

Atmatzidis v 36-28 31 St. Realty LLC
2022 NY Slip Op 35194(U)
November 14, 2022
Supreme Court, Queens County
Docket Number: Index No. 701807/2019
Judge: Carmen R. Velasquez
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SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x
NIKOLAOS ATMATZIDIS,

Index No. 701807/2019

Plaintiff,

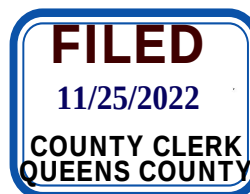
Motion

Date: June 13, 2022

-against-

M# 2 and 3

36-28 31 STREET REALTY LLC,

Defendants.
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The following papers numbered EF 37-81 read on these motions: (1) the motion by the defendant for summary judgment dismissing the complaint; and (2) the separate motion by the plaintiff, pursuant to CPLR 3212, for summary judgment as to liability on (a) his cause of action alleging a violation of Labor Law § 240(1), and (b) so much of his cause of action alleging a violation of Labor Law § 241(6) as is predicated on 12 NYCRR 23-1.7(f) and 23-1.21(b)(4)(i).

Papers
Numbered

Seq. #2

Notice of Motion - Affidavits - Exhibits..... EF 37-48

Answering Affidavits - Exhibits..... EF 67-72

Reply Affidavits..... EF 81

Seq. #3

Notice of Motion - Affidavits - Exhibits..... EF 49-64

Answering Affidavits - Exhibits..... EF 73-76

Reply Affidavits..... EF 77-80

Upon the foregoing papers it is ordered that these two motions are determined as follows:

The defendant owns a multi-unit apartment building on 31st Street in Astoria. In October 2018, the defendant's principal, Xenophon Xenophontos, asked the plaintiff to perform certain repairs in the building. According to Xenophontos, this work was

limited to performing sidewalk repairs outside of the property, replacing sheetrock in one of the apartments, and installing a new bulkhead door on the roof. Notably, however, the plaintiff testified that he was also instructed to perform other various repairs on the roof of the building.

The plaintiff alleges that he was injured while performing these roof repairs. According to the plaintiff, he also needed to replace the bulkhead roof. To access the bulkhead roof, the plaintiff used an A-frame ladder, which he found in the basement of the building. However, the plaintiff testified that, because the roof was very narrow, he was unable to set up the A-frame ladder in the proper open position. Thus, to access the bulkhead roof, the plaintiff leaned the A-frame ladder, in the closed position, against the bulkhead wall. The plaintiff testified that his accident occurred while descending the ladder. The plaintiff stated that after he placed his foot on the top step of the ladder, the ladder shifted and went out from under him, causing him to fall from the bulkhead roof and sustain injuries.

The plaintiff subsequently commenced this action against the defendant, asserting causes of action for alleged violations of Labor Law §§ 240(1), 241(6), and 200, as well as common-law negligence. Discovery having been completed, the defendant now moves for summary judgment dismissing the complaint, and the plaintiff separately moves for summary judgment as to liability on his cause of action alleging a violation of Labor Law § 240(1), and so much of his cause of action alleging a violation of Labor Law § 241(6) as is predicated on sections 23-1.7(f) and 23-1.21(b)(4)(i) of the Industrial Code.

On a motion for summary judgment, the proponent "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). Once the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party, who "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party (see *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). A moving party's failure to meet its prima facie burden requires denial of the motion, regardless of the sufficiency of the papers submitted in opposition (see *Winegrad v City of New York*, 64 NY2d 851, 852 [1985]).

The plaintiff's Labor Law § 240(1) claim

In support of its motion, the defendant submits, among other things, the pleadings, the transcript from the deposition of the plaintiff, and an affidavit from its expert engineer, Michael Cronin, P.E. Based on these submissions, the defendant argues that it is entitled to summary judgment dismissing the plaintiff's Labor Law § 240(1) claim because the plaintiff's conduct was the sole proximate cause of his injuries. In particular, the defendant contends that the plaintiff misused the A-frame ladder from which he fell because he leaned it, in a closed position, against the bulkhead wall, and that he was standing on the top step of the ladder when it fell over.

Under Labor Law § 240(1), "[a]ll contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 [construction workers employed on the premises]" (Labor Law § 240(1); see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]). The statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). In order to prevail on a claim under Labor Law § 240(1), a plaintiff must prove that the defendant violated the statute and that this violation was a proximate cause of his or her injuries (see *Jones v City of New York*, 166 AD3d 739, 740 [2d Dept 2018]).

However, "[w]here a 'plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240(1) [does] not attach'" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006], quoting *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]). Thus, although "the owner or contractor must breach the statutory duty under section 240(1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries" (*Robinson*, 6 NY3d at 554), "[t]hese prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*id.*; see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Here, the defendant failed to establish, prima facie, that the plaintiff was the sole proximate cause of his injuries. Contrary to the defendant's contention, "[a] worker's decision to use an A-frame ladder in the closed position is not a per se reason to

declare him the sole proximate cause of an accident" (*Noor v City of New York*, 130 AD3d 536, 540 [1st Dept 2015]; see *Gillet v City of New York*, 165 AD3d 1064, 1064 [2d Dept 2018]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750 [2d Dept 2009]). The plaintiff testified that, to get to the bulkhead roof, he leaned an A-frame ladder, in the closed position, against a wall. However, he also testified that the roof was too narrow to allow him to use the A-frame ladder in the open position. Notably, the plaintiff also testified that he looked in the basement for another ladder, that "[t]hey didn't have any different type of ladder," and that of the two ladders that were available, the one he ultimately used was in the best condition. Under these circumstances, there are issues of fact as to whether appropriate safety devices were available and whether the A-frame ladder could have been placed such that the plaintiff could have safely performed the work (see *Gillet*, 165 AD3d at 1064; *Rico-Castro*, 60 AD3d at 750). The branch of the defendant's motion summary judgment dismissing the plaintiff's Labor Law § 240(1) claim is therefore denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 852).

Turning to the plaintiff's separate motion, the plaintiff submits, among other things, the pleadings, the transcripts from the depositions of the plaintiff and Xenophontos, and an affidavit from his safety expert, John Coniglio. The plaintiff contends that, under the circumstances, the defendant's failure to provide him with an appropriate ladder was the proximate cause of his injuries. However, the plaintiff failed to establish prima facie entitlement to summary judgment as to liability on his Labor Law § 240(1) claim. Notably, while the plaintiff testified that his accident occurred as he was climbing down from the bulkhead roof, Xenophontos testified that he did not ask the plaintiff to examine the bulkhead roof, that he did not the plaintiff him to perform any repairs to the bulkhead roof, and that "there was no reason for [the plaintiff] to go up there." This testimony raises an issue of fact as to whether the plaintiff's decision to climb up to the bulkhead roof was the sole proximate cause of his injuries (see *Benavidez-Portillo v G.B. Constr. & Dev., Inc.*, 149 AD3d 681, 682-683 [2d Dept 2017]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013]; *John v Klewin Bldg. Co., Inc.*, 94 AD3d 1502, 1503-1504 [4th Dept 2012]). This branch of the plaintiff's separate motion is therefore denied, regardless of the sufficiency of the defendant's opposition papers (see *Winegrad*, 64 NY2d at 852).

The plaintiff's Labor Law § 241(6) claim

"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'" (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). "To prevail on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards, and that his or her injuries were proximately caused by such Industrial Code violation" (*Moscatti v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; see *Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). Here, the plaintiff's bill of particulars predicates his Labor Law § 241(6) claim on alleged violations of sections 23-1.5, 23-1.7(b)(1), (d), and (f), 23-1.8, 23-1.16, 23-1.17, 23-1.21(a) and (b), 23-1.30, 23-2.1(b), and 23-3.3(c), (e), (f), and (l) of the Industrial Code. The defendant argues that it is entitled to summary judgment dismissing this cause of action because each of these Industrial Code provisions either lack the requisite specificity to form the basis for liability under the statute, or are inapplicable to the plaintiff's accident.

Under the circumstances here, the defendant established, prima facie, that sections 23-1.5(a), 23-1.5(b), 23-1.5(c)(1), and 23-1.5(c)(2) are insufficient to serve as a predicate for liability pursuant to Labor Law § 241(6) (see *Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1224 [2d Dept 2011]; *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009]; *Maday v Gabe's Contr., LLC*, 20 AD3d 513, 513 [2d Dept 2005]). Moreover, to the extent that section 23-1.5(c)(3) is sufficiently specific to serve as a predicate for liability pursuant to Labor Law § 241(6) (see *Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009]; *Perez*, 134 AD3d at 1086), the defendant nevertheless established, prima facie, that this provision is inapplicable. Section 23-1.5(c)(3) states that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Here, the plaintiff testified that the A-frame ladder he used was in good condition. The plaintiff's deposition testimony also established, prima facie, that the accident did not involve the general hazards set forth in section 23-1.7(b)(1) and (d) (see *Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1223 [2d Dept 2018]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]).

Next, section 23-1.8 mandates that personal protective

equipment, such as eye protection and respirators, be used under certain circumstances which do not apply here (see 12 NYCRR 23-1.8). Similarly, sections 23-1.16 and 23-1.17 apply to the use of safety belts, harnesses, tail lines, lifelines, and life nets (see 12 NYCRR 23-1.16; 12 NYCRR 23-1.17), and for these sections to be applicable, the safety devices enumerated here must be available at the job site (see *Venegas v Shymer*, 201 AD3d 1001, 1003 [2d Dept 2022]). Thus, by submitting the plaintiff's deposition testimony, the defendant established, prima facie, that sections 23-1.8, 23-1.16, and 23-1.17 are inapplicable to the plaintiff's accident (*Carrillo v Circle Manor Apts.*, 131 AD3d 662, 663 [2d Dept 2015]).

To the extent that the plaintiff alleges a violation of section 23-1.21(a), this section is not sufficiently specific to support a claim under Labor Law § 241(6) (see *Sochan v Mueller*, 162 AD3d 1621, 1624 [4th Dept 2018]; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014]). In addition, based on the plaintiff's testimony regarding the manner in which his accident occurred the defendant's submissions established, prima facie, that sections 23-1.21(b)(1), 23-1.21(b)(2), 23-1.21(b)(3), 23-1.21(b)(8), 23-1.21(b)(9), 23-1.30, and 23-2.1(b) are inapplicable here (see *Singh v 180 Varick, LLC*, 203 AD3d 1194, 1197 [2d Dept 2022]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Moreover, the plaintiff's testimony establishes, prima facie, that his accident did not occur during demolition work, and thus, section 23-3.3 of the Industrial Code is inapplicable to his accident (see 12 NYCRR 23-1.4[b][16]; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801 [2d Dept 2013]). Finally, to the extent that the plaintiff relies on alleged violations of OSHA regulations, as the defendant correctly contends, these alleged violations cannot form the basis for liability under Labor Law § 241(6) (see *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258-1259 [2d Dept 2019]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 313 [2d Dept 1997]).

The defendant's submissions, however, failed to establish, prima facie, that 12 NYCRR 23-1.7(f) and 12 NYCRR 23-1.21(b)(4) are inapplicable to the plaintiff's accident (see *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 664 [2d Dept 2015]). Section 23-1.7(f) requires that "[s]tairways, 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" (12 NYCRR 23-1.7[f]). For the reasons described previously, the plaintiff's testimony fails to eliminate an issue of fact as to whether appropriate ladders or other safe means of

access to the bulkhead roof were available (see *Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]). Similarly, the plaintiff's testimony raises issues of fact as to whether the A-frame ladder was being used as a regular means of access to the bulkhead roof, whether it was securely fastened in place, and whether its footings were firm (see 12 NYCRR 23-1.21[b][4][i], [ii]).

In opposition to the defendant's motion, the plaintiff does not challenge the defendant's prima facie proof regarding sections 23-1.5, 23-1.8, 23-1.16, 23-1.17, 23-1.30, 23-2.1, 23-3.3. Rather, the plaintiff only asserts that issues of fact remain with respect to sections 23-1.7(f) and 23-1.21(b)(4)(i). However, because the defendant failed to meet its prima facie burden with respect to these specific sections of the Industrial Code, the plaintiff's opposition papers need not be addressed (see *Winegrad*, 64 NY2d at 852).

The branch of the plaintiff's separate motion for summary judgment as to liability on so much of his cause of action alleging a violation of Labor Law § 241(6) as is predicated on 12 NYCRR §§ 23-1.7(f) and 23-1.21(b)(4)(i) is denied, as the plaintiff failed to meet his prima facie burden to be entitled to summary judgment. As discussed previously, the plaintiff submitted testimony which provided conflicting accounts of whether the plaintiff was instructed to perform work on the bulkhead roof. Under these circumstances, the plaintiff's submissions present an issue of fact as to whether his own conduct was the sole proximate cause of his accident (see *Jones v City of New York*, 166 AD3d 739, 741 [2d Dept 2018]; see also *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 25 [2d Dept 2016]).

The plaintiff's Labor Law § 200 and common-law negligence claims

Cases alleging violations of Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work, fall into two general categories, "those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a plaintiff alleges that an accident was caused by the manner in which the work was performed, in order to establish liability against a property owner, a plaintiff must show that the owner had the authority to supervise or control the performance of the plaintiff's work (see *Alberici v Gold Medal Gymnastics*, 197 AD3d 540, 543 [2d Dept 2021]). Yet "[w]here a plaintiff's injuries stem not from the

manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2d Dept 2010], quoting *Ortega*, 57 AD3d at 61).

Critically, however, "a defendant is not 'required to blindly accept a plaintiff's categorization of an accident as either a method and manner case or a dangerous condition case, or both' and may 'establish, as part of its prima facie showing, that the accident falls into one of the two broad categories of Labor Law § 200 cases'" (*Rodriguez v HY 38 Owner, LLC*, 193 AD3d 839, 841-842 [2d Dept 2021], quoting *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 673 [2d Dept 2018]; see *Paez v Shah*, 78 AD3d 673, 674-675 [2d Dept 2010]). Here, the defendant effectively asserts that this is the case because, while the plaintiff alleges that his Labor Law § 200 cause of action falls under both of these categories, the evidence shows that no defective condition existed, and thus, the plaintiff's accident only falls under the "method and manner" line of cases. The court agrees. The plaintiff's testimony establishes, prima facie, that the plaintiff's accident did not involve an allegedly defective condition at the property (see *Poulin*, 166 AD3d at 671-673). Thus, to establish prima facie entitlement to summary judgment dismissing these claims, the defendants must only establish that they lacked the authority to supervise or control the performance of the plaintiff's work (see *Lombardi v City of New York*, 175 AD3d 1521, 1523 [2d Dept 2019]).

"A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62). However, "[g]eneral supervisory authority at a work site, the right to stop a contractor's work if a safety violation is observed, or the authority to ensure compliance with safety regulations or the terms of a contract is insufficient to impose liability under Labor Law § 200" (*Messina v City of New York*, 147 AD3d 748, 749 [2d Dept 2017]). Here, the plaintiff testified that he worked at the property by himself, that neither Xenophontos nor the building superintendent came up to the roof while he was working, and that no one told him how to set up the ladder to access the bulkhead roof. This testimony establishes, prima facie, that the defendant did not bear responsibility for the manner in which the work at issue was performed (see *Lombardi*, 175 AD3d at 1523 [2d Dept 2019]; *Poulin*, 166 AD3d at 673).

In opposition to this branch of the defendant's motion, the

plaintiff failed to raise an issue of fact. The court notes that, because the defendant established that no allegedly defective condition existed at the property, it does not need to also establish that it lacked actual or constructive notice of said condition (see *Poulin*, 166 AD3d at 673).

Accordingly, it is

ORDERED that the branch of the defendant's motion for summary judgment dismissing the plaintiff's cause of action alleging a violation of Labor Law § 240(1) is denied; and it is further

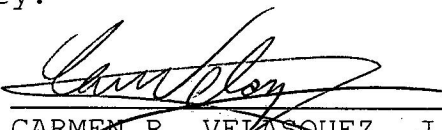
ORDERED that the branch of the defendant's motion for summary judgment dismissing so much of the plaintiff's cause of action alleging a violation of Labor Law § 241(6) as is predicated on sections 23-1.5, 23-1.7(b), 23-1.7(d), 23-1.8, 23-1.16, 23-1.17, 23-1.21(a), 23-1.21(b)(1), 23-1.21(b)(2), 23-1.21(b)(3), 23-1.21(b)(8), 23-1.21(b)(9), 23-1.30, 23-2.1(b), and 23-3.3 is granted; and it is further,

ORDERED that the branch of the defendant's motion for summary judgment dismissing the plaintiff's cause of action alleging a violation of Labor Law § 241(6) is otherwise denied; and it is further,

ORDERED that the branch of the defendant's motion for summary judgment dismissing the plaintiff's cause of action alleging a violation of Labor Law § 200 and common-law negligence is granted; and it is further;

ORDERED that the plaintiff's separate motion for summary judgment is denied in its entirety.

Dated: November 14, 2022


CARMEN R. VELASQUEZ, J.S.C.

