Supreme Court of the State of New York
County of Kings

Part LL1

Index Number 505543/2022
Seqs. 002, 003

AMENDED[1]
DECISION/ORDER

ALEX DE LA CRUZ,

Plaintiff,

against

4TH AVENUE DEVELOPMENT OWNER LLC AND THE BOARD OF MANAGERS OF THE 58 SAINT MARKS PLACE CONDOMINIUM,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	3–4
Replying Affidavits	5–6
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 002) and defendant 4th Avenue Development Owner LLC's motion for summary judgment (Seq. 003) are decided as follows:

Factual Background

Plaintiff commenced this action to recover for damages he claims he sustained on February 15, 2022, while working at a construction site. Plaintiff was employed by L1C Corp., the general contractor to perform work at 58 St. Marks Place, Brooklyn, NY (the site). 4th Avenue Development Owner LLC (Owner) was the undisputed owner of the premises.

Plaintiff testified as follows: Plaintiff was engaged in compound and paint work as part of a new multi-story construction project at the site (De La Cruz EBT at 31). Plaintiff was walking on the first floor at the time of the occurrence and was looking up because he was instructed to

[1] This decision amends and replaces the prior decision and order dated March 24, 2025, in order to correct a typographical error on page 4.

repair holes in the ceiling of the first-floor hallway (*id.* at 35). While walking, plaintiff stepped onto a piece of plywood which was covering a 3-foot by 3-foot hole in the floor (*id.* at 35–36). The plywood moved, struck plaintiff in the face, and then plaintiff's body fell in the hole (*id.*). It is undisputed that the hole was for decorative indoor plants and is referred to by counsel as a "tree pit." Plaintiff testified that he landed in a seated position, hitting his knee and back on the floor (*id.* at 42). Plaintiff testified that the hole was "approximately" three feet deep (*id.* at 42). Justin Frank, a foreman from non-party Avdoo, testified on behalf of the defendants. Mr. Frank did not witness the accident, but prepared an accident statement based on the statements of those who reported the accident to him (Frank at 20–21).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute is the proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500 (1993)]). The failure of a plywood floor covering placed over a hole constitutes a violation of the statute (*see Gamez v New Line Structures & Development, LLC*, 218 AD3d 446 [2d Dept 2023]).

Here plaintiff, established his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim through his testimony that the unsecured plywood floor covering failed to protect him from falling into the hole. Here, plaintiff testified that the hole into which he fell was approximately three feet deep. A three-foot hole is sufficient to constitute an "elevation-related risk" (*see Durando v City of New York*, 105 AD3d 692 [2d Dept 2013]; *see also Haskins v Metropolitan Transportation Authority*, 227 AD3d 409 [1st Dept 2024] [two-and-a-half-foot deep hole is an "elevation-related risk," not an "ordinary workplace hazard]). Although the photo of the hole in the record might raise questions about its depth, the photograph does not contain measurements or any way of assessing the actual depth of the hole. Additionally, there is no testimony to contradict plaintiff's contention that the hole was three feet deep. Defendant does not raise any argument about the depth of the hole in its moving papers. Therefore, based on the admissible evidence and the relevant precedent, plaintiff has demonstrated his prima facie entitlement to summary judgment.

In opposition, and in support of its own motion, defendants raise several arguments, each of which is unavailing. First, defendants argue that the accident was unwitnessed. However, "the fact that the accident was unwitnessed does not preclude granting summary judgment to the plaintiff" (*Rivera v Dafna Const. Co., Ltd.*, 27 AD3d 545, 545 [2d Dept 2006]). Second, even if taken as true *arguendo*, defendant's arguments that plaintiff had worked at the site for a year and should have been aware of the holes, that the plywood was marked with a red "X," and that plaintiff was looking up when he fell indicate at most comparative fault. Comparative fault is not a defense to a Labor Law § 240 (1) claim (*Blake*, 1 NY3d at 289).

Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff predicates his Labor Law § 241 (6) claim on alleged violations of multiple Industrial Codes. However, in opposition to defendant's motion, the only alleged violation which plaintiff disputes is Rule 23-1.7 (b) (1) (i), which requires in relevant part: "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place." The remaining alleged violations of the Industrial Code are deemed abandoned (*see Rivas v Purvis Holdings, LLC*, 222 AD3d 676 [2d Dept 2023]).

Here, plaintiff testified that the plywood cover was not secured, moved, and that plaintiff fell into an opening in the floor. The defendant does not contend that the plywood was secured. However, Rule 23-1.7 (b) (1) has been interpreted as "intended to protect workers from falling through an opening to the floor below" (*Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 423 [2d Dept 2001]). This interpretation is based on other language in the same rule required that "employees must be protected by planking installed not more than one floor or 15 feet beneath the opening, a life net five feet underneath the hole, or a safety belt with a lifeline" (*id.* at 423). This hole, which the admissible evidence indicates was only three feet deep, does not appear to be the kind of hazard contemplated by Rule 23-1.7 (b) (1).

Therefore, plaintiff's motion is denied and defendant's motion is granted with respect to plaintiff's Labor Law § 241 (6) claims.

Labor Law § 200

Defendant moved for summary judgment on plaintiff's Labor Law § 200 claims and the plaintiff did not oppose this branch of defendant's motion. Therefore, defendant's motion is granted without opposition.

Conclusion

Plaintiff's motion for summary judgment (Seq. 002) is granted with respect to his Labor Law § 240 (1) claim; the motion is otherwise denied.

Defendant's motion for summary judgment (Seq. 003) is granted with respect to plaintiff's Labor Law §§ 241 (6) and 200 claims; the motion is otherwise denied.

This constitutes the decision and order of the court.

June 25, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court