

Maldonado v 151 Maiden LLC
2022 NY Slip Op 33478(U)
October 12, 2022
Supreme Court, New York County
Docket Number: Index No. 160317-2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 8

CESAR MALDONADO

INDEX NO. 160317-2018

- v -

MOT. DATE

151 MAIDEN LLC et al

MOT. SEQ. NO. 008

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS Doc. No(s).
ECFS Doc. No(s).
ECFS Doc. No(s).

This is an action for personal injuries sustained at a construction site. Plaintiff now moves for summary judgment on his labor law and common law negligence claims against defendant 151 Maiden LLC ("Maiden") and Pizzarotti LLC ("Pizzarotti"). Maiden and Pizzarotti oppose the motion and cross-move for summary judgment dismissing plaintiff's complaint. Plaintiff opposes the cross-motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff's accident occurred on October 1, 2018 at 151 Maiden Lane, New York, New York (the "site"). On that date, a new hotel was being erected at the site (the "project"). Maiden owned the site and hired Pizzarotti as construction manager for the project. Plaintiff was employed by non-party Doria, Inc. ("Doria"), a subcontract which installs and moves suspended scaffolds.

Plaintiff's accident occurred on a short metal staircase which led down from the exit door to the roof. According to Pizzarotti's witness, Michael Izzo, the staircase was installed by defendant Prestige, a structural steel subcontractor. Before the accident, plaintiff was utilizing the staircase to move to the east side of the roof. In order to do so, plaintiff testified at his deposition that he had to travel through a mechanical room on the roof and proceed down the staircase. The exit door from the mechanical room was slightly higher than the roof surface. Meanwhile, the staircase was missing a bottom step and a stack of loose pavers was left in place of a permanent bottom step. Plaintiff's accident occurred as he set his left foot onto the pavers, which he claimed "wobble[d]", causing him to lose his balance, twist his ankle and fall.

Plaintiff's foreman and his brother, George Colon, prepared a witness statement form on the date

Dated: 10.12.22

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

of the accident. Although Colon clarified at his deposition that he did not witness the accident, Colon wrote the following:

Saw Cesar Maldonado walk down the 3 steps on that leads to the outside on the 31st fl it was a whole step missing from the stairs that he was not aware of and it caused him to sprang (sic) his ankle on some pavements they had used to replace the missing step. Had to help insist (sic) him to the 5th floor where we then filed a report with site safety.

Meanwhile, Eco Safety also prepared a report which was purportedly signed by plaintiff, thereby acknowledging that the information contained in the report, including the description of the accident and description of injuries, is true and accurate to the best of his knowledge. The Eco Safety report provides in pertinent part as follows:

While the injured was walking down the three steps on the south east roof he missed the last step and fell down to his side. The injured claims that he injured his left foot and came down to the Pizzarotti office to file a report before he exists (sic) to go to his house. The injured was offered first aid and hospitalization but refused both and decided to go home and rest.

Plaintiff denies signing the Eco Safety report and Colon testified that the day after plaintiff's accident, Colon was instructed by defendants' representatives to sign plaintiff's name on the report. Plaintiff also questions the admissibility of Colon's report and points to Colon's testimony that he also slipped on the pavers approximately a week prior to plaintiff's accident. Colon admitted that he failed to advise his brother about the issue with the pavers when he instructed his brother to go to the east side of the roof, explaining it "[s]lipped [his] mind because there is really no reason for us to be back there."

Photographs of the staircase with the paver(s) at the bottom have been provided to the court. When shown these photographs, Pizzarotti's witness, Izzo, opined that the staircase looked like it had not been properly installed.

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]).

Plaintiff's motion

At the outset, there are multiple versions of plaintiff's accident which preclude summary judgment in his favor. If plaintiff slipped, tripped or just lost his balance and fell while walking down the staircase, plaintiff does not have a viable Labor Law §§ 240[1] or 241[6] claim. While plaintiff denies signing the Eco Safety report, this is an issue of credibility which the court cannot determine on this record. The court further notes that although defendants did not submit Colon's statement in admissible form, plaintiff relies upon Colon's deposition testimony, Colon is not a disinterested witness as he is plaintiff's brother, and Colon's statement conflicts with his deposition testimony. Accordingly, plaintiff's motion is denied in its entirety.

Defendant's motion – Section 240[1]

The court now turns to defendants' motion as to the Labor Law § 240[1] claim. 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]).

If plaintiff's accident was caused because he stepped onto a paver which shifted and he thus fell, a version of events which a jury could credit, he still does not have a viable Section 240[1] claim. The undisputed facts on this record show that the height differential between the paver and the roof was so trivial as to take this version of plaintiff's accident outside the ambit of the statute (*see i.e. Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915 [1999]). Nor would any enumerated safety devices have protected plaintiff from the application of gravity, i.e. a hoist, sling, brace or rope. Accordingly, defendants' motion is granted to the extent that plaintiff's Labor Law § 240[1] claim is severed and dismissed.

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's Section 241[6] claim is premised upon violations of Industrial Code §§ 23-1.5; 23-1.7 (d)–(f); 23-2.1(b); 23-2.4; and 23-2.7.

Industrial Code § 23-1.5 sets forth general safety standards which do not support a Section 241[6] claim (see *Meslin v New York Post*, 30 AD3d 309 [1st Dept 2006]). Therefore, defendants' motion as to this provision is granted.

Industrial Code § 23-1.7 states in pertinent part as follows:

[d] Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

[e] Tripping and other hazards.

[1] Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

[2] Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

[f] Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Section 23-1.7[d] is not applicable because plaintiff did not slip due to a slippery condition or due to the presence of a foreign substance which caused slippery footing. Section 23-1.7[e] is not applicable because plaintiff's accident was not caused by accumulations of dirt and debris, sharp projections or scattered tools and materials. Section 23-1.7[f] is equally inapplicable.

Industrial Code § 23-2.1(b) states in pertinent part as follows: "[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area" (12 NYCRR 23-2.1[b]). This provision is not applicable to plaintiff's accident. Similarly, Industrial Code § 23-2.4 and § 23-2.7 are inapplicable and/or irrelevant. Accordingly, defendants' motion as plaintiff's Labor Law § 241[6] claims is also granted.

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 Assoc., 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]).

Defendant's motion as to this claim is denied, as defendants have failed to meet their burden by establishing that the staircase was not in a defective or dangerous condition and/or that the defendants should not be charged with constructive notice of same.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiff's Labor Law §§ 240[1] and 241[6] claims are severed and dismissed; and it is further

ORDERED that the balance of defendants' motion is 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:

10/12/22
New York, New York

So Ordered:



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