Supreme Court of the State of New York
County of Kings

Part LL1M

ANDRES F. GOMEZ GALLEGO,

Plaintiff,

against

183 BROADWAY OWNER LLC, SL GREEN REALTY CORP., PAVARINI MCGOVERN, LLC, AND CAPITAL INTERIORS CONSTRUCTION CORP.,

Defendants.

Index Number 520178/2021
Seqs. 002, 004

DECISION/ORDER

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

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3–4
Replying Affidavits	5–6
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgement (Seq. 002) and defendants' motion for summary judgment (Seq. 004) are decided as follows:

Introduction & Factual Background

Plaintiff commenced this action for damages he claims were caused by a scaffold collapse on July 22, 2021. It is undisputed that 183 Broadway Owner LLC (Broadway) is the owner of the building at 185 Broadway New York, New York. Pavarini McGovern, LLC (Pavarini) was the construction manager for the project at the site.

Capital Interiors Construction Corp. (Capital) was a Pavarini sub-contractor hired to perform drywall and rough carpentry work at the project. Plaintiff was employed by a sub-sub-contractor, K&K Contracting Corp. (K&K Contracting) as a taper. K&K Contracting was retained by Capital.

Plaintiff testified as follows: On the date of his accident, plaintiff was applying compound to sheetrock in a unit of a large building that was under renovation (Gallego EBT at 38–39, 44). There was a toolbox talk four days before the plaintiff's accident, on his first day at the site, but there was no discussion of safety practices (*id.* at 49). Plaintiff was performing compound work throughout the apartment at the time of his accident which required the use of a scaffold (*id.* at 57–58). Based on plaintiff's deposition, the scaffold appears to have been a six-foot Baker scaffold (*id.* at 62). Plaintiff inspected the scaffold, which included checking whether the wheels were locked, whether the pins were in place, and shaking the scaffold "a little bit to make sure it was stable" (Gallego EBT at 63). The record does not contain any evidence that the plaintiff assembled the scaffold himself and no party that was deposed knew who assembled the scaffold. The plaintiff was not provided with a harness (*id.* at 66). After climbing on the scaffold and standing for approximately forty seconds, plaintiff claims that the scaffold platform collapsed causing him to fall to the ground (*id.* at 67–68).

Analysis

As an initial matter, defendants' cross-motion for summary judgment is untimely as it was filed 119 days after the Note of Issue. Defendants cite (New York County) Justice *David* Cohen's part rules which allow motions within 120 days of the Note of Issue; however, those are neither this part's rules, nor the rules in Kings County. The issue of timeliness was raised in plaintiff's opposition papers, however the defendants did not offer a *Brill* argument in their reply,[1] but instead maintained that the motion was timely under the incorrect Justice's Part Rules. Further, the cross-motion does not seek relief on "nearly identical grounds," instead seeking

[1] In any event, replies in further support of cross-motion are procedurally improper without prior leave of the court (CPLR 2214).

summary judgment on plaintiff's Labor Law §§ 241 (6) and 200 claims (*see Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]).

Labor Law § 240 (1)

Plaintiff seeks summary judgment on his Labor Law § 240 (1) claim. Plaintiff's testimony established prima facie: he was applying compound at a construction site from a scaffold and then the scaffold planking failed, causing his injuries (EBT at 38–39, 58, 64, 67–68). Plaintiff was not provided with a harness (*id.* at 66).

Defendants offer two arguments as to why plaintiff may have been the sole proximate cause of his accident and summary judgment should be denied. First, defendants argue that because plaintiff admitted that he did not inspect the wood platform before standing on the scaffold he was the sole cause of his fall (Gallego EBT at 62). Defendants provide no evidence that plaintiff's failure to inspect the scaffold was recalcitrance to a specific instruction he had been given and there is no evidence that plaintiff himself laid the wood planking or constructed the scaffold (*see Durmiaki v International Business Machines Corp.*, 85 AD3d 960 [2d Dept 2011]). Defendants' argument that plaintiff's failure to inspect the planking was the sole proximate cause of his accident fails as a matter of law.

