Lopez v Lendlease (US) Constr. Inc.
2025 NY Slip Op 32719(U)
June 26, 2025
Supreme Court, Bronx County
Docket Number: Index No. 30428-2017E
Judge: Myrna Socorro
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

003

Supreme Court of the State of New York
County of Bronx: Part IA-9

---x

Darwin Lopez,
Plaintiff

-against-

Lendlease (US) Construction Inc.,
Lendlease (US) Construction LMB, Inc.
Lendlease (US) Infrastructure LLC,
Lendlease Towers LLC,
Snowplow LLC, Snowplow LH LLC,
Snowplow LH1 LLC, and Snowplow
LH2, LLC,
Defendants

---x

Index No. 30428-2017E

Motion seq #3

Hon. Myrna Socorro, J.S.C.

DECISION & ORDER

The following e-filed documents, listed by NYSCEF Doc. Nos. 70-100; and 103-110 were read on motions for summary judgment.

According to the plaintiff, at the time of the accident, he was employed by Navillus Contracting ("Navillus") as a laborer and was injured while standing on a scaffold and removing a heavy panel that was above him when the panel fell from the wall onto his right hand.

Defendant Snowplow LH LLC owned the subject property and Lendlease (US) Construction LMB Inc. was the construction manager for the project.

Plaintiff now moves for summary judgment against defendants on his Labor Law §240(1) and §241(6) claims. As to Labor Law §240(1), plaintiff argues that said section was violated as plaintiff was struck from above by a heavy Doka form panel, which was not properly secured as it was being removed. As to Labor Law §241(6), plaintiff moves on this section as predicated on Industrial Code §23-1.5(a) and ©, §23-1.7(a)(1), and §23-2.2(a).

Defendants oppose plaintiff's motion. Defendants argue that the motion must be denied as there are issues of fact with regard to how the accident occurred. Defendants note that during his deposition, plaintiff testified that while removing an unsecured Doka panel, it fell and struck his hand while it was resting on the tubing of the frame of a scaffold. However, defendants argue that this contradicts the description of the accident as found in the report prepared by Lendlease in connection with the subject incident and also contradicts plaintiff's medical records from the urgent care that he went to on the date of the accident.

Defendants cross-move to dismiss plaintiff's Labor Law §200, §240(1) and §241(6) claims.

Summary Judgment

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st Dept. 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b];Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr*. 64 NY 2d 851; 487 NYS 2d 316 (1985)

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]).

Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].

A review of the record shows that on November 7, 2014, at 1:55am, Lendlease generated an accident report wherein it states that on November 5, 2014, at 2:00 p.m., "IP was stripping Doka wall forms and dropped a panel on his hand causing a small laceration. During examination by on-site medic, IP complained of numbness in fingers so was sent to urgent care for xrays…" Plaintiff argues that the Court should not consider this accident report as it is inadmissible hearsay since the report is not signed or sworn by the person who prepared the report. Plaintiff notes that the person who allegedly prepared this report, Mr. Beisner, no longer works for Lendlease and argues that because the report was prepared days after the accident it is not contemporaneous. In support of its papers, defendants submit the affidavit of Edwin Garcia, a Lendlease senior site safety manager, who states that the report was prepared by site safety manager, Rodney Beisner, who has retired from the company. Mr. Garcia further states that it was Mr. Beisner's duties and responsibilities to prepare such report and that it was prepared and maintained in the regular course of Lendlease's business operations. Thus, based on this affidavit, this Court finds that the incident report is in admissible form as it is a business record and therefore the Court will consider it. Further, based on this incident report, this Court finds that there is a question of fact as to how the accident occurred.

Accordingly, plaintiff's motion for summary judgment as to his Labor Law §240(1) claim and defendant's cross-motion to dismiss plaintiff's Labor Law §240(1) claim are **Denied**.

Labor Law §241(6)

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, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

Plaintiff claims numerous violations of safety regulations in his bill of particulars. In their moving papers, moving defendants went through all the alleged Industrial Code provisions in plaintiff's bill of particulars (namely: §23-1.7(b) and (e), §23-1.30, §23-1.31, §23-1.32 and OSHA) in support of their argument that none of the provisions are applicable and/or not violated in this matter. In his opposition papers, plaintiff only addresses Industrial Code §23-1.5(a) and ©, §23-1.7(a)(1), and §23-2.2(a). Therefore, plaintiff has abandoned all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014]. Accordingly, defendant's cross motion to dismiss the Industrial Code §23-1.7(b) and (e); §23-1.30; §23-1.31; §23-1.32 and OSHA is **Granted**.

Industrial Code §§ 23-1.5(a) and ©, 23-1.7(a)(1), and 23-2.2(a)

In its opposition, defendants state that Industrial Code §23-1.5(a) and ©, §23-1.7(a)(1), and §23-2.2(a) were not pled by plaintiff in his complaint, verified bill of particulars or any of the three

supplemental bill of particulars that they previously served and are only raised now during summary judgment.. Thus, it is their position that this portion of plaintiff's motion must be denied. In reply, plaintiff acknowledges that these three provisions were not previously included in any of its bill of particulars and attaches (for the first time) a fourth supplemental bill of particulars to its papers.

Here, it is undisputed that plaintiff did not seek the relief for leave to amend their Bill of Particulars, after the Note of Issue was filed and only in their Reply papers are referencing that

> "in the event this Court finds that there should be a supplemental bill of particulars to allege the additional Industrial Code violations, we have exchanged a fourth Supplemental Bill of Particulars including the three additional industrial code violations. . . ." (NYSCEF Doc. #103, Page 9).

Said exchange was without leave of court, as it was served *after* the filing of the note of issue alleging *additional* violations of the Industrial Code (emphasis added). In *Gaisor v. Gregory Madison Ave., LLC,* the Court found that the addition of an industrial code violation in a "supplemental" bill of particulars constitutes an amendment and, further, because plaintiff did not seek leave of court and was served after the filing of the note of issue, the fifth bill of particulars was a nullity. See *Gasior* 13 AD3d 58 (1st Dep't 2004). Accordingly, this Court will not consider the violations of Industrial Code §23-1.5(a) and ©, §23-1.7(a)(1), and §23-2.2(a), and as such this branch of plaintiff's motion is **denied** as to summary judgment on these Industrial Codes.. *JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 576 [1st Dept 2012].

Labor Law § 200/Common Law Negligence

The branch of defendants' summary judgment motion seeking to dismiss the Labor Law §200 and common-law negligence claims as against it is **DENIED**. Although the record demonstrates that defendants did not direct, supervise, or direct the means and methods of the plaintiff's work as plaintiff received all of his instructions for Jimmy, Navillus' foreman, a defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]. Upon a review of the motion papers, this Court finds that defendants have failed to establish *prima facie* that it neither created nor had notice of a hazardous condition resulting in the plaintiff's injuries to support dismissal of the Labor Law 200 and common-law negligence claims against it. *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022].

Lendlease (US) Construction, Inc., Lendlease (US) Infrastructure, LLC, Lendlease Towers, LLC, Snowplow, LLC, Snowplow LH1, LLC and Snowplow LH 2 LLC

Defendants move to dismiss plaintiff's claims as against defendants Lendlease (US) Construction, Inc., Lendlease (US) Infrastructure, LLC, Lendlease Towers, LLC, Snowplow, LLC, Snowplow LH1, LLC and Snowplow LH 2 LLC on the ground that none of these entities had any involvement or connection with the subject construction project or premises. According to the record, defendant Snowplow LH LLC owned the subject property and Lendlease (US) Construction LMB Inc. was the

construction manager. There is no evidence linking the other named defendants to the subject property but the affidavit of Jodi Gertsman for Snowplow wherein she states that she is currently employed by a entity named Monarch Equity LLC, and states that the affidavit is based on her personal knowledge; and the affidavit of Edwin Garcia for Lendlease (US) Construction LMB Inc. However, they both fail to address what if any these related entities are and what they were established for, and simply deny any involvement by these related entities. Accordingly, this branch of defendants' motion is **denied**.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its Labor Law §240(1) claim is **DENIED**; and it is further

ORDERED that plaintiff's motion for summary judgment on its Labor Law §241(6) claim is **DENIED**; and it is further

ORDERED that defendants' cross-motion seeking dismissal plaintiff's Labor Law § 240(1) claim is **DENIED**; and it is further

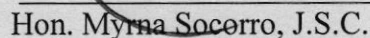
ORDERED that defendants' cross-motion seeking dismissal plaintiff's Labor Law § 241(6) claim as predicated on Industrial Code §23-1.7(b) and (e), §23-1.30, §23-1.31, §23-1.32 and OSHA is **GRANTED**; and it is further

ORDERED that defendants' cross-motion seeking dismissal plaintiff's Labor Law §200 and common law negligence claims is **DENIED**; and it is further

ORDERED that defendants' cross-motion seeking dismissal plaintiff's complaint as against defendants Lendlease (US) Construction, Inc., Lendlease (US) Infrastructure, LLC, Lendlease Towers, LLC, Snowplow, LLC, Snowplow LH1, LLC and Snowplow LH 2 LLC is **DENIED**; and it is further

ORDERED that plaintiff is to file a Notice of Entry of this Decision and Order within twenty (20) days from the date hereof.

This constitutes the Decision and Order of the Court.



Dated: June 26, 2025

Hon. Myrna Socorro, J.S.C.