

Hayes v L&M Dev. Partners

2022 NY Slip Op 33195(U)

September 22, 2022

Supreme Court, New York County

Docket Number: Index No. 160255/2019

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 160255/2019

MATTHEW HAYES,

Plaintiff,

MOTION SEQ. NO. 002

- v -

L&M DEVELOPMENT PARTNERS, 23 PARK ROW ASSOCIATES, LLC, and URBAN ATELIER GROUP, L.L.C.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action commenced by plaintiff Matthew Hayes, defendants L&M Development Partners, Inc. i/s/h/a L&M Development Partners ("L&M"), Park Row 23 Owners, LLC i/s/h/a 23 Park Row Associates, LLC ("Park Row") and Urban Atelier Group L.L.C. ("UAG")(collectively "defendants") move, pursuant to CPLR 3212, for an order granting summary judgment dismissing: 1) plaintiff's Labor Law section 200 and common-law negligence claims and 2) plaintiff's claim pursuant to Labor Law section 241(6) as predicated upon certain provisions of the New York State Industrial Code. Plaintiff opposes the motion in part. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on October 1, 2019 in which plaintiff, a stone derrickman employed by nonparty Artex System, Inc., was injured while working at a project at

25 Park Row in Manhattan (“the building” or “the site”). Plaintiff commenced this action by filing a summons and complaint on October 22, 2019. Doc. 1. In his complaint, plaintiff alleged that L&M and/or Park Row, the owner and/or developer of the building, hired UAG to act as general contractor and/or construction manager at the site. Doc. 1. He further claimed that the incident was caused by the negligence of the defendants as well as their violation of Labor Law sections 200, 240(1), and 241(6). Doc. 17. Plaintiff’s Labor Law section 241(6) claim was predicated upon sections 23-1.5, 23-1.7, 23-2.1, 23-2.2, 23-3, 23-5, 23-6, 23-7, 23-8, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5 of the New York State Industrial Code and violations of OSHA regulations.

Defendants joined issue by their answer filed November 18, 2019, in which they denied all substantive allegations of wrongdoing and asserted numerous affirmative defenses. Doc. 3.

In his bill of particulars, plaintiff alleged that he was injured at the site on October 1, 2019 when “he was struck by a stone panel that was inadequately hoisted and improperly secured.” Doc. 17. Plaintiff also reiterated the negligence and Labor Law claims set forth in his complaint. Doc. 17.

At the time of the incident, Artex was erecting panels, or pieces of exterior stone, that were to be attached to the side of the building. Plaintiff reported to the Artex foreman, Anthony Valentino, with whom he worked on the 47th floor of the building on the date of the occurrence. Doc. 34 at 95, 125. He was also supervised by, and received materials and tools exclusively from, Artex. Plaintiff testified that each panel weighed approximately 2 to 3 tons. Doc. 34 at 117; Doc. 35 at 207. The panel involved in plaintiff’s accident was lifted from a flatbed truck at street level, where it was rigged and secured by an Artex co-worker. The load was then lifted by tower crane to a position 15 feet above the placement location. Doc. 34 at 142-143. At the

placement location on the 47th floor, plaintiff prepared dowels, or inserts, upon which the panel was to be lowered. Doc. 34 at 124. He held two dowels upright, one in each hand, with each dowel an arm's length apart. Doc. 34 at 132.

The plaintiff laid on his stomach as the panel was lowered onto the dowels and, since one dowel was not correctly positioned, the panel had to be lifted again. Doc. 34 at 143-149. The panel was then lifted 3 to 4 feet above plaintiff as he continued to lay down while holding the dowels. Doc. 34 at 152-159. He was instructed to hold the dowels until the panel was in place. Doc. 34 at 189. After one of plaintiff's coworkers advised that the panel was being lowered again, the panel suddenly accelerated and dropped onto his wrist. Doc. 34 at 156-157. Prior to the alleged incident, the load appeared to be balanced. Doc. 34 at 143-144. Plaintiff did not inspect the crane prior to the incident and was not aware of any problems with the device. Doc. 34 at 167-171.

Peter Fonti, a superintendent for UAG, a construction management company, appeared for deposition on behalf of that entity. Doc. 36 at 6-7. In that role he would "[m]onitor the progress of the work being completed, make sure that [subcontractors] were adhering to the schedule that [UAG set] and [handled] general site logistics." Doc. 36 at 11. On a typical day, Fonti spent approximately five hours walking the site and approximately five hours in the office at the site. Doc. 36 at 11-12.

According to Fonti, Artex's role at the site was to "fabricate the precast panels in Toronto, ship them down [to 25 Park Row in Manhattan] and then have their erecting crew install the façade." Doc. 36 at 19-20. Fonti represented that Artex had two crews and was responsible for the means and methods of its work as well as providing its own equipment. Doc. 36 at 29-30, 46. The first was a "a street crew, which was responsible for hooking up all of the

panels from the truck [and] communicating with the crane” which lifted the panels to where they were to be installed, Doc. 36 at 29-30. The street crew rigged the panels from a truck using equipment including chain falls, wire, nylon straps, chokers, come-a-longs, and taglines. Doc. 36 at 29-30. He insisted that two taglines were always used to move precast panels. Doc. 36 at 25-26. The second Artex crew, which worked inside the building, received and installed the panels which were to be installed. Doc. 36 at 29-30. The panel being lifted at the time of the alleged incident was approximately 3-5 feet tall, 30 feet long, weighed at least 1,000 pounds, and was to be installed on the 47th floor of the building. Doc. 36 at 28-30, 77. The panel was to be lowered and placed on a flat steel plate which was to sit on tubing which was to be slid into place by plaintiff. Doc. 36 at 31-32.

Although Fonti was present at the time and place of plaintiff’s accident, he did not see it occur. Doc. 36 at 27. At that time, Fonti was standing in the doorway to the perimeter of the 47th floor about 13 – 15 feet from the precast panel. Doc. 36 at 51. He did not know exactly where the Artex workers were positioned although he was approximately 5-10 feet from plaintiff and Valentino. Doc. 36 at 80-81. Just before the accident, the panel had been moved by crane “into its place of final position” and Fonti heard Valentino direct the crane operator to slowly lower the panel the remaining few inches into place. Doc. 36 at 75-76. The panel was moving very slowly and was not swinging or moving back and forth at that time. Doc. 36 at 75-76. After Fonti heard plaintiff scream, he saw that plaintiff’s hand was stuck between the panel and a concrete curb. Doc. 36 at 55-56.

Plaintiff filed a note of issue and certificate of readiness on November 18, 2021. Doc. 13.

Defendants now move for the relief set forth above. In support of the motion, they argue that plaintiff’s common-law negligence claim and claim pursuant to Labor Law section 200 must

be dismissed since they did not control the means and methods of the work during which plaintiff was injured and had no notice of any dangerous condition. Doc. 33. They further maintain that plaintiff's claim pursuant to Labor Law section 241(6), as predicated upon the following sections of the Industrial Code, must be dismissed: 12 NYCRR 23-1.5, 23-1.7, 23-2.1, 23-2.21, 23-3, 23-5, 23-6, 23-7, 23-8, 23-8.2, 23-8.3, and 23-8.4. Doc. 33. Defendants also assert that the claim pursuant to Labor Law 241(6) must also be dismissed insofar as it is predicated on OSHA Article 1926. Doc. 33.

In an affidavit in support of the motion, Dan Mooney, an employee of nonparty U.S. Crane & Rigging, L.L.C. ("U.S. Crane"), states that he was the crane operator at the time of plaintiff's accident and that he was certified to operate the same. Doc. 40. He further represented that U.S. Crane "provided a professional engineer to erect and conduct routine inspections of the crane." Doc. 40. On the day of the incident, precast panels stored on a flatbed truck located at street level were being hoisted to certain floors of the building for installation. Doc. 40. Before the panels were lifted, a worker on street level rigged them to the tower crane with a hook. Doc. 40. The panels were then rigged with wire chokers, tightly secured and balanced. Doc. 40. When a panel was raised to the floor where it was to be installed, it was slowly lowered until it was a few feet above the cement slab where it was to be placed. Doc. 40. As the panels were being maneuvered, Mooney communicated with a trade foreman by two-way radio. Doc. 40. The trade foreman served as the signalperson and provided direction as to how the load was to be maneuvered. He maintained that, on the day of the alleged incident, no sudden acceleration or deceleration of a load occurred; no load swung uncontrollably; all loads appeared balanced and secured; no load exceeded the crane's rated capacity; and the crane was well-maintained and in working order. Doc. 40.

In partial opposition to the motion, plaintiff argues that Industrial Code rules 23-8.1(b), 8.1(e), and 8.1(f) apply herein and, thus, plaintiff's claim pursuant to Labor Law section 241(6), as predicated on those provisions, cannot be dismissed. Doc. 44. Plaintiff does not oppose the branch of defendants' motion seeking to dismiss the common-law negligence and Labor Law section 200 claims and those causes of action are withdrawn by plaintiff. Doc. 44.

In reply, defendants argue, inter alia, that plaintiff's claim pursuant to Labor Law section 241(6), as predicated upon Industrial Code sections 23-1.5, 23-1.7, 23-2.1, 23-2.2, 23-3, 23-5, 23-6, 23-7, 23-8, 23-8.1, 23-8.2, 23-8.4, 23-8.5 and OSHA Article 1926 must be dismissed. Doc. 46. They further assert that, contrary to plaintiff's contention, his Labor Law section 241(6) claim, as predicated upon Industrial Code sections 23-8.1(b)(1), 23-8.1(e) and 23-8.1(f), which are raised in plaintiff's opposition, must be dismissed since they are insufficiently specific to support a claim pursuant to Labor Law section 241(6), they are inapplicable to the facts herein, and/or the violation thereof was not the proximate cause of the alleged incident. Doc. 46.

LEGAL CONCLUSIONS

A party moving for summary judgment pursuant to CPLR 3212 "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 "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

As noted above, plaintiff does not oppose the branch of defendants' motion seeking to dismiss his common-law negligence and Labor Law section 200 claims but rather withdraws the same. Therefore, these claims are dismissed and this Court will address plaintiff's claim pursuant to Labor Law section 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) is not self-executing, and in order to establish a violation of this statute, and withstand a defendant's motion for summary judgment, a plaintiff must prove that a defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

Although plaintiff alleges multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code rules 23-8.1(b)(1), 23-8.1(e) and 23-8.1(f)(1)(iv) and 8.1(f)(2)(i), he does not oppose dismissal based on these rules, nor does he move for summary judgment in his favor based on the same and, thus, they are deemed abandoned (*See Murphy v Schimenti Constr. Co.*, 204 AD3d 573, 574 [1st Dept 2022]; *see also Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]). Plaintiff has also abandoned his claim of a violation of OSHA Article 1926 which, in any event, could not have provided a basis for liability pursuant to Labor Law section 241(6) (*See Schiulaz v Arnell Constr. Corp.*, 261

AD2d 247, 248 1st Dept 1999]). The following is an analysis of the Industrial Code rules relied on by plaintiff in opposition to the motion.

Rule 23-8.1(b)(1)

Rule 23-8.1(b)(1) provides:

(b) Inspection.

(1) Every mobile crane, tower crane and derrick shall be thoroughly inspected by a competent, designated employee or authorized agent of the owner or lessee of such mobile crane, tower crane or derrick at intervals not exceeding one month. Such inspections shall include but not be limited to all blocks, shackles, sheaves, wire rope, connectors, the various devices on the mast or boom, hooks, controls and braking mechanisms.

This rule has been found sufficiently specific to impose liability pursuant to section 241(6) (*See Howell v Karl Koch Erecting Corp.*, 192 Misc2d 491, 494 [Sup Ct Bronx County 2002]). Although Mooney represents in his affidavit that the crane was routinely inspected by an engineer, he does not specify whether the inspections were made “at intervals not exceeding one month.” Nor does he set forth any detail whatsoever about the parts of the crane inspected. Therefore, the defendants fail to establish their prima facie entitlement to summary judgment pursuant to Labor Law section 241(6) as predicated on Industrial Code rule 23-8.1(b)(1).

Rule 23-8.1(e)

Rule 23-8.1(e) provides as follows:

(e) Load handling.

(1) Mobile cranes, tower cranes and derricks shall not be loaded beyond their rated capacities.

(2) Hoisting ropes for concrete buckets used with mobile cranes, tower cranes or derricks shall be provided with safety hooks or closed shackles.

(3) Where slings are used to hoist material of long length, spreader bars shall be used to space and keep the sling legs in proper balance.

(4) Reinforcing rods, conduit and lumber, when of uneven lengths as well as column clamps and similar items which cannot be easily secured to form safe drafts or loads shall be hoisted in boxes. Each such box shall be substantially constructed and supported from its four corners by individual lengths of wire rope having spliced or clipped loops for attachment to the load line. The construction and suspension of each such box shall be capable of holding at least four times the load for which it is intended.

(5) In steel erection, when a load is suspended from a mobile crane, tower crane or derrick at two or more points with slings, the eyes of the lifting legs of the slings shall be shackled together and this shackle or the eyes of the shackled slings shall be placed on the hook. Alternatively, the eyes of the lifting legs may be shackled directly to the hoisting block, ball or balance beam. The eyes may be placed on the lifting hook without shackles if the hook is of the safety type.

(6) No more than one load shall be suspended from the same load line of a mobile crane, tower crane or derrick at one time.

Plaintiff's counsel, relying on *Hayek v Metro. Transp. Auth.*, 195 AD3d 568, 568-569 [1st Dept 2021]), argues that rule 23-8.1(e) is sufficiently specific to establish liability pursuant section 241(6). However, that case held only paragraphs 3 and 4 of 23-8.1(e) to be sufficiently specific. Regardless of that fact, however, none of the provisions of section 23-8.1(e) apply to the facts herein. Indeed, in his opposing papers, plaintiff only argues that paragraph 3 of the said rule applies herein. Specifically, counsel asserts that "the failure to provide spreader bars *could have been the cause* of the [panel] suddenly shooting down" (*emphasis added*). Doc. 44 at 6. However, it is well settled that speculation is insufficient to defeat a motion for summary judgment (*See Tihan v Apollo Mgt. Holdings, L.P.*, 201 AD3d 557 [1st Dept 2022]). Therefore, plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code section 23-8.1(e), is dismissed.

Rule 23-8.1(f)(1)(iv)

Rule 23-8.1(f)(1)(iv) provides as follows:

(f) Hoisting the load.

(1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made:

* * *

(iv) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

Rule 23-8.1(f)(1)(iv) has been found sufficiently specific to impose liability under section 241(6) (*See Hayek v Metro. Transp. Auth.*, 195 AD3d at 568-569). However, defendants fail to establish their prima facie entitlement to the dismissal of plaintiff's 241(6) claim as predicated on this rule since they fail to submit any evidence that the inspection required thereby was conducted. Although plaintiff admitted that the panel appeared to be balanced, it is unclear from the moving papers whether it was properly secured and, if not, whether this caused or contributed to the occurrence.

Rule 23-8.1(f)(2)(i)

Rule 23-8.1(f)(2)(i) provides as follows:

(2) During the hoisting operation the following conditions shall be met:

(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions.

This rule has also been found sufficiently specific to impose liability under section 241(6) (*See Hayek v Metro. Transp. Auth.*, 195 AD3d at 568-569). Mooney establishes the defendants' prima facie entitlement to summary judgment based on this rule by representing in his affidavit that there was no sudden acceleration of the load during the operation in which plaintiff was allegedly injured. However, since plaintiff raises a material issue of fact in opposition by submitting his deposition testimony that the load suddenly accelerated and injured his wrist, that

branch of the motion seeking dismissal of the section 241(6) claim, as predicated on rule 23-8.1(f)(2)(i), is denied.

Accordingly, it is hereby:

ORDERED that the branch of the motion by defendants L&M Development Partners, Inc. i/s/h/a L&M Development Partners, Park Row 23 Owners, LLC i/s/h/a 23 Park Row Associates, LLC, and Urban Atelier Group L.L.C. seeking an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's Labor Law section 200 and common-law negligence claims is denied as moot since these claims have been withdrawn by plaintiff; and it is further

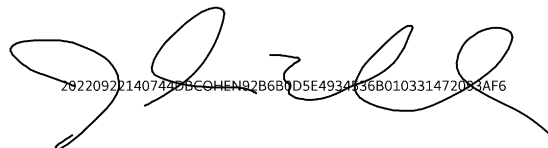
ORDERED that the branch of defendants' motion seeking an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), insofar as predicated on sections 12 NYCRR 23-1.5, 23-1.7, 23-2.1, 23-2.21, 23-3, 23-5, 23-6, 23-7, 23-8.1(e), 23-8.2, 23-8.3, 23-8.4, and 23-8.5 of the New York State Industrial Code and OSHA Article 1926, is granted; and it is further

ORDERED that the branch of defendants' motion seeking an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), insofar as predicated on sections 23-8.1(b)(1), 23-8.1(f)(1)(iv), and 8.1(f)(2)(i) of the New York State Industrial Code, is denied; and it is further

ORDERED that plaintiff's Labor Law section 200, common-law negligence, and Labor Law section 241(6) claims are hereby severed and dismissed, except those Labor Law section 241(6) claims predicated upon rules 23-8.1(b)(1), 23-8.1(f)(1)(iv), and 8.1(f)(2)(i) of the New York State Industrial Code, which claims shall continue as against the defendants; and it is further

ORDERED that the Clerk shall mark his records accordingly; and it is further

ORDERED that service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



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DAVID B. COHEN, J.S.C.

9/22/2022

DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE