

Prieto v BPP PCV Owner, LLC

2023 NY Slip Op 34603(U)

January 18, 2024

Supreme Court, New York County

Docket Number: Index No. 151676/2020

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 151676/2020

FABIOLA CARMONA PRIETO,

MOTION SEQ. NO. 001

Plaintiff,

- v -

BPP PCV OWNER, LLC., and BLACKSTONE PROPERTY
ADVISORS, L.P.,**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 95, 96

were read on this motion to/for

JUDGMENT - SUMMARY

In this Labor Law action, plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendant BPP PCV Owner, LLC (BPP) on the issue of liability under Labor Law §§ 240(1) and 241(6).

I. Factual and Procedural Background

This case arises from an incident on January 14, 2019, in which plaintiff was allegedly injured after a wall collapsed onto her while working in a building located at 7 Peter Cooper Road in Manhattan (the premises), which was owned by BPP (NYSCEF Doc No. 54). Plaintiff commenced this action against defendants alleging claims of common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 62). BPP joined issue by its answer dated April 17, 2020, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 55). Plaintiff now moves for partial summary judgment on her Labor Law §§ 240(1) and 241(6) claims (Doc No. 50), which BPP and third-party defendant Legacy Builders/Developers Corp. (Legacy) oppose (Doc Nos. 72, 95).

Deposition Testimony of Plaintiff (Doc No. 65)

At her deposition, plaintiff testified that, on the day of the incident, she was employed by a nonparty construction entity and working on the premises. Her and her coworkers were demolishing the interior of several apartments at the premises, and she was responsible for removing debris from the apartments to keep the jobsite clean. She placed any debris into a large dumpster and dragged it to a nearby elevator, where it was then taken outside. She was not provided with any equipment, and only wore a hard hat, gloves, and boots, all of which she owned. She was given instructions by her supervisor, who was another employee within her company and the only person from whom she received instructions.

On the date of the incident, plaintiff entered one of the apartments through the front entrance after her lunch break. Just after she entered, one of her coworkers began to demolish an interior wall. The wall was approximately three to four feet long and stretched from floor to ceiling, it had not been demolished in any way prior to the incident, and plaintiff was standing roughly two feet away from it. Her coworker hit the wall with a sledgehammer, causing the wall to strike the left side of plaintiff's body and knock her to the ground. Plaintiff did not hear the coworker using the hammer prior to the accident and was unaware that her coworker was beginning to demolish the wall. After the incident, she rested for a short period and continued working the rest of the day.

Deposition Testimony of BPP (Doc No. 66)

A senior vice president for a nonparty entity owned by one of BPP's subsidiaries testified on behalf of BPP and confirmed that Legacy was the general contractor on the project. Although he oversaw design and construction for many properties owned by BPP, he offered few details

about the renovation project that took place at the premises. He explained that work was tracked in two sets of work logs.

Daily Work Logs (Doc No. 64)

The daily work logs identified what apartment was being demolished and how complete the demolition was on a given day. However, neither set of logs provided that demolition occurred on the exact date of plaintiff's accident, they only indicated that demolition occurred on the days leading up to, and the days following, her accident.

II. Legal Analysis and Conclusions

A. Plaintiff's Labor Law § 240(1) Claim

Plaintiff contends that she has made a prima facie showing that BPP violated the statute and such violation caused her injuries because the wall being demolished should have been secured, and the lack of a safety device caused her injuries. BPP argues in opposition that plaintiff failed to show the statute was violated because a falling wall is an ordinary and usual peril at a job site, and she failed to provide any evidence that securing the wall was required. It also maintains that questions of fact exist regarding whether the wall falling down could generate enough force to be considered a violation of the statute. In reply, plaintiff contends that BPP failed to identify a question of fact that would prohibit summary judgment on the issue of liability.

“Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute” (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013] [citations omitted]; see *Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]). A plaintiff seeking summary judgment on the issue of liability “must establish that the statute was violated and that such violation was a proximate cause of his injury” (*Barreto v Metropolitan*

Transp. Auth., 25 NY3d 426, 433 [2015]; *see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 405 [1st Dept 2018]).

Plaintiff fails to make a prima facie showing that BPP violated the statute. “[T]he collapse of a wall is not the type of elevation-related accident that [Labor Law § 240(1)] is intended to guard against” (*Kaminski v 53rd St. & Madison Tower Dev., LLC*, 70 AD3d 530, 531 [1st Dept 2010] [internal quotation marks and citation omitted] [concluding statute inapplicable where plaintiff injured at demolition site after portion of exterior wall collapsed onto him]; *see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995] [holding Labor Law § 240(1) inapplicable to collapse of fire wall because it was not elevation-related accident covered by statute]). “Rather, . . . [it] is the type of peril a construction worker usually encounters on the job site” (*Misseritti*, 86 NY2d at 491). Therefore, plaintiff’s motion must be denied (*see Kaminski*, 70 AD3d at 530-531 [affirming denial of plaintiff’s summary judgment motion on issue of liability under Labor Law § 240(1) because plaintiff failed to show statute violated]).

“In view of [plaintiff’s] failure to establish [her] prima facie entitlement to judgment as a matter of law, there is no need to consider the sufficiency of the opposition papers” (*Zabawa v Sky Mgt. Corp.*, 183 AD3d 430, 431 [1st Dept 2020]).

B. Plaintiff’s Labor Law § 241(6) Claim

In her bill of particulars, plaintiff’s Labor Law § 241(6) claims are predicated on violations of numerous Industrial Code provisions. However, she only addresses sections 23-1.5, 23-1.7(a)(2), 23-3.3(b)(1), and 23-3.3(c) in her motion papers. Therefore, the Labor Law § 241(6) claims predicated on violations of other Industrial Code provisions are deemed abandoned (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013]).

i. Industrial Code § 1.5

Plaintiff contends that she has made a prima facie showing that BPP violated 12 NYCRR 23-1.5(a) and (b) because the coworker who struck the wall was inexperienced. BPP maintains in opposition that neither of those Industrial Code subsections can be a basis for liability under Labor Law § 241(6).

Here, BPP is correct; neither of those subsections provide a sufficient predicate for liability under Labor Law § 241(6) (*see McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016] [holding 12 NYCRR 23-1.5(a) is insufficient predicate for liability]; *Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016] [same as to 12 NYCRR 23-1.5(b)]). Therefore, plaintiff fails to make a prima facie showing that she is entitled to judgment as a matter of law on this alleged Industrial Code violation.

ii. Industrial Code § 1.7(a)(2)

Plaintiff contends that she has made a prima facie showing that BPP violated 12 NYCRR 23-1.7(a)(2) because her accident occurred in an area that should have been cordoned off due to the demolition taking place. BPP maintains in opposition that section 23-1.7(a)(2) is inapplicable here, because plaintiff was required to work or pass through the area where she was allegedly injured. In reply, plaintiff reiterates that the section is applicable and was violated by BPP.

12 NYCRR 23-1.7(a)(2) requires barricades, fencing, or other equivalent safety measures in areas exposed to falling materials or objects. However, such measures are only required in areas where “employees are *not* required to work or pass” (*id.* [emphasis added]). When a plaintiff suffers an injury where he or she was required to perform work, the absence of barricades or other equivalent measures is not a violation of the Industrial Code (*see Griffin v Clinton Green S., LLC*, 98 AD3d 41, 49-50 [1st Dept 2012] [finding no violation of 12 NYCRR 23-1.7(a)(2) because

plaintiff struck by falling piece of scaffolding was required to work in area where he was struck]; *Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138 [4th Dept 2005] [“(12 NYCRR 23-1.7[a][2]) is inapplicable because plaintiff was required to work or pass in or through the area of the partially demolished wall” (internal quotation marks omitted)]).

Plaintiff fails to make a prima facie showing that BPP violated section 23-1.7(a)(2), because her testimony establishes that she was required to work in the area where she was allegedly injured, rendering 12 NYCRR 23-1.7(a)(2) inapplicable (*see Griffin*, 98 AD3d at 49-50; *Perrillo*, 17 AD3d at 1138; *Mulvihill v Brooklyn Law School*, 22 Misc 3d 1114[A], *7 [Sup Ct, Kings County 2009, Knipel, J.] [finding 12 NYCRR 23-1.7(a)(2) inapplicable because plaintiff was required to remove debris from area where he was struck by falling piece of wood]).

iii. Industrial Code § 3.3(b)(1)

Plaintiff contends that she has made a prima facie showing that BPP violated 12 NYCRR 23-3.3(b)(1) because the demolition performed at the premises was not systematic. BPP maintains in opposition that plaintiff failed to demonstrate how this section of the Industrial Code is applicable to the facts of this case. In reply, plaintiff reiterates that the demolition was not systematic.

Section 23-3.3(b)(1) of the Industrial Code requires, among other things, that demolition done by hand must be performed “in a systematic manner” (12 NYCRR 23-3.3 [b] [1]; *accord Perez v Master E. 167 LLC*, 2021 WL 7449251, *3 [Sup Ct, Bronx County, Aug. 13, 2021, Suarez, J.]). In order to demonstrate whether the demolition proceeded in such manner, a party must provide evidence of the order of operations at the job site, or the lack thereof (*see Sinchi v HWA 1290 III LLC*, 2019 NY Slip Op 31096[U], *4 [Sup Ct, NY County 2019, James, J.] [finding 12 NYCRR 23-3.3(b)(1) inapplicable, in part, because testimonial evidence demonstrated that there

was “a set order in the demolition work, with the carpet being removed first, followed by the walls, and then followed by the ceiling”]).

Plaintiff, however, fails to provide any evidence regarding the sequence of events involved with the demolition inside the apartment. Although she submitted work logs maintained during the renovation, the logs only include generalized references to demolition occurring in various apartments on certain days, they do not contain any specific information describing how the demolition occurred. Further, her deposition testimony does not include any details regarding how the demolition was supposed to proceed or should have proceeded, she merely stated that the interior of the apartments were being demolished and that the demolition was taking place throughout the apartment on the day her accident occurred. As the movant, plaintiff bears the burden of demonstrating that the demolition took place in an unsystematic way, in violation of the Industrial Code. By failing to provide any evidence regarding how the demolition proceeded, or should have proceeded, she fails to make a prima facie showing that 12 NYCRR 23-3.3(b)(1) was violated (*cf. Garcia v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 494, 496 [1st Dept 2014] [finding questions of fact existed regarding alleged 12 NYCRR 23-3.3(b)(1) violation because parties presented “conflicting evidence regarding how demolition operations were performed”]; *see Sinchi*, 2019 NY Slip Op 31096[U],*4).

iv. Industrial Code § 3.3(c)

Plaintiff contends that she has made a prima facie showing that BPP violated 12 NYCRR 23-3.3(c) because the demolition was done by an “unsupervised and inexperienced worker.” BPP argues in opposition that plaintiff failed to demonstrate how this section of the Industrial Code is applicable here, because her arguments are conclusory and fail to address any alleged structural instability in the demolished wall that allegedly struck her.

“12 NYCRR 23-3.3(c) . . . requires continuing inspections during hand demolition operations to protect against hazards resulting from weakened or deteriorated floors or walls or from loosened material” (*Medina v City of New York*, 87 AD3d 907, 908 [1st Dept 2011] [internal quotation marks omitted]). The section is intended “to safeguard against the hazards which are created by the progress of the demolition work, not how the demolition work is being done” (*Mosca v Triborough Bridge & Tunnel Auth.*, 24 Misc 3d 1251[A] [Sup Ct, NY County 2009, Gische, J.]; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 12 [2011]).

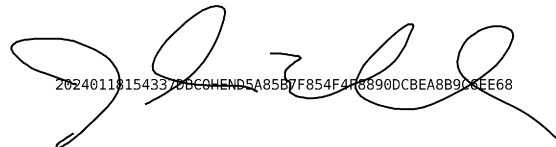
Plaintiff’s contentions regarding the inexperience of the coworker demolishing the wall are therefore irrelevant to whether BPP violated this provision of the Industrial Code (*see Campoverde v Bruckner Plaza Assoc., L.P.*, 50 AD3d 836, 837 [2d Dept 2008] [concluding that section “requires continuing inspections against hazards which are created by the progress of the demolition work itself rather than inspections of how demolition would be performed” (internal quotation marks and citation omitted)]). In any event, her deposition testimony fails to explain how the wall was either weakened, deteriorated, or in some way inherently unstable prior to her accident. Instead, it demonstrates that “[t]he hazard which injured . . . plaintiff was the actual performance of the demolition work, not structural instability caused by the progress of the demolition” (*id.*). Therefore, there was no violation of 12 NYCRR 23-3.3(c) (*see Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 93 [1st Dept 2012] [finding no Industrial Code violation where plaintiff injured by broken mirrored wall panels because “(t)he mirrored panel did not break because it was weakened by the progress of demolition” and plaintiff’s job was to remove such panels]; *cf. Medina*, 87 AD3d at 909 [finding section violated where piece of subway rail sprung upward and struck plaintiff because rail was loosened and unstable after repeated saw cuts during demolition]).

As with the branch of plaintiff’s partial summary judgment motion concerning Labor Law § 240(1), because plaintiff fails to make the required prima facie showing, the branch of her motion concerning Labor Law § 241(6) is denied, and there is no need to consider the sufficiency of the opposition papers (see *Zabawa*, 183 AD3d at 431)

The parties remaining contentions are either unavailing or do not need to be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that plaintiff’s motion for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) against defendant BPP PCV Owner, LLC is denied.



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DAVID B. COHEN, J.S.C.

1/18/2023
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: