

Pellecchia v Forte Constr. Corp.

2024 NY Slip Op 32745(U)

August 5, 2024

Supreme Court, New York County

Docket Number: Index No. 159957/2021

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02M

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PAUL PELLECCCHIA,

Plaintiff,

- v -

FORTE CONSTRUCTION CORP., EMIS
CONSTRUCTION GROUP INC.,FORTE EMIS JOINT
VENTURE

Defendant.

INDEX NO. 159957/2021

MOTION DATE 12/20/2023,
12/27/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 77, 79, 80, 81, 82, 83, 84

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 85

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

In this action asserting Labor Law §§ 240(1), 241(6), and 200 claims, defendants Forte Construction Corp. (“Forte”), Emis Construction Group Inc. (“Emis”), and Forte Emis Joint Venture (“Joint Venture”) (collectively “Defendants”) move for summary judgment pursuant to CPLR 3212 dismissing Plaintiff’s Complaint in its entirety. Plaintiff Paul Pelleccchia (“Plaintiff”) opposes the motion and moves for summary judgment on his Labor Law § 240(1) cause of action. The motions are consolidated herein for disposition.

Plaintiff alleges he was injured while working as an electrician for nonparty IDL Communications & Electric, Inc. (“IDL”) at East River Houses on 101st Street and Second Avenue. Forte and Emis formed the Joint Venture, which was retained by NYCHA to act as general contractor. IDL was subcontracted by the Joint Venture to perform electrical work.

Plaintiff alleges he was working in the basement of Building #8 on July 10, 2019 installing electrical conduits into an open ceiling. This required him to use an A-frame ladder. Plaintiff testified that the ladder shifted as he was descending, causing him to fall. When he landed, his leg fell into a hole in the cement floor near the ladder's base (NYSCEF Doc. No. 39, Plaintiff EBT, 43-45). He testified that the hole had been covered with plywood, that he had not noticed it before his accident, and that, to his knowledge, IDL did not create the hole (*id.* at 45-46, 59-60). Plaintiff maintains the ladder did not lose stability because of the hole (*id.* at 50).

On a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendants first argue that the entire Complaint must be dismissed as against Forte and Emis because they are not proper parties, on the grounds that the Joint Venture was the general contractor for purposes of the Labor Law. As parties to a joint venture are liable for acts committed by other members in the venture, this branch of the motion must be denied (*see Kauffman v Turner Constr. Co.*, 195 AD3d 1003 [2d Dept 2021]).

Labor Law § 240(1) “places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks” (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]). “The 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]).

A defendant's failure to properly secure a ladder to "ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Montalvo v J. Petorcelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]). A plaintiff does not need to "prove that the ladder was defective to make a prima facie showing" (*Rivera v Suydam 379 LLC*, 216 AD3d 495, 495-496 [1st Dept 2023], citing *Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013]). "The fact that plaintiff was the only witness to his accident does not preclude summary judgment in his favor" where "nothing in the record controverts his account of the accident or calls his credibility into question" (*Rroku v West Rac Contr. Corp.*, 164 AD3d 1176, 1177 [1st Dept 2018]).

Plaintiff satisfies his prima facie burden as to Defendants' liability under Labor Law § 240(1) by submitting his testimony that he was working on a ladder that shifted and caused him to fall. The Court finds that Defendants' opposition fails to submit evidence creating an issue of fact. They present an affidavit from an IDL foreman stating that Plaintiff only mentioned falling into a hole at the time of his injury (NYSCEF Doc. No. 76). This does not contradict Plaintiff's testimony that he fell off the ladder and then into the hole in the basement floor. Accordingly, Plaintiff's motion for summary judgment on his § 240(1) cause of action is granted as against all Defendants, and the corresponding branch of Defendants' motion is denied.

Defendants further move for summary judgment dismissing Plaintiff's Labor Law § 241(6) cause of action. Section 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection to persons employed in . . .

all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a defendant’s liability under Section 241(6), “a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494).

Plaintiff specifically alleges that Defendants violated Industrial Code §§ 23-1.7(e)(1) and (2) and 23-1.7(f). 12 NYCRR § 23-1.7(e) requires statutory agents to keep passageways and working areas free from accumulations of dirt and debris and other obstructions that might cause tripping, while § 23-1.7(f) requires that safe means of access be provided to access working levels above or below ground. The Court finds that these Industrial Code provisions are not applicable to Plaintiff’s injury, as it was not caused by debris or obstructions in a passageway or working area and did not occur when he was trying to access another working level (*see Miranda v NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 AD3d 445, 446 [1st Dept 2014]).

The last branch of Defendants’ motion seeks dismissal of Plaintiff’s Labor Law § 200 and common law negligence causes of action. Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where a dangerous premises condition or existing defect causes an injury, “liability attaches if the owner or general contractor created the condition” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012]). “Where the injury was caused by the manner and means 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” (*id.* at 144). An owner or general contractor will not be

liable under a method and means theory where they “at most exercised general supervisory powers over plaintiff” (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). The “mere presence” of an owner’s or general contractor’s personnel on a work site is “insufficient to infer supervisory control” (*id.*; *Philbin v A.C. & S., Inc.*, 25 AD3d 374 [1st Dept 2006]).

The Court finds issues of fact preclude summary judgment on the § 200 cause of action. The Forte employee who served as construction executive for the project testified that the Joint Venture employed a site safety manager who was to perform walkthroughs of the work area (NYSCEF Doc. No. 40, Tsiokas EBT at 14, 21, 29). This person had the authority to stop work if he observed a dangerous condition, and the Joint Venture held this authority generally (*id.* at 29-30). This raises questions as to whether Defendants had supervisory control of the work that caused Plaintiff’s injury as well as whether Defendants were aware of the hole into which Plaintiff’s leg fell. This branch of Defendants’ motion is therefore denied.

Accordingly, it is hereby:

ORDERED that Defendants’ motion (Motion Sequence 001) is granted as to the extent of dismissing Plaintiff’s Labor Law § 241(6) cause of action and otherwise denied; and it is further

ORDERED that Plaintiff’s motion (Motion Sequence 002) for summary judgment on his Labor Law § 240(1) cause of action is granted in its entirety.

This constitutes the Decision and Order of the Court.



8/5/2024
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE