McCormick v Dipersia
2024 NY Slip Op 30970(U)
March 25, 2024
Supreme Court, New York County
Docket Number: Index No. 156367/2018
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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KENNETH MCCORMICK,

Plaintiff,

- v -

JOHN DIPERSIA, COLLEEN DEPERSIA, NAVESINK PRESTIGE LIMITED LIABILITY COMPANY, SULLIVAN LAND SERVICES LTD.

Defendants.

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INDEX NO. 156367/2018

MOTION DATE 06/15/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action, plaintiff moves for summary judgment against defendants Navesink Prestige Limited Liability Company and Sullivan Land Services LTD on his Labor Law §§ 240(1) and 241(6) claims. Defendants oppose.

I. BACKGROUND

The following undisputed facts are taken from the parties' statement and counter-statement of material facts (NYSCEF 56, 69):

(1) On September 6, 2017, the date of plaintiff's accident, he was employed as a carpenter with non-party JSL Management, and was working at a construction site located at 167 Marine Way in Staten Island, New York;

(2) The construction site and project involved the "Build It Back" program and the goal was to elevate the existing home on a new foundation;

(3) Sullivan was the construction manager for the project, and it retained Navesink as the general contractor;

(4) On the accident date, the house was already raised off of the foundation and a trench had been dug beneath it and workers were excavating the trench;

(5) The accident occurred as plaintiff attempted to enter the trench;

(6) A "Foreman's 24-Hour Incident Report" reflects that as plaintiff stepped into the trench, he stepped onto a concrete slab that flipped and hit him on his leg, causing him to fall in the trench;

(7) A report written by Sullivan similarly recounts how the accident occurred, and also states, under "Contributing Factors," that the trench was 3 1/2 feet deep and the contractor should have provided a ladder, and in the section asking how a similar accident could be prevented in the future, it states "Ladder going into excavation";

(8) The report also identified the cause of the accident as "[plaintiff] should not have stepped on slab" and categorized it as resulting from human failure to adequately recognize hazards;

(9) During depositions taken in this case, one of defendant's witnesses testified that he was not aware of anyone instructing plaintiff to use a ladder to enter the trench or whether plaintiff refused or ignored any directives, and another witness testified that he did not know whether plaintiff refused to use any available equipment; and

(10) At the time of the accident, plaintiff had only been working at the site for that one day.

According to Navesink's part owner, the concrete slab was part of the house's existing walkway and would have been removed during the excavation. He also opined that the trench would generally measure between zero and three feet in depth (NYSCEF 48).

II. LABOR LAW § 240(1)

A. Contentions

According to plaintiff, the accident occurred when he attempted to step from a portion of concrete pavement next to the trench, and the concrete collapsed, causing him to fall into the trench, which was five to six feet in depth. Then the broken concrete hit him in the back of the leg and pinned him to the soil in the trench. His request for a ladder to enable him to safely enter the trench was denied by his foreman, who told him that JSL did not have any ladders available for him to use and that he should just jump down into the trench. Before his accident, he had entered and exited the trench as directed without issue. Plaintiff contends that both the collapse of the concrete and the concrete hitting him constitute violations of Labor Law § 240(1). He denies that he was the sole proximate cause of the accident or a recalcitrant worker (NYSCEF 40).

Plaintiff submits the expert opinion of an engineer, who states that, relying on plaintiff's estimate of the depth of the trench as five to six feet, that defendants were required to provide a safe means to access the trench, and that they failed to support or protect the trench's perimeter, and that their failure to do so caused plaintiff's accident (NYSCEF 55).

Defendants deny that they violated Labor Law § 240(1) as there are factual issues regarding the depth of the trench, and observe that their expert opined that the trench was no more than two feet deep. They also argue that it would have been contrary to the objectives of the work to cover the trench, which was being dug out at the time, and that to the extent the

injury was caused by the collapse of the concrete, it does not constitute an elevation-related risk sufficient to impose liability under Labor Law § 240(1). Defendants further assert that plaintiff caused the accident by stepping on the concrete despite having previously entered and exited the trench safely without touching the concrete, and they deny that the concrete was a "falling object" covered by the statute. They also maintain that plaintiff was working on ground level and therefore not on an elevated surface, and thus his work did not expose him to an elevation-related risk, and, in any event, plaintiff was the sole proximate cause of his accident (NYSCEF 70).

Defendants submit an expert report from a civil engineer, in which the engineer opines that the depth of the trench was no more than two feet and that, therefore, the trench did not pose an elevation-related risk and no ladder or other device was required (NYSCEF 61).

In reply, plaintiff contends that a ladder should have been provided and that it would not have been contrary to the work at issue to provide him with one, and denies he was the sole proximate cause of the accident or a recalcitrant worker (NYSCEF 71).

B. Analysis

"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]). The statute "was designed 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]), and therefore "applies to both 'falling worker' and 'falling object' cases" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259,

267 [2001]). A plaintiff's contributory negligence is not a defense (*Blake v Neighborhood Hous. Servs. of City of N.Y. City*, 1 NY3d 280, 286 [2003]).

However, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci*, 96 NY2d at 267). "Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*id.*). In falling object cases, whether Labor Law § 240(1) applies does not "depend upon whether the object has hit the worker … [but] whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc*., 13 NY3d 599, 604 [2009]). Thus, the plaintiff must demonstrate that the object fell while it was being "'hoisted or secured'" or "'required securing for the purposes of the undertaking,'" and "'the object fell … *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute'" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014] [internal citations removed]).

Plaintiff's fall into an unsecured trench represents the type of elevation-related risk covered by Labor Law § 240(1). In *Sunun v Klein*, the plaintiff was injured when he stepped in an excavated area of a trench and his leg sank into the ground up to the middle of his thigh. The Appellate Division, First Department, held that Labor Law § 240(1) had been violated as no safety devices were given to the plaintiff to "protect him against the gravity-related risk of descending a significant distance into the trench." (188 AD3d 507 [1st Dept 2020]; *see also Trillo v City of New York*, 262 AD2d 121 [1st Dept 1999] [Labor Law § 240(1) violated when plaintiff fell into trench after stepping on beam next to trench, which collapsed when soil gave way on side of trench]).

While defendants rely on caselaw from other Appellate departments for the proposition that a worker's fall into a trench or ditch does not constitute a covered accident under Labor Law § 240(1), the Appellate Division, First Department, has not so held, as recognized by the dissenting justice in *Salazar v Novalex Contr. Corp*., 72 AD3d 418 (2010) (r*ev'd on other grounds*, 18 NY3d 134 [2011]). The Appellate Division, First Department's determination is binding on this court (*Maple Med., LLP v Scott*, 191 AD3d 81 [2d Dept 2020] ["Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own department"]).

It is irrelevant to plaintiff's Labor Law § 240(1) claim whether there is a dispute between the parties about the depth of the trench (*see Demetrio v Clune Constr. Co., L.P*., 176 AD3d 621, 622 [1st Dept 2019] [witnesses' differing estimates of depth of trench, ranging from 3 feet to 15 feet, not dispositive as to whether accident resulted from significant elevation differential]).

Moreover, plaintiff's unrebutted testimony that he asked his foreman and coworkers for a ladder to help him enter the trench but was told none were available and he needed to just jump into the trench, establishes that he was neither the sole proximate cause of the accident, nor a recalcitrant worker (*see Asian v Flintlock Constr. Svces., LLC*, ___ AD3d ___, 2024 WL 1098407 [1st Dept 2024] [any negligence by plaintiff did not constitute sole proximate cause of accident, as he was following employer's instructions when injured]; *DaSilva v Everest Scaffolding, Inc*., 136 AD3d 423 [1st Dept 2016] [recalcitrant worker defense unavailing absent evidence plaintiff knew he was expected to use ladder or workers had practice of obtaining ladders for use]).

However, as it is undisputed that the trench was being excavated at the time of plaintiff's accident, and as it appears that the concrete slab was part of a walkway that was also being excavated, a triable issue is raised as to whether it would have been practical to maintain safety

devices around the trench or to brace or shore the walkway (*compare Demetrio,* 176 AD3d at 622 [where plaintiff fell in trench while working at site, defendant did not raise factual issue as to whether excavation work was being performed, which would have thereby rendered it "impracticable to maintain safety devices around the trench at the time"]; *Dias v City of New York*, 110 AD3d 577 [1st Dept 2013] [as work on trench had not yet commenced, defendants did not establish that safeguarding trench would have been contrary to objectives of plaintiff's work]; *with Salazar v Novalex Contr. Corp*., 18 NY3d 134 [2011] [finding it would have been illogical to require placement of protective cover over hole when work was being done on hole]).

For the same reason, even assuming that the piece of concrete that fell onto plaintiff in the trench constitutes a "falling object" within the meaning of Labor Law §240(1), there is a triable issue whether it was an object which required securing for the work being done, given the fact that it may not have been practical to secure the trench or to brace the concrete walkway.

Plaintiff is thus not entitled to summary judgment on his Labor Law § 240(1) claim.

III. LABOR LAW § 241(6)

A. Contentions

Plaintiff contends that defendants violated sections 23-4.2(a), 23-4.2(f), 23-4.2(g), and 24-4.3 of the Industrial Code, and thereby violated Labor Law § 241(6). Defendants deny the applicability of these particular Code sections.

B. Analysis

Labor Law § 241(6) "imposes a *nondelegable* duty of reasonable care upon owners and contractors '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" (*Rizzuto v L.A. Wenger Contr. Co*., 91 NY2d 343, 348 [1998]). To prevail on a

Labor Law § 241(6) claim, the plaintiff must establish that there was a violation of rule or regulation setting forth a specific standard of conduct, and that the violation was a proximate cause of the injury (*Buckley*, 44 AD3d at 268-269).

Given the differing estimates of the depth of the trench, defendants raise a triable issue as to whether 12 NYCRR 23-4.2(a) applies, as that subsection requires shoring and sheeting when a trench or excavation is five feet or more in depth, and additional protection if the trench is clay, sand, silt, loam or nonhomogenous soil and has sides or banks more than three feet but less than five feet in depth. The same is true for subsection 23-4.3, as that subsection pertains to excavations more than three feet in depth.

The photograph submitted by plaintiff in support of the motion does not sufficiently establish the depth of the trench (NYSCEF 52), and this Court does not consider the other photographs submitted by plaintiff (NYSCEF 72) as they were improperly submitted for the first time in reply (*see Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, fn 1 [1st Dept 2006] [photographs submitted in reply papers could not be considered on movant's prima facie case], *affd* 8 NY3d 931 [2007]).

As to 12 NYCRR 23-4.2(f), the subsection requires that "excavated material and other superimposed loads be placed at least 24 inches" back from an edge of an open excavation and placed so that it cannot slide, fall or roll into the excavation. Here, there is no evidence indicating whether the concrete slab was either excavated material or a superimposed load.

Subsection 23-4.2(g) requires that all sides or banks adjacent to any excavation be stripped and cleared of loose rock or any other material which may slide, fall, roll or be pushed upon any person located in such excavation. Again, there is no evidence that the concrete slab constitutes

"loose rock or any other material which may slide, fall, roll or be pushed" upon a person, or that it was part of a "side or bank" adjacent to the excavation, rather than part of the excavation itself.

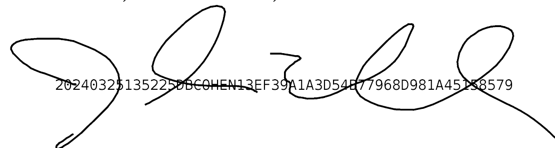
Plaintiff thus fails to establish that defendants violated any applicable Industrial Code provision, and is therefore not entitled to summary judgment on his Labor Law § 241(6) claim.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on liability on his Labor Law §§ 240(1) and 241(6) claims is denied; and it is further

ORDERED, that the parties appear for a settlement/trial scheduling conference before this Court on May 29, 2024 at noon, at 71 Thomas Street, Room 305, New York, New York.



3/25/2024
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED			[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[X] DENIED		[ ] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER			[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN			[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE