Supreme Court of the State of New York
County of Kings

Index Number 526915/2023
Seqs. 002, 004

Part LL1M

MARIO HERNAN ZAMBRANO,

Plaintiff,

against

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, AND CIVIL CONTRACTING CORP.,

Defendants.

DECISION/ORDER

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: 60–82, 114, 118–129.

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 002) and defendants' cross-motion for summary judgment (Seq. 004) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on December 9, 2022, while working on a renovation of the premises located at 7000 21st Avenue, Brooklyn, NY (the premises or PS 247). It is undisputed that the premises was owned by the City of New York (NYC or the City). Civil Contracting Corp. (Civil) was the general contractor. Civil sub-contracted work to non-party Prime Contractors (Prime), and Prime employed the plaintiff.

The plaintiff testified as follows: On the date of his accident, plaintiff was dismantling the sidewalk shed around the school (Zambrano EBT at 22). Plaintiff and his foreman, Hector

Nolasco, climbed onto the sidewalk shed to hand material down (*id.* at 31–32). Plaintiff was wearing a harness attached to a yo-yo (or retractable lanyard), but there was no anchorage point on which he could tie off and no lifelines were provided (*id.* at 46–47; Zambrano 50-h transcript at 22–23). While he was passing planks down to his co-workers, plaintiff stepped on a metal sheet which either bent or broke, causing the plaintiff to lose his balance and fall off the sidewalk shed (Zambrano EBT at 42–43; Zambrano 50-h transcript at 31). After falling, the plaintiff struck a metal fence that was adjacent to the scaffold and then fell to the ground (Zambrano EBT at 45). Plaintiff also requested a ladder from Mr. Nolasco to ascend and descend from the sidewalk bridge and his request was denied (*id.* at 31–32).

The purported witness statements in the records contain accounts that are consistent with plaintiff's testimony. Plaintiff's foreman Hector Nolasco's statement avers that Mr. Nolasco did not witness the accident because his back was turned, and that he turned around and saw that plaintiff had fallen. Mr. Nolasco says the deck was "dry," but does not address the sheet of metal or the absence of an anchorage point (Nolasco witness statement). Plaintiff's co-worker Jesus Mura stated that, while plaintiff was handing Mr. Mura beams the plaintiff lost his balance and fell, which does not contradict plaintiff's account of his accident (Mura witness statement). Plaintiff's co-worker Syed Ahmed also does not claim to have witnessed the accident. Mr. Ahmed admits that there was no place for the plaintiff to tie off, and although Mr. Ahmed contends that the plaintiff would have struck the fence even if he was tied off, that contention is not supported by any stated distances or evidence other than Mr. Ahmed's speculation. Additionally, Mr. Ahmed does not claim that plaintiff would still have fallen to the ground even if he had been properly tied off.

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 (*e.g.* a scaffold and fall arrest system) is a 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)]).

A plaintiff can prevail on summary judgment even where there are different accounts of how his accident occurred, if he is entitled to summary judgment on every version supported by the record (*see Keen v Tishman Construction Corporation of New York*, 233 AD3d 1001 [2d Dept 2024]). Here, the defendants admit that the plaintiff did not have a place to tie off (aff in supp of cross-motion at ¶ 4). The absence of an adequate anchorage point rendered plaintiff's harness and yo-yo wholly inadequate to protect him from the elevation-related risk posed by working on top of the sidewalk bridge, and the absence of an adequate fall arrest system was at a minimum *a* proximate cause of his fall. Therefore, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim.

The failure of the metal sheet that was serving as a working platform while plaintiff handed scaffold planks down to his co-worker also constitutes a statutory violation. Irrespective

of whether the sheet is described as bent or broken, there is no evidence in the record that this component of the scaffold did not fail. Finally, the failure of plaintiff's employer to provide him with a ladder to ascend and descend a scaffold that was being demolished likely constitutes an additional statutory violation. That said, although plaintiff points this fact out, he does not seem to promote it as a proximate cause of the incident.

In opposition, defendants fail to raise a triable issue of fact. The statements that defendants contend contradict plaintiff's account are each consistent with plaintiff's own testimony, and any discrepancies between plaintiff's deposition and his 50-h hearing are not material. Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim; defendants' cross-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 harm, (4) a 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's claim is predicted on the alleged violation of Rule 5.1 (c) (1), which reads:

> **Scaffold Structure.** (1) Except where otherwise specifically provided in this Subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereupon when in use. . . . Such maximum weight shall be construed to mean the sum of both dead and live loads.

In support of his motion, plaintiff provides the affidavit of John P. Coniglio, a safety engineering expert. Mr. Coniglio opines that the failure of the metal plate indicates that the scaffold was unable to support four times the maximum weight required. Plaintiff has therefore demonstrated his prima facie entitlement to summary judgment on this claim by demonstrating

that the violation of a sufficiently specific Industrial Code provision was a proximate cause of his accident.

In opposition and in support of their own motion, defendants argue that plaintiff knew about the metal sheets "decaying nature" but decided to stand on the sheet anyway. At most, this argument does not raise a material issue of fact as to the statutory violation, but rather asserts that the plaintiff was comparatively at fault. Therefore, plaintiff's motion is granted with respect to his Labor Law § 241 (6) claim. Defendants' cross-motion is granted solely to the extent of preserving the issue of comparative fault as to Labor Law § 241 (6) in the unlikely event of a liability trial (*Rodriguez v City of New York*, 31 NY3d 312 [2018]). However, preservation of comparative fault is likely academic in light of defendants' liability to plaintiff under Labor Law § 240 (1), which is "not subject to [the defense of comparative fault]" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 502 n. 4 [1993]).

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]). Claims under this statute are evaluated under a dangerous premises condition analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 131 [2d Dept 2008]), a dangerous means and methods analysis (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]), or a combination of the two (*id.*)

In this action, plaintiff contends that both the lack of an adequate tie-off point and the defective metal sheet constituted dangerous conditions. The defendants advance arguments solely with respect to their lack of notice regarding the metal sheets on the sidewalk bridge. Defendants fail to address the lack of tie-off points for workers standing on top of the sidewalk

bridge, which plaintiff raised at length in his memorandum of law in support of his motion (*see* plaintiff's memo. of law at 12–14). Therefore, in the absence of substantive opposition, plaintiff's motion is granted with respect to his Labor Law § 200 claim predicated on the absence of an anchorage point; defendant's cross-motion is denied.

Conclusion

Plaintiff's motion for summary judgment (Seq. 002) is granted.

Defendants' cross-motion for summary judgment (Seq. 004) is granted solely to the extent indicated above; the motion is otherwise denied.

This constitutes the decision and order of the court.

December 22, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court