Pimentel-Chavez v New York City Sch. Constr. Auth.
2024 NY Slip Op 32772(U)
August 1, 2024
Supreme Court, Kings County
Docket Number: Index No. 529976/2021
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings
Part LL1

JULIO PIMENTEL-CHAVEZ

Plaintiff,

against

THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, THE NEW YORK CITY BOARD OF EDUCATION, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY, AKM CONSTRUCTION SERVICES CORP.

Defendants.

Index Number **529976/2021**
Seqs. 004–005

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 judgment (Seq. 004) and defendant's motion for summary judgment (Seq. 005) are decided as follows:

Introduction & Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on June 10, 2021, after a fall at a construction site located at 875 Williams Avenue, Brooklyn. Plaintiff moves for summary judgment against the defendants under Labor Law § 240 (1). The New York City School Construction Authority (NYCSCA), The New York City Board of Education, The New York City Department of Education (the DOE), The City of New York, and AKM Construction Services Corp. (collectively "defendants") move for summary judgment to dismiss plaintiff's Labor Law §§ 200, 240 (2), and 241 (6) claims. This action was previously discontinued against defendant New York City Housing Authority, pursuant to a stipulation signed by all parties.

It is undisputed that the DOE owned the construction site located at 875 Williams Avenue and that NYCSCA was the construction manager of the project. NYCSCA's representative performed daily visits to produce progress reports and possessed stop-work authority (Llewellyn Lennon, NYCSCA project officer, EBT at 16). NYCSCA hired AKM Construction as a general contractor (Amarjit Malhi, AKM's president, EBT at 15). AKM sub-contracted non-party Everlast Scaffolding (Everlast) to install scaffolding and sidewalk bridges (*id.* at 16, 17). It is undisputed that plaintiff was employed by Everlast.

Plaintiff testified as follows: At the time of his accident, plaintiff was constructing scaffolding at the site on top of a fourteen-foot-tall sidewalk bridge (Pimentel EBT at 33, 54). Plaintiff was wearing a harness and lanyard (*id.* at 70). Plaintiff was working with co-worker Samuel Confessor and both were being supervised by their foreman Hector Perez (Pimentel EBT at 37). Mr. Confessor and Mr. Perez were both employed by non-party Everlast, which also employed the plaintiff.

At the time of the accident, Mr. Confessor was helping plaintiff build the scaffolding. Plaintiff and Mr. Confessor were looking at the scaffold frame to see if it was too tight (Pimentel EBT at 92). Mr. Confessor was standing in front of the plaintiff, holding the frame and trying to see if he needed to make adjustments (*id* at 94–95). Plaintiff walked backwards to look at the frame, tripped on the toe-board, and fell approximately fourteen feet to the ground below (*id.* at 74, 92, 95). It is undisputed that there was no safety railing or wall around the perimeter of the sidewalk bridge. Mr. Confessor claimed that "the perimeter protection was in the process of being erected when this incident took place" (Confessor sworn statement).

Plaintiff testified that there was no place to tie off his harness or lanyard (Pimentel EBT at 73). Mr. Confessor claims to have observed other Everlast workers

tied-off to the frame of a scaffold sixteen to twenty feet away from where he and plaintiff were working (Confessor sworn statement at ¶¶ 4–6) but does not comment on whether it would have been possible for plaintiff to tie off to the scaffold and perform his assigned task. Mr. Confessor merely says that these other workers were "passing materials" and that "only [plaintiff and he] were working together in this particular area" (*id.*). Mr. Confessor also claims to have been wearing a harness and lanyard, but notably does not say that he was tied off to any anchor point (*id.*). Mr. Perez, the Everlast foreman who would have had authority over both the plaintiff and Mr. Confessor, confirmed plaintiff's contention that "[plaintiff] was not tied off at the time as there was nowhere to tie off yet" (Perez aff. at ¶¶ 21–22). Plaintiff claims that just before his fall he voiced this concern directly to Mr. Perez (*id.* at 75–77). Plaintiff further contends that Mr. Perez told him to continue working or go home (Pimentel EBT at 76).

AKM superintendent, Authrav Gosavi, claims that at around 6:00 pm on the date of the occurrence he told Mr. Perez that everyone had to tie off (Gosavi sworn statement at ¶ 1). Mr. Gosavi further claims that he reminded the workers at 2:30 pm daily to tie off and that workers could tie off to the scaffold as it could support 5000 pounds (*id.*). Mr. Gosavi said he had previously seen other Everlast workers tied off to the scaffold (*id.*). Mr. Gosavi does not claim to have spoken directly to the plaintiff.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the

non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure or absence of a safety device enumerated by the statute (*e.g.* a harness and tether) is the proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500 (1993)]).

Plaintiff contends that defendants violated Labor Law § 240 (1) and that his accident was caused by that violation. First, plaintiff and his foreman testified that there was not a secure place to tie off, and plaintiff testified that he was told to keep working when he voiced concern about this issue.[1] Second, plaintiff contends that he fell because there were no walls or safety railings in place (Pimentel 50-h hearing at 83). There is no dispute about the absence of walls or a safety railing around the sidewalk shed. Plaintiff's testimony that he was exposed to an elevation-related risk, that the statute was violated due to the absence of a sufficient place to tie off and adequate perimeter protection, and that he fell due to these statutory violations is sufficient to satisfy his prima facie burden for summary judgment on his Labor Law § 240 (1) claim.

In opposition, defendants argue that the plaintiff could have tied off on the scaffold itself, citing to Mr. Confessor's and Mr. Gosavi's statements that they observed other Everlast workers

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[1] Mr. Perez's statement is not accepted for the truth of whether or not he would actually have sent plaintiff home, but rather for the effect that it had on plaintiff's behavior—to wit, to determine whether or not plaintiff was a recalcitrant worker. The statement is, therefore, not hearsay and is admissible (*see People v Gibian*, 76 AD3d 583 [2d Dept 2010]).

tied off to the scaffold. However, defendants overstate the significance of these statements. Plaintiff's and Mr. Confessor's supervisor, Mr. Perez, admits that "there was no place to tie off yet" where plaintiff was working (Perez aff. at ¶¶ 21–22). Mr. Confessor was not plaintiff's supervisor and does not claim to have given plaintiff any direction about where to tie off. Moreover, Mr. Confessor does not claim to have been tied off himself, instead only stating that he was wearing a lanyard and harness. Mr. Confessor also points out that the other Everlast workers he observed tied off to the scaffold were sixteen to twenty feet away, not working in the same area as he and the plaintiff. Neither Mr. Confessor nor anyone else on site claimed that the plaintiff or Mr. Confessor could have tied off where the other Everlast workers tied off, and it therefore cannot be inferred that the same anchoring point was available to the plaintiff. Plaintiff testified that he was not provided with a longer lifeline to connect to the building itself, indicating that even if he had been told to tie off where the other workers were tethered he did not have adequate equipment to do so (Pimentel EBT at 73–74).

Mr. Gosavi's sworn statement also does not create an issue of fact. Mr. Gosavi's contention that he gave instructions to Mr. Perez does not indicate that Mr. Perez actually told the plaintiff to tie off that day—that fact would have to be demonstrated by someone with actual knowledge of Mr. Perez's instructions. This contention also does not demonstrate that plaintiff was given adequate equipment to tie off where other Everlast workers did. The same issues are true of Mr. Gosavi's contentions about his general practice of reminding workers to tie off. Finally, as is true of Mr. Confessor's statement, Mr. Gosavi's observation of other workers sixteen to twenty feet away from plaintiff tied off to the scaffold does not warrant an inference that plaintiff could have tied off to the scaffold, either in the area he was working or at the remote location where the other workers had tied off.

Second, defendants argue, without support from the record, that there was not a wall or safety railing on the sidewalk shed only because the scaffold was under construction and because plaintiff himself was tasked with building the perimeter protection. Mr. Confessors' statement that the perimeter protection was under construction does not explain why perimeter protection could not be completed before the scaffold was erected in order to protect the workers assigned to construct the scaffold. Moreover, there is no evidence that plaintiff himself was responsible for installing the perimeter protection. Without an evidentiary basis, defendants' arguments are unavailing.

A secure place to tie off is integral to a harness and lanyard serving as proper safety devices. As there is no evidence that plaintiff was provided with an adequate anchoring point for his lanyard, it follows that he was not provided with an adequate safety device to prevent his fall. It is also unrebutted that there were no safety railings or walls in place along the sidewalk shed. The lack of perimeter protection constitutes an additional statutory violation which contributed to plaintiff's fall. Therefore, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is granted.

Labor § 240 (2)

Defendants move for summary judgment to dismiss plaintiff's Labor Law § 240 (2) claim. The section does not apply, and plaintiff does not oppose the dismissal of his § 240 (2) claim (aff in opp. at 2 n.2). Therefore, defendants' motion for summary judgment is granted to the extent that plaintiff's Labor Law § 240 (2) claim is dismissed.

Labor § 241 (6)

Labor Law § 241(6) requires that owners and contractors provide reasonable and adequate protection and safety to workers. Still, a defendant that is liable under Labor Law §

240 (1) may not necessarily be liable under Labor Law § 241 (6). The former imposes liability when plaintiff suffers harm due to any absence of an adequate safety device or the presence of an inadequate safety device. The latter requires the plaintiff to prove that he suffered harm due to the violation of a sufficiently specific section of the Industrial Code (see *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501–502 [1993]).

To prevail on 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 move for summary judgment on plaintiff's Labor Law § 241 (6) claim. Plaintiff only opposes defendants' motion as to three Industrial Code provisions: 12 NYCRR 23-1.18 (b) (2), 1.22 (c) (2), and 5.1 (j) (1). Notably, plaintiff does not oppose the motion as to any of the Industrial Code provisions that concern lifelines, tail lines, or other safety tethers.

Rule 5.1 (j) (1) pertains to scaffold platforms and requires that all open sides be provided with safety railings. As plaintiff's claims are based on his fall from a sidewalk bridge, and not from a scaffold, defendants' motion is granted as to this rule.

Rule 1.18 (b) (2) concerns sidewalk shed construction and requires the outside edge and ends of the deck of every sidewalk shed should be provided with a substantial enclosure of at least 42 inches. Rule 1.22 (c) (2) requires every platform more than seven feet above the ground to have an installed safety railing on all sides. Defendants contend that the perimeter protection was in the process of being constructed and therefore plaintiff cannot recover due the absence of proper safety protection. However, defendants overstate the contents of Mr. Confessor's statement. Mr. Confessor merely says that "there was no perimeter protection, since the scaffold

was being erected." This statement does not establish that completion of the perimeter protection was somehow necessarily predicated upon completion of the scaffold nor does it place the responsibility for constructing the perimeter protection on the plaintiff, which could make it integral to his work. Defendants have failed to demonstrate their prima facie entitlement to summary judgment as to these two provisions of the Industrial Code.

Defendants' motion is, therefore, granted to the extent of dismissing every alleged violation of the Industrial Code except Rules 1.18 (b) (2) and 1.22 (c) (2); the motion is denied as to these two provisions.

Labor Law § 200

Defendants move for summary judgment to dismiss plaintiff's Labor Law § 200 claim. "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]). "[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." (*id.* at [internal citations omitted]). The law requires only that a party have the authority to control the means and methods of the work; that party does not need to have actually exercised that authority (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–19 [1981]).

Mr. Lennon testified that NYCSCA performed daily visits for progress reports and possessed stop-work authority (Lennon EBT at 16). Furthermore, Mr. Gosavi was on the site

daily and instructed employees on how to perform their duties including with regards to safety (Gosavi sworn statement). The President of AKM, Amarjit Malhi, testified that Mr. Gosavi had authority over safety procedures (Malhi EBT at 25). Moreover, the lack of safety railings or walls on the sidewalk shed and the lack of viable secure anchoring points were easily observable dangerous conditions at the site. Because questions of negligence are ordinarily fact-specific, they do not usually warrant summary judgment (*see Ugarriza v Schmieder*, 46 NY2d 471 [1979]). Here, there are at a minimum triable questions of fact regarding the authority of the defendants to control plaintiff's work and as to the notice, constructive or actual, that the parties had of the dangerous condition.

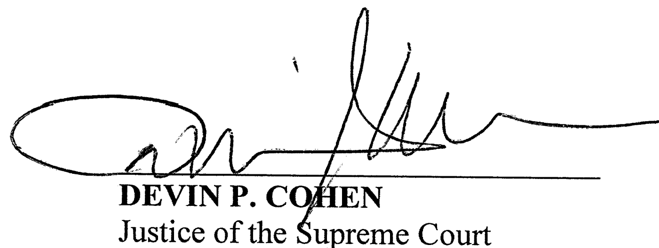
Defendant's motion for summary judgment is therefore denied.

Conclusion

Plaintiff's motion for summary judgment (Seq. 004) is granted.

Defendants' motion for summary judgment (Seq. 005) is granted to the extent of dismissing all alleged Industrial Code violations except for Rules 1.18 (b) (2) and 1.22 (c) (2). The remainder of the motion is denied.

This constitutes the decision and order of the court.



August 1, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court