Onofre v 243 Riverside Dr. Corp.

2023 NY Slip Op 32234(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 150754/2020

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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MIGUEL ONOFRE,

Plaintiff,

- v -

243 RIVERSIDE DRIVE CORPORATION, NOVA CONSTRUCTION SERVICES LLC,

Defendants.

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INDEX NO. 150754/2020

MOTION DATE 06/08/2023, 06/08/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 106, 109, 110, 112, 113, 116

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

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, 104, 105, 107, 108, 111, 114, 115

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

In this action arising out of a construction site ladder fall, defendants 243 Riverside Drive Corporation (Riverside) and Nova Construction Services LLC (Nova) move, pursuant to CPLR § 3212, for summary judgement dismissing plaintiff Miguel Onofre's complaint and all cross-claims as against them (mot seq no 003). Defendants argue the protective plastic on the ladder's rungs that plaintiff opines caused his fall was integral to the work such that plaintiff's Labor Law § 200 and related negligence claims must be dismissed, plaintiff was provided with an adequate safety device under Labor Law § 240 (1), there is no industrial code violation sufficient to sustain a Labor Law § 241 (6) claim, and they are entitled to indemnification by third-party defendant Kostan, Inc. (Kostan).

Plaintiff does not oppose dismissal of his Labor Law § 200 claim and Labor Law § 241 (6) claim based on any of the Industrial Code provisions set forth in his bill of particulars and

supplemental bill of particulars except for Industrial Code §§ 23-1.5 (c) (3), 1.7 (d), and 1.21 (b) (2). Plaintiff argues defendants failed to meet their *prima facie* burden on Labor Law § 240 (1) because the ladder plaintiff used was furnished in such a way that it failed to protect plaintiff from an elevation-related hazard of his work. Plaintiff also asserts that Industrial Code §§ 23-1.5 (c) (3), 1.7 (d), and 1.21 (b) (2) sufficiently support his Labor Law § 241 (6) claim in that the ladder was not kept safe and operable, the protective plastic on the ladder was a slippery substance that needed to be removed, and the protective plastic was a prohibited opaque protective coating.

Plaintiff also moves for summary judgment, pursuant to CPLR § 3212, on his Labor Law § 240 (1) claim (mot seq no 004). The arguments asserted by plaintiff and defendants in motion sequence number 004 are the same as those asserted in motion sequence number 003.

The motions are consolidated for disposition.

BACKGROUND

On January 9, 2020, plaintiff, a construction worker employed by subcontractor Kostan, was installing façade repairs and skyline replacements at 243 Riverside Drive, New York, New York (the premises) for the owner of the premises, Riverside (Statement of Material Facts, ¶¶ 13, 26, NYSCEF Doc No 71; Onofre EBT, p 23, NYSCEF Doc No 81). While ascending an affixed ladder to get to the upper roof work area, plaintiff slipped and fell, which plaintiff claims was due to protective plastic tape wrapped on each rung of the ladder (NYSCEF Doc No 81, pp 44-50; Response to Statement of Material Facts, ¶ 29, NYSCEF Doc No 110). Plaintiff also testified that on the ladder was blue tape and photographs of the ladder show three pieces of blue tape on each rung of the ladder (NYSCEF Doc No 81, p 47; Ladder Photographs, NYSCEF Doc No 85).

Plaintiff alleges the incident resulted in injuries to his left ankle and right knee (NYSCEF Doc No 81, pp 62-64).

Bogdan Khyliak, an employee of general contractor Nova and the project manager, testified on March 29, 2022, that the ladder was almost brand-new, in good condition, and stable, and that the plastic wrap was installed as temporary protection to prevent damage to the ladder (Khyliak EBT, pp 47-49, 72, NYSCEF Doc No 83). Andrzej Janczyk, Kostan's manager, testified on November 8, 2022 that the plastic was standard practice to protect workers from hurting their hands due to the rough, sharp tread on each rung (Janczyk EBT, p 44, NYSCEF Doc No 84).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be

examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 200

Defendants move for summary judgment to dismiss plaintiff's Labor Law § 200 and related negligence claims as against them because the protective tape on the ladder that plaintiff alleges caused him to slip and fall off the ladder was an integral part of job safety.

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" (*Singh v Black Diamonds* LLC, 24 AD3d 138, 139 [1st Dept 2005]; citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states in pertinent part, as follows:

> 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. The board may make rules to carry into effect the provisions of this section.

(Labor Law § 200 [1]).

However, "this duty does not extend to hazards which are 'part of or inherent in' the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience" (*Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004]). This is known as the integral to work defense and it "applies

to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident" (*Krzyzanowski v City of New York*, 179 AD3d 479, 481 [1st Dept 2020]).

Unlike in the case proffered by defendants, *Bazdaric v Almah Partners LLC* (203 AD3d 643 [1st Dept 2022]), where a plastic covering on an escalator to protect it from dripping paint was found to be integral to the work, the plastic on the ladder rungs is not integral to construction since it was merely used to protect the ladder from damage, not to facilitate plaintiff's construction work. Therefore, defendants failed to meet their *prima facie* burden on plaintiff's Labor Law § 200 claim.

Accordingly, defendants' motion for summary judgment on plaintiff's Labor Law § 200 and related negligence claims will be denied.

Labor Law § 240 (1)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim arguing that the protective plastic that allegedly caused him to slip off the ladder made it inadequate to support the plaintiff and protect him from the elevation-related hazard of his work. Defendants move for summary judgment to dismiss plaintiff's Labor Law § 240 (1) claim arguing that they provided plaintiff with an adequate safety device as contemplated by the statute since the ladder was not defective nor inadequately secured.

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

> All contractors and owners and their agents . . . 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.

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the 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 [2009]). Yet, there cannot be liability under the statute where 'the proper safety devices were entirely sound and in place'" (*Walker v City of New York*, 72 AD3d 936, 937 [2d Dept 2010], *quoting Blake*, 1 NY2d at 292).

Here, plaintiff has successfully met his *prima facie* burden since "[t]he permanently affixed ladder [he] used was the only means by which he could reach his elevated work site and, as such, was a device within the meaning of section 240 (1)" (*Stallone v Plaza Constr. Corp.*, 95 AD3d 633, 633-34 [1st Dept 2012]; *see also* NYSCEF Doc No 83, p 48). Because the record demonstrates plaintiff fell down a steep ladder, "there is no question that his injuries were at least partially attributable to defendants' failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential, and thus that grounds for the imposition of liability pursuant to Labor Law § 240 (1) were established" (*Crimi v Neves Assoc.*, 306 AD2d 152, 153 [1st Dept 2003]).

Defendants have failed to meet their own *prima facie* burden and/or successfully rebut plaintiff's showing because the case law defendants proffer, which accepts the integral to work

defense as a barrier to liability, has not been applied to Labor Law § 240 (1) claims (*see generally Bazdaric*, 203 AD3d 643; *Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864 [2d Dept 2016]).

Accordingly, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim will be granted and defendants' motion for summary judgment on this same claim will be denied.

Labor Law § 241 (6)

Defendants move to dismiss plaintiff's Labor Law § 241 (6) claim based on all the Industrial Code violations cited by plaintiff arguing that none are applicable to the present circumstances. Plaintiff only opposes defendants' motion to dismiss based on violations of Industrial Code §§ 23-1.5 (c) (3), 1.7 (d), and 1.21 (b) (2). As such, the uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]).

Labor Law § 241 (6) provides, in relevant part, as follows:

> All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:
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> ***
>
> 6. 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which

have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-05 [1993]). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Industrial Code § 23-1.5 (c) (3), which provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable and shall be immediately repaired or restored or immediately removed from the job site if damaged." Defendants argue that the plain meaning of the regulation as well as cases addressing this provision only cover instances where the ladder is damaged or defective, which plaintiff does not rebut. Testimony from all the parties demonstrates that the ladder was not damaged or defective. Therefore, this provision is inapplicable.

Industrial Code § 23-1.7 (d) states, "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice snow water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Defendants rely again upon *Bazdaric*, 203 AD3d 643, which holds that protective plastic is not a foreign

substance such as those listed in § 1.7 (d) (*id.* at 644 ["Sensibly interpreted, the heavy-duty plastic covering is not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease."]; *see also Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 869 [2d Dept 2016] [plaintiff's slip and fall due to drop cloth placed on staircase was not caused by defendant's failure to remove or cover a foreign substance under the regulation]). Both cases that plaintiff proffers in response, *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730 (2d Dept 2007), and *Velasquez v 795 Columbus LLC*, 103 AD3d 541 (1st Dept 2013), are distinguishable in that the causes of the fall were glass and mud, respectively, both items found to be foreign substances within the meaning of the regulation. Therefore, defendants have met their *prima facie* burden demonstrating that the protective tape is not a foreign substance and plaintiff fails to rebut their showing.

Industrial Code § 1.21 (b) (2) states that "[t]he use of an opaque protective coating on any ladder is prohibited." Here, it is not clear from plaintiff's testimony or the photographs of the ladder whether the protective plastic is opaque. Therefore, a question of fact remains as to whether this provision is applicable.

Accordingly, defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against them will be granted to the extent it is based off any Industrial Code section except for Industrial Code § 1.21 (b) (2).

Indemnification

Defendants request indemnification in their motion papers but do not do so in their notice of motion, which must state all relief sought (*see* CPLR § 2214 [a] [the notice of motion shall "specify the time and place of the hearing on the motion, and the supporting papers upon which the motion is based, the relief demanded and the grounds therefor"]; *see also Abizadeh v*

Abizadeh, 159 AD3d 856, 857 [2d Dept 2009] [internal citations omitted] ["[T]he Supreme Court providently exercised its discretion in denying the plaintiff's cross motion on the ground that the plaintiff's notice of cross motion was deficient. The plaintiff's cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor. Although the plaintiff's supporting papers supplied the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion."]).

Accordingly, defendants' motion for indemnification from Kostan will be denied.

CONCLUSION

Accordingly, it is hereby

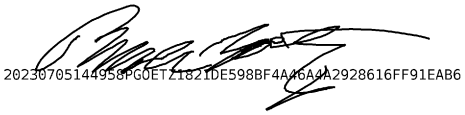
ORDERED that defendants' motion for summary judgment on plaintiff's Labor Law § 200 and related negligence claims is denied; and it is further

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

ORDERED that defendants' motion for summary judgment on plaintiff's Labor Law § 240 (1) claim is denied; and it is further

ORDERED that defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted to the extent plaintiff's claim is based off any Industrial Code section except for Industrial Code § 1.21 (b) (2); and it is further

ORDERED that defendants' motion for indemnification from Kostan is denied.



7/5/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE