

McAteer v L&L Holding Co., LLC
2022 NY Slip Op 33286(U)
September 29, 2022
Supreme Court, New York County
Docket Number: Index No. 156920/2018
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES d'AUGUSTE

PART 55

Justice

-----X	INDEX NO.	156920/2018
DENIS McATEER,		
Plaintiff,		05/05/2021,
	MOTION DATE	06/23/2021
- v -		
L&L HOLDING COMPANY, LLC, COMREF 380 LLC, CLARION PARTNERS, LLC, TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, RAD & D'APRILE CONSTRUCTION CORP.,	MOTION SEQ. NO.	003 004
Defendants.		

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 102, 103, 104, 105, 106, 107, 108, 112 were read on this motion to/for SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 004) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 109, 110, 111 were read on this motion to/for SUMMARY JUDGMENT .

This action is brought by plaintiff Denis McAteer for alleged violations of Labor Law §§ 240, 241, 200, and common law negligence claims, for serious injuries he allegedly sustained on May 1, 2018.

These are motions for summary judgment pursuant to CPLR 3212. Plaintiff moved for summary judgment on liability in Motion Sequence 003, and defendants cross-moved for summary judgment dismissing all of plaintiff's claims in Motion Sequence 004.

Plaintiff was allegedly injured when he fell on a loading dock while descending an unguarded makeshift staircase composed of unsecured cinderblocks. Plaintiff alleges that he fell when one of the cinderblocks moved. At the time of the accident, plaintiff was employed by non-party Construction Resources Corp. of New York ("CRC") and engaged in construction work at the premises (NYSCEF Doc. No. 59). Plaintiff was as a Master Mechanic. According to Dawn Varrone, owner of CRC, that company provided plaintiff's labor for the construction project at the subject site, but allegedly did not supervise or control any of McAteer's work (NYSCEF Doc. No. 60). Varrone's deposition testimony reflects she knew of defendant Tishman Construction Corp. of New York ("TCCNY"), "but did not know the other two Tishman entities named as defendants...Tishman was the general contractor for this site" (NYSCEF Doc. No. 60).

Defendants claim that defendant Clarion Partners LLC ("Clarion") is an investment company, and defendant L&L Holding Company LLC ("L&L") is merely a holding company for the property whose owners hired defendant Tishman Interiors Corp. ("TIC") to be the construction manager for this project. Defendants assert that defendant RAD & D'Aprile Construction Corp. ("RAD") is a masonry subcontractor, and defendant Tishman Construction Corp. ("TCC") and TCCNY (collectively, these two entities, along with TIC, will be referred to as Tishman) lacked involvement on the project. Thus, defendants argue that TCC and TCCNY are not proper parties to the action, and the claims against them must be dismissed. Defendants also argue that, since TIC was a construction manager and not a general contractor, it, too, must be dismissed from the action (NYSCEF Doc. No. 80). However, plaintiff disputes such claims--

that no other defendants, except, the property owners, defendant COMREF 380 LLC (“COMREF”) and L&L, had any involvement on the project. Plaintiff asserts that Wayne Pipher, employed by TCC as a Senior Superintendent, testified that TCC and TCCNY “are the same entity,” and TIC is a “division of that same entity” (NYSCEF Doc. No. 109). Plaintiff also points out that, during his own deposition, Pipher stated L&L were owners of the job site, along with defendant COMREF (NYSCEF Doc. No. 68). Also, Senior Vice President Frank Polemeni testified he was employed by Tishman AECOM, but “did not know the relationship between [TIC] and the other Tishman entities, and believed they were all one company” (NYSCEF Doc. Nos. 73, 109).

Defendants allege that plaintiff did not have a supervisor on site, and defendants did not monitor or provide him with instructions for work (NYSCEF Doc. No. 102). Plaintiff, in his deposition testimony, disputes this, noting he was initially “hired and under Tishman’s supervision and therefore...for the majority of the job the checks came from them, from Tishman...” (NYSCEF Doc. No. 88). He also stated that, at some later date, TCC delegated its payroll to CRC and his paychecks started coming from that company (NYSCEF Doc. No. 88). Additionally, plaintiff testified that, while he did not have a supervisor on the job site, he reported to TCC’s foremen (NYSCEF Doc. No. 88).

TIC acknowledges, and its contract with COMREF reflects, “it was hired to perform pre-construction services, construction management and general construction with...with respect to renovation of the building” (NYSCEF Doc. No. 112). Yet, defendants claim TIC is only the construction manager, not a general contractor and that plaintiff’s Labor Law claims do not apply to it. However, in *Walls v. Turner Const. Co.*, 4 N.Y. 3d 861, 864 (2005), the Court of Appeals held that a construction manager of a work site may be vicariously liable as an agent of

the property owner for injuries sustained under the Labor Law “when the work giving rise to the duty to conform to the requirements of section 240(1) has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor.” Additionally, the Appellate Division, First Department recently held that Tishman was liable as a statutory agent for purposes of the Labor Law upon reviewing a similar “construction management” contract as found herein between TIC and the owners for the subject project. *Lind v. Tishman Constr. Corp.*, 180 A.D. 3d 505 (1st Dep’t 2020).

Plaintiff claims that he fell on “a cinderblock staircase that...was being used for quite a while. There was no railing or netting...[or] hand railings. There [were] no guards up at the loading dock.” There was a door with a ramp that would have allowed for ingress/egress in the vicinity of the loading dock, but the door was kept locked (NYSCEF Doc. No. 59). Plaintiff claims co-worker David Smith had a similar incident. Smith testified that, before plaintiff’s accident, he almost tripped on the same condition that caused plaintiff’s fall. Smith’s deposition stated, “...as I came down the stairs, cinderblocks, one of them rolled under my feet and I steadied myself, but I was upset that if I was to fall I was going to be there by myself because there was really nobody around and it would be a problem.” He continued that the “next day I let everybody I know there that this was a problem and that door should not be locked” (NYSCEF Doc. No. 93). Further, Smith stated he informed Polemeni of the incident. Smith testified he also had to use the cinderblocks as an access route because the door with a ramp that would have permitted for ingress/egress was locked. He testified that the cinderblocks were just “laid on top of one another that was it...there was no mortar. They were just loose cinderblocks stacked in a configuration that looked like steps” (NYSCEF Doc. Nos. 60, 93). Polemini, however, denies

that Smith ever complained to him about any allegedly unsafe conditions at the loading dock area (NYSCEF Doc. No. 102).

Defendants allege that the entrances and exits were clearly marked with signs, and that witnesses confirmed that the proper designated entrance to the loading area was always unlocked (NYSCEF Doc. No. 102). Plaintiff and Smith both deny such claims. Plaintiff testified that at the time of the incident, “[he] was walking toward the exit from [the] loading dock, and [he] stepped down on a cinderblock staircase that was there and the block...just...flipped and he twisted to try to grab on to something, but there was nothing to grab, and he went down.” He testified that there were three to four levels of cinderblocks stacked as a temporary staircase, and that he fell approximately four feet (NYSCEF Doc. Nos. 60, 67). Plaintiff was heading to check on the hoist at the time of his fall, and the cinderblock moved when he stepped on it because “[it] wasn’t secured” (NYSCEF Doc. No. 60).

The subject loading dock was under construction during part of the project and, when finished, the loading dock was used as a staging area for building materials used at the project, including masonry materials that were being brought through the loading dock (NYSCEF Doc. Nos. 59, 71).

Bricklayer Timothy Boyle testified at his deposition that Aubrey Lewis, a Tishman foreman, was in charge of the lobby and loading dock (NYSCEF Doc. No. 71). Boyle recalled that he cleaned up the cinderblocks after plaintiff’s fall and told Lewis it should be made known to all other trades that “our material is not used for any other purpose than building walls.” He testified the cinderblocks involved in the subject incident, when shown photographs of them, “looked like the ones RAD was using on the site, and they could have been RAD’s blocks.”

Additionally, RAD performed work in the loading dock prior to plaintiff's incident (NYSCEF Doc. No. 60).

Non-party AMS Safety ("AMS") was hired as the site safety contractor; they noted and reported the hazardous cinderblocks as a safety violation almost one month prior to this incident on April 9, 2018, and again just one day before the incident on April 30, 2018. AMS reports the hazardous cinderblock conditions were noted in daily logs created from site safety supervisor Anthony Cappelluti's daily inspections of the site, and such logs were sent to TIC (NYSCEF Doc. No. 59). Polemeni denied ever being sent copies of AMS' logs. Cappelluti confirmed the unsecured cinderblock staircase shown in the AMS report was a safety violation and should not have been there (NYSCEF Doc. No. 59).

AMS also noted that the main entrance to the job site was the proper way to enter and exit the jobsite, and the door was kept open with a security guard. All the workers, including plaintiff, were aware that the proper way to get in and out of the building was through the main entrance, and it took less than thirty seconds to enter or exit the building using the proper entrance. AMS did not observe anyone using the loading dock to enter or exit the jobsite. There were wooden barricades with orange netting on the loading dock that were always in place and nailed to the ground. Plaintiff claims there were no barricades to the loading dock area before the alleged incident (NYSCEF Doc. No. 102).

Defendants argue plaintiff's incident was unwitnessed and dispute his version of events concerning how the incident allegedly occurred. Plaintiff asserts RAD worker Danny Preston witnessed the incident. Preston, however, has denied having any knowledge of the incident (NYSCEF Doc. No. 102). Defendants further claim that, even if plaintiff's version of events may be believed, he was a recalcitrant worker and his own actions were the sole proximate cause of

the accident and his alleged injuries. They argue that plaintiff knew he was required to use the ramp that led to the marked, designated entrance, rather than using the allegedly barricaded loading dock (NYSCEF Doc. No. 107).

Further, defendants argue the loading dock was not defective, and that a proper means of entering and exiting the jobsite was provided. Also, defendants assert that, even if there was an allegedly defective condition, they did not create it or have any actual or constructive notice of it. Thus, and as such, defendants argue plaintiff's Labor Law § 200 and common law negligence claims must be dismissed against them.

Labor Law § 200 (1) provides:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

“Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work.” *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D. 3d 139, 143 (1st Dep't 2012).

The AMS report and daily logs suggest actual and constructive notice to defendants, as far back as one month before, and also, the day prior to plaintiff's fall, concerning the hazardous conditions posed by the cinderblocks forming an unguarded makeshift staircase. A jury may determine that if an injury took place due to this condition, it was attributable to defendants' negligence. Thus, as factual issues remain, summary judgment on the Labor Law § 200 and common law negligence claims is denied to both plaintiff and defendants.

Labor Law § 240(1) “imposes absolute liability on...owners, contractors and their agents whose failure to provide adequate protection to workers employed on a construction site

proximately causes injury to the worker. *Wilinski v. 334 E. 92nd Hous. Devl. Fund Corp.*, 18 N.Y. 3d 1, 7 (2011).

Section 240(1) of the Labor Law, requires that all contractors and owners:

“in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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.”

Here, plaintiff’s expert, Kathleen Hopkins, a Certified Site Safety Manager, states, with a reasonable degree of professional safety certainty, that defendants failed to “furnish or erect...scaffolding, stays, ladders...or other devices such as a safe stairway...as to give proper protection to plaintiff.” She continues that plaintiff’s fall and injuries were “indisputably a gravity-based accident,” and the violations of Labor Law § 240(1) were “direct, substantial and proximate causes of plaintiff’s accident and injuries,” concluding defendants failed to protect him from this “height-related accident” (NYSCEF Doc. No. 60). Additionally, Hopkins stated in an affidavit that defendants violated Labor Law § 241(6) as predicated on violations of 12 NYCRR §§ 23-1.7(f), 23-2.7(b) and 23-2.7(e) of the Industrial Code. She further opines that defendants’ failure to ensure the site was constructed to provide a reasonable and adequate protection to plaintiff’s “life, health and safety” is in violation of Labor Law § 200 (NYSCEF Doc. No. 60).

However, defendants argue there is no Labor Law § 240(1) violation as its expert, Bernard P. Lorenzo, a civil engineer, opined the stairs and ramp leading to the entrance and exit were appropriate safety devices. Further, Lorenzo notes no violations of Labor Law § 241(6) as the Industrial Code sections allegedly violated are neither applicable nor violated (NYSCEF Doc. No. 102).

Defendants contend that *McGarry v. CVP ILLC*, 55 A.D. 3d 441 (1st Dep't 2008), while factually similar, is distinguishable from the subject matter as the cinderblocks in *McGarry* were being used to access various levels of the jobsite and were used as a ladder equivalent. Defendants note the cinderblocks herein were not being used as steps but were merely stacked in the area, hence, defendants were not required to construct a temporary staircase because there was a ramp that led to a marked, designated door (NYSCEF Doc. No. 106). Plaintiff argues that he fell after stepping down onto a first cinderblock, which moved, causing his fall, as did the plaintiff in *McGarry*. Non-party Smith's deposition testimony reflects that the cinderblocks were "placed at the loading dock to enable like stairs, that's the only way they were set up. They were staggeredly [sic] stored so you could use them as steps" (NYSCEF Doc. No. 93). The *McGarry* Court held that a "fall down a temporary staircase is the type of elevation-related risk the statute was intended to cover, regardless of the distance the worker falls." *Id.* Further, plaintiff notes "temporary staircases have routinely been held to be the functional equivalent of a ladder" for purposes of Labor Law § 240(1) liability. *Wescott v. Shear, Jr.* 161 A.D. 2d 925 (1st Dep't 1990). Plaintiff argues the subject cinderblocks were being used as a staircase on this job site, noting Smith stated that he, too, used the cinderblocks as a stairway. Plaintiff points to the Appellate Division, Second Department case *Przyborowski v. A & M Cook LLC*, holding "that when there was testimony that occasionally other workers used the ladder plaintiff fell from as opposed to a nearby staircase, then 'plaintiff's exercise of his discretion in connection with whether to use the ladder or the staircase cannot be said to be the sole proximate cause of his injuries.'" 120 A.D. 3d 651 (2d Dep't 2014) (NYSCEF Doc. No. 112). Plaintiff notes the First Department cited to the *Przyborowski* holding in *Biaca-Neto v. Bos. Rd. II Hous. Dev. Fund Corp.* 176 A.D. 3d 1 (1st Dep't 2019), thus acknowledging *Przyborowski* is controlling law.

Next, defendants argue plaintiff's Labor Law § 240(1) claim must be dismissed because he was the sole proximate cause of the incident. However, there are sharp disputes on the occurrence of the incident, and questions of fact surrounding the makeshift cinderblock staircase.

Finally, while a worker falling at a construction site, in itself, does not establish a violation of Labor Law § 240(1), *see O'Brien v. Port Auth. Of N.Y. & N.J.*, 29 N.Y. 3d 27, 33 (2017), testimony herein shows owners COMREF and L&L, and TIC as their statutory agent, had actual or constructive notice of the hazardous condition posed by the cinderblocks at the loading dock via AMS' reports. As it is undisputed COMREF is an owner, and Tishman's own witnesses stated L&L is another owner of the property, plaintiff's motion for summary judgment on his Labor Law § 240(1) claim on liability is granted as against them. Further, plaintiff is granted summary judgment on his Labor Law § 240(1) claim on liability against TIC as the owners' statutory agent.

Section 241(6) of the Labor Law, entitled "Construction, excavation and demolition work", provides that:

"All 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."

Plaintiff argues summary judgment on Labor Law § 241(6) must be granted as Hopkins' affidavit made clear there were Industrial Code violations. Defendants argue their expert, Lorenzo's, affidavit made plain the Industrial Code violations plaintiff alleged are inapplicable to the instant matter. However, as the conflicting expert testimonies raise issues of fact whether

Industrial Code violations existed and/or are applicable, such issues are for the trier of fact.

Therefore, summary judgment as to Labor Law § 241(6) is denied.

Next, RAD has not demonstrated an entitlement to summary judgment. This is because AMS Safety reports appear to have provided notice that its cinderblocks were creating a hazardous condition as early as one month before plaintiff's accident, and again one day before the incident. The fair reading of the evidence potentially supports the conclusion that RAD owned and placed those cinderblocks at the subject area in the loading dock (NYSCEF Doc. Nos. 60, 109). As such, summary judgment dismissal of RAD as an improper party is denied.

Additionally, there is a question of fact, at this juncture, as to whether the Tishman entities were essentially operating as one company as it relates to the project. Therefore, dismissal of plaintiff's claims asserted against TCC and TCCNY is inappropriate at this stage.

Finally, it is undisputed that Clarion is an investment company without any potential liability for plaintiff's injuries. Thus, Clarion is granted summary judgment dismissing plaintiff's complaint as against it.

Accordingly, it is,

ORDERED that the branch of plaintiff's motion for summary judgment on liability on his Labor Law § 240(1) claim is granted as against COMREF and L&L as owners, and TIC¹ as a statutory agent, but otherwise denied.

ORDERED that the branch of plaintiff's motion seeking summary judgment on liability on his Labor Law § 241(6) claim against defendants is denied.

¹ While two witnesses from defendant Tishman, Pipher and Polemeni, treated the Tishman companies as one and the same, this did not give rise to those entities being liable as general contractors. Neither TCC nor TCCNY were the contracted parties on the subject job with COMREF. Plaintiff's motion for summary judgment on liability on his Labor Law § 240(1) claim is denied without prejudice as against TCC and TCCNY.

ORDERED that the branch of plaintiff’s motion seeking summary judgment on his Labor Law § 200 and common law negligence claims is denied.

ORDERED that the branch of defendants’ cross-motion for summary judgment dismissing plaintiff’s complaint as against them as improper parties is granted only as to Clarion, and otherwise denied.

ORDERED that the branch of defendants’ cross-motion for summary judgment dismissing plaintiff’s Labor Law § 240(1) claim as against COMREF, L&L, and TIC is denied, and otherwise granted.

ORDERED that the branch of defendants’ cross-motion for summary judgment dismissing plaintiff’s Labor Law § 241(6) claims is denied.

ORDERED that the branch of defendants’ cross-motion for summary judgment dismissing plaintiff’s Labor Law § 200 and common law negligence claims is denied.

ORDERED that plaintiff’s Labor Law § 241(6), 200, and common law negligence claims are hereby severed and directed to be held in abeyance pending the outcome of plaintiff’s damages-only trial.

This constitutes the decision and order of the Court.

9/29/2022

DATE



Hon. James E. d’Auguste, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: