Supreme Court of the State of New York
County of Kings

Part LL1M

Index Number 522159/2021
Seq. 004–005

DECISION/ORDER

RAPHAEL GONCALVES BRAGA,

Plaintiff,

against

THIRD STREET EQUITY, LLC, GOOSE PROPERTY MANAGEMENT, LLC, DEVELOPING NY STATE, LLC, AND SHIA CONSTRUCTION LLC,

Defendants.

THIRD STREET EQUITY LLC AND DEVELOPING NY STATE, LLC,

Third-Party Plaintiffs,

against

CAPITAL CONCRETE NY INC.,

Third-Party Defendant.

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	2–3
Replying Affidavits	4
Exhibits	Var.
Other	

Upon the foregoing papers, defendant/third-party plaintiff Third Street Equity LLC (Third Street) and Developing NY State, LLC (Developing)'s motion for summary judgment (Seq. 004) and plaintiff's motion for summary judgment (Seq. 005) are decided as follows:

Plaintiff commenced this action to recover for damages he claims to have sustained on May 25, 2021, at a premises located at 26-45 3rd Street, Queens, New York (the premises). It is undisputed that the premises were owned by Third Street and that Developing was the general contractor hired to construct a new seven-story building at the premises. The third-party action was discontinued without prejudice by stipulation on February 9, 2024 (CPLR 3217 [c]).

Plaintiff testified as follows: Plaintiff was a carpenter employed by third-party defendant Capital Concrete NY Inc. (Capital) (Braga first EBT at 14). Plaintiff reported to Capital foreman Ufredo Patino (Braga second EBT at 11). On the date of his accident, plaintiff was removing, or stripping, plywood forms off of the ceiling (Braga first EBT at 21). Plaintiff was working with two co-workers, "Jonathan" and "Kenny Delgado" (Braga second EBT at 12). Plaintiff estimated that the forms were seven feet above the floor, although it appears from the site photographs that the forms were higher than that above the floor (*id.* at 25; cf. the apparently full-height doorway running approximately halfway up the wall). Each form weighed approximately ten kilograms (*id.* at 38). The workers who were stripping the forms worked from a mobile lift (*id.* at 26).

Plaintiff described the process for removing forms as follows: First, the 2x4 boards that were attached to the plywood with nails were removed (*id.* at 62). Then, a worker on the ground would strike a handle on the post, or jack, with a hammer to lower the jack slightly so that there was space to begin removing the plywood (*id.* at 61–62). The worker on the lift would hold the plywood with one hand and use a hammer to remove the plywood from the newly cured concrete with the other (*id.* at 33, 62). The worker on the lift would lower the lift and hand the plywood to plaintiff once it was removed (*id.* at 54–55). Finally, the jack would be lowered completely and removed (*id.* at 34–35, 64).

On the date of the accident, Jonathan was on the lift, while plaintiff and Kenny were on the floor holding the metal jacks that supported the forms (*id.* at 27). Plaintiff testified that he did not completely lower the jack before his accident happened, but only partially lowered it to allow Jonathan to begin removing the plywood (*id.* at 37, 53, 61). While plaintiff was holding his jack, the plywood fell and struck him (*id.* at 40).

Mr. Braga denied being able to read or speak English (*id.* at 42, 50). Plaintiff speaks "a little" Spanish, but his primary language is Portuguese (*id.* at 64–65). Plaintiff disputed the incident report which said he was "moving materials around on the floor" at the time of his accident (*id.* at 49). The workers were obligated to set up a controlled access zone while performing their work (*id.* at 72). Plaintiff learned how to perform stripping work by observing other workers; he did not receive any training from Capital (*id.* at 77–78).

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)

Labor Law § 240 (1) imposes a non-delegable duty on owners and general contractors to furnish adequate safety devices (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Falling object liability under Labor Law § 240 (1) depends in part on whether the object that fell was being hoisted, secured, or required securing for the purpose of the undertaking (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). In this action, plaintiff's unrebutted testimony is that the practice of the workers was to lower the lift after the plywood was removed and hand it to the co-workers on the ground. This practice utilized the lift as a hoist operated by the elevated worker. Therefore, the plywood was in the process of being hoisted/lowered and was not properly secured (*cf. Crichingo v Pac*, 186 AD3d 664 [2d Dept 2020] [worker struck by falling plywood that may or may not have been hoisted/required securing]; *compare also Roberts*

v General Elec. Co., 97 NY2d 737 [2002] [asbestos-laden material intentionally dropped]). These facts constitute a violation of Labor Law § 240 (1) and the failure to properly secure the object being hoisted was a proximate cause of the plaintiff's accident. Therefore, plaintiff's motion is granted with respect to Labor Law § 240 (1), and defendants' motion is denied.

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 only argues with respect to the alleged violation of Rule 1.7 (a) (1), governing proper protection in areas ordinarily exposed to falling objects. The remaining Industrial Code provisions are, therefore, deemed waived (*Medina v 1277 Holdings, LLC*, 234 AD3d 839 [2d Dept 2025]).

Plaintiff testified that he was responsible for using caution tape to mark off a controlled access zone (CAZ) under the area where forms were being stripped (Braga EBT at 72). This testimony is sufficient to demonstrate that the area was one that was "normally exposed to falling materials or objects" (*see e.g. Amerson v Melito Const. Corp.*, 45 AD3d 708 [2d Dept 2007]). However, this testimony also raises a question of material fact as to, *inter alia*, whether standing within the CAZ was integral to the plaintiff's work and whether a violation of Rule 23-1.7 (a) (1) was a proximate cause of the plaintiff's accident (*see Mercado v Caithness Long Island LLC*, 104 AD3d 576 [1st Dept 2013], cited in *Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089 [2d Dept 2015]; *see also Urquia v Deegan 135 Realty LLC*, 231 AD3d 567, 569 [1st Dept 2024]). Therefore, plaintiff's motion is denied with respect to his Labor Law § 241 (6) claim as

predicated upon an alleged violation of Rule 23-1.7 (a) (1). Defendants' motion is granted to the extent of dismissing all alleged Industrial Code violations except Rule 23-1.7 (a) (1).

Labor Law § 200

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]), and claims are evaluated using a negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a ladder or scaffold is borrowed or supplied by the owner, the court will assess liability under a dangerous premises condition analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 131 [2d Dept 2008]). Otherwise, liability for dangerous or defective equipment is analyzed under the "supervision and control" standard established by *Ortega* (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]).

On this claim, defendants alone move for summary judgment. Plaintiff does not oppose the motion with respect to defendant Third Street; therefore, the motion is granted as to Third Street. However, plaintiff opposes Developing's motion, correctly noting that the standard for Labor Law § 200 is not *actually* controlling the means and methods of plaintiff's work, but having the *authority* to control the work (*see Ortega*, 57 AD3d at 62 n. 2). Developing does not provide evidence that it did not have the authority to direct or control the work that allegedly caused the plaintiff's accident. Therefore, Developing has not made out its prima facie entitlement to summary judgment on plaintiff's Labor Law § 200 claims.

Conclusion

Plaintiff's motion for summary judgment (Seq. 005) is granted with respect to his Labor Law § 240 (1) claim; the motion is otherwise denied.

Defendants' motion for summary judgment is granted with respect to plaintiff's Labor Law § 241 (6) claim as predicated on all Industrial Code violations except Rule 23-1.7 (a) (1) and as to plaintiff's Labor Law § 200 claim against Third Street; the motion is otherwise denied.

This constitutes the decision and order of the court.

July 8, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court