

Burley v SMI Constr. Mgt. Inc.

2025 NY Slip Op 34335(U)

February 25, 2025

Supreme Court, Queens County

Docket Number: Index No. 719960/2020

Judge: Robert I. Caloras

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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART PART 36 MOTIONS

Justice

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CHRISTOPHER BURLEY and MONIKA BURLEY,

MOTION SEQ. NO. 6

Plaintiff,

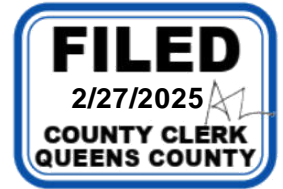
- v -

SMI CONSTRUCTION MANAGEMENT INC., BENNETT LINDENBAUM and REBECCA LINDENBAUM,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF under the motion and cross motion as: 14-74 were read on the motion by Plaintiff for an order: pursuant to CPLR § 3212 (a) for summary judgment in favor of plaintiffs and against Defendant SMI CONSTRUCTION MANAGEMENT INC. under Labor Law 240 (1);and pursuant to CPLR 3212 (a) for summary judgment in favor of plaintiffs and against defendant SMI CONSTRUCTION MANAGEMENT INC. under Labor Law § 241(6) as predicated upon the Industrial Code sections (12 NYCRR) 23-1.7(d), (e)(1) and/or (e)(2); and on the cross motion by Defendants for an order dismissing Plaintiff’s Complaint as against the LINDENBAUM Defendants in its entirety and dismissing Plaintiff’s claims as against defendant SMI CONSTRUCTION INC. arising under Labor Law 240(1) and 241(6).

Upon the foregoing documents, it is ordered that the motion by Plaintiff is denied and the cross motion by Defendants is granted for the following reasons:

According to the Complaint and the submitted papers, on October 16, 2014 Plaintiff Christopher Burley (hereinafter “Plaintiff”) was injured while working at the premises located at 14-16 West 83rd Street, New York, New York (hereinafter “premises”). At the time of the alleged accident, Defendants Bennett Lindenbaum and Rebecca Lindenbaum owned the premises. The Lindenbaums had retained Defendant SMI CONSTRUCTION MANAGEMENT INC. (hereinafter "SMI") as the general contractor and the construction manager to convert two townhouses into a single family home. SMI retained non-party Joseph Sgroi & Sons, Inc. (hereinafter “Sgroi & Sons”) as its electrical subcontractor for the project, and Plaintiff was employed by Sgroi & Sons.

In the first branch of Plaintiffs’ motion, they move for summary judgment against Defendant SMI on Plaintiffs’ Labor Law 24(1) claim. Plaintiff argues that the staircase he fell on was a temporary staircase which provided the only means to travel from the basement to the first floor, and lacked an adequate handrail. Plaintiffs’ submitted, among other things, the following: Plaintiff’s affidavit, along with photographs; affidavit from Elizabeth Caccavale, along with the following

annexed thereto: Plaintiff's photographs, inspection photographs and sketch prepared by Joseph Cannizzo, P.E.; affidavit from Anthony Corrado; Plaintiff's deposition transcripts and photographs marked as Exhibits at Plaintiff's deposition; Defendant Bennett Lindenbuam's deposition transcript; Steve Mark's (hereinafter "Marks") deposition transcript; Architectural Drawing A-801.00 Stair Plan – Section; Noel Tansey's (hereinafter "Tansey") deposition transcript; Certificate of Occupancy for the premises; construction agreement between Defendant SMI and the Lindenbaum Defendants; NYC DOB Permits issued to SMI; Derek Maks ("hereinafter "Maks") deposition transcript; trade contractor agreement between SMI and Sgroi & Sons; and Sgroi & Sons' proposal and change order.

According to Plaintiffs' submissions they claim the following: As part of the renovation work at the premises, the interior existing staircases, which were made of wood, were remodeled during construction. The existing staircases were all demolished, and fabricated new permanent staircases made of metal with wood treads were installed from the cellar to the third floor in the same place the existing staircases were located. The new staircase between the basement and the first floor was installed around August 2014, and was in place for two to three months before the alleged accident occurred on October 16, 2014. On October 16, 2014, Plaintiff was working on the third floor. The employee bathroom was located in the basement, and the only way to get to the bathroom was by using the staircase between the basement and the first floor. At some point, Plaintiff went to the basement to use the bathroom. After using the bathroom, Plaintiff grabbed some screws that were in a bucket and started to climb the stairs to the first floor. Nobody told Plaintiff that there were screws in the basement. As Plaintiff was climbing the staircase from the basement to the first floor his right foot stepped on an empty candy bag causing him to slip and fall backwards on the staircase towards the basement. Plaintiff tried to grab onto a handrail, but it was too low for Plaintiff to grasp.

In opposition, Defendants argue, among other things, that Labor Law 240(1) is inapplicable herein because the staircase that Plaintiff allegedly slipped and fell on was a permanent, fixed structure to the building and was not designed as a safety device to protect Plaintiff from an elevation related risk.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

“ ‘Labor Law § 240(1) imposes a nondelegable duty [and absolute liability] upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites’ ” (Verdi v SP Irving Owner, LLC, 227 Ad3d 932 [2d Dept. 2024]). “ To prevail on a Labor Law § 240(1) cause of action, a plaintiff must prove (1) that the defendant violated Labor Law § 240(1), and (2) that such violation was a proximate cause of his or her injuries (id.).

Here, the Court finds that Plaintiff failed to establish his prima facie entitlement to summary judgment on his Labor Law 240(1) claim. Contrary to Plaintiff's claims, the staircase which Plaintiff

slipped and fell on is not covered by Labor Law 240(1) because the staircase is a normal appurtenance to the building and was not designed as a safety device to protect Plaintiff from an elevation related risk (Parsuram v I.T.C. Bargain Stores, Inc., 16 AD3d 471 [2d Dept. 2005]; Norton v Park Plaza Owners Corp., 263 AD2d 531, 531-532 [2d Dept. 1999]). Furthermore, the subject staircase was not the sole means for Plaintiff to carry materials, tools, and supplies between the basement and the first floor, nor was the subject staircase the sole means of access to areas where Plaintiff was performing work. Rather, Plaintiff testified that he used the subject stairs to go to the employee bathroom located in the basement. Moreover, Plaintiff testified that he was never instructed to retrieve screws or other equipment from the basement, and that the work he was performing was on the first and third floor. Accordingly, the branch of Plaintiffs' motion seeking summary judgment on the Labor Law 240(1) claim against Defendant SMI is denied.

In the next branch of Plaintiffs' motion, Plaintiffs' move for summary judgment pursuant to Labor Law 241(6) on their claims that Defendant SMI violated 12 NYCRR 23-1.7(d), (e)(1) and/or (e)(2). Defendants oppose. 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' " (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998], quoting Labor Law § 241 [6]; Harrison v State of NY, 88 AD3d 951, 953 [2nd Dept 2011]; Romero v J & S Simcha, Inc., 39 AD3d 838[2d Dept 2007]). In order to prevail under this section of the Labor Law, a Plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494[1993]); Ares v State of New York, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d at 349). "Contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim" (Aragona v State of New York, 147 AD3d 808, 809 [2d Dept. 2017]).

Section 23-1.7(d) of the Industrial Code (12 NYCRR 23-1.7 [d]) provides; "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing". "While a staircase used to provide access to a job site is not a passageway or other working surface within the meaning of the provision unless it is the sole means of access, [Industrial Code 23-1.7(d)] is applicable if the staircase was a work area (Ohadi v Magnetic Constr. Group Corp., 182 AD3d 474, 476 [1st Dept. 2020])[internal citations omitted]).

Here, the testimony did not establish that the subject staircase on which Plaintiff allegedly slipped not was not the sole means of access to the worksite or an area that was integral for the furtherance of the work being performed, particularly the work being performed by Plaintiff. Notably, Plaintiff testified that he never performed work in the basement and that his work was limited exclusively to the first and third floor. Moreover, Plaintiff testified that the only reason he went to the basement was to use the bathroom, and that the workers accessed the building and the worksite through the front door of the main floor, and went in and out of the main floor door. Consequently, Plaintiff failed to establish that the subject stairway was a passageway. Accordingly,

the branch of Plaintiffs' motion seeking summary judgment on pursuant to Labor Law 241(6) on their claim that Defendant SMI violated 12 NYCRR 23-1.7(d) is denied.

12 NYCRR 23-1.7(e) provides that tripping and other hazards include:

- (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
- (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

The Court finds that 12 NYCRR 23-1.7(e)(1) and (2) are not applicable herein because the testimony established that subject staircase was not the sole means of accessing to the job site nor was the basement a work area. Accordingly, the branch of Plaintiffs' motion seeking summary judgment on pursuant to Labor Law 241(6) on their claim that Defendant SMI violated 12 NYCRR 23-1.7(e)(1) and (2) is denied.

Turning to Defendants cross motion, the first branch seeking to dismiss Plaintiff's Labor Law 240(1) and 241(6) claims against the Lindenbaum Defendants is granted as unopposed. In the next branch of the cross motion, Defendants move to dismiss Plaintiff's Labor Law 200 claim against the Lindenbaum Defendants arguing that the Lindenbaums are subject to the protection of the homeowners' exemption. Plaintiff opposes.

Labor Law 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). "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." (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]). Where the manner and method of work are at issue in a Labor Law 200 analysis, the issue is whether the owner or contractor had the authority to supervise or control the work. (See Mitchell v Caton on the Park, LLC, 167 AD3d 865 [2d Dept 2018]; see also Poalacin v Mall Props., Inc., 155 AD3d 900 [2d Dept 2017]; Ortega v Puccia, supra). Where 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 property owner or contractor may be liable in common-law negligence and under Labor Law 200 only if the owner or contractor had control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous condition while having actual or constructive notice of it (See Abelleira v City of New York, 120 AD3d 1163 [2d Dept 2014]; see also Martinez v City of New York, 73 AD3d 993 [2d Dept 2010]; Van Salisbury v Elliott-Lewis, 55 AD3d 725 [2d Dept 2008]).

Here, the Court finds that Defendants' submissions established their prima facie entitlement to summary judgment dismissing Plaintiff's Labor Law 200 claim against the Lindenbaum Defendants. Tansey (SMI's Construction Manager) testified that the Lindenbaums did not have authority to supervise or direct the work being performed. Mr. Lindenbaum testified that: he visited the job site on average about once a month to attend scheduled meetings and occasionally made

unannounced visits to oversee the progress of the work. He has no construction training and did not know who was responsible for safety on the site, nor did he designate any individual to be responsible for safety on the site. If Mr. Lindenbaum had concerns about the work, he would bring them to the attention of Tansey. Mr. Lindenbaum did not have authority to supervise or direct the work of the workers. Mr. Lindenbaum's unannounced visits were solely out of curiosity to check on the progress of the renovations. Mr. Lindenbaum was not on the site on October 16, 2014 and did not witness Plaintiff's accident.

The Court finds that Defendants' submissions established that the Lindenbaums only had general supervisory authority to oversee the progress and at no time did the Lindenbaums supervise or direct the work that was being performed. Defendants' submissions also established that the Lindenbaums did not create or have actual or constructive notice of the alleged defective condition on the staircase. The Court finds that Plaintiff failed to establish any issues of fact regarding whether the Lindenbaum Defendants had the authority to supervise or control the work, and/or created the dangerous condition causing his injury, or had actual or constructive notice of the dangerous condition. Accordingly, the branch of Defendants' motion seeking summary judgment dismissing Plaintiff's Labor Law 200 claim against the Lindenbaum Defendants is granted.

In the next branch of the cross motion, Defendants move to dismiss Plaintiff's Labor Law 240(1) claim. Plaintiff opposes. The Court notes that the parties rely upon the same submissions they submitted with respect to Plaintiff's summary judgment motion. The Court finds that Defendants' submissions established their prima facie entitlement to summary judgment dismissing Plaintiff's Labor Law 240(1) claim. The Court also finds that Plaintiff failed to raise any triable issues of fact concerning whether the subject staircase is a normal appurtenance to the building and was designed as a safety device to protect Plaintiff from an elevation related risk. Accordingly, the branch of the cross motion seeking to dismiss Plaintiff's Labor Law 240(1) claim is granted.

In the remaining branch of the cross motion, Defendants move to dismiss Plaintiff's Labor Law 241(6) claim alleging that Defendants violated 12 NYCRR 23-1.7(d), (e)(1) and (e)(2). Plaintiff opposes. Again the Court notes that the parties rely upon the same submissions they submitted with respect to Plaintiff's summary judgment motion. The Court finds that Defendants' submissions established that 12 NYCRR 23-1.7(d), (e)(1) and (e)(2) are inapplicable because the subject staircase was not the sole means of accessing to the job site nor was the basement a work area. The Court further finds that Plaintiff's submission failed to raise any triable issues of fact regarding the applicability of 12 NYCRR 23-1.7(d), (e)(1) and (e)(2). Accordingly, the branch of the cross motion seeking summary judgment dismissing Plaintiff's Labor Law 241(6) claim alleging that Defendants violated 12 NYCRR 23-1.7(d), (e)(1) and (e)(2) is granted.

DATED: February 25, 2025



ROBERT I. CALROAS, J.S.C.

