

Lopez v CBP 441 9th Ave. Owner LLC

2023 NY Slip Op 32695(U)

August 3, 2023

Supreme Court, New York County

Docket Number: Index No. 158551/2018

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

NIMER LOPEZ,

Plaintiff,

- v -

CBP 441 9TH AVENUE OWNER LLC, PAVARINI
MCGOVERN LLC

Defendant.

-----X

INDEX NO. 158551/2018

MOTION DATE 07/17/2023

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 72, 73, 75, 76, 77, 78, 79, 80, 81, 85, 86

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 82, 83, 84

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

BACKGROUND

Plaintiff commenced this Labor Law action seeking damages for personal injuries allegedly incurred on July 9, 2018, when while in the course and scope of his employment with Regulator Construction Inc. at 441 Ninth Avenue, New York, New York, he fell from a temporary wooden ladder.

On May 12, 2023, Plaintiff moved for partial summary judgment as to liability on his Labor Law §240(1) cause of action. On May 17th, 2023, Defendants moved for summary judgment and dismissal of the claims asserted under Labor Law §§200 and 241(6) and the common law negligence claims. On July 17th, 2023, the motions were fully briefed, marked

submitted and the court reserved decision. The motions are consolidated herein for determination.

Plaintiff does not oppose Defendants' motion with regard to the causes of action based on Labor Law Section 200 and common-law negligence or with respect to violations of the Industrial Code, other than 12 NYCRR 23-1.5(c)(3) and 23.121(b)(3)(i). As such Defendants' motion to dismiss these claims is granted.

For the reasons set forth below, the balance of the relief sought by both parties is denied.

ALLEGED FACTS

441 Ninth Avenue was a 9-story building that was undergoing a major renovation on July 9, 2018. The renovation included the addition of 17 or more floors on top of the existing building. The building was owned by CBP 441 Ninth Avenue Owner, LLC ("CBP"). Pavarini McGovern LLC ("Pavarini") functioned as the general contractor for the job site.

Pavarini hired Regulator Construction, Inc. ("Regulator") as the superstructure sub-contractor. On July 9, 2018, Plaintiff was employed by Regulator and performing construction work at the premises. On that day, the Regulator crew had completed construction of the 19th floor and was in the process of constructing the 20th floor deck.

Towards the end of the day, Plaintiff's co-worker, Milton, asked the Plaintiff to get nails that were on the 19th floor for use on the 20th floor. Plaintiff went to the nearest ladder, which was a wooden, job-built ladder assembled by the crew's supervisor earlier that day. The ladder was located in the opening of the deck of the 20th floor and was supposed to have had approximately 12 or 13 rungs. It was approximately 12 or 13 feet tall. There were no staircases that could be used to travel from the 20th floor to the 19th floor.

Plaintiff asserts that as he began to descend the ladder he fell because the ladder was missing the second and third rungs. Plaintiff further submits the affidavit of his co-worker, Milton Jimenez, who witnessed the accident and also states that Plaintiff fell because the ladder was missing the second and third rungs.

It is uncontested that the ladder was built by Regulator employees.

Defendants submit an affidavit from Stephen McGonnell, a former supervisor at Regulator, who asserts that the date of the accident he was on site and as soon as he was notified of the accident, he went to see what happened. Mr. McGonnell states he arrived as Plaintiff was “being removed downstairs” and “was informed that the accident occurred on one of the job-built ladders used by employees to access the floors.” Mr. McGonnell further avers that the ladder was in good working condition upon his examination of it and that no rungs were missing. Mr. McGonnell references photos taken of the ladder and states that they are a fair and accurate representation of “the ladder in question.”

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.

***Summary Judgment Is Not Appropriate on A Labor Law § 240(1)
Claim Where There Is a Factual Dispute as To How the Accident Occurred***

As noted above, there are different versions as to how the accident occurred. While the affidavit of Mr. McGonnell is not overwhelmingly specific, and while it is uncertain if the ladder Mr. McGonnell examined, and that appears in the photographs, is in fact the ladder that Plaintiff was using when he fell, the court finds that the affidavit is sufficient to raise a triable issue of fact as to how the accident occurred.

As held by the First Department:

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 (*Sillman v. Twentieth Century–Fox Film Corp.* 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387). Because summary judgment is a drastic measure that deprives a party of her day in court, it may be granted only if no genuine triable issue of fact is presented (*see Ugarriza v. Schmieder*, 46 N.Y.2d 471, 414 N.Y.S.2d 304, 386 N.E.2d 1324). If there is any doubt as to the existence of a triable issue, the motion should be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141, 385 N.E.2d 1068; *Stone v. Goodson* 8 N.Y.2d 8, 200 N.Y.S.2d 627, 167 N.E.2d 328).

Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224, 226 (2002).

Summary judgment is not appropriate on a cause of action alleging a violation of Labor Law § 240 (1) where there is a triable issue of fact as to the manner in which the accident occurred. *McCue v. Cablevision Systems Corporation*, 160 A.D.3d 595 (1st Dept. 2018); *Giannas v 100 3rd Ave. Corp.*, 166 A.D.3d 853, 855 (2nd Dept. 2018).

Defendants' Motion with Respect to Plaintiff's Labor Law § 241(6) Cause of Action Premised Upon a Violation of Industrial Code § 1.5(C)(3) And 1.21(B)(3)(I) Is Denied

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

All areas in which construction, excavation or demolition work is being performed shall be so...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.

As a predicate to a section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

Industrial Code §23- 1.5(c)(3) states “All 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.” It has been held that this provision is sufficiently specific to support a Labor Law § 241(6) cause of action. *See, Tuapante v. Lq-39, LLC*, 151 A.D.3d 999 (2nd Dep't 2017); *Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085 (2nd Dep't 2015); *Becerra v. Promenade Apartments Inc.*, 126 A.D.3d 557 (1st Dep't 2015).

Additionally, given the testimony of Plaintiff and his co-worker that the accident occurred because the ladder was missing two rungs, it is directly applicable to the facts of this case.

Industrial Code § 23-1.21(b)(3)(i) provides, in pertinent part:

Maintenance and Replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

- (i) If it has a broken member or part

The above-cited regulation has also been found to be sufficiently specific to support a Labor Law § 241(6) cause of action. *See, Przyborowski v. A&M Cook, LLC*, 120 A.D.3d. 651 (2d Dep't

2014). Furthermore, based on Plaintiff’s version of how the accident happened it is clearly applicable to this case.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Plaintiff’s motion for summary judgment is denied; and it is further


ORDERED that Defendant’s motion for summary judgment is granted to the extent of dismissing all claims pursuant to Labor Law §200 and common law negligence as well as respect to violations of the Industrial Code, other than 12 NYCRR 23-1.5(c)(3) and 23.121(b)(3)(i), and is otherwise denied; 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 any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

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


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SABRINA KRAUS, J.S.C.

8/3/2023
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

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<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: