

Volquez v Wade Hampton Apts., Inc.

2024 NY Slip Op 34924(U)

December 30, 2024

Supreme Court, Bronx County

Docket Number: Index No. 31040/2019E

Judge: Myrna Socorro

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#2

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

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FELIX ANIBAL TEJEDA VOLQUEZ,
Plaintiff,

Index No. 31040/2019E
Motion seq #2

-against-

WADE HAMPTON APARTMENTS, INC., 2166
ASSOCIATES, LLC, TRION REAL ESTATE
MANAGEMENT LLC, PHILIP COLON and HILDA
COLON,

Defendants.

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DECISION & ORDER
Hon. Myrna Socorro, J.S.C.

The following papers were read on this motion (Seq. No. 2) for **SUMMARY JUDGMENT** filed by Defendants, and marked submitted on May 24, 2024.

Papers	NYSCEF Doc. No.
Notice of Motion – Affirmation, Exhibits, Memorandum of Law, and Statement of Material Facts	# 33 – 45
Affirmation in Opposition and Exhibit	# 50 – 51
Reply Affirmation and Exhibit	# 54 – 55

Upon the foregoing papers, defendants WADE HAMPTON APARTMENTS, INC., 2166 ASSOCIATES, LLC, and TRION REAL ESTATE MANAGEMENT LLC (collectively Defendants), move for an order, inter alia, pursuant to CPLR 3212 granting summary judgment and dismissing plaintiff FELIX ANIBAL TEJEDA VOLQUEZ’s complaint. Plaintiff opposes the motion. The motion is decided in accordance herewith.

Plaintiff commenced the instant action on September 26, 2018, for personal injuries he allegedly sustained while performing construction work on August 7, 2019, at the premises located at 2081 Cruger Avenue, Bronx, New York (the Premises). Plaintiff testified that he fell from a ladder while painting the walls of an apartment after his finger was cut by a circular saw operated by his coworker (Jose Sebastro). Specifically, Plaintiff testified that he was standing on the second rung of a ladder, painting the corner wall of the kitchen, holding onto a table for support, when his coworker cut his finger while holding the table (NYSCEF Doc No. 39, Plaintiff’s TR-48-49). Plaintiff states that he reacted to being cut, the ladder moved, and he fell to the floor (*Id.*, at 49-50).

Defendant claims in their moving papers that the labor law claims must be dismissed because there is no plausible evidence that §240(1) was violated; that the Industrial Codes relied on by plaintiff for his Labor Law §241(6) claims were not violated or inapplicable; and that there can be no finding of violation of Labor Law §200 or any other negligence since no one from the defendants supervised, directed or controlled any of the work that the plaintiff was performing at the time of the accident.

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

Labor Law § 240 (1)

Labor Law § 240 (1) imposes absolute liability on "owners, contractors, and their agents" when they fail to "provide proper protection to those working on a construction site ... [and that failure] is the proximate cause of a worker's injury" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]). "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).

Defendants submitted testimony from Jose Sebastro, Plaintiff’s coworker, who testified that there was no ladder involved in the accident (NYSCEF Doc No. 37, Sebastro TR-25 (L-10); TR-31 (L-14-15); TR-32 (Lines 3-6) TR-36); that Plaintiff did not fall (*Id.*, at 42), and that while he was cutting a piece of plywood with the circular saw Plaintiff attempted to grab the wood and placed his hand into the path of the saw blade (*Id.*, at 39-41). Further, Glenda Ramirez, in her affidavit, averred that she was in the living room of the apartment when the accident happened, and did not observe a ladder when she entered the kitchen (NYSCEF Doc No. 40, Ramirez aff paras 4-6). Based on this evidence, Defendants have set forth a prima facie showing that Plaintiff did not sustain an injury as a result of a gravity-related risk in violation of Labor Law §240(1).

Accordingly, as defendants have set forth a prima facie showing that Plaintiff did not sustain an injury as a result of a gravity-related risk in violation of Labor Law § 240 (1), Plaintiff must demonstrate the existence of a triable issue of material fact to avoid dismissal of this cause of action. While “[a]n ‘accident alone’ is insufficient to establish a violation of Labor Law §240 (1) or causation” (*Cutaia v Board of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037 [2022]), “[i]t is well settled that a statutory violation is established if a ... ladder shifts, slips, or collapses, thereby causing injury to a worker” (*Castillo v TRM Contr. 626, LLC*, 211 AD3d 430, 430 [1st Dept 2022] citing *Panek v. County of Albany*, 99 N.Y.2d 452, 458 [2003]). Plaintiff’s testimony that the ladder’s movement caused him to fall suffices to raise a triable issue of material fact. Accordingly, Defendants’ motion is **DENIED** with respect to Plaintiff’s cause of action under Labor Law §240(1).

Labor Law § 241(6)

To properly state a claim under Labor Law § 241(6), a plaintiff must identify a specific and applicable Industrial Code provision that has been violated (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Labor Law § 241(6) is not self-executing, but requires reference to outside sources to determine whether the safety measures actually employed on a job site were reasonable and adequate (*Zimmer v Chemung County Performing Arts. Inc.*, 65 NY2d 513, 523 [1985]).

In his bill of particulars, Plaintiff claims numerous violations of safety regulations, however, in the instant motion, Plaintiff only identifies the following predicates for liability under Labor Law §241(6): Industrial Code §§ 23-1.12 [c], 23-1.5 [c] (3), and 23-9.2 (a). On summary judgment, parties must lay bare their proofs, and thus any other predicate for which Plaintiff has failed to raise

a legal argument is deemed abandoned, and all claims based upon abandoned predicates are dismissed. (*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]). Analysis is guided by the Court of Appeals' repeated emphasis that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*Badzaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024]; *St. Louis v Town of N. Elva*, 16 NY3d 411, 416 [2011]).

Industrial Code §23-1.12 [c] requires portable power saws to "be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating." Significantly, Plaintiff was not the "operator" of the circular saw, but rather his coworker (Sebastro) was. Accordingly, the cited provisions of the Industrial Code required safety devices for his protection, not for Plaintiff's.

Industrial Code §23-1.5 [c][3] reads, "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." The only defect in the circular saw claimed by Plaintiff is the lack of a fixed blade guard, which cannot serve as a predicate for Labor Law §241(6) liability in this matter because the guard is only intended to protect the saw's operator, not the Plaintiff herein.

Industrial Code §23-9.2 (a) states: Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

Based on the above, there was no inherent defect in the saw that caused Plaintiff's injury, the proximate cause whereof was the negligence of either Plaintiff, Sebastro, or both. Plaintiff has made no allegation that he was injured during an attempted repair of the saw, and the "unsafe condition" of which he complains relates solely to his claim that the fixed blade guard, which is required only for the operator's protection, was missing.

Defendants have demonstrated their prima facie entitlement to summary judgment as a matter of law, dismissing Plaintiff's cause of action for violations of Labor Law § 241 (6), by showing that none of the claimed Industrial Code predicates can serve as a basis for liability herein. In response,

Plaintiff has not raised any triable issue of fact. Accordingly, **Defendants' motion with respect to dismissal of Labor Law §241(6) is Granted.**

Plaintiff's Claim under Labor Law § 200

Labor Law §200 codifies 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]).

“A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed” (*Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013], *quoting Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]).

“[T]he right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law §200 or for common-law negligence” (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010] *quoting Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009]).

Defendants have demonstrated that none of them exercised any control over the means or methods in which Plaintiff’s work was performed. Plaintiff’s opposition failed to address Defendants’ arguments and evidence with respect to this issue. Hence, Plaintiff failed to raise a triable issue of material fact with respect to its cause of action pursuant to Labor Law §200.

Therefore, this Court finds that **Defendants’ motion with respect to dismissal of Labor Law §200 is Granted**

Accordingly, it is hereby

ORDERED that Defendants’ motion is **GRANTED IN PART**, and Defendants are granted summary judgment dismissing Plaintiff’s causes of action brought under Labor Law §241(6) and §200, and it is further

ORDERED, that the parties are to appear for a Pre-Trial Conference on February 5, 2024 at 9:30

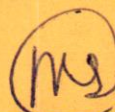
A.M.; and it is further

ORDERED that Defendants' motion as to dismissal of Plaintiff's cause of action under Labor Law §240(1) 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 date of this Decision and Order.

This constitutes the Decision and Order of this Court.

Dated: December 30, 2024



HON. MYRNA SOCORRO, J.S.C.