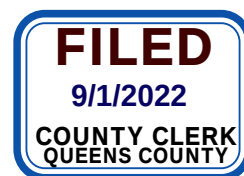


Zych v River House Realty Co., Inc.
2022 NY Slip Op 35260(U)
September 1, 2022
Supreme Court, Queens County
Docket Number: Index No. 702676/2020
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101



P R E S E N T : HON. ROBERT J. MCDONALD
 Justice

- - - - - x

WIESLAW ZYCH,

Index No.: 702676/2020

Plaintiff,

Motion Date: 8/25/22

- against -

Motion Nos.: 24 & 25

RIVER HOUSE REALTY CO. INC.,

Motion Seqs.: 2 & 3

Defendant.

- - - - - x

The following electronically filed documents read on this motion by defendant (**seq. no. 2**) for an Order pursuant to CPLR § 3212, granting defendant summary judgment and dismissing plaintiff's complaint; and on this motion by plaintiff (**seq. no. 3**) for an Order pursuant to CPLR § 3212, granting plaintiff partial summary judgment on plaintiff's cause of action premised upon a violation of New York Labor Law § 240(1):

	Papers Numbered
Notice of Motion(seq. no. 2)-Affirmation-Exhibits-	
Memo. of Law.....	EF 28 - 41
Affirmation in Opposition-Exhibits.....	EF 55 - 56
Reply Affirmation.....	EF 60
Notice of Motion(seq. no. 3)-Affirmation-Exhibits-	
Memo. of Law.....	EF 42 - 52
Affirmation in Opposition-Exhibits.....	EF 57 - 59
Reply Affirmation-Exhibit.....	EF 60 - 61

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on January 27, 2020 when he fell from a ladder at a construction project located at 435 East 52nd Street, New York, New York.

This action was commenced on February 14, 2020 by filing a summons and verified complaint. Defendant joined issue by service of an answer on June 24, 2020. Defendant now moves for summary

judgment dismissing the complaint. Plaintiff moves for partial summary judgment on his Labor Law § 240(1) claim.

At his examination before trial, plaintiff testified that at the time of the accident, he was employed by West New York Restoration of CT (West New York). West New York was a scaffolding company that also performed facade work, masonry repairs, and pointing service. He worked for West New York for approximately two years prior to the accident. He was sent to the subject building by West New York, specifically by Damien, to install two cameras. If he needed a ladder while at the jobsite, he would ask the jobsite foreman. The foreman would then direct a laborer or helper to retrieve the equipment. There were two foreman, Gregorz and Stanislaw. On the date of the accident, he arrived at the building at approximately 8:30 a.m. He met with Gregorz and Stanislaw. Gregorz assigned plaintiff a partner to work with, Jan Mikuski. The only instruction he received from Gregorz was to install two cameras near the service entrance. He asked Gregorz for a ladder. Prior to the accident, he had already installed one of the two cameras. He used the same ladder to install the first camera. He had tested the ladder prior to climbing on it by climbing three or four rungs to make sure that it was stable. He believes the ladder had feet. He had no issue using the ladder. He felt comfortable using the ladder. He did not experience any slipping or moving of the ladder. He leaned the ladder up against the cross member of the sidewalk bridge. It was possible to tie off the ladder to the sidewalk bridge crossbars, but it would have been inconvenient because he would have had to constantly reposition the ladder. He never asked his partner to hold the ladder for him. There was no need to wear a harness. After he steadied the ladder, he went up to begin his work. At some point, he needed to come back down to retrieve a wire needed for the installation. He went up the ladder the second time. He did not feel it move, shake, or vibrate. He did not hear any sounds prior to the ladder suddenly slipping down to the ground. At the time of the accident, he was approximately five and a half feet off the ground. He could not recall what happened, but suddenly, he felt the ladder start to slip, causing it to fall straight down with him.

Mark Dehnert appeared for an examinations before trial on behalf of defendant. Dehnert testified that in 2018, defendant retained West New York to perform exterior facade restoration. Someone reported the accident to him sometime late in the afternoon on the day of the accident. He did not prepare an accident report. Defendant hired BSI to perform site safety work.

Non-party Gregorz Kezzior appeared for an examination before trial and testified that he was employed by his own company GNR Construction Services (GNR). GNR had been subcontracted by West New York to act as the supervisor for the project. As the supervisor, he was to ensure that the workers were following the drawings. He did not have any duties and responsibilities to manage employees or to check on anyone. There were various meetings which he would attend, typically every Monday, known as toolbox talks. They would discuss with the West New York employees the use of safety glasses and fall protection. The foreman, Stanley Rumotoski, would also participate in the toolbox talks. West New York had various types of extension ladders on site made of aluminum. West New York employees used these types of ladders since they had to work at heights greater than ten feet and A-Frame ladders were not to be used. He did not tell plaintiff what tools to use. He did not supply plaintiff with any equipment. All of the equipment was either stored on the roof of the premises or on the sidewalk bridge. All of the employees knew where to get equipment.

In support of its motion, defendant also submits the expert affidavit of Anthony Kelly, a registered architect and licensed professional engineer. Expert Kelly concludes that plaintiff was provided with an adequate safety device and that it was plaintiff's misuse that caused his accident and resulting injuries.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

It is well-settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see Pirotta v EklecCo., 292 AD2d 362 [2d Dept. 2002]; Kobeszko v Lyden Realty Investors, 289 AD2d 535 [2d Dept. 2001]; Giambalvo v Chemical Bank, 260 AD2d 432 [2d Dept. 1999]).

Here, defendant established that it did not supervise, direct or control the method or manner in which plaintiff performed his work (see Lofaso v J.P. Murphy Assoc., 37 AD3d 769, 771 [2d Dept. 2007]; Pineda v 79 Barrow St. Owners Corp., 297 AD2d 634 [2d Dept. 2002]; Schuler v Kings Plaza Shopping Center & Marina, Inc., 294 AD2d 556 [2d Dept. 2002]). Plaintiff testified that he received instructions from West New York and his foremen. He did not have any dealings with anyone who represented themselves to be the owner of the building. Although plaintiff argues that there was a site safety coordinator, there is no evidence that the site safety coordinator directed or supervised plaintiff's work. To the extent plaintiff argues that the alleged defective ladder constitutes a dangerous condition, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (Persichilli v Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145 [1965]).

Accordingly, plaintiff's Labor Law § 200 and common law negligence claims are dismissed in their entirety (see Dupkanicova v Vasiloff, 35 AD3d 650 [2d Dept. 2006]; Reilly v Loreco Constr., 284 AD2d 384 [2d Dept. 2001]).

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]; Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]; Miranda v City of New York, 281 AD2d 403 [2d Dept. 2001]). To support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation that is both concrete and applicable given the circumstances surrounding the incident (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]).

Plaintiff withdrew his Labor Law § 241(6) claims premised upon violations of Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, and 23-1.17. Plaintiff only opposes the dismissal of his Labor Law § 240(1)(6) claims premised upon violations of Industrial Code § 23-1.21(b)(4)(ii), providing that the ladder footings were not firm because the ladder slipped and fell over, § 23-1.21(b)(4)(iv), providing that the ladder was not secured as no one was holding the ladder in place, § 23-1.21(b)(4)(v), providing that when the upper end of any ladder is leaning against a slippery

surface, the ladder shall be mechanically secured, and § 23-1.21(b)(3)(iv), providing that all ladders shall be maintained in good condition. Here, there is no evidence that the ladder was placed on a slippery surface. Thus, § 23-1.21(b)(4)(v) is inapplicable. However, §§ 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), and 23-1.21(b)(3)(iv) are applicable. Although Expert Kelly opined that the subject ladder was not defective, Expert Kelly did not examine the subject ladder. Additionally, the photographs and video do not conclusively establish that there are proper feet on the ladder. Moreover, while plaintiff testified that there was nothing wrong with the ladder and that the ladder did not break, plaintiff is not an expert. Thus, viewing the evidence in the light most favorable to the nonmoving party, there is at least an issue of fact as to whether there was proper feet on the bottom of the ladder and whether the ladder was in good working condition. Lastly, it is undisputed that there was no one footing the ladder.

Accordingly, plaintiff's § 241(6) claim premised upon violations of Industrial Code §§ 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), and 23-1.21(b)(3)(iv) shall remain.

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute, a claim under Labor Law § 240(1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (see Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]; Plass v Solotoff, 5 AD3d 365 [2d Dept. 2004]). Liability does not attach if plaintiff failed to use safety devices, which were readily available at the work site, and plaintiff knew he or she was expected to use them, but chose not to do so (see Robinson v East Med. Ctr., LP, 6 NY3d 550 [2006]).

Regarding defendant's motion, defendant failed to establish, prima facie, that plaintiff failed to use a safety device, which was readily available at the work site and which plaintiff knew he was expected to use, but chose not to. Plaintiff specifically testified that he did not know where his coworker got the ladder from. Although defendant argues that at the time of the accident, plaintiff had a wire that could have been used to tie-off, there is no evidence that the wire was sufficient to tie-off or that plaintiff deliberately refused to use an adequate and available

safety device (see Vetrano v J. Kokolakis Contr., Inc., 100 AD3d 984 [2d Dept. 2012]. Additionally, plaintiff's failure to ask his coworker to hold the ladder does not constitute the sole proximate cause of the accident, since a coworker is not a safety device contemplated by the statute (see Noor v City of New York, 130 AD3d 536 [1st Dept. 2015][internal quotation marks omitted]).

Regarding plaintiff's motion, plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) against defendant. Plaintiff established that his fall from the unsecured ladder occurred when the ladder slipped and fell (see Seferovic v Atlantic Real Estate Holdings, LLC, 127 AD3d 1058 [2d Dept. 2015]; Hai-Zhong Pang v LNK Best Group, Inc., 111 AD3d 889 [2d Dept. 2013]; Gonzalez v AMCC Corp., 88 AD3d 945 [2d Dept. 2011]). However, there are triable issues of fact and credibility regarding, inter alia, whether plaintiff was provided with adequate safety equipment, and whether plaintiff was the sole proximate cause of the accident (see Negron v City of New York, 22 AD3d 546 [2d Dept. 2005][finding that the alleged violations of Labor Law § 240(1) were not the proximate cause of the incident, rather the sole proximate cause of the incident was plaintiff's failure to tie off to the lanyard beforehand]).

Accordingly, and based on the above reasons, it is hereby,

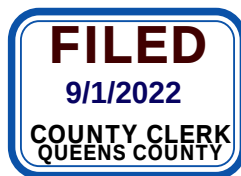
ORDERED, that the branch of defendant's summary judgment motion (**seq. no. 2**) seeking to dismiss plaintiff's common-law negligence and Labor Law § 200 claims is granted, and plaintiff's Labor Law § 200 and common law negligence claims are dismissed; and it is further

ORDERED, that the branch of defendant's summary judgment motion (**seq. no. 2**) seeking to dismiss plaintiff's § 241(6) claim is granted in part as to the claim premised upon violations of 12 NYCRR §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17, and 23-1.21(b)(4)(v), and denied in part as to plaintiff's claims premised upon violations of 12 NYCRR §§ 23-1.21(b)(4)(ii), 23-1.21(b)(4)(iv), and 23-1.21(b)(3)(iv); and it is further

ORDERED, that the branch of defendant's summary judgment motion (**seq. no. 2**) seeking to dismiss plaintiff's § 240(1) claim is denied; and it is further

ORDERED, that the summary judgment motion by plaintiff (**seq. no. 3**) is denied in its entirety.

Dated: September 1, 2022
Long Island City, N.Y.



Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.