Aponte v 298 E. Vil. Owner LLC
2025 NY Slip Op 35179(U)
January 28, 2025
Supreme Court, Bronx County
Docket Number: Index No. 34327-2019E
Judge: Myrna Socorro

#2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 9

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Steven Aponte
Plaintiff

-against-

298 East Village Owner LLC, Rock Group NY Corp., OTL Enterprises LLC, On the Level Enterprises, Inc., and Jemmco LLC,
Defendants

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298 East Village Owner LLC and OTL Enterprises LLC,
Third Party Plaintiffs,

-against-

Liquid Gold Self Leveling LLC, and Premier Ironworks, Inc.,
Third-Party Defendants

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Index No. 34327-2019E
Motion seq #2

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

Recitation as required by CPLR §2219 as to motion seq #2 filed by Plaintiff for partial summary judgment submitted on May 17, 2024

Papers	NYSCEF Doc. No.
Notice of Motion – Affirmation and Exhibits, Memorandum of Law in Support; Statement of Material Facts	# 69 – 92
Notice of Cross Motion – Affirmation in Opposition to Motion and in Support of Cross Motion; Memorandum in Opposition to Motion and in Support of Cross Motion	# 94 – 97
Affirmation in Opposition, Response to Statement of Material Facts, Memorandum of Law, Affidavit and Exhibits	# 98 – 108
Affirmation in Opposition, Affidavit, Response to Statement of Material Facts	# 108 – 111
Affirmation in Opposition to Motion and in Support of Cross Motion	# 112
Affirmation in Support of Cross Motion	# 116
Affirmation in Opposition to Cross Motion and Reply, Counter Statement of Facts, Affirmation and Memorandum of Law in Reply to 298 East Village & OTL Enterprises; Affirmation and Memorandum of Law in Reply to Liquid Gold Self Leveling	# 117 – 123
Reply Memorandum in Support of Cross Motion and Appendix	# 124 – 125

Plaintiff moves pursuant to CPLR 3212, for an order granting him partial summary judgment against defendant 298 EAST VILLAGE OWNER LLC (298 East Village or Owner) and OTL ENTERPRISES LLC (OTL Enterprises or General Contractor) for liability pursuant to Labor Law §240(1) and §241(6).

Third-Party Defendant PREMIER IRONWORKS, INC. cross-moves for an Order pursuant to CPLR §3212, granting summary judgment to Premier and dismissing plaintiff's causes of action against Owner and General Contractor under Labor Law §240(1) and §241(6).

Third-Party Defendant LIQUID GOLD SELF LEVELING, LLC opposes plaintiff's motion and joins in the cross motion.

Defendants/Third-Party Plaintiffs 298 East Village and OTL Enterprises oppose plaintiff's motion and join in the cross motion. This motion and cross motion are decided in accordance herewith.

Background

Plaintiff commenced this action on December 4, 2019, for personal injuries he allegedly sustained on November 4, 2019 at a building being erected at 298 East 2nd Street, New York, New York (the Premises). Plaintiff, an employee of Liquid Gold Self Leveling, LLC, testified that he went to the Premises to set pins marking out the proper elevation of the concrete floors that would later be poured. He testified that his access to the first floor was blocked by an A-frame dolly loaded with ten to fifteen metal sheets. Plaintiff testified that when the other workers on the floor told him they could not move these materials, he went to find the site's safety supervisor. Plaintiff alleges that the site's safety supervisor instructed him to move the A-frame dolly himself. Plaintiff testified that shortly after he started moving the dolly, it tipped over, and both the metal sheets and the dolly fell on his leg injuring him.

In support of his motion, Plaintiff submits, inter alia, deposition transcripts of Plaintiff and Angelo Cosentini (OTL Enterprises), a contract between 298 East Village and OTL Enterprises, a Condo Declaration for the Premises, a purchase order, a contract between OTL and Premier, OTL Enterprises's safety plan for the project, an Incident Report, the First Report of Injury, and photographs purporting to show the injury to Plaintiff's leg.

Summary of the Parties' Arguments

Plaintiff argues that he is entitled to summary judgment on his Labor Law §240(1) claim against 298 East Village and OTL Enterprises because he was injured in a gravity-related accident. Plaintiff also argues in his Memorandum of Law and Affirmation in Support entitlement to summary judgment

on claims brought under Labor Law §241(6) for violations of Industrial Code §§ 23-1.7(e)(2), 23-2.1 (a)(1), and 23-2.1(a)(2).

