

McGee v 42 Broad St. W. Owner LLC

2023 NY Slip Op 32645(U)

August 1, 2023

Supreme Court, New York County

Docket Number: Index No. 153008/2021

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

ROMAS MCGEE,

Plaintiff,

- v -

42 BROAD STREET WEST OWNER LLC, 42 WEST BROAD
DEVELOPERS LLC, BANTA HOMES CORP.

Defendant.

-----X

INDEX NO. 153008/2021

MOTION DATE 07/17/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries he alleges arose out of an accident that occurred on October 21, 2019, at a construction site located at 42 Broad Street West in Mount Vernon, New York (“Broad Street Project”), a building owned by defendant 42 Broad Street West Owner LLC (“Owner”). Banta Homes Corp. (“Banta”) was the general contractor of the Broad Street Project.

PENDING MOTIONS

On May 10, 2023, defendants moved for summary judgment and dismissal of the action.

On June 23, 2023, plaintiff cross-moved for an order granting leave to serve an amended bill of particulars.

On July 17, 2023, the motions were fully briefed, marked submitted and the court reserved decision.

For the reasons set forth below, Defendants' motion is denied except as to certain claims under Labor Law §241(6), and Plaintiff's cross-motion is granted.

ALLEGED FACTS

On the date of the accident, Plaintiff, an employee of subcontractor C. Williams Electrical Construction, Inc., was tasked by his supervisor, Theophilus Rogers, with hanging a light fixture in the building's elevator lobby. Greg Richards, Plaintiff's co-worker was assigned to assist Plaintiff.

Plaintiff used a ladder that was on site. Defendants allege the ladder was leaning against a dumpster and was broken. Plaintiff disputes that it was leaning against a dumpster and acknowledges the ladder needed a minor repair which he did before using the ladder.

While Plaintiff was on the ladder it fell to one side and he was injured. Defendants allege that the ladder fell because the repair made by Plaintiff was faulty and did not hold. Plaintiff alleges that the ladder was caused to fall by his co-worker who stepped around the wrong side of the ladder while trying to assist Plaintiff.

Defendants allege there were many other ladders available for Plaintiff's use. Plaintiff alleges there was no other ladder on site tall enough for the assigned job.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]. However, "[o]nce the movant makes the required showing, the burden

shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Alvarez*, 68 NY2d at 324.

“[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion.” *People v Grasso*, 50 AD3d 535,544 (1st Dept 2008). “On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” *Martin v Citibank, N.A.*, 64 AD3d 477, 478 (1st Dept 2009); *see also Sheehan v Gong*, 2 AD3d 166,168 (1st Dept 2003) (“The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”), *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

There Are Questions of Fact Precluding Summary Judgment On Plaintiff's Labor Law § 240(1) Claim

Liability under Labor Law §240(1) is appropriate where, while engaging in a task covered by the statute, a worker is “exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate” *Vasquez v Cohen Bros. Realty Corp.*, 105 A.D.3d 595, 597 (1st Dept. 2013). Liability requires both a violation of the statute and proximate cause. “[A] defendant is not liable under Labor Law §240(1) where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident.” *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 290 (2003).

Defendants allege that this cause of action must be dismissed because plaintiff was the sole proximate cause of the accident by using a broken ladder instead of one of the other ladders,

they assert were readily available. However, given Plaintiff's account of the accident that the ladder only tilted and fell over when his co-worker improperly stepped on the "wrong" side of the ladder to try and hand something to Plaintiff, there is a clear question of fact as to whether Plaintiff is the sole proximate cause of the accident. Other questions of fact pertaining to this cause of action include whether other ladders were available that were tall enough for the job, whether the ladder was leaning against a dumpster and whether as defendants allege the repair to the ladder was insufficient causing a rung to give way.

Rarely has this court seen a request for summary judgment in a case where there are so many factual disputes. Where, as here, the record presents markedly different versions as to how the accident occurred, summary resolution of the Labor Law § 240 (1) claim is inappropriate. *Higgins v. Consol. Edison Co. of New York*, 93 A.D.3d 443 (2012); *Antenucci v Three Dogs, LLC* 41 AD3d 205 (2007); *Cameron v. City of Long Beach*, 297 A.D.2d 773, 774 (2002); *Pearson v. Wallace*, 140 A.D.3d 1731, 1732 (2016).

Based on the foregoing, defendants' motion to dismiss the cause of action for liability pursuant to Labor Law §240(1) is denied.

***Defendants' Motion for Dismissal of Certain
Portions of Plaintiff's Labor Law §241(6) Claim Is Granted***

Labor Law §241(6) requires owners and contractors to provide reasonable and adequate protection and safety equipment for workers and to comply with specific rules and regulations promulgated by the Commissioner of the Department of Labor.

Labor Law § 241 (6), by its very terms, 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 (*see also, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502; *Long v Forest-Fehlhaber*, 55 NY2d 154, 160,

rearg denied 56 NY2d 805; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 299-300, *rearg denied* 45 NY2d 776). Indeed, the history underlying section 241, as amended, clearly manifests the legislative intent to place the “*ultimate responsibility* for safety practices at building construction jobs where such responsibility actually belongs, *on the owner and general contractor*” (1969 NY Legis Ann, at 407-408 [emphasis supplied]; *see also, Allen v Cloutier Constr. Corp.*, 44 NY2d, at 300, *supra*).

Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 348 (1998).

Defendants assert, and Plaintiff does not dispute, that many of the violations asserted in the pleadings are insufficient to support a Labor Law §241(6) cause of action.

Specifically, in his Bill of Particulars, Plaintiff asserted violations of the following OSHA regulations: 29 CFR §1910.24(b); 29 CFR §1910.28(a)(4); 29 CFR §1910.28(a)(5); 29 CFR §1910.28(a)(6); 29 CFR §1910.28(a)(7); 29 CFR §1910.28(a)(8); 29 CFR §1910.28(a)(9); CFR §1926.20; 29 CFR §1926.21, 29 CFR §1926.25, 29 CFR §1926.26; 29 CFR §1926.27; 29 CFR §1926.28; 29 CFR §1926.100; 29 CFR §1926.105; 29 CFR §1926.201; 29 CFR §1926.250; 29 CFR §1926.251; 29 CFR §1926.252; 29 CFR §1926.500, 29 CFR §1926.501, 29 CFR §1926.502; 29 CFR §1926.503; 29 CFR §1926.851; 29 CFR §1926.852; 29 CFR §1926.853; 29 CFR §1926.854; 29 CFR §1926.855; 29 CFR §1926.856; 29 CFR §1926.857; 29 CFR §1926.858; 29 CFR §1926.859. Defendants have argued that these provisions are insufficient to support a Labor Law Claim under § 241(6). This argument is not addressed by Plaintiff in its opposition papers and as such the 241(6) claims based upon the above cited OSHA provisions are dismissed.

Similarly, in his bill of particulars, the following specific subsections of the Industrial Code are identified: §23-1.7(a)(1), §23-1.7(a)(2), §23-1.7(e)(1), §23-1.7(e)(2), §23-1.8(c)(1), §23-1.30, §23-3.3(b)(1), §23-3.3(b)(2), §23-3.3(b)(3), §23-3.3(c), §23-3.3(d), §23-3.3(e)(1), §23-3.3(e)(2), §23-3.3(e)(3), §23-3.3(f), §23- 3.3(g), §23-3.3(m), and §23-3.4(b).

Plaintiff does not oppose dismissal of the cause of action predicated on any of said provisions other than §§23-1.21(b)(3)(i) and 23-1.21(b)(3)(iv). Thus, the cause of action based on the other statutory violations asserted in the Bill of Particulars is dismissed. The two remaining statutory violations have been held sufficient to support a Labor Law §241(6) claim *see eg Przyborowski v A&M Cook, LLC* 120 AD3d 651(2014).

§23-1.21 is a regulation pertaining to ladders and provides that all ladders shall be maintained in good condition. §23-1.21(b)(3)(i) further provides that a ladder shall not be used if it has a broken part, and §23-1.21(b)(3)(iv) provides that a ladder shall not be used if it has any flaw or defect of material that may cause a ladder to fail. Thus, contrary to defendants' arguments these provisions are applicable to the case at bar.

Moreover, Plaintiff alleges that Defendants were on notice of the defective ladder based on testimony that it was on site and broken for weeks, that Banta's construction Superintendent walked the job daily, and that it was Banta's policy that all broken equipment was to be tagged and removed from the site immediately.

Based on the foregoing Defendants' summary judgment motion as to the 241(6) cause of action is denied to the extent that said cause of action is predicated upon the above two statutory violations.

Plaintiff's Cross-Motion for Leave to Supplement His Bill of Particulars Is Granted

Leave to amend pleadings shall be freely given under CPLR §3025, including when a plaintiff seeks to add violations of the Industrial Code not previously alleged. Case law in the First Department provides that "an amendment to allege a specific section of the Industrial Code is appropriately permitted 'in the absence of unfair surprise or prejudice ... even where a note of issue has been filed.'" *Gjeka v Iron Horse Transp., Inc.*, 151 A.D.3d 463, 464-65 (1st Dept

2017). *See, also, Walker v. Metro-North Commuter R.R.*, 11 A.D.3d 339, 341 (1st Dept. 2004) (failure to allege violation not necessarily fatal to a §241(6) claim and, absent unfair surprise or prejudice, may be rectified by amendment, even where note of issue has been filed).

The Industrial Code violation Plaintiff seeks to add is Industrial Code section 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.” 23- 1.5(c)(3) is sufficiently specific to support the imposition of liability under §241(6). *See, Gonzalez v. United Parcel Service*, 249 A.D.2d 210 (1st Dept. 1998); *Becerra v. Promenade Apartments Inc.*, 126 A.D.3d 557 (1st Dept. 2015).

Defendants have failed to show any prejudice which would be suffered as a result of the amendment and the cross-motion is therefore granted.

The Labor Law §200 Claim

Labor Law § 200 requires that:

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.

Claims brought under Labor Law §200 “fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed.” *Ortega v. Puccia*, 57 A.D.3d 54 (2d Dept. 2008).

An owner of real property is obligated to maintain the premises in reasonably safe condition, with foreseeability being the measure of that proprietary duty (*Basso v Miller*, 40 NY2d 233, 241). It is generally accepted that a ladder falls within the protection afforded by Labor Law § 200 (*Kammerer v Baskewicz*, 257 AD2d 811; *Sprague v Peckham Materials Corp.*, 240 AD2d 392 [2d Dept]; *Schlueter v Health Care Plan*, 168

AD2d 985 [4th Dept]). This Court has previously applied the statute to a plaintiff injured in a fall from a ladder in the course of repairing an elevator (*Spiteri v Chatwal Hotels*, 247 AD2d 297 [no evidence owner aware of defect]). As it was reasonably foreseeable that a worker might use the defective ladder and sustain injury, its presence in the building clearly constituted a dangerous condition.

Higgins v. 1790 Broadway Assocs., 261 A.D.2d 223, 224–25 (1999).

The holding in *Higgins* is applicable to the facts in this case. Defendants have failed to make out a *prima facie* case for dismissal of this cause of action.

WHEREFORE it is hereby:

ORDERED that Defendants' motion for summary judgment as to the causes of action predicated upon Labor Law §§ 240(1) and 200 is denied; and it is further

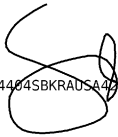
ORDERED Defendants' motion for summary judgment on the cause of action under Labor Law § 241(6) is granted with the exception of the claims predicated upon 12 NYCRR §§ 23-1.21(b)(3)(i) and 23-1.21(b)(3)(iv); and it is further

ORDERED that Plaintiff's cross motion for leave to amend its Bill of Particulars is granted; and it is further

ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.

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8/1/2023
DATE

SABRINA KRAUS, 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 checked="" type="checkbox"/>	GRANTED IN PART	<input 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