

Briceno v MIP One Wall St. Acquisition LLC
2023 NY Slip Op 35120(U)
December 18, 2023
Supreme Court, Queens County
Docket Number: Index No. 715660/2019
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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MAXIMILIANO BRICENO,

Plaintiff,

-against-

MIP ONE WALL STREET ACQUISITION LLC, and
J.T. MAGEN & COMPANY INC

Defendants.

Index
Number: 715660/2019

Motion Date:
July 11, 2023

Motion Seq. No.: 001

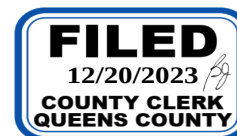
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MIP ONE WALL STREET ACQUISITION LLC. and
J.T. MAGEN & COMPANY INC.,

Third-Party Plaintiff,

-against-

NEW LAND INTERIORS CORP.

Third-Party Defendant.



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The following papers were read on this motion by defendants MIP One Wall Street Acquisition LLC, and J.T. Magen & Company Inc., for an order, pursuant to CPLR § 3212, granting said defendants summary judgment dismissing the complaint; and cross-motion by plaintiff for an order, pursuant to CPLR 3025(b), granting plaintiff leave to amend his bill of particulars to include an allegation of a violation of Industrial Code § 23-1.28, and have same deemed served nunc pro tunc.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....E61-76
Notice of Cross-Motion, Affirmation, Exhibits.....E77-81
Reply Affirmation.....E82

The Court, on its own motion, recalls the previous Decision and Order on this motion, dated October 10, 2023, and substitutes the following in its place and stead:

Upon the foregoing papers, it is ordered that this motion, and cross motion, are determined as follows:

On July 2, 2018, plaintiff was injured while performing demolition-related work at the subject premises, owned by defendant, MIP One Wall Street Acquisition LLC, and where defendant, J.T. Magen & Company, served as general contractor, and where plaintiff's employer, New Land Interiors (New Land), was a subcontractor. According to plaintiff's deposition testimony, the accident occurred as plaintiff and another employee were pushing a cart loaded with debris up a ramp, at which time one of the wheels "locked up" causing the cart to "tip," and plaintiff to suffer injuries when he attempted to stabilize it.

A proponent of summary judgment must make a prima facie showing of entitlement through the submission of sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 24 [1986]). Once the movant establishes prima facie entitlement to summary judgment, it is incumbent upon the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, 63 [1980]). Summary judgment is "a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

The first branch of defendants' motion seeks dismissal of plaintiffs's cause of action asserting a violation of Labor Law § 240(1), on the ground that plaintiff's injury was not caused by an elevation related risk. Plaintiff states he does not oppose this branch of defendants' motion. As such, the first branch of the motion, asserting a violation of Labor Law § 240(1), is granted, without opposition.

The second branch of the motion seeks dismissal of plaintiff's cause of action asserting a violation of Labor Law § 241(6), on the ground that the Industrial Code sections cited to by plaintiff in his pleadings, to wit: 12 NYCRR §§ 23-1.2(a), 23-1.2(e), 23-1.5(a), 23-1.8, 23-2.1(a), and 23-1.28, either lack specificity, or are not applicable to the facts of this case, alleging that there was nothing wrong with the wheels of the cart.

Labor Law § 241(6) imposes a non-delegable duty upon an owner, and/or general contractor, 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 (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]). "To prevail on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of a specific and concrete provision of the Industrial Code, and that such violation was a proximate cause of his or her injuries" (Fonck v City of New York, 198 AD3d 874 [2d Dept 2021]; see Toussaint v Port Auth. of New York and New Jersey, 38 NY3d 89, 94 [2022] [internal quotation marks omitted]).

Plaintiffs' opposition asserts that there is a question of fact as to whether defendants violated 12 NYCRR §§ 23.1.28(a) and (b). To the extent that plaintiff relied exclusively on those sections of the Rules in his opposition to defendant's motion, plaintiff waived opposition to the dismissal of the other Industrial Code sections cited to by defendants (see Cardenas v One State St., LLC, 68 AD3d 436, 438 [1st Dept 2009]).

Contrary to defendants' contention, plaintiff's general citation to 12 NYCRR §§ 23.1.28 in his bill of particulars does not preclude consideration of the specific subsections identified for the first time in plaintiff's opposition, i.e., (a) and (b)), as plaintiff's "belated allegation of a violation of [12 NYCRR 23-1.28(a) and (b)] involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants" (Kelleir v Supreme Indus. Park, LLC, 293 AD2d 513, 514 [2d Dept 2002]).

As pertinent to the claim herein, 12 NYCRR §§ 23.1.28(a), which concerns the "maintenance" of hand-propelled vehicles, states: "[h]and-propelled vehicles shall be maintained in good repair," and subsection(b), concerns "[w]heels and handles," stating, as applicable herein: "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles."

Defendants, in asserting there was no problem or issue with the wheels of the cart pushed by plaintiff, rely on the deposition testimony of non-party Jorge Luna, who was plaintiff's co-worker helping with the carts at the time of plaintiff's accident, and who attested that he did not observe any problem with the cart's wheels prior to plaintiff's injury.

Plaintiff testified, however, that the right wheel of the cart "stopped" while he was pushing, which caused the accident; that he frequently experienced difficulty with the wheels "stopping" and "dragging" while he pushed the carts; and that he had complained

about this problem to his supervisor prior to the time of his accident.

In light of the conflicting testimony between non-party, Luna, and plaintiff, defendants have failed to establish, prima facie, that 12 NYCRR 23.1.28(b) was inapplicable to the facts of this case, or that the alleged violation thereof was not a proximate cause of plaintiff's injuries.

As such, the second branch of defendants' motion, seeking summary judgment dismissing the cause of action asserting violation of Labor Law § 241(6), is denied, solely with regard to 12 NYCRR 23.1.28(b).

The third branch of defendants' motion seeks dismissal of plaintiff's common law negligence and Labor Law § 200 claims, on the ground that the accident did not involve a premises "defect," and that defendants did not have, or exercise any, any control over the manner in which the work was performed.

"Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work" (Chugui v Amna, LLC, 203 AD3d 1018 [2d Dept 2022]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (Sanchez v BBL Constr. Services, LLC, 202 AD3d 847, 849 [2d Dept 2022] [internal quotation marks omitted]). "When there are allegations involving the manner in which the work was performed, a property owner will be held liable only if it possessed the authority to supervise or control the means and methods of the work" (Saitta v Marsah Properties, LLC, 211 AD3d 1062, 1063 [2d Dept 2022] [internal quotation marks omitted]). "As to allegations involving dangerous or defective conditions on the premises where the work was performed, the property owner will be held liable if it either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" (Saitta v Marsah Properties, LLC, 211 AD3d 1062, 1064-65 [internal quotation marks omitted]).

Plaintiff contends that this action involved both the means and methods and the dangerous conditions categories of Labor Law § 200 claim. However, in plaintiff's deposition testimony, he identified only the "dangerous," defective wheels of the cart as the cause of the accident.

"[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]; see Pchelka v Southcroft, LLC, 178 AD3d 836 [2d Dept 2019]; Kusayev v Sussex Apartments Assoc., LLC, 163 AD3d 943, 945 [2d Dept 2018]).

Defendants rely on plaintiff's deposition testimony wherein plaintiff testified that he received work instructions only from the foremen employed by New Land. Defendants also annexed the deposition testimony of defendant J.T. Magen & Company, Inc.'s "assistant superintendent," George Shunick, who testified that New Land was solely responsible for the demolition work at the subject premises and that defendants did not provide any equipment for New Land's use. The right to generally supervise the work, or stop the work if a safety violation is noted, or to monitor compliance with contract specifications or safety regulations, is insufficient to impose liability under Labor Law § 200 or common law negligence (see Derosas v Rosmarin Land Holdings, LLC, 148 AD3d 988 [2d Dept 2017]; Messina v City of New York, 147 AD3d 748 [2d Dept 2017]). Defendants argue, among other things, that they did not supervise or control the work performed by New Land, nor was there any showing of actual or constructive notice of any dangerous condition at the work site. In opposition, plaintiff fails to raise an issue of fact demonstrating that defendants supervised or controlled the work performed by New Land.

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011], quoting, Chowdhury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]).

Defendants assert that they did not have notice of any alleged dangerous condition at the work site. In opposition, plaintiff raised facts to dispute such claim, sufficient to deny summary judgment on this issue, to wit: the testimony of Mr. Schunick, defendant J.T. Magen & Company, Inc.'s "assistant superintendent". Mr. Shunick testified that defendant J.T. Magen & Company were previously aware that carts similar to that used by plaintiff at the time of his accident that were deemed unusable due to the wheels on the cart stopping working.

As such, the third branch of the motion by defendants seeking summary judgment, and dismissal of plaintiff's common law negligence and Labor Law § 200 claim, is denied.

The cross motion by plaintiff seeks leave to amend the bill of particulars to assert specific violations of 12 NYCRR 23.1.28(a) and (b), in place and stead of generally stating 12 NYCRR 23.1.28.

"Leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise" (J.D.R.G. v Golden Brick Dev. JP, LLC, 2023 NY Slip Op 03340 [2d Dept 2023]). Plaintiff's proposed amendment asserting violations of 12 NYCRR 23.1.28(a) and (b) does not add any new factual allegations, or assert a new theory of liability, and does not prejudice defendant. Defendants have failed to oppose such amendment, and plaintiff has previously demonstrated the applicability of subsection (b) herein. As such, the cross motion by plaintiff seeking leave to amend the bill of particulars to assert violations of 12 NYCRR 23.1.28 (b), in place and stead of 12 NYCRR 23.1.28, is granted.

Accordingly, it is

ORDERED that the first branch of the motion by defendants seeking summary judgment, and dismissal of plaintiffs's cause of action asserting violation of Labor Law § 240(1), is granted in the absence of opposition and plaintiffs's cause of action asserting violation of Labor Law § 240(1) is hereby DISMISSED; and it is further,

ORDERED that the second branch of the motion, seeking dismissal of plaintiff's cause of action asserting violation of Labor Law § 241(6), is DENIED; and it is further,

ORDERED that the third branch of the motion, seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claim, is DENIED; and it is further

ORDERED that the cross motion by plaintiff seeking leave to amend the bill of particulars to assert violations of 12 NYCRR 23.1.28 (b), in place and stead of 12 NYCRR 23.1.28, is GRANTED.

This constitutes the Decision and Order of the court.

Dated: December 18, 2023



Denis J. Butler, J.S.C.

