Twells v City of New York
2023 NY Slip Op 33696(U)
October 18, 2023
Supreme Court, Kings County
Docket Number: Index No. 524810/2019
Judge: Francois A. Rivera
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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 18th day of October 2023

HONORABLE FRANCOIS A. RIVERA

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RANDOLPH U. TWELLS

Plaintiff,

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENTOF TRANSPORTATION, NEW YORK CITY TRANSITAUTHORITY, and METROPOLITAN TRANSIT AUTHORITY,

Defendants.

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DECISION & ORDER
Index No.: 524810/2019

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of plaintiff Randolph U. Twells (hereinafter plaintiff) filed on July 28, 2022, under motion sequence two, for an order granting partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) as against defendants the New York City Transit Authority (hereinafter NYCTA) and the Metropolitan Transit Authority (hereinafter MTA). This motion is opposed by defendants the City of New York, the New York City Department of Transportation, the NYCTA, and the MTA.

- Notice of Motion
- Affirmation in Support
  - Exhibits A to G
- Statement of Material Facts
- Affirmation in Opposition
  - Exhibits H to L
- Counter Statement of Material Facts
- Memorandum of Law in Opposition
- Affirmation in Reply
  - Exhibit A

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion by defendants the City of New York, the New York City Department of Transportation, the NYCTA, and the MTA filed on August 10, 2022, under motion sequence three, seeking an order pursuant CPLR 3212 granting summary judgment in their favor dismissing the plaintiff's complaint in its entirety and all causes of action alleged therein. This motion is opposed by the plaintiff.

- Notice of Motion
- Affirmation in Support
  - Exhibits A to K
- Statement of Material Facts
- Memorandum of Law in Support
- Affirmation in Opposition
- Affirmation in Reply
  - Exhibits M to O

BACKGROUND

On November 13, 2019, Randolph U. Twells (hereinafter the injured plaintiff or Twells) commenced the instant action to recover damages for personal injuries by electronically filing a summons and verified complaint with the Kings County Clerk's Office (hereinafter KCCO).

On July 17, 2020, defendants the City of New York, the New York City Department of Transportation, NYCTA, and MTA (hereinafter collectively as defendants) interposed a verified answer.

On June 10, 2022, the plaintiff filed a note of issue and certificate of readiness for trial with the KCCO.

The verified complaint alleges eighty-two allegations of fact in support of five causes of action. The first cause of action is for negligence. The second cause of action asserts that the defendants violated Labor Law § 200. The third cause of action asserts that the defendants violated Labor Law § 240. The fourth cause of action asserts that the

defendants violated Labor Law § 241 (6). The fifth cause of action asserts that the defendants violated sections of the Industrial Code including 12 NYCRR §§ 23-1.5, 23-1.7. 23-1.16 and 23-1.21.

The verified complaint alleges the following salient facts. The defendants retained the services of John P. Picone (hereinafter JPP) to perform construction work at a premises known as the 8th Avenue Station, located in Brooklyn, New York (hereinafter the subject premises). The defendants entered into an agreement whereby JPP was to serve as the general contractor providing labor, services, and materials to perform construction work at the subject premises.

On May 11, 2019, Twells, an employee of JPP was lawfully at the premises to perform work. Twells was working upon an I-Beam[1] when he was caused to fall from the I-Beam when he stepped upon a brace and fell and was injured. Twells alleges that his fall was due to the negligence of the defendants in their ownership, operation, maintenance, control, and supervision of the premises, among other things.

The complaint alleges that a timely notice of claim was filed on June 21, 2019. On September 5, 2019, a hearing was held pursuant to General Municipal Law 50-h.

MOTION PAPERS

The plaintiff's motion papers consist of a notice of motion, an affirmation of counsel, a statement of material facts, and seven annexed exhibits labeled A through G. Exhibit A is the plaintiff's deposition transcript dated March 22, 2022. Exhibit B is

[1] An I-Beam is commonly made of structural steel and used in buildings. It is designed to play a key role as a support member in a structure. I-Beams are also known as H, W, wide universal beams or rolled joists.

described as the accident report. It includes three copied pages. Page one is titled Injured Person's Statement of Injury. The remaining two pages are titled MTA Supervisor's Accident Investigation Report. Exhibit C is a copy of Contract No.: A-36090 between the NYCTA and JPP. Exhibit D includes two color photographs described as the general job site. Exhibit E is a copy of the summons and verified complaint for the instant action. Exhibit F is a copy of the defendants' answer. Exhibit G is a copy of the verified bill of particulars.

The defendants' opposition papers consist of an affirmation of counsel, a counter statement of material facts, a memorandum of law, and five annexed exhibits labeled H through L. Exhibit H is a copy of the transcript of the September 5, 2019, 50 (h) hearing. Exhibit I is a color photograph. Exhibit J is an affidavit by Keith Williams, a laborer employed by JPP. Exhibit K is an affidavit by Joseph Connolly, superintendent employed by JPP. Exhibit L is an affidavit by David B. Peraza, Professional Engineer.

The plaintiff's reply papers consist of an affirmation of counsel and one annexed exhibit labeled A. Exhibit A is copy of the defendants' discovery response dated March 25, 2021.

The defendants' motion papers consist of a notice of motion, an affirmation of counsel, a statement of material facts, a memorandum of law, and eleven annexed exhibits labeled A through K. Exhibit A is a copy of the plaintiff's notice of claim date stamped July 2, 2019. Exhibit B is described as the plaintiff's complete 50 (h) hearing transcript on September 5, 2019, at 10:07 a.m. Exhibit B is a duplicate of the defendant's opposition exhibit H. Exhibit C is copy of the pleadings including summons, verified

complaint, and the defendants' answer. Exhibit D includes the plaintiff's verified bill of particulars, supplemental verified bill of particulars, and the second supplemental verified bill of particulars. Exhibit E includes three discovery part orders: (1) J. Knipel dated February 25, 2021, (2) J. Knipel dated July 15, 2021, and (3) J. Knipel dated January 6, 2022. Exhibit F is a copy of the plaintiff's deposition transcript. Exhibit F is a duplicate of plaintiff's exhibit A. Exhibit G is a copy of the note of issue and certificate of readiness. Exhibit H is an affidavit by David B. Peraza, Professional Engineer. Exhibit H is a duplicate of the defendants' opposition exhibit L. Exhibit I is an affidavit by Keith Williams, a laborer employed by JPP. Exhibit I is a duplicate of the defendants' opposition exhibit J. Exhibit J is an affidavit by Joseph Connolly, superintendent employed by JPP. Exhibit J is a duplicate of the defendants' opposition exhibit K. Exhibit K is described as photograph marked at the plaintiff's 50 (h) hearing. Exhibit K is a duplicate of the defendants' opposition exhibit I.

The plaintiff's opposition papers consist of an affirmation of counsel[2], and a response to the statement of material facts.

The defendants' reply papers consist of an affirmation of counsel and three annexed exhibits labeled M through O. Exhibit M is a stipulation to vacate the note of issue signed by the parties dated June 28, 2022. Exhibit N is an email exchange between the Court's chamber staff and Mary J. Rich, Esq. dated June 30, 2022. Exhibit O is copy of emails exchanged between the parties' law firms.

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[2] NYSCEF documents 66 and 70 purport to be an affirmation in opposition by counsel which seem to be identical.

LAW AND APPLICATION

Plaintiff's Motion Under Labor Law 240(1)

The plaintiff seeks an order pursuant to CPLR 3212 for partial summary judgment in the plaintiff's favor on the issue of liability under labor law § 240 (1) as against NYCTA and the MTA.

To recover under Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d 625, 626 [2d Dept 2007]). The Labor Law imposes upon all contractors and owners and their agents nondelegable duties to provide workers with proper safety devices and adequate protection (Labor Law §§ 240[1], 241; *see Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 500, 502, [1993]). When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor (*Lodato v Greyhawk N. Am., LLC,* 39 AD3d 491, 493 [2d Dept 2007]).

The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915–916 [1999], quoting *Ross*, 81 NY2d at 501). The core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need

for the safety device in the first instance, no section 240(1) liability exists (*Nieves*, 93 NY2d at 916; *see Melber v 6333 Main St., Inc.*, 91 NY2d 759, 763–764 [1998]).

The plaintiff submitted the contract between JPP, plaintiff's employer and NYCTA. The contract demonstrates that JPP was hired as a general contractor. The contract did not disclose the name of the property owner for the subject premise where plaintiff's accident took place. The plaintiff contends that if the MTA and NYCTA are not the property owners, then they were at the very least, acting as agents on the owner's behalf with respect to the improvements on the subject property and may be deemed agents of the owner within the intendment of Labor Law 240(1) because they had authority to contract with JPP.

The plaintiff did not proffer any other evidence in admissible form to demonstrate that the MTA and NYCTA were either owners or agents of the owner within the intendment of Labor Law 240(1).

Contrary to the plaintiff's contention, a party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done in which the plaintiff is injured (*Southerton v City of New York*, 203 AD3d 977 [2d Dept 2022], citing *Linkowski v City of New York*, 33 AD3d 971, 974–975 [2d Dept 2006]). It is not based on the party's authority to enter a contract.

As correctly contended by the defendants in opposition to the instant motion, the plaintiff has failed to establish that the NYCTA and MTA are either owners, general contractors or agents of the owner or general contractor. Therefore, plaintiff has failed to

meet his prima facie burden that these defendants violated Labor Law § 240(1), and as such, the plaintiff's motion for partial summary judgment must be denied.

Defendants' Motion for Dismissal

All the defendants jointly seek an order pursuant CPLR 3212 granting summary judgment in their favor dismissing the plaintiff's complaint in its entirety and all causes of action alleged therein.

The Labor Law 240(1) Claim

Regarding the plaintiff's claim under Labor Law 240(1) the defendants contend that the plaintiff's injury was not caused by an elevation related hazard contemplated by the statute. They further contend that the accident occurred because the plaintiff failed to follow his employer's instructions not to stand on the bracing. Instead, he needlessly stepped on the bracing, rather than stepping over it and as result was the sole proximate cause of the accident.

Although a plaintiff's comparative negligence is not a defense to a cause of action under Labor Law § 240(1) (*Debennedetto v Chetrit,* 190 AD3d 933, 935–936 [2d Dept 2021], a defendant is not liable under Labor Law § 240(1) where the plaintiff's own actions are the sole proximate cause of the accident (*Calle v City of New York*, 212 A.D.3d 763, 764 [2d Dept 2023]).

The plaintiff's deposition testimony, however, directly contradicts, the defendants' contentions. The plaintiff testified to the following facts. On May 11, 2019, he was injured in the course of his employment when the plaintiff fell from a height. Specifically, the plaintiff fell from a concrete form when its wooden brace collapsed. On

the accident date, wet concrete had been poured into a form creating the south end of the above-ground train platform, and plaintiff along with a co-worker was assigned to create a keyway or channel along the platform's back edge. The wet cement of the platform was five feet above the ground. The area of wet cement poured that morning was 100 feet long and 16 to 17 feet wide.

The keyway that plaintiff was assigned to create needed to run the entire 100 feet of wet cement, four to five inches from its back edge. To do this, the plaintiff and a coworker worked while standing on the ground in the adjacent trench. However, wooden braces two feet apart held the concrete form in place and in the accident location these wood braces ran straight across the trench from the form to the back wall of the trench. There was no way for these workers to move from one side of a brace to the other except to climb over them. The plaintiff testified that while climbing over a brace on the accident date, the brace fell, causing him to fall the approximately five feet from the top of the form to the ground below. After the plaintiff fell, he saw that the brace had not been nailed into the form properly because the nails were angled in such a way that they did not go deeply enough into the form.

The plaintiff's testimony raises triable issues of fact regarding whether the work he was doing exposed the plaintiff to an elevation related hazard contemplated by the statute.

The plaintiff further testified that during an early platform concrete pour at the same station, he had done the same task using the same system of climbing up onto the form to get over the braces. He had climbed onto forms and braces typically when

creating the keyway[3] on a new platform concrete pour. He further testified that at the site of the accident there was no other way to move past the braces but to climb over them. He also testified that no instructions had been given regarding the formwork or the bracing that would have prohibited this known worksite practice.

A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]).

The plaintiff's testimony also raises triable issues of fact regarding whether he was the sole proximate cause of the accident. Accordingly, the branch of the defendants' motion seeking dismissal of the plaintiff's claim under Labor Law 240(1) is denied.

The Labor Law 241(6) Claim

Labor Law § 241(6) requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross,* 81 NY2d at 505 [1993]). As a predicate to a Labor Law § 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 (*Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]).

[3] Creating a keyway is a process involving creating a two-inch wide channel running the length of the freshly poured cement along the back of the platform, four to five inches from the platform's edge.

On July 28, 2022, the plaintiff filled a bill of particulars wherein he alleged, inter alia, that the defendants violated Labor Law § 241(6) by failing to comply with Rule 23 of the Industrial Code sections 23-1.5, 23-1.7, 23-1.16 and 23-1.21.

The plaintiff, however, did not set forth the specific subsection of each Industrials Code provision that he stated in the bill of particulars. The defendants contend that the plaintiff's alleged accident had nothing to do with: defective equipment (12 NYCRR 23-1.5); overhead hazards, falling hazards related to hazardous openings or bridge or highway overpasses, drowning, slipping, tripping, vertical passage hazards, air contaminated or oxygen deficient work areas, corrosive substances (12 NYCRR 23-1.7); safety belts, harnesses, tail lines, lifelines (12 NYCRR 23-1.16); or ladder or ladderways (12 NYCRR 23-1.21).

12 NYCRR 23–1.5(a), is only a general provision of the Industrial Code and not a concrete specification with which the defendant must comply under Labor Law § 241(6) (*Gordineer v County of Orange*, 205 AD2d 584 [2d Dept 1994]).

12 NYCRR 23–1.5(b) serves to amplify other provisions of the Industrial Code that require a designated individual to perform or supervise work, and thus does not provide an implementing regulation upon which to predicate a Labor Law § 241(6) cause of action (*Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]).

12 NYCRR 23-1.5 (c) "condition of equipment and safeguards" provides as follows:

> "(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

(2) All load carrying equipment shall be designed, constructed, and maintained throughout to safely support the loads intended to be imposed thereon.
(3) 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."

The defendants correctly contend that only 12 NYCRR 23-1.59 (c)(3) is the only section arguably pertinent to the instant action. They also correctly contend that the subject accident did not arise from inoperable or defective equipment (*Canty v 133 E. 79th St., LLC*, 167 AD3d 548, 549 [1st Dept 2018]).

12 NYCRR 23-1.7(f) provides in pertinent part as follows: "[v]ertical passage. Stairways, ramps, or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

The defendants did not establish that 12 NYCRR 23-1.7(f) was inapplicable to the subject accident. Furthermore, the plaintiff's testimony raised triable issues of fact on whether he was provided proper access to do the work at an elevation.

12 NYCRR 23-1.16 pertains to safety belts, harnesses, tail lines, and lifelines. The defendants established that this provision is inapplicable here because the plaintiff, according to his own deposition testimony, was not provided with any safety devices to do his assigned work (*Venegas v Shymer*, 201 AD3d 1001, 1003 [2d Dept 2022]).

12 NYCRR 23-1.21 pertains to ladders and ladderways. The defendants contend that the work being performed by the plaintiff was done on the ground level and did not require the use of ladders or ladderways. They further allege that the employees were

able to step over or around, rather than on, the bracing to do the work. Hence, they argue that the plaintiff's accident was not caused by any condition related to the requirements of ladders or ladderways. This contention was buttressed by an expert affidavit from civil engineer David B. Peraza.

The plaintiff contends that the plaintiff was using the form and brace as a makeshift ladder, that it collapsed under his weight and failed to afford adequate protection. The defendants' contention that 12 NYCRR 23-1.21 did not apply to the plaintiff's accident is correct.

Inasmuch as the defendants failed to establish that 22 NYCRR 23-1.7(f) was inapplicable to the subject accident, their motion to dismiss the plaintiff's cause of action based on a violation of Labor Law 241(6) is denied.

The Labor Law § 200 and Common Law Negligence Claims

The defendants seek dismissal of the plaintiff's claims asserted against them on the basis that they neither controlled the means and methods of plaintiff's work; nor did they create or have notice of any alleged dangerous condition.

The plaintiff claimed in his bill of particulars, among other things, that the subject accident was due to a hazardous condition at the job site. Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Devoy v City of New York*, 192 AD3d 665, 668 [2d Dept 2021]). Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured because of dangerous or defective premises conditions at a work site, and those involving the way the work is performed" (*Ortega v Puccia*, 57

AD3d 54, 61 [2d Dept 2008]). These two categories should be viewed in the disjunctive (*id.*).

Claims arising out of an alleged dangerous premises condition require a plaintiff to establish that a property owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it (*Mitchell v Caton on the Park LLC*, 167 AD3d 865 [2d Dept 2018], citing *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). Whereas a claim that arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*Ortega*, 57 AD3d at 61-62).

A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed (*id.*). Notwithstanding, a general contractor's right to generally supervise the work, to stop work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence (*Sanchez v Metro Builders Corp.*, 136 AD3d 783, 787 [2d Dept 2016]). The requisite supervision or control exists for Labor Law § 200 purposes when the property owner bears responsibility for the manner in which the work is performed (*Moscati v Consol. Edison Co. of New York, Inc.*, 168 AD3d 717, 720 [2d Dept 2019], citing *Marquez v. L & M Dev. Partners, Inc.*, 141 AD3d 694,

698 [2d Dept 2016]). The determinative factor is whether the party had the right to exercise control over the work, not whether it exercised that right (*id.*).

In support of the motion the defendants relied on the following testimony. The affirmation of its counsel, the testimony of the plaintiff, the affidavit of Keith Williams, a laborer for JPP, an affidavit of Joseph Connolly, the superintendent of JPP, and an affidavit of David B. Peraza, a licensed professional engineer.

Noticeably absent from the defendants' submission is sworn testimony from anyone speaking on behalf of the defendants. In particular, no one offered sworn testimony from the City of New York, New York City Department of Transportation, New York City Transit Authority, and Metropolitan Transportation Authority.

The affirmation of defendants' counsel demonstrated no personal knowledge of any of the transactions or occurrences alleged in plaintiff's complaint or in the defendants' answer. An attorney's affirmation that is not based upon personal knowledge is of no probative value (*Hackett-Napier v All Health Operations, LLC*, 73 Misc 3d 1228 [A] [Sup Ct, NY County 2021], citing *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

Neither, the testimony of the plaintiff, the affidavit of Keith Williams, the affidavit of Joseph Connolly, nor the affidavit of David B. Peraza demonstrated personal knowledge of the defendants' authority or lack of authority to supervise the manner or method that the plaintiff was to do his work. At best, the defendants' evidentiary submissions demonstrated that they did not exercise supervisory control over plaintiff's work. However, it failed to demonstrate that they did not have the right to do so.

Nor did the defendants demonstrate that they lacked notice of the allegedly dangerous condition. Inasmuch as no testimony was offered by anyone speaking on behalf of the defendants, they could not make a prima facie showing of lack of notice. Consequently, the defendants' motion to dismiss the plaintiff's claim under Labor Law 200 and the common law must be denied for the same reason.

CONCLUSION

The motion by plaintiff Randolph U. Twells for an order pursuant to CPLR 3212 granting summary judgment in the plaintiff's favor on the issue of liability on the claim for a violation of Labor Law § 240 (1) as asserted against defendants the New York City Transit Authority and the Metropolitan Transit Authority is denied.

The motion by the City of New York, the New York City Department of Transportation, New York City Transit Authority, and the Metropolitan Transportation Authority i/s/h/a Metropolitan Transit Authority for an order pursuant CPLR 3212 granting summary judgment in their favor on the issue of liability dismissing the plaintiff's complaint in its entirety is denied.

The foregoing constitutes the decision and order of this Court.

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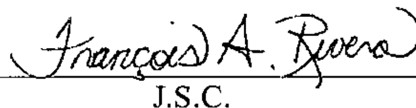

J.S.C.

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