Mema v Procida Constr. Corp.
2025 NY Slip Op 35167(U)
May 8, 2025
Supreme Court, Bronx County
Docket Number: Index No. 20484-2020E
Judge: Myrna Socorro

#23

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

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Ferid Mema,
Plaintiff

-against-

Procida Construction Corp.,
Defendant

----------x

Procida Construction Corp.,
Third Party Plaintiff

-against-

Mastercraft Masonry Inc.,
Third Party Defendant

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Index No. 20484-2020E
Motion seq #2 and #3

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

The following e-filed documents, listed by NYSCEF document numbers (Motion #2): 33-43; 46-57; and (Motion seq #3): 63-80, were read on these motions for summary judgment.

According to the plaintiff, on the day of the accident: he was employed by Mastercraft Masonry Inc. ("Mastercraft") as a bricklayer/mason; plaintiff was on the 6th floor, which had no roof/ceiling, and he and his worker Nest were instructed by Rich and Howie to move beams by hand from a pile and to place them under the openings of cinder block where windows were going to be installed; the beams were slippery due to condensation; the beams were about 400 pounds each; one beam slipped out of plaintiff's hands and fell onto his foot; the beam fell approximately 8-10 inches before striking his foot; they were not provided any hoists, cranes, booms or any other safety device or equipment to help them move the beams; there was one pallet jack at the site, however, plaintiff was not offered to use one and the only pallet jack at the site was being used for another task.

According to the record, Procida Construction Corp. ("Procida") was the general contractor for the subject construction project. Procida hired Mastercraft to build a senior residence at the subject property.

In motion sequence no. 2, which was initially filed on March 21, 2023, plaintiff moves for summary judgment on his Labor Law §240(1) claim arguing that plaintiff was struck by a falling heavy beam that was being moved by hand and that no safety equipment or devices were given to plaintiff and his coworker to enable them to move the beams safely.

Procida opposes plaintiff's motion. First, Procida argues that the motion should be denied as premature as the deposition of third-party defendant Mastercraft and non-party witnesses have not yet been completed. Second, Procida argues that plaintiff has not shown that the absence or failure of a safety device was the proximate cause of his accident. Lastly, Procida argues that plaintiff was the sole proximate cause of his accident as both his hand and foot slipped causing him to drop the subject beam.

Mastercraft also opposes plaintiff's motion. Mastercraft argues that there are questions of fact as to whether the work being performed by the plaintiff is covered conduct warranting the protections afforded by Labor Law §240(1) as the subject beam "was not in the process of being raised or lowered" but was being carried by plaintiff and his coworker from one location to another. Mastercraft also argues that the motion must be denied as premature since Mastercraft's deposition has not been completed.

In motion sequence no. 3, which was initially filed on April 3, 2024, after the Note of Issue was filed on December 5, 2023 [1] Procida moves for summary judgment to dismiss plaintiff's Labor Law §200 and common law negligence claims, as well as plaintiff's Labor Law §240(1) and §241(6) claims. As to Labor Law §240(1), Procida argues that the evidence shows that plaintiff's accident did not occur due to the absence or failure of a safety device and that plaintiff was the sole proximate cause of his accident. As to Labor Law §241(6), Procida argues that the Industrial Code sections cited by plaintiff are too general to impose liability or are not applicable. Lastly, as to Labor Law §200 and common law negligence, Procida argues that they must be dismissed since Procida did not direct or control the means and methods of plaintiff's work and did not create or have notice of the alleged slippery condition at the location where plaintiff was walking at the time of the accident.

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*

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[1] Therefore, the issues in motion seq #2 as to the motion being premaure are deemed **moot**.

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, 235 [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, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

Upon a review of the motion papers, this Court finds that plaintiff established a *prima facie* entitlement to liability under Labor Law §240(1) by demonstrating that he was struck by a falling object, that such object required securing for the purposes of the undertaking, and that the lack of adequate overhead protection failed to shield the Plaintiff against the falling of said object, thereby proximately causing plaintiff's injuries. S*ee Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 405 [1st Dept 2018]. In opposition, defendants do not raise a triable issue of fact. A worker cannot be solely to blame for an accident proximately caused by a statutory violation. *Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]. Here, the evidence shows that the 400-pound beam was not properly or adequately secured, as the plaintiff and his co-worker were directed to manually carry the beam without it being hoisted or in any other manner secured for transport.

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) claim is **GRANTED**.

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, Procida went through all the alleged Industrial Code provisions in support of their argument that none of the provisions are applicable and/or not violated in this matter. In his opposition, plaintiff "concedes that he should have pled Industrial Code §23-1.7(d) Slipping Hazards," instead of Industrial Code §23-1.5. However, the Court notes that plaintiff did not cross-move to supplement his bill of particulars to add a violation of §23-1.7(d) nor does he, in any other way, address Procida's argument regarding the Labor Law §241(6) claim. Therefore, plaintiff has failed to raise an issue of fact.

Accordingly, plaintiff's Labor Law §241(6) claim is **DISMISSED**.

Labor Law §200/Common Law Negligence

Labor Law §200 applies to owners, general contractors, and their statutory agents. *Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 234AD3d 623 [1st Dept. 2025]. A subcontractor will be found to be a statutory agent where they have been "delegated the supervision and control over the specific work area involved or the work which [gave] rise to the injury." *Id*, quoting *Nascimiento v Bridgehampton Constr. Corp.*, 86 AD3d 189 [1st Dept. 2011].

Labor Law §200 is a "codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Jackson v Hunter Roberts Constr. LLC*, 205 AD3d 542 [1st Dept. 2022]). There are two branches of claims that can be made pursuant to Labor Law §200/common law negligence. Those two branches are those "arising from an alleged defect or dangerous condition existing on the premises or those arising from the manner in which the work was performed" *Cappabianca v Skanska USA Bldg Inc.* 99 AD3d 139 [1st Dept. 2012].

Plaintiff testified that on the day of the accident, he was instructed by Rich and Howie to move the subject beam with his coworker Nest. Further, Keron Philip, Procida's project manager, testified as follows:

> Q. Who were your bosses for the Millbrook Terrace Housing Project?
> A. Rich Rendals and Brian McCurry.
> Q: Were they employees of Procida Construction?
> A: Yes.
> Q: What were their titles?
> A: Rich Rendals was the senior project manager and Brian McCurry was superintendent
> Q. Who is Howie?
> A. He might have been Mastercraft's foreman
> …
> Q. Was he [Rich Rendals] at the premises on a daily basis?
> A. Yes
> Q. Were you at the premises on a daily basis?
> A. Yes

Thus, it is undisputed that Rich Rendals was an employee of Procida. Further, even though Procida argues that it did not control or direct plaintiff's work, pursuant to plaintiff's testimony, "Rich and Howie" instructed him to move the subject beams by hand with his coworker. Therefore, this Court finds that there are questions of fact that preclude summary judgment on plaintiff's Labor Law § 200 and common law negligence claims.

Accordingly, it is hereby

ORDERED, that the summary judgment motion by the plaintiff (motion sequence no. 2) seeking judgment on the Labor Law §240(1) claim is **GRANTED**; and it is further

ORDERED, that the summary judgment motion by Procida (motion sequence no. 3) is **GRANTED TO AN EXTENT** in that plaintiff's Labor Law §241(6) claim is DISMISSED; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED, the counsel for plaintiff shall serve a copy of this order with notice of entry upon defendants within thirty (30) days of the upload of this order in NYSCEF.

This constitutes the decision and order of this court.

Dated: May 8, 2025

HON. MYRNA SOCORRO, J.S.C.