

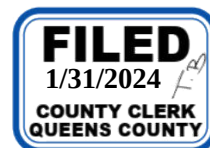
Pacheco v City of New York
2024 NY Slip Op 35312(U)
January 31, 2024
Supreme Court, Queens County
Docket Number: Index No. 704812/21
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



-----X
Bruno Pacheco,

Index
Number: 704812/21

Plaintiff,

Motion
Date: 1/29/24

- against -

Motion Seq. No.: 4

City of New York, New York City Department
of Environmental Protection and New York
City Department of Design and Construction,

Defendants.
-----X

The following papers numbered E53-E61 & E64-E67 read on this
motion by Plaintiff for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	E53-61
Affirmation in Opposition.....	E64
Reply-Memorandum of Law.....	E65-67

Upon the foregoing papers it is ordered that the motion is
decided as follows:

Motion by Plaintiff for summary judgment pursuant to New York
State Labor Law §§240(1) and 241(6) is granted solely to the extent
the branch of Plaintiff's motion for summary judgment with respect
to his Labor Law §241(6) claim predicated on violation of Section
23-1.5(c)(3) of the Industrial Code is granted. The remaining
branches of the Plaintiff's motion for summary judgment are denied.

Plaintiff allegedly sustained injuries while delivering
construction materials on October 27, 2020 at the premises known as
102-06 103rd Avenue in Queens County. On the date of incident,
Plaintiff was employed by non-party, PCI Industries Corp. He was
transporting construction materials to a job site in a pickup truck
rented by Hertz. The materials were delivered to a construction

site owned and operated by the Defendant, City of New York. The job site was for a "bioswale" project, which was a water drain job related to the City's sewer system. The work involved digging up water drains and filling them with stone to create drainage. The incident in question occurred on the street abutting 102-06 103rd Avenue. The materials were delivered to a designated, fenced off area of the street.

Plaintiff worked alone in delivering materials. On the date of incident, the materials were unloaded from the rear of the truck using a 400-pound metal "gate." The gate was attached to the base of the truck bed. The gate was manually opened to a ninety degree angle, then lowered to the ground with a hydraulic system. After unloading the materials, the gate is supposed to be raised back up and manually locked into position on either side. Safety brakes/pins ensure that the gate does not flap open. On the date of incident, after Plaintiff closed the gate, he turned around. A couple of seconds later, the gate dislodged and flapped open. The gate fell and struck the back of Plaintiff's back, neck, and right shoulder, causing him to fall. Plaintiff suffered injuries to his knees, right shoulder, neck, and back as a result.

Plaintiff testified that typically, the pins slide into a hole to ensure the gate doesn't become dislodged. In this instance, the subject truck did not contain the pins. The pins that locked this specific gate were the kind that go into the door frame once it is shut. Plaintiff alleges that the pins did not properly secure into the frame once the door was shut, causing the gate to flap open. Subsequent to the incident, Plaintiff inspected the pins and discovered they were rusty. After the accident, Plaintiff reported the accident to his supervisor, Antonio Silverio. He was instructed to go to the hospital.

Despite the Defendants' contention, the Court finds the testimony of the Plaintiff alone, and without additional expert testimony, is adequate in determining the instant motion with respect to his claims pursuant to Labor Law §240(1). Indeed, Plaintiff's testimony establishes that he was familiar with the subject truck and the pinning mechanism contained within it (see generally Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582 [1st Dept. 2018]; Serra v. Goldman Sachs Group, Inc., 116 A.D.3d 639 [1st Dept. 2014]).

Labor Law §240(1) imposes liability upon owners or contractors who fail, inter alia, to furnish ladders that are "so constructed, placed and operated as to give proper protection to a person so employed" in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (see

Labor Law §240(1)).

Labor Law §240(1) only applies to elevation-related hazards where the peril to be protected against, and the injury it affords a worker a cause of action for, is gravity-related. "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides" (Rocovich v Consolidated Edison Co., 78 N.Y.2d 509, 514 [1991]). The Court of Appeals subsequently found in Ross that the parameters of the statute's application, stated, "the 'special hazards' to which we referred in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity (see Ross v Curtis-Palmer Hydro-Elec. Co. (81 N.Y.2d 494, 501 [1993])). Rather, the 'special hazards' referred to are limited to specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (see id.). In other words, Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person within the confines of performing work on a building or structure.

Defendants argue that §240(1) does not apply because a "highway at grade" is not a "structure," as contemplated by §240(1). The State of New York defines the term "highway" as any highway, road, street, avenue, alley, public place, public driveway, or any other public way (see NY Vehicle & Traffic Law §134). Here, it is undisputed that the Plaintiff was tasked with delivering materials to the job site, which, per the photographs, was on a public roadway, or "highway."

The Court agrees that §240(1) specifically and solely applies to buildings or structures. Various Appellate Division Courts, including the Second Department, have specifically addressed the issue of claimants working on or around trucks on roadways and injured as a result (see Vargas v. State, 273 A.D.2d 460 [2d Dept. 2000]; see Sciora v. New York State DOT, 226 A.D.2d 621 [2d Dept. 1996]; Dilluvio v. City of New York, 264 A.D.2d 115 [1st Dept. 2000]; Spears v. State, 266 A.D.2d 898 [4th Dept. 1999]; see Dillon v. State, 201 A.D.2d 793 [3d Dept. 1994]). The courts have all come

to the same conclusion, in that §240(1) is inapplicable when the type of work performed by a plaintiff does not involve work to a "structure" or "building."

Plaintiff, in reply, contends that similar claims pursuant to §240(1) involving accidents occurring or involving sidewalks have been upheld by the Courts. However, in all of the cases cited to by Plaintiff, a structure or building was involved in the type of work performed(see Sainato v. City of Albany, 285 A.D.2d 708 [3d Dept. 2001][finding that because the work involved excavation, the light pole from which Plaintiff fell could be considered a structure]; Morin v. Machnick Builders, Inc., 4 A.D.3d 668 [3d Dept. 2004][wherein the ladder on which the Plaintiff was situated was situated against the building, i.e., a structure, and not situated squarely upon the sidewalk and unsupported]; Kaferstein v. Chase, 9 Misc.3d 1078 [NY Sup Ct New York County 2005] [wherein the plaintiff was injured while lowering a pipe from the sidewalk into the basement of a building]; see also Mora v. Sky Lift Distrib. Corp., 126 A.D.3d 593 [1st Dept. 2015]; Hunter v. Metro N. Gardens Hous. Dev. Fund, 2016 N.Y. Misc. LEXIS 2778 [NY Sup Ct New York County 2016]). In contrast, Plaintiff's accident occurred on the roadway and/or sidewalk and did not involve "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (see Labor Law §240[1]). Accordingly, on this basis alone, the Court finds that Plaintiff failed to meet his prima facie burden on summary judgment pursuant to Labor Law §240(1).

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that the owner (or agent of the owner) or contractor violated a specific rule or regulation of the Industrial Code and that such violation was a substantial factor in causing plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 A.D.3d 648 [2d Dept. 2004]).

Plaintiff alleges in his bill of particulars that Defendant violated the following sections of the Industrial Code: §§23-1.5, 23-9.2(a), and 23-9.8(c), as well as violations of the following sections of the Occupational Safety and Health Administration (OSHA): §§1910.12, 1910.22, 1910.27, 1910.28, 1910.29, 1910.30, 1910.132, 1910.133, 1910.135, 1910.140, 1926.20, 1926.25, 1926.26, 1926.28, 1926.56, 1926.95, 1926.100, 1926.104, 1926.451, 1926.452, 1926.501, 1926.502, and 1926.503.

Counsel solely addresses Industrial Code Sections 23-1.5(c)(3), 23-9.2(a), 23-9.8(c).

Section 23-1.5(c)(3) of the Industrial Code provides "Condition of equipment and safeguards. All 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 forgoing section applies to power-operated heavy equipment or machinery, such as trucks (see Misicki v. Caradonna, 12 N.Y.3d 511 [2009]). Plaintiff's Counsel avers that the Plaintiff's testimony regarding the rusty pins and missing clips, in addition to the fact that he had been driving the subject truck for two weeks, and thereby establishing constructive notice of the alleged condition, entitle him to summary judgment based on Section 23-1.5(c)(3).

Defendants contend that Section 23-1.5(c)(3) is not specific enough to support a claim under Labor Law §241(6) and that a more specific section exists by which this Court should make a determination (Section 23-9.2(a)). Initially, this Court notes that the Appellate Division, Second Department has found that Section 23-1.5(c)(3) is sufficiently specific to support a §241(6) claim (see Opalinski v. City of New York, 205 A.D.3d 917 [2d Dept. 2022]; Perez v. 286 Scholes St. Corp., 134 A.D.3d 1085 [2d Dept. 2015]). The Defendants point to Zaino v. Rogers in support of the argument that the Court should disregard Section 23-1.5(c)(3) and solely analyze Plaintiff's motion pursuant to §241(6) under the more specific Section 23-9.2(a) (see Zaino v. Rogers, 153 A.D.3d 763 [2d Dept. 2017]). In Zaino, the defendants were the party moving for summary judgment (see id.). They successfully argued that, while Section 23-1.5(c)(3) was applicable as a general safety provision, another provision (Section 23-9.5[g]) was even more applicable because it related to the specific kind of safety device which was at issue (see id.). However, the Court finds Zaino distinguishable from the case at bar. In that matter, the defendants established that they were not liable under an even more specific provision and which governed the safety device at issue (see id.). In making the determination, the Court cited to authority regarding statutory interpretation (see People v. Walker, 81 N.Y.2d 661 [1993]; Matter of Winston v. Freshwater Wetlands Appeals Bd., 224 A.D.2d [1996]). In those cases, the Court of Appeals found that in the event of apparent conflicts between parts of a statutory scheme, the specific overrides the general. Here, no conflict between the provisions exist. Moreover, in Zaino, the defendants were successful, in part, because they were able to establish that they were not liable under a more specific Industrial Code section, thereby eliminating the need for the Court to make a determination under the more general provision (see Zaino, 153 A.D.3d at 765). Accordingly, the Court finds that Section 23-1.5(c)(3) is a proper predicate here by which to determine liability under §241(6).

Plaintiff has demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability as to his Labor Law §241(6) claim predicated on violation of Section 23-1.5(c)(3). Plaintiff's un rebutted testimony established that his injuries were proximately caused by the gate attached to the subject truck, which swung open after the pinning mechanism failed to keep it shut. Defendants failed to rebut Plaintiff's testimony with any evidence that the safety devices involved were kept "sound and operable" or that the device was "immediately repaired or restored or immediately removed from the job site." Accordingly, the branch of the motion for summary judgment with respect to Plaintiff's Labor Law §241(6) claim predicated on violation of Section 23-1.5(c)(3) of the Industrial Code is granted.

Section 23-9.2(a) of the Industrial Code provides "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."

In the seminal case interpreting Section 23-9.2(a), the Court of Appeals held that the third sentence of the section is the only portion which is specific enough to permit recovery under §241(6) (see Misicki v. Caradonna, 12 N.Y.3d 11 [2009]). The Court found that the third sentence "imposes an affirmative duty on employers to correct by necessary repairs or replacement any structural defect or unsafe condition in equipment or machinery upon discovery or actual notice of the structural defect or unsafe condition (see id.; internal quotations omitted). The Court further specified that the term "upon discovery" requires actual notice. The Court goes on to reiterate that, in sum, the section permits recovery under Section §241(6) for an employee who has suffered injuries proximately caused by a previous identified and unremedied condition affecting such heavy machinery (see id.). Here, Plaintiff failed to submit any evidence that the defect was previously identified and unremedied. Instead, Plaintiff solely focuses on the fact that the Defendants had constructive notice of the defect because he had driven the vehicle for approximately two weeks prior to the incident. The forgoing does not meet the standard set forth in Misicki. Accordingly, that portion of the Plaintiff's motion for summary judgment must be denied.

Section 23.9.8(c) of the Industrial Code provides "Brakes and load-elevating mechanisms. Every power-operated fork and lift truck shall be provided with a lockable brake. The load-elevating mechanism shall be capable of being locked at any elevation." Defendants argue that there is a question of fact as to the applicability of this section, and whether it applies to the sort of truck involved here. The Court agrees. Indeed, the section is entitled "lift and fork trucks." Plaintiff submits no evidence to demonstrate that the type of truck used by him fits within the constructs of this section. While the Court agreed that an expert affidavit was not necessarily required for Plaintiff to establish prima facie entitlement to summary judgment, there is no evidence whatsoever to establish that the truck involved in the incident qualifies under Section 23.9.8(c). The only information in the Court's possession regarding the truck is derived from Plaintiff's testimony. Plaintiff merely indicated that the truck was a "heavy duty" Ford model. Plaintiff's testimony fails to establish that the subject truck was a "lift truck," nor is it the Court's position to speculate. Accordingly, there appears to be a question of fact as to the applicability of Section 23-9.8(c), sufficient to defeat the instant branch of the Plaintiff's motion for summary judgment.

Accordingly, the branch of Plaintiff's motion for summary judgment with respect to his Labor Law §241(6) claim against Defendants predicated on violation of Section 23-1.5(c)(3) of the Industrial Code is granted. The remaining branches of the Plaintiff's motion for summary judgment, including those claims under Labor Law §240(1) and Labor Law §241(6) predicated on violation of Industrial Code Sections 23-9.2(a) and 23-9.8(c) are denied

Serve a copy of this order with notice of entry without undue delay.

Dated: January 31, 2024


KEVIN J. KERRIGAN, J.S.C.

