Hernadez-Flores v Leeding Bldrs. Group, LLC
2024 NY Slip Op 35096(U)
December 5, 2024
Supreme Court, Queens County
Docket Number: Index No. 709087/2019
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ROSARIO HERNANDEZ-FLORES,

Plaintiff,

-against-

LEEDING BUILDERS GROUP LLC, 30-02 ASSOCIATES LLC, THE LIGHTSTONE GROUP, LLC, CONSTRUCTION REALTY SAFETY GROUP INC., BAY RESTORATION CORP., 30-02 39TH AVENUE CONDOMINIUM, and BOARD OF MANAGERS OF 30-02 39TH AVENUE CONDOMINIUM,

Defendants.

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Index No.: 709087/2019
Motion Seq. No.: 3, 4, 5

DECISION and ORDER

Present: **HONORABLE ULYSSES B. LEVERETT**

	Papers Numbered
Plaintiff's Notice of Motion (Seq. 3) -Memorandum-Affidavit-Affirmations-Exhibits	EF 73-101
The Building Defendant's Affirmation in Opposition (Seq. 3)	EF 165
Plaintiff's Affirmation in Reply (Seq. 3)	EF 166
The Building Defendant's Notice of Motion (Seq. 4)-Affirmation-Exhibits-Statement of Material Facts	EF 102-128
Plaintiff's Notice of Cross-Motion (Seq. 4)-Affirmation-Exhibit-Response Statement of Material Facts	EF 161-164
The Building Defendant's Affirmation in Reply (Seq. 4)-Response Statement of Material Facts	EF 167-168
Defendant Construction Realty Safety Group, Inc.'s Notice of Motion (Seq. 5)-Affirmation-Exhibits	EF 129-154

Plaintiff's motion (Seq. 3) seeking an Order pursuant to CPLR § 3212 granting summary judgment with respect to liability in favor of Plaintiff and against Defendants Leeding Builders Group, LLC (LBG), 30-02 39th Avenue Associates, LLC (30-02 Associates), and The Lightstone Group LLC (Lightstone), collectively The Building Defendants, pursuant to New York State Labor Law §§ 240(1) and 241(6); Defendants Leeding Builders Group, LLC, 30-02 39th Avenue Associates, LLC, and The Lightstone Group LLC's motion (Seq. 4) pursuant to CPLR § 3212 granting summary judgment dismissing the Complaint and any and all cross-claims; Plaintiff's motion for an Order pursuant to CPLR §3025(b) and (c), and Rule 3042(b), granting leave to permit Plaintiff to amend her Verified Bill of Particulars and Construction Realty Safety Group, Inc.'s (CRSG) motion (Seq. 5) for an Order pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's Complaint, and all cross-claims are decided as follows:

This action arises from Plaintiff's allegations that she was injured while in the course of employment with non-party Mejia Maintenance Corp. on or about June 6, 2018 at a site located at 30-02 39th Avenue, Long Island City, New York (the "Premises") when, as Plaintiff was using a

ladder to clean construction dust from overhead pipes, the ladder allegedly broke, moved and fell, causing her to fall from the ladder and resulting in serious personal injuries.

Plaintiff claims Defendants 30-02 Associates as a premises owner, Lightstone as a development manager responsible for overseeing construction on the project and LBG as a construction manager/general construction contractor violated Labor Law §240(1) by failing to supply safe devices to protect Plaintiff against elevation-related hazards and Labor Law § 241(6) based on their violation of Industrial Code § 23-1.21(b)(3)(iv).

On June 6, 2018, Plaintiff was employed by Mejia Maintenance Corp., where she did cleaning, removing paint that painters got on glass, cleaning dust created by the carpenters in the kitchens and bathrooms, and removing plastic and paint from floors. On that day, Plaintiff's employer instructed her to work at the premises, just as she had done for two or three days per week throughout the prior year. Plaintiff was instructed to clean only the hallway, to remove paint from the glass of the window and the door, the water dispensers for the fire department, the walls, the rug, and the entrances to the doors leading into the apartments.

At the time of the incident, plaintiff was using glass cleaner, blades to clean the glass, rags, ladders, and a vacuum all of which were owned and provided by Mejia Maintenance Cleaners. She did not recall whether the ladder had the word "Mejia" written on it. Plaintiff had used this ladder before and had no problems with it in the past. The incident occurred as Ms. Hernandez Flores was cleaning the overhead sprinkler heads and sprinkler piping in the hallway. She had previously performed this work elsewhere in the building; she was required to make sure the ladder was locked and then climb the ladder.

After her fall, Plaintiff had an opportunity to look at the ladder for less than a minute before the people who were in charge of construction, took it away. She noticed that one of the locks of the ladder had become unhinged and it appeared as though one of the screws had become loose and had separated.

The Defendant's were involved in the construction of a residential rental building, owned by 30-02 Associates, where Lightstone served as the development manager charged with overseeing the design, marketing, operations, and construction activities on site. Lightstone oversaw the project from design to the completion of construction, and its project manager determined the scope of work for the construction manager, LBG, whom Lightstone hired. One of the development managers for Lightstone confirmed that it was general practice to hire a cleaning company to clean up as the general contractor and the subcontractors performed their construction work. LBG hired Mejia Maintenance Corp. to perform this cleaning, and LBG's superintendents directed its work. LBG's project manager opined that Mejia was not a construction subcontractor because their work does not need a permit, and its workers did not work on floors where active construction work was taking place, but also stated that the workers were given safety orientations. LBG's daily log from the day of the incident also lists Mejia on its manpower list and reflects the occurrence of the incident. LBG created an incident report for the occurrence. After the incident, the New York City Department of Buildings was called, confirming that Plaintiff's work was considered part of the construction activities on site.

Plaintiff in support of her motion (Seq. 3) and in opposition to Defendant's motion (Seq. 4) argues that the Building Defendants were responsible for safety on site and were each obligated and failed to provide Plaintiff with the proper equipment and/or safety devices to protect her from falling

from an alleged elevated work site, specifically the alleged unsecured, broken a-frame ladder that Plaintiff's employer provided to her as required by Labor Law §240(1).

Labor Law § 240(1) provides that:

> All contractors and owners as well as 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.

New York courts have construed Labor Law §240(1) to impose a liability that is strict, or absolute, in that: (1) the duty to provide proper protection is nondelegable, and "thus contractors and owners are liable under the statute whether or not they supervise or control the work," and (2) the plaintiff's negligence is not a defense to a violation of the statute. *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35 (2004). Plaintiff argues that there can be more than one proximate cause of an accident and that the possibility of comparative negligence and the failure to provide her with the proper safety devices to protect her against elevation-related hazards was a violation of the Labor Law provisions.

Plaintiff seeks to amend the Verified Bill of Particulars to allege a violation of NYS Industrial Code §23-1.21(b)(3)(iv). Plaintiff also argues that she is also entitled to summary judgment pursuant to Labor Law §241(6) based on their violation of Industrial Code §23-1.21(b)(3)(iv). Labor Law § 241(6) places a non-delegable duty on owners and contractors to "provide reasonable and adequate protection and safety" for workers by complying with specific safety rules and regulations. Section 23-1.21(b)(3)(iv) requires that all ladders be maintained in good condition and shall not be used if "it has any flaw or defect of material that may cause ladder failure." Plaintiff argues that it is undisputed that Plaintiff was provided with an unstable A-frame ladder and that the failure by the Building Defendants to provide a ladder free of defect caused Plaintiff's fall and injuries.

In support of the Building Defendant's summary judgement motion to dismiss the Complaint and claims against them (Seq. 4) and in opposition of Plaintiff's motion, the Building Defendants argue that Plaintiff has no affidavit from a professional engineer nor any expert to support their claim of a defective ladder. They further argue that the Complaint should be dismissed in its entirety as Labor Law 240 and 241 do not apply to routine cleaning. Plaintiff asserts that Plaintiff was not engaged in any covered activity but was only performing routine non-construction cleaning services. Plaintiff's testimony was that her employer's contract with LBG specifies that it was for non-construction services and it forbade Mejia and its employees from interfering with construction activities. Plaintiff further testified that neither the office nor the hallway outside of the office were under construction at the time of plaintiff's accident. The Building Defendant's argue that plaintiff's assertion that continued construction elsewhere in the building does not change the fact that she was injured post-construction which would constitute her work as routine cleaning not covered under Labor Law. *See Duque v. 50 Clinton Prop. Owner LLC*, 210 A.D.3d 469 (1st Dep't 2022).

Building Defendants argue that the Plaintiff was provided an appropriate safety device as she

testified that she inspected and used the ladder numerous times before her fall and found nothing wrong with it. In support of this argument is the affidavit of Kristopher Seluga, P.E. who states that the ladder, which had been stored at the home of Blandia Cardenzas, the president of plaintiff's employer Mejia Maintenance Corp. since the accident was a customary and proper safety device for the cleaning work and was in good and proper working condition. After examining the ladder, Mr. Seluga opined that to a reasonable degree of engineering certainty that the ladder Plaintiff was provided was a customary safety device for the work she was performing.

Plaintiff's assertion is that the Building Defendants arguments are meritless as Plaintiff was engaged in cleaning construction dust from overhead pipes and thus making her job construction related. It is Plaintiff's beliefs that her work was essential to the ongoing construction project making it a protected activity under 240(1). The Building Defendants argue that the cases Plaintiff cite in their brief are not on point as the actions were integral to a construction project whereas the subject accident took place post construction.

As to the nature of Plaintiff's work, the Building Defendants argue that Plaintiff's work as a cleaner was not a protected activity within the ambit of the Labor Law. Rather, defendants argue, plaintiff's work consisted of routine maintenance or cleaning. The New York Court of Appeals examined the term "cleaning" under Labor Law §240(1).

> "[A]n activity cannot be characterized as 'cleaning' under the [Labor Law], if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other"

(*Soto v. J. Crew Inc.*, 21 N.Y.3d 562 [2013]).

Applying these factors here, Plaintiff's work does not constitute protected cleaning under the Labor Law §240(1). Plaintiff's work at the subject premises was the kind repeated daily routine maintenance provided by the Plaintiff in *Soto*, (1) as Plaintiff did this type of comparable domestic housecleaning work three or four times a week for the year after the area being cleaned was completely constructed; (2) the work did not require specialized equipment or expertise, nor unusual deployment of labor; and (3) the core work was not related to any ongoing construction, renovation, painting, alteration or repair project. Plaintiff's work also involved an elevation risk — i.e. cleaning the overhead pipes which required an A-Frame ladder. The presence or absence of any one of the four *Soto* factors is not necessarily dispositive. Accordingly, given the totality of the circumstances, Plaintiff's work at the premises does not fall within the protections of the Labor Law.

Defendant CRSG's motion (Sequence 5) which was submitted without opposition, asserts that CRSG was not the owner, general contractor and/or agent of the owner or general contractor in connection with this project that would subject CRSG to Labor Law §200, §240(1) or §241(6). *Linkowski v. City of New York*, 33 A.D.3d 971 (2d Dep't 2006). The record has established that 30-02 Associates was the owner. CRSG was the safety consultant for the job and had a general role to observe the site and identify safety issues and report them to an individual at LBG, or the supervisor in charge, and then they would speak to the subcontractor's foreman about a safety issue as this was the chain of command. CRSG argues that they did not have the authority nor the power to order any deficiencies be corrected, but it was LBG who was to communicate with the subcontractors. CRSG offered evidence through LBG's and their own party deposition that CRSG was not informed of the work done by Plaintiff nor that CRSG had any authority over Plaintiff's work. As such, no liability can be imposed on CRSG.

A party is entitled to summary judgment when there are no material issues in dispute requiring trial. The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. See *Alvarez vs. Prospect Hospital*, 68 N.Y.2d 320 (1986).

The Court finds that there are no triable issues of fact and that the Plaintiff has not established prima facie entitlement that the required cleaning was typical of general maintenance cleaning to qualify for a judgment for liability under Labor Law 200, 240(1) and 241(6) pursuant to CPLR §3212.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (Seq. 3) for an Order pursuant to CPLR §3212 for summary judgment on liability is denied, and it is further

ORDERED, that Plaintiff's cross-motion to amend the Bill of Particulars to include a claim of violations of Industrial Code §23-1.21(b)(3)(iv) is granted, and it is further

ORDERED, that Defendants Leeding Builders Group, LLC, 30-02 39th Avenue Associates, LLC, and The Lightstone Group LLC's motion (Seq. 4) pursuant to CPLR § 3212 granting summary judgment dismissing the common law negligence and Labor Law §200, §240(1) and §241(6) is granted, and it is further

ORDERED, that Defendant Construction Realty Safety Group, Inc.'s (CRSG) motion (Seq. 5) for an Order pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's Complaint, and all cross-claims against them is granted without opposition.

This is the decision and order of this Court.

Dated: December 5, 2024

Hon. Ulysses B. Leverett, J.S.C.

HON. ULYSSES B. LEVERETT

FILED
12/6/2024
COUNTY CLERK
QUEENS COUNTY

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