

Vaiatica v BOP NW LLC

2023 NY Slip Op 31887(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 156764/2018

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

-----X

JOSEPH VAIATICA,

Plaintiff,

- v -

BOP NW LLC, PAVARINI MCGOVERN, LLC,

Defendant.

-----X

PAVARINI MCGOVERN, LLC

Third-party Plaintiff

-v-

JOHN CIVETTA & SONS, INC.

-----X

INDEX NO. 156764/2018
MOTION DATE N/A, N/A
MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 117, 118, 120, 122, 124, 126, 127, 128, 129, 130, 131, 132, 133, 135, 138, 139, 147, 148, 149, 151, 152, 156, 157

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 121, 123, 125, 134, 136, 137, 140, 141, 142, 143, 144, 145, 146, 150, 153, 154, 155, 158

were read on this motion to/for SUMMARY JUDGMENT.

Motion Sequence Numbers 004 and 005 are consolidated for disposition.

Defendants' motion (MS004) for summary judgment is granted in part and denied in part and plaintiff's cross-motion for summary judgment is granted in part. Plaintiff's motion for summary judgment (MS005) is granted.

Background

In this Labor Law action, plaintiff was working for third-party defendant John Civetta & Sons, Inc. at a jobsite owned by defendant BOP NW, LLC when he was allegedly injured. He claims he was doing excavation work, initially with a two-man crew but that they “upgraded to a larger drill that required four men to run it” (NYSCEF Doc. No. 102 at 44). On the day of the accident plaintiff was helping the team “[d]rilling footings for the site” (*id.* at 57).

Plaintiff testified that he was on a ladder to “muck out” the earth below—meaning that his team was drilling large holes and removing the debris so that rebar footings can be put in the holes (*id.* at 70). He claimed that he was holding a “high-voltage cable” so that a co-worker could clear the debris when he “was struck in the back of the knees by that falling piece of wall there, and then I continued to slide down the ledge and George caught me before I actually went into the pit” (*id.* at 87). He claims that a piece of concrete fell from about 20-25 feet above him and that this concrete weighed about 35-40 pounds.

According to defendants’ expert, Dr. Levitan, the piece that hit plaintiff was from the wall of an adjoining building that was covered in sheetrock that was not being demolished but a portion of the wall was removed in order to provide access for the drill.

Plaintiff’s Motion (MS005)

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

“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 grants plaintiff’s motion. There is undisputed evidence that plaintiff was working at a construction site when a piece of debris fell from a temporary wall above and injured him. That establishes liability under Labor Law § 240(1) (*see Paz Avila v St. David's School*, 187 AD3d 460, 133 NYS3d 18 [1st Dept 2020]).

Defendants’ insistence that summary judgment must be denied because the accident was not foreseeable does not raise an issue of fact. Plaintiff was doing excavation work involving a large drill—that means it was certainly foreseeable that a temporary wall above or a wall from an adjoining structure might break apart and fall on the workers below. In this Court’s view, substantial drilling means that the structure above or adjacent must be secured or, alternatively, protective measures should have been taken to ensure the safety of the workers in the trench below (*see Sinchi v HWA 1290 III LLC*, 184 AD3d 408, 409, 125 NYS3d 415 [1st Dept 2020] [granting summary judgment on Labor Law § 240(1) where a ceiling collapsed on a worker and noting that the ceiling was not braced or shored]).

Defendants’ contention that there was no reason to expect that the sheetrock wall was not secure, as discussed by Dr. Levitan, does not raise an issue of fact. The fact is that the wall was not secured and a piece of it fell and hit plaintiff. That entitles him to liability under this statute

on this record. The Court emphasizes that plaintiff did not have to explain exactly how the piece of temporary wall fell in order to obtain summary judgment (*Fuentes v YJL Broadway Hotel, LLC*, 210 AD3d 552, 553, 176 NYS3d 781(Mem) [1st Dept 2022]).

And, to the extent that defendants attempt to blame plaintiff's employer (the third-party defendant), the Court observes that Labor Law § 240(1) provides strict liability for an owner and the general contractor (defendants BOP NW LLC and Pavarini). Defendants may of course make arguments about the responsibility of plaintiff's employer at trial, but it is not a defense to this claim.

Defendants' Motion and Plaintiff's Cross-Motion

Defendants move for summary judgment on all of plaintiff's claims. As the Court has already awarded plaintiff liability on his Labor Law § 240(1), the Court denies defendants' motion for liability on that issue for the reasons described above.

Labor Law § 241(6)

“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]).

Defendants move to dismiss the Industrial Code sections cited by plaintiff, including §§ 23-1.7(a), 23-4.1(a), 23-4.1(b), 23-4.2(a), 23-4.2(k). Plaintiff only addresses section 23-4.1 (a) in

his opposition and seeks to amend his bill of particulars to add section 23-4.4(a). Therefore, the Court dismisses plaintiff's claim to the extent he has abandoned certain Industrial Code sections.

23-4.1(a) provides that "(a) Stability of structures. Except in hard rock, whenever any excavation is to be performed in the vicinity of buildings, structures or utilities, the integrity, stability and structural adequacy of such buildings, structures or utilities shall be maintained at all times by the use of underpinning, sheet piling, bracing or other equivalent means to prevent damage to or failure of foundations, walls, supports or utility facilities and to prevent injury to any person. Such underpinning, sheet piling, bracing or equivalent means shall be inspected at least once each day or more often if conditions warrant. Every such inspection shall be conducted by an experienced, designated person."

Defendants maintain that this section is inapplicable because the piece of the wall that fell on him came from well above the trench where plaintiff was working. Plaintiff insists that this section was clearly violated as he was doing excavation work and the walls were not secured.

The Court grants plaintiff's cross-motion for summary judgment on this Industrial Code section as the accident squarely falls under this section. Plaintiff was doing excavation work and a piece of the wall above broke off and hit him. Defendants' attempt to narrow the statute or create an exception because of how high up the wall was located is without merit. A plain reading of the statute does not evidence this type of exception and the very nature of excavation (and the associated drilling and vibrations) implicates the integrity of the entire structure, as the language of the statute suggests.

Preliminarily, the Court grants the branch of the cross-motion to amend to add an Industrial Code section (23-4.4[a]). Leave to amend should be freely given (CPLR 3025[b]) and the proposed amendment merely adds another theory based on the facts already explored by the

parties. This proposed amendment does not prejudice defendants as it does not require discovery about new facts.

This section, 23-4.4(a), provides that “(a) Where any excavation is not protected by sloped sides or banks in compliance with Table I of this Subpart, any person in such excavation shall be protected by sheeting, shoring and bracing in compliance with Tables II, III and IV of this Subpart.” Plaintiff contends that there was no shoring, sheeting, or bracing provided at all. Defendants argue that this section is inapplicable because the sheetrock that fell was part of the adjacent building and not located within the excavation trench where plaintiff was working.

The Court grants summary judgment on this Industrial Code section in favor of plaintiff. There is no requirement in this Industrial Code section, as defendants seem to argue, that the wall has to be located within the excavation trench itself. The entire purpose of this Industrial Code section is to detail the ways in which protections must be afforded to workers performing excavation work. Defendants do not argue that there was protection from sloped sides or banks; rather they appear to want to add additional language that shoring must only be provided for wall located within the trench. The Court declines to do that.

Labor Law § 200

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]ecoverly 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]).

“Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). “Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*id.* at 144).

“Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

Both defendants and plaintiff seek summary judgment on this claim. Defendants insist that Pavarini (the general contractor) did not supervise or control the worksite. They also argue that Pavarini hired a safety company and that both the safety company and Pavarini conducted regular inspections. Defendants emphasize that plaintiff testified that neither he nor his co-workers thought the sheetrock wall was in danger of collapsing prior to the accident.

Plaintiff emphasizes that defendants did not show when they last inspect the area and that Pavarini had the sole responsibility for safety in the jobsite. He insists that the safety inspector in plaintiff’s work area was notified just moments before the accident that certain machinery was operating too close to the trench, but no action was taken.

The Court denies both requests for summary judgment on this claim. The Court is unable, as matter of law, to find that defendants are liable under this theory or that they are free from liability. It is undisputed that there was a safety inspector, which means that defendants cannot claim that plaintiff’s employer was solely responsible for the job site. Moreover, a fact

finder might conclude that he or she should have explored the potential ramifications of doing excavation work. As evidenced by the numerous Industrial Code sections relating to this type of work, it might be that a safety inspector could have suggested that appropriate safety measures be taken to secure the surrounding structures and walls while a large drill was being used. There is no question that the drill caused vibrations, which raises an issue of fact about whether defendants satisfied their duties under this Labor Law section.

Summary

The Court denies defendants' argument that the Court should not consider a "successive summary judgment" motion from plaintiff. Certainly, plaintiff's choice to proceed by bringing a cross-motion and a separate summary judgment motion was bizarre. But both motions were timely (the cross-motion relates back to defendants' motion) and defendants did not suffer any prejudice.

The Court also observes that plaintiff cross-moved to dismiss defendants' affirmative defenses of comparative negligence and assumption of risk on the ground that he was simply performing his tasks as directed by his employer. (Defendants did not oppose the branch of the motion that sought to strike the sole proximate cause affirmative defense).

Defendants insist that based on plaintiff's testimony, the dangerous condition was created when plaintiff's employer removed a portion of an existing wall in order to move the drill into the area where the excavation work was being performed.

The Court grants this branch of plaintiff's cross-motion as defendants argument focuses on what the third-party defendant did, not plaintiff. In other words, there is no evidence that plaintiff potentially knew about possible dangers from removing a portion of the wall and


directed that it be done anyway. Instead, the record shows that plaintiff was only doing the tasks assigned to him by his employer.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted only to the extent that plaintiff's Labor Law claims based on Industrial Code sections 23-1.7(a), 23-4.1(b), 23-4.2(a) and 23-4.2(k) are severed and dismissed and denied with respect to the remaining portions of the motion; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent that he has leave to amend his bill of particulars, he is entitled to summary judgment on his Labor Law § 241(6) claim based on sections 23-4.1(a) and 23-4.4(a) and defendants' first, second and seventh affirmative defenses are severed and dismissed, and the cross-motion is denied with respect to the remaining relief requested; and it is further

ORDERED that plaintiff's motion (MS005) for summary judgment on liability on his Labor Law § 240(1) claim is granted.

<u>6/5/2023</u> 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