

Sarmiento v Hotel Carlyle Owners Corp.

2023 NY Slip Op 30731(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 155521/2018

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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FRANCISCO SARMIENTO,

Plaintiff,

- v -

HOTEL CARLYLE OWNERS CORPORATION, 76
MADISON L.L.C., J.T. MAGEN CONSTRUCTION
COMPANY, INC., THE CARLYLE LLC, J.T. MAGEN &
COMPANY INC.,

Defendant.

-----X

HOTEL CARLYLE OWNERS CORPORATION, 76 MADISON
L.L.C., J.T. MAGEN CONSTRUCTION COMPANY, INC.

Plaintiff,

-against-

LIBERTY CONTRACTING CORP.

Defendant.

-----X

HOTEL CARLYLE OWNERS CORPORATION, 76 MADISON
L.L.C., J.T. MAGEN CONSTRUCTION COMPANY, INC.

Plaintiff,

-against-

LIBERTY CONTRACTING CORP.

Defendant.

-----X

HOTEL CARLYLE OWNERS CORPORATION, 76 MADISON
L.L.C., J.T. MAGEN CONSTRUCTION COMPANY, INC., THE
CARLYLE LLC, J.T. MAGEN & COMPANY, INC.

Plaintiff,

-against-

INDEX NO. 155521/2018
MOTION DATE 03/09/2023
MOTION SEQ. NO. 006 007 008

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595356/2019

Second Third-Party
Index No. 595099/2020

Third Third-Party
Index No. 595096/2021

LCC SERVICES INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 197, 200, 206, 207, 213, 215, 216, 217

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 175, 176, 177, 178, 179, 180, 198, 218

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 199, 203, 204, 205, 208, 209, 210, 211, 212, 214, 219, 220, 221

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Number 006, 007 and 008 are consolidated for disposition.

Defendants' motion (MS006) for summary judgment is granted in part and denied in part. The cross-motion by third third-party defendant LCC Services, Inc. ("LCC") for summary judgment dismissing the third-party complaint is granted in part and denied in part. Plaintiff's motion to vacate a certain Court order is granted in part without opposition (MS007). Plaintiff's motion (MS008) for summary judgment is granted.

Background

Plaintiff brings this Labor Law action and contends he fell off a ladder while working at a construction site in Manhattan. Defendant Hotel Carlyle Owners Corporation ("Hotel Carlyle") was the owner of the premises and defendant 76 Madison LLC ("76 Madison") was a tenant at the property while J.T. Magen & Company ("JT") was the general contractor for the subject renovation project.

Plaintiff insists he worked for Liberty Contracting, which was hired by JT to do demolition work. Plaintiff testified that on the day of the accident, he was assigned to demolish an interior wall (NYSCEF Doc. No. 145 at 43). He claims he used an eight-foot A frame ladder to accomplish this task (*id.* at 44). Plaintiff asserted that “ The foreman sent me to demolish the wall. Then the blocks started falling to the floor—to the ground. And as the big pieces of blocks started to fall on the ground, the ground started to shake, the ladder started vibrating. And then as the two ends of the ladder sunk into the ground I fell to my right and the ladder to the left. And that is when I fell to the ground and I was unconscious. And when I woke up I was already at the hospital” (*id.* at 45). Plaintiff argues that the concrete floor partially collapsed, which caused two of the side rails of the ladder to fall through the floor.

Defendants’ Motion MS006

In this motion, defendants contend that the case against them should be dismissed because Labor Law § 240(1) is inapplicable. They contend that plaintiff did not fall because the ladder was defective. Instead, defendants argue that plaintiff simply lost his balance when a portion of the floor collapsed. They argue that the floor is what caused the accident, not the ladder. Defendants also insist that the floor that collapsed was permanent and therefore its collapse was not foreseeable.

In opposition, plaintiff emphasizes that the ladder was not secured; when it moved and fell, it caused plaintiff to fall. He insists that there is no foreseeability requirement under Labor Law § 240(1) and there was nowhere for plaintiff to tie off a harness.

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that all 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” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). “Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*id.* at 501).

“[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough” (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court denies this branch of defendants’ motion. Plaintiff raised a material issue of fact about whether plaintiff suffered a gravity-related injury. He claimed he was working on his assigned task (to demolish a wall) when the floor below collapsed, which caused his ladder to tip over and fall. That falls squarely under the provisions of Labor Law § 240(1). The Court is unable to find, as defendants demand, as a matter of law that plaintiff lost his balance. Defendants did not point to irrefutable evidence that this is how the accident occurred or sufficiently show that summary judgment is appropriate to dismiss this claim. And, as plaintiff points out, there is no foreseeability requirement under this section of the Labor Law; the Court’s task on this motion is only whether there is an issue of fact about Labor Law § 240(1). Plaintiff’s account raises a material issue of fact.

Defendants also move to dismiss plaintiff’s Labor Law § 241(6) claim premises on certain Industrial code sections. These sections include 23-1.7(b); 23-1.15, et. seq.; 23-1.16, et seq.; 23-1.21, et. seq.; 23-1.22, et. seq.; 23-1.24, et. seq.; and 23-3.3(1).

“The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). “The regulation must also be applicable to the facts and be the proximate cause of the plaintiff’s injury” (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Industrial Code Section 23-1.16(b) provides that “Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.”

The Court severs and dismisses plaintiff’s claim based upon this Industrial Code section as he testified that he was not provided with a harness (NYSCEF Doc. No. 145 at 96). The Court finds that this section is inapplicable because it describes obligations where a harness is provided. A plain reading of the above-cited section suggests it only applies in situations where the worker was actually provided with a harness and there are questions about how the harness was secured.

Plaintiff also takes issue with defendants’ motion to dismiss Industrial Code sections 23-3.3(c) and (b)(2). 23-3.3(b)(2) provides that “Masonry shall not be loosened nor permitted to fall in such masses as to endanger the structural stability of any floor or structural support which

such masonry may strike in falling.” 23-3.3(c) provides that “Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.”

Plaintiff raised issues of fact with respect to both of these sections. The accident in question occurred when debris began to fall on the concrete floor below and that floor later collapsed. The structural stability of the floor and whether defendants did the required inspection is a material issue of fact under the circumstances at issue here.

Defendants even admit in reply that some pieces of debris fell on the floor near where plaintiff’s ladder was placed. That defendants claim that only a few pieces fell there is not a basis to grant summary judgment as a matter of law. That is a factual issue to be determined by a fact finder.

The remaining Industrial Code sections, for which plaintiff did not offer opposition (23-1.7(b); 23-1.15, et. seq.; 23-1.21, et. seq.; 23-1.22, et. seq.; 23-1.24, et. Seq.) are severed and dismissed.

Defendants also move to dismiss plaintiff’s Labor Law § 200 claim. Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the

owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

Defendants contend that plaintiff received all of his work instructions from his foreman at Liberty Contracting and so defendants have no liability under a common-law theory of negligence. They stress that plaintiff admitted that he worked in the machine room for two days prior to the accident without any indication that something was wrong with the floor below. Defendants question how they can be liable where plaintiff admitted there was nothing obviously wrong with the floor below.

Plaintiff claims he raised material issues of fact about this claim. He insists that defendants were at the job site on a daily basis, did daily walkthroughs and had the authority to stop the work if unsafe conditions existed.

The Court denies this branch of the motion. While defendants stress that the collapse of the floor was unforeseeable, the Court observes that plaintiff testified that he was performing demolition work where the debris was falling on the floor below. That raises a material issue of fact about whether defendants (who indisputably had knowledge that this subcontractor was going to do demolition work) had constructive knowledge that the stability of the floor was an issue. In other words, the Court finds that a jury could conclude that defendants should have thought about whether the floor below could withstand falling debris from demolition and that it might have been negligent not to take steps (such as performing an inspection) to ensure the job was safe.

Cross-Motion

LCC cross-moves for summary judgment dismissing plaintiff’s claims. It makes arguments similar to those raised by defendants. For the reasons described above, the Court

denies the branch of the cross-motion that seeks to dismiss the Labor Law §§ 240(1) and 200 and grants, in part, the request to dismiss the Labor Law § 241(6) claim.

MS007

In this unopposed motion, plaintiff seeks to vacate a stipulation so-ordered by this Court that required, among other things, plaintiff to appear for scheduled IMEs and that a note of issue be filed by August 12, 2022 (NYSCEF Doc. No. 177). The Court then issued a decision on a motion that compelled plaintiff to appear for IMEs by December 16, 2022 (NYSCEF Doc. No. 180).

Plaintiff explains that he appeared for one of the outstanding IMEs on July 26, 2022, but could not find the correct suite number and arrived too late. He observes that he intends to show up for the remaining IMEs (one is scheduled for March 28, 2023 and the other was scheduled for February 3, 2023).

The Court finds as follows: Because plaintiff's remaining IMEs seem to be the product, at least in part, of the doctor's availability, the Court finds that plaintiff's appearances for those IMEs does not constitute a default under the Court's December 16, 2022 deadline. As long as plaintiff appears (or can show good cause for a non-appearance), the Court has no interest in imposing the preclusion language cited in the NYSCEF Doc. No. 180. As of the date of this decision, plaintiff is only supposed to appear for one more IME.

The Court denies the branch of the motion that seeks to vacate or to strike this case from the trial calendar. The fact is that this Court already struck the note of issue in connection with a motion by certain defendants (NYSCEF Doc. No. 154). It seems that no party complied with this Court's order to serve that decision (for MS004 and 005) on the General Clerk's office so that

the case would be struck from the trial calendar. This case should not be on the trial calendar; in fact, the case has an upcoming conference scheduled for April 19, 2023.

There is also no reason to vacate the Court's November 14, 2022 order. Plaintiff paid the no-show fees as indicated in the parties' stipulation dated December 8, 2022 and he claims he has (and will shortly) appear for all of the scheduled IMEs. Any outstanding discovery issues can be discussed in connection with the upcoming conference.

MS008

In this motion, plaintiff moves for summary judgment on Labor Law § 240(1). The Court grants the motion. Plaintiff's account, as described above, details a situation where his ladder shifted due to a partial collapse of the floor below, which led him (and the ladder) to fall. "[A]n unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law § 240(1)" (*Kehoe v 61 Broadway Owner LLC*, 186 AD3d 1143, 1144, 130 NYS3d 451 [1st Dept 2020]).

Defendants failed to raise a material issue of fact in opposition. Defendants, particularly the affidavit of Dr. Levitan, focus on the ladder itself. That the ladder may not have had a defect misses the point: Labor Law § 240(1) covers accidents that occur while a worker is performing a task at a height. Here, the floor partially collapsed, which rendered the unsecured ladder as an insufficient device to prevent plaintiff's fall.

Defendants' claim that plaintiff simply lost his balance is, on these papers, mere speculation. And, even if defendants could articulate a supported claim that plaintiff contributed in some way to his accident, that is not a defense to a Labor Law § 240(1) claim (*id.* at 1144 [noting that issues of comparative negligence are not proper defense to a Labor Law § 240(1) claims]). Falling off an unsecured ladder because the floor below collapsed is a textbook

example of a Labor Law § 240(1) claim and defendants did not raise a material issue of fact in opposition.

Summary

The Court recognizes that defendants insist the partial collapse of the floor was unforeseeable and so they should bear no liability for it. But the Court cannot make such a finding as a matter of law nor is the foreseeability question relevant to the Labor Law § 240(1) claim. The undisputed facts are that plaintiff was on an unsecured ladder doing demolition work, which involved falling debris, and the floor (where at least some of the debris was falling) partially collapsed, causing the unsecured ladder to move and plaintiff to fall.

Accordingly, it is hereby

ORDERED that defendants' motion and third third-party defendant LCC's cross-motion (MS006) for summary judgment is granted only to the extent that plaintiff's Labor Law § 241(6) cause of action based upon Industrial Code sections 23-1.7(b); 23-1.15, 23-1.21, 23-1.22, 23-1.24 and 23-1.16(b) are severed and dismissed, and denied with respect to the remaining requests for relief; and it is further

ORDERED that plaintiff's motion (MS007) is granted only to the extent that he may appear for the scheduled IMEs, which have (or will) occur after the Court's deadline and he shall not face any preclusion as long as he appears for the scheduled IMEs and the motion is denied to the extent it seeks vacatur or to strike the note of issue as the note of issue was already stricken; and it is further

ORDERED that plaintiff's motion for summary judgment on his Labor Law § 240(1) claim is granted as to liability only; and it is further

ORDERED that this case was previously stricken from the trial calendar, but the parties failed to comply with the Court’s directive to serve the General Clerk’s office; and it is further

ORDERED that, within 7 days from the entry of this order, **plaintiff** shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that such upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

Conference: Already scheduled for April 19, 2023 at 11 a.m. (see NYSCEF Doc. No. 202).

3/14/2023
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE