

Caines v One Flatbush Ave. Prop. LLC

2025 NY Slip Op 30327(U)

January 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 522897/17

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of January, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
MUdTADI CAINES,

Plaintiff,

-against-

Index No. 522897/17
Mot. Seq. Nos. 4-5

ONE FLATBUSH AVENUE PROPERTY LLC,
SLATE PROPERTY GROUP, MEADOW PARTNERS
LLC, DANYA CEBUS CONSTRUCTION, LLC, and
NORTHEAST INTERIORS SPECIALISTS, LLC,

DECISION AND ORDER

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion and Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Affidavits/Affirmations in Reply _____

74-87, 104
92-102
105, 106-107, 108

Upon the foregoing papers in this action to recover damages for personal injuries, defendants One Flatbush Avenue Property LLC, Slate Property Group, and Danya Cebus Constructions, LLC (collectively, defendants) jointly move for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing all claims of plaintiff MuDtadi Caines (plaintiff) as against them (Seq. No. 4). Plaintiff cross-moves for: (1) an order, pursuant to CPLR 3212, granting him partial summary judgment on his Labor Law § 240 (1) claim; (2) leave, pursuant to CPLR 3025 (b), to further amend his bill of particulars to add 12 NYCRR 23-1.7 (e) (2) as a predicate for his Labor Law § 241 (6) claim; and (3) subject to his receiving the aforementioned leave, an order, pursuant to CPLR 3212, granting him partial summary judgment on his Labor Law § 241 (6) claim, as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (2) (Seq. No. 5).

On July 7, 2017, plaintiff allegedly was injured when he fell from a ladder while performing construction work inside a newly erected building located in Brooklyn and owned by defendant One Flatbush Avenue Property LLC (the project). Defendant Slate Property Group acted as the developer of – while Danya Cebus Constructions, LLC was the general contractor for – the

project. At the time of the accident, plaintiff was employed by nonparty Naf Pak Plumbing & Heating Corp. as a plumbing assistant.

According to plaintiff, on the day at issue, his supervisor directed him to work in a small, 10 x 5 feet bathroom on the 11th floor of the project. The bathroom's floor, at the time, was littered with "medium-sized pieces of wire, rock . . . [,] like the metal casing around the electrical wires".¹ The supervisor retrieved a ten-foot A-frame ladder for plaintiff, set up the ladder in the open position onto the bathroom floor, and positioned it beneath the portion of the bathroom ceiling on which plaintiff was to work.² The supervisor directed plaintiff to install a piece of pipe in the bathroom ceiling. Plaintiff climbed up the third step of the ladder (counting from the floor) and drilled a hole in the bathroom ceiling. He then descended the ladder, picked up his hammer, and climbed up the ladder again. Standing once again on the third step of the ladder, he "lean[ed] past the ladder" and "to [his] left" to hammer an anchor into the newly made hole in the bathroom ceiling.³ As soon as he hit the anchor with his hammer, however, the ladder tipped over to his left, and he fell from the ladder onto the floor below, allegedly sustaining injuries.⁴ At the time of the accident, plaintiff was approximately 24 years old, stood 6 feet tall, and weighed 210 pounds.⁵

Four months later in November 2017, plaintiff commenced this action against defendants⁶ asserting violations of Labor Law §§ 240 (1), 241 (6), and 200, as well as common-law negligence. After the completion of discovery, defendants and plaintiff served the instant motion and cross-motion, respectively.

"[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders, Inc v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotations omitted]). "[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" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ Med Center*, 64 NY2d 851 [1985]). When evaluating a motion for summary judgment, "facts must be viewed 'in the light most favorable to the nonmoving party'" (*Vega v Restani Const Corp*, 18 NY3d 499, 503 [2012]). "It is not the

¹ Plaintiff's EBT transcript, page 140, lines 6-10.

² Plaintiff estimated (at page 143, lines 21-24 of his pretrial deposition) that the top of the ladder in the open position was approximately 2 to 4 inches short of the bathroom ceiling.

³ Plaintiff's EBT transcript, page 157, line 20 to page 158, line 11.

⁴ Plaintiff's EBT transcript, page 165, line 13 to page 166, line 9.

⁵ Plaintiff's EBT transcript, page 8, lines 11-22; page 237, lines 8-9.

⁶ Plaintiff's claims against remaining defendants, Meadow Partners LLC and Northeast Interiors Specialists, LLC, were discontinued by stipulations, dated July 18, 2019 and February 7, 2019, respectively.

function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega*, 18 NY3d at 505).

“Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). “To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]).

Here, the branch of defendants’ motion which is for summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim is denied because they failed to establish, prima facie, that plaintiff was the sole proximate cause of the accident. “To establish, prima facie, that a plaintiff was the sole proximate cause of an accident, a defendant has to establish that the plaintiff misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available” (*Lochan v H & H Sons Home Improvement, Inc.*, 216 AD3d 630, 633 [2d Dept 2023]). Defendants failed to raise a triable issue of fact as to whether a shorter ladder was readily available to plaintiff and whether he had been instructed to use a shorter ladder (*see Chiarella v New York State Thruway Auth.*, 230 AD3d 463, 465-466 [2d Dept 2024]). More fundamentally, defendants failed to rebut plaintiff’s consistent pretrial testimony that his supervisor had set up the ladder at issue and instructed him to start working quickly because it was a “rush job” and “the boss was coming around.”⁷

Conversely, plaintiff established, prima facie, his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim. In support of this branch of his cross-motion, plaintiff submitted his affidavit and his uncontroverted deposition testimony that the accident happened because the ladder was not properly secured; specifically, that (1) “the ladder was too tall” for the job; (2) it was not at “[t]he right level to do the job properly and efficiently”; and (3) “[t]here was debris under the ladder”⁸ (*see Acevedo v PSM Long Is. Corp.*, 217 AD3d 813,

⁷ Plaintiff’s EBT transcript, page 144, lines 17-19; page 145, lines 10-17.

⁸ Plaintiff’s EBT transcript, page 171, lines 8-21. Plaintiff’s Affidavit, dated Feb. 13, 2024, ¶¶ 7-11. The pretrial testimony of the site-safety contractor that the bathroom “floor was not an issue of any deficiencies that [he was] aware of” and that “[it] was a newly poured concrete floor” (Thomas Dowd’s EBT transcript, page 20, lines 21-22, and page 26, line 23), is not probative (one way or the other) as to the presence (or absence) of debris on the bathroom floor. The site-safety contractor conceded (at page 37, lines 12-17 of Thomas Dowd’s pretrial testimony) that he had

814 [2d Dept 2023]; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *see also Llach v L.I.C.C. Realty Co.*, 232 AD3d 548 [1st Dept 2024]). In opposition, defendants failed to raise a triable issue of fact by offering no evidence contradicting plaintiff's account of the events surrounding the accident⁹ (*see Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]). Plaintiff's statement that he "los[t] his balance on the ladder"¹⁰ does not contradict his principal testimony that the ladder "was too tall" for the job and "wasn't at the right height that [he] needed it [at]"¹¹ (*see Rodas-Garcia v NYC United LLC*, 225 AD3d 556, 557 [1st Dept 2024]). Accordingly, the branch of plaintiff's cross-motion which is for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim is granted.

"Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in . . . all areas in which construction . . . work is being performed." *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014], *lv denied* 26 NY3d 905 [2015]). "As a predicate to a section 241 (6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code" (*Simmons v City of New York*, 165 AD3d 725, 729 [2d Dept 2018]).

Here, defendants established, *prima facie*, that 12 NYCRR 23-1.21 ("Ladders and Ladderways") and 12 NYCRR 23-1.8 ("Personal Protective Equipment"), as the pleaded predicates for plaintiff's Labor Law § 241 (6) claim,¹² were inapplicable under the circumstances¹³ (*see Kauffman v Turner Constr. Co.*, 195 AD3d 1003, 1005 [2d Dept 2021], *lv denied* 38 NY3d 908 [2022]; *Simmons*, 165 AD3d at 729). In opposition, plaintiff failed to raise a triable issue of fact as to these Industrial Code provisions.

no "recollection as to whether there was debris or any detritus on the floor where the ladder [at issue] was located [at the time of the accident]."

⁹ Defendants' contention that plaintiff was wrong as to both the length of the ladder and the height of the bathroom ceiling, does not negate the substance of plaintiff's affidavit and his pretrial testimony that his supervisor had set up the ladder in the bathroom for him and directed him to promptly start working at the ceiling level.

¹⁰ Plaintiff's EBT transcript, page 159, lines 18-19.

¹¹ Plaintiff's EBT transcript, page 159, lines 21-22; page 168, lines 7-10; page 171, lines 8-21. Plaintiff's Affidavit, ¶¶ 7 and 9.

¹² Plaintiff's Amended Verified Bill of Particulars, dated January 15, 2019 (Amended BOP), ¶ 16.

¹³ 12 NYCRR 23-1.21 ("Ladders and Ladderways") is inapplicable because the condition of the ladder at issue – "it looked like it was decent," according to plaintiff's pretrial testimony at page 131, lines 5-6 – had nothing to do with the happening of the accident. Rather, the size and placement of the ladder were a proximate cause of the accident. Likewise inapplicable is 12 NYCRR 23-1.8 ("Personal Protective Equipment") because plaintiff testified (at page 173, lines 18-20 of his pretrial deposition) that he was wearing his work gloves at the time of the accident. In that regard, the allegation in ¶ 16 of plaintiff's Amended BOP that he was not "provide[d] [with] work gloves suitable for the task at hand" is unsupported by the record.

Contrary to defendants' contention, plaintiff is entitled to further amend his bill of particulars to add an allegation that 12 NYCRR 23-1.7 (e) (2) ("Protection from general hazards" – "Tripping and other hazards" – "Working areas") was violated.¹⁴ The amendment presented no new factual allegations or a new theory of liability, and did not prejudice defendants. The fact that plaintiff raised his allegation of this specific Industrial Code provision for the first time in opposition to defendants' motion for summary judgment and in support of his own cross-motion for partial summary judgment on the issue of liability on, among others, his Labor Law § 241 (6) claim,¹⁵ is not fatal to his request, and is sufficient to raise a triable issue of fact regarding defendants' liability under Labor Law § 241 (6), as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (2) (*see Gonzalez v City of New York*, 227 AD3d 958, 961 [2d Dept 2024]; *Simmons*, 165 AD3d at 729; *Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1196 [2d Dept 2012]).

The Court, however, is not prepared to separately grant plaintiff partial summary judgment on the issue of liability on his Labor Law § 241 (6), as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (2). Considering the Court's prior granting of the branch of plaintiff's cross-motion which is for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, his concurrent, "belts-and-suspenders" request for the same relief on the basis of Labor Law § 241 (6), as predicated on the alleged violation of 12 NYCRR 23-1.7 (e) (2), is redundant and overreaching.

Lastly, plaintiff has abandoned his Labor Law § 200 and common-law negligence claims by failing to oppose that branch of defendants' motion seeking the dismissal of those claims (*see Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449, 450-451 [1st Dept 2020]).

The parties' remaining contentions have been considered and found to be either without merit or moot in light of the court's determination.

Accordingly, it is hereby

ORDERED that in Motion Seq. No. 4, defendants' joint motion for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing all claims of plaintiff as against them is granted to the extent that: (1) plaintiff's Labor Law § 241 (6), as predicated on the alleged violation of 12 NYCRR 23-1.21 ("Ladders and Ladderways") and 12 NYCRR 23-1.8 ("Personal Protective Equipment"), is dismissed, and (2) plaintiff's Labor Law § 200 and common-law

¹⁴ Although plaintiff also referenced 12 NYCRR 23-1.7 (d) ("Protection from general hazards" – "Slipping Hazards") at page 10 of his opening memorandum of law, he sought no leave to add this provision. Consistent with his position, plaintiff's reply affirmation likewise made no reference to this provision.

¹⁵ Plaintiff's Affirmation in Opposition to Defendants' Motion, and in Support of Plaintiff's Cross-Motion, dated February 14, 2024, pages 4-5.

