Quevedo v Metropolitan Transp. Auth.
2023 NY Slip Op 32401(U)
July 14, 2023
Supreme Court, New York County
Docket Number: Index No. 152137/2019
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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INDEX NO. 152137/2019

JOSEPH QUEVEDO,

Plaintiff,

MOTION SEQ. NO. 002

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, MTA LONG ISLAND RAILROAD, CITNALTA CONSTRUCTION CORP. and PETER SCALAMANDRE & SONS,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

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

This is an action to recover damages for personal injuries allegedly sustained by a union construction worker on August 8, 2018, when, while attempting to exit a sloped excavation area located at the Deer Park Long Island Railroad Station, Suffolk County, New York ("premises"), he slipped and fell.

In Mot. Seq. 002, defendants Metropolitan Transportation Authority ("MTA"), MTA Long Island Railroad ("LIRR"), Citnalta Construction Corp. ("Citnalta") and Peter Scalamandre & Sons ("PS&S") (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.

On the day of the accident, the premises were, effectively, owned by MTA and operated by LIRR. Citnalta and PS&S, as a joint venture ("the JV"), provided general contractor services for a project at the premises that entailed the renovation of the Deer Park railroad station ("the Project"). The JV hired non-party "Faxa" to perform demolition, masonry and concrete work on the Project (*defendants' statement of material facts*, ¶ 2-3). Plaintiff was employed by Faxa.

Plaintiff testified that on the day of the accident, he was employed by Faxa as a laborer at the Project. He received his direction from his foreman, who was also a Faxa employee. His responsibilities that day included "digging a hole for a foundation" (50-h, at 12). He later described the hole as a "trench" (*id.* at 16).

Plaintiff, along with one coworker, began digging in the morning. He worked without issue until 2:30 PM. By then, the trench he was digging was completed (*id.* at 19), and plaintiff had moved on to other work, in a different area, in an approximately five feet deep trench (*id.* at 21).

Plaintiff then testified that he "noticed something was wrong with [the trench]" and he showed his foreman the issue (*id.* at 21). Then, "as [he] was coming out of the trench, on the

slope of the dirt . . . the dirt gave way, and then when [he] went to step down again . . . [he] felt [his] knee go out" (*id.* at 21). He further explained that the area of the trench where this accident happened was approximately four feet deep (*id.* at 27).

At his deposition, plaintiff further explained that the trenches he directly built "are only maybe two, tops three feet down" (plaintiff's tr at 74). According to plaintiff, Faxa was not responsible for the larger trenches, or sloping trench walls, rather, the "GCs" were responsible for them (*id.* at 74).

On the day of the accident plaintiff was directed to dig a trench "two feet down, two feet wide and . . . four or five feet long" (*id.* at 92). The dig area was, itself, within a larger trench that was approximately 100-feet long by 50-feet wide (the Excavation). To get into the Excavation from street level, plaintiff "had to walk down a little slope" in a "shallower" area of the Excavation that was "only two or three feet" deep (*id.* at 92). The Excavation would then gradually slope down further. He did not know who built the Excavation (*id.* at 95). Plaintiff successfully traversed this slope several times on the day of the accident.

Shortly before the accident, a trade began backfilling the Excavation near where plaintiff was working. He did not know who was performing the backfilling (*id.* at 155). He testified that this backfilling created a "slope . . . of five to six feet of dirt" so the only way to get to his work area was to "walk down the slope" (*id.* at 124). As he traversed this slope, "the dirt gave out underneath [his] feet" and he injured his knee (*id.* at 126). More specifically, he testified that he stepped onto the slope and felt the dirt move, then he lifted his foot, stepped again, and injured his knee (*id.* at 126-127 [noting that when he "stepped," "[t]he dirt gave out," he then "re-stepped again because my foot lost tracks on the slope" and then "felt a really bad pop" in his knee]). He then fell to the ground.

Paul Hafner testified that on the day of the accident, he was Citnalta's safety manager for the Project. Citnalta and PS&S, as the JV, were the general contractor for the Project. He was responsible for the general safety and oversight of the Project. He primarily attended progress meetings and weekly site walkthroughs (Hafner tr at 23).

Hafner testified that the work done at the Project around the time of the accident included the installation of a "wing wall" (*id.* at 27) to prevent the public from accessing the area underneath the station's tracks. To do this work, "foundation would need to be dug, rebar placed, concrete poured, cured . . . and then the brick in-lay placed" (*id.* at 27).

According to Hafner, a "trench by definition, OSHA, is deeper than it is actually wide" (*id.* at 28). Hafner testified that the area where plaintiff was working was not a trench, rather, it was "a small depression [made] to access the foundation" (*id.* at 28). He further explained that most of the work site had been covered with concrete. That concrete had been removed long before the accident, creating the large, excavated area where the accident occurred. Work within that area would include foundation work for new walls. With respect to plaintiff's work, Faxa was required to "dig adjacent to the stair in order to allow for the footing" for the new wall (*id.* at 33). That area would then be backfilled and evened out in advance of a new concrete pour (*id.* at 30).

Hafner testified that, per OSHA rules, any excavated area of less than four feet deep did not need a ladder for egress. Rather, the sides of the excavation could be sloped, or a board could be used to create a ramp (*id.* at 46). If the hole was small enough, workers could just step out as well. Hafner was shown a photograph of the excavation area and estimated, based on the size of rebar and plywood pieces depicted in the photograph, that the hole was approximately three feet deep. Therefore, according to Hafner, it "would not require a ladder" (*id.* at 51). Hafner was not present at the Premises at the time of the accident. He learned of the accident and arrived at around 4 PM that day. No one was present when he got there, but the area looked identical to how it was depicted in the accident photographs he was shown (*id.* at 61 ["if there is an accident you wouldn't touch the scene at all. You would wait for an investigation"]). Hafner then performed an inspection of the excavation. He indicated that he was able to "walk[] in and out with no issues" and that the excavation was "a textbook hole" (*id.* at 63). Hafner was unaware of any backfilling that was going on at the time of the accident.

A representative of the JV prepared an accident report on August 8, 2018, the day of the accident (NYSCEF Doc. No. 71, *notice of motion*) (the JV Report). As relevant, the JV Report states that plaintiff did "not secure proper footing when exiting trench/excavation" and notes one witness, Charles Bowen, a Faxa foreman. Annexed to it were several photos and witness statements.

The first statement was made by Andrew Robinson, the Project's safety manager, who stated that plaintiff was "coming out of excavated footing @ staircase . . . lost his balance and injured his right knee" (*id.*). The second statement was made by Charles Bowen, who stated that he "witnessed [plaintiff] attempting to climb out of the trench where he was working. [Plaintiff] slipped on the loose soil and fell backwards" (*id.*).

LIRR prepared an accident report, signed by Clarissa Fuller, on August 10, 2018, two days after the accident. It states that plaintiff "was climbing out three foot trench . . . where he slipped on soil and fell backwards" (*id.*). It also notes that plaintiff "slipped, fell stumbled, etc. due to object" (*id.*).

"[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

As an initial matter, plaintiff argues that defendants' motion is untimely, as the deadline to file summary judgment motions was September 28, 2021, while the instant motion was not filed until September 29, 2021, one day late.

A trial court "has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue" (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]). That said, "'statutory time frames – like court-ordered time frames . . . are not options, they are requirements, to be taken seriously by the parties'" (*Appleyard v Tigges*, 171 AD3d 534, 536 [1st Dept 2019]; quoting *Miceli v State Farm Mut. Auto Ins. Co.,* 3 NY3d 725, 726 [2004]). Nevertheless, it is within the court's discretion to consider a late filing where there is good cause shown for the delay in making the motion (CPLR 3212 [a]). To establish such good cause, a late movant must establish "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

In their reply papers, defendants establish good cause for their delay. Specifically, they provide evidence that their motion papers were uploaded onto NYSCEF at 12:09 A.M. – nine minutes late – due to an internet error. Given this explanation and the *de minimis* filing delay, defendants have established good cause for their delay and the court will consider the instant motion.

Defendants move for summary judgment dismissing the Labor Law § 240(1) claim as against them. Labor Law § 240(1), also known as the Scaffold Law, provides, as relevant:

> "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 a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*O'Brien v Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240(1) "must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

That said, not every worker who is injured at a construction site is afforded the protections of Labor Law § 240(1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240(1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, defendants do not challenge that they are proper defendants under the Labor Law.

Here, plaintiff alleges that he was injured when, while exiting an excavation area, he stepped on loose soil and twisted his knee, causing him to fall down. This is not the type of hazard that Labor Law § 240(1) protects against. "[L]iability arises under Labor Law § 240(1) only where the plaintiff's injuries are the direct consequence of an elevation-related risk . . . not a separate and ordinary tripping or slipping hazard" (*Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90, 98-99 [2015]; *see also Settimo v City of New York,* 61 AD3d 840, 841 [2d Dept 2009] [slip and fall down a slope "did not involve an elevation-related risk"]). Accordingly, as plaintiff's accident was, essentially, "caused by a separate hazard . . . unrelated to any elevation risk" (*Nicometi* 25 NY3d at 99), defendants have established their *prima facie* entitlement to summary judgment dismissing this claim.

In opposition, plaintiff fails to raise a question of fact sufficient to overcome defendants' *prima facie* entitlement to summary judgment. Specifically, plaintiff's reliance on *Favaloro v Port Auth. of N.Y. & N.J.* (191 AD3d 524 [1st Dept 2021]) is misplaced. *Favaloro* involved a fall into an improperly covered hole within an excavated area. In other words, plaintiff's injuries were proximately caused by the failure of a safety device to protect him from an elevation related hazard. Here, plaintiff's injuries were caused, not from a fall, but from a misstep/slip on loose soil (plaintiff's tr at 126-127 [explaining that he stepped down and felt dirt shift, then he moved his foot and stepped again before realizing that his knee was injured]). As discussed above, stepping on loose soil is not a gravity-related hazard contemplated by section 240(1).

Similarly, *Sunun v Klein* (188 AD3d 507 [1st Dept 2020]), which plaintiff also relies on, is inapposite to the instant accident. In *Sunun*, the plaintiff fell into muddy backfill that had been filled with "insufficiently dense or compactable soil" (*id.* at 509). The court determined that the situation was analogous to the "risk that a worker standing on a platform on a body of water would fall into the water, which we have found to be covered by Labor Law § 240" (*id.* at 509). In contrast, here, plaintiff's accident was not analogous to a fall from a platform on a body of water. Rather, as alleged and testified to, plaintiff's accident involved a slip on loose soil, which

is not a protected hazard (*Nicometi,* 25 NY3d at 99; *Settimo,* 61 Ad3d at 841). Thus, defendants are entitled to summary judgment dismissing the Labor Law § 240(1) claim as against them.

Defendants move for summary judgment dismissing the Labor Law § 241(6) claims against them.

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

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]). Here, plaintiff has alleged violations of 11 Industrial Code sections, as well as two OSHA regulations. Defendants seek dismissal of each Code provision and addresses them materially.

In opposition, plaintiff does not oppose the dismissal of any of the Industrial Code provisions. These 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"]).

In addition, defendants are entitled to dismissal of the section 241(6) claims predicated on violations of OSHA regulations. "[V]iolations of OSHA . . . standards . . . do not provide a basis for liability under Labor Law § 241(6)" (*Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]). Accordingly, defendants are entitled to summary judgment dismissing the Labor Law § 241(6) claims against them.

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

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]). Labor Law § 200(1) 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] ["Claims for personal injury under [section 200] and the common law fall into 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"]).

Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless "it actually exercised supervisory control over the injury-producing work" *Jackson v Hunter Roberts Constr., L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]). "General supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

However, where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Notably, "[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, plaintiff was injured when he stepped on loose soil or dirt that either was a part of the excavation's slope or arose from the infill of dirt in the area near plaintiff's worksite. Accordingly, this accident was caused by the means and methods of the work – namely, the construction and maintenance of the excavation slope and the implementation of the alleged backfilling in the area (*Villanueva,* 162 AD3d at 406).

Initially, defendants argue that they cannot be liable under the means and methods theory because they did not control plaintiff's work. That is not the standard. The relevant issue related to means and methods does not fall on whether a defendant had the actual authority to supervise or control plaintiff's work, but whether defendants had the actual authority to supervise or control the "injury producing work" (*Naughton,* 94 AD3d at 11). A review of the record reveals that questions of fact exist as to who excavated the Excavation, who was responsible for maintaining the Excavation's perimeter, and who was responsible for backfilling the Excavation. Testimony fails to establish the specific duties of any of the defendants (or the lack thereof) with respect to these work matters. Therefore, the court cannot determine whether defendants had only a general supervisory control over the worksite, rather than a specific direct control over the injury producing work (*see e.g.*, *Bisram v Long Is. Jewish Hosp.,* 116 AD3d 475, 476 [1st Dept 2014] [general supervisory responsibilities "do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200"]). Finally, aside from asserting that they did not control plaintiff's work, defendants raise no other argument on this issue. Accordingly, defendants have failed to establish their prima facie entitlement to dismissal of the common-law negligence or Labor Law § 200 claims against them. The parties remaining arguments have been considered and were unavailing. For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority, MTA Long Island Rail Road, Citnalta Construction Corp., and Peter Scalamandre & Sons (Mot. Seq. 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent that the Labor Law §§ 240(1) and 241(6) claims are dismissed as against them, and the motion is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

July 14, 2023

HON. VERNA L. SAUNDERS, JSC

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**