Ray v Alfa Gramercy Park, LLC.
2022 NY Slip Op 33086(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 156018-2020
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

DAVID RAY

INDEX NO. 156018-2020

MOT. DATE

- v -

MOT. SEQ. NO. 1 and 2

ALFA GRAMERCY PARK, LLC., et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is a personal injury action arising from a construction site accident. There are two summary judgment motions pending which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 1, plaintiff moves for partial summary judgment on liability on his Labor Law § 240[1] and § 241[6] claims. Defendants, Alfa Gramercy Park, LLC., Alfa Development Management, LLC., Longer Hills II, LLC ("Longer Hills"), Bravo Builders, LLC ("Bravo"). and Rock Group NY Corp. (collectively, "defendants") oppose the motion. In motion sequence 2, defendants move for summary judgment dismissing plaintiffs' Labor Law §§ 200, 240[1] and 241[6] claims. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are as follows. On August 14, 2017, plaintiff, a truck driver, was injured on the loading dock located at 200 East 21st Street, New York, New York (the "premises"). At that time, plaintiff was working for non-party Cardella Waste removing debris from a construction site. The premises was owned by defendant Longer Hills. Defendant Alfa Gramercy Park LLC hired Bravo as the construction manager for the subject project involving the construction of a new twenty-story condominium building. Bravo, in turn, hired Cardella Waste to remove construction debris from the premises.

Before the accident, plaintiff was directed by Bravo's employee to back his truck into the loading dock. As debris was being loaded into the truck by laborers, a 6 inch by 4 inch steel wedge fell off the building and hit plaintiff in the right arm by his shoulder. Plaintiff testified at his EBT that he did not see the steel wedge before it hit him. In fact, plaintiff testified that he "didn't even realize" he had been hit with the wedge until he "tried to lift [his] arum up straight and [he] couldn't". According to Bravo's employee, the steel wedge that struck plaintiff was used by the concrete sub-contractor ACS- Advanced Concrete Solutions for "concrete form work". After the accident, plaintiff signed an accident report and sought medical treatment.

Dated: 9-13-22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

The site safety manager's log about the accident provides as follows:

> At 11:15 AM a cardella container Truck operator (David Ray) was struck by falling material (steel wedge) when operating the truck dumping mini containers adjacent to the loading zone inside the site fence. First aid was given on site. He completed accident forms and left to drive the truck back to NJ before seeking clinic observation & treatment to his right shoulder. SSM advised site super & CRSG & contacted BEST. At 12:30pm BEST Inspector D. Hennessy (2779) arrived with2 BEST trainees. SSM, CSM, site super (Pat Baker), & ACS assistant PM (Martina Quirke) reviewed the incident at the loading dock, walked the site from 20th fl to cellar & reviewed documentation. Two PSWOs were issued. Stop all Concrete operations forming, stripping, or placement of concrete; Housekeeping & safety related work required from 14-20 fls. Holes from 15-20 fls are to be covered. Crane operations and removals of materials & debris to comply with the SWOs is permitted. When ACS completes the required remediation & submits means & methods to control Housekeeping, perimeters (materials away from the edge required by code) ..., a meeting will be scheduled at BEST including SSM, CSM, CSFSM, Bravo supervision, ACS supervision/management prior to a possible reinspection & partial lifting of the PSWP
>
> ...
>
> SSM advised locations below the working floors have materials & debris too close to unenclosed perimeters.

The site safety manager's log includes a photo which shows wooden planks hanging over the edge of the building with the following caption: "ONE ISSUE THE INSPECTOR ADVISED ON WAS THAT HOUSEKEEPING ON OUTRIGGER PLATFORMS & OUTSIDE VERTICAL NETTING ON PERIMTER EYEBROW REQUIRE HOUSEKEEPING & ALL WOOD RAILING SYSTEMS REQUIRE TOEBOARDS AND SECURED NETTING."

Also on the date of plaintiff's accident, the New York City Department of Buildings issued a stop work order, which noted three safety failures: [1] "[f]ailure to safeguard person's [sic] + property in response to an incident where it was reported that a driver operating a garbage removal truck was struck in the right shoulder by a concrete shoring shim which appears to have fallen from the 19 or 20th sty's where concrete stripping * erecting operations were ongoing"; [2] "[f]ailure to instate [sic] safety measures during concrete stripping ops resulted in this hazardous condition"; and [3] uncovered holes larger than 2 feet that were not protected. Bravo's employee testified that Bravo installed perimeter protection on every floor, which consisted of vertical and horizontal safety netting below the concrete operation.

Plaintiff argues that he has established prima facie entitlement to judgment as a matter of law under Labor Law § 240(1) "falling object" liability as well as Labor Law § 241[6] predicated upon 12 NYCRR § 23-1.7[a][1] and § 23.2.1[a][2]. Meanwhile, defendants maintain that plaintiff cannot establish that the steel wedge fell from the building as opposed to simply from above him, that plaintiff failed to "timely identify any applicable provisions of the Industrial Code" and that the defendants did not direct, supervise or control plaintiff's work nor did they create the allegedly dangerous condition or have notice of same.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary

judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Section 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Both parties' motions as to the Section 240[1] claim are denied. Neither side has shown conclusively where the steel wedge came from. While plaintiff posits that it came from the 19th or 20th floors, he testified that he didn't even feel the metal wedge strike him, which raises a triable issue of fact as to where the steel wedge came from. Similarly, defendants have not shown that the steel wedge did not come from a height where proper protection in the form of perimeter netting should have prevented the accident from occurring. Nor have the defendants established that the steel wedge was not being hosted or should have otherwise been secured as a matter of law. Accordingly, both motions as to the Section 240[1] claim are denied.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.7[a][1] was violated as a matter of law.

Industrial Code § 23-1.7[a][1] states in pertinent part as follows:

> Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

Plaintiff has not shown as a matter of law that the loading area was normally exposed to falling material or objects or that the netting which Bravo's employee testified was installed was not suitable. Defendants have not shown the opposite, and there is a triable issue of fact as to whether the netting was sufficient protection. Accordingly, both motions as to the Section 241[6] claim predicated upon Industrial Code § 23-1.7[a][1] are denied.

Plaintiff next moves as to § 23-2.1, which defendants contend was untimely asserted in plaintiff's supplemental bill of particulars served on the eve of summary judgment. The court will consider this claim properly asserted since it does not raise any new factual allegations, is not a new theory of liability and defendants have not established prejudice as a result of the late assertion. Section 23-2.1[1][2] mandates that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Since there is a triable issue of fact as to whether this provision was violated and whether the violation was a proximate cause of plaintiff's injuries, neither side is entitled to summary judgment as to this branch of plaintiff's Section 241[6] claim.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Plaintiff's counsel explains that plaintiffs' Section 200 and common law negligence claims are premised upon both the means and methods of plaintiff's work and a dangerous condition. The court agrees with plaintiff's counsel that since plaintiff testified that Bravo's employee directed plaintiff and since defendants otherwise failed to show that they did not direct the workers who allegedly caused the steel wedge to fall from the building, defendants are not entitled to summary judgment dismissing the Section 200 and common law negligence claim premised upon a means and methods analysis. The court further agrees that the defendants failed to establish that they lacked notice of the dangerous condition which caused plaintiffs' accident: insufficient perimeter netting and unsecured building materials jutting out over from the building as evidenced in the site safety manager log. Accordingly, defendants' motion as to the Section 200 and common law negligence claims is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that both summary judgment motions by plaintiff and are denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9-13-22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.