SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 525071/2018
Motion Date: 4-10-23
Mot. Seq. No.: 3, 6

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MUHAMET BABAXHANI,

Plaintiff,

-against-

1414 WEST 4TH PARTNERS, LLC,

Defendant.

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DECISION/ORDER

1414 WEST 4TH PARTNERS, LLC,

Third-Party Plaintiff,

-against-

INSURANCE DEPOT INC.,

Third-Party Defendant.

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The following papers, listed on NYSCEF as document numbers 41-52, 79-101, 107 -108 were read on these motions:

In this action to recover damages for personal injuries, the plaintiff, MUHAMET BABAXHANI, moves for an order pursuant to CPLR §3212, granting him partial summary judgment against the defendant 1414 West 4th Partners, LLC on this issue of liability under Labor Laws §241(6). The defendant, 1414 WEST 4TH PARTNERS, LLC, cross-moves for summary judgment dismissing plaintiff's complaint.

Background:

This action involves a construction accident that occurred on October 26, 2017, in a building owned by the defendant, 1414 West 4th Partner, LLC, located at 1414 West 4th Street, Brooklyn, New York. The plaintiff, Muhamet Babaxhani, was working as a laborer at the building for Rybak Development and Construction Corp., who was converting the building into a condominiums. At the time of the accident, the plaintiff was working on the third-floor clearing debris. Just prior to the accident, the plaintiff had bent over to pick up a metal strap which was lying in a pile of debris when a portion of the metal strap somehow flew into his right eye

causing his injuries. The plaintiff described the metal strap as being approximately one meter long and one centimeter wide. He believed that the metal strap was once used to tie pieces of rebar together. Plaintiff was not wearing any eye protection at the time of the accident and maintains that there is no eye protection available at the site.

In opposition to the motion, the defendant submitted the affidavit of Igor Mosnoi, an employee of Rybak, who was plaintiff's foreman and who was supervising plaintiff's work on the day of the accident. Mosnoi stated that as of the day of the accident, construction on the third floor had been completed and the skilled laborers were working on the fourth floor. He averred that on the day of the accident, he directed the plaintiff to clear the debris from the third floor, which consisted of some wood and miscellaneous garbage bags. He maintained that the plaintiff was only assigned menial tasks, such as sweeping and picking up garbage.

Contrary to the plaintiff's contention, Mosnoi stated that every employee on the Project was provided with eye protection. He annexed to his affidavit an acknowledgement form, signed by the plaintiff acknowledging such. According to Mosnoi, every employee/worker present at site, regardless of the assigned job, was required to use eye protection. Such equipment was located in the toolbox which is always located two floors below the current construction. That day, the toolbox was located on the second floor. According to Mosnoi, every employee of Ryback is required to go to the toolbox and obtain the productive protective equipment before they start their daily assigned job. He stated that he walked around the job site to confirm that everyone is wearing eye protection and that in the event that he noticed an employee/worker not wearing such protection, he would direct the worker to put the eye protection..

Mosnoi stated that the type of eye protection provided to the employees at the job site was 3M and was purchased from Home Depot. Furthermore, he stated that every week, safety meetings were held and the plaintiff was required to attend. During these safety meetings, every worker/employee was reminded to obtain the necessary Protective Equipment from the tool box, including eye protection, before starting work.

Discussion:

That branch of plaintiff's motion for partial summary judgment on his Labor Law § 241(6) is **DENIED.** Labor Law § 241(6), provides, in pertinent part, that:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

Labor Law § 241(6) imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515; *Rizzuto v L.A. Wenger Contr.* Co., 91 NY2d 343, 348; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728). "'To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" (*Zaino v. Rogers*, 153 A.D.3d 763, 764, 59 N.Y.S.3d 770, quoting *Aragona v. State of New York*, 147 A.D.3d 808, 809, 47 N.Y.S.3d 115).

In this case, even if the plaintiff established that the defendant violated the Industrial Code, as plaintiff contends, and such violation was a substantial factor in causing plaintiff's injuries, a violation of the Industrial Code does not conclusively establish defendant's liability as a matter of law under Labor Law 241(6). Such a violation only constitutes some evidence of negligence and reserves for a jury "the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *see Long v. Forest--Fehlhaber*, 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Daniels v. Potsdam Cent. School Dist.*, 256 A.D.2d 897, 898, 681 N.Y.S.2d 852; *Seaman v. Bellmore Fire Dist.*, 59 A.D.3d 515, 516, 873 N.Y.S.2d 181, 182--83). This principle was recently reiterated by the Court of Appeals (see *Toussaint v. Port Auth. of New York & New Jersey*, 38 N.Y.3d 89, 93 n2, 188 N.E.3d 571, 573 (2022) ["Breach of a duty imposed by a regulation promulgated under

Labor Law § 241(6) is merely some evidence of negligence...." (*Ross,* 81 N.Y.2d at 502 n. 4, 601 N.Y.S.2d 49, 618 N.E.2d 82)]"; *see also, Mulhern v. Manhasset Bay Yacht Club*, 22 A.D.3d 470, 471, 803 N.Y.S.2d 90, 91). Moreover, the affidavit of Mosnoi raises triable issues of fact as to whether the plaintiff was a recalcitrant worker and therefore the sole proximate cause of his injuries his injuries, which is a complete defense to a Labor Law § 241(6) claim (see *Garcia v. Emerick Gross Real Est., L.P.*, 196 A.D.3d 676, 152 N.Y.S.3d 462, 466; *Jones v. City of New York*, 166 A.D.3d 739, 741, 87 N.Y.S.3d 631, 635).

That branch of the cross motion seeking summary judgment dismissing plaintiff's cause of action pursuant to Labor Law § 241(6) is also **DENIED**. Plaintiff's 241(6) claim is premised on a violation of Industrial Code is 12 NYCRR §23-1.8(a), which provides: "Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while . . . engaged in any other operation which may endanger the eyes." This regulation is specific enough for purposes of stating a cause of action under Labor Law § 241(6) (see *Galawanji v. 40 Sutton Place Condo.*, 262 A.D.2d 55, 55, 691 N.Y.S.2d 436, 437; *Dennis v. City of New York*, 304 A.D.2d 611, 611, 758 N.Y.S.2d 661, 663) and it cannot be said, as a matter of law, that this regulation is inapplicable to the facts of this case. In this regard, the defendant did not eliminate the existence of a triable issue of fact as to whether the plaintiff was engaged in operations that may endanger the eyes at the time of the accident (see *Badzmierowski v. PBAK*, LLC, 5 Misc 3d 1005[A], 1005A [Sup Ct, NY County 2004].

That branch of the cross-motion seeking summary judgment dismissing plaintiff's causes of action pursuant to Labor Law § 200(1) and the common law is **DENIED**. "Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*DiMaggio v. Cataletto,* 117 A.D.3d 984, 986, 986 N.Y.S.2d 536; *see Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 631 N.E.2d 110). '[W]hen the manner and method of work is at issue in a Labor Law § 200 analysis' the issue is 'whether the defendant had the authority to supervise or control the work' " (*Poalacin v. Mall Props., Inc.,* 155 A.D.3d 900, 908, 63 N.Y.S.3d 679, quoting *Ortega v. Puccia,* 57 A.D.3d at 62 n. 2, 866 N.Y.S.2d 323; *Rodriguez v. HY 38 Owner, LLC*, 192 A.D.3d 839, 841, 143 N.Y.S.3d 411, 413). "[W]hen a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner's liability under Labor Law § 200

and for common-law negligence rests upon whether there is evidence that the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition" (*Reyes v. Arco Wentworth Mgt. Corp.*, 83 A.D.3d 47, 49, 919 N.Y.S.2d 44; *see Chowdhury v. Rodriguez*, 57 A.D.3d at 130, 867 N.Y.S.2d 123). Where, as here, both the manner and method of work and an alleged defective premises may be at issue, the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both standards (*Reyes v. Arco Wentworth Mgt. Corp.*, 83 A.D.3d at 52, 919 N.Y.S.2d 44).

Here, while the defendant established as a matter of law that it did not have the authority to supervise or control plaintiff's work and that it cannot be held liable under Labor Law § 200(1) under a means and methods analysis, the defendant did not rule out the possibility that it may be liable under Labor Law § 200(1) on the ground that the plaintiff's injuries were the result of a defective premises condition. Certainly, the defendant did not establish, in the first instance, that it lacked actual and/or constructive notice of the alleged defective conditions which may have caused plaintiff's accident.

Accordingly, it is hereby

ORDRED that the motion and cross-motion are decided as indicated above.

This constitutes the decision and order of the Court.

Dated: May 26, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020