Carmona v SLD 550 Corp.
2024 NY Slip Op 35088(U)
September 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 66279/2022
Judge: Nancy Quinn Koba
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--x
INOCENCIO CARMONA,

Plaintiff,

DECISION & ORDER

Index No. 66279/2022
Mot. Seq. Nos. 1,2

-against-

SLD 550 CORP. and MORRIS MOVING CORP.,

Defendant.
--x

QUINN KOBA, J.

By notice of motion, plaintiff, Inocencio Carmona ("Carmona"), seeks an order, pursuant to CPLR 3212, granting partial summary judgment against defendants and in his favor on his Labor Law § 240(1) cause of action, together with such other and further relief as is just and proper (the "Carmona Motion"). Defendants oppose the Carmona Motion.

By notice of motion, defendants, SLD 550 Corp. ("SLD 550"), and Morris Moving Corp. ("Morris Moving"), seek an order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the subject complaint, together with such other and further relief in favor of defendants as is just and proper (the "Defendants' Motion"). Carmona opposes the Defendants' Motion.

The following papers were considered in determining the instant motions:

Papers	NYSCEF DOC. No.
The Carmona Motion	
Notice of motion, Statement of material facts, Affirmation in support, Affidavit of service, Exhibits A-H	21-23, 28, 42-49

Response to statement of material facts, Affirmation in opposition	57-58
Reply affirmation	59
The Defendants' Motion	
Notice of motion, Affirmation in support, Statement of material facts, Memorandum of law, Exhibits A-G, Affidavit of service	29-40
Affirmation in opposition, Response to statement of facts	51-52
Reply affirmation	56

Upon the foregoing documents, the Court determines the motions as follows:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On or about October 4, 2022, Carmona commenced this action against defendants to recover damages for personal injuries. The complaint, as amended, alleges, *inter alia*, violations of Labor Law §§ 200, 240(1), and 241(6). On or about May 12, 2021, Carmona was working for nonparty Guaranteed Contracting Corp ("GCC"), on a project located at 550 South Fulton Avenue, Mount Vernon (the "Premises"), when he allegedly slipped on metal racking and fell to the ground. SLD 550 is the owner, and Morris Moving is the lessee, of the Premises. A Note of Issue was filed on April 2, 2024. The parties now bring their respective motions.

Both parties submitted a copy of Carmona's verified bill of particulars, copies of the transcripts from Carmona and Jacob Morris' ("Morris") depositions in support of their respective motions, and court-related documents. In support of the Carmona Motion, Carmona also submitted, *inter alia*, a copy of the work order for the Premises prepared by GCC and signed by Jacob Morris ("Morris") (the "Work Order").

The following is a summary of Carmona's deposition testimony. Carmona, who is employed by GCC, was working on a construction project at the Premises on or about May 12, 2021. Morris and Glen

Scuderi ("Scuderi"), the owner of GCC, were onsite that day. GCC was hired to install stucco on the Premises, remove the metal from the windows, cover the windows with "blocks," and to "place the scaffold." On the date of the accident, Carmona was tasked with installing plastic covering on the inside of the Premises to protect the interior from the stucco dripping down from the windows. To perform his task, Carmona had to climb up metal racking shelves to install the protective plastic from the window and on the metal racking. As Carmona was climbing up the shelves on the metal racking, he slipped on either the metal or plastic and fell approximately six to eight feet to the ground.

On the date of the accident, Scuderi was Carmona's supervisor and Carmona only received instructions from GCC. Carmona was not provided with any equipment from GCC or any other entity. Carmona was not wearing a hard hat, a harness, or any other safety gear. There was no handrail or scaffolding in his work area. No safety meetings were held; nor was Carmona required to take any training or safety courses prior to the date of the accident.

The following is a summary of the deposition testimony of Morris. Morris is the owner and president of Morris Moving, a moving and storage company. Morris is also the sole member of SLD 550, a limited liability company that was established for the purpose of purchasing the Premises. Morris signed the Work Order, which details the scope of the project at the Premises, which includes exterior and interior work.

Shortly after purchasing the Premises and prior to hiring GCC, Morris had metal racking installed inside the Premises by another company. The metal racking was drilled into the cement floor. The metal racking is secure because it does not move when he or Morris Moving's employees climb up and stand on it to store loads. The metal racking has three tiers, with the top rack approximately ten feet from the ground. Morris acknowledged that it would be easier and safer to use a ladder to get to the top of the metal racking.

On the date of the accident, Morris observed GCC's workers installing stucco inside the Premises. The stucco was dripping down the walls. Concerned that the stucco would drip onto, and damage, the storage items belonging to Morris Moving's customers, Morris called Scuderi. Scuderi came to Premises, Morris showed him where the stucco was dripping, and Scuderi assured him the matter would be handled. Morris then observed GCC's workers climbing up the metal racking. Protective plastic was used to cover the metal racking to prevent the stucco from dripping onto the said storage items. Morris did not remember if the plastic covering belonged to

Morris Moving or GCC. Morris did not remember if Scuderi told him they were going to put up the plastic. GCC's workers "used the [metal] racks as their ladder or as their scaffolding" to cover the area with plastic. Morris did not know whether Morris Moving or GCC owned the plastic covering. Morris did not observe GCC's workers using safety harnesses or any other safety equipment. Morris had the authority to stop GCC's workers if he observed any unsafe conditions. He did not supervise or control GCC's work. Morris did not stop GCC's workers from climbing up the metal racking.

Morris did not know if Carmona was installing the protective plastic or if Carmona was attempting to climb the metal racking when the accident occurred. Morris did not witness the accident or know how it occurred. Morris did not know if GCC held any safety meetings or any other meetings regarding the subject project. Morris did not hold any safety meetings with respect to the subject project. Scuderi was responsible for taking all necessary measures to ensure worker safety. Morris was onsite on weekdays for short periods of time during the subject project. He does not remember if there were any ladders at the Premises during the relevant time periods. Morris observed scaffolding erected outside the Premises.

The scope of the Work Order provided for GCC to "Block Up" seven windows on the exterior, and stucco two side walls, of the Premises. GCC was to "[s]et up scaffolding and safety equipment as needed" (Work Order [Ex. H.]). Morris testified that the subject work had been completed by GCC.

ANALYSIS

"On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotations and citations omitted]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d at 505 [internal

citation omitted]). "[I]n deciding a motion for summary judgment, issue-finding, rather than issue-determination, is the key to the procedure" (*id.* [internal quotation marks and citation omitted]).

Summary judgment is not warranted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Karel v Pizzorusso*, 215 AD3d 738 [2d Dept 2023]).

The Carmona Motion and Defendants' Motion - Labor Law § 240(1)

"Labor Law § 240(1) imposes upon owners, contractors, and their agents a nondelegable duty to provide workers with proper protection from elevation-related hazards (internal citation omitted). To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries (internal quotation marks and citations omitted)" (*Ramirez v Pace Univ.*, 2024 NY Slip Op 04334 **1 [2d Dept August 28, 2024]). "The protections of the statute are implicated where a worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against (internal quotation marks and citation omitted])" (*Mushkudiani v. Racanelli Constr. Group, Inc.*, 219 A.D.3d 613, 614 [2d Dept 2023]).

"Labor Law § 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (internal quotation marks and citation omitted)" (*Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 887 [2d Dept 2021]). To recover under Labor Law § 240(1) "for an injury caused by the failure to provide such safety devices, the plaintiff must first show they were engaged in one of the section's enumerated activities . . . ." (*Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]).

"'The intent of [Labor Law § 240 (1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts' (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882, 800 NE2d 351, 768 NYS2d 178 [2003]). The statute 'is to be construed as liberally as may be for the accomplishment of [that] purpose' (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521, 482 NE2d 898, 493 NYS2d 102 [1985] [internal quotation marks omitted])" (*Bonilla-Reyes v Ribellino*, 169 AD3d 858, 860 [2d Dept 2019]).

When viewed in the most favorable light to defendants, the facts here demonstrate that Carmona established, *prima facie*, his

entitlement to judgment as a matter of law on his Labor Law § 240(1) claim. The uncontroverted evidence establishes that the subject accident occurred in the course of, or sufficiently related to, an activity enumerated under Labor Law § 240(1) (*see Ramones v 425 County Rd., LLC*, 217 AD3d 977 [2d 2023]), that defendants failed to provide Carmona with any safety devices or protection, and that this failure was a proximate cause of Carmona's injuries (*see Kharie v South Shore Record Mgt, Inc*, 118 AD3d 955, 956 [2d 2014]).

In opposition to Carmona's *prima facie* showing, defendants failed to raise any triable issues of material fact. Contrary to defendants' contention, the subject accident was not the result of the usual and ordinary dangers attendant at a construction site or a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance. Defendants' reliance on *Krarunzhiy v 91 Cent Park W Owners Corp.*, 212 AD3d 722 [2d Dept 2023]) is misplaced. Unlike in the *Krarunzhiy* case, Carmona was not provided with any safety devices or equipment and the subject accident occurred during the course of an activity contemplated by Labor Law § 240(1).

Here, Carmona was instructed to install protective plastic covering on the metal racking in response to Morris' complaint about dripping stucco. This task was sufficiently related to the contracted stucco work. To accomplish his task, Carmona had to climb up to the window on metal racking. While climbing up the metal racking, Carmona slipped and fell six to eight feet to the ground. Thus, the subject accident resulted from a hazard related to the risk which brought about the need for the safety device in the first instance.

Moreover, any inconsistencies in Carmona's deposition testimony regarding the exact manner in which the accident occurred do not raise any triable issues of material facts, as defendants contend, because it is undisputed that Carmona was not provided with any safety devices and, a result thereof, he slipped and feel eight to ten feet to the ground while engaged in a covered activity (*see Turisse v Dominick Milone, Inc.*, 262 AD2d 305 [2d Dept 1999]).

Further, contrary to defendants' position, Carmona is not required to claim the metal racking was in some way defective because the same does not constitute a safety device within the meaning of Labor Law § 240(1). The metal racking was designed to be used as shelving for storage, not as a makeshift safety device. Therefore, the existence of any defects in the subject meal racking is irrelevant. Here, defendants' failure to provide Carmona with

any adequate safety device within the meaning of Labor Law § 240(1) was the proximate cause of the subject accident.

Based upon the foregoing, the branch of Defendants' Motion seeking dismissal of Carmona's Labor Law § 240(1) claim must be denied.

Defendants' Motion – Labor Law § 241(6)and § 200

Labor Law § 241(6)

"Labor Law § 241(6) requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (internal quotation marks and citations omitted)" (*Ramones v 425 County Rd., LLC*, 217 AD3d at 980). As a predicate to such claim, the plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*see Vita v New York Law School*, 163 AD3d 605[2d 2018]).

12 NYCRR § 23.17(d) "Protection from general hazards, Slipping hazards," provides:

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Whether a particular covering is "a foreign substance within the meaning of 12 NYCRR § 23.17(d) depends on its relation to the area where [] [the injured plaintiff] was assigned to work, and the covering's uniform properties" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310,319 [2024]).

12 NYCRR § 23-17(f) "Protection from general hazards, Vertical passage," provides:

> Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Here, Carmona's claim under Labor Law § 241(6) is predicated on a violation of 12 NYCRR Sections 23-1.5, 1.7(d), 1.7(e), 1.8, 1.15, 1.16, 1.17, 1.19, 1.21, 1.30, 1.31, 1.32, 5.1, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.10, 5.11, 5.12, 5.13, 5.14. 5.15, 5.16. 5.17, and 5.18 (*see* Verified Bill of Particulars at ¶ 8[Ex. D]). Defendants made arguments against the applicability of the foregoing sections to this case in their moving papers. However, Carmona did not address the same in his opposition submissions, except for 12 NYCRR § 1.7(d). Thus, as defendants correctly contend, Carmona abandoned so much of his Labor Law § 241(6) claim that is predicated on the sections enumerated in his verified bill of particulars, except for 12 NYCRR § 1.7(d), by failing to address the same in his opposition (*see Louie's Seafood Rest., LLC v Brown*, 199 AD3d 790 [2d Dept 2021]). Accordingly, this Court need only assess the sufficiency of this branch of the Defendants' Motion as it pertains to 12 NYCRR § 1.7(d).

As to Carmona's Labor Law § 241(6) claim predicated on a violation of 12 NYCRR § 1.7(d), defendants did not make a *prima facie* showing of their its entitlement to judgment dismissing the same. There are material issues of fact as to whether 12 NYCRR § 1.7(d) applies to the facts of this matter and whether Carmona slipped on plastic or metal. As defendants failed to meet their *prima facie* burden and eliminate any triable issues of material fact as to whether they violated 12 NYCRR § 1.7(d), the burden does not shift to Carmona.

It appears that Carmona is alleging a violation of 12 NYCRR § 23-1.7(f) for the first time in his opposition to the Defendants' Motion, as the same does not appear in the complaint or bill of particulars. Defendants addressed the foregoing in their Reply submissions. Defendants did not proffer any admissible evidence in this regard and, therefore, did not establish, *prima facie*, the inapplicability of this provision.

Labor Law § 200

"Labor Law § 200 codifies the common-law duty . . . to provide employees with a safe place to work (internal quotation marks and citations omitted), and applies to owners, contractors, and their agents (internal citation omitted). 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 (internal quotation marks and citation omitted). [W]hen the manner and method of work is at issue in a Labor Law § 200 analysis the issue is whether the defendant had the authority to supervise or control the work (internal

quotations and citations omitted). On the other hand, [w]hen a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it (internal quotation marks and citations omitted)" (*Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 841 [2d Dept 2021]).

Here, the uncontroverted evidence established that defendants did not have the authority to supervise or control the work site or the work being done by Carmona. In fact, Carmona testified at his deposition that he only received instruction from GCC and no other entity. Moreover, Morris testified that he was only at the Premises for short periods of time and that Scuderi oversaw the project and took necessary measures, including addressing his complaint about the dripping stucco. Therefore, defendants tendered sufficient evidence establishing their *prima facie* entitlement to judgment as a matter of law dismissing Carmona's Labor Law § 200 claim.

In opposition to defendants' *prima facie* showing, Carmona failed to raise any triable issues of material fact on this branch of the Defendants' Motion. Contrary to Carmona's contention, the "right to . . . stop the contractor's work if a safety violation is noted . . . is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*see Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]).

All other arguments raised on the motions and evidence submitted therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that the plaintiff's motion (motion sequence no. 1) for partial summary judgment, pursuant to CPLR 3212, on the issue of liability under Labor Law § 240(1) against defendants, SLD 500 Corp, and Morris Moving Corp, is granted; and it is further

ORDERED that defendants, SLD 500 Corp's and Morris Moving Corp.'s motion for summary judgment, pursuant to CPLR 3212, (motion sequence no. 2), is granted to the extent that plaintiff's Labor Law § 200 claim and Labor Law § 241(6) claim predicated on alleged violation of 12 NYCRR 23-1.5, 1.7(e), 1.8, 1.15, 1.16, 1.17, 1.19, 1.21, 1.30, 1.31, 1.32, 5.1, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.10,

5.11, 5.12, 5.13, 5.14. 5.15, 5.16. 5.17, and 5.18, are dismissed and severed from the remaining claims, which shall continue; and the motion is otherwise denied; and it is further

ORDERED that the parties shall appear in **Courtroom 1602 for an in-person Settlement Conference on October 3, 2024, at 9:30 a.m., and shall timely file the settlement form** uploaded to NYSCEF on June 18, 2024 as a court attachment (NYSCEF Doc. No.50-1) to the original court notice.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 17, 2024

ENTER:

____
HON. NANCY QUINN KOBA, J.S.C.

TO: All Counsel VIA NYSCEF