

Brooks v 662 Pac. St., LLC

2023 NY Slip Op 30766(U)

March 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 524408/2019

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of March, 2023.

P R E S E N T:
HON. DEBRA SILBER, Justice.

-----X
THOMAS BROOKS,

Plaintiff,

-against-

662 PACIFIC STREET, LLC, TISHMAN
CONSTRUCTION CORPORATION, TISHMAN
INTERIORS CORPORATION, TISHMAN
CONSTRUCTION CORPORATION OF NEW YORK
and NEW YORK STATE URBAN DEVELOPMENT
CORPORATION d/b/a EMPIRE STATE
DEVELOPMENT,

Defendants.

-----X

DECISION / ORDER

Index No.: 524408/2019
Mot. Seq. # 2 & 3

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notices of Motion and Affidavits (Affirmations)
Annexed _____
Opposing Affidavits (Affirmations) _____
Affirmations in Reply _____

50-64; 65-87
97-104; 93-96
107; 105

Upon the foregoing papers, plaintiff Thomas Brooks moves for an order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability (motion sequence number 2). Defendants 662 Pacific Street, LLC, (Pacific Street LLC), Tishman Construction Corporation, Tishman Interiors Corporation, Tishman Construction Corporation of New York d/b/a AECOM Tishman (Tishman) and New York State Urban Development Corporation d/b/a Empire State Development (Empire State Development), move for an order, pursuant to CPLR 3212, dismissing the complaint (motion sequence number 3).

Plaintiff's complaint pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) arising from injuries he sustained in of an accident that occurred on May 23, 2019, while he was assisting in setting up a drill rig at a construction site. Empire State Development was the owner of the construction site and Pacific Street LLC was the ground lessee of the site. Pacific Street LLC thereafter hired Tishman to act as construction manager for the project, which involved the construction of a six story mixed use condominium building. Tishman, in turn, hired New York Concrete Corporation (NYCC) as an excavation and foundation contractor. Plaintiff was employed by NYCC as an operating engineer.

Plaintiff testified at his deposition that his duties as an operating engineer primarily involved the maintenance of the equipment used by NYCC, which included checking the fluid levels and starting up the drill rigs to ensure that they were ready for the day's work. In addition, plaintiff regularly assisted in the set-up of the drill rigs. On the day of the accident, he was asked to assist in setting up a "down-the-hole" type drill rig. The set-up plan was to attach pieces of drill steel between the rig's drill head and it's hammer. Each piece of drill steel was between 10 to 20 feet long and weighed up to 18,000 pounds.¹

Plaintiff began to assist in the set-up after one piece of drill steel had already been attached to the drill head. Plaintiff stood on the platform of an aerial lift along with a coworker, Arnold Drange, who used hand signals to communicate with the operator of the drill rig, Paul Peterson. Peterson lifted the drill head so that the first piece was above the lower (second) piece, which was approximately 15 to 20 feet long. The piece was held in a

¹ Plaintiff's coworker, Arnold Drange, testified at his deposition that the drill steel at issue was 12 feet long and weighed around 10,000 pounds.

standing position by a sling or whip line. Plaintiff helped to line up the two pieces, as Peterson lowered the first piece towards the second. The first piece had a hex head that protruded from its bottom that would fit into the top of the second piece, which was standing on the ground. When the hex head connector on the drill steel piece being lowered had partially entered into the connector of the second (lower) drill steel piece standing on the ground, the hex head became stuck and would not properly drop into the bottom drill steel piece. At that time, plaintiff shouted for the lift operator to stop, and Drange gave a stop signal to Peterson, who “dogged off” the switches of the drill rig, which action prevented further mechanical operation of the drill rig. Plaintiff then reached over to wipe off grease or debris from the hex connector of the top drill steel, and, while his hand was still in between the two pieces,² the top piece “slammed down,” and slid into position with the bottom piece, and as it did so, three of plaintiff’s fingers were severed.³

Plaintiff, Drange and Peterson each state at their depositions that there was no further mechanical lowering of the drill steel after the drill rig operator received the signal from plaintiff’s coworker on the lift. However, according to Peterson and Drange, there was still downward pressure from the weight of the drill steel after Peterson stopped the drill rig’s mechanical operation⁴ and Drange believes that this pressure caused the hex head connector of the upper drill steel to “settle” into its connection with the lower drill steel. While Peterson could not see what occurred from the cab, he explained that, in his

² At his deposition, plaintiff stated that he does not know if his fingers made contact with the grease before the accident but asserted that he did not actually wipe any grease before the drill steel came down onto his fingers.

³ These facts are taken from the deposition testimony of plaintiff, Drange, and Peterson.

⁴ Which, if not turned off, might have been utilized to raise the steel and hold it in place while plaintiff checked the connection area.

experience, when a drill steel is not entirely correctly lined up, vibrations from the subway or other equipment at the worksite, in conjunction with the pressure caused by the weight of the drill steel, can cause the hex head to “settle.” In other words, vibrations could cause the hex head to line up and settle into the lower piece. Peterson added that this “settling” is something that can occur after the drill rig has been dogged off.

Plaintiff, in his testimony, stated that it was his decision to wipe the grease away using his fingers and that he received no instruction from Drange to do so. Although plaintiff testified that he had used his fingers to wipe grease away from a hex head in the past, he could not recall if anyone from NYCC had told him to use his fingers to do so. In his testimony, Drange stated that he did not give any directions to plaintiff after the drill steel got stuck, and that plaintiff was injured before Drange knew what had happened. Drange testified that he did not know why plaintiff chose to put his fingers between the drill steel pieces. While Drange did not recall or describe a specific safety meeting where such issues were discussed, he noted that the workers were repeatedly told at safety meetings not to put their fingers in pinch points such as the gap between the drill steel pieces. If grease needed to be removed from between the drill steel pieces, Drange stated that the normal practice would have been to move the top piece out of the way so a worker’s hands are free and clear to do the work and an accident like plaintiff’s would not happen. After the accident, Tishman’s safety director sent a letter [Doc 63] to the Chief Inspector from New York City’s Department of Buildings, indicating that in the future, the drill steel sections would be cleaned and cleared of debris prior to being connected, and

that the workers would have a wire brush on hand to clear grease or obstructions from the drill steel pieces.

Plaintiff, Drange, and Peterson each testified that using a “rat hole” to connect the drill steel pieces to a drill rig was a safer means of connecting pieces of drill steel than the means being used at the time of the accident. The “rat hole” method is when a hole is drilled into the ground, into which a drill steel piece is inserted, and which would have allowed plaintiff and Drange to perform their connection work at ground level rather than while standing on the platform of the aerial lift with lower steel piece held upright with a whip or a sling.

It is in this factual context that the parties’ competing motions must be considered. Turning first to plaintiff’s Labor Law § 240 (1) cause of action, section 240 (1)⁵ imposes absolute liability on property owners and general contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by gravity-related risks, such as those associated with workers falling from a height or those associated with objects falling (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff’s injuries must be both the “direct consequence of the application of the force of gravity to an object or person” and “the

⁵ As is relevant here, Labor Law § 240 (1) provides: “All 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.”

direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603-604 [2009]; *see Wilinski*, 18 NY3d 1 at 10; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]). With respect to accidents involving falling objects, the “plaintiff must show more than simply that an object fell, causing injury to a worker” (*Narducci*, 96 NY2d 259 at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.L.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was “being hoisted or secured” (*Narducci*, 96 NY2d 259 at 268) or “required securing for the purposes of the undertaking” (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell “because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci*, 96 NY2d 259 at 268; *see Fabrizzi*, 22 NY3d 658 at 663; *Wilinski*, 18 NY3d 1 at 10-11).

Defendants initially contend that the accident was not a direct consequence of the application of the force of gravity to an object because the accident arose from the mechanical operation of the drill rig. An accident proximately caused by the mechanical operation of a crane, hoist, excavator or like device generally does not implicate the application of the force of gravity requirement of Labor Law § 240 (1) (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010]; *Malvestuto v Town of Lancaster*, 201 AD3d 1339, 1340 [4th Dept 2022]; *Mohamed v City of Watervliet*, 106 AD3d 1244, 1246 [3d Dept 2013]; *Jaeger v Costanzi Crane*, 280 AD2d 743, 744 [3d Dept 2001]; *Elezaj v Carlin Constr. Co.*, 225 AD2d 441, 442 [1st Dept 1996], *affd* 89 NY2d 992 [1997]; *see also Lima*

v HY 38 Owner, LLC, 208 AD3d 1181, 1183 [2d Dept 2022]), and, indeed, the controlled mechanical lowering of the top drill steel onto the lower drill steel, in and of itself, did not involve the force of gravity for purposes of the statute (*see Mohamed*, 106 AD3d 1244 at 1246; *Jaeger*, 280 AD2d 743 at 744; *Elezaj*, 225 AD3d 441 at 442). However, once the top drill steel's hex head became stuck, and Peterson "dogged off" the controls of the drill rig, the mechanical operation of the drill rig had ended. As such, and contrary to the contentions of defendants, there are at least factual issues regarding whether the falling or "settling" of the top drill steel onto the lower drill steel was the result of the weight of the top drill steel being acted upon by the force of gravity.

The fact that the accident was gravity related,⁶ however, does not end the inquiry, since a liability finding also requires a showing that the drill steel fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d 259 at 268). Defendants argue that the drill steel pieces were adequately secured and that there was no safety device of the kind enumerated in Labor Law § 240 (1) that could have been used to prevent the drill steel from "settling" or slipping into connection

⁶ The court notes that the parties have failed to address Labor Law § 240's related requirement of a significant elevation differential (*see Simmons*, 165 AD3d at 726-727). In view of the testimony showing that the hex head of the top drill steel was in contact with the lower drill steel when the hex got stuck, the settling of the top drill steel onto the lower drill steel only involved a fall that was no more than the length of the hex head. The parties, however, have failed to point to deposition testimony or other evidence regarding the size of the gap between the top drill steel and the bottom drill steel when plaintiff placed his fingers between them. Even if this distance was quite small, the extreme weight of the drill steel would likely warrant a finding that the accident involved a significant elevation differential under section 240 (1) (*see Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 815 [2d Dept 2018]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1090 [3d Dept 2012]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 731 [2d Dept 2011]; *Gutman v City of New York*, 78 AD3d 886, 886-887 [2d Dept 2010]; *but see Simmons*, 165 AD3d at 726-727; *Christiansen v Bonacio Constr., Inc.*, 129 AD3d 1156, 1158-1159 [3d Dept 2015]; *Cambry v Lincoln Gardens*, 50 AD3d 1081, 1083 [2d Dept 2008]; *Brown v East 22nd St. Acquisition Holdings, LLC*, 2019 NY Slip Op 31460, *2-3 [U] [Sup Ct, Kings County 2019]).

(see *Fabrizzi*, 22 NY3d 658 at 663; *Houston v State of New York*, 171 AD3d 1145, 1145-1146 [2d Dept 2019]; *Portalatin v Tully Constr. Co.-E.E. Cruz & Co.*, 155 AD3d 799, 800 [2d Dept 2017]; *Zamora v 42 Carmine St. Assoc., LLC*, 131 AD3d 531, 532 [2d Dept 2015]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). In support of this contention, defendants point to testimony in the record showing that the connection between the top piece of drill steel and the rig's drill head and the connection between the bottom piece supported by the whip or sling was sufficient to allow plaintiff and his coworkers to safely place the hex head into position to connect the drill steel pieces without incident. The accident only happened after the drill steel pieces were in position and settled into connection from a distance no greater than the length of the hex head. In addition, defendants have submitted an affidavit from a site safety expert who asserts that "none of the safety devices listed in section 240 (1), nor any other type of safety device that I am aware of, should have been provided or would have prevented the drill steel from coming together at the connection point" (Aff. of defendants' safety expert, at ¶ 16). Defendants' expert further asserts that a "rat hole" is not a section 240 (1) safety device, and that, in any event, the use of a "rat hole" instead of the method used here would not have resulted in a different outcome. The drill steel could still get hung up or stuck and could thereafter settle (*id.* at ¶¶ 17, 21).

Although such facts and opinions support a finding that the accident was not caused by the absence or inadequacy of a Labor Law § 240 safety device, plaintiff, in his own motion and opposition papers, has demonstrated the existence of a factual issue in this respect. Notably, under the circumstances, the drill rig itself was being used as a section

240 safety device, such as a crane or hoist, to lift the drill steel pieces into position (*see Apel v City of New York*, 73 AD3d 406, 406-407 [1st Dept 2010]; *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1566-1567 [4th Dept 2010]; *D'Avila v City of New York*, 205 AD2d 729, 730 [2d Dept 1994]), and the continued downward movement of the top drill steel after it was “dogged off” by the operator raises factual questions regarding the drill rig’s adequacy as a safety device (*see Castano v Algonquin Gas Transmission, LLC*, ___ AD3d ___, 2023 NY Slip Op 00983, *2 [2d Dept 2023]; *cf. Houston*, 171 AD3d 1145 at 1146). In addition, plaintiff submits an affidavit from an expert, an engineer, who asserts that the drill steel sections were inadequately secured and that using a “rat hole” would have reduced the likelihood of the drill steel pieces shifting and causing the accident. The opinion of plaintiff’s engineer is sufficient to demonstrate a factual issue as to whether a “rat hole” would have effectively functioned as a brace or stay, and thus be deemed a safety device “of the kind enumerated in the statute” (*Narducci*, 96 NY2d 259 at 268; *Carlton v City of New York*, 161 AD3d 930, 932-933 [2d Dept 2018]), and that the use of a “rat hole” may have prevented the accident.

Defendants also contend that plaintiff’s placing his fingers between the two pieces of drill steel was the sole proximate cause of the accident. The testimony of plaintiff and Drange demonstrates that plaintiff stuck his fingers between drill steel pieces of his own accord. In addition, defendants point to Drange’s testimony that the proper practice would have been to raise the top piece of drill steel out of the way before wiping off the hex head. On the other hand, plaintiff testified that he had, in the past, used his fingers to wipe grease off a hex head, and testified that there was pressure to move the job along. These

circumstances, and the absence of any evidence that plaintiff had been provided with a brush or other device to wipe grease or move obstructions without using his fingers, and the absence of evidence that plaintiff received direct warnings about using his fingers, or that he was advised regarding the proper practice to clear obstructions, demonstrates the existence of factual issues regarding sole proximate cause (*see Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]; *Finocchi v Live Nation Inc.*, 204 AD3d 1432, 1433-1434 [4th Dept 2022]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653 [2d Dept 2014]; *but see Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]; *Houston*, 171 AD3d 1145 at 1146; *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 23 [2d Dept 2016], *lv denied* 29 NY3d 913 [2017]; *Lin v City of New York*, 117 AD3d 913, 914 [2d Dept 2014]; *see also Hernandez v Asoli*, 171 AD3d 893, 895 [2d Dept 2019]; *Barone v Town of New Scotland*, 145 AD3d 1416, 1419 [3d Dept 2016]).

Accordingly, these factual issues regarding the absence or inadequacy of a Labor Law § 240 safety device and whether plaintiff was the sole proximate cause of his accident require the denial of both plaintiff and defendants' motions with respect to plaintiff's section 240 cause of action.

With respect to plaintiff's Labor Law § 241 (6) cause of action, the court finds that defendants have demonstrated, *prima facie*, that Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7 (a), 23-1.12, 23-9.1, 23-9.2, 23-9.5, and 23-9.10 (a)-(i), either fail to state specific standards or are inapplicable to the facts of this case (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d

820, 821 [2d Dept 2017]). In addition, the Occupational Safety and Health Administration (OSHA) regulations identified by plaintiff do not provide a basis for liability under section 241 (6) (*see Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]; *Wetter v Northville Indus. Corp.*, 185 AD3d 874, 876 [2d Dept 2020], *lv denied* 35 NY3d 918 [2020]). With the exception of 12 NYCRR 23-9.10 (d) and 23-9.10 (e), plaintiff has abandoned reliance on the aforementioned regulations by failing to address them in his moving and opposition papers (*see Debenedetto v Chetrit*, 190 AD3d 933, 935 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Plaintiff does address, and argues that it is applicable, 12 NYCRR 23-9.10 (d), which provides that, “Each member of the pile driving crew shall be properly instructed in the work he is to perform and the pile driving operation shall be in the charge of a trained, designated person who alone shall direct the work and give the operating signals.” This section is inapplicable, however, because the drill rig is not a pile driver. To the extent that the section may be deemed to apply to a drill rig, it does not state a specific standard (*see Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 95 [2022] [finding that a similar requirement contained in 12 NYCRR 23-9.9 (a) did not state a specific standard]). In any event, 23-9.10 (d) was not violated as Drange testified at his deposition that he had significant experience in attaching drill steels to drill rigs, that he was placed in charge of the operation, and that he was the person who signaled the operator.

Plaintiff also addresses, and argues for the applicability of, 12 NYCRR 23-9.10 (e), which provides that, “[t]he preparation of the piles shall be done at a safe distance from the driving operation. During the hoisting of piles, all persons not actually engaged in

operating the equipment and handling the piles shall be kept from the area.” Section 23-9.10 (e), however, is inapplicable because, like section 23-9.10 (d), it regulates pile driving operations, not drilling operations. Moreover, assuming that section 23-9.10 (e) does apply, the accident was not proximately related to its location at the site and plaintiff’s presence in the area of the drill steels did not violate section 23-9.10 (e) because plaintiff was directly involved in handling the drill steels at the time of the accident.

Accordingly, plaintiff has failed to demonstrate the existence of a factual issue with respect to the merits of his Labor Law § 241 (6) cause of action.

With respect to plaintiff’s common-law negligence and Labor Law § 200 causes of action, it is undisputed that the accident occurred because of NYCC’s means and methods of performing the work in setting up the drill rig at issue rather than as the result of a dangerous property condition (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671 [2d Dept 2018]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]). Where the plaintiff’s injuries arise from the manner in which the work is performed, “there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed” (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *see Jarnutowski v City of Long Beach*, 210 AD3d 881, 883 [2d Dept 2022]).

Here, through the deposition testimony of Tishman’s senior safety director that Tishman did not supervise the means and methods of NYCC’s work, and the testimony of plaintiff, Drange and Peterson, to the effect that they received all of their directions

regarding the performance of their work from NYCC's supervisors, defendants have demonstrated, prima facie, that the defendants did not supervise or control the work at issue (*see Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]).⁷ Contrary to plaintiff's contentions, Tishman's authority to stop the work and its general supervisory authority over the injury-producing work is insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 495 [2d Dept 2022]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670-673 [2d Dept 2018]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). In addition, Tishman's letter submitted to the Department of Buildings after the accident that addressed how work would be performed in the future has no bearing on its supervision and control at the time of the accident. Plaintiff has thus failed to demonstrate an issue of fact with respect to supervision and control, and defendants are thus entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action.

Finally, defendants have submitted evidence demonstrating, prima facie, that defendants Tishman Construction Corporation and Tishman Interiors Corporation had no involvement in the project and did not own, possess or control the property at issue. As plaintiff has not addressed this aspect of defendants' motion in his opposition papers, Tishman Construction Corporation and Tishman Interiors Corporation are entitled to dismissal of the action as against these two corporations.

⁷ This prima facie showing relates to all of the defendants. The court notes that plaintiff, in his opposition papers, did not address the liability of any of the defendants other than Tishman.