Defendants' second argument is that the plaintiff may have caused the scaffold planking's instability by shaking it prior to using it. Plaintiff testified that he shook the scaffold "a little bit to make sure it was stable" (Gallego EBT at 63). Defendants contend that this action may have caused the planking to become unseated or otherwise defective and was therefore the sole cause of the plaintiff's accident. This argument fails for two reasons. First, it is speculative and not predicated on evidence before the court (*Morales v Amar*, 145 AD3d 1000 [2d Dept 2016]). Second, this argument fails to appreciate that the scaffold, as a safety device, must be so

constructed and placed that it provides "proper protection" (*see e.g. Cruz v Roman Catholic Church of St. Gerard Magella in Borough of Queens in the City of NY*, 174 AD3d 782 [2d Dept 2019]). If a scaffold that is meant to bear the weight of multiple workers is unable to withstand a single worker shaking it "a little bit," defendant cannot contend that that scaffold was in the first instance an adequate safety device under Labor Law § 240 (1) nor is this sufficient evidence that the plaintiff "[handled] the scaffold in such a manner as to . . . [cause] its collapse" (*Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500 [2d Dept 2014]). To the extent that plaintiff's actions may have rendered him comparatively at fault, comparative fault is not a defense under Labor Law § 240 (1) (*see Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]).

Defendants also argue that this is an unwitnessed accident—however, the fact that an accident is unwitnessed does not preclude summary judgment (*Cardenas v 111-127 Cabrini Apartments Corp.*, 145 AD3d 955, 957 [2d Dept 2016]). Defendants do not otherwise produce any evidence to overcome plaintiff's prima facie showing. Accordingly, plaintiff's motion is granted as to his Labor Law § 240 (1) claim.

Labor Law § 241 (6)

To maintain a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]).

Defendants cross-move for summary judgment on plaintiff's Labor Law § 241 (6) claim. Plaintiff's Labor Law § 241(6) claim is based on Industrial Code sections 23-1.7 (b), (f); 23-1.8; 23-1.15; 23-1.16(b), (d), (e), (f); 23-1.17(b)-(e), 23-5.1(b), (c), (e), (f), (g), (h), (j); 23-5.3(d), (e),

(g) and 23-5.18(a)-(g). Plaintiff only raises opposition to summary judgment on his Labor Law § 241 (6) claim as predicated on Industrial Codes 23-5.1 (c) (1), 5.1 (e) (1), and 5.18 (a). The relevant portion of these provisions read:

23-5.1
- Section 23-5.1 (c) (1) requires a scaffold be "so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."
- Section 23-5.1 (e) (1) requires scaffold planks to "be laid tight" and "inclined planking shall be securely fastened in place."

23-5.18
- Section 23-5.18 (a), regarding a manually propelled mobile scaffold, requires that the scaffold platform "shall be tightly planked for the full width of the scaffolds except for necessary access openings."

In light of the plaintiff's testimony that the planking failed, there are questions of fact as to whether the planking satisfied the specific requirements of these three provisions of the Industrial Code. Although defendants' cross-motion is untimely, since the motion is unopposed as to certain provisions of the Industrial Code, the motion is granted as to those provisions in the interest of efficiency. As to the remainder (12 NYCRR 23-5.1 [c], [e], and 5.18 [a]), defendants' motion is denied both due its untimeliness and on the merits.

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Defendants also cross-move for summary judgment on plaintiff's Labor Law § 200 claims. Besides the blanket opposition as to timeliness, plaintiff does not substantively oppose

summary judgment on his Labor Law § 200 claims as to either Broadway, the owner, or Pavarini, the construction manager.

Defendants argue that plaintiff's work was directed, controlled, and supervised by his employer and that Capital, Pavirini, and Broadway did not have the prerequisite authority to be held liable under Labor Law § 200, and that there is no evidence that any of these parties had actual or constructive notice of a dangerous condition at the site.

Plaintiff opposes on the grounds that Capital's foreman Arekadiusz Builicz performed a daily meeting where he went over safety topics and had a supervisory role over K&K employees (Builicz EBT at 22; 27–28). Mr. Builicz performed quality, progress, and safety walk-thrus on the site daily (Builicz EBT at 18; 32–33; 42). Mr. Builicz had ability to stop work right away if he saw something unsafe (Builicz EBT at 42). Additionally, the underside of the plank that allegedly failed was stamped with the word "Capital."

Capital was an agent of the general contractor, Pavarini, as demonstrated by the fact that Capital hired K&K and supervised the work plaintiff was performing (Builicz EBT at 27). There is therefore a question of fact as to whether Pavarini had sufficient authority and control over plaintiff's work for liability to obtain under Labor Law § 200.

Accordingly, defendants' Capital and Pavarini's motions are denied as to plaintiff's Labor Law § 200 claim; defendant Broadway's motion is granted as to this claim only.

Conclusion

Plaintiff's motion for summary judgment (Seq. 002) is granted; defendants' motion for summary judgment (Seq. 004) is granted as to the Industrial Code provisions outlined above and as to Labor Law § 200 against defendant Broadway only, the motion is otherwise denied.

This constitutes the decision and order of the court.

July 12, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court

[This is the final page of the summary judgment decision in *Gallego v 183 Broadway Owner LLC*, 520178/2021, granting motion sequence 002 and granting in part motion sequence 004.]