

Buffamante v City of New York

2022 NY Slip Op 34504(U)

October 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 525042/2017

Judge: Karen B. Rothenberg

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
SALVATORE BUFFAMANTE as Administrator of the
ESTATE OF MICHAEL BUFFAMANTE,

Plaintiff(s),
-against-

Index No: 525042/2017

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s)
_____ x

Recitation as required by CPLR 2219(a), of the papers considered in this motion and cross-motion for summary judgment.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	50-85
Cross-motion and supporting papers.....	
Answering Affidavits.....	86-114
Reply papers.....	115-121
Memoranda of law.....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to recover damages for personal injuries and wrongful death, the plaintiff moves [seq. no. 3] for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). Defendants move [seq. no. 4]for summary judgment dismissing the plaintiff’s causes of action alleging common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

On October 16, 2016, plaintiff’s son, the decedent Michael Buffamante [Buffamante], a union laborer employed by non-party Welkin Mechanical, LLC [Welkin], drowned when he fell into a 30-foot-deep effluent channel at the Coney Island Wastewater Treatment Plant located in Brooklyn, which is owned and operated by defendants The City of New York [City] and New York City Department of Environmental Protection [DEP].

Welkin entered into a contract with DEP to construct a new building and install piping and structural support in the plant’s waste water effluent channels. The effluent

channels are individual systems laid out throughout the facility that are used for the disinfection of waste water. Each of the individual effluent channels are surrounded by concrete walkways that have 43-inch-high guardrails in place for fall protection.

Nick DePietto, Welkin's Site Safety Manager, testified that on the morning of the accident, Buffamante and his foreman Thomas Gould [Gould] were tasked with performing punch list items which required Gould to work off a floating platform in the effluent channel with Buffamante stationed on the walkway to hand him tools through the railing if needed. Each of the men were provided a full body safety harness and a tethering system. According to DePietto, Welkin required their workers to 'tie-off' if they were working inside the guardrails, or if they had to lean their bodies over or through the guardrails for their work. Anchors were installed throughout the walkways for the men to attach their lines, and were in place on the day of the accident. DePietto testified that Gould and Buffamante had been instructed of these safety requirements, and were 'tied-off' when he saw them working that morning.

Gould testified that he and Buffamante completed the punch list items around 10:30 AM on the day of the accident and then took a break. In the afternoon, he and Buffamante were tasked with lifting and demobilizing a floating platform from one of the effluent channels by use of a gantry crane. To perform the task, the men wheeled the gantry crane into position on the concrete walkway. Gould then hooked the crane to the floating platform's sling and tightened the slack in preparation for hoisting but did not start the process of raising it out of the water. Buffamante did not assist Gould in attaching the crane to the platform and was not assigned any tasks during that time period. Because the work was performed on the concrete walkway and did not require either man to lean or reach over the railing, they were not required to 'tie-off'. After Gould attached the crane to the platform, he had a brief discussion with George Okpem [Okpem], a Welkin field engineer, who was in the immediate vicinity, about waiting until the following week to lift the floating platform out of the channel by use of a full crane. While the men were having this conversation, Gould received a call from his wife. At some point during or immediately after his call with his wife, Gould heard a splash and he quickly ran over to the nearby effluent channel where Okpem and another worker were already standing. Gould was unable to see Buffamante in the water and he asked Okpem to immediately call 911.

Okpem testified that he was on the concrete walkway for a very short period before the accident took place. Okpem was waiting for Gould to finish his call with his wife when he heard a splash. Okpem did not see Buffamante fall into the channel, he just saw his boots and then saw him sinking very quickly down into the water.

Michael Budney, a DEP sewage treatment worker, who was on-site at the time of the accident, testified that as he was in the process of performing his work he saw "a

figure out of the left corner of my eye, fall towards the tank.” Budney did not hear anything before the fall, and that after the fall the only thing he could see was Buffamante’s foot at the top of the water. In a later affidavit, Budney states that when he saw Buffamante fall, Buffamante was standing inside the guardrail.

Labor Law § 240 (1) imposes a nondelegable duty upon owners and contractors to provide safety devices necessary to protect workers from elevation-related risks (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Barr v 157 5 Ave., LLC*, 60 AD3d 796 [2d Dept 2009]). “To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Allan v. DHL Express [USA], Inc.*, 99 A.D.3d 828, 833 [2d Dept 2012]). However, there can be no liability where a plaintiff’s own actions are the sole proximate cause of the accident (*see Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Here, plaintiff fails to demonstrate that Buffamante’s drowning was the result of defendants’ failure to provide adequate safety devices in violation of Labor Law § 240 (1) (*cf. Smith v State of New York*, 180 AD3d 1270 [3rd Dept 2020]; *Collado v City of New York*, 72 AD3d 458 [1st Dept 2010]). The evidence demonstrates that on the afternoon of the accident, the men were working solely on the concrete walkway which had 43-inch-high guardrails in place for fall protection. Buffamante’s task did not require him to ‘tie-off’ since he was not working over or through the guardrail. Contrary to plaintiff’s counsel’s contention, there is no evidence that Buffamante fell over the guardrail, and there is nothing to suggest that the fall was related to any insufficiency in the guardrail, itself, as a safety device. Moreover, even assuming that Buffamante was performing an assigned task inside the railings, he had been provided with an adequate safety device, namely, a full body harness, which he did not utilize, despite specific instructions to ‘tie-off’ when inside the railing area.

Defendants, on the other hand, establish prima facie that Buffamante’s own actions in choosing to bypass the guardrail protections, for no known reason, and then to not use his harness system, was the sole proximate cause of his drowning death (*see Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16 [2d Dept 2016]); *see Serrano v Popovic*, 91 AD3d 626 [2d Dept 2012]). In opposition, plaintiff fails to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to “provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Lopez v. New York City Dept. of Env’tl. Protection*, 123 AD2d 982, 983 [2d Dept 2015]). “Although a plaintiff asserting a Labor Law § 241(6) cause of action must allege a violation of a specific provision of the Industrial Code, a failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to

such a claim” (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 605-606 [2d Dept 2013]). “A plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241(6) claim for the first time in opposition to a motion for summary judgment if the allegation involve[s] no new factual allegations, raise[s] no new theories of liability, and cause[s] no prejudice to the defendants” (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011]).

Here, defendants demonstrate that they would be prejudiced by the plaintiff’s belated citation of Industrial Code [12 NYCRR] 23-1.7(c), which requires that appropriate rescue equipment consisting of a manned boat be provided when any person is exposed to a drowning hazard. Nothing in the complaint, bill of particulars, or deposition testimonies put defendants on sufficient notice that the plaintiff’s Labor Law § 241(6) claim is related to a failure to make appropriate rescue efforts.

On the other hand, plaintiff’s belated citation of 23-1.16(b) [safety belts and harnesses] and 23-1.7(b)(1) [falling hazards] do not involve new factual allegations or new theories of liability, and will not cause unfair prejudice. Defendants were put on sufficient notice that that the plaintiff’s Labor Law § 241(6) claims related to the failure to provide Buffamante with adequate fall protections. In any event, defendants demonstrate prima facie entitlement to judgment as a matter of law, dismissing plaintiff’s § 241(6) claim as predicated upon 23-1.16(b) and 23-1.7(b)(1). First, as the evidence establishes that Buffamante was provided with a safety harness, and a proper place to ‘tie-off’ his harness, it is demonstrated that 23-1.16(b) was not violated (*cf. Anderson v MSG Holdings, L.P.*, 146 AD3d 401 [1st Dept 2017]). Moreover, as it is undisputed that there were guardrails protecting the concrete walkways, defendants also demonstrate that 23-1.7(b)(1) was not violated.

Labor Law § 200 codifies the common-law duty of owners, general contractors, or their agents to provide workers with a reasonably safe place to work (*see Pacheco v Smith*, 128 AD3d 926 [2d Dept 2015]; *Everitt v Nozkowski*, 285 AD2d 442 [2d Dept 2001]). Where, as here, a plaintiff’s claim arises out of alleged dangers in the methods or manner in which the work is performed, a defendant must have authority to supervise or control over the work (*see Navarro v Hannon*, 197 AD3d 474, 476 [2d Dept 2021]). Here, defendants establish prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law § 200 and common-law negligence through their submissions, which demonstrate that they did not have the authority to supervise or control the method or manner in which the work was performed (*see Southerton v City of New York*, 203 AD3d 977 [2d Dept 2022]). In opposition, the plaintiff fails to raise a triable issue of fact (*see Alvarez, supra*).


Accordingly, the plaintiff’s motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) is denied. The

defendants' motion for summary judgment dismissing the plaintiff's complaint is granted in its entirety.

This constitutes the decision/order of the Court

Dated: October 14, 2022

Enter,



Karen B. Rothenberg, J.S.C.