

Marrero v Gotham Plaza Assoc., LLC

2023 NY Slip Op 31995(U)

June 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160382/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 04

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ANGEL L. MARRERO,

Plaintiff,

- v -

GOTHAM PLAZA ASSOCIATES, LLC, BDG GOTHAM
PLAZA, LLC, THE SALVATION ARMY, MEGA
CONTRACTING GROUP, LLC, REPUBLIC SCAFFOLD &
HOIST CORP., URBAN ERECTORS, LLC, URBAN
PRECAST, LLC, US CRANE LLC, NYC CRANE HOIST &
RIGGING, LLC, NYC CRANE HOIST OPERATIONS, LLC,

Defendant.

INDEX NO. 160382/2017

MOTION DATE 12/02/2021,
06/23/2022,
06/24/2022,
06/27/2022,
06/28/2022

MOTION SEQ. NO. 002 004 005
006 007

**DECISION + ORDER ON
MOTIONS**

-----X

URBAN PRECAST, LLC

Plaintiff,

-against-

Defendant.

Third-Party
Index No. 595656/2018

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 280, 281, 282, 283, 284, 285, 287, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 306, 307, 308, 309, 546

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 449, 450, 451, 452, 453, 481, 482, 483, 484, 485, 493, 494, 499, 500, 501, 502, 503, 514, 515, 516, 532, 536, 537, 538, 547

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 454, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 477,

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were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 455, 474, 475, 476, 495, 496, 508, 509, 510, 534, 539, 540, 541, 542, 549

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 007) 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 456, 467, 468, 469, 470, 471, 472, 473, 511, 512, 513, 519, 520, 530, 535, 545, 550

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Hon. Frank P. Nervo, J.S.C.:

The parties move and cross-move for, inter alia, summary judgment on this Labor Law matter under motion sequences 002, 004, 005, 006, and 007. The Court heard on-the-record oral argument regarding this and related applications on May 17, 2023. This Decision and Order results.

As relevant here, plaintiff was engaged in construction activity when a beam was caused to fall upon his person during the crane-operated lift of said beam. Plaintiff has asserted claims under Labor Law §§ 200, 240(1), and 241(6) for his injuries. Unsurprisingly, the parties have differing conclusions as to cause of the accident.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]).

LABOR LAW § 200

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). It provides, in pertinent part:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons

(Labor Law § 200).

The party responsible under Labor Law § 200 must, therefore, have the control over the activity bringing about the injury (*Russin v. Picciano & Son*, 54 NY2d 311 [1981]). Accordingly, a breach of Labor Law § 200 is, effectively, a breach of the common law duty to maintain a safe work site (*Allen v. Cloutier Constr. Corp.*, 44 NY2d at 299). If the dangerous condition or defect arises from the contractor's methods, the owner will not be liable under § 200 or the common law, absent a showing the owner exercised some control or supervision over the operation (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 877; *see also Lombardi v. Stout*, 80 NY2d 290, 295 [1992]). However, where the plaintiff's injuries arise from a dangerous condition on the premises not caused by the contractor's methods, liability will attach if the property owner had control over the work site and notice of the dangerous condition (*Bradley v. HWA 1290 III LLC*, 157 AD3d 627 [1st Dept 2018]; *Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, issues of fact preclude summary judgment on Labor Law § 200.

Among other things, the parties dispute: who was located at the construction site; the responsibilities of those employed and located at the construction site; what was able to be seen by the crane operator; the appropriate measures to be taken when a crane operator performs a “blind lift” relying on signalpersons to guide the crane operation; and whether plaintiff’s own actions contributed to his accident. Put simply, the trier of fact must determine the credibility of various witnesses in the face of competing evidence as to: who was on site, where those persons were located, what those persons saw, and what those persons did leading up to plaintiff’s accident.

LABOR LAW § 240(1)

Labor Law § 240(1) provides, in pertinent part:

all contractors and owners ... 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.

The duty imposed by Labor Law § 240(1) is nondelegable; an owner or contractor may be held liable regardless of whether such party actually

exercised supervision or control over the work (*Haimes v. New York Tel. Co.*, 46 NY2d 132 [1978]; compare *Russin v. Picciano & Son*, 54 NY2d 311 [1981], Labor Law § 200). Labor Law § 240(1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed” (*Koenig v. Patrick Constr. Corp.*, 298 NY 313 [1948] quoting *Quigley v. Thatcher*, 207 NY 66 [1912]). However, the injury claimed under § 240(1) must result from elevation-related hazards, “injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device” (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d 494 [1993] Back strain alleged because platform was placed in manner requiring worker to contort not within class of hazards contemplated by Labor Law § 240[1]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]). That an accident occurred at an elevated height, without more, is insufficient to trigger the protections of Labor Law § 240(1) (*Reyes v. Magnetic Constr., Inc.*, 83 AD3d 512 [1st Dept 2011]; see also *Auchampaugh v. Syracuse Univ.*, 57 AD3d 1291 [3d Dept 2008]). Finally, a plaintiff may not recover for a violation of Labor Law § 240(1) where the plaintiff is the sole proximate cause of their own accident (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]).

Here, defendants concede, and indeed there can be no question, that the beam fell from an elevated height striking plaintiff and that the safety devices employed at the construction site were insufficient to afford plaintiff proper protection (*see Gallegos v. Bridge Land Vestry, LLC*, 188 AD3d 566 [1st Dept 2020]). Consequently, and as set forth in the motion papers and as presented at oral argument, the issue before this Court on Labor Law § 240(1) is whether plaintiff was the sole proximate cause of his accident. This Court finds that plaintiff was not the sole cause of his accident as evinced by, among other things: use of guidelines (taglines) of insufficient length to effectively guide the beam during the crane lift; testimony of the crane operator that the operator did not monitor the crane's computer display during the lift of the beam; and testimony by Galindez that the beam was not in their field of vision during the lift. Consequently, summary judgment is appropriate as against defendant owner, Salvation Army, and the general contractor, Mega, as parties held statutorily liable under Labor Law § 240(1).

L a b o r L a w § 2 4 1 (6)

Labor Law § 241(6) requires contractors, owners, and their agents to “provide reasonable and adequate protection and safety’ for workers” as well as comply with the rules and regulations as promulgated by the Department of

Labor (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d at 501-02; see Labor Law § 241). As with Labor Law § 240(1), the duty imposed by Labor Law § 241(6) is nondelegable as it relates to compliance with the Industrial Code. However, to the extent Labor Law § 241(6) relates to general safety standards, it does not give rise to the same non-delegable duty (*id.*). Thus, § 241(6) is best described as a “hybrid” between the common law duty of Labor Law § 200 and the specific duties imposed by § 240(1) (*id.*).

The issues of fact which preclude summary judgment on Labor Law § 200 likewise preclude summary judgment on Labor Law § 241(6); all questions related to § 241(6) insofar as they may become relevant, are referred to the trial court.

COLLATERAL ESTOPPEL

To the extent that plaintiff seeks to apply preclusive effect to a determination by the Office of Administrative Trials and Hearings (OATH), and thus find the parties here responsible on such basis, this Court declines such invitation.

The doctrine of collateral estoppel precludes a party from re-litigating, in subsequent actions, those issues which have been raised in a prior proceeding and decided against said party (*id.*). “What is controlling is the identity of the issue which has necessarily been decided in the prior action” (*id.*). Put differently, the issue must be “material to the first action... and essential to the decision rendered therein” and the issue “must be the point actually to be determined in the second action ... such that ‘a different judgment in the second would destroy or impair rights or interest established by the first’” (*id.* at 500-01 quoting *Schuylkill Fuel Corp v. Nieberg Realty Corp.*, 250 NY 304, 307 [1929]). “The estoppel is limited ... to the point actually determined” (*Schuylkill Fuel Corp v. Nieberg Realty Corp.*, 250 NY at 307). It is beyond cavil that collateral estoppel may only be asserted against a party who has had a fair and full opportunity to litigate the issue (*Ryan v. New York Telephone Co.*, 62 NY2d 494).

Initially, the Court notes that any violation of the industrial code found by OATH may be considered some evidence of negligence by the trier of fact, but does not rise to the level of negligence *per-se* (*Elliot v. New York*, 95 NY2d 730 [2001]; *Schneider v. Diallo*, 14 AD3d 445, 446 [1st Dept 2005]), violations of local ordinances constitute only some evidence of negligence, not negligence *per-se*). Additionally, and more importantly, the parties before OATH and the

parties herein differ, that is to say a full and fair opportunity to litigate the issue before OATH was not afforded to all defendants in this matter. Accordingly, the Court declines to apply collateral estoppel.

INDEMNIFICATION

Determining issues of indemnification, by contract or common law, is premature at this time and is best reserved for the trial court. It is beyond cavil that a party may not be indemnified for its own negligence and, at this stage, no party has been found actively negligent notwithstanding statutory liability imposed under § 240(1). Where a Labor Law party has been found only “passively negligent by virtue of Labor Law §§ 240(1) and 241(6) ... [they] are not entitled to summary judgment dismissing the common-law indemnification, contribution, and apportionment cross claims against it” (*Winkler v. Halmar*, 206 AD3d 508, 510 [1st Dept 2022]). Accordingly, indemnification, if any, shall be determined after the trier of fact has determined the issue of negligence.

CONCLUSION

Summary judgment has long been found to be a drastic remedy by New York Courts, as it deprives the parties of their “day in court” and is warranted only “when there is no doubt as to the absence of triable issues” (*see e.g. Andre v.*

Pomeroy, 35 NY2d 361 [1974]; see also *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). So well understood is this principle that nearly all summary judgment motion papers cite the proposition as though a legal benediction, and it is the rare submission that omits language recognizing the drastic nature of summary judgment. Nevertheless, a motion for summary judgment has become perfunctory in New York, even where triable issues of fact are blatantly obvious to those with basic familiarity of the matter and where there can be no reasonable argument that summary judgment is warranted.

This Court notes that other jurisdictions with similar standards for summary judgment – namely the absence of a disputed material issue of fact and entitlement to judgment as a matter of law – do not accept that summary judgment motions should be filed perfunctorily. “New Mexico courts ... view summary judgment with disfavor, preferring a trial on the merits” (*Romero v. Phillip Morris Inc.*, 148 NM 713, 242 P.3d 280 [New Mexico Supreme Court, 2010]; see also *Ridlington v. Contreras*, 501 P.3d 444, 2022 NMSC 002 [New Mexico Supreme Court, 2021]; *Fargo v. Hays-Kuehn*, 2015 OK 56 [Oklahoma Supreme Court, 2015] “summary judgments are disfavored and should only be granted when it is clear there are no disputed material fact issues”).

This Court is not unmindful of the business considerations confronting legal practitioners; however, while an appropriate summary judgment motion conserves judicial resources by avoiding trial on an issue with a foregone legal conclusion, a substantial number of summary judgment motions waste judicial resources by needlessly requiring the Court to address a motion replete with issues of fact which preclude summary judgment or where there can be no reasonable argument supporting summary judgment. In large part, these five motions seeking summary judgment, and their concomitant cross-motions seeking same, serve to highlight this issue. This Court has granted a small portion of the extraordinary relief sought by the parties, indeed, the vast majority of the relief sought by the parties on these motions has been denied as premature or precluded by obvious issues of fact.

Accordingly, it is

ORDERED that plaintiff's summary judgment motion is granted to the extent of finding owner, The Salvation Army, and general contractor, Mega Contracting, statutorily liable under Labor Law § 240(1) and otherwise denied; and it is further


ORDERED that defendants' motions seeking summary judgment dismissing the complaint are denied; and it is further

ORDERED that those motions seeking summary judgment on indemnification are denied without prejudice to renewal before the trial court upon the determination of liability by the trier of fact; and it is further

ORDERED that the parties shall file a copy of the Court's transcript of the May 17, 2023 oral argument (Senior Court Reporter Monica Martinez, mmartin2@nycourts.gov) within 10 days of this order and all parties shall share in the costs associated with same; and it is further

ORDERED that the failure to timely file a copy of the May 17, 2023 oral argument transcript may result in sanctions, including but not limited to waiver of relief granted herein and monetary sanctions against counsel and/or parties.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

6/14/2023 DATE			 HON. FRANK P. NERVO J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE