

Lazo v Bedford Ave. Assoc. LLC

2024 NY Slip Op 34603(U)

December 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 533070/2021

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 533070/2021
Seqs. 003, 004

Part LLIM

DECISION/ORDER

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

JUAN LAZO,

Plaintiff,

against

BEDFORD AVENUE ASSOCIATES LLC AND LEEDING BUILDERS LLC,

Defendants.

Papers Numbered

Notice of Motion and Affidavits Annexed	<u>1-2</u>
Order to Show Cause and Affidavits Annexed.	<u> </u>
Answering Affidavits	<u>3-4</u>
Replying Affidavits	<u>5-6</u>
Exhibits	<u>Var</u>
Other	<u> </u>

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 003) and defendants’ motion for summary judgment (Seq. 004) are decided as follows:

Procedural Posture

Plaintiff commenced this action to recover for damages he claims to have sustained on December 15, 2021 when he fell from a scaffold. It is uncontested that the premises where plaintiff allegedly fell, 361 Bedford Avenue, Brooklyn, NY, is owned by defendant Bedford Avenue Associates LLC (Bedford) and that defendant Leeding Builders LLC (Leeding) was hired as the construction manager. Defendants interposed an answer on April 14, 2022. Plaintiff was deposed on February 21 and 28, 2024. The Note of Issue was filed on March 22, 2024. Defendant was then deposed on May 22, 2024.

Factual Background

Plaintiff testified as follows: On December 15, 2021, plaintiff was a bricklayer working for Bunlin LLC (Bunlin) at 361 Bedford in Brooklyn, NY (Lazo EBT at 24–25, 28). Plaintiff had an OSHA certification in pipe scaffolding (*id.* at 27). “Hugo” was plaintiff’s foreman,

although plaintiff sometimes received instructions from “Chavez” (*id.* at 30). Just prior to his accident, plaintiff was working to disassemble a scaffold in the basement of the premises (*id.* at 33, 36). Chavez installed the scaffold, and at the time of his accident plaintiff was passing OSHA boards down from the scaffold to Chavez (*id.* at 35, 40).¹ Plaintiff was wearing a harness on the date of the accident, and he had been tied off on the scaffold pipe on the date of the accident (*id.* at 41). In order to climb down from the scaffold and move to the next level, plaintiff unhooked his lanyard from the “banana” on the side of the pipe and intended to sit down and then slide to the next plank (*id.* at 48, 59). While preparing to descend the scaffold, the scaffold moved forward and the plaintiff fell (*id.* at 40). Plaintiff inferred that the scaffold moved because there were no “X-braces,” or cross-braces. Braces had never been installed on this scaffold (*id.* at 49), although other scaffolds on the site had four cross-braces (*id.* at 57). Plaintiff did not loosen the scaffold as part of his work in any way (*id.* at 60).

James Vicari, the site superintendent and representative of Leeding Builders LLC, testified as follows: On the date of plaintiff’s accident, Mr. Vicari was present on sight and went to the scene of the accident when he heard that plaintiff had fallen (*id.* at 27). Mr. Vicari tried to speak to the plaintiff, but plaintiff did not respond (*id.* at 29). Mr. Vicari further testified that there was an available anchor in the concrete wall for the plaintiff to attach his lanyard and harness (Vicari EBT at 70). The defendants submit pictures, identified at plaintiff’s deposition, of the location where the accident allegedly happened. Mr. Vicari testified that the anchor is visible in defendants’ Exhibit A, either immediately adjacent to or perhaps underneath the white “Exhibit” tab (*id.* at 71–72). Mr. Vicari claimed that plaintiff could have securely tied off to this anchor and performed the work he was assigned (*id.* at 44–45).

¹ The parties stipulated that the boards on the scaffold were standard OSHA boards (Lazo EBT at 65).

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, tether, and scaffold) 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 contends that the scaffold moved unexpectedly and that this movement caused him to fall. Second, plaintiff claims that he was not provided with an adequate place to tie off his tether and harness, which meant the harness he was provided with failed to protect him from falling. Based on this testimony, plaintiff has made out his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim (*see Ramirez v Pace University*, 230 AD3d 811 [2d Dept 2014]).

In opposition, defendants first argue that the scaffold had cross-braces, contrary to the plaintiff's testimony. This argument is unavailing, however, because the presence or absence of cross-braces is irrelevant to this Labor Law § 240 (1) analysis. The plaintiff does not need to specify why a scaffold failed but is only required to testify that it failed or malfunctioned (*see*

Blake v Neighborhood Housing Services of NYC, Inc., 1 NY3d 280, 289 n.8 [2003]).

Defendants next argue that there was a secure anchoring point where the plaintiff could tether himself while performing his assigned work. Mr. Vicari's testimony and plaintiff's testimony are directly opposed as to whether there was an adequate place where plaintiff could tie off while he descended the scaffold (Vicari EBT at 44-45; Lazo EBT at 48, 59). Upon a review of the photographs, the court does not see the anchoring point that Mr. Vicari testified was in Defendant's Exhibit A. However, the function of the court is not to make credibility determinations between two parties on a motion for summary judgment (*see Schultheis v Arcate*, 216 AD3d 1018 [2d Dept 2023]). Although plaintiff's testimony that the scaffold failed is unrebutted, since the scaffold only moved and did not collapse it is possible that a properly attached tether could have prevented plaintiff from falling. There is conflicting testimony about whether the plaintiff was provided with an adequate place to attach his tether and, therefore, whether the statutory requirements of Labor Law § 240 (1) were met.

Plaintiff's motion for summary judgment is denied.

Labor Law § 241 (6)

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 (*Moscato 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 opposes the motion only as to his Labor Law § 241 (6) claim as predicated on Industrial Code 23-1.16.

Rule 1.16 (a)-(c) requires that workers be provided with adequate safety belts, harnesses, tail lines, and lifelines. Plaintiff does not contend that he was not supplied with any of this

equipment; therefore, defendants' motion is granted as to these Industrial Code provisions. Rule 1.16 (b) requires that the tail line and lifeline must be "securely anchored." As indicated above, there is contradictory testimony about whether plaintiff had a secure place to anchor the tether with which he was provided.

Defendants' motion is therefore denied with respect to plaintiff's Labor Law § 241 (6) claim as predicated on a violation of Industrial Code 23-1.16 (b). The remainder of the motion is granted.

Labor Law § 200

Defendants also 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]).

As an initial matter, plaintiff does not oppose this motion as to Bedford; therefore, plaintiff's Labor Law § 200 claim against Bedford is dismissed.

With respect to Leeding, Mr. Vicari testified that he was on-site and had two superintendents present on site working for him (Vicari EBT at 14). Additionally, Leeding's contract required it to "furnish all tools, materials, supplies, equipment and labor required to perform the services to complete the Project" (§ 1.7), to "administer, coordinate, manage, and supervise the Work" (§ 2.2.1), and to "oversee and monitor all safety precautions and programs in connection with the performance of the work" (§ 10.4). Because questions of negligence are ordinarily fact-specific, they do not usually warrant summary judgment (*see Ugarriza v Schmieder*, 46 NY2d 471 [1979]). There are, at a minimum, questions of fact about the extent of Leeding's authority over the work.

Therefore, Leeding's motion for summary judgment on plaintiff's Labor Law § 200 claim is denied.

Conclusion

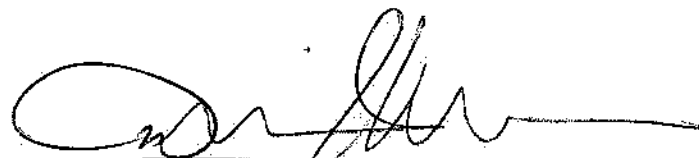
Plaintiff's motion for summary judgment (Seq. 003) is denied.

Defendants' motion for summary judgment (Seq. 004) is granted with respect to the dismissal of all Industrial Code violations except 23-1.16 (b), and with respect to plaintiff's Labor Law § 200 claim against Bedford; the motion is otherwise denied.

This constitutes the decision and order of the court.

December 20, 2024

DATE



DEVIN P. COHEN

Justice of the Supreme Court