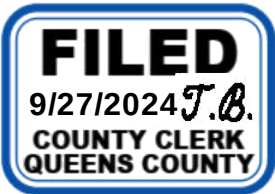


Ordonez v 118 Equities, LLC
2024 NY Slip Op 35365(U)
September 27, 2024
Supreme Court, Queens County
Docket Number: Index No. 715773/2019
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY



PRESENT: HON. PHILLIP HOM PART 14
Justice

-----X

CRISTHIAN ORDONEZ,

Plaintiff,

- V -

118 EQUITIES, LLC, ROSA 118 MANAGER LLC, KYROUS
REALTY GROUP INC., K&R REALTY MANAGEMENT INC.,
MAXWELL-KATES, INC., ROSA PARKS CONDOMINIUM,

Defendants.

-----X

MAXWELL-KATES, INC., ROSA PARKS CONDOMINIUM,

Third-Party Plaintiffs,

-against-

CANIDO BASONAS CONSTRUCTION SERVICES, LLC, AND
CANIDO BASONAS CONSTRUCTION CORP.,

Third-Party Defendants.

-----X

CANIDO BASONAS CONSTRUCTION SERVICES, LLC, AND
CANIDO BASONAS CONSTRUCTION CORP.,

Second Third-Party Plaintiffs,

-against-

DVG RESTORATION CORP.,

Second Third-Party Defendant.

-----X

MAXWELL-KATES, INC., AND ROSA PARKS

INDEX NO.

715773/2019

MOTION DATE

03/14/2024

MOTION SEQ. NO.

003 & 005

DECISION + ORDER ON
MOTION

Third-Party
Index No.

Second Third-Party
Index No.

CONDOMINIUM.,

Third Third-Party

Index No.

Third Third-Party Plaintiffs,

-against-

DVG RESTORATION CORP,

Third Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 110, 114, 132, 133, 134, 135

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 136

were read on this motion to/for

DISMISS

Upon the foregoing papers, it is ordered that the motions are determined as follows:

Plaintiff Cristhian Ordonez (“Plaintiff”) commenced this action against defendants 118 Equities, LLC, Rosa 118 Manager LLC, Kyrous Realty Group, Inc., K&R Realty Management Inc., Maxwell-Kates, Inc. (“Maxwell-Kates”), and Rosa Parks Condominium (“Rosa Parks”), to recover for work-related injuries he allegedly sustained on July 11, 2019. Plaintiff’s complaint asserts causes of action predicated on alleged violations of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. Defendants/third-party plaintiffs Maxwell-Kates and Rosa Parks (collectively “Moving-Defendants”) served an answer (EF 4).

Moving-Defendants commenced a third-party action against third-party defendants Canido Basonas Construction Services, LLC and Canido Basonas Construction Corp. (“Canido”) (EF 7). Thereafter, Moving-Defendants filed a supplemental summons and amended third-party complaint (EF 12). Canido served an answer to the third-party action (EF 19). This third-party action was ultimately discontinued (EF 63).

Canido commenced a second third-party action against second/third third-party defendant DVG Restoration Corp. (“DVG”), asserting claims for contractual indemnification, common-law indemnification, contribution, and breach of contract (EF 23). DVG failed to answer and/or otherwise appear in the second third-party action. Canido moved (Seq. No. 1) for a default judgment against DVG in the second third-party action. DVG was served with the notice of motion; however, DVG did not oppose the motion. In an order, dated January 13, 2023, and entered January 17, 2023, this Court denied same without prejudice, as Canido failed to submit the agreement it seeks to enforce against DVG (EF 65).

Moving-Defendants commenced a third third-party action against DVG, asserting claims for contractual indemnification, common-law indemnification, contribution, and breach of contract. Moving-Defendants moved (Seq. No. 4) for a default judgment on their third third-party claims against DVG. DVG opposed same. In an order, dated July 24, 2024, this Court denied Moving-Defendants' motion on the basis that they failed to submit proof of service of the third third-party summons and complaint, and the additional notice. Additionally, DVG moved (Seq. No. 6) to sever the third third-party action, which this Court granted in an order, dated July 24, 2024.

Now, Plaintiff moves for partial summary judgment as to liability against Moving-Defendants on his Labor Law § 240 (1) claim (Seq. No. 3). Moving-Defendants oppose.

In a separate motion, Moving-Defendants also seek summary judgment dismissing Plaintiff's Labor Law § 200 and common-law negligence claims as well as so much of Plaintiff's Labor Law § 241 (6) claim as is predicated on alleged violations of sections 23-1.7, 23-1.8, 23-1.28, 23-1.30, 23-2.1, and 23-6 of the Industrial Code (Seq. No. 5). Plaintiff opposes.

In 2019, Moving-Defendants entered into a contract with Canido to perform certain façade restoration work on a residential condominium building in Manhattan (the "Property"). Canido subsequently subcontracted this work to DVG.

Plaintiff testified that he was employed by Canido as a demolition laborer, that he began working at the property in July 2019, and that an accident occurred on his third day on the job. According to Plaintiff, the accident occurred as follows: He was working on an exterior scaffold platform which was the height of the second floor of the building, and he was removing debris from the scaffold when his accident occurred. There were about twenty bags of garbage and other debris on the scaffold platform which weighed approximately fifty pounds each, and he was moving these bags across the platform to position them closer to the scaffold's ladder. As Plaintiff was moving the fourth or fifth bag across the scaffold, one of the planks of the platform gave way, causing Plaintiff to fall to the scaffold's lower platform. As a result of the fall, Plaintiff allegedly sustained injuries to his left shoulder and left knee.

Labor Law § 240 (1) (Seq. No. 3)

In support of his motion, Plaintiff submits, among other things, the pleadings, the transcript from the examination before trial ("EBT") of Plaintiff, the transcript from the deposition of Michael Brion ("Brion"), the principal of Canido, the transcript from the deposition of Sibyl Colon ("Colon"), a witness for Maxwell-Kates, Inc., and the contract for the façade work at the property. Based on these submissions, the plaintiff asserts that he is entitled to partial summary judgment as to liability on his Labor Law § 240 (1) claim asserted against the defendants because the plaintiff's testimony establishes that the scaffold platform he fell from had collapsed for no apparent reason, and that these circumstances establish a prima facie violation of Labor Law § 240 (1).

Under Labor Law § 240 (1), "a]ll contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 [construction workers employed on the premises]” (Labor Law § 240 [1]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]). Labor Law § 240 (1) “imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). To prevail on a claim under Labor Law § 240 (1), a plaintiff must prove that the defendant violated the statute and that this violation was a proximate cause of his or her injuries (*see Jones v City of New York*, 166 AD3d 739, 740 [2d Dept 2018]).

Here, the Plaintiff’s submissions are sufficient to establish prima facie entitlement to summary judgment as to liability on his Labor Law § 240 (1) claim asserted against the moving defendants. Rosa Parks, as the owner of the property, and Maxwell-Kates, as its agent, are proper parties under the Labor Law (*see Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 973 [2d Dept 2020]). In addition, “[t]he collapse of a scaffold or ladder for no apparent reason while a plaintiff is engaged in an activity enumerated under the statute creates a presumption that the ladder or scaffold did not afford proper protection” (*Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). Here, Plaintiff’s testimony that the scaffold platform gave way is sufficient to establish that the statute was violated, and that this violation was the proximate cause of the Plaintiff’s injuries (*see Debenedetto*, 190 AD3d at 936; *Chabla v 72 Greenpoint, LLC*, 101 AD3d 928, 928-929 [2d Dept 2012]).

In opposition, the Moving-Defendants submit a Workers’ Compensation C-3 claim form. The Moving-Defendants first argue that Plaintiff failed to demonstrate prima facie entitlement to summary judgment as to liability on his Labor Law § 240 (1) claim because he provided an inconsistent description of the accident during each of his EBTs. The Moving-Defendants also contend that the C-3 claim form creates an issue of fact as to how the accident occurred because the form indicates that Plaintiff’s accident occurred when he tripped and fell, rather than when the scaffold platform collapsed.

The Moving-Defendants’ arguments are insufficient to preclude summary judgment as to liability on the plaintiff’s Labor Law § 240 (1) claim. As an initial matter, the court disagrees with the Moving-Defendants’ contention that Plaintiff’s deposition testimony is inconsistent. To the contrary, Plaintiff consistently testified that the scaffold platform gave way while he was walking across it, causing him to fall to the platform below. Moreover, the C-3 claim form fails to raise an issue of fact as to the manner in which Plaintiff’s accident allegedly occurred. As Plaintiff correctly points out in his reply papers, the C-3 claim form is not properly authenticated (*see CPLR 4518*). In any event, the C-3 claim contains a notation that Plaintiff’s accident occurred “while carrying a bag of debris he tripped and fell from temporary flooring down to ground.” However, the defendants failed to produce any evidence that this statement is attributable to the Plaintiff (*see Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766 [2d Dept 2008]; *Berrios v TEG Mgt. Corp.*, 35 AD3d 775, 776 [2d Dept 2006]). Finally, to the extent that Moving-Defendants assert that Plaintiff’s conduct was the sole proximate cause of his injuries, this argument is speculative, and therefore insufficient to raise an issue of fact.

Thus, Plaintiff’s motion for summary judgment pursuant to Labor Law § 240 (1) is granted.

Labor Law § 241 (6) (Seq. No. 5)

In support of their separate motion for summary judgment, Moving-Defendants submit, among other things, the pleadings, the transcripts from the EBTs of Plaintiff, Brion, Colon, and the contract for the façade work at the property. Based on these submissions, Moving-Defendants assert that they are entitled to summary judgment dismissing Plaintiff's Labor Law § 241 (6) claim asserted against Maxwell-Kates, because it is not a proper party under the Labor Law. Moving-Defendants contend that they are entitled to summary judgment dismissing Plaintiff's Labor Law § 241 (6) claim, as is predicated on alleged violations of sections 23-1.7 (a), (d), (e), and (f), 23-1.8 (c), 23-1.28, 23-1.30, and 23-6.1 (j) (2) of the Industrial Code, because these provisions are inapplicable to Plaintiff's accident.

“Labor Law §§ 240 (1) and 241 (6) apply to owners, contractors, and their agents” (*Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 973 [2d Dept 2020], quoting *Fucci v Douglas S. Plotke, Jr., Inc.*, 124 AD3d 835, 836 [2d Dept 2015] [internal quotation marks omitted]). Yet in opposing Plaintiff's motion for summary judgment as to liability on his Labor Law § 240 (1) claim, Moving-Defendants fail to assert that Maxwell-Kates is not a proper Labor Law defendant. Thus, this argument is not properly before the Court.

“Labor Law § 241 (6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). “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” (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

Here, Moving-Defendants' submissions are sufficient to establish prima facie entitlement to summary judgment dismissing so much of Plaintiff's Labor Law § 241 (6) claim as is predicated on alleged violations of sections 23-1.7 (a), (d), (e), and (f) and 23-1.8 (c). Plaintiff's testimony demonstrates that his accident did not involve any of the hazards set forth under these subsections of 23-1.7 (see *Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1223 [2d Dept 2018]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]), and was not caused by the failure to use any of the personal protective equipment described in section 23-1.8 (c) (see *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Similarly, Plaintiff's testimony demonstrates that his accident did not involve hand propelled vehicles, the lack of adequate illumination, or the use of any hoisting machines, rendering sections 23-1.28, 23-1.30, and 23-6.1 (j) (2) inapplicable here (see *Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]; *Honeyman*, 154 AD3d at 821-822).

In opposition to these branches of Moving-Defendants' motion, Plaintiff asserts that there is an issue of fact as to whether Moving-Defendants violated sections 23-1.16 and 23-5.1 of the Industrial Code. This argument is insufficient to raise an issue of fact. Critically, the Industrial Code sections upon which Plaintiff relies are either not alleged in Plaintiff's bill of particulars or not addressed in Moving-Defendants' motion.

Finally, to the extent that Moving-Defendants' notice of motion seeks summary judgment dismissing the portions of Plaintiff's Labor Law § 241 (6) claim, which are predicated on violations of any other Industrial Code provisions, these sections of the Industrial Code were not substantively addressed in the defendants' moving papers. These branches of the defendants' motion are therefore denied.

Labor Law § 200 claim (Seq. No. 5)

"Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). "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" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). Where an accident was caused by the manner in which the work was performed, "recovery against a property owner cannot be had 'unless it is shown that the [owner] had the authority to supervise or control the performance of the work'" (*Lazo v Ricci*, 178 AD3d 811, 813 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Conversely, "[w]here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2010], quoting *Ortega*, 57 AD3d at 61).

A Labor Law § 200 cause of action falls under both categories where, as here, "the plaintiff's bill of particulars specifically describes [a defendant's] alleged negligence as including both the condition of the work site and the absence of safe and proper equipment" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52 [2d Dept 2011]). Under these circumstances, "the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (*Reyes*, 83 AD3d at 52).

Here, the Moving-Defendants' submissions fail to establish prima facie entitlement to summary judgment dismissing the plaintiff's Labor Law § 200 claim, insofar as asserted against them. To the extent that Plaintiff's Labor Law § 200 claim is predicated on premise liability, the Moving-Defendants merely assert that Plaintiff did not observe or make a report of such a condition. This argument is insufficient to affirmatively demonstrate that the Moving-Defendants did not have actual or constructive notice of a dangerous or defective condition at the property (*see Merchant v New York City Tr. Auth.*, 183 AD3d 647, 648 [2d Dept 2020]). This branch of the motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff's motion (Seq No. 3) for partial summary judgment as to liability on his Labor Law § 240 (1) cause of action, as asserted against Maxwell-Kates, Inc. and Rosa Parks Condominium, is granted; and it is further

ORDERED that Maxwell-Kates, Inc. and Rosa Parks Condominium's motion (Seq No. 5) for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, as is predicated on alleged violations of sections 23-1.7 (a), (d), (e), and (f), 23-1.8 (c), 23-1.28, 23-1.30, and 23-6.1 (j) (2) of the Industrial Code is granted; and it is further

ORDERED that the remaining branches of Maxwell-Kates, Inc. and Rosa Parks Condominium's motion (Seq No. 5) for summary judgment are denied; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry, via NYSCEF, upon all parties, within seven (7) days from the date of entry.

This constitutes the Decision and Order of this Court.

Dated: September 27, 2024



PHILLIP HOM, J.S.C.

