

DaSilva v Lendlease (US) Constr. LMB Inc.

2023 NY Slip Op 34781(U)

January 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 525509/2018

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, 360 Adams Street, County of Kings, State of New York on the 3rd day of January 2023

Present: Hon. Carolyn E. Wade, Justice.

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ANTONIO DASILVA,

Index No. 525509/2018

Plaintiff,

-against-

LENDLEASE (US) CONSTRUCTION LMB INC. and
138 WILLOUGHBY LLC,

ORDER

Motion seqs. 2 & 3

Defendants.
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Upon the foregoing cited papers, and after oral argument, Plaintiff Antonio DaSilva ("Plaintiff"), moves for Partial Summary Judgment against the Defendants on the issue of liability under Labor Law §241(6) (motion seq. #2). Defendants move for an Order granting them summary judgment (motion seq. #3). The applications are decided as follows:

The underlying action was commenced by Plaintiff, an employee of non-party Trident General Contracting LLC, who alleges that on October 10, 2018, he was injured while manually transporting a heavy metal and wood concrete form/mold from a crane drop-off area on the 28th floor of the building under construction to the location where it was to be used. Plaintiff alleges that he was traversing a narrow pathway when he tripped on a piece of discarded pipe and lost his footing. He then fell to the ground with the form on top of him, trapping one of his arms

between the form and a low steel box, and striking his body onto the ground. The construction site, located at 138 Willoughby Street, Brooklyn, NY, was owned by defendant, 138 Willoughby LLC, which hired defendant Lendlease (US) Construction LMB Inc, as its Construction Manager pursuant to a written agreement.

Plaintiff's Motion for Partial Summary Against the Defendants on the issue of liability under Labor Law §241(6) (motion seq. #2)

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

All contractors and owners and their agents [...] when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

6. All areas in which construction [...] work is being performed shall be so 'equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work [...] shall comply therewith."

The statute imposes a nondelegable duty of care upon owners, contractors and their agents "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 v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To maintain a cause of action under § 241(6), a plaintiff must specifically plead and prove that the defendant violated an applicable *Industrial Code regulation*.

In the instant action, Plaintiff has alleged, *inter alia*, the violation of Industrial Code § 23-1.7, which reads as follows:

(e) Tripping and other hazards:

(1) *Passageways.* All passageways shall be kept free from accumulations of dirt and debris and other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) *Working areas.* The part of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials from sharp projections insofar as may be consistent with the work being performed.

This regulation has been found to be sufficiently specific to support a Labor Law § 241(6) violation (*Jara v. New York Racing Ass'n, Inc.*, 85 AD3d 1121, 1123 [2nd Dept 2011]; *White v. Vil of Port Chester*, 92 AD3d 872, 877 [2nd Dept 2012]).

Here, after an examination of the respective submissions, the Court finds that there is a triable issue of material fact as to whether Plaintiff was using the subject area as a passageway at the time of his accident. Consequently, this Court finds that there is a triable issue of material fact as to whether Industrial Code § 23-1.7(e)(1) was violated by the defendants.

With respect to Industrial Code § 23-1.7(e)(2), all of the parties acknowledge that the Plaintiff was in a "working area" at the time of the accident. However, Defendants contend that since the pipe was integral to the performance of Trident's work, the statutory provision was not violated. However, Plaintiff and the eyewitnesses noted that he tripped on a piece of discarded pipe that was rubbish, was not part of ongoing work, and should have been cleared from the site.

Defendants do not refute that the Plaintiff tripped on a discarded pipe. As a result, Plaintiff has established that Defendants have violated Industrial Code § 23-1.7(e)(2).

Accordingly, based upon the above, Plaintiff's Motion for Summary Judgment is granted to the extent that Defendants are liable for violating Labor Law § 241(6), as it relates to Industrial Code § 23-1.7(e)(2) ("Working areas"). However, a triable issue of material fact exists as to whether Defendants violated Industrial Code § 23-1.7(e)(1) ("Passageways").

Defendants' Motion for Summary Judgment (motion seq. #3)

As a preliminary matter, this Court notes that Plaintiff does not oppose the branch of Defendants' motion, which seeks dismissal of his Labor Law § 240 claim; and Labor Law § 241(6) cause of action that is predicated on violations of Industrial Code Rules §§ 23-1.5, 23-1.7(a), (b), (c), (d), (f), (g) and (h), 23-1.15, 23-1.16, 23-2.1, 23-2.2, 23-3.3, 23-6.1, and 23-6.2. Consequently, those claims are hereby dismissed.

Consistent with this Court's ruling above for motion sequence # 2, the branch of Defendants' motion seeking summary judgment, pursuant to Labor Law § 241(6), is denied.

Personal injury claims under Labor Law § 200 and the common law can arise from "an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v. Skanska USA Bldg., Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

In the instant case, Plaintiff testified at his deposition that Trident's supervisor, "Tony," and foreman, "Paul" gave him work assignments, and that the defendants did not tell him how to perform his work. Since the defendants did not supervise, direct or control Plaintiff's work, the Labor Law § 200 claim is hereby dismissed.

Accordingly, based upon the above, Defendants' Motion for Summary Judgment (motion seq. #3) is granted to the extent that Plaintiff's Labor Law § 240 claim; and Labor Law § 241(6) cause of action that is predicated on violations of Industrial Code Rules §§ 23-1.5, 23-1.7(a), (b), (c), (d), (f), (g) and (h), 23-1.15, 23-1.16, 23-2.1, 23-2.2, 23-3.3, 23-6.1, and 23-6.2 are dismissed. The Labor Law § 200/common law claim is also dismissed.

Plaintiff's Motion for Summary Judgment, pursuant to Labor Law § 241(6) (motion seq. #2), is granted to the extent that Defendants are liable for violating Labor Law § 241(6), as it relates to Industrial Code § 23-1.7(e)(2) ("Working areas"). However, a triable issue of material fact exists as to whether Defendants violated Industrial Code § 23-1.7(e)(1) ("Passageways").

This constitutes the Decision/Order of the Court.


Hon. Cardlyn E. Wade, J.S.C.

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