Solarte v Brearley Sch.
2023 NY Slip Op 34159(U)
November 30, 2023
Supreme Court, New York County
Docket Number: Index No. 155911/2019
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK, *Justice* — **PART** 11M

INDEX NO. 155911/2019

MOTION DATE 06/02/2023, 06/02/2023, 06/03/2023

MOTION SEQ. NO. 004 005 006

ADRIAN OSCAR OSEGUERA SOLARTE,

Plaintiff,

- v -

THE BREARLEY SCHOOL, E.W. HOWELL CO., LLC,LJC DISMANTLING CORP., PAR ENVIRONMENTAL CORPORATION,

Defendant.

DECISION + ORDER ON MOTION

THE BREARLEY SCHOOL, E.W. HOWELL CO., LLC

Plaintiff,

-against-

PAL ENVIRONMENTAL SERVICES, INC.

Defendant.

Third-Party Index No. 595551/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 215, 216, 219, 223, 232, 233, 234, 235, 236, 237, 240

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 217, 220, 224, 230, 238, 241, 242

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 218, 221, 225, 226, 227, 228, 229, 231, 239, 243

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of injuries allegedly sustained by plaintiff while working at a construction site. Plaintiff moves for partial summary judgment, defendants and third-party

defendants oppose, and move separately for summary judgment. Based on the reasons set forth below, all motions for summary judgment are denied.

Facts

The owner of the subject premises, THE BREARLEY SCHOOL (hereinafter "Brearley"), contracted with E.W. HOWELL CO., LLC (hereinafter "Howell") as the construction manager for the project. Howell then contracted with PAL ENVIRONMENTAL SAFETY CORP. d/b/a PAL ENVIRONMENTAL SERVICES, INC. (hereinafter "PAL"), to perform asbestos abatement, prior to the demolition of the premises.

Plaintiff was employed as an asbestos handler by third-party defendant PAL. On the date of the incident, July 13, 2016, during the course of his employment for PAL, plaintiff fell while descending an interior staircase. Specifically, plaintiff contends that a single step unexpectedly broke while he was carrying a ladder and tools down the stairs causing him to fall down the stairs. Prior to the subject accident plaintiff did not notice any defects on the subject staircase.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. 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, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Plaintiff, motion sequence 004, moves for summary judgment as to its claims pursuant to Labor Law §241(6), alleging violations of Industrial Codes 12 NYCRR 23-3.3(c) and 12 NYCRR 23-1.7(f)[1].

PAL, motion sequence 005, moves to dismiss plaintiff's complaint on the grounds, *inter alia*, that plaintiff's accident occurred on a permanent staircase, thus Labor Law §240(1) does not apply and further the alleged violations of the industrial code are also inapplicable. PAL contends that there was no abatement work done in the subject staircase.

Similarly, Brearley and Howell, motion sequence 006, move for summary judgment on the Labor Law §241(6) claims as well as the Labor Law §240(1) claims. Additionally, Brearley and Howell move to dismiss plaintiff's claims pursuant to Labor Law §200 because neither entity controlled the means and methods of the injury inducing work, nor was either entity on notice of the alleged defective condition that caused the accident. Further, Brearley and Howell seek contractual indemnification from PAL.

Discussion

Labor Law § 240(1)

Labor Law §240(1) states in pertinent part as follows: "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,

[1] Defendants/third party plaintiffs' motion to dismiss claims pursuant to the myriad of industrial code violations listed in plaintiff's bill of particulars is granted without opposition and deemed abandoned with the exception of the two industrial codes cited in plaintiff's motion for summary judgment.

contractors and their agents where a breach of the statutory duty proximately causes an injury. *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].

It is well established law that "an accident alone does not establish a Labor Law § 240(1) violation or causation." (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id.*

Labor Law § 200

It is well-settled law that an owner or general contractor will not be found liable under common law or 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 Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

Moreover, "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200." (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224, [2004], *lv denied,* 4 NY3d 702, 790 [2004]).

Preliminarily, the Court finds that there is a question of fact as to whether defendants/third-party plaintiffs had actual or constructive notice of the defective staircase. Defendants/third-party plaintiffs contend that the defect was latent and thus plaintiff cannot establish that in inspection would have revealed the defect,; however, this argument misses the

mark. In support of their respective positions, the movants allege that the inspection was done before PAL began its work and no defects were noted. Here, defendants/third-party plaintiffs and likewise the third-party defendants have failed to establish that the subject staircase was inspected after its alleged abatement. Which leads the Court to the next issue of fact.

While the third-party defendants urge this Court to ignore the incident report by the site supervisor, the plaintiff's father, that describes the steps in the stairwell as damaged "due to the abatement" and rely solely on its logbooks to find that abatement in fact did not occur on the staircase, this inconsistency is an issue of fact. This Court is not in the position of fact finder so as to credit the third-party defendant's records of one type over another, therefore at this juncture it is inappropriate to deem the accident report describing a prior abatement as not credible while simultaneously crediting the records that claim an abatement has not taken place.

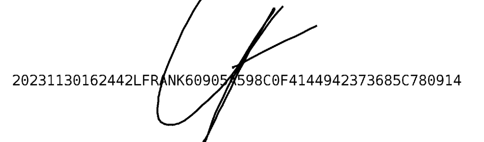
It appears undisputed that the subject staircase was the sole means of access to and from plaintiff's work location, however as all parties concede a threshold issue is foreseeability of the harm in order for Labor Law § 240 (1) to apply. The argument that because the accident happened on a permanent staircase it is not within the ambit of Labor Law § 240 (1) has been repeatedly rejected by the First Department. The First Department has held that a permanent stairway qualifies as an "other" safety device under the statute when it is provided as the sole means of access to and from the work area, *see* (*Gory v Neighborhood Partnership Hous. Dev. Fund Company, Inc.*, 113 AD3d 550 [1st Dept 2014]; *Ramirez v Shoats*, 78 AD3d 515, 516 [1st Dept 2010]).

As to plaintiff's claims predicated on the violation of 12 NYCRR 23-1.7(f), regarding staircases be free from defects, as questions of fact preclude a dismissal of this claim, questions

of fact equally preclude a finding of judgment in plaintiff's favor, for the reasons indicated above.

Accordingly, the Court finds that threshold issue of any work being done on the subject staircase after the inspection that occurred before the commencement of work by PAL is a factual issue that prevents the finding of summary judgment for any of the movants. Accordingly, it is hereby

ADJUDGED that motions sequences, 004, 005, and 006 are denied.



11/30/2023			LYLE E. FRANK, J.S.C.		
DATE					
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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