Marin v New York Life Ins. Co.
2024 NY Slip Op 31822(U)
May 28, 2024
Supreme Court, New York County
Docket Number: Index No. 154281/2016
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD G. LATIN, *Justice*	PART 46M
LUIS MARIN, Plaintiff,	INDEX NO. 154281/2016
- v -	MOTION DATE 02/10/2023
NEW YORK LIFE INSURANCE CO., CUSHMAN & WAKEFIELD, INC, JRM CONSTRUCTION MANAGEMENT LLC, Defendant.	MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiff's motion and defendants' cross-motion, both for summary judgment, are determined as follows:

PROCEDURAL BACKGROUND

In this action, plaintiff, Luis Marin, seeks damages for personal injuries he allegedly sustained on July 27, 2015. Plaintiff alleges that he fell from a "Baker scaffold" (the "Scaffold") while working on a construction project (the "Project") at a building located at 51 Madison Avenue, New York, NY 10010 (the "Premises"). Plaintiff alleges the Scaffold did not have railings, he was not provided with a harness, and that there were no anchor-points to which to attach his harness.

Plaintiff moves for summary judgment on his Labor Law §§ 240 (1) & 241 (6) claims against defendants. Defendants oppose and cross-move for summary judgment dismissing plaintiff's complaint.[1]

At the time of the accident, the Premises was owned by New York Life Insurance ("New York Life"). JRM Construction Management ("JRM") was the Construction Manager on the Project, and Cushman & Wakefield, Inc. ("Cushman & Wakefield") was the property manager for the Premises. Plaintiff was an employee of National Environmental Safety ("National"), a subcontractor hired by JRM to work on the Project.

Plaintiff's Deposition Testimony

Plaintiff appeared for depositions on August 21 and September 5, 2019 (NYSCEF Doc. No. 54). At the time of the accident, plaintiff was working for National (Plaintiff tr. at 44). His supervisor on the Project was Juan Saevedra, a National employee (*id.* at 49, 59). Plaintiff testified that on the date of the accident there were approximately eight other National employees working on the jobsite and that Saevedra was the supervisor for all of its employees (*id.* at 58, 96-97).

On the date of the accident, plaintiff arrived at the jobsite at approximately 6:00 p.m. (*id.* at 50). Saevedra gave plaintiff his work assignment, which required using a scaffold (*id.*at 59, 63). Saevedra instructed plaintiff to use the Scaffold, which National owned (*id.* at 62-63). The Scaffold was six feet high, with locking wheels and no railings (*id.* at 31-32, 62-63, 72). Plaintiff testified that he was not provided with a harness nor were there any anchoring points to secure a harness (*id.* at 66-68). Plaintiff did not know who assembled the Scaffold (*id.* at 72-73).

The accident occurred at approximately 7:30 p.m. (*id.* at 62). Plaintiff was using the Scaffold to cut down air conditioning ducts that were in the ceiling (*id.* at 63, 65). Plaintiff was

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[1] By stipulation dated November 8, 2017, the separate defendants discontinued all cross-claims and third-party claims asserted among them (NYSCEF Doc. No. 49).

standing on the Scaffold cutting sections of duct and letting them fall to the ground (*id.* at 65-66, 84).]Saevedra was holding the Scaffold the entire time that Plaintiff was on it (*id.* at 75-76). Saevedra moved the Scaffold while plaintiff was on top it so that plaintiff could cut different sections of duct (*id.* at 62, 74-75). Saevedra did not lock the Scaffold's wheels while he was holding and/or moving it (*id.* 75, 79, 96).

Plaintiff was on the Scaffold for approximately fifteen minutes immediately before the accident (*id.* at 66). As plaintiff was cutting a duct section, it fell and struck the Scaffold (*id.* 84-85). Plaintiff testified that when the duct hit the Scaffold, the Scaffold was pushed out from under him and he fell to the ground (*id.* at 85). He further testified that at the time of the accident Saevedra was holding the Scaffold and the wheels were not locked (*id.* at 84-85).

Deposition Testimony of Danny O'Conner, project director for JRM

Danny O'Connor appeared for deposition on October 12, 2021 (NYSCEF Doc. No. 55). At the time of the accident, JRM was the construction manager for the Project and employed O'Conner as the project director (O'Connor tr. at 8, 14). The Project was an abatement and buildout of one of the floors on the Premises (*id.* at 9). New York Life was JRM's client on the Project (*id.* at 15-16). JRM subcontracted National to do asbestos abatement work on the Project (*id.* at 26-27).

JRM was responsible for getting the Project completed according to the plans, hiring subcontractors, and maintaining the Project schedule (*id.* at 22-23). O'Connor had a superintendent and project manager who were responsible for overseeing the subcontractors on the Project (*id.* at 21). The superintendent held safety "toolbox talks" with the subcontractors and JRM gave out a safety manual to them (*id.* at 21, 23). Both the superintendent and project manager regularly walked through the worksite and had the authority to stop work if they saw unsafe work

practices (*id.* at 24-25). O'Connor testified that neither the superintendent nor the project manager ever stopped work on the Project (*id.* at 25).

O'Conner testified that JRM did not have any employees doing remediation or construction work on the worksite (*id.*at 18-20). Except for some garbage removal, subcontractors did all the remediation and construction work on the jobsite (*id.* at 18). O'Conner further testified that each subcontractor was responsible for their employees' safety on the worksite (*id.* at 23). JRM did not provide any construction or abatement equipment to the subcontractors (*id.* at 29). The subcontractors, including National, were required to provide their own materials and safety equipment (*id.* at 30). JRM did not have the authority to supervise National's work, nor was JRM allowed in the area of the abatement work (*id.* at 32-33).

O'Conner was not aware of the accident until after the instant action was filed (*id.* at 28-29).

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]).

If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law § 240 (1) claim

Plaintiff moves for summary judgment as to liability on his Labor Law § 240 (1) claim. Defendants oppose plaintiff's motion and cross-moves for summary judgment dismissing the claim on the basis that plaintiff's accident fell outside of the scope of the Labor Law.

Labor Law § 240 (1), also known as the Scaffold Law reads as follows:

"Scaffolding and other devices for use of employees

> "1. All contractors and owners and their agents, except owners of one and two-family dwellings 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) "imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" (*Barreto v Metropolitan Transp. Auth.,* 25 NY3d 426, 433 [2015]). Said liability applies to "injuries that are proximately caused by the failure to provide appropriate safety devices to workers subject to gravity-related risks" (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 111 [1st Dept 2022]).

"The mere fact that a worker falls from a ladder or a scaffolding is not enough, by itself, to establish that the device did not provide sufficient protection. The worker must show that Labor Law § 240 (1) was violated and the violation was a proximate cause of the injury." (*Nazario v 222 Broadway, LLC*, 135 AD3d 506, 508 [1st Dept 2016], citing *Blake v Neighborhood Hous. Servs.*

of N.Y. City, 1 NY3d 280, 289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Initially, defendants do not contest that they are proper Labor Law defendants.

Plaintiff argues that he meets his prima facie burden as he fell from the Scaffold while doing construction work, and defendants' failure to provide adequate safety rails, harnesses and/or anchors was the proximate cause of the accident.

Defendants further argue that plaintiff's accident does not fall within the scope of Labor Law § 240 (1). Defendants argue that the Scaffold did not fail, and the accident was caused by a duct falling and hitting the Scaffold.

Here, plaintiff has established prima facie that he was subjected to a gravity related risk, that defendants failed to furnish him with adequate safety equipment, and that said failure was a proximate cause of the accident. Specifically, plaintiff has established that he was working on the six-foot high Scaffold, which lacked railings and was thereby inadequate to protect him from a gravity related hazard. Further, defendants did not provide plaintiff with adequate safety equipment in the form of a harness and/or anchor points. Defendants' failure to provide plaintiff with adequate safety equipment proximately caused his accident.

Defendants have failed to establish that the accident does not fall within the scope of Labor Law § 240 (1), nor created an issue of fact on this point. Plaintiff's accident falls within the scope of Labor Law § 240 (1) (*see Buckley v Columbia Grammar & Preparatory,* 44 AD3d 263, 268[1st Dept 2007], citing *Nimirovski v. Vornado Realty Trust Co.,* 29 AD3d 762, 762 [2nd Dept 2006][Labor Law § 240 (1) applicable where foreseeable that pieces of metal that dropped to the

floor could strike scaffold on which plaintiff was working and cause it to shake, rendering scaffold inadequate to protect him; additional safety devices necessary]; *see also Munzon v Victor at Fifth, LLC*, 161 AD3d 1183, 1184 [2nd Dept 2018] [Labor Law § 240 (1) applicable where metal beam hit part of a wood beam on which the plaintiff was standing, causing him to fall between floors].

Here, it was foreseeable that the pieces of duct that were cut from the ceiling and allowed to drop to the floor could strike the Scaffold and cause it to move. The Scaffold lacked railings, and plaintiff was unable to maintain his balance once the Scaffold moved. Therefore, the Scaffold was inadequate to prevent plaintiff from falling when it suddenly moved. Further, plaintiff testified that there were no anchorage points upon which to attach a safety harness, and there is nothing from the record to dispute said testimony. As such, even if plaintiff had requested and/or been provided with a harness, it would have been inadequate to prevent the accident (*see Mena v 5 Beekman Prop. Owner LLC,* 212 AD3d 466, 467 [1st Dept 2023]; *see also Hoffman v SJP TS, LLC,* 111 AD3d 467, 467 [1st Dept 2013]).

In addition, defendants argue that plaintiff negligently allowed the falling duct to "mov[e] laterally against the scaffold" (Defendants' affirmation, NYSCEF Doc. No. 68). This argument is unpersuasive as there is nothing from the record to suggest that the duct moved laterally against the Scaffold.

Defendants' failure to provide adequate safety devices in violation of Labor Law § 240 (1) proximately caused the accident. Therefore, any alleged contributory negligence on plaintiff's part is not a defense to his Labor Law § 240 (1) claim (*see Sinera v Embassy House Eat, LLC,* 188 AD3d 549, 549 [1st Dept 2020]).

As such, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim; and defendants are not entitled to summary judgment dismissing the claim.

Plaintiff's Labor Law § 241 (6) claims

Plaintiff moves for summary judgment as to liability on that part of his Labor Law § 241 (6) claims predicated upon a violation of Industrial Code § 23-5.18 (b).

Defendants move for summary judgment dismissing all of plaintiff's Labor Law § 241 (6) claims.

Labor Law §241 (6) reads as follows:

"Construction, excavation and demolition work

. . .

> "6. 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

"Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors 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" (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 93 [2022] [internal quotations marks and citations omitted]).

The non-delegable duty is absolute and "imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993] [emphasis omitted]). "To establish liability 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 'mandating compliance with concrete specifications'" (*Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505).

Plaintiff does not oppose dismissal of his Labor Law § 241 (6) claims based upon any alleged violations other than Industrial Code § 23-5.18 (b). Accordingly, those claims are dismissed as abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]).

As such, the only Labor Law § 241 (6) claim before the Court is based upon the defendants' alleged violation of Industrial Code § 23-5.18 (b).

Industrial Code 23-5.18 (b)

Industrial Code 23-5.18 (b) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241 (6) (*See Ying Choy Chong v 457 W. 22nd St. Tenants Corp.,* 144 AD3d 591, 592 [1st Dept 2016], citing *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280- 281 [1st Dept 2005][Industrial Code 23-5.18 (b) applies to manually propelled scaffolds which require safety railings]) and reads as follows:

"Manually-propelled mobile scaffolds

> "(b) Safety railings required. The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule)."

Defendants argue that since Industrial Code 23-5.18 (b) fails to set a height at which railings are required on mobile scaffolds, it is too general to form a basis for a Labor Law § 241

(6) claim. This argument is unpersuasive as section 23-5.18 (b) has been found sufficiently specific to support a claim even though it has no height requirement (*Ying Choy Chong*, 144 AD3d at 592 ["The motion court also properly refused to dismiss plaintiff's Labor Law § 241 (6) claim insofar as it is predicated on Industrial Code (12 NYCRR) § 23-5.18 (b), which requires safety rails on manually propelled scaffolds without regard to the height of the scaffold"]).

As previously stated, plaintiff has established that the Scaffold, which was manually propelled, did not have railings in violation of Industrial Code 23-5.18 (b). That lack of safety railings was a proximate cause of the accident.

As such, plaintiff is entitled to summary judgment on his Labor Law § 241 (6) claim based upon an alleged violation of Industrial Code 23-5.18 (b); and defendants are not entitled to summary judgment dismissing the claim.

Plaintiff's Labor Law § 200 and common law negligence claims (motion sequence 002)

Defendants move to dismiss plaintiff's Labor Law § 200 and common law negligence claims. Plaintiff does not raise an argument in opposition to the dismissal of these claims.

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005] citing *Comes v N.Y. State Elec. & Gas Corp.,* 82 NY2d 876, 877 [1993]). "[T]here are 'two broad categories' of personal injury claims: 'those

arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed.'" (*Rosa v 47 E. 34th St. (NY), L.P.*, 208 AD3d 1075, 1081 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

> "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means [means and methods] of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work."

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 144 [internal citations omitted]; *see also Toussaint v Port Auth. of N.Y. & NY*, 38 NY3d at 94 [to recover under Labor Law § 200 "a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation"]).

Further, "when a worker's injury results from his or her employer's own tools or methods, it makes sense that a defendant property owner be liable only if possessed of authority to supervise or control the work, since such defendant is vested with the authority to remedy any dangers in the methods or manner of the work" (*Chowdhury v Rodriguez*, 57 AD3d 121, 130 [2d 2008]).

Here, plaintiff's accident arose from means and methods of the injury producing work. Specifically, plaintiff's supervised use of the unlocked Scaffold without safety rails and the manner in which the ducts were removed from the ceiling. As such, defendants would be negligent only if they actually supervised or controlled that injury producing work.

Defendants have established prima facie that they did not supervise or control National's work. Plaintiff testified that his supervisor, a National employee, directed his work and was even

holding the Scaffold at the time of the accident (Plaintiff's tr. at 49, 59, 74-76). There is nothing from the record to suggest that defendants exercised any such supervisory control over the work.

As such, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims.

The parties' remaining arguments have been considered and found unavailing.

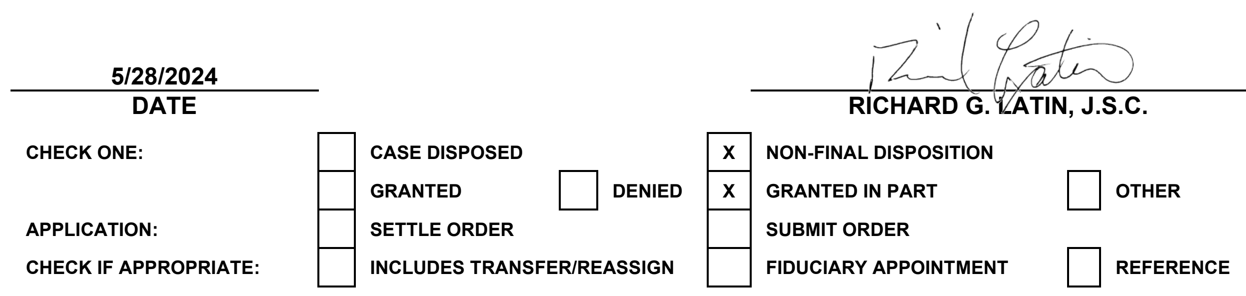
CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Luis Marin's motion for summary judgment pursuant to CPLR 3212 as to liability in his favor on his Labor Law §§ 240 (1), 241 (6) claims is granted to the extent that plaintiff is entitled to summary judgment against the defendants as to liability on his Labor Law § 240 (1) claim and Labor Law § 241 (6) claim based upon a violation of Industrial Code 23-5.18 (b); and it is further

ORDERED that defendants New York Life Insurance, Cushman & Wakefield, Inc., and JRM Construction Management's cross-motion for summary judgment pursuant to CPLR 3212 dismissing the complaint is granted to the extent that plaintiff's common law negligence claims, Labor Law § 200 claims, and Labor Law § 241 (6) claims based upon all violations of the Industrial Code, except for Industrial Code 23-5.18 (b) are dismissed.

The foregoing constitutes the Order and Decision of the Court.



5/28/2024
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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