

Griffith v One Vanderbilt Owner, LLC

2023 NY Slip Op 34797(U)

April 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 504997/2019

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 April 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
LYNDON GRIFFITH,
Plaintiff,

Index No. 504997/2019

-against-

DECISION AND ORDER

ONE VANDERBILT OWNER, LLC, SL GREEN REALTY CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and TISHMAN CONSTRUCTION CORPORATION,
Defendants.

Motions Sequence #4

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	63-70,
Opposing Affidavits (Affirmations).....	72, 74-80,
Reply Affidavits (Affirmations)	83-87,
Memorandum of Law.....	73

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff Lyndon Griffith (hereinafter the "Plaintiff") alleges causes of action relating to violations of New York State Labor Law 200, 240, and 241(6) and common law negligence against Defendants One Vanderbilt Owner, LLC ("One Vanderbilt"), SL Green Realty Corp. ("SL Green"), Tishman Construction Corporation of New York and Tishman Construction Corporation (hereinafter collectively "Tishman"). Plaintiff alleges in his Verified Bill of Particulars that he was injured on February 27, 2019, while employed as a construction worker, and working at 10 Vanderbilt Avenue, New York, N.Y. (hereinafter the "Premises" or "Project"). Specifically, the

Plaintiff alleges that he suffered personal injuries when he was struck by an unsecured piece of wood that fell on him.

The Plaintiff now moves (motion sequence #4) for an order pursuant to CPLR 3212 granting the Plaintiff summary judgment against the Defendants on the issue of liability in relation to alleged violations of Labor Law 200, 240(1) 241(6) and common law negligence. More specifically, the Plaintiff contends that the Defendants One Vanderbilt, SL Green and Tishman are liable under Labor Law 240(1) given that the Plaintiff was injured while employed as a construction worker at the Premises when a piece of wood fell and struck him. The Plaintiff argues that the wood was improperly or not secured. The Plaintiff also contends that Defendants One Vanderbilt, SL Green, and Tishman are liable under his Labor Law 241(6) claims. Specifically, the Plaintiff contends that the Industrial Code provisions he has cited relate to his accident and these provisions have been violated. The Plaintiff also seeks summary judgment in relation to his Labor Law 200 and common law negligence claims as against Tishman.

The Defendants oppose the motion. In opposition to the Plaintiff's motion, the Defendants argue that the Plaintiff failed to meet his burden regarding whether SL Green was an owner, contractor or agent subject to Labor Law 240(1) and 241(6) and did not move for summary judgment against SL Green on either its Labor Law 200 or common law negligence claims.¹ The Defendants also argue that the Plaintiff's motion should be denied as the Plaintiff failed to meet his *prima facie* burden regarding his Labor Law 240(1) claim as the piece of wood that fell was not hoisted or secured with a Labor Law section 240(1) safety device and did not fall because of

¹ As an initial matter, the Court notes that the Plaintiff has failed to show or otherwise address the argument that Defendant SL Green is not an owner, contractor or agent subject to the Plaintiff's Labor Law claims. Accordingly, the Plaintiff's motion is denied as to Defendant SL Green. *See Scckic v. SL Green Realty Corp.*, 132 AD3d 563, 565, 19 N.Y.S.3d 26, 29 [2d Dept 2015].

the absence or failure of such a device. The Defendants also argue that the Plaintiff's motion should be denied as to his Labor Law 241(6) claim as the Plaintiff failed to show that Industrial Code provisions 23-1.7(a)(1) and (2), apply to the facts or that a violation of this provision was a substantial factor in causing the Plaintiff's injuries. The Defendants oppose the Plaintiff's motion in relation to his Labor Law 200 and common law negligence claims and argue that the Plaintiff has failed to meet his *prima facie* burden and has not shown that the Defendants caused the condition at issue, had actual or constructive notice of the condition, or that they supervised, directed or controlled the means and methods of the Plaintiff's work.

“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, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 131 [1974]. 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. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [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 evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d

50 [2d Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Labor Law § 240(1)

Labor Law 240(1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

All contractors and owners and their agents ... 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.

Labor Law 240(1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured *worker* from harm directly flowing from the application of the force of gravity to an object or person.” *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]. Thus, the purpose of Labor Law § 240 (1) is “to protect construction workers not from routine workplace risks, but 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]. Also, the duty to provide “proper protection” against elevation-related risks is nondelegable; therefore, owners and contractors are liable for the violations of their agents even if the owners or contractors have not exercised supervision and control over the subject work

or the injured worker. *Rocovich*, 78 NY2d at 513. Lastly, this statute “is to be construed as liberally as may be” to protect workers from injury. *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 520–521 [1985], quoting *Quigley v. Thatcher*, 207 NY 66, 68 [1912]; see also *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011].

“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.” *Cacanoski v. 35 Cedar Place Assocs., LLC*, 147 AD3d 810, 812, 47 N.Y.S.3d 71, 73 [2d Dept 2017]. However, liability will not be found when “plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.” *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40, 823 N.E.2d 439, 441 [2004].

The Plaintiff sat for deposition on December 17, 2020 (NYSCEF Doc. 68). When asked who employed him on the date of the accident, the Plaintiff stated “Navillus Construction.” When asked when he started working with Navillus, the Plaintiff stated “I think 2018, October or November.” (Pages 24-25). When asked what his role and duties were at the Project, the Plaintiff stated “[s]tripper, laborer.” (Page 33). When asked what the Project involved, the Plaintiff stated, “[c]ommercial building.” When asked what Navillus’ role was on the Project, the Plaintiff stated, “[c]oncrete.” When asked who gave him his daily assignments, the Plaintiff stated, “Gregg, the foreman.” “He also stated that Greg worked for Navillus (Pages 37-39). He further stated that none of the named Defendants supervised his work. (Pages 40-41). When asked what floor he was working on at the time of his accident, the Plaintiff stated, “47th floor.” (Page 49). When asked what he was wearing on the date of the accident, he stated, “[h]elmet, eyeglasses, fluorescent vest, gloves, boots, regular work gear.” He also confirmed that his “helmet” was a hard hat. (Pages 53-54). When asked whether his accident happened before or after lunch, the Plaintiff stated,

“[b]efore.” (Page 56). When asked how the accident occurred, the Plaintiff stated, “I was hit with a four by four. It came from up top and hit me.” When asked what he was doing when his accident occurred, the Plaintiff stated, “I was waiting for my stripping bar. I was about to go for my stripping bar to head back up to the scaffold.” (Page 60). When asked where on his body he was struck by the four by four, the Plaintiff stated, “[i]n my head and neck.” (Pages 62-63). When asked what the ceiling height was from where the four by four fell, the Plaintiff stated, “[i]t could be about sixteen feet or more.” (Page 63). When asked what the length of the four by four was, the Plaintiff stated, “[i]t could be 16 feet, 14 feet or longer.” When asked how heavy the four by four was, the Plaintiff stated, “[a]bout 50 pounds or 80 pounds, it is pretty heavy.” (Pages 65-66). When asked whether there was an opening in the ceiling above him, the Plaintiff stated, “[y]es.” (Page 67). When asked whether he knew what caused the four by four to fall, the Plaintiff stated, “[s]omeone on top dropped it I guess.” (Page 69). When asked what could have prevented the occurrence, the Plaintiff stated, “[i]f they had covered the hole. Normally the hole is supposed to be covered and cautioned off.” (Page 70).

John Kolody sat for deposition on February 25, 2021 (NYSCEF Doc. 69). When asked whether Tishman Construction was his employer, Mr. Kolody stated, “[y]es, it is.” When asked how long he had worked for Tishman, Mr. Kolody stated, “I have been with Tishman since May of 2017.” (Page 7). When asked what his position was with Tishman, Mr. Kolody stated, “CCIP safety manager.” (Page 9). When asked what his duties were, Mr. Kolody stated, “[n]otification of incidences to the rest of the Tishman team, filing of injury or incident reports to our corporate office, tracking incidents, interfacing with medical care, and interfacing with our insurance carrier.” (Page 11). He stated that Tishman’s role at the project was “[c]onstruction management.” (Page 15). He also stated that his role at the Project was “[b]asically it was to assist the senior safety manager.” When asked how often he was at the Project in February of 2019, Mr. Kolody

stated “[e]very day.” When asked what he would do each day, Mr. Kolody stated, “conduct site audits, investigate accidents and incidents, attend toolbox talks- weekly toolbox talks with contractors, attend daily safety briefings that the contractors would hold.” (Page 21). When asked what he had determined, as a result of his interviews and investigation, regarding the nature of the Plaintiff’s accident, Mr. Kolody stated, “[i]t was determined that two Navillus workers, Craig Lyle and Justin Phillips, who were working up on the 48th floor were installing safety protection, basically covering some gaps between the floor and where the core was about to be poured on the 48th floor. And they were putting down pieces of 3 by 4 various lengths, and while they were doing it, they were trying to secure a piece of the 3 by 4 to the concrete wall. And as they were doing it they stated that it slipped and started to fall, and because one end was still partially attached, it caused the piece of wood to fall in a vertical fashion falling down to the ground.” (Pages 38-39). When asked why the workers were able to walk or work directly under the opening where a cover is being constructed, Mr. Kolody stated, “[t]here should be some kind of protection and there were no other incidences other than the one you’re referencing.” (Page 46).

The Plaintiff also relies on the affidavit of David Fielding (NYSCE Doc. 70). As part of his affidavit, David Fielding states that “[o]n February 27, 2019, I personally witnessed the accident of Lyndon Griffith.” Mr. Fielding also states that “[o]n that date, I was a laborer employed by Navillus Contracting and was working on the 47th floor with Mr. Griffith, a co-worker also employed by Navillus.” Mr. Fielding also stated that “[a]t the time of the accident, I personally observed Mr. Griffith walking towards the northeast wall/corner when a 3 x 4 piece of wood, known as a rib, fell through a gap from the 48th floor directly striking Mr. Griffith.” Mr. Fielding then stated that “[t]he rib was approximately 16 feet in length. The rib did not hit the floor prior to striking Mr. Griffith.” Mr Fielding also stated that “[o]n the date of the accident, there was no caution tape, warning signs or other warning devices on the 47th floor in the area of the accident.

There were also no safety nets or other protective devices to protect against objects falling through the floor.”

The Plaintiff has established his *prima facie* entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law 240(1) by submitting evidence that he was struck in the head by a wooden board when it fell through a hole from the floor above him and struck his head and shoulders. In *Escobar v. Safi*, the Appellate Division found that the Plaintiff met his *prima facie* burden on his Labor Law 240(1) claim by providing evidence that “the sheet of plywood fell from the hands of the plaintiff’s coworkers on the roof as it was being installed or about to be installed due to a failure to secure it, a theory advanced by the defendant.” *Escobar v. Safi*, 150 AD3d 1081, 1083, 55 N.Y.S.3d 350, 353 [2d Dept 2017]. In *Passos v. Noble Const. Grp., LLC*, the Court found that the Plaintiff had met its *prima facie* burden by showing that he was hit by an unsecured four-by-eight-foot plywood sheet that fell from the first floor ceiling onto the plaintiff as he was walking underneath.” *Passos v. Noble Constr. Grp., LLC*, 169 AD3d 706, 707, 93 N.Y.S.3d 132, 133 [2d Dept 2019]; see also *Rodriguez v. Waterfront Plaza, LLC*, 207 A.D.3d 489, 490, 172 N.Y.S.3d 38 [2d Dept 2022].

In opposition to the motion, the Defendants have failed to raise a material issue of fact that would prevent this Court from granting the Plaintiff’s application. The Defendants argue that since the board was not secured at the time the accident occurred, the Plaintiff does not qualify for protection under Labor Law 240(1). However, as the Court held in *Quattrocchi v. F.J. Sciamè Const. Corp.*, “‘falling object’ liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured.” *Quattrocchi v. F.J. Sciamè Const. Corp.*, 11 N.Y.3d 757, 758–59, 896 N.E.2d 75 [2008]. Accordingly, Plaintiff’s motion relating to his Labor Law 240(1) claim is granted.

Labor Law § 200, Common Law Negligence

Liability under Labor Law 200, relates to two different theories of liability. Liability may be found if the construction site at the premises is dangerous or unsafe or if the Defendant exercised supervision and control over the means and methods of the work. Under the theory of unsafe premises “a property owner may be held liable in common-law negligence and under Labor Law § 200 when the owner has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous defective condition while having actual or constructive notice of it.” *Korostynskyy v. 416 Kings Highway, LLC*, 136 AD3d 758, 759, 24 N.Y.S.3d 747, 748 [2d Dept 2016]. For injuries arising from the manner in which work is performed, the liability must be premised upon one having the authority to exercise supervision and control over the work. *See Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Hernandez v Pappco Holding Co.*, 136 AD3d 981, 982 [2nd Dept, 2016]; *Torres v City of New York*, 127 AD3d 1163, 1165 [2nd Dept, 2015]; *Gallelo v MARJ Distribs. Inc.*, 50 AD3d 734, 735 [2nd Dept, 2008]. “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.” *Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2nd Dept, 2013] quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2nd Dept, 2008]. “[T]he right to generally supervise the work, stop the contractor's 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.” *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709 [2nd Dept, 2015], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009], *affd.* 15 NY3d 869 [2010].

Turning to the merits of the Plaintiff's motion in relation to the Plaintiff's Labor Law 200 and common law negligence claims against Tishman, the Court finds that the Plaintiff has not provided sufficient evidence to establish his *prima facie* burden in relation to his Labor Law 200

and common law negligence claims. In the instant proceeding, the Plaintiff's claims are based upon an unsafe and dangerous condition that existed on the Premises. *Doto v. Astoria Energy II, LLC*, 129 A.D.3d 660, 663, 11 N.Y.S.3d 201, 205 [2nd Dept, 2015]; see also *Costa v. Sterling Equip., Inc.*, 123 A.D.3d 649, 997 N.Y.S.2d 704 [2nd Dept, 2014]. The Plaintiff does not appear to allege a means and methods theory of liability. Tishman in any event argues that under either analysis, the Plaintiff has not met his *prima facie* burden. Tishman contends that the Plaintiff has not shown that Tishman had supervisory authority over the Plaintiff. Additionally, Tishman argues that that the Plaintiff has failed to show that Tishman created the condition or had actual or constructive notice of it. General safety oversight is insufficient. See *Rodriguez v. BCRE 230 Riverdale, LLC*, 91 AD3d 933, 935, 938 N.Y.S.2d 146, 149 [2nd Dept, 2012]. The Court finds that the Plaintiff has not established a *prima facie* showing to support his common law negligence and Labor Law 200 claims. As a result, the Plaintiff's motion in relation to his common law negligence and Labor Law 200 claims is denied. *Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047, 947 N.Y.S.2d 566,571 [2nd Dept, 2012].

Labor Law § 241(6)

Labor Law 241(6) imposes on owners and contractors a non-delegable duty "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Perez v. 286 Scholes St. Corp.*, 134 AD3d 1085, 1086, 22 N.Y.S.3d 545, 546 [2d Dept 2015]; *Lopez v. New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 983, 999 N.Y.S.2d 848, 850 [2d Dept 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. See *Misicki v. Caradonna*, 12 NY3d 511, 515, 882 N.Y.S.2d 375,

377 [2009]; *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505, 601 N.Y.S.2d 49, 55 [1993]; *La Veglia v. St. Francis Hosp.*, 78 AD3d 1123, 912 N.Y.S.2d 611 [2d Dept, 2010]; *Pereira v. Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 N.Y.S.2d 220 [2d Dept 2010].

The Plaintiff contends that summary judgment should be granted as to his Labor Law 241(6) claim in relation to the violation of Industrial Code provisions NYCRR § 23-1.7(a)(1) and (a)(2). Industrial Code provisions NYCRR § 23-1.7(a) is entitled “Overhead hazards.” Sections (a)(1) and (a)(2) provides as follows:

(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

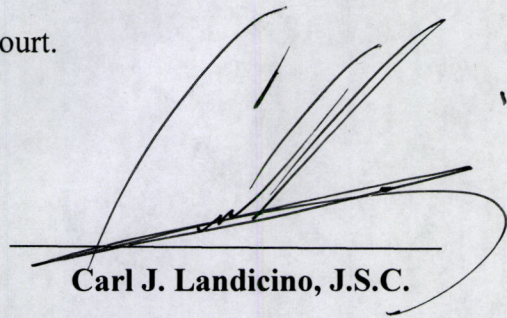
In the instant proceeding, as detailed above, the Plaintiff and Mr. Kolody testified that the Plaintiff was struck by a four by four that fell vertically from the 48th floor to the 47th floor through a gap in the upper story. NYCRR 23–1.7(a)(1) applies to areas “normally exposed to falling material or objects.” In the instant proceeding, “the plaintiff failed to demonstrate that the area where he was working was such an area and, therefore, whether that provision was applicable.” *Crichigno v. Pac. Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665, 127 N.Y.S.3d 309, 310 [2d Dept 2020]. Moreover, as Plaintiff’s claim relates to NYCRR 23–1.7(a)(2), there is at least an issue of fact regarding whether the Plaintiff’s accident occurred on in an area where “employees are not required to work or pass.” As a result, the Plaintiff’s motion is denied as it relates to his Labor Law 241(6) claim.

Based upon the foregoing, it is hereby Ordered that:

The Plaintiff's motion (motion sequence #4) for summary judgment on the issue of liability, as it relates to the Plaintiff's Labor Law 240(1) claim is granted as against Defendants One Vanderbilt Owner LLC and Defendants Tishman Construction Corporation of New York and Tishman Construction Corporation. As to the Plaintiff's Labor Law 241(6) claim, summary judgment on the issue of liability is denied. As to the Plaintiff's Labor Law 200 and common law negligence claims, summary judgment on the issue of liability is denied. The motion by the Plaintiff is denied in its entirety as against Defendant SL Green.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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