

Buestan v SJC 33 Owner 2015, LLC

2024 NY Slip Op 34919(U)

October 7, 2024

Supreme Court, Bronx County

Docket Number: Index No. 31815/2019E

Judge: Myrna Socorro

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This opinion is uncorrected and not selected for official publication.

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

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JESUS BUESTAN and YOLANDA BUESTAN,

Plaintiffs,

-against-

Index No. 31815/2019E

Motion seq #1 and #2

DECISION & ORDER

SJC 33 OWNER 2015, LLC, OXFORD
PROPERTIES CORPORATION, 550
WASHINGTON OWNER (DE) LLC and
TURNER CONSTRUCTION COMPANY,

Defendants.

Hon. Myrna Socorro, J.S.C.

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The following papers were read on the motion by the plaintiff (Seq. No. 1) for **summary judgment** noticed for October 11, 2023, and submitted on April 16, 2024; on the motion by defendants 550 Washington Owner (DE) LLC and Turner Construction Company (Seq. No. 2) for **summary judgment** noticed for October 11, 2023, and submitted on April 16, 2024.

Papers	NYSCEF Doc.
Motion seq #1	
Notice of Motion by Plaintiff – Affirmation in Support,	# 20-41
Memorandum of Law in Support and Exhibits	
Affirmation in Opposition by Defendants 550 Washington Owner (DE) LLC and Turner Construction Company	# 69
Plaintiff’s Reply Affirmation	# 101
Motion seq #2	
Notice of Motion by Defendants 550 Washington Owner (DE) LLC and Turner Construction Company – Affirmation in Support, Memorandum of Law in Support, and Exhibits	# 42-67
Plaintiff’s Memorandum of Law in Opposition	# 77-100
Reply Affirmation by Defendants 550 Washington Owner (DE) LLC and Turner Construction Company	# 102-103

Motion by the plaintiff (Seq. No. 1), for an order pursuant to CPLR §3212, granting judgment on the Labor Law §240(1) and §241(6) claims against defendants 550 Washington Owner (DE) LLC and Turner Construction Company; and the motion by defendants 550 Washington Owner (DE) LLC (“550 Washington”) and Turner Construction Company (“Turner”) (Seq. No. 2), for an order pursuant to CPLR §3212, dismissing the plaintiff’s complaint pursuant to Labor Law §§§ 240(1),

241(6), 200 and common-law negligence, are decided as follows:

Preliminarily, at oral argument on April 16, 2024, counsel for plaintiff withdrew plaintiff's summary judgment motion (Seq. No. 1) on the record, and therefore, will not be further addressed herein. Plaintiff however opposed defendants 550 Washington's and Turner's summary judgment motion seeking dismissal of his complaint and will be addressed accordingly.

According to the plaintiff, on the day of the accident, he was employed by non-party Breeze National, Inc. ("Breeze") to perform demolition work at a premises located at 550 Washington Street, New York County. It is undisputed that the premises was owned by defendant 550 Washington. As owners, 550 Washington retained Turner to serve as construction manager for the subject project. Pursuant to its contract with 550 Washington, Turner was responsible for hiring the subcontractors to perform the work. Turner retained Breeze (plaintiff's employer) and another subcontractor, non-party Urban Foundation Engineering, LLC. The plaintiff testified that he received all instructions from his foreman, including the task of performing demolition in the basement. He testified that he had been cutting or burning pipes in the ceiling with a torch in the basement of the premises for three days prior to his accident. The plaintiff testified that he was burning the pipe in the basement ceiling when, without warning, the concrete ceiling collapsed and fell on him resulting in injuries. He testified that he did not inspect the ceiling or observe any cracks in the ceiling prior to starting his work. He also testified that he never observed pieces of the ceiling fall prior to his accident. The plaintiff testified that he never made any complaints about the condition of the ceiling before the accident occurred.

In support of their motion for summary judgment, defendants 550 Washington and Turner submitted, *inter alia*, deposition testimonies of the plaintiff and James Romagnoli (Turner superintendent on the project), Romagnoli's affidavit, the subcontract between Turner and Breeze National, Inc. (plaintiff's employer), an incident report prepared by Turner, a sworn affidavit of Luis Valderruten, P.E. (Breeze project engineer), the expert engineer affidavit and supplemental affidavit of Steve Pietropaolo, P.E., the sworn affidavit of Javier Padilla (Breeze senior foreman on the project), and the sworn affidavit of Jose Martinez (Breeze superintendent). In seeking dismissal of the Labor Law § 200 and common-law negligence claims, defendants 550 Washington and Turner argue that they did not supervise or control the means and methods of the plaintiff's work and did not have notice of a hazardous condition. They further contend that the Labor Law §240(1) claim should be dismissed as plaintiff's accident, i.e., the collapse of a permanent ceiling, was not foreseeable to warrant a need for safety devices of the kind enumerated under this statute. Finally, they argue that the Labor Law §241(6) claim should be dismissed as the plaintiff failed to make out a violation of any safety regulation applicable to the herein facts.

In opposition, the plaintiff submitted, *inter alia*, the expert engineering affirmation of Anthony M. Dolhon, P.E., photographs of the alleged collapsed concrete ceiling, and a copy of the construction management agreement between 550 Washington and Turner for the subject project. The plaintiff argues that the moving defendants' motion should be denied as there are triable issues of fact as to whether said defendants are liable under Labor Law §241(6) in violation of Industrial Code § 23-3.3(c) for failing to conduct continuing inspections to detect hazards resulting from weakened or deteriorated floors or walls during hand demolition operations. Plaintiff also contend that there are triable issues of fact as to whether the moving defendants violated Labor Law §240(1) by failing to brace or shore the concrete ceiling during demolition operations to protect plaintiff from a ceiling collapse resulting in falling concrete slabs. Moreover, the plaintiff argues that triable issues of fact on the issue of constructive notice of the hazardous condition of the concrete ceiling preclude summary judgment in favor of the moving defendants on the Labor Law §200 claim.

Summary Judgment

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 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 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].

Labor Law §240(1)

Labor Law §240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that “[n]ot 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). Rather, liability is contingent upon the existence of a hazard contemplated in §240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

This court finds there are triable issues of fact as to whether the collapse of the basement ceiling was a foreseeable risk of the task that the plaintiff was performing. *See Vasquez v Urban Assoc. Inc.*, 79 AD3d 493 [1st Dept 2010]; *see also Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]. Pietropaolo, defendants’ expert, opined that hidden corrosion in the steel reinforcement inside the concrete ceiling caused the collapse and not due to any “visible or obvious distress to the concrete ceiling” (NYSCEF Doc No., Pietropaolo affidavit at 4-6). In opposition, Dolhon, plaintiff’s expert, conceded that there were no visible cracks or obvious distress of the concrete ceiling, but that the internal condition of the concrete slab which caused the collapse would have been detected had the defendants performed continuing inspections via a visual condition survey of the slab in compliance with the Industrial Code (NYSCEF Doc No. 78, Dolhon expert affirmation at 21). Accordingly, the plaintiff raised triable issues of fact precluding summary judgment in favor of the moving defendants, therefore defendant’s motion seeking to dismiss plaintiff’s Labor Law §240(1) is denied.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors “to provide reasonable and adequate protection and safety” to persons employed in, or lawfully

frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Code 12 NYCRR § 23-3.3(c) (Demolition by hand; Inspection), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

Industrial Code § 23-3.3(c) provides, in relevant part, that “continuing inspections” shall be made during hand demolition operations “as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material.” The provision further requires that shoring or bracing be provided where such hazards exist. Here, the court finds that the moving defendants failed to meet their *prima facie* burden of demonstrating that “they complied with the regulation or that their noncompliance did not cause plaintiff’s accident.” *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 12-13 [2011]. Contrary to the moving defendants’ arguments, the purpose of Industrial Code § 23-3.3 is to fashion a safeguard, in the form of continuing inspections against hazards resulting from the progress of demolition work, including, but not limited to, the demolition of walls and partitions. *See id.* Accordingly, defendant’s motion seeking to dismiss plaintiff’s Labor Law §241(6) is denied.

Labor Law §200/Common-Law Negligence

The branch of the summary judgment motion to dismiss the Labor Law §200 and/or common-law negligence claims against defendant 550 Washington, is granted. Said defendant demonstrated that it neither supervised nor controlled the injury-producing work as the owner of the premises. The plaintiff testified that he received his instructions only from Breeze employees, and never had any interactions with anyone from 550 Washington. *See Siegel v Delta Airlines, Inc.*, 227 AD3d 516 [1st Dept 2024]; *see generally Polonia v 14 Sutton Tenants Corp.*, 210 AD3d 417 [1st Dept 2022]. There was also no evidence that 550 Washington provided any equipment or tools in connection with the plaintiff’s work or that any employees of defendant 550 Washington were present at the work site to impute actual or constructive notice of a hazardous condition. *See id.*

However, the branch of the summary judgment motion to dismiss the Labor Law §200 and/or common-law negligence claims as against defendant Turner, is denied. Although the record demonstrates that Turner did not direct, supervise, or direct the means and methods of the plaintiff's work, a defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]. Turner's superintendent, Romagnoli, testified that Turner employees generally walked the site "throughout the day" and that he recalled performing demolition of concrete slabs on the premises and repaired or replaced them if they showed signs of damage or wear and tear (NYSCEF Doc No. 54, Romagnoli (Turner) tr at 43, 48). Accordingly, there are triable issues of fact as to whether Turner had notice of a hazardous condition resulting in the plaintiff's injuries with respect to the integrity of the concrete ceiling where the accident occurred. *See generally Herrero v 2146 Nostrand Ave. Assoc., LLC*, 193 AD3d 421 [1st Dept 2021].

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movants was not addressed by the court, it is hereby denied.

Accordingly, it is hereby,

ORDERED, that the plaintiff's summary judgment motion (Seq. No. 1), is marked **WITHDRAWN**; and it is further

ORDERED, that as to motion seq #2, that portion of defendants, 550 Washington and Turner's motion seeking dismissal of Labor Law §240(1) and §241(6) is **Denied**; and it is further

ORDERED that as to motion seq #2, as to dismissal of Labor Law §200/common law negligence as to defendant Turner is **Denied**; and it is further

ORDERED that as to motion seq #2, as to dismissal of Labor Law §200/common law negligence as to defendant 550 Washington is **Granted**; and it is further

ORDERED, that the Labor Law 200 and/or common-law negligence claims are dismissed against 550 Washington Owner (DE) LLC; and it is further

ORDERED, the counsel for plaintiff shall serve a copy of this order with notice of entry upon all

parties within fifteen (15) days of the upload of this order in NYSCEF; and it is further

ORDERED that all parties are to appear for a Pre-Trial conference on November 14, 2024 at 9:30 A.M.

This constitutes the decision and order of this court.

Dated: 10/7, 2024

Hon. Myrna Socorro, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE

- 2. PLAINTIFF'S MOTION (SEQ. NO. 1) IS. GRANTED DENIED GRANTED IN PART OTHER (WITHDRAWN)

- 3. DEFENDANTS 550 WASHINGTON OWNER (DE) LLC's AND TURNER CONSTRUCTION COMPANY'S MOTION (SEQ. NO. 2) IS..... GRANTED DENIED GRANTED IN PART OTHER

- 4. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE FIDUCIARY APPOINTMENT REFEREE APPOINTMENT