Castro v City of New York
2024 NY Slip Op 34801(U)
December 20, 2024
Supreme Court, Bronx County
Docket Number: Index No. 33106/2019E
Judge: Myrna Socorro
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C #4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 9

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KORREIN CASTRO,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT, METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, CITNALTA CONSTRUCTION CORP. and FORTE CONSTRUCTION CORP.,

Defendants.

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Index №. 33106/2019E
Motion seq #4

DECISION & ORDER

HON. MYRNA SOCORRO, J.S.C.

The following papers were read on this motion (Seq. No. 4) for **SUMMARY JUDGMENT** noticed for December 15, 2023 and submitted on May 14, 2024.

Papers	NYSCEF Doc. No.
Notice of Motion – Affirmation and Exhibits, Memorandum of Law, Statement of Material Facts	# 86 – 100
Affirmation in Opposition and Exhibit	# 103 – 104
Reply Affirmation	# 105 – 106

Upon the foregoing papers, defendants THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT, METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, CITNALTA CONSTRUCTION CORP. and FORTE CONSTRUCTION CORP. (collectively Defendants), move for an order pursuant to CPLR 3212 granting summary judgment and dismissing plaintiff KORREIN CASTRO (Castro or Plaintiff)'s claims premised on the Common-Law, Labor Law §§ 200, 240, and 241 (6), and various sections of the Industrial Code of the State of New York (12 NYCRR 23) claims and OSHA; and for such other and further relief as this Court deems both just and proper. Plaintiff opposes the motion, which is decided in accordance herewith.

Background

Plaintiff commenced this action upon filing of the Summons and Complaint on September 26, 2018, for personal injuries she allegedly sustained while performing construction work on December 4,

2018 on the platform at the "174 – 175 Street" Station of the subway in the Bronx. Plaintiff testified that her only supervisor at the work site was a foreman from her employer, Braybent, which is not a party to this action. At the beginning of each work day, she and other workers would meet the foreman at Braybent's gang boxes and receive their tools and instructions for the day.

Plaintiff was grouting the tile wall, using a Baker scaffold, a wheeled platform which she used to access the upper portion of the wall as well as for transporting tools and supplies including buckets of water. The Baker scaffold had four wheels and a locking device that immobilized the wheels. While standing on the ground, Plaintiff moved the scaffold and then removed buckets from it with the wheels unlocked. Plaintiff placed one half full bucket of water on the scaffold. When she turned around to pick up the next bucket, the scaffold began rolling away.

Turning back around, Plaintiff saw that the scaffold was rolling away and attempted to stop it. The scaffold's leading wheel ran into an unfinished portion of the platform floor where the concrete had been cut away and a grid of reinforcing iron bar (rebar) was exposed. When the wheel traversed this unfinished area, the Baker scaffold toppled over, and Plaintiff was injured attempting to keep it from falling. Plaintiff did not fall down. Neither the scaffold nor anything on it fell onto Plaintiff, but the scaffold did strike her body.

In support of their motion, Defendants submit, inter alia, transcripts of plaintiff's deposition and 50-h hearing, deposition transcripts of Ajay Chilhan (MTA) and RaShawn Austin (Citnalta Forte, a Joint Venture), and a photograph of the alleged Baker scaffold.

Plaintiff opposes the motion, by stating that defendants have not established their entitlement to summary judgment as to plaintiff's §240(1) and §200/common law negligence claims. Plaintiff however did concede dismissal of the §241(6) claims.

Summary Judgment Standard

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508; 894 NYS 2d 422 [1st Dept 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]; Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v*

Restani Constr. Corp., 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr*, 64 NY 2d 851; 487 NYS 2d 316 (1985).

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Discussion

Plaintiff's Claim under Labor Law § 240 (1)

Labor Law § 240 (1) imposes strict liability on "owners, contractors, and their agents" when they fail to provide adequate safety equipment and that failure causes a worker's injury in a gravity-related accident (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658 [2014]). Labor Law § 240 (1) applies when an object upon which the force of gravity is applied is material being hoisted or a load that required securing for the purpose of carrying out plaintiff's undertaking (*Garcia v Wallace Ave. I, LLC*, 101 AD3d 415 [1st Dept 2012] *citing Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [2001]). However, this statute "does not apply simply because an object fell and injured a worker; a plaintiff must show that the object fell … because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Id.*). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci*, 96 NY2d 259). The statute lists the following safety equipment, "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" (Labor Law § 240 [1]). "[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials … there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]).

Defendants argue that Plaintiff failed to use the appropriate available safety device, i.e., the wheel locks on the Baker Scaffold, and that Plaintiff's failure to use the provided safety device was the sole

proximate cause of her injury.

A plaintiff is the sole proximate cause of her own injuries when, acting as a "recalcitrant worker," she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY 3d 280, 291-292 [2003]; *Robinson v East Med Ctr, LP*, 6 NY3d 550, 554-555 [2006]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *see Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022] *citing Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601 [1st Dept 2022]). To the extent that the wheel locks constitute a safety device as contemplated by Labor Law § 240 (1), they must protect against an elevation-related risk. The elevation-related risk against which the wheel locks are intended to safeguard is the danger of a worker falling from the Baker scaffold because of it moving whilst he or she stands upon it.

Where a violation of the Labor Law is a proximate cause of plaintiff's injury, even if plaintiff's negligence is also a proximate cause of the injury, a defendant's motion for summary judgment should be denied. Defendant's burden is to demonstrate that plaintiff's negligence is the *sole* proximate cause. Here, Defendants have, at best, demonstrated that there may be some comparative negligence on the part of the Plaintiff, which cannot meet their burden on the instant motion.
Defendants also argue that Plaintiff's injury is not actionable under Labor Law § 240 (1) because it did not arise from a gravity-related risk of the kind contemplated by the statute. They argue that Plaintiff was standing on the same level as the Baker scaffold which injured her. Defendants also argue that Plaintiff's injury does not trigger the statute because she did not fall and nothing fell on her. "[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials … there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). In *Runner*, the Court of Appeals observed that "[t]he relevant inquiry … [is] whether the harm flows directly from the application of the force of gravity to the object." (*Id.* at 604).

In opposition, Plaintiff cites cases relating to either workers who fell from scaffolds (*see, e.g., Ordonez v One City Block, LLC*, 191 AD3d 412 [1st Dept 2021]; *Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]), or cases where objects on the same level fell onto the worker (*see, e.g., Spero v. 3781 Broadway, LLC*, 214 AD3d 546 [1st Dept 2023]; *Grigoryan v 108 Chambers St. Owner, LLC*, 204 AD3d 534 [1st Dept 2022]). This Court finds that there are triable issues of fact as to whether the Baker scaffold was a load that required securing for the purposes of the undertaking in which

Plaintiff was involved and whether Plaintiff's injuries were proximately caused by the lack of a safety device of a kind contemplated by Labor Law § 240 (1) (*see Connor v AMA Consulting Engrs. PC*, 213 AD3d 483 [1st Dept 2023]).

Accordingly, **Defendants' motion for summary judgment is DENIED with respect to Plaintiff's cause of action under Labor Law § 240 (1).**

Plaintiff's Claim under Labor Law § 241 (6)

In opposition, Plaintiff failed to contest dismissal of her cause of action for violation of Labor Law § 241 (6) and, accordingly, has conceded the dismissal of that cause of action. Accordingly, **Defendants' motion for summary judgment as to §241(6) is GRANTED.**

Plaintiff's Claim under Labor Law § 200

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Licata v AB Green Ganswevoort, LLC*, 158 AD3d 487 [1st Dept 2018]). Pursuant to Labor Law § 200, "liability for an injury resulting from a dangerous condition at the work site may be imposed on the owner where the owner either exercised supervision and control over the work or had actual or constructive notice of the unsafe condition." (*Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work" (*Hughes v Tishman Const. Corp.*, 40 AD3d 305 [1st Dept 2007])

Defendants have demonstrated that none of them exercised any control over the means or methods in which Plaintiff's work was performed, however, they have not adduced any evidence to demonstrate that they did not have actual or constructive notice of the unsafe condition of the platform (*Pawlicki v 200 Park, L.P.*, 199 AD3d 578 [1st Dept 2021]) Accordingly, **Defendants' motion for summary judgment is DENIED with respect to Plaintiff's cause of action under Labor Law § 200.**

Plaintiff's Claim under OSHA

Plaintiff has alleged a cause of action for Defendants' violation of regulations promulgated by the Occupational Safety and Health Administration (OSHA) pursuant to the Occupational Safety and Health Act of 1970 (29 USC § 651 *et seq*.). Defendant seeks dismissal of this purported cause of action, arguing that OSHA as well as its concomitant regulations do not provide injured employees with a private right of action. This argument is well founded (*Pantovic v YL Realty, Inc.*, 117 AD3d 538, 539 [1st Dept 2014]; *see also Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 528-529

[2d Dept 2006] *lv dismissed* 7 NY3d 864 [2006]), and Defendants have demonstrated that they are entitled to judgment as a matter of law dismissing this cause of action. Defendants' motion for summary judgment is **GRANTED** as to Plaintiff's cause of action for violation of OSHA regulations.

Accordingly, it is hereby

ORDERED that Defendants' motion is **GRANTED IN PART**, in that Plaintiff's cause of action brought under Labor Law § 241 (6), as well as Plaintiff's cause of action for Defendants' alleged violations of OSHA regulations are dismissed, and it is further

ORDERED that Defendant's motion as to Plaintiff's causes of action as related to §240(1) and §200/common law negligence is **DENIED**; and it is further

ORDERED that Defendants shall serve notice of entry of this order upon Plaintiff within twenty (20) days of the filing on this Decision and Order on the NYSCEF system.

This constitutes the Decision and Order of this Court.

Dated: December 20, 2024

HON. MYRNA SOCORRO, J.S.C.