

De Queiroga Oliveira v Flushing & Little Nassau LLC

2023 NY Slip Op 33695(U)

October 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 523975/2020

Judge: Devin P. Cohen

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Supreme Court of New York
County of Kings
Part LL1 M

Index Number 523975/2020
(Seq. 002)

DIEGO DE QUEIROGA OLIVEIRA,

Plaintiff,

against

FLUSHING & LITTLE NASSAU LLC. AND RIVERSIDE
DEVELOPERS USA INC.,

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.....	<u>1</u>
Order to Show Cause and Affidavits Annexed.....	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon review of the foregoing papers, plaintiff Diego De Queiroga Oliveira’s motion (Seq. 002) for summary judgment against Flushing & Little Nassau LLC. (Flushing) and Riverside Developers USA Inc. (Riverside) is hereby decided as follows:

Introduction & Procedural History

Plaintiff commenced this action for injuries he allegedly sustained on November 12, 2020. At that time, plaintiff was working at a construction site located at 378 Flushing Avenue, Brooklyn, New York (the site) owned by Flushing (*see deed*). Flushing contracted Riverside to perform construction work at the site. Riverside sub-contracted non-party Magellan Concrete Structures LLC (Magellan) for construction services (*see sub-contractor agreement*). Plaintiff, a carpenter, was employed by Magellan. Plaintiff now requests summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims.

Facts

On November 12, 2020, it was cold and rainy the entire day (Oliveira EBT at 32; 45; Aaron Goldberger, project manager for Riverside, EBT at 120). Plaintiff testified as follows: he attended the daily safety meeting the morning of November 12. This meeting was led by site

foreman Marcello Queiroz who discussed safety and daily assignments. At that meeting, plaintiff was told to be cautious of the wet conditions on the site (Oliveira EBT at 33).

After the meeting, plaintiff headed to his work area with his gloves, harness, hardhat, and “yo-yo” (*id.*). A yo-yo is a retractable safety line with hooks on each end which is used to extend the reach of a harness—plaintiff was instructed to use one when working at elevation of eight feet and above (Goldberger EBT at 159; Oliveira EBT at 33). Plaintiff testified that he asked foreman Marcello for a yo-yo longer than the one he had, but it was not provided (Oliveira EBT at 62–63). Weeks prior to the accident, workers who were not from Magellan instructed plaintiff on how to use a yo-yo (*id.* at 12). Plaintiff claims he was not told to use the rungs of the ladder to attach the yo-yo, but rather to “hang it on the side of [the scaffold]” (*id.* at 13).

At the time of his accident, plaintiff was assigned a “decking” job (*id.* at 37). Plaintiff needed to climb a scaffold elevated about twenty feet high to where the decking work area was located. Due to the elevation, plaintiff used his yo-yo the entire time he was decking (*id.* at 38–41). In addition, the photograph provided by the parties shows that there was only one work platform at the top of the scaffold. Mr. Goldberger testified that on the type of scaffold plaintiff was working on, a harness was sufficient, and a yo-yo was not necessary (Goldberger EBT at 159).

Plaintiff testified the following: the rain from the night before and through the day had created wet and slippery conditions on the scaffold (Oliveira EBT at 45). Plaintiff and other workers complained about working in the rain due to the slippery conditions (*id.* at 47–49). Previously when it had rained, plaintiff was told to perform a different job; but on the day of the accident, he was told to continue decking because the job needed to be completed quickly (*id.* at

45). Moreover, there was oil on some of the scaffold rungs due to other workers applying oil to keep the wall and cement from sticking (*id.* at 56).

Around 9:00 AM, plaintiff and his co-worker began to climb up the scaffold to the decking work area (*id.* at 50). They climbed to the top of scaffold to where their work platform was located. Plaintiff attached his yo-yo to the scaffold upon reaching the platform (*id.* at 36). At around 9:50 AM, plaintiff began to descend the scaffold on its rungs. The yo-yo, only having around eight feet of line, needed to be detached so plaintiff could descend fully to the ground. Plaintiff descended the full eight feet the yo-yo provided, then he detached the yo-yo (*id.* at 38–39). After detaching it, while still approximately around fifteen feet from the ground, plaintiff slipped on the scaffold rung and fell to the ground (*id.* at 64).

Analysis

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 § 240 (1)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim. 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]). “[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures” (*Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [1988]).

The following is undisputed: Flushing owned the property and Riverside was the general contractor on the site (*see* Deed; *see* Sub-Contractor Agreement). At the time of this accident, plaintiff was performing construction work, and is therefore a “covered worker” under Labor Law § 240 (1). Plaintiff fell from a height while performing this covered work.

Plaintiff was given a yo-yo that afforded eight feet of line. The scaffold on which he was working was approximately twenty feet high. Plaintiff claims that the yo-yo provided was inadequate protection for his required ascent and descent on the subject scaffold.

In opposition, defendants allege plaintiff had the proper safety device in the yo-yo provided to him. They allege plaintiff had places to hook his yo-yo, contending that plaintiff’s testimony on this issue is contradictory. Specifically, in his first deposition, plaintiff testified that there were no areas around him to attach the yo-yo but then changed his account by stating the yo-yo could be attached to the scaffold.

Even assuming *arguendo* that plaintiff did have areas to attach his yo-yo, the yo-yo provided was an insufficient length given the plaintiff’s assigned task. With an eight-foot line, plaintiff would have necessarily had to detach the yo-yo at some point in his descent to reattach it to another point. There is no evidence in this record that plaintiff was given a secondary device to clip-in or to secure himself (like a tail-line or an additional tether) while he re-attached

his eight-foot yo-yo. Further, based on the photograph provided by the parties, there was no additional deck between the one where the plaintiff attached his yo-yo and the ground, approximately fifteen feet.

Therefore, the safety devices with which plaintiff was provided were inadequate for the plaintiff to safely descend the full height of the scaffold he was told to work on, and by extension inadequate to shield defendants from liability under Labor Law § 240 (1) (*see Lazo v NY State Thruway Auth.*, 204 AD3d 774 [2d Dept 2022]). Importantly, on at least one occasion, the record indicates that plaintiff and co-workers asked for longer yo-yos to perform their work but were not provided them (Oliveira EBT at 62–63).

Accordingly, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is granted.

Labor Law 241 (6)

Plaintiff also moves for summary judgment on his 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 (*Moscato 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 §§ 23-1.7 (d), 23-5.3 (f), and 23-1.16 (d).

Industrial Code Rule §23-1.7(d) "Slipping hazards" provides,

"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."

On November 12, 2020, it is uncontroverted that plaintiff 's right foot slipped due to the scaffold being wet from rain or oil, causing him to fall to the ground. Defendants argue that since plaintiff cannot distinguish whether it was oil or water he slipped on, his motion as predicated on this Rule should be denied. However, defendant cites no cases supporting this view, and it is clear that either water or oil on the scaffold would satisfy the Industrial Code's prohibition on slippery scaffold conditions. Plaintiff's motion is therefore granted as to Labor Law § 241 (6).

For the sake of completeness, the remainder of plaintiff's alleged Industrial Code violations will be briefly addressed. Rule §23-1.16 (b) addresses tail-lines and lifelines; plaintiff does not make any arguments or cite any cases in relation to this code section. Defendants correctly contend plaintiff has not submitted any evidence that a tail line was required for his work. Instead, plaintiff's argument addresses the adequacy of the yo-yo. Accordingly, plaintiff has not shown that this code section is applicable.

Rule § 23-5.3 (f) the provision of "ladders, stairs or ramps" to access "metal scaffolds" that are more than two feet above the ground. No additional ladders or stairs were provided for the plaintiff; however, in opposition, defendants argue that the means of ingress and egress to the scaffold platform were the integrated ladder rungs running up the fame of the scaffold, akin to those found on bakers' scaffolds. Plaintiff's testimony supports the finding that workers were accessing the scaffold platform via the rungs on its side, and plaintiff does not provide any evidence (expert testimony or otherwise) that this was an inappropriate means of ascent and descent. Therefore, without making a universal finding about the propriety of integrated rungs, in this case it appears that the integrated rungs satisfied that requirement of Rule 23-5.3 (f).

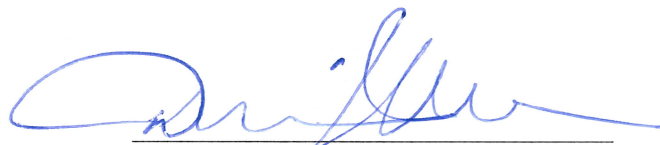
Conclusion

Plaintiff's motion for summary judgment is granted as to Labor Law § 240 (1) and § 241 (6) as predicated on 12 NYCRR § 23-1.7 (d). The motion is otherwise denied.

This constitutes the decision and order of the court.

October 13, 2023

DATE



DEVIN P. COHEN

Justice of the Supreme Court