

Keen v Tishman Constr. Corp. of N.Y.

2022 NY Slip Op 34983(U)

December 23, 2022

Supreme Court, Queens County

Docket Number: Index No. 717945/19

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice

JEANINE KEEN,
Plaintiff,

-against-

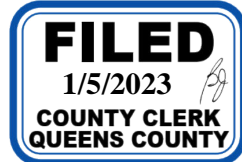
TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK, et al.,

Defendants.

Index No. 717945/19

Motion Date: 5/18/22

Motion Seq. No. 1



The following numbered papers read on this motion by plaintiff Jeanine Keen (plaintiff), for partial summary judgment on the issue of liability on her causes of action brought under Labor Law §§ 240 (1), and 241 (6).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF 16-29
Answering Affidavits - Exhibits	EF 35-42
Reply Affidavits	EF 43-44

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries that plaintiff allegedly sustained on or about November 16, 2017, at premises located at 400 11th Avenue, in New York County, as a result of defendants Tishman Construction Corporation of New York's, Meushar 34th Street LLC's, and BP/M 3HB Owner LLC's (collectively referred to as defendants), violation of Labor Law §§ 200, 240, 241, and common-law negligence. Plaintiff has alleged that Meushar 34th Street LLC (Meushar), and BP/M 3HB Owner LLC (BP/M), were the owners of the subject premises, while Tishman Construction Corporation of New York (Tishman), acted as an agent of the owners and as the construction manager. Plaintiff has alleged that she was an employee of non-party Scalamandre & Sons, and that

she was working at the subject premises when she fell from a ladder and sustained injuries.

As an initial matter, the court notes that although plaintiff has brought causes of action under Labor Law §§ 200, 240, 241, and common-law negligence, she has moved for partial summary judgment against defendants only on her causes of action brought under Labor Law §§ 240 (1), and 241 (6). Therefore, the court will not address plaintiff's causes of action brought under Labor Law § 200 and for common-law negligence. "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25 [internal quotes omitted]), and "the proponent of a summary judgment motion 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" (*id.*, at 25-26, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court will first address plaintiff's cause of action brought under Labor Law § 240 (1).

Labor Law § 240 (1)

In support of this branch of her motion, plaintiff has argued that she was not provided with proper protection from an elevation-related hazard which proximately caused her alleged injuries, and that her conduct was not the sole proximate cause of her alleged injuries. Labor Law § 240 (1) provides that:

"[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

The scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect workers against

elevation-related hazards (*see St. v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]; *Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 1300 [2d Dept 2020]; *Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2d Dept 2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2d Dept 2009]). A prima facie case under Labor Law § 240 (1) requires a showing that a defendant's statutory violation was a proximate cause of the plaintiff's injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). "Although '[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1),' liability will be imposed when the evidence shows 'that the subject ladder was ... inadequately secured and that ... the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries'" (*Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2d Dept 2012], quoting *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]).

The record in this matter contains, among other things, copies of the pleadings, plaintiff's deposition testimony, the deposition testimony of non-party Richard Mazzella (Mazzella), an employee of Tishman, and the affidavit of non-party Frank Mangano (Mangano), an employee of Scalamandre & Sons, and a copy of an agreement between Meushar and Tishman dated May 25, 2017. The agreement between Meushar and Tishman, dated May 25, 2017, as well as defendants' admissions, are sufficient to demonstrate that Meushar was the owner of the subject premises at the time of the accident.

Additionally, said agreement, on its face, designated Tishman as the "construction manager as agent of the owner." "A construction manager of a work site is generally not responsible for injuries under Labor Law § 200, § 240(1), or § 241(6) unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the injury" (*Lamar v Hill Intern., Inc.*, 153 AD3d 685, 686 [2d Dept 2017]; *see Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *Barrrios v City of New York*, 75 AD3d 517, 519 [2d Dept 2010]). Mazzella testified that he was the Senior Vice President for Tishman, and that he managed and supervised Tishman staff on the project at the subject premises in order to bring the project to completion. Based upon his testimony, the language of the agreement between Meushar and Tishman dated May 25, 2017, as set forth above, and defendants' admission, plaintiff has sufficiently demonstrated that Tishman acted as the construction manager for the work and was an agent of Meushar, the owner.

However, despite the allegations that BP/M was an owner of the subject premises, plaintiff has failed to make a sufficient showing through admissible evidence what the role of BP/M was in this matter. As such, the court's determinations on this motion do not include any determinations as to BP/M's liability.

Plaintiff testified that while she was ascending a wooden “job-built” ladder that was already in place when she arrived to perform her work at that particular location, she needed to step off the ladder and onto a concrete slab in order to hang a sign. She further testified that, in the process of doing so, when one foot was on the ladder and one foot was on the concrete slab, the bottom of the ladder slid away from the wall while the top of the ladder moved toward the wall, causing her to fall. Plaintiff testified that the top portion of her body landed on top of the concrete slab, that one of her legs became entangled in the ladder, that one knee came into contact with either the ladder or the wall, and that she did not fall to the ground below, but onto the level where she was climbing off the ladder. Plaintiff further testified that the ladder was not “footed,” which meant that it was not secured at the bottom in order to prevent the bottom of it from slipping away from the wall and that it was not “tied” at the top which meant that it was not secured in order to stop the top of it from swaying or falling away from the wall.

Based upon plaintiff’s undisputed testimony as to how the subject accident occurred, plaintiff has satisfied her prima facie burden as to the cause of action based upon Labor Law § 240 (1), by establishing that the subject ladder was inadequate for the task at hand, thereby causing plaintiff to fall and sustain injuries (*see generally Monioudis v City of New York*, 82 AD3d 945, 945 [2d Dept 2011]; *see also generally Begeal v Jackson*, 197 AD3d 1418, 1419-20 [3d Dept 2021]). Plaintiff has sufficiently demonstrated that, despite not falling to the ground below, she was standing at a height when the ladder slid or gave way, that plaintiff was not provided with proper protection to prevent plaintiff’s resulting fall, and that the device plaintiff was provided to perform her work “proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity...” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

As is the case here, “[o]nce the plaintiff makes a prima facie showing, the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]). In opposition, defendants have failed to point to sufficient evidence in the record to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Despite defendants’ contention, “[t]he fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor” (*Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011]; *see Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]). Plaintiff’s credibility has not

been placed in issue to prevent the granting of summary judgment on the issue of liability in her favor on a Labor Law § 240 (1), cause of action (*see generally Alvarez v 2455 8 Ave, LLC*, 202 AD3d 724, 725 [2d Dept 2022]; *Woszczyzna v BJW Assoc.*, 31 AD3d 754, 755 [2d Dept 2006]; *Hirsch v Greenridge Assoc., LLC*, 26 AD3d 411, 412 [2d Dept 2006]).

Furthermore, to the extent that defendants have argued that plaintiff's own actions were the sole proximate cause of the subject accident they have failed to satisfy their burden with admissible evidence. It is well settled that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *see Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849, 852 [2d Dept 2009]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d at 696). There was a statutory violation in this matter. The evidence in the record before the court, including Mangano's affidavit in which he stated, among other things, that plaintiff chose to use this ladder over another, has raised, at most, an issue of plaintiff's comparative negligence, which is not a defense to a cause of action brought under Labor Law § 240 (1) (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]; *Castillo v 62-25 30th Ave. Realty, LLC*, 47 AD3d 865, 866 [2d Dept 2008]; *La Lima v Epstein*, 143 AD2d 886, 888 [2d Dept 1988]).

Therefore, in light of the above, plaintiff is entitled to partial summary judgment on the cause of action brought under Labor Law § 240 (1), only against Meushar, as the owner, and Tishman, as the construction manager. The branch of plaintiff's motion for partial summary judgment on this cause of action against BP/M is denied. The matter is set down for an inquest on the issue of damages following a trial on the remaining causes of action. Next, the court will turn to plaintiff's cause of action brought under Labor Law § 241 (6).

Labor Law § 241 (6)

"In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that ... defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2007]; *see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Moscatti v Consol. Edison Co. of New York, Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In the instant matter, in her pleadings, plaintiff has predicated her section 241 claim upon alleged violations of various sections of the Industrial Code, including 12 NYCRR 23-1.5, 1.5 (a), 1.7, 1.7 (e), 1.21(a), 1.21(b)(1), 1.21(b)(4)(I), 1.21(b)(4)(ii), 2.1, and 9.8.

To the extent that, in her motion papers, plaintiff has failed to address her claims brought under 12 NYCRR 23-1.5, 1.5 (a), 1.7, 1.7 (e), 1.21(a), 2.1, and 9.8, these sections

are, hereby, deemed abandoned and the court's determination is limited to plaintiff's allegations brought under to 12 NYCRR 23-1.21(b)(1), 1.21(b)(4)(i), and 1.21(b)(4)(ii). In support of this branch of her motion, plaintiff has argued that 12 NYCRR 23-1.21(b)(1), 1.21(b)(4)(i), and 1.21(b)(4)(ii), are applicable in this matter and that defendants violated these sections of the Industrial Code, which proximately caused her alleged injuries.

12 NYCRR 23-1.21, entitled "Ladders and ladderways," provides the following at subsection (b): "General requirements for ladders. (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon." This section has been found to be sufficiently specific to support a cause of action brought under Labor Law § 241 (6) (*see Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 654 [2d Dept 2014]).

Based upon a review of the evidence in the record, including but not limited to plaintiff's deposition testimony, plaintiff has failed to satisfy her prima facie burden as to whether this section was applicable and violated. The court has determined that issues of fact remain as to whether "any component" of the subject ladder was incapable of supporting "at least four times the maximum load intended to be placed thereon," and whether the ladder became dislodged or loosened within the meaning of the statute. Therefore, plaintiff is not entitled to summary relief as to this claim.

Next, 12 NYCRR 23-1.21, also provides the following at subsection (b)(4):

"Installation and use. (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise. (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

These two parts of subsection (b)(4), have been found to be sufficiently specific to support a cause of action brought under Labor Law § 241 (6) (*see Przyborowski v A & M Cook, LLC*, 120 AD3d at 654; *see also Rodriguez v Bsrep UA Heritage LLC*, 2019 NY Slip Op. 32659 [U], *7 [Sup Ct, New York County 2019], *affd*, *Rodriguez v BSREP UA Heritage LLC*, 181 AD3d 537 [1st Dept 2020]). Based upon plaintiff's deposition testimony and the evidence in the record, she has failed to sufficiently demonstrate whether the ladder at issue was a "portable" ladder within the meaning of the statute that was used as a "regular means


of access,” and, thus, plaintiff has failed to satisfy her prima facie burden as to whether 12 NYCRR 23-1.21(b)(4)(i), was applicable in this matter and was violated.

Additionally, based upon the evidence, plaintiff has failed to make a sufficient showing that 12 NYCRR 23-1.21(b)(4)(ii), was applicable and was violated inasmuch as plaintiff has failed to demonstrate what surface the ladder involved in the accident was placed on any, whether it was placed upon “slippery surfaces” within the meaning of the statute, or whether any other insecure objects were used as ladder footings. Therefore, in light of the above, plaintiff has failed to satisfy her prima facie burden on this branch of her motion and is not entitled to partial summary judgment on her cause of action brought under Labor Law § 241 (6).

Accordingly, the branches of plaintiff’s motion for partial summary judgment on the cause of action brought under Labor Law § 240 (1), only against Meushar and Tishman, are granted. Plaintiff’s motion is denied in all other respects. The matter is set down for an inquest on the issue of damages following a trial on the remaining causes of action.

The foregoing constitutes the Decision and Order of this court.

Dated: December 23, 2022



J.S.C.

