

Michael v T.G. Nickel & Assoc., LLC

2023 NY Slip Op 34902(U)

April 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 519024/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 519024/2019
Motion Date: 1-23-23
Mot. Seq. No.: 5

-----X
AARON MICHAEL,

Plaintiff,

-against-

DECISION/ORDER

T.G. NICKEL & ASSOCIATES, LLC and SITE 2 DSA
RESIDENTIAL LLC,

Defendants.
-----X

KINGS COUNTY CLERK
FILED
2023 APR 21 AM 11:00

Upon the following papers, listed on NYSCEF as document numbers 54-75 were read on this motion:

In this action to recover damages for personal injuries, defendants, Consigli & Associates, LLC f/k/a T.G. Nickel & Associates, LLC and Site 2 DSA Residential LLC, move for an order pursuant to CPLR 3212 dismissing plaintiff's complaint in its entirety.

The plaintiff, Aaron Michael, an employee of Taylor Made Contracting LLC ("Taylor"), commenced this action claiming that he was injured on November 7, 2018, when his right hand got caught in the gate of a scissor lift at a construction site located at 115 Delancey Street, New York, New York. He commenced the action against T.G. Nickel Associates, the Construction Manager, and Site 2 DSA Residential LLC, a beneficial owner of a portion of the subject premises. In his complaint, he alleged a cause of action under Labor Law 241(6) premised on a violations of Industrial Code, 12 NYCRR §§ 23-1.5(c) and 23-1.3, as well as a cause of action under Labor Law 200(1). On January 23, 2023, when the motion appeared for oral argument, the Court issued a short form order granting that branch of the motion for summary judgment dismissing the Labor Law 200(1) claim and reserved decision on that branch of the motion for summary judgment dismissing the Labor Law 241(6) claim.

The Accident.

At his deposition on December 16, 2020, the plaintiff testified that on the day of the accident, he was working as a taper for Taylor, who was hired to install sheetrock in the basement of the building under construction. As a taper, plaintiff's job was to smooth out the sheet rock after it was installed and to get it ready for painting. At the time of his accident,

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[* 1]

plaintiff was working on a scissors lift known as a MEC lift that consisted of a rectangular shaped metal platform that was approximately three feet wide and six feet in length and surrounded by railings on all sides. The platform could be raised and lowered by a motor. There was a gate located at the back for the lift which allowed workers to both enter and exit the platform. There were three steps built into the lift in front of the gate that led up to the platform. There was a metal latch attached to the gate, which was approximately two to three inches in length. On one end of the latch there is a metal knob that one would pull to move the latch away from the door frame so the door can open. According to the plaintiff, the latch was controlled by a tight spring inside the gate that allows the latch to move back and forth.

At the time of the accident, the plaintiff was using the MEC lift for the first time. At around 11:00 a.m. that day, plaintiff's supervisor, Gary White, told him to tape the sheet rock that had been installed on the northern wall. After receiving these instructions, the plaintiff got into the subject MEC lift, which was positioned along the northern wall, and was in the down position. The gate was already open. Plaintiff then entered the lift, closed the gate, and raised it to a height of eight feet. Plaintiff worked on the lift for approximately 40 minutes and then lowered the lift to its down position intending to exit the lift to get more compound.

To exit the lift, using his right hand (he was wearing gloves at the time), plaintiff pulled the latch attached to the gate approximately six to eight inches to the left to disengage the gate from the frame. Without warning, the latch suddenly snapped back to the right causing his right hand and wrist to come into contact with the frame of the lift causing plaintiff's middle and pointer fingers and the outer portion of his wrist to get caught between the end of the metal latch and the frame. The latch was "almost" fully extended to the left when it suddenly snapped back to right. His hand was got caught for a "split second" at which point he immediately pulled it out of the latch. When his hand became loose, the gate also opened towards him.

After the accident, the plaintiff saw that that the latch had come loose and was "freed out." He was not aware of any witnesses to the accident and did not know what caused the latch to suddenly move from the left to the right. Plaintiff returned to the accident scene and took four photographs of the subject lift but did not take any photographs of the latch that was involved in the accident.

Discussion:

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.”

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 N.Y.2d at 501–502, 601 N.Y.S.2d 49, 618 N.E.2d 82). Accordingly, it is well settled that in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Ares v. State*, 80 N.Y.2d 959, 960, 590 N.Y.S.2d 874, 605 N.E.2d 361; *see also Adams v. Glass Fab*, 212 A.D.2d 972, 973, 624 N.Y.S.2d 705).

Since the plaintiff limited his opposition to a claimed violation of Industrial Code section 12 NYCRR 23–1.5(c)(3), he waived any claim to the other provisions of the Industrial Code that he alleged were violated in his complaint and bill of particulars (*see Cardenas v. One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [“Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal”]).

“Since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law § 241(6) liability” (*Rizzuto v. Wenger Contr. Co.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *see Wrighten v. ZHN Contracting Corp.*, 32 A.D.3d 1019,

1021, 822 N.Y.S.2d 115, 116; *Amirr v. Calcagno Constr. Co.*, 257 A.D.2d 585, 586, 684 N.Y.S.2d 280).

12 NYCRR 23–1.5(c)(3) provides:

These general provisions shall not be construed or applied in contravention of any specific provisions of this Part (rule).

(c) Condition of equipment and safeguards...

- (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

To demonstrate entitlement to summary dismissing plaintiff's Labor Law 241(6) claim, it was incumbent upon the defendants to demonstrate, in the first instance, that either that 12 NYCRR 23–1.5(c)(3) was insufficiently specific to support a Labor Law § 241(6) claim, that 12 NYCRR 23–1.5(c)(3) does not apply to the facts of this case, that 12 NYCRR 23–1.5(c)(3) was not violated, or that any such violation was not the proximate cause of plaintiff's injuries (see, e.g., *King v. Villette*, 155 A.D.3d 619, 623, 63 N.Y.S.3d 500, 504; *Rivas-Pichardo v. 292 Fifth Ave. Holdings, LLC*, 198 A.D.3d 826, 156 N.Y.S.3d 85, 89).

Contrary to defendants' contention, 12 NYCRR 23–1.5(c)(3) is sufficiently specific to support a Labor Law § 241(6) claim (see *Misicki v. Caradonna*, 12 N.Y.3d 511, 520–521, 882 N.Y.S.2d 375, 909 N.E.2d 1213; *Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085, 1086, 22 N.Y.S.3d 545; see also *Williams v. River Place II, LLC*, 145 A.D.3d 589, 589–590, 43 N.Y.S.3d 347; *Becerra v. Promenade Apts. Inc.*, 126 A.D.3d 557, 558, 6 N.Y.S.3d 42). Defendants do not dispute that 12 NYCRR 23–1.5(c)(3) is applicable to the facts and circumstances of this case.

To demonstrate that 12 NYCRR 23–1.5(c)(3) was not violated, it was incumbent upon the moving defendants to show that the latch was “sound and operable” at the time of the accident. The Court finds that the defendants did not demonstrate this as a matter of law. Plaintiff's account of how the latch operated and his testimony regarding his post-accident inspection of the latch raise triable issues for fact as to whether the latch was sound and operable. The record also raises triable issue of fact as to whether any violation of 12 NYCRR 23–1.5(c)(3) was a proximate cause of plaintiff's injuries.

Accordingly, it is hereby

ORDERED that the branch of defendants' motion dismissing plaintiff's 2241(6) claim is DENIED.

This constitutes the decision and order of the Court.

Dated: April 20, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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