

Hernandez v 60-74 Gansevoort LLC

2023 NY Slip Op 33618(U)

October 16, 2023

Supreme Court, New York County

Docket Number: Index No. 154788/2019

Judge: Leslie A. Stroth

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

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X

JUAN VERA HERNANDEZ,

Plaintiff,

- v -

60-74 GANSEVOORT LLC, MJM ASSOCIATES
CONSTRUCTION, INC.,

Defendant.

-----X

60-74 GANSEVOORT LLC, MJM ASSOCIATES
CONSTRUCTION, INC.

Plaintiff,

-against-

TRI MAR INDUSTRIES INC.

Defendant.

-----X

INDEX NO. 154788/2019
MOTION DATE 05/04/2023,
05/04/2023
MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595661/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 88

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of injuries allegedly sustained at a construction site where plaintiff was walking when he fell from on an I-beam that was approximately 3 feet off the ground. Defendants 60-74 Gansevoort LLC and MJM Associates Construction, Inc. (collectively, defendants) move for summary judgment to dismiss plaintiff's claims pursuant to Labor Law §§ 200, 240 (1), and 241 (6) (motion sequence 001). Plaintiff opposes and separately moves for

summary judgment on his Labor Law §§ 240 (1) claims (motion sequence 002). The motions will be discussed in turn.

I. Alleged Facts

Defendant 60-74 Gansevoort LLC (Gansevoort) is the owner of the subject premises located at 60-74 Gansevoort Street, New York, New York. Defendant MJM Associates Construction, Inc. (MJM) was hired as the general contractor for the job. Defendant MJM Associates then sub-contracted with third-party defendant, Tri Mar Industries (Tri Mar) to perform concrete work on the premises.¹

Plaintiff was employed by sub-contractor Tri Mar Industries, to perform concrete work at the construction site. On the date of the incident, April 22, 2019, plaintiff was walking on an I-beam, which was approximately 3 feet above the ground, to reach and adjust a screw jack when he slipped and fell on rainwater that had accumulated on the beam. As a result of the accident, plaintiff suffered a torn meniscus and ACL in his right knee requiring surgical intervention, a trabecular fracture of the tibial plateau, and lumbar herniations with symptoms of radiculopathy.

II. Analysis

It is well-established that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to

¹ A third-party action was commenced as against Tri Mar Industries, however that action has since been discontinued.

the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

A. Defendants' Motion for Summary Judgment – Labor Law §§ 200 and 241 (6)

Defendants first move for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241 (6) claims. Plaintiff opposes the motion.

i. Labor Law § 200: Common Law Negligence

An owner or general contractor will not be found liable under common law Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries nor the ability to control the activity which caused the dangerous condition. *See Filarakos v St. John the Baptist Greek Orthodox Church*, 169 AD3d 489, 490 (1st Dept 2019); *Chowdhury v Rodriguez*, 57 AD3d 121, 128 (2d Dept 2008).

Defendants argue that plaintiff received his job instructions from sub-contractor Tri Mar Industries, and defendants cannot be held liable for common law negligence because they did not supervise, direct, or control plaintiff's work. Defendants also maintain they did not have any notice of the allegedly dangerous condition that caused plaintiff's accident.

Here, plaintiff alleges that the accident involved defects in both the premises and the equipment used at the worksite. *See Lane v Fratello Const. Co.*, 52 AD3d 575, 576 (2d Dept 2008) (“...the alleged defect, a pile of debris created by several subcontractors, would constitute a defective condition of the premises.”). As an owner may be held liable for a dangerous condition on its premises irrespective of whether it supervised or controlled the work being performed if it

had actual or constructive notice of the condition, the critical inquiry here is whether Gansevoort, the owner, had notice of the wet and slippery condition of the beam off of which plaintiff fell and/or the debris and materials below the beam which itself were a tripping hazard. *See Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 294 (1st Dept 2008); *Griffin v New York City Tr. Auth.*, 16 AD3d 202 (1st Dept 2005).

Defendants do not tender any evidence in support of their position that they had no notice of the alleged dangerous condition. In support of their motion, they submit the incident report regarding the subject accident (NYSCEF doc. no. 67), the plaintiff's deposition (NYSCEF doc. nos. 64, 65), and the deposition testimony of Franco Barone, MJM's construction superintendent and concrete safety manager (NYSCEF doc. no. 66). The deposition testimony of Mr. Barone does not address whether he had previous complaints of water pooling on the beam after rain, nor do defendants submit any exhibits or other proof that it did not have notice of such condition or whether such condition was recurring. As for the debris below the beam, defendants do not claim that the debris had so recently been placed there such that they could have known that it created a dangerous condition leaving plaintiff with no choice but to traverse the slippery beam to do his job and adjust the screw jack.

Therefore, defendants fail to meet their initial burden to eliminate all material issue of fact with respect to plaintiff's Labor Law § 200 claim against Gansevoort. Similarly, as to the defendant general contractor MJM, triable issues of fact exist as to both whether it had notice of the defect and whether it exercised sufficient supervision and control over the work to support a finding of liability under Labor Law § 200 against it.

Accordingly, the portion of defendants' motion that seeks summary judgment as to plaintiff's Labor Law § 200 claims is denied.

ii. Labor Law § 241 (6): Violation of Industrial Code

For plaintiff to establish liability pursuant to Labor Law § 241 (6), a violation of the Industrial Code must be shown. *See e.g. Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993) (holding that Labor Law § 241 (6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute). To prevail on a claim under this section, plaintiff must demonstrate that his or her injuries were proximately caused by a violation of the Industrial Code provision. *See Ares v State*, 80 NY2d 959, 960 (1992).

Here, plaintiff's claim under Labor Law § 241 (6) is based on violations of 22 NYCRR 23-1.7(d) and (3) and 22 NYCRR 23-1.16(b), (d), and (e).² Industrial Code § 23-1.7(d) provides:

Slipping hazards. Employers 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.

Industrial Code § 23-1.7(e)(1) provides:

Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

Industrial Code § 23-1.7(e)(2) provides:

Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Plaintiff claims that defendants violated all three cited sections of Industrial Code § 23-1.7.

First, by allowing the surface of the beam over which he had to traverse to become and remain a slipping hazard (§ 23-1.7[d]), second by causing the beam and the area below to be a tripping hazard (§ 23-1.7[e][i]), and third by allowing debris to accumulate from scattered tools and materials (§ 23-1.7[e][2]).

² Plaintiff does not oppose defendants' motion to the extent it seeks dismissal of Labor Law § 241 (6) claims based on violations of other industrial code provisions. Therefore, to the extent plaintiff pursued Labor Law claims premised on anything other than violations of 12 NYCRR 23-1.7 and 1.16, such claims are deemed abandoned.

Defendants argue that Industrial Code § 23-1.7 is inapplicable here, as they did not permit or require plaintiff to walk on the slippery I-beam, which, in any event, they argue, is not a working surface. Defendants also maintain that the I-beam was not a passageway, and that the accumulated debris was inherent in the work being performed at the time of the accident.

The First Department has held that, “[a]s the Industrial Code does not provide a formal definition of ‘passageway,’ the practical function of the area where plaintiff fell is a question to be addressed by the trier of fact.” *Prevost v One City Block LLC*, 155 AD3d 531, 535 (1st Dept 2017). There is therefore an issue of fact as to whether the I-beam was “...used to traverse between discrete areas as opposed to an open area.” *Id.* (quoting *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]). Further, according to plaintiff’s deposition testimony, he was forced to traverse the beam as he was unable to walk on the ground below due to the accumulated debris. Issues of fact exist as to whether defendants permitted plaintiffs to use a working surface which was in a slippery condition or kept all passageways and work surfaces free from accumulation of debris. Therefore, defendants have failed to establish their entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action predicated upon Industrial Code § 23-1.7.

Additionally, defendants argue that Industrial Code section 23-1.16 is wholly inapplicable because there is no evidence that plaintiff was provided with a safety belt/harness or lifeline for the type of work he was performing. Industrial Code § 23-1.16 (b) provides:

Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. (Emphasis added).

Here, plaintiff testified that he was wearing his own personal harness. Plaintiff argues that although the harness was not provided to him, there is a question of fact presented because there was no place a harness could be properly secured at the worksite. However, such issue is inapposite. As plaintiff was not using an approved safety belt or harness that was furnished to him, plaintiff’s

reliance on Industrial Code § 23-1.16 (b) is misplaced. See *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 (1st Dept 2006) (reversing the trial court and holding that a Labor Law § 241 [6] claim brought pursuant to Industrial Code § 23-1.16 [b] cannot survive where plaintiff is not provided with any of the enumerated safety devices.

Accordingly, Industrial Code § 23-1.16 is inapplicable to the case at bar, and defendants have established their entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action predicated upon Industrial Code § 1.16. However, as detailed *supra*, plaintiff's claims pursuant to Industrial Code § 1.7 survive.

III. Labor Law § 240 (1)

Defendants move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Plaintiff opposes the motion and separately moves for summary judgment pursuant to Labor Law § 240 (1).

Labor Law § 240(1) states in pertinent 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.

The statute imposes absolute liability upon owners, contractors, and their agents where a breach of this statutory duty proximately causes an injury. See *Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 (1993); *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). "The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility." See *Ross*, 81 NY2d at 500.

Plaintiff argues that he is entitled to summary judgment pursuant to Labor Law § 240 (1) because he was caused to fall from a height as a result of the absence of adequate safety equipment.

Defendants contend that plaintiff voluntarily elected to walk on the elevated I-beam to perform his work, which he was not directed to do, and, therefore, he is the sole proximate cause of his injuries. In opposition, plaintiff asserts that, as he testified in his deposition, traversing the I-beam was the only route by which he could adjust the screw jack because plaintiff's alternative point of entrance to the screw jack was littered with material and debris that was not possible to clear.

Plaintiff establishes that he suffered injuries when he slipped and fell from the I-beam upon which he worked without the benefit of any safety devices sufficient to protect him from the elevation-related hazards of his job. Defendants did not dispute plaintiff's testimony at his deposition that there was no other way to reach the jack other than traversing the beam from which he fell, because the floor adjacent to the beam was blocked with materials. Plaintiff further testified that defendants failed provide proper protection to him. Defendants do not dispute that they did not provide safety devices, only that such safety devices were unnecessary. As no safety devices were provided to plaintiff, plaintiff's conduct cannot be deemed the sole proximate cause of the accident. *See Melchor v Singh*, 90 AD3d 866, 867 (2d Dept 2011); *see also McEachern v Extell Dev. Co.*, 199 AD3d 464, 465 (1st Dept 2021) (reversing the trial court's denial of plaintiff's summary judgment motion and holding that, "[b]ecause no safety devices were available to plaintiff for gaining access to the room, his attempt to use the oil barrel [to descend a four-foot distance] cannot be the sole proximate cause of his accident").

In support of his motion, plaintiff tenders sufficient evidence to show that he was participating in the construction of a new commercial building, the type of work covered by Labor Law § 240 (1), when he fell from a height from the slippery beam. The record reveals that defendants did not provide plaintiff with any safety equipment to prevent or break his fall, which

was a proximate cause of his accident. In opposition, defendants fail to raise a triable issue of fact, especially given the strict liability standard promulgated by Labor Law § 240.

Construing Labor Law § 240 (1) as liberally as possible (see *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 292 [2003]), as required, plaintiff is entitled to judgment as a matter of law on his Labor Law § 240 (1) claim, and plaintiff's motion for summary judgment is granted.

IV. Conclusion

Accordingly, it is


ORDERED that the motion of defendants 60-74 Gansevoort LLC and MJM Associates Construction, Inc. for summary judgment is granted in part only as to that portion of plaintiff's Labor Law § 241 (6) claim that is predicated upon Industrial Code § 23-1.16; and it is further

ORDERED that such cause of action is severed and dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is granted, with damages to be determined at the time of trial.

The foregoing constitutes the decision and order of the Court.

10/16/2023
DATE



LESLIE A. STROTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE