Supreme Court of New York
County of Kings
Part LL1

Index Number 508956/2018
(Seq. 006 & 008)

GRANTLEY LAYLOR, JR.

Plaintiff,

against

540 WEST 26TH STREET PROPERTY INVESTORS IIA, LLC AND TRITON CONSTRUCTION COMPANY, LLC

Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3–4
Replying Affidavits	5–6
Exhibits	Var.
Other	

Upon review of the foregoing papers, 540 West 26th Street Property Investors IIA, LLC (540 Investors) and Triton Construction Company LLC's (Triton) (collectively defendants) motion for summary judgment (Seq. 006) and plaintiff's cross-motion for summary judgment (Seq. 008) are decided as follows:

Introduction & Procedural History

This action arises out of injuries that the plaintiff claims to have sustained on January 31, 2017, while working at a construction site at 540 West 26th Street, which was owned by 540 Investors. 540 Investors hired Triton as the general contractor for the job site.

Plaintiff filed his summons and complaint on April 12, 2018. Plaintiff alleges defendants are liable under New York Labor Law §§ 200, 240 (1), and 241 (6), citing violations of Industrial Code provisions 12 NYCRR 23-1.16, 12 NYCRR 23-1.21, and 12 NYCRR 23-1.7 (d) (e).

Factual Background

On January 31, 2017, the plaintiff was working as a mechanic on a construction site at 540 West 26th Street in Manhattan (the site). He was employed by DiFerro Construction Contracting Corp. (DiFerro), a sub-contractor retained by Triton. Plaintiff was qualified by the

NYC Fire Department to conduct brazing work and received OSHA accreditations in work safety (Laylor EBT at 16–17; 19; 41).

On the day of his accident, plaintiff was using a brazing rod to secure copper plumbing pipes while on the third floor of the site (*id.* at 53–54). The couplings used to secure the pipes were brazed at extreme temperatures reaching above 1500 degrees Fahrenheit (*id.* at 134). Plaintiff used a 12-foot tall, A-frame ladder to perform this work since the pipes were near the ceiling (*id.* at 146). He used the ladder in a closed position, leaning the ladder against a wall (*id.* at 151).

Plaintiff testified he was eight steps up the ladder when the ladder slipped and twisted as he was securing pipes (*id.* at 190–191). Plaintiff testified there was not enough room for both the ladder to be open and for him to properly climb up the ladder to perform his work (*id.* at 188–189; 209). Plaintiff did not have any harness or fall protection at the time of the accident (*id.* at 203).

Stephen Luna was working with plaintiff as a helper at the time of his accident. He stated that in "the toolbox talks which took place every Friday, we had been told by our [foreman], Mr. Christian Gomez, that an A-frame ladder should not be leaned against a wall in a closed position, and that when a worker goes higher than six (6) feet, the worker must be tied off (Luna Aff. at 3; Gomez Aff. at 2). Plaintiff testified that he was never supplied a harness at the site (Laylor EBT at 108).

Plaintiff testified that certain safety meetings were held at the construction site by safety consultant Kevin Kelly, but that these talks did not cover ladder safety (Laylor EBT at 120). Further, foreman Christian Gomez was on-site, and he assigned tasks to plaintiff the morning of

the accident (*id.*). Plaintiff testified that Gomez did not talk about ladder safety either (*id.* at 119–121; 188–191). Plaintiff states that Gomez never told him not to use the ladder in a closed position despite allegedly seeing plaintiff using the ladder in that manner in prior instances (*id.* at 119–121; 188–191).

Kevin Kelly testified that "[plaintiff] was specifically told not to lean an A-frame ladder against a wall during the orientation [he] conducted. Plainitff was instructed that the A-frame ladder must always be locked in position" (Kelly Aff. at 2).

Foreman Gomez states in his affidavit "all DiFerro employees, including [plaintiff], were told to use all materials and equipment that DiFerro provided on the project and was the property of DiFerro. On this project, DiFerro had four (4) 12-foot ladders, 2 baker's [sic] scaffolds and 2 scissor lifts. DiFerro also had harnesses and retractables, located in the gang boxes, and easily could be accessed and taken for use by all of its workers" (Gomez Aff. at ¶ 7).

Analysis

Defendants move for summary judgment on plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims (Seq. 006). Plaintiff cross-moves for summary judgment on his Labor Law § 240 (1) claim (Seq. 008). For the sake of brevity these two motions will be analyzed together.

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 200

"Labor Law § 200 is a codification of the common law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, violations of Labor Law § 200 are evaluated using basic negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition on the premises, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of the use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991 92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]).

Triton "designated a field superintendent responsible for oversight of on-going plumbing construction work with the authority to stop any observed unsafe condition and they engaged a NYC DOB certified full-time on-site Site Safety Coordinator (i.e., Kevin Kelly, Total Safety Consulting) responsible for enforcement of worksite safety requirements" (Laylor EBT at 120).

In addition, the affidavits of Christian Gomez, Kevin Kelly and Stephen Luna establish that Triton did not control the means and methods utilized by DiFerro. Moreover, Plaintiff does not submit opposition on this branch of defendants' argument. Accordingly, Defendants' motion for summary judgment as to Labor Law § 200 is granted.

Labor Law § 240 (1)

Defendants and plaintiff both move for summary judgment on Labor Law § 240 (1).

Labor Law § 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from "gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]).

Defendants claim that they are not liable for plaintiff's fall since, they contend, his injuries were proximately caused solely by his decision to use an A-frame ladder in the closed position. Defendants assert that plaintiff was previously instructed at the safety training orientation and the "toolbox talks" to not use the ladder folded, and only to use an A-frame in a fully opened and locked position (*see* Luna Aff. at 3; Gomez Aff. at 2; Kelly Aff. at 2).

However, "it is not enough to defeat liability to show … the mere fact that generalized safety instructions were given at some point in the past" (*Marin v Levin Props., LP*, 28 AD3d 525 [2d Dept 2006]). Here, the safety training orientation was given on November 22, 2016, around two months before the date of the accident (Kelly Aff. at ¶ 8). Plaintiff testified the toolbox talks, which were given by various personnel, were held only every 3–4 weeks (Laylor EBT at 115). This contrasts with his co-worker Mr. Luna's testimony that the talks were held every Friday (Luna Aff. at ¶ 10). Consequently, there is an issue of fact as to the frequency and detail of these safety instruction meetings.

Where a "plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach" (*Weininger v Hagedorn* & Co., 91 N.Y.2d 958, 960, 695 N.E.2d 709, 672 N.Y.S.2d 840 [1998]). Instead, the owner or contractor must breach

the statutory duty under Labor Law § 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them (*Robinson v E. Med. Ctr., LP*, 6 NY3d 550, 554 [2006]).

In his cross-motion, plaintiff asserts that foreman Gomez, who plaintiff claims saw him using the ladder in a closed position, gave "tacit approval" of plaintiff's use of the ladder in a leaning, closed position (Laylor EBT at 188–89; Memorandum of Law in Support of Cross-Motion at 4–5). Plaintiff specifically testified that on prior occasions Gomez saw him using the ladder in an unopened, leaned position, but said nothing (Laylor EBT at 188).

Plaintiff alleges he could not fully open the ladder and still perform his work in the space available (Laylor EBT at 208). He testified that if he had used the A-frame in an opened, locked position, it would have created a fall risk due to the legs of the ladder being on different elevations (Laylor EBT at 178–81). Plaintiff also testified that no safety devices were usable while he was on the ladder since he had nowhere to tie off a harness (Laylor EBT at 202–03).

Accordingly, there are triable issues of fact as to whether proper safety devices were available or feasible for plaintiff's use and whether the ladder itself was used in an unsafe and proscribed manner by plaintiff. Whether or not the plaintiff was required by his employer or by circumstances to use the ladder improperly or chose to do so on his own is a question of fact that warrants denial of both parties' motions for summary judgment. Additionally, there is a question of fact as to whether the plaintiff was provided with a harness, the answer to which would also implicate Labor Law § 240 (1). Accordingly, plaintiff's and defendants' motions are both denied as to Labor Law § 240 (1).

Labor Law § 241 (6)

Defendants move for summary judgment with respect to plaintiff's Labor Law § 241 (6) claim. To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In this action, plaintiff alleges that defendants violated Industrial Code Rules 23-1.16, 1.21, and 1.7 (d) (e).

12 NYCRR 23-1.16 requires that "safety belts, harnesses and all special devices for attachment to hanging lifelines shall be approved" and "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 rule and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Defendants allege that approved safety harnesses were not needed in the first instance as the ladder was the only safety device that was necessary for the job. Interestingly, Defendants also submit affidavits from Kevin Kelly and Christian Gomez, both of whom stated plaintiff should have been wearing a harness or fall protection of some kind (see Kelly Aff. at ¶ 13.; Gomez Aff. at ¶ 6). In opposition, Plaintiff alleges there was no proper place to tie off his harness (Laylor EBT at 200–03).

Plaintiff alleges a safety belt or harness was required for the task but could not be used in

the existing conditions. Defendants claim the ladder alone was all that was needed to perform the task and further, that plaintiff was provided with a proper safety belt and harness. There is a question of fact as to, inter alia, whether the plaintiff needed a safety belt or harness, in addition to the ladder, to perform his task. Accordingly, defendants' motion is denied as to 12 NYCRR 23-1.16.

12 NYCRR 23-1.21 provides general requirements for ladders on worksites –as to strength, size, maintenance, and use. Specifically, subsection (e) (2) provides: ". . . bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked."

It is undisputed the ladder itself was functional and intact, and that plaintiff inspected the ladder prior to use, and he never complained about the particular ladder involved in the incident (Laylor EBT at 150–158, 171–172, 188–189).

Defendants allege that plaintiff should have opened the ladder to its full position, and was instructed to do so, and that no other safety devices were needed (Quick Aff.; Gomez Aff.). Plaintiff contends that although the ladder itself was in proper working condition, he was not provided with adequate space and safety devices to open the ladder to its full position (Laylor EBT at 178–79. Plaintiff testifies he could not open the ladder fully while he was performing his work without creating a risk of a fall (*id.*). Plaintiff further alleges that defendants knew the A-frame ladder plaintiff was using was not fully opened and locked but still allowed for this dangerous method of work to continue. Accordingly, questions of fact exist and defendants' motion is denied as to 12 NYCRR 23-1.21.

12 NYCRR 23-1.7 (d) (e) provides that "[e]mployers 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." Plaintiff testified that the floor area in front of where he set up the ladder was flat, clean and had no problems, and no obstructions, and that there was no debris present (Laylor EBT at 182). There is no evidence in the record that there was any "slippery condition" present, within the meaning of the cited code section. As a result, defendants' motion is granted as to 12 NYCRR 23-1.7 (d) (e).

Conclusion

For the foregoing reasons, defendants' motion (Seq. 006) for summary judgment on Labor Law § 200 is granted.

Defendants' motion for summary judgment on Labor Law § 240 (1) is denied.

Defendants' motion for summary judgment on Labor Law § 241 (6) is granted as to 12 NYCRR 23-1.7 (d) (e). It is otherwise denied.

Plaintiffs cross-motion for summary judgment (Seq. 008) is denied.

October 13, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court