

Munguia v 5501 New Utrecht LLC

2023 NY Slip Op 33775(U)

October 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 512535/19

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of October 2023.

P R E S E N T: HON. INGRID JOSEPH,
Justice.

-----X
ELMER MUNGUIA,

Plaintiff,

-against-

Index No. 512535/19

5501 NEW UTRECHT LLC, GREENLINE
DEVELOPERS LLC, AND TOT
DEVELOPERS, INC.,

DECISION AND ORDER

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

| | |
|---|---------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | <u>84-96</u> |
| Opposing Affidavits (Affirmations) | <u>98-101</u> |
| Affidavits/ Affirmations in Reply | <u>104</u> |

Upon the foregoing papers, plaintiff Elmer Munguia (“plaintiff”) moves (in motion [mot.] sequence [seq.] number [no.] 5), for an order, pursuant to CPLR 3212, granting partial summary judgment in plaintiff’s favor on his Labor Law §§ 240 (1) and 241 (6) claims.

5501 New Utrecht LLC (“5501”) is the owner of property located at 5501 New Utrecht Avenue in Brooklyn, New York (the “property”). Non-party Beitel Group is the entity that served as the general contractor for a project at the property which involved the construction of a new building. Non-party Team One NYC/International Concrete (“International”) was subcontracted to perform work as part of the project. Plaintiff was employed by International and worked as a laborer.

On May 30, 2019, plaintiff was performing work on the structural concrete foundation. To accomplish this task, he was required to work in a construction pit. Plaintiff was responsible for placing waterproofing over insulation coverings on forms or rebar/metal framing. He testified that

he was not provided with a ladder to perform his work in the pit, rather he was provided with a makeshift toe board. In his affidavit in support of his motion, plaintiff states that the toe board was approximately eight feet high and had seven rungs that were approximately one foot apart from each other. Plaintiff states that he was standing on the second or third rung from the top performing his work when the toe board tilted backwards and away from the wall, causing him to fall approximately eight feet down to the ground, with the toe board landing on top of him.

Plaintiff commenced the instant action by filing a summons and verified complaint on June 5, 2019. Defendant 5501 joined issue by filing a verified answer with cross claims on August 7, 2019. On or about September 3, 2019, plaintiff served his verified bill of particulars. On or about November 9, 2021, plaintiff served an amended summons and complaint adding TOT Developers Inc., as a defendant.¹ On December 9, 2021, 5501 served its answer to the amended complaint. Plaintiff was deposed on March 3, 2021, and May 11, 2021, and 5501 produced a witness for examination before trial on August 17, 2022. On November 30, 2022, plaintiff filed his note of issue and the following timely motion ensued.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact’” (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). “The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact” (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (see *Gesuale v Campanelli & Assocs.*, 126 AD3d 836, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d

¹ By orders dated November 12, 2019, and July 6, 2022, plaintiff was granted default judgment as against Greenline Developers, LLC and TOT Developers Inc., respectively.

at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

Plaintiff moves for partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims. Plaintiff argues that he was caused to fall from an elevated height when he was not provided with proper safety equipment to perform his work. In this regard, he points out that the makeshift toe board that he was provided was not secured and that there was no place that he could attach his safety harness to when he was working on the toe board. Moreover, he asserts that he was not provided with a lifeline or anchored retractable line above his work area to safely attach to in order to prevent his fall. Plaintiff testified that when he was performing work while standing at the top of the toe board, he was able to clip his harness on the top of the metal form wall but, as he descended down the toe board and into the pit, there was nothing for him to attach his safety harness to. Plaintiff contends that it was unsafe for him to perform his work on the toe board because it was not attached to the foundation wall, no other worker was securing it from below and there was no place to attach his harness. Moreover, he notes that the toe board only allowed the front part of a workers' foot to rest on the rung which resulted in the rest of the workers' weight being set further back not resting on anything, rendering it unsafe. Accordingly, plaintiff argues that Labor Law § 240 (1) was violated and that 5501 is strictly liable for this violation.

In opposition, 5501 argues that plaintiff was not required to be provided with a fall arrest system in the form of a lifeline or harness for the work that he was performing. In support of this argument, 5501 submits an expert affidavit from Joseph Danatzko, a licensed professional engineer. Mr. Danatzko affirms that he reviewed all of the deposition testimony, plaintiff's bill of particulars, plaintiff's motion and supporting affirmations, as well as three videos of the incident. He opines that the location where plaintiff was required to work at the time of the incident did not require that he be provided with a fall arrest system. Specifically, he states that "[t]here is also no evidence that Plaintiff was required to wear a safety belt, a harness, a tail line or a lifeline in order to properly and safely perform his job, nor that the absence of or defect in those safety items was a proximate cause of the incident" (NYSCEF Doc No. 99, Danatzko aff at ¶15). Mr. Danatzko further states that plaintiff fails to specify a single required enumerated safety device that 5501 failed to provide.

In reply, plaintiff argues that Mr. Danatzko's affidavit fails to raise an issue of fact as it is conclusory and fails to assert any basis for his opinion that a fall arrest system was not needed. Moreover, plaintiff points out that the expert mistakenly claims that plaintiff has failed to "specify a single required enumerated safety device" (*id.* at 13). In this regard, plaintiff points out that in support of his motion he specifically argues that he should have been provided with a properly secured ladder, scaffold, lifelines, and/or retractable safety line that could be anchored from above.

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501).

The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or

contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; see *Roblero v Bais Ruchel High` Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*). “A worker’s comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; see also *Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, “where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker’s conduct cannot be deemed solely to blame for it” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290). “In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, ‘the single decisive question is whether [the] plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential’” (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Plaintiff’s testimony herein reveals that his Labor Law § 240 (1) claim arises out of his fall off of a toe board that he was utilizing as a makeshift ladder to perform his work in a construction pit. In cases involving falling workers, “[w]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his or her materials” (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], quoting *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). Thus, the collapse of a scaffold, ladder, or in this case a toe board, constitutes prima facie evidence of a Labor Law § 240 (1) violation (see *Exley v Cassell Vacation Homes, Inc.*, 209 AD3d 839, 841 [2d Dept 2022]; *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that the collapse of the scaffold, for no apparent reason, gave rise to “a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker’s injuries”]; *Schutt v Bookhagen*, 186 AD3d 1027, 1028 [4th Dept 2020] [holding that plaintiff established that Labor § 240 (1) was violated when the toe board he was directed to use failed causing him to fall off of a roof and he was not provided with a harness]).

Here, plaintiff has established that his “injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY 39 90, 97 [2015]; see *Exley v Cassell Vacation Homes, Inc.*, 209 AD3d 839, 841 [2d Dept 2022] [holding that plaintiff established entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim where the ladder he was provided was not properly secured resulting in the feet of the ladder being “kicked” backwards from the wall and plaintiff falling to the ground]; *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653-654 [2d Dept 2014] [with regard to his Labor Law § 240 (1) claim, the court held that “plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when the unsecured, closed A-frame ladder fell backwards as he descended it”]).

The court notes that the expert affidavit submitted by Mr. Danatzko is filled with conclusory assertions that fail to establish an issue of fact (see *Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 735 [2d Dept 2015]). Specifically, the court notes that the expert merely opines that at the time of his accident, plaintiff was not required to have been provided with a fall arrest system. Mr. Danatzko provides no basis for this opinion, nor does he address the inadequacy of the toe board for the work that was being performed. Thus, 5501 fails to raise an issue of fact. Accordingly, that branch of plaintiff’s motion seeking partial summary judgment on the issue of liability as against 5501 for his Labor Law § 240 (1) claim is granted.

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

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (see *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*,

142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]). To prevail on a Labor Law § 241 (6) claim, the claim must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (see *Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

Here, plaintiff moves for summary judgment in his favor on his Labor Law § 241 (6) claim as predicated on 5501's violation of Industrial Code §§ 23-1.16 and 23-1.21, including §§ 23-1.21(b)(1), 23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), and 23-1.21(b)(4)(iv). Plaintiff argues that these provisions are specific, applicable and were violated.

Although plaintiff does not specify which subdivision of § 23-1.16 was violated, the court notes that subdivision (b) requires that a worker using a harness have an appropriate secure location to tie off his or her tail line and that such "attachments shall be so arranged that if the user should fall such fall shall not exceed five feet." In his affidavit in support of his motion, plaintiff states that he was working on the second or third rung of the toe board with his shoulders and upper back approximately eight feet above the ground (NYSCEF Doc No. 91 at ¶3). He further states that he was wearing a harness, but that he could only tie off when he was working at the top of the toe board and that there was no place for him to tie off when he was performing the work at the time of his accident. The court finds that plaintiff met his prima facie burden demonstrating that section 23-1.16 (b)'s requirement that a worker have a proper place on which to tie off a harness was violated (see *King v Villette*, 155 AD3d 619, 623 [2d Dept 2017]; *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404-405 [1st Dept 2017], *lv dismissed* 29 NY3d 1100 [2017]; *Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]). In opposition, 5510 fails to raise a triable issue of fact. Accordingly, the court finds that plaintiff has made a prima facie demonstration of his entitlement to summary judgment on the issue of liability on so much of his Labor Law § 241 (6) cause of action as is predicated upon a violation of Industrial Code § 23-1.16 (b).

Industrial Code § 23-1.21 (b) (1) provides that a "ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon;" § 23-1.21 (b) (3) (i) states that a ladder should not be used if "it has a broken member or part;" and § 23-1.21 (b) (4) (ii) provides that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes should not be used as ladder footings." Plaintiff has failed to establish or even allege that the toe board he was utilizing

as a ladder broke, that any of its components dislodged or loosened, that it had a broken part or that it was placed on a slippery surface.

Industrial Code § 23-1.21 (b) (4) (iv) provides, in pertinent part, that “[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means.” Here, plaintiff has indicated that the toe board he was utilizing was approximately eight feet in height, that each rung was about one foot apart and that he was standing on the second or third rung from the top. Thus, it is unclear from the record presented whether plaintiff was performing work at rungs that were between six and ten feet above the footing of the toe board. Accordingly, plaintiff has failed to meet his prima facie burden of establishing that § 23-1.21 (b) (4) (iv) is applicable to the facts herein. Inasmuch as none of the above-referenced subdivisions of section 23-1.21 can be used as a predicate for plaintiff’s Labor Law § 241 (6) claim, that branch of his motion seeking summary judgment in his favor on said claim as based upon a violation of Industrial Code § 23-1.21 is denied.

To the extent not specifically addressed herein, the parties’ remaining contentions and arguments were considered and found to be without merit and/or moot.

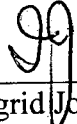
Accordingly, it is

ORDERED that plaintiff’s motion (mot. seq. no. 5) seeking partial summary judgment in his favor on the issue of liability on his Labor Law § 240 (1) claim is granted; and it is further

ORDERED that plaintiff’s motion seeking partial summary judgment on his Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code 23- 1.16 is granted; and it is further

ORDERED that plaintiff’s motion seeking partial summary judgment as predicated upon a violation of Industrial Code 23-1.21, including §§ 23-1.21(b)(1), 23-1.21(b)(3)(i), 23-1.21(b)(4)(ii), and 23-1.21(b)(4)(iv) is denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**