Cuatlapantzi v 15 Park Row Condominium
2023 NY Slip Op 32650(U)
July 21, 2023
Supreme Court, Kings County
Docket Number: Index No. 503608/2017
Judge: Francois A. Rivera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July 2023

HONORABLE FRANCOIS A. RIVERA

---X

ISMAEL CUATLAPANTZI,

Plaintiff,

- against -

15 PARK ROW CONDOMINIUM. PARK ROW REALTY, L.P. and TOWNHOUSE BUILDERS INC. d/b/a PROMONT

Defendants.

---X

15 PARK ROW CONDOMINIUM and PARK ROW REALTY, L.P.,

Third-Party Plaintiffs,

- against -

CONTACT ELECTRIC CORP.,

Third-Party Defendant.

---X

DECISION & ORDER

Index No.: 503608/2017

Oral Argument: 6/8/2023

Cal. No.: 33, 34; Ms. No.: 7,6

By notice of motion filed on November 29, 2021, under motion sequence #6, plaintiff sought an order pursuant to CPLR 3212 for summary judgment on its cause of action under Labor Law §240(1). Further, by notice of motion filed on November 29, 2021, under motion sequence #7, defendants sought an order pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint. The following documents were considered.

	Papers (NYSCEF)
Notice of Motion/ Affidavits (Affirmations) Annexed ______	94-112; 113-127;
Opposing affidavits (Affirmations) ______	134-145; 146-147
Reply Affidavits (Affirmations) ______	152-153; 151
Other Papers ______	______

After oral argument the order of the Court is as follows:

This lawsuit arises from an incident occurring on September 9, 2016, at a building renovation project at 15 Park Row, New York, New York. At the time of the accident, plaintiff, Ismael Cuatlapantzi an employee of electrical subcontractor, Contact Electric Corp., ("Contact"), was working with his partner, Contact employee, Edgar Aviles, to pull three to four, 500 caliber electrical cables, horizontally 80' to 100' through a 4" conduit attached, and running parallel to, the ceiling. A brand-new nylon rope was attached to the cables by Contact supervisor, Manual Moran. The rope was threaded through the conduit before the other end of the rope was attached to a wood board that plaintiff and Mr. Aviles used for leverage to pull the cables through the conduit. Plaintiff and Mr. Aviles were standing on the floor, moving away from the conduit opening while pulling the rope and cables through the conduit, when the nylon rope broke, causing plaintiff to fall to the ground.

Plaintiff moves pursuant to CPLR 3212 seeking summary judgment on Labor Law §240(1). Defendants seek summary judgment dismissing plaintiff's complaint, which alleges causes of action under Labor Law §§240(1), 241(6), 200 and common law negligence.

Labor Law §240(1)

Plaintiff's motion pursuant to CPLR 3212 seeking summary judgment on Labor Law §240(1) cause of action is denied. Plaintiff failed to make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Winegard v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985).

Plaintiff failed to submit any evidence that he was engaged in an elevation-related risk of the kind that the safety devices listed in Labor Law §240(1). *Zimmer v Chemung County Performing Arts*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S2d 12 (1985); *Sereno v Hong Kong Chinese Rest.*, 79 A.D.3d 1414, 912 N.Y.S.2d 811 (2010); *Johnson v Small Mall, LLC*, 79 A.D.3d 1240, 912 N.Y.S2d 735 (2010); *Salazar v. Novalex Contracting Corp.*, 18 NY3d 134, 139 (2011). The key question is assessing if an accident is an elevation-related risk 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 N.Y.3d 599, 603, 922 N.E.2d 865 (2009). "[T]he single decisive question is whether [a] 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, 922 NE2d 865, 895 NYS2d 279 (2009).

In the present case, plaintiff was not struck by a falling object, nor was he engaged in a hoisting operation, nor did he fall from an elevated surface. Instead, plaintiff was injured when he fell backwards, on the same level, when the rope he was using to pull cables horizontally through the conduit, broke. Thus, it was not the elevation of the conduit or cables that caused the risk. *See e.g., Davis v. Wyeth Pharmaceuticals*, 86 A.D.3d 907, 928 N.Y.S.2d 377 (3rd Dep't 2011); *Simmons v. City of New York*, 165 A.D.3d 725, 85 N.Y.S.3d 462 (2d Dep't 2018); *Christie v. Live*

Nation Concerts, Inc., 192 A.D.3d 971, 145 N.Y.S.3d 98 (2021); *see also Parrino v. Ravert,* 208 A.D. 3d 672, 173 N.Y.3d 618 (Sup. Ct. Kings Co. 2022) (plaintiff not engaged in elevation related risk when he was injured when 20 unsecured panels of sheetrock, toppled and pinned him against the wall); *Vargas v. Toll GC LLC*, 2021 N.Y. Misc. LEXIS 8386 (Queens Co. Sup. Ct. 2021) (plaintiff injured when an A-frame cart containing several heavy stone kitchen countertops, tipped onto plaintiff while he attempted to move the cart); *Markowski v. Dolp 1133 Props. II LLC*, 2021 N.Y. Misc. LEXIS 1423 (Kings Co. Sup. Ct 2021) (plaintiff injured when construction debris container rolled down a sloped sidewalk, striking him. Court held the alleged incident did not involve an elevation risk as the sidewalk slope was less than 1.6 degrees and the loading dock surface was less than one foot higher than the loading area).

Plaintiff cannot rely in support of their motion on evidence submitted for the first time in their reply papers, therefore plaintiff's expert affidavit is not considered. *GJF Constr. Corp. v. Cosmopolitan Decorating Co., Inc.* 35 A.D.3d 535, 828 N.Y.S.2d 409 (2d Dep't 2006).

That branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law §240(1) cause of action is granted based on the grounds stated above.

Labor Law §241(6)

Defendants' motion seeking summary judgment dismissing of Labor Law §241(6) is denied.

Plaintiff initially alleged violations of Industrial Code §§23-1.7(a) (d) (e), 23-1.10, 23-1.12, 23-1.31, 23-1.32, 23-2.1, 23-6.2. Plaintiff, in opposition to defendants' motion, withdrew §§ 23-1.7(a); 23-1.7(d); 23-1.7(e); 23-1.10; 23-1.12; 23-1.31; 23-1.32; 23-2.1, leaving Industrial Code §23-6.2 as the only alleged violation under Labor Law §241(6).

Industrial Code §23-6.2 is sufficiently specific to support a Labor Law 241(6) violation. Whether it is applicable to the present case is a question of fact to be determined at the time of trial.

Defendants' motion seeking summary judgment dismissing plaintiff's Labor Law §200 and common law negligence causes of action is denied.

Labor Law §200/Common Law Negligence

Claims asserted under Labor Law §200 typically fall into one of two categories: (1) worker's injured as a result of a premises defect; or (2) those involving the means and methods in which the contractor is performing his work. *Ross v. Curtis-Palmer Hydro-Electric* Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993); *Mendoza v. Highpoint Assoc.*, 83 A.D.3d 1, 919 N.Y.S.2d 129 (1st Dep't 2011); *Ortega v. Puccia,* 57 A.D.3d 54, 62, 866 N.Y.S.2d 323 (2d Dep't 2008).

Where the worker's injury arise from the means and methods used to complete the work, plaintiff must prove that the contractor had authority to supervise and control the injured person's means and methods for completing their work. *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993); *Cuartas v. Kourkoumelis*, 265 A.D.2d 293, 696 N.Y.S.2d

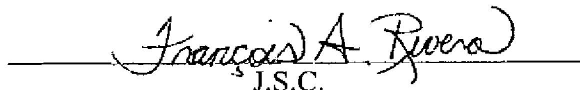
475 (2d Dept. 1999).*Comes v. N.Y. State Elec. & Ga Corp.*, 82 N.Y.2d 876, 609 N.Y.S.2d 168 (1993); *Ortega v. Puccia*, 57 A.D.3d 54, 62, 866 N.Y.S.2d 323 (2d Dep't 2008). Where a dangerous or defective premises condition was the alleged cause of the worker's injury, a contractor may be held liable under Labor Law §200 only where it either created or had notice of the condition that allegedly caused injury, and had a duty to correct the defect. *v. Highpoint Assoc.*, 83 A.D.3d 1, 13, 919 N.Y.S.2d 129 (1st Dep't 2011); *Chowdhury v. Rodriguez*, 57 A.D.3d 701, 867 N.Y.S.2d 123 (2d Dep't 2008).

In the present case, defendants did not submit any evidence of the last time they inspected the rope prior to the accident. As such, whether defendants had notice of the condition of the rope prior to the alleged incident is a question of fact to be resolved at the time of trial.

Under its contract with PARK ROW REALTY, LLP ("Park Row"), the general contractor, TOWNHOUSE BUILDERS INC. d/b/a PROMONT ("Promont") agreed to supervise and direct the work under the contract. Defendants failed to produce any evidence that Promont' s supervision and control of Contact's employees was delegated to Contact. Absent any such evidence, whether defendants supervised, and controlled plaintiff's work is question of fact.

This constitutes the decision and order of the court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.