Shenouda v John P. Picone, Inc.

2024 NY Slip Op 35039(U)

March 22, 2024

Supreme Court, Queens County

Docket Number: Index No. 722265/ 2020

Judge: Cassandra A. Johnson

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CASSANDRA A. JOHNSON IA Part 2
Justice

NADER Z SHENOUDA and SALLY G GADELRAB,

Plaintiffs,

-against-

JOHN P. PICONE, INC.,

Defendant.

Index Number 722265/ 2020

Motion Date January 31, 2024

Mot. Seq. No. 1

The following numbered papers have been read on this motion by defendant, seeking summary judgment dismissing the complaint.

	Papers Numbered
Notices of Motion - Statement of Material Facts - Affirmation - Exhibits	E19-E31
Answering Affirmation - Response to Statement of Material Facts	E33-E35
Reply Affirmation	E36-E37

Upon the foregoing papers, it is ordered that the instant motions for summary judgment, pursuant to CPLR 3212, is determined as follows:

Plaintiff was employed by the New York City Department of Environmental Protection (DEP) as a sewage treatment worker, at DEP's Bowery Bay Water Treatment Plant located at 39-01 Berrian Boulevard, Queens, N.Y., on August 6, 2019, at approximately 1:20 a.m., when he allegedly tripped over the "raised edge" of a metal plate, causing him to fall across the plate, and sustain serious injuries.

Plaintiff claims that, immediately prior to the accident, he was walking from a building, where he was performing raking work, to the hydrochloride station, which was located across an area where the subject metal plate was situated. Defendant, who was doing work for the DEP at the Water Treatment Plant site, states that it had, earlier, placed the metal plate on the ground at that location, at the behest of DEP, "to allow DEP forklifts to drive over" it. Defendant contends that the metal plate was not in an area where defendant was performing work, but that such area was "only for forklifts".

Plaintiff commenced this action against defendant in November 2020, alleging common law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Defendant appeared and answered in January 2021. Plaintiffs served a bill of particulars in June 2021, and depositions were held, including one of a non-party witness, David Bovenzi, a coworker of plaintiff. In August 2022, plaintiff filed a stipulation of discontinuance, solely on behalf of Sally G. Galderab. Plaintiff filed a note of issue in September 2023. Defendant now moves for summary judgment, dismissing the complaint.

"[T]he 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Only if a prima facie demonstration has been made, does the burden shift to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see Alvarez v Prospect Hospital*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Roos v King Constr.*, 179 AD3d 857 [2d Dept 2020]). On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendants (*see Monroy v Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]: *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361

[1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The branch of defendant's motion seeking summary judgment dismissing plaintiff's action brought under Labor Law § 240 (1) is granted. Such statute protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" *(Ross v Curtis Palmer Hydro-Electric Company,* 81 NY2d 494, 501 [1993]). This statute is to be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658 [2014]; *Misseritti v Mark IV Construction Co, Inc.*, 86 NY2d 487 [1995]; *Zamora v 42 Carmine St. Associates, LLC,* 131 AD3d 531 [2d Dept 2015]), and the duty imposed upon owners, contractors and lessees that control the work being performed pursuant to it is nondelegable (*see McCarthy v Turner Constr., Inc., 17 NY3d 369 [2011];Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Vicuna v Vista Woods, LLC, 168 AD3d 1124 [2d Dept 2019]; Scofield v Avante Contracting Corp, 135 AD3d 929 [2d Dept 2016]).*

"To recover on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2014]; *see Hossain v Condominium Bd. of Grand Professional Bldg.,* 221 AD3d 981 [2d Dept 2023]; *Exley v Cassell Vacation Homes, Inc.*, 209 AD3d 839 [2d Dept 2022]; *Chuqui v Amna, LLC*, 203 AD3d 1018 [2d Dept 2022]). Such statute is not applicable unless plaintiff's injuries result from an elevation-related risk (*see Stoneham v Joseph Barsuk, Inc.*, – NY3d –, 2023 NY Slip Op. 06467 [2023]; *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658; *Wilson v Bergon Constr. Corp.*, 219 AD3d 1380 [2d Dept 2023]). "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 v Manhasset Bay Assoc.*, 96 NY2d 259 at 267; *see Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]; *Guallpa v Canarsie*

Plaza, LLC, 144 AD3d 1088 [2d Dept 2016]).

Here, defendant demonstrated that "plaintiff's injuries did not result from the type of elevation related hazard to which the statute applies" (*Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2012]), utilizing plaintiff's own testimony to assert that "[t]he occurrence ... did not involve the traversal of an elevation differential" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 604 [2009]). Plaintiff failed to oppose such contention, and, thereby, failed to raise issues of fact sufficient to rebut plaintiff's *prima facie* entitlement to summary judgment, under Labor Law § 240 (1) (*see DeSerio v City of New York*, 171 AD3d 867 [2d Dept 2019]; *Vicuna v Vista Woods, LLC*, 168 AD3d 1124 [2d Dept 2019]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758 [2d Dept 2018]).

Defendant further seeks dismissal of the causes of action based upon common-law negligence, and on Labor Law § 200, which is a codification of the common-law duty imposed upon an owner and general contractor or agent to provide construction site workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]; *Pchelka v Southcroft, LLC*, 178 AD3d 836 [2d Dept 2019]; *Turgeon v Vassar Coll.,* 172 AD3d 1134 [2d Dept 2019]; *Amster v Kromer*, 157 AD3d 922 [2d Dept 2018]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see DiSanto v Spahiu*, 169 AD3d 861 [2d Dept 2019]).

To be held liable for injuries, pursuant to Labor Law § 200 or for common-law negligence, arising from an alleged dangerous condition on the property, as here, defendant must demonstrate that there is no evidence in the action that, either, defendant created the alleged condition or that it had actual or constructive notice of the alleged dangerous condition in time to correct it, and failed to do so (*see Ricottone v PSEG Long Island, LLC*, 221 AD3d 1032 [2d Dept 2023]; *Freyberg v Adelphi Univ.*, 221 AD3d 658 [2d Dept 2023]; *Bonkoski v Condos Bros. Constr. Corp.*,216 AD3d 612 [2d Dept 2023]; *Channer v ABAX, Inc.*, 169 AD3d 758 [2d Dept 2019]). In the case at bar, defendant has failed to sufficiently establish either element without the existence of material issues of fact extant. Consequently, the branch of defendant's motion pertaining to Labor Law § 200 is denied.

Defendant also moves to dismiss plaintiff's cause of action based upon Labor Law § 241 (6), which section imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v*

Caradonna, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343; *Ricottone v PSEG Long Island, LLC*, 221 AD3d 1032; *Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717 [2d Dept 2019]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2016]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 457 [2d Dept 2022]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2d Dept 2008]).

Thus, defendant, being the general contractor of the subject workplace, had a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of said defendant (*see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]). To succeed in denying summary judgment under this section, said defendant must establish either that the Industrial Code sections allegedly violated cannot serve as a predicate for liability pursuant to Labor Law § 241 (6), because they merely set forth general standards of care for employers, "a recitation of common-law safety principles," and did not involve a violation of a provision of the Industrial Code that set forth "a specific standard of conduct," applicable safety requirements or standards, which was a proximate cause of plaintiff's accident (*id.* at 414; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Llamas v Yu Yu Chen*, 195 AD3d 702 [2d Dept 2021]; *Rodriguez v 250 Park Ave., LLC*, 161 AD3d 906 [2d Dept 2018]: *Aragona v State of New York,* 147 AD3d 808 [2d Dept 2017]), or that such sections did not apply in this case or were not violated (*see Quizhpi v South Queens Boys & Girls Club, Inc.*, 166 AD3d 683 [2d Dept 2018]; *Tuapante v LG-39, LLC*, 151 AD3d 999 [2017]; *Cruz v Cablevision Systems Corp.*, 120 AD3d 744 [2014]).

Plaintiff's pleadings assert that defendants violated Labor Law § 241 (6), and §§ 23-2.1 (a) (1) and (b), and 23-1.7 (e) (1) and (2), of the Industrial Code Rules. Defendant has demonstrated that 12 NYCRR 23-2.1 (b) "is not sufficiently specific to support a cause of action pursuant to Labor Law § 241 (6)" (*Dyszkiewicz v City of New York*, 218 AD3d 546, 547 [2d Dept 2023]). Additionally, 12 NYCRR § 23-2.1 (a) (1), entitled "Storage of material or equipment," has been shown to be "inapplicable to the facts of this case" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014]; *see Grosskopf v Beechwood Org.*, 166 AD3d 860 [2d Dept 2018]), as the facts herein do not describe the "storage" of "building materials" (plural), nor do they involve "[m]aterial piles," as required by said statute, which are required to "be stable."

12 NYCRR § 23-1.7 (e), regarding "Tripping and other hazards," requires owners and general contractors to keep "[a]ll passageways ... free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping" (at [1]), and, at (2), "areas where persons work or pass shall be kept free from accumuylations of dirt and

debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." Defendant asserts that such sections are inapplicable herein, as the subject area is not a "work area" or a "passageway." However, defendant's evidence fails to meet the summary judgment burden of proof with regard to whether the area containing the metal plate was a "passageway" or was a "work area." and fails to convince the court that said metal plate "was an integral part of the construction work" (*Balbuena v 395 Hudson New York, LLC*, 214 AD3d 586, 588 [1st Dept 2023]; see *Dyszkiewicz v City of New York*, 218 AD3d 546; *Bazdaric v Almah Partners, LLC*, 203 AD3d 643 [1st Dept 2022]; *Cody v State of New York*, 82 AD3d 925 [2d Dept 2011]). As such, the branch of defendant's motion to dismiss, pursuant to Labor Law § 241 (6), is denied.

Defendant's remaining contentions and arguments either are without merit, or need not be addressed, in light of the foregoing determinations.

Accordingly, the branch of defendant's motion seeking summary judgment dismissing the cause of action of plaintiff's complaint based on Labor Law § 240, is granted. The remaining branches of the motion, seeking dismissal of the causes of action of the complaint, based on common law negligence and on Labor Law §§ 200 and 241, are denied.

Dated: March 22, 2024

Hon. Cassandra A. Johnson, J.S.C.

FILED
7/30/2024 TA
COUNTY CLERK
QUEENS COUNTY