Counsel for defendants 298 East Village and OTL Enterprises argues that Plaintiff's motion should be denied summary judgment because: a) it is premature given that significant discovery including depositions of Third-Party Defendants Liquid Gold and Premier remain outstanding; b) Plaintiff's alleged accident was not caused by an elevation-related or gravity-related risk; c) there is a question of fact as to whether Plaintiff was the sole proximate cause of the accident; and d) there are questions of fact as to whether the alleged violations of the Industrial Code are sufficiently specific and/or the proximate cause of the accident.

Premier argues that Plaintiff's motion should be denied because: a) Plaintiff's testimony about the accident is "incredible as a matter of law" because his account of the accident is physically impossible; b) Plaintiff's accident was not caused by an elevation-related or gravity-related risk; c) Plaintiff was acting as a "volunteer" and not an employee when he was injured, as no one directed him to move the dolly, it was outside of the scope of his employment and he did so of his own free will; and d) Plaintiff has not adduced evidence showing violations of the Industrial Code.

Liquid Gold argues that Plaintiff's motion for summary judgment should be denied because: a) the notice of motion failed to include Labor Law §241(6) as a basis for relief; b) it is premature as significant discovery is outstanding; c) Plaintiff's accident was not the result of a force of gravity; d) he was not acting within the scope of his work when the accident occurred; and e) he was not authorized or permitted to move the equipment or materials of other trades.
Defendants/Third-Party Plaintiffs argue that Premier's cross-motion should be granted dismissing the complaint because a) Plaintiff acted outside of the scope of his employment as a volunteer in moving the dolly; b) the accident was not caused by an elevation-related or gravity-related risk; and c) Plaintiff cannot demonstrate that any provision of the Industrial Code was violated by defendants.

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]; *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508 [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 [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 [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 NY2d 320 [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]).

Plaintiff's Claim under Labor Law §240(1)

Plaintiff maintains that he is entitled to summary judgment on his Labor Law §240(1) cause of action, based upon "falling object" liability. Labor Law §240 (1) imposes strict liability on "owners, contractors, and their agents" when they fail to provide adequate safety equipment and that failure causes a worker's injury in a gravity-related accident (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658 [2014]). Labor Law §240(1) applies when an object upon which the force of gravity is applied is material being hoisted or a load that required securing for the purpose of carrying out plaintiff's undertaking (*Garcia v Wallace Ave. I, LLC*, 101 AD3d 415 [1st Dept 2012] *citing Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [2001]). However, this statute "does not apply simply because an object fell and injured a worker; a plaintiff must show that the object fell … because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Id.*).

"Not 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)" (*Narducci*, 96 NY2d 259). The statute lists the following safety equipment, "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" (Labor Law § 240 [1]).

"[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials … there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). "[T]o establish a prima facie case under § 240 (1), a plaintiff must also establish that the absence of a protective device, or the presence of a defective one, of the type enumerated in the

statute, was a proximate cause of the injuries alleged" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007]).

Plaintiff argues that a safety device consisting of an A-frame dolly failed and collapsed with an unsecured, 100 to 200 pound load of metal sheets. Plaintiff testified that both the dolly and the load fell onto his leg, injuring him.

In support of its cross motion, Premier and defendants 298 East Village and OTL Enterprises argue that Plaintiff's injuries were not caused by an elevation differential that is actionable under §240(1), and that the one-foot elevation of the dolly is insufficient to create an elevation-related risk.

Where an object falls from the top of an A-frame dolly, it is not necessarily de minimis, and can be the source of an elevation-related risk, provided it exerts enough weight and force, (*see Kuylen v KPP 107th St., LLC*, 203 AD3d 465 [1st Dept 2022]; *cf. Connor v AMA Consulting Engrs. PC*, 213 AD3d 483 [1st Dept 2023] [finding a two-foot-wide and eight-foot-high piece of gypsum wallboard that fell onto plaintiff was an ordinary construction hazard]; *O'Brian v 4300 Crescent L.L.C.*, 180 AD3d 437 [1st Dept 2020] [finding triable issues of fact as to whether a stack of eight to nine windows was required to be secured]).

This Court finds that there is a triable issue of fact as to whether Plaintiff's injuries were proximately caused by the lack of a safety device of a kind contemplated by Labor Law §240(1) (*see, Connor v AMA Consulting Engrs. PC*, 213 AD3d 483 [1st Dept 2023]). "[C]ourts will take into consideration whether the size and weight of the object can generate a significant amount of force as it falls" (*Id.* at 484; *see Kuylen v KPP 107th St., LLC*, 203 AD3d 465 [1st Dept 2022]). Thus there remains a triable issue of fact as to whether the elevation differential measuring one foot between the platform of the dolly and the ground was sufficient for the load of metal sheets to generate a significant amount of force.

Any argument that Plaintiff's testimony should be disregarded because it is "incredible" or because Plaintiff is the sole witness to the accident is inapposite. Submissions by Premier, 298 East Village and OTL Enterprises fail to refute Plaintiff's version of the events leading up to his accident (*see Rroku v West Rac Contr. Corp.*, 164 AD3d 1176, 1177 [1st Dept 2018]). Moreover, it will also require a jury to determine whether Plaintiff's own conduct of moving the A-frame dolly may have been the sole proximate cause of his accident (*see, Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022] [*citing Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601 [1st Dept 2022]).

Neither Plaintiff nor Premier carried their prima facie burden to demonstrate entitlement to summary judgment as a matter of law. In light of the aforementioned issues of fact, Plaintiff's motion is **DENIED**, and Premier's cross motion is **DENIED.**

Plaintiff's Claim under Labor Law § 241 (6)

To properly state a claim under Labor Law §241(6), a plaintiff must identify a specific and applicable Industrial Code provision that has been violated (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Labor Law §241(6) is not self-executing, but requires reference to outside sources to determine whether the safety measures actually employed on a job site were reasonable and adequate (*Zimmer v Chemung County Performing Arts. Inc.*, 65 NY2d 513, 523 [1985]). In his counsel's affirmation, Plaintiff also alleges that defendants' violation of Labor Law §241(6) also supports Plaintiff's motion for summary judgment on liability. In his bill of particulars, Plaintiff claims numerous violations of safety regulations, however, in the instant motion, Plaintiff only identifies Industrial Code §§23-1.7(e)(2), 23-2.1(a)(1), and 23-2.1(a)(2). Plaintiff has, therefore, 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]). Plaintiff specifically identifies defendants' failure "to provide any ropes, straps, clamps, tie-downs, materials, or any other devices to safely secure the elevated load" as violating these Industrial Code sections.

§23-1.7 (e) (2) states, "[t]he 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." Significantly, the Industrial Code stresses the difference between areas where persons work and passageways. This subsection of the Industrial Code is inapplicable because the Plaintiff does not allege that he tripped on any accumulation of dirt and debris or scattered tools and materials. (*Castillo v 3440 LLC*, 46 AD3d 382 [1st Dept 2007]; *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158 [1st Dept 2005]). "Section 23-1.7(e)(2) is inapplicable because the accident was not caused by materials or tools scattered on the floor" (*Marrero*, 106 AD3d at 410; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]). Accordingly, § 23-1.7 (e) (2) cannot serve as a predicate for §241(6) liability in the instant matter.

§23-2.1(a) (1) provides that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" While Plaintiff alleges that the one hundred to two hundred pound load of unsecured metal sheets on the dolly was work material that was not safely stored, and thus violated §23-2.1(a)(1), there is no allegation that the accident occurred in or

blocked "a passageway, walkway, stairway or other thoroughfare" (*Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 [1st Dept 2013]). Premier therefore demonstrated its entitlement to dismissal of this predicate and Plaintiff fails to raise a triable issue of fact with respect to the same.

§23-2.1(a) (2) provides that "[m]aterial and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Plaintiff argues that defendants violated this Code section insofar as the dolly's load of ten to fifteen unsecured metal sheets exceeded its safe carrying capacity, arguing that the dolly was a "platform" contemplated by the Industrial Code. Significantly, Plaintiff does not adduce any admissible, competent evidence or expert opinion demonstrating the safe carrying capacity of the dolly. Plaintiff's estimate of the total weight of the load, i.e., one hundred to two hundred pounds, does not constitute a per se excessive load. Premier therefore demonstrated its entitlement to dismissal of this predicate and Plaintiff fails to raise a triable issue of fact with respect to the same. The evidence in the record fails to demonstrate that the material or equipment here was being "stored." (*Buckley*, 44 AD3d 263).

As Plaintiff failed to meet his burden to present a prima facie case for Defendants' violation of any provision of the Industrial Code, he therefore failed to demonstrate entitlement to judgment as a matter of law for liability under Labor Law §241(6), and therefore Plaintiff's motion is **DENIED** with respect to that cause of action. Third-Party Defendant Premier has demonstrated its entitlement to judgment as a matter of law with respect to Plaintiff's cause of action pursuant to