

Pereira v Cactus 36-20 Steinway LLC

2024 NY Slip Op 34761(U)

September 18, 2024

Supreme Court, Queens County

Docket Number: Index No. 705674/20

Judge: Timothy J. Dufficy

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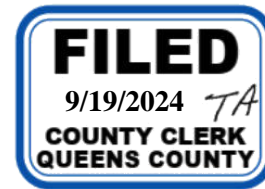
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



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LUCAS PEREIRA,

Plaintiff,

Index No.: 705674/20

-against-

Mot. Date: 6/11/24

Mot. Seq. 4

CACTUS 36-20 STEINWAY LLC, STEINWAY STREET LIC LLC, JMH DEVELOPMENT LLC, STEINWAY STREET INVESTORS I LLC, STEINWAY STREET INVESTORS I SUBSIDIARY LLC and RAY BUILDERS, INC.,
Defendants.

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The following papers were read on this motion by plaintiff for an order, *inter alia*, pursuant to CPLR 3212, granting plaintiff partial summary judgment against all defendants on his cause of action for violation of Labor Law § 240(1); granting plaintiff summary judgment against all defendants on his cause of action for violation of Labor Law 241(6); and for an order, pursuant to CPLR 3025(b) for leave to amend the Bill of Particulars.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 86; EF 87-106
Memorandum of Law in Support.....	EF 88
Answering Affidavit.....	EF 111-119
Memorandum of Law in Opposition.....	EF 120
Replying Affidavit.....	EF 134

Upon the foregoing papers, it is ordered that this motion by plaintiff is granted, in part, and denied, in part, as set forth below.

This action arises from a construction site accident, that occurred on March 3, 2020, at 36-20 Steinway Street, in Queens County. The property was owned by defendant Cactus 36-20 Steinway LLC (Cactus). Plaintiff submits evidence, unchallenged by defendants, that Cactus leased the property to Steinway Street LIC LLC, which was restructured as Steinway Street Investors I LLC and then restructured into Steinway Street Investors I Subsidiary LLC (Steinway Subsidiary). Steinway Subsidiary then hired Ray Builders, Inc. (Ray Builders) to serve as general contractor for the construction of a

seven-story residential building at the site. Ray Builders hired non-party Capital Concrete, Inc. (Capital Concrete) for the foundation and superstructure.

Plaintiff, an employee of Capital Concrete, alleges that he was injured while building concrete forms with a coworker at the site. He testified that: he built the concrete forms, while working at ground level; and he built each form to the specification of his coworker, who was located in an excavated hole or “footer”, which was about eight feet deep and six feet wide. After building the forms, the plaintiff would hand them down to the coworker in the excavated hole, for assembly into a rectangle.

Although the plaintiff testified that he had been provided with a harness, he did not remember if he was wearing the harness at the time of his accident. He testified that there was no place to hook a harness onto. Plaintiff testified that his accident occurred when, as he was handing down a concrete form to his coworker, the side of the excavated footer suddenly collapsed, and he fell eight feet down into the hole, sustaining injuries.

Plaintiff alleges that the defendants violated Labor Law §§ 240(1) and 241(6). The Labor Law § 241(6) claim is predicated on sections of Part 23 of the New York Industrial Code, including: 23-1.5; 23-1.7(d)(e); 23-1.15; 23-1.23(a), (b), (c) and (d); 23-2.1(a)(1) and 23-4.3.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form (*see Id.*).

Labor Law § 240 (1)

“Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374[2011]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512 [1991]). To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute

was violated and that the violation proximately caused his or her injuries (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39[2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). "[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Cahill, supra*, 4 NY3d at 39; *Blake, supra*, 1 NY3d at 289).

Liability under Labor Law § 240(1) depends on whether the injured worker's task "creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011]). The kind of accident triggering Section 240(1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [*emphasis removed*], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Here, the plaintiff has established a *prima facie* entitlement to summary judgment through his testimony that, as he was working near the hole, the ground beneath him gave way, causing him to fall into the excavated hole. The risk of falling into a hole on an excavation site is a type of elevation-related risk within the purview of protection of Labor Law § 240(1) (*see Thorpe v One Page Park, LLC*, 208 AD3d 818, 820, 821 [2d Dept. 2022]; *Covey v Iroquois Gas Transmission Sys.*, 89 NY2d 952, 953-954 [1997]).

In opposition, the defendants fail to raise a triable issue of fact. Plaintiff's testimony that the side of the excavated footer gave out, causing him to fall into the hole, is not refuted (*see Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043 [2d Dept 2012]). The deposition testimony of Alex Abad of Ray Builders, who did not witness the accident and only inspected the area after the accident, is insufficient to raise an issue of fact, as he had no first hand knowledge of the accident or the condition of the location (*see Pirozzo v Laight St. Fee Owner LLC*, 209 AD3d 596, 597 [1st Dept 2022]). Defendants also have not sufficiently refuted the plaintiff's testimony that there was no place to tie-off a harness (*see Myiow v City of New York*, 143 AD3d 433, 435 [2d Dept 2016]; *Hoffman v SJP TS, LLC*, 111 AD3d 467 [2d Dept. 2013]).

Accordingly, the branch of plaintiff's motion for partial summary judgment against the defendants on his cause of action for violation of Labor Law § 240(1) is granted.

Labor Law § 241(6)

Plaintiff also asserts a cause of action for violation of Labor Law §241(6). As stated above, in his Verified Bill of Particulars, the plaintiff alleges violations of Industrial Code Sections 23-1.5; 23-1.7(d)(e); 23-1.15; 23-1.23(a), (b), (c) and (d); 23-2.1(a)(1) and 23-4.3.

Plaintiff moves for summary judgment on his of Labor Law § 241(6) claim predicated upon 12 NYCRR Sections 23-4.3 and 23-1.15(a)-(e). Plaintiff also moves for leave to serve an Amended Verified Bill of Particulars to include a violation of Industrial Code 23-4.4(a).

Labor Law § 241(6) imposes a non-delegable duty on owners, contractors, and their agents 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 (*White v Village of Port Chester*, 84 AD3d 946 [2d Dept 2011]). “[T]o establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant’s violation of a specific rule or regulation was a proximate cause of the accident” (*Creese v Long Is. Light. Co.*, 98 AD3d 708, 710 [2d Dept. 2012], quoting *Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009]; see also *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]; *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 24 [2d Dept 2016]).

In order to support a cause of action, 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 that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]; *Ares v State*, 80 NY2d 959, 960 [1992]).

12 NYCRR Section 23-4.3

Industrial Code § 23-4.3 Excavation Operations: Access to excavations provides Ladders, stairways or ramps constructed in compliance with this Part (rule) shall be

provided in every excavation more than three feet in depth for safe access and egress. Such ladders, stairways or ramps shall be installed in sufficient number and in such locations as to be readily accessible to any person wishing to enter or leave such excavation without more than 25 feet of lateral travel

This section has been held to set forth concrete specifications (*see Allen v Hodorowski and DeSantis Bldg. Contractors Inc.*, 220 AD2d 959 (3d Dept 1995)). However, it is not applicable to the facts of this case, as it pertains to the protection of persons working inside an excavation (*see Settimo v City of New York*, 16 Misc3d 1133(A) [Sup. Ct., Richmond County 2007]; *affirmed*, 61 AD3d 840 [2d Dept 2009]).

Accordingly, plaintiff's motion for summary judgment on his Labor Law § 241(6) claim, predicated upon Industrial Code § 23-4.3, is denied.

12 NYCRR Sections 23-1.15(a)-(e)

Plaintiff seeks summary judgment on his Labor Law § 241(6) claim, predicated upon Industrial Code § 23-1.5(a)-(e), which concerns standards for safety railings. However, this section is inapplicable as there is no allegation in this case that a safety railing failed but, rather, that the allegation is that the excavation gave way and plaintiff fell into a hole (*see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799 [2d Dept 2013]).

Accordingly, plaintiff's motion for summary judgment on his Labor Law § 241(6) claim, predicated upon Industrial Code § 23-1.5(a)-(e), is denied.

Defendants' Opposition Requesting Dismissal

The Court denies the defendants' request, raised in its opposition papers, to dismiss the plaintiff's Labor Law § 241(6) claim, predicated upon the other previously pled Industrial Code sections, as "abandoned."

Requests for affirmative relief must be done by notice of motion or cross-motion, not in opposition papers. Furthermore, the First Department cases cited by defendants are distinguishable.

Branch of Motion to Amend the Bill of Particulars.

Plaintiff also moves for an order, pursuant to CPLR 3025(b), for leave to amend the Bill of Particulars.

The proposed amendment does not involve any new factual allegations, raise new theories of liability or cause any prejudice to the defendants, since they were on notice of this claim through plaintiff's deposition testimony and his previously served Verified Bill of Particulars (*see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654 [2d Dept 2014]; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801 [2d Dept 2013]; *Kowalik v Lipschutz*, 81 AD3d 782 [2d Dept 2011]). Furthermore, it is well established law that leave to amend pleadings shall be freely given (*see Palaguachi v. Idlewild 228th St., LLC.*, 197 AD3d 1321 [2d Dept 2021]).

Thus, the branch of the plaintiff's motion to amend the Bill of Particulars to include a violation of Industrial Code 23-4.4(a), which involves excavations, is granted.

The proposed Amended Verified Bill of Particulars, annexed to plaintiff's motion papers, is deemed served *nunc pro tunc*.

CONCLUSION

Based upon the foregoing, it is ordered that plaintiff's motion is granted, in part, and denied, in part, in that: it is

ORDERED that the branch of plaintiff's motion for partial summary judgment against the defendants, on his cause of action for violation of Labor Law § 240(1), is **granted**; and it is further

ORDERED that the branch of plaintiff's motion for partial summary judgment against the defendants, on his cause of action for violation of Labor Law § 241(6), is **denied**; and it is further

ORDERED that the branch of plaintiff's motion to amend the Bill of Particulars to include a violation of Industrial Code 23-4.4(a), pursuant to COLR 3025(b), is **granted**; and it is further

ORDERED that the proposed Amended Verified Bill of Particulars, annexed to plaintiff's motion papers, is deemed served, *nunc pro tunc*; and it is further

ORDERED that any arguments or requests for relief not addressed herein have nonetheless been considered by the Court and are denied.

Dated: September 18, 2024



TIMOTHY J. DUFFICY, J.S.C.

