

Berrios v City of New York
2022 NY Slip Op 35099(U)
May 2, 2022
Supreme Court, Queens County
Docket Number: Index No. 712709/2015
Judge: Denis J. Butler
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Denis J. Butler IA Part 12
Justice

DAVID BERRIOS, x

Plaintiff,

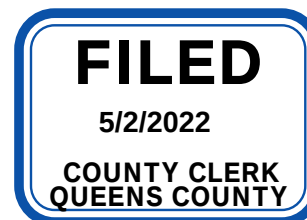
THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION, NEW YORK
CITY SCHOOL CONSTRUCTION AUTHORITY
and WHITESTONE CONSTRUCTION CORP.,

Defendants.

Index
Number 712709 2015

Motion
Date February 15, 2022

Motion Seq. No. 2



The following numbered papers read on this motion by plaintiff David Berrios (plaintiff), for partial summary judgment pursuant to CPLR § 3212, on the cause of action brought pursuant to Labor Law §§ 240 (1), and 241 (6), against defendant New York City School Construction Authority (SCA), and to dismiss all affirmative defenses predicated upon plaintiff's alleged comparative fault and/or culpable conduct.

Papers Numbered

Notice of Motion - Affidavits - Exhibits EF 28-43
 Answering Affidavits - Exhibits EF 45-46
 Reply Affidavits EF 47-49

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 December 10, 2014, as a result of SCA's, defendants The City of New York's, New York City Department of Education's, and Whitestone Construction Corp.'s violation of Labor Law §§ 200, 240 (1), 241 (6), and for common-law negligence. Plaintiff

has alleged that SCA, The City of New York, and New York City Department of Education owned, operated, maintained, managed and controlled the premises located at 88-08 164th Street, in the County of Queens, and that Whitestone Construction Corp., was hired to perform certain construction work at the premises.

Plaintiff has alleged that he was an employee of non-party Silverite Construction, which was hired by SCA to act as the general contractor for certain construction work at the subject premises. Plaintiff has further alleged that while he was working at the subject premises, he fell off of a wooden ramp and sustained personal injuries. The court notes that although plaintiff has alleged causes of action pursuant to Labor Law §§ 200, 240 (1), 241 (6), and for common-law negligence, plaintiff has moved, herein, for partial summary judgment only on his causes of action brought under Labor Law §§ 240 (1), and 241 (6).

“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]).

Labor Law § 240 (1)

In support of this branch of his motion, plaintiff has argued that the ramp from which he allegedly fell was an improper safety device that was used to get workers and materials from one elevation to another and that the plywood constituting the ramp surface was not properly supported, which caused it to move and caused plaintiff to fall approximately two to three feet to the ground below. 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]).

Cases involving the type of platform and/or ramp, such as in the instant case, fall into two general categories, those in which a device is being used as the functional equivalent of a scaffold, and those in which a device serves as a mere passageway (*see Ramirez v Metro. Transp. Auth.*, 106 AD3d 799, 800 [2d Dept 2013]; *Salcedo v Swiss Ranch Estates, Ltd.*, 79 AD3d 843, 844 [2d Dept 2010]). Labor Law § 240 (1) has been held not to apply in cases where a device has been used as a mere passageway (*see id*; *Grabowski v Consol. Edison Co. of N.Y.*, 72 AD3d 888, 889 [2d Dept 2010]; *Donohue v CJAM Assoc., LLC*, 22 AD3d 710, 711-712 [2d Dept 2005]; *Sandi v Chaucer Assoc.*, 170 AD2d 663, 664 [2d Dept 1991]). In cases where a device has been used as the functional equivalent of a scaffold, ladder or other device enumerated in Labor Law § 240 (1), section 240 (1) has been found to be applicable (*see Ramirez v Metro. Transp. Auth.*, 106 AD3d at 800; *Beharry v Pub. Storage, Inc.*, 36 AD3d 574 [2d Dept 2007]).

The record in this matter contains, among other things, copies of the pleadings, a copy of plaintiff’s testimony at a 50-h hearing, and a copy of plaintiff’s deposition testimony. Plaintiff testified that the wooden ramp involved in the subject accident was approximately 13 feet in length, approximately 3 to 4 feet in width, that it had no railings, and that he had used the subject ramp approximately 6 or 7 times without incident on the day of the accident. Plaintiff further testified that the ramp was a means of ingress and egress into the building at the premises, and that he had used it prior to the accident to bring materials into and out of the building. Plaintiff testified that at the time of the subject accident, he was assisting his shop steward in carrying a propane tank out of the building and that he was walking down the ramp to exit the building.

Based upon the evidence in the record, in particular, plaintiff’s deposition testimony, under the circumstances, the court has concluded that plaintiff was not subjected to an elevation-related risk as contemplated by the statute (Labor Law § 240 [1]). Based upon

plaintiff's testimony, the wooden ramp in the instant case "was not a tool used in the performance of the plaintiff's work. It was a passageway from one place of work to another. The distinction is critical. An accident arising on such a passageway does not lie within the purview of subdivision 1 of section 240" (*Ryan v Morse Diesel, Inc.*, 98 AD2d 615, 616 [1st Dept 1983]; see *Creese v Long Is. Light. Co.*, 98 AD3d 708 [2d Dept 2012]; *Salcedo v Swiss Ranch Estates, Ltd.*, 79 AD3d at 844; *Donohue v CJAM Assoc., LLC*, 22 AD3d at 712; see also *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]; *Kavanaugh v Marrano/Marc Equity Corp.*, 225 AD2d 1037 [4th Dept 1996]).

Plaintiff's testimony reflected that he used the subject wooden ramp as a means of ingress and egress and there is insufficient evidence in the record to demonstrate that the wooden ramp was used by plaintiff as the functional equivalent of a scaffold or one of the other safety devices enumerated in Labor Law § 240 (1). Indeed, within his motion papers, plaintiff has advanced the argument that the ramp was a "passageway" within the meaning of the Labor Law. Therefore, given the evidence in the record, including but not limited to plaintiff's own deposition testimony, plaintiff has failed to satisfy his prima facie burden and is not entitled to partial summary judgment on this cause of action (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

In fact, since the evidence in the record has sufficiently demonstrated that plaintiff's alleged accident does not fall within the purview of Labor Law § 240 (1), given the court's ability to search the record and grant judgment as is warranted (CPLR §§ 3212[b], 3213; see *Schulz v Barrows*, 263 AD2d 565, 570 [3d Dept 1999], *affd*, 94 NY2d 624 [2000]; see also *Dresdner Bank AG. (New York Branch) v Morse/Diesel, Inc.*, 115 AD2d 64, 69 [1st Dept 1986]; *Dillon, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR C3213:17), based upon the above determinations, plaintiff's cause of action brought under Labor Law § 240 (1), is, hereby, dismissed.

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]; *Moscato v Consol. Edison Co. of New York, Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In the instant matter, in his pleadings, plaintiff has predicated his section 241 claim upon alleged violations of various sections of the Industrial Code, including 12 NYCRR 23-23-1.5 (a) to (c), 1.7(b)(1), (d), (e) (1) and (2), and (f), 1.22 (a) to (c), and 2.4 (a) to (c).

In support of this branch of his motion for partial summary judgment, plaintiff has argued that SCA violated 12 NYCRR 23-1.7 (d), (e) (1), and 1.22 (b) (2). Inasmuch as plaintiff has not moved with regard to, nor addressed his claims brought under the remaining sections of the Industrial Code he has alleged were violated, which have been set forth above, the court does not make any determination as to those claims.

First, 12 NYCRR 23-1.7, entitled “Protection from general hazards,” provides the following at subsection (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.”

Plaintiff has argued that this section was applicable and was violated. This section has been found to be “sufficiently specific to act as a predicate for Labor Law § 241(6) liability” (*Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099 [2d Dept 2020]). Plaintiff gave testimony at both a 50-h hearing and at his deposition. Although plaintiff testified at various times that he lost his footing, or lost his balance, or tripped, or that he fell as a result of the instability of the ramp, he never testified that he slipped on the ramp as a result of a “slippery condition... [such as] [i]ce, snow, water, grease and any other foreign substance which may cause slippery footing...” (12 NYCRR 23-1.7[d]).

In addition to his testimony, plaintiff has relied upon a copy of a safety report dated December 10, 2014, which details an inspection that was conducted after the subject accident. To the extent that this report contains evidence of remedial measures, it is inadmissible (*see Soto v CBS Corp.*, 157 AD3d 740, 741 [2d Dept 2018]; *Niemann v Luca*, 214 AD2d 658, 658 [2d Dept 1995]). To the extent that plaintiff has argued that the report contains the statement that plaintiff “slipped and fell,” that statement is inadmissible hearsay since the inspector that prepared the report, non-party Martin Dziki (Dziki), did not witness the subject accident (*see Roldan v New York Univ.*, 81 AD3d 625, 627 [2d Dept 2011]; *see generally Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294 [2d Dept 2019]). To the extent that the report contains Dziki’s observation that the ramp “[s]urface was wet and slippery,” plaintiff did not testify that he slipped as a result of a wet condition.

Given plaintiff’s own testimony as to how the subject accident occurred, plaintiff has failed to satisfy his prima facie burden as to this section of the Industrial Code (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). As such, the court need not address the sufficiency of the opposition with respect to this claim (*see Brachfield v Sternlicht*, 202 AD3d 742, 744 [2d

Dept 2022])). In light of the above determination and given the court's ability to search the record (CPLR §§ 3212[b], 3213), plaintiff's claim under this section of the Industrial Code is, hereby, dismissed.

Next, 12 NYCRR 23-1.7 (e) (1), provides the following: "Tripping and other hazards ... 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." Plaintiff has argued that this section of the Industrial Code was applicable and was violated. This section has been found to be sufficiently specific to support a cause of action brought under Labor Law § 241 (6) (*see Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010] *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 317 [2d Dept 1997])).

After careful consideration, given plaintiff's conflicting testimony at the 50-h hearing and at his deposition that he lost his footing, lost his balance, and/or tripped on the ramp itself and/or that he fell as a result of the instability of the boards constituting the ramp, plaintiff has failed to satisfy his prima facie burden by sufficiently eliminating all triable issues of fact as to how the subject accident occurred and, thus, whether this section of the Industrial Code is applicable in the instant action or was violated (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). As such, the court need not address the sufficiency of the opposition with respect to this claim (*see Brachfield v Sternlicht*, 202 AD3d at 744).

12 NYCRR 23-1.22, entitled "Structural runways, ramps and platforms," provides the following at subsection (b)(2):

"(b) Runways and ramps...(2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed."

Plaintiff has argued that this section of the Industrial Code was applicable and was violated. This section has been found to be sufficiently specific to support a cause of action brought pursuant to Labor Law § 241 (6) (*see Gray v City of New York*, 87 AD3d 679, 680 [2d Dept 2011])). Given plaintiff's conflicting deposition testimony as to how the subject accident occurred, discussed above, plaintiff has failed to satisfy his prima facie burden of eliminating all triable issues of fact in the record as to whether this section was applicable in the instant action and was violated (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Thus,

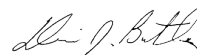
the court need not reach the opposition with respect to this claim (*see Brachfield v Sternlicht*, 202 AD3d at 744).

Therefore, in light of the above determinations, plaintiff has failed to satisfy his prima facie burden on his cause of action brought under Labor Law § 241 (6), and is not entitled to partial summary judgment on this cause of action.

Lastly, with regard the branch of plaintiff's motion for partial summary judgment dismissing all affirmative defenses alleging plaintiff's comparative fault and contributory negligence, inasmuch as "contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim" (*Aragona v State*, 147 AD3d 808, 809 [2d Dept 2017]; *see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343 [1998]; *Lorefice v Reckson Operating Partnership, L.P.*, 269 AD2d 572, 573 [2d Dept 2000]), and there remain issues of fact as to how the subject accident occurred, plaintiff has failed to satisfy his burden on this branch of his motion (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Accordingly, plaintiff's motion for partial summary judgment is denied in its entirety, and plaintiff's cause of action brought under Labor Law § 240 (1), is dismissed.

Dated: May 2 , 2022



Denis J. Butler, J.S.C.

