier, it was no longer balanced with the counterweight, so the hoist company added additional weight to balance out the added weight (id.). As for plaintiff's accident, Ross met with plaintiff to investigate the incident. Ross traveled with plaintiff to the on-site nurse and learned that plaintiff was injured as he tried to exit the hoist and the hoist gate door hit him on the head, back, and neck (id. at 37-38, 8-18). After this incident all the hoists were taken out of service and inspected before they were used again (id. at 24, 11-15).

DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The “evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). “In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist” (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion “should not be granted where there are facts in dispute,

where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Labor Law § 240 (1)

“Section 240 (1) of the Labor Law, often referred to as the ‘scaffold law,’ provides that ‘[a]ll contractors and owners and their agents’ engaged in cleaning a building or structure shall furnish or erect proper scaffolding, ladders and similar safety devices to protect employees in the performance of the work” (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]). It “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” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993] [emphasis removed]). “[Courts] have adhered to the bedrock principle that the statute is to be construed liberally to achieve its purpose of protecting workers” (O’Brien v Port Auth. of NY & NJ, 29 NY3d 27, 35-36 [2017] [Rivera, J., dissenting]).

Plaintiff argues he is entitled to judgment as a matter of law as defendants failed to provide him with an adequate safety device. According to plaintiff a hoist qualifies as an enumerated safety device under Labor Law § 240 (1), and defendants violated said section as the cable on the hoist gate door snapped, causing the hoist gate door to fall and injure plaintiff. Defendants argue in opposition that the work performed by plaintiff did not impose an elevated risk necessitating safety devices of the kinds enumerated in Labor Law § 240 (1), and this prevents plaintiff’s recovery.

As an initial matter, the Court finds that plaintiff met his burden demonstrating Labor Law § 240 (1) liability is applicable to these facts. The statute “imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury,” and “does not require that the owner exercise supervision or control over the worksite

before liability attaches” (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559-60 [1993]). Here, the record clearly demonstrates that defendants failed to furnish a hoist that was “constructed, placed and operated as to give proper protection” to plaintiff (Labor Law § 240 [1]). Defendants argue the work plaintiff performed as a cleaner did not impose an elevated risk necessitating the safety devices covered by Labor Law § 240 (1), however, this is misguided. As testified by plaintiff, his responsibility was to clean the bathrooms on the construction job site. As a shop steward plaintiff cleaned the bathrooms from the 65th floor to the sub cellar of the building (NYSCEF Doc. No. 49 [plaintiff’s deposition transcript] page 32, 12-22). The type of cleaning plaintiff was engaged in while on an active construction site affords him the protections covered by Labor Law § 240 (1).

“[A]n activity cannot be characterized as ‘cleaning’ under the statute, if the task: (1) is routine, in the sense that...the...job [] occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction” (Soto v J. Crew Inc., 21 NY3d 562, 568–69 [2013]).

“Whether the activity is ‘cleaning’ is an issue for the court to decide after reviewing all of the factors” and the Court finds that plaintiff was engaged in the activity of cleaning for the purposes of Labor Law § 240 (1) (*id.*).

The Court also finds that plaintiff meets the second hurdle under Labor Law § 240 (1) which is “proof in admissible form that the task [plaintiff] had been assigned necessarily created ‘an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against’” (Soto v J. Crew Inc., 21 NY3d 562, 567 [2013] quoting Broggy v Rockefeller Grp., Inc., 8 NY3d 675, 681 [2007]).

For plaintiff to perform his job he was required to travel to different floors using a hoist, which is recognized as an enumerated safety device under Labor Law § 240 (1), which therefore placed a duty on defendants to make sure the hoist was properly furnished or erected. That the hoist proved to be defective and caused personal injury to plaintiff allows his Labor Law § 240 (1) claim to stand. “Labor Law § 240 (1) applies to tasks that, inter alia, involve a significant inherent risk ‘because of the relative elevation . . . at which materials or loads must be positioned or secured’ (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]). ‘Thus, for section 240 (1) to apply, . . . [a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute’ (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001] [emphasis removed])” (Cammon v City of New York, 21 AD3d 196, 200 [1st Dept 2005]). Therefore, the Court finds the work plaintiff was engaged in did impose an elevated risk necessitating safety devices of the kinds enumerated in Labor Law § 240 (1).

Contrary to defendant’s argument the height differential when considering the fall of the object in this matter cannot be considered de minimis. For Labor Law § 240 (1) applies even when the subject device falls only a few feet (see Marrero v 2075 Holding Co. LLC, 106 AD3d 408, 409 [1st Dept 2013] [height differential was not de minimis because of the force generated during descent]; Kempisty v 246 Spring St., LLC, 92 AD3d 474 [1st Dept 2012] [“elevation differential cannot be considered de minimis when the weight of the object being hoisted is capable of generating [] extreme force]; McCallister v 200 Park, L.P., 92 AD3d 927, 928–29 [2d Dept 2012] [“given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis”]). Plaintiff testified that it required the assistance of four individuals to lift the hoist gate door after it fell (NYSCEF Doc. No. 49 [plaintiff’s

deposition transcript] page 43, 21-23). Though the exact height of the hoist gate door when it fell is unknown, the elevation differential cannot be considered de minimis given the amount of force the hoist gate door generated when the support cable popped. For these reasons the Court finds that plaintiff met his burden demonstrating Labor Law § 240 (1) liability is applicable to the defendants.

Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501–02 [1993]; Everitt v Nozkowski, 285 AD2d 442, 443 [2d Dept 2001]). As with Labor Law § 240 (1), the duty imposed under Section 241 (6) is nondelegable (Ross, 81 NY2d at 502-503).

Plaintiff argues in support of his motion that he is entitled to summary judgment as to liability on his Labor Law § 241 (6) claim because defendants violated 12 NYCRR 23-7.1 (a), 23-7.1 (b), and 23-7.2 (d) (3), in failing to supply him with a hoist entrance door that was durable and securely enforced. In opposition and in support of their cross motion, defendants claim plaintiff’s Labor Law § 241 (6) claims are meritless because 12 NYCRR 23-7.1 (a) and (b) are too general in nature to impose liability. This Court agrees.

As for Rule 23-7.2 (d) (3), defendants argue that it is inapplicable to the facts and there is no evidence, expert or otherwise that suggests the requirements for hoist way doors were not complied with.

Section 23-7.2 (d) (3) provides:

“[h]oistway entrance doors shall be hung to provide durability and shall be securely reinforced.”

Defendant argues there is no evidence, expert or otherwise that suggests the requirements for hoistway doors were not complied with. However, the Court disagrees. 12 NYCRR 23-7.2 (d) (3) requires that the hoistway entrance doors be hung to provide durability and the doors to be securely enforced. Plaintiff testified that the hoist gate door fell and hit his head, back, and neck as he attempted to exit the hoist. Plaintiff also testified that hoist gate door required four individuals to pick up once it fell. Expert testimony is not required to prove that the provision, which requires the temporary hoist gate doors to be hung in a manner that provides durability and is securely reinforced, was not complied with. Therefore, the Court finds that plaintiff met his prima facie burden demonstrating 12 NYCRR 23-7.2 (d) (3) is applicable and was violated by the defendants and defendants failed to show an issue of fact in opposition since defendants offer no material to refute plaintiff's sworn testimony.

Labor Law § 200 & Common Law Claims

Defendants move to dismiss plaintiff's common law negligence and Labor Law § 200 claims arguing that defendants did not supervise the means and methods of plaintiff's work, nor were they on notice of any alleged hazardous condition.

"Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-17 [1981]; see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352-54 [1998]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin, 54

NY2d at 317 [1981]; see Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]).

The Court has considered all other issues raised by the parties and finds them to be without merit.


The Court finds that defendants met their initial burden by relying on, inter alia, the deposition testimony provided by both parties. Neither witness proffered information supporting the argument that defendants had the responsibility or authority to control plaintiff's work. Neither does plaintiff offer any argument in opposition. Therefore, that branch of defendants' motion is granted.

CONCLUSION

It is hereby ORDERED that plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) and § 241 (6) claims are granted in its entirety; and it is further

ORDERED that defendants' cross motion for summary judgment is granted solely to the extent that plaintiff's Labor Law § 200 and common law claim are dismissed; and the cross motion is otherwise denied.

This constitutes the decision and order of the Court.

<u>8/8/2022</u> DATE	 ALEXANDER TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE