

Cuzco v Broome Prop. Owner JV LLC

2022 NY Slip Op 32879(U)

August 15, 2022

Supreme Court, New York County

Docket Number: Index No. 156994/2017

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

DIEGO ALVAREZ CUZCO,

Plaintiff,

- v -

BROOME PROPERTY OWNER JV LLC, TRITON
CONSTRUCTION COMPANY, LLC,

Defendants.

-----X

INDEX NO. 156994/2017

MOTION DATE 04/08/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 51, 52, 53, 54, 55,
56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for SUMMARY JUDGMENT.

On June 21, 2017, plaintiff, Diego Alvarez Cuzco, was employed by non-party Advanced
Construction Solutions (ACS), subcontractors hired by second defendant and general contractor,
Triton Construction Company, LLC. Plaintiff worked with ACS as a laborer/helper in which he
performed a variety of tasks while working on a construction site of a 25-floor, dual tower
residential building. Plaintiff alleges while working on a three-level elevated platform he was
caused to fall and sustain personal injuries when the platform allegedly moved as he was traveling
up the internal ladder of the platform. The platform was attached to the outside architectural wall
of the subject residential building, in which the platforms of the elevated structure come out from
the wall and were capable of ascending in height as the platform was raised, Defendants move for
summary judgment dismissing plaintiff's causes of action pursuant to Labor Law §§ 241 (6), 200,
and common law negligence.

FACTUAL ALLEGATIONS

Plaintiff's deposition

Plaintiff testified that he was involved in an accident on June 21, 2017, while on an elevated three-level platform. Paul McGill, the ACS supervisor for the construction project directed plaintiff to move material located on the middle level of the elevated three-level platform to the top (NYSCEF Doc. No. 57 at 81, 21-24). In order to access the middle level of the elevated platform, plaintiff had to walk to the top and travel down using the platform's internal ladder (*id.* at 77, 14-21). Plaintiff testified that he did not feel any movement when he was on the top level preparing to travel down (*id.* at 89, 13-22). However, when plaintiff reached the middle level of the platform, and after he placed the material over his shoulder to bring upstairs, he felt the platform shake as he proceeded to travel up the ladder, causing him to lose his balance and fall backwards (*id.*). According to plaintiff the platform was not stable on the date of his accident. Each time he moved he felt the platform move (*id.* at 90, 4-13).

Paul McGill's deposition

Paul McGill served as the ACS superintendent/foreman for the construction project (NYSCEF Doc. No. 59 [McGill EBT transcript] at 9, 13-16). McGill testified that an individual would not feel movement on the three-level elevated platform if it was not in the process of being lifted (jumped), as the locks on the platform referred to as shoes prevent such movement (*id.* at 45, 16-25). As established below, the platform was not being lifted on the date of plaintiff's accident. McGill also testified that the elevated platform was attached to and supported by sheer walls, which caused the structure to remain lifted off of the ground (*id.* at 13-16, 25-4). McGill assigned plaintiff his duties on the date of accident which included helping the wall and platform crew prepare to jump the elevated platform and sweep the area to prevent anything from flying off the edge of the

building (*id.* at 63-64, 12-3). McGill did not see plaintiff's accident occur, nor was he aware of how it occurred, however, he testified that he saw plaintiff at some point on the date of accident and noticed "he didn't look right" as he swept the floor (*id.* at 54, 14-16). At no point did plaintiff express to McGill that he was hurt or injured (*id.* at 70-71, 25-3).

Rafael Santos' deposition

Rafael Santos was plaintiff's immediate supervisor in June of 2017 (NYSCEF Doc. No. 62 [Santos EBT transcript] at 31, 2-7)). Santos testified that on the date of the accident he, plaintiff, and another individual, were hoisting the platform shoes from the bottom level of the platform to the top (*id.* at 48-49, 23-2) prepping for the platform to be raised at a later date (*id.* at 36, 10-13). Santos further testified that he could not see plaintiff during this process as he was on the top level and plaintiff was on the bottom (*id.* at 49, 9-19). To complete the process of hoisting the shoes from the bottom level to the top, an individual either had to climb up the ladder while holding the shoes and bring them up manually or tie the shoes to a rope and allow the individual on the level above to pull the shoes through the designated entry points (*id.*). Santos did not see plaintiff get hurt during this process (*id.* at 49, 3-5) but testified that plaintiff complained that he wasn't feeling good due to a headache (*id.* at 58-59, 20-4).

Rajendra Shrestha deposition

Rajendra Shrestha was employed by Total Safety Consulting and served as the site safety manager for the construction project in 2017 (NYSCEF Doc. No. 61 [Shrestha EBT transcript] at 19, 7-19)). Shrestha's duties as a safety consultant involved inspecting the job site, leading orientation for new employees, meeting weekly with the subcontractors and foremen, and notifying proper personnel if he noticed any noncomplying aspects on the project grounds, and correcting these issues (*id.* at 25, 16-22). Shrestha did not observe plaintiff's accident but met with

him afterwards and was told by plaintiff that “he was sweeping and felt uncomfortable in his back” when asked how his accident occurred (*id.* at 78-79, 24-8). Shrestha testified that plaintiff made no mention that he fell from a ladder on the elevated platform (*id.* at 79, 14-17).

DISCUSSION

Standard of Law

“The 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 eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the nonmoving party “[t]o produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 241 (6)

Defendants contend that plaintiff fails to plead a proper claim pursuant to Labor Law § 241 (6).

Labor Law § 241 (6) provides, in pertinent part:

"[a]ll 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, equipped, guarded, arranged, operated and conducted 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 on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which

have been set forth by the Commissioner of the Department of Labor (St. Louis v Town of N. Elba, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (Nostrom v A.W. Chesterton Co., 15 NY3d 502, 507 [2010]).

Plaintiff's Verified Bill of Particulars fail to plead specific regulatory requirements that allow for recovery under Labor Law § 241 (6), as the pleaded provisions reference generalized requirements. However, within his opposition to defendant's motion for summary judgment, plaintiff pleads new Industrial Code provisions that are seemingly specific, applicable regulatory requirements. Defendant argues "Industrial Code violations raised for the first time within reply papers cannot be considered" and therefore must be dismissed (NYSCEF Doc. No. 73 [defendant's reply brief] at ¶ 12, quoting Dipalma v Metro. Transp. Auth., 20 Misc 3d 1128[A], 2008 NY Slip Op 51654[U], 2008 WL 2959761 [Sup Ct, Bronx County 2008]). But the new Industrial Code provisions raised by plaintiff in his opposition raise no new theories of liability. "Plaintiff's theory of the case, supported by the allegations in his bill of particulars and his deposition testimony, was always that he fell due to the [elevated platform moving]. Thus, defendants cannot reasonably claim prejudice or surprise" (Alarcon v UCAN White Plains Hous. Dev. Fund Corp., 100 AD3d 431, 432 [1st Dept 2012]; see also Leveron v Prana Growth Fund I, L.P., 181 AD3d 449 [1st Dept 2020]; Burton v CW Equities, LLC, 97 AD3d 462, 462-63 [1st Dept 2012]). The Court finds that the Industrial Code violations raised by plaintiff in his opposition to defendant's motion for summary judgment do not invoke new factual allegations or raise new theories of liability, because plaintiff's overarching claim remains the same. Namely, that the elevated platform which plaintiff was working on moved when it was not supposed to, and such movement caused plaintiff personal

injury. Accordingly, defendants are not prejudiced by plaintiff raising sections 23-5.1 (b), 23-5.1 (c)(2), 23-5.3 (g)(1), 23-5.3 (h)(1), and 23-1.21 (b)(4)(i) in opposition.

Industrial Code § 23-5.1 (b)

Plaintiff argues that section 23-5.1 (b) of the Industrial Code was violated.

Section 23-5.1 (b) provides:

“[t]he footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used.”

Section 23-5.1 (b) of the Industrial Code “is insufficiently specific to constitute a proper predicate since it is a subpart of Industrial Code (12 NYCRR) § 23-5.1, General Provisions for All Scaffolds” (Kosovrasti v Epic (217) LLC, 96 AD3d 695, 696 [1st Dept 2012]; see also Greaves v Obayashi Corp., 55 AD3d 409, 410 [1st Dept 2008]; Moutray v Baron, 244 AD2d 618, 619 [1st Dept 1997]). Accordingly, plaintiff’s claim in relation to this section is dismissed.

Industrial Code § 23-5.1 (c) (2)

Plaintiff argues that section 23-5.1 (c) (2) of the Industrial Code was violated because scaffolds are required to be adequately braced to prevent any lateral movement, and plaintiff alleges the scaffold moved which caused him personal injuries.

Section 23-5.1 (c) (2) provides:

“[e]very scaffold shall be provided with adequate horizontal and diagonal bracing to prevent any lateral movement.”

Section 23-5.1 (c) (2) of the Industrial Code has been held to be “insufficiently specific to support a Labor Law § 241 (6) claim” (Susko v 337 Greenwich LLC, 103 AD3d 434, 436 [1st Dept 2013]; see also Greaves v Obayashi Corp., 55 AD3d 409, 410 [1st Dept 2008] [plaintiff’s

claims premised upon 23-5.2 (c) (2) are insufficiently specific to support a section 241 (6) claim]).

Accordingly, plaintiff's claim in relation to this section is dismissed.

Industrial Code § 23-5.3 (g) (1)

Plaintiff argues that section 23-5.3 (g) (1) of the Industrial Code was violated.

Section 23-5.3 (g) (1) provides:

“[f]ootings for metal scaffolds shall be sound, rigid and capable of supporting the maximum design loads of such scaffolds without settlement or deformation. Such footings shall be secure against movement in any direction and shall have sufficient area to properly transfer the vertical post or end frame loads of the scaffolds to the ground, grade or equivalent surface without causing any unsafe condition.”

Plaintiff alleges this section was violated as the platform moved, causing plaintiff to fall and suffer personal injuries. Defendant argues this section is not applicable because the subject scaffold did not contact the ground or grade but was attached to and supported by anchoring of the wall that was being constructed.

The deposition testimony of several witnesses establishes that section 23-5.3 (g) (1) of the Industrial Code is not applicable within this matter, as the elevated platform plaintiff was working on was suspended in the air and was not the type of scaffold section 23-5.3 (g) (1) applies to. Plaintiff testified the elevated platform was attached to a wall that allowed the structure to jump and ascend in height as the platform was raised (NYSCEF Doc. No. 57 [plaintiff's EBT transcript] at 74-75, 21-13]). ACS superintendent/foreman Paul McGill also testified the elevated platform system was attached to and supported by sheer walls, which invalidate the importance of the structures footing, which 12 NYCRR 23-5.3 (g) (1) focuses on (NYSCEF Doc. No. 59 [McGill EBT transcript] at 13-16, 25-4). Plaintiff's supervisor Rafael Santos also testified the elevated platform was attached to a wall (NYSCEF Doc. No. 62 [Santos EBT transcript] at 28-29, 16-2]).

The deposition testimony above rejects the contention that section 23-5.3 (g) (1) is applicable within this matter. The elevated platform that plaintiff was working on was not the type of scaffold that utilizes metal footing for support. Plaintiff relies on section 23-5.3 (g) (1) to bolster his argument that the scaffold moved and caused him to sustain personal injuries, and the alleged movement of the scaffold violates the section as it states “[f]ootings for metal scaffolds... shall be secure against movement in any direction”, however, plaintiff’s alleged injury did not occur in accordance with the required circumstances of this provision, therefore, plaintiff’s claim in relation to this section is dismissed.

Industrial Code § 23-5.3 (h) (1)

Plaintiff argues that 12 NYCRR 23-5.3 (h) (1) of the Industrial Code was violated.

Section 23-5.3 (h) (1) provides:

“[e]very metal scaffold shall be securely tied into the building or other structure at intervals not to exceed 30 feet horizontally and 26 feet vertically.”

Plaintiff argues this section was violated because the alleged movement of the elevated platform that caused plaintiff to suffer personal injuries deviated from the requirement that every scaffold be “securely tied into the building or other structure.” Defendant argues that the elevated platform was secured to the wall of the concrete structure being constructed at the subject location.

The deposition testimony by McGill and Santos establishes that the elevated platform plaintiff was working on was secure, as the structure was attached to an architectural wall that kept the structure in place, but also allowed the structure to lift when required to do so (NYSCEF Doc. No. 59 [McGill EBT transcript] at 13-16, 25-4). Moreover, both McGill and Santos testified that they never experienced or received complaints about the DOKA system being unstable, shaky, or moving when the structure was not being lifted (NYSCEF Doc. No. 62 [Santos EBT transcript] at 46, 6-16]; NYSCEF Doc. No. 59 [McGill EBT transcript] at 44-45, 15-15]). Construing the

evidence in favor of the nonmoving party and resolving reasonable inferences in favor of the nonmoving party (see Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]), plaintiff's testimony that "it moved...the platform moved" and "I felt it shake" (NYSCEF Doc. No. 71 at ¶ 21, quoting plaintiff's EBT [NYSCEF Doc No 58] at 97-98, 82, 89) is sufficient to deny defendant's motion for summary judgment because it presents a question of fact (see Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2nd Dept 2009] [summary judgment should be denied "where conflicting inferences may be drawn from the evidence or where there are issues of credibility"]).

Industrial Code § 23-1.21 (b)(4)(i)

Plaintiff contends that section 23-1.21 (b)(4)(i) of the Industrial Code was violated.

Section 23-1.21 (b)(4)(i) provides:

"[a]ny portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise."

Plaintiff argues that he was accessing a higher level of the three-level platform using the only means available to him – a wooden ladder or stair that lacked a handrail. And due to the alleged lack of a handrail, plaintiff was caused to suffer personal injuries when the movement of the platform occurred. Plaintiff argues that defendants violated 12 NYCRR 23-1.21 (b)(4)(i) because the wooden ladder or stair did not have a handrail to support plaintiff. Defendant argues that deposition testimony establishes the subject ladder was properly nailed to the platform and in compliance with 12 NYCRR 23-1.21 (b)(4)(i) as the ladder contained handrails.

Throughout his deposition testimony plaintiff refers to the device that allowed him to travel between floors as both wooden stairs and a ladder, which are different structures. When asked whether it was a ladder or staircase that provided him access to different floors, plaintiff answered

that they were wooden stairs. See (NYSCEF Doc. No. 71 [Plaintiff's aff in partial opp] ¶ 11). Thus, plaintiff's claim in-relation to 12 NYCRR 23-1.21(b)(4)(i) must be dismissed as this section of the Industrial Code pertains to ladders and ladderways only. Moreover, plaintiff's claim under this section warrants dismissal even if the structure was a ladder because McGill's deposition testimony demonstrates the ladders on the elevated platform complied with 12 NYCRR 23-1.21(b)(4)(i), as the ladders were nailed in place and equipped with handrails, and plaintiff fails to proffer material to rebut. According to McGill, individuals used the permanent, fiber glass ladder to travel between floors (NYSCEF Doc. No. 59 [McGill EBT transcript] at 25-26, 21-16)). Each ladder was tied top and bottom with banding wire and secured with rope at the very top (Id. at 28, 2-7). The ladders and banding wire attached were also nailed to the wooden platforms and equipped with a handrail system that traveled the full length of the ladder (*id.* at 29-30, 3-7); (*id.* at 48-49, 11-12). Additionally, plaintiff consistently testified that the whole platform moved, not necessarily the ladder alone. Because his own testimony infers that the ladder was fastened in place, plaintiff's claim in relation to this section is dismissed.

Labor Law § 200 & Common Law Claim


“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]).

Plaintiff's Labor Law § 200 and common law claim are dismissed without opposition as defendant has established that nonparty ACS employees were the only individuals certified and allowed to work on the elevated platform system (NYSCEF Doc. No. 62 [Santos EBT transcript] at 20-21, 25-8]). Thus, defendants lacked the authority to control the activity that allegedly caused injury to plaintiff.

It is hereby ORDERED that defendant's motion for summary judgment, dismissing plaintiff's causes of action under Labor Law § 241 (6), § 200, and common law negligence is denied only to the extent of plaintiff's Labor Law § 241 (6) claim that is premised upon Section 23-5.3 (h) (1); and it is further

ORDERED that the remainder of the motion is granted, and plaintiff's Labor Law § 200 and common law negligence claims are dismissed.

This constitutes the decision and order of the Court.

8/15/2022 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	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE