

Webb v City of New York

2025 NY Slip Op 34766(U)

January 22, 2025

Supreme Court, Bronx County

Docket Number: Index No. 22336-2020E

Judge: Myrna Socorro

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#2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-9

-----X
Antonio Webb
Plaintiff

Index No. 22336-2020E
Motion seq #2

-against-

DECISION & ORDER
Hon. Myrna Socorro, J.S.C.

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION, THE
NEW YORK CITY BOARD OF EDUCATION,
and THE NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY,
Defendants
-----X

The following papers were read on this motion seq #2 wherein defendant is seeking **Summary Judgment against plaintiff** and marked submitted on August 26, 2024.

Papers	NYSCEF Doc. No.
Notice of Motion, Affirmation in Support, Statement of Material Facts and Exhibits	#42-56
Affirmation in Opposition, Response to Statement of Material Facts and Memorandum of Law	#61-64
Affirmation in Reply and Response to Statement of Material Facts	#65-66

Upon the foregoing papers, the motion by the City of New York, the New York City Department of Education, the New York City Board of Education, and the New York City School Construction Authority (collectively, "Defendants") for an Order pursuant to CPLR §3212 dismissing the complaint and granting summary judgment to Defendants is decided as follows:

This action stems from a construction accident at 2760 Briggs Avenue in Bronx County. Antonio Webb ("Webb") testified at his deposition (transcript NYSCEF Doc. #52) that the construction involved building a new addition onto a school (Webb TR-12). He testified that he was issued safety equipment including safety glasses (*id.* at 36). The glasses were made of plastic and covered the front and side of Webb's face (*id.* at 38). Webb testified that, because of dust on the jobsite, he had for weeks leading up to the accident been requesting goggles, which hold tight to the face around the eyes (*id.* at 39). Webb was also issued a face shield (*id.* at 43). He testified that the project involved demolition work (*id.* at 54). At the time of the accident, Webb was above the ceiling on a ladder, using a tension control ("TC") bolt gun to affix bolts to a steel beam (*id.* at 55, 57, 64). He was wearing both his safety glasses and face shield (*id.* at 56). A burst of air generated by the TC

gun blew dust and rust from on top of the beam into Webb's right eye (Webb 50H tr 39).

Summary Judgment Standard

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 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 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 facie 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) and §200

Plaintiff codes that this accident "does not implicate either Labor Law §200 or §240(1)." (NYSCEF Doc. #61 - Paragraph #3).

Accordingly, defendant's motion to dismiss these claims is **granted**.

Labor Law §241(6)

Labor Law § 241 (6) imposes on owners and contractors a nondelegable duty to provide "reasonable and adequate protection and safety to persons employed [in] or lawfully frequenting" areas in which construction, excavation, or demolition work is being performed (*id.*). As a predicate to a cause of

action under this section, a plaintiff must allege that the accident was proximately caused by a violation of an Industrial Code regulation “that sets forth a specific standard of conduct and [is] not simply a recitation of common-law safety principles” (*Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 94 [2022] [internal quotation and citations omitted]).

Plaintiff concedes that the Labor Law §241(6) claims as to industrial codes 12 NYCRR 23-1.7 (a) (2), 12 NYCRR 23-1.8 © (4), and 12 NYCRR 23-1.8 (d) (1) and (d) (2) “are not applicable to the facts herein”. (NYSCEF Doc. #61 - Paragraph #3).

Therefore, plaintiff’s claims in Labor Law §241(6) under Industrial Codes 12 NYCRR 23-1.7 (a) (2), 12 NYCRR 23-1.8 © (4), and 12 NYCRR 23-1.8 (d) (1) and (d) (2) are hereby dismissed. The only Labor Law §241 (6) claims premised upon 12 NYCRR 23-1.8 (a) and 23-3.2 (d) remain at issue.

Industrial Code 12 NYCRR §23-1.8(a)

Industrial Code 12 NYCRR §23-1.8(a) requires that suitable eye protection be provided for all persons “employed in welding, burning, or cutting operations, or in chipping, cutting, or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.” 12 NYCRR §23-1.8(a) is sufficiently concrete and specific to support a Labor Law §241(6) claim (*e.g. Buckley v Triborough Bridge and Tunnel Auth.*, 91 AD3d 508, 509 [1st Dept 2012]).

Defendants contend that 12 NYCRR §23-1.8(a) is inapplicable because Webb was not engaged in any welding, burning, chipping, cutting, or grinding. However, this contention is unavailing because the section also covers persons engaged in any other operation which may endanger the eyes. Here, Webb’s use of a pneumatic bolt gun was an operation that may endanger the eyes (*see Montenegro v P12, LLC*, 130 AD3d 695, 696 [2d Dept 2015] [plaintiff’s use of a pneumatic nail gun raised a triable issue of fact as to whether he was engaged in work that may endanger the eyes]). Therefore, 12 NYCRR §23-1.8(a) applies.

There remains a triable issue of fact as to whether the provided eye protection was adequate. Webb testified that prior to the accident he requested goggles because he believed that safety glasses were insufficient to protect his eyes from the dust at the construction site, which is precisely the injury he testified he suffered (*see Bundo v 10-12 Cooper Square, Inc.*, 140 AD3d 535 [1st Dept 2016] [liability established under Labor Law §241(6), predicated on a violation of 12 NYCRR §23-1.8(a), where the plaintiff requested goggles which were not provided]).

Industrial Code 12 NYCRR §23-3.2(d)

Industrial Code 12 NYCRR §23-3.2(d) requires that “provision shall be made at every demolition site to control the amount of airborne dust resulting from demolition operations by wetting the debris and other materials with appropriate spraying agents or by other means.”

Defendants also contend that Industrial Code 12 NYCRR §23-3.2(d) is inapplicable because Webb was not engaged in demolition. However, Webb’s testimony that demolition was taking place at the site of the accident raises a triable issue of fact (*see Cardenas v One State Street, LLC*, 68 AD3d 436, 438 [1st Dept 2009]).

Accordingly, under both industrial codes remaining, there are triable issues of fact and summary judgment is **denied** as to Industrial Codes 12 NYCRR §23-1.8(a) and 12 NYCRR §23-3.2(d).

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by Defendants (Seq. No. 2) is **GRANTED TO AN EXTENT**; and it is further

ORDERED that Defendants’ request for dismissal of Plaintiff’s Labor Law §200, §240(1) and Industrial Codes 12 NYCRR §23-1.7(a)(2), 12 NYCRR §23-1.8©(4), and 12 NYCRR §23-1.8(d)(1) and (d) (2) under Labor Law §241(6) claims is **Granted**; and it is further

ORDERED, that the Clerk is directed to enter judgment in favor of defendant and against plaintiff as to Labor Law §200, §240(1) and Industrial Codes 12 NYCRR §23-1.7(a)(2), 12 NYCRR §23-1.8©(4), and 12 NYCRR §23-1.8(d)(1) and (2) under Labor Law §241(6); and it is further

ORDERED, that defendant’s request for dismissal of plaintiff’s remaining Labor Law §241(6) claims, more specifically Industrial Code 12 NYCRR §23-1.8(a) and Industrial Code 12 NYCRR §23-3.2(d) is **DENIED**

ORDERED that counsel for Plaintiff shall serve and file a Notice of Entry of this Decision and

Order within twenty (20) days from the date hereof.

This decision constitutes the Order of the Court.

Dated: January 22, 2025



HON. MYRNA SOCORRO, J.S.C.