

Alpi v 3100 Ocean LLC

2022 NY Slip Op 34921(U)

May 11, 2022

Supreme Court, Kings County

Docket Number: Index No. 503269/2018

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 503269/2018
Seqs. 007, 008

Part 91

DECISION/ORDER

AZI ALPI,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed	<u>2, 3</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>3</u>
Exhibits	_____
Other	_____

3100 OCEAN LLC, CLIPPER EQUITY LLC, CLIPPER REALTY CONSTRUCTION LLC, CLIPPER REALTY INC., GAMBRINUS SEAFOOD CAFÉ INC. D/B/A GAMBRINUS, KAIFUEM EXPRESS INC., AND BIG APPLE BUILDERS CORP.,

Defendants.

Upon the foregoing papers, plaintiff's motion for partial summary judgment against defendants 3100 Ocean LLC and Clipper Equity LLC (Mot. Seq. 007) and defendants 3100 Ocean LLC's and Clipper Equity LLC's cross-motion for partial summary judgment (Mot. Seq. 008) are decided as follows:

Factual Background

Plaintiff commenced this action to recover for injuries allegedly sustained at a construction project as a result of defendants' purported negligence and violation of New York Labor Law §§ 200, 240(1), and 241(6). Defendant 3100 Ocean LLC is the owner of the premises on which the construction project occurred. Defendant Clipper Equity LLC is the managing agent of 3100 Ocean LLC.

At the time of the accident, plaintiff was installing sheetrock while standing on a 7-foot-tall A-frame ladder. Plaintiff testified that the ladder had no footings. Plaintiff was "beating" the sheetrock into position, which involved applying plaster mix compound to the back of the piece,

patting it with his fists, then using his palms to move the sheetrock up and down while shaking the plaster compound to spread it out. As plaintiff did so, the ladder started swaying side to side and then fell with plaintiff to the ground.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's Claims for Negligence and Violation of Labor Law § 200

Defendants 3100 Ocean LLC and Clipper Equity LLC seek summary judgment dismissing plaintiff's claims for negligence and violation of Labor Law § 200 against them. "Labor Law § 200 is a codification of the common law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 and negligence in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition on the premises, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of the use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept

2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991 92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]). There is no allegation that there was a dangerous condition on the premises itself, and so the first circumstance does not apply. Additionally, it is uncontested that the moving defendants did not supervise plaintiff. Accordingly, 3100 Ocean LLC and Clipper Equity LLC are not liable in negligence or for violation of Labor Law § 200, and these claims are dismissed against them.

Plaintiff's Claim for Violation of Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). To prevail on a claim for violation of Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation proximately caused his or her injuries (*Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 887 [2d Dept 2019]).

Plaintiff claims defendants violated the statute because the ladder was unsecured, was without the footings, and was otherwise not sufficient for the task of installing sheetrock at nine feet or when "beating" is required. Defendants claim there is no evidence of defect, but a defect is not necessary prerequisite for a violation of the statute. Additionally, a ladder that is missing footings from the base of the ladder is arguably defective or otherwise dangerous (*see eg, Soczek v 8629 Bay Parkway, LLC*, 193 AD3d 1093 [2d Dept 2021]). Defendants also contend that the ladder was sufficient to the task because plaintiff previously used the ladder without incident. However, accidents do not need to occur the instant insufficient equipment is used (*see Morocho v Plainview-Old Bethpage Cent. School Dist.*, 116 AD3d 935, 936 [2d Dept 2014]; *see also Avendano v Sazerac, Inc.*, 248 AD2d 340, 341 [2d Dept 1998]). Finally, defendants argue that

plaintiff should have waited for another worker to secure the ladder as he had previously done. Defendants, and not plaintiff, are responsible for securing the ladder. Additionally, even if plaintiff chose to use the ladder without another person holding on to it, such a decision does not render plaintiff the sole proximate cause of the accident. Accordingly, this court finds that defendants 3100 Ocean LLC and Clipper Equity LLC violated Labor Law § 240(1).

Plaintiff's Claim for Violation of Labor Law § 241(6)

Defendants seek summary judgment dismissing plaintiff's claim for violation of Labor Law § 241(6). Labor Law § 241(6) imposes on owners and contractors a non-delegable 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 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

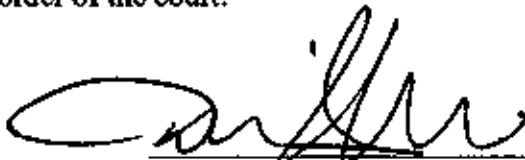
Defendants seeks dismissal of plaintiff's claim for violation of Labor Law § 241(6) based on violation of certain OSHA regulations and Industrial Code §§ 23-1.5(a-c), 23-1.7, 23-1.8(c)(1), 23-1.16, 23-1.21(b)(1)(3)(i-iv)(5)(e)(1-5), and 23-2.1. Plaintiffs only contests Sections 23-1.21(b)(3)(iv) and 23-1.21(b)(4)(iv). However, defendants do not appear to seek dismissal of 23-1.21(b)(4)(iv). With regard to Section, 23-1.21(b)(3)(iv), the section prohibits defective ladders. There are at least questions of fact as to whether a ladder without proper footing is defective.

Conclusion

For the foregoing reasons, plaintiff's motion for partial summary judgment (Seq. 007) is granted. Defendants' motion for partial summary judgment (Seq. 008) is granted to the extent that plaintiff's claims against defendants 3100 Ocean LLC and Clipper Equity LLC for negligence, violation of Labor Law § 200 and violation of Labor Law § 241(6) based on Industrial Codes §§ 23-1.5(a-c), 23-1.7, 23-1.8(c)(1), 23-1.16, 23-1.21(b)(1)(3)(i-iii)(5)(e)(1-5), and 23-2.1 are dismissed.

This constitutes the decision and order of the court.

May 11, 2022
DATE



DEVIN F. COHEN
Justice of the Supreme Court

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