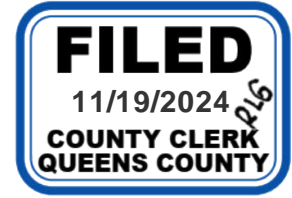


Johnson v J.E. Levine Bldr. Inc
2024 NY Slip Op 35036(U)
November 19, 2024
Supreme Court, Queens County
Docket Number: Index No. 700906/2021
Judge: Robert I. Caloras
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY



PRESENT: HON. ROBERT I. CALORAS PART 36

Justice

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INDEX NO. 700906/2021

KELSEY JOHNSON,

MOTION SEQ. NO. 001

Plaintiff,

- v -

J.E. LEVINE BUILDER INC, TOTAL SAFETY CONSULTING, L.L.C., DOUGLASTON DEVELOPMENT LLC, DD WEST 29TH LLC, BRIAN CHAPMAN, CONSTRUCTION REALTY SAFETY GROUP, INC., and CONSTRUCTION AND REALTY SERVICES GROUP, INC.,

DECISION + ORDER ON MOTION

Defendants.

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J.E. LEVINE BUILDER INC, DOUGLASTON DEVELOPMENT LLC, DD WEST 29TH LLC ,

Third Party Plaintiff,

-against-

HIGHRISE SAFETY SYSTEMS INC D/B/A PARK AVENUE CONCRETE,

Third Party Defendant.

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The following e-filed documents, listed by NYSCEF under the motion as: 46-59, 61-71 were read on the motion by Plaintiff for an order granting Plaintiff partial summary judgment pursuant to Labor Law sections 240(1) and 241(6) against Defendants J.E. LEVINE BUILDER, INC. and DD WEST 29th LLC.

Upon the foregoing papers, it is ordered that the motion by Plaintiff is granted in part and denied in part for the following reasons:

According to the Amended Complaint, on October 13, 2020 construction equipment fell on Plaintiff at the premises located at 601 West 29th Street, New York, New York (hereinafter “premises”).

In the first branch of the instant motion, Plaintiff moves for summary judgment on his Labor Law 240(1) claim against Defendants J.E. Levine Builder Inc. (hereinafter "Levine") and DD West 29th LLC (hereinafter "DD"). Plaintiff submitted, among other things, the following: construction agreement; Plaintiff's affidavit and deposition transcript; photo; accident report; and deposition transcript of Dominick A. Bove (hereinafter "Bove"). According to these submissions, Plaintiff claims the following: on October 13, 2020, Plaintiff was employed by Park Avenue Concrete, also known as High Rise Concrete (hereinafter "High Rise"), and was working as a concrete laborer at the premises. High Rise was the concrete subcontractor for the construction project at the premises. The owner/developer of the construction project was Defendant DD and the general contractor was Defendant Levine. Plaintiff's job at the construction project was to strip forms from concrete columns, flooring and walls.

At his deposition and in his affidavit, Plaintiff stated that: he was stripping a column on the 26th floor when a Doka jack fell onto his foot. The jack was a metal pole, approximately 8-10 feet in height, with a square plate on each end that went from floor to ceiling. The square part at the top of the jack was the part that struck his foot. The jack weighed 50-60 pounds. The purpose of these jacks was to support the concrete flooring of the 27th floor until the cement was completely dried. Before the jack fell, it was about 10 feet away from Plaintiff, unsecured. As Plaintiff was stripping the column, he heard a sound and turned around. The top of the Doka jack fell onto his right foot. The metal plates had holes through which nails or screws could be placed to secure the jack to the floor and ceiling. It was the plate at the top of the jack that hit Plaintiff's foot. The jack had not been nailed to the ceiling. There were no nails sticking out from the plate. If it had been nailed to the ceiling, the jack would not have fallen. Plaintiff denied ever reporting to his employer that the "doka prop bounced up". Plaintiff also denied telling anyone the injury was his fault and that he would defend and hold the owner and general contractor harmless for any claims relating to his accident. Further, when Plaintiff signed the accident report, he did not see the statement acknowledging that he was provided all PPE and training for the work, and that the injury was due to his own fault.

The accident report made by Plaintiff's employer stated, in pertinent part, "Description of how injury happened:" "Stripping Floor and doka prop bounced up and landed on foot". The report also included the following statement:

"The injured employee acknowledges he/she was provided all PPE and training for the work that he/she was performing before this incident occurred and that the injury was due to his/her own fault. This injured employee releases Highrise Safety Systems, Inc. dba Park Avenue Concrete (HRSS) and the Owner/GC/CM of this project from any and all claims and will defend and hold harmless HRSS and the Owner/GC/CM from any and all claims related to this injury to the fullest extent permitted by law."

Bove testified as follows: On October 13, 2020, he was employed by Defendant Levine as a senior construction superintendent for the subject construction project. Bove was on site on a daily basis. On October 13, 2020, the 26th floor of the building was the stripping floor. Stripping involved removing form work. Reshores, also known as jacks, were used to support the form work and concrete for the floor above that was not yet cured or hardened. Each ceiling was about 9 feet high.

Each jack had a square base on each end of the pole with nail holes in it. The nail holes are for nails to be installed in them. Nailing the jacks and reshores in place prevent them from falling.

Based upon the foregoing, Plaintiff argues that he is entitled to summary judgment on his Labor Law 240(1) claim because his injury was the direct result of the force of gravity from the falling unsecured Doka jack, and that the Doka jack required securing for the purposes of the undertaking. Plaintiff further argues that Labor Law 240(1) is applicable herein even though his testimony and affidavit differ from the accident report with respect to the manner in which the jack struck his foot.

In opposition, Defendants Levine and DD (hereinafter collectively "Defendants") argue, among other things, that Plaintiff was not exposed to an elevation-related risk as contemplated by the statute, and that the alleged violation did not proximately cause Plaintiff's injuries. Further, triable issues of fact exist as to whether Plaintiff's accident was caused by a violation of Labor Law 240(1) because the manner in which the accident occurred as described by Plaintiff at his deposition and in his affidavit differ from the accident report.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Labor Law 240 (1) provides that:

"[a]ll 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."

Notably, however, "[t]he extraordinary protections of Labor Law 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (Nieves v Five Boro A.C. & Refrig. Corp., 93 NY2d 914, 915-916 [1999], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). "Rather, the special hazards referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (id., internal quotation omitted). "[F]alling object liability under Labor Law 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured but also where the plaintiff demonstrates that, at the time the object fell, it required securing for the purposes of the undertaking" (Carlton v City of New York, 161 AD3d 930, 932 [2d Dept 2018], quoting Escobar v Safi, 150 AD3d 1081, 1083 [2d Dept 2017]; see Fabrizi v 1095 Ave. of the Ams., LLC, 22 NY3d 658, 663 [2014]). "Importantly, Labor Law § 240 (1) does not automatically 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” (Carlton v City of New York, supra at 930; see Fabrizi v 1095 Ave. of the Ams., LLC, supra at 663)

Here, the Court finds that Plaintiff’s submissions established his prima facie burden of demonstrating that he was injured by a falling object that required securing for the purposes of the undertaking (see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 11 [2011]); Fabrizi v 1095 Ave. of the Ams., LLC, supra at 663; Carlton v City of New York, supra at 932). The subject jack was a metal pole approximately 8-10 feet in height. That height differential cannot be described as de minimis, under these circumstances, given the “amount of force [the Doka jack] was able to generate” (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., supra at 10). Whether the unsecured Doka jack directly impacted Plaintiff’s foot or bounced off the ground striking Plaintiff’s foot is not a matter that creates a material issue of fact. Under either of these versions, the Court finds that Plaintiff’s injury was the direct result of the force of gravity from the falling unsecured Doka jack. As such, the Court finds that Plaintiff suffered a harm that “flow[ed] directly from the application of the force of gravity to the [unsecured Doka jack]” (id.; see Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501). The Court further finds that Defendant has not satisfied his burden of demonstrating that Plaintiff’s motion for summary judgment is premature, since “[t]he mere hope or speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis for denying the motion” (Toltchelnikova v Cmty. Recycling, 197 AD3d 677 [2d Dept. 2021]; Skura v Wojtowski, 165 AD3d 1196 [2d Dept. 2018]). Accordingly, the branch of Plaintiff’s motion seeking summary judgment on his Labor Law 240(1) claim against Defendants is granted.

In the remaining branch of the motion, Plaintiff moves for summary judgment on his Labor Law 241(6) claim based upon a violation of Industrial Code Sections 23-2.2(a), 23-2.2(b) and 23-2.2(c)(1). Defendants oppose. “Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers” (Aragona v State of New York, 147 AD3d 808, 809 [2d Dept. 2017]). “In order to recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards” (id.). “To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (id.). “Contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim” (id.).

Section 23-2.2(a) of the Industrial Code provides:

(a) General requirements. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.

The Court finds that Plaintiff failed to establish its prima facie entitlement to summary judgment on his Labor Law 241(6) claim based upon a violation of Section 23-2.2(a) because Plaintiff failed to submit an affirmation from an expert opining that the Doka jack was not structurally safe (See Morris v Pavarini Constr., 22 NY3d 668, 671 [2014]). Accordingly, the branch of Plaintiff’s motion seeking summary judgment on his Labor Law 241(6) claim based upon a violation of Section 23-2.2(a) is denied.

Section 23-2.2(b) of the Industrial Code provides:

(b) Inspection. Designated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately.

The Court finds that Plaintiff's submissions established his prima facie entitlement to summary judgment on his Labor Law 241(6) claim based upon a violation of Section 23-2.2(b). The Court agrees with Plaintiff that this section applies at all stages of concrete work, not just during the placing of concrete (*Morris v Pavarini*, 22 NY3d 668 [2014]). Further, Defendants failed to submit any evidence that the owner or general contractor inspected the Doka jack involved in the accident, or any other Doka jacks used in this construction project. Instead, Defendants seek to delegate their non-delegable duty to Plaintiff's employer by claiming that the duty to inspect the Doka jacks was the sole responsibility of Plaintiff's employer. Accordingly, the branch of Plaintiff's motion seeking summary judgment on his Labor Law 241(6) claim based upon a violation of Section 23-2.2(b) is granted.

Section 23-2.2(c)(1) of the Industrial Code provides:

(c) (1) Necessary horizontal and diagonal bracing shall be provided in both longitudinal and transverse directions to provide structural stability of beams, floors or roofs. Shores and reshores shall be properly seated top and bottom and shall be secured in place.

The Court finds that Plaintiff's submissions established his prima facie entitlement to summary judgment on his Labor Law 241(6) claim based upon a violation of Section 23-2.2(c)(1). As stated above, Plaintiff's submissions established that the Doka jack was not secured, and Defendants failed to raise any triable issues regarding this. Accordingly, the branch of Plaintiff's motion seeking summary judgment on his Labor Law 241(6) claim based upon a violation of Section 23-2.2(c)(1) is granted.

DATED: November 19, 2024



ROBERT I. CALORAS, J.S.C.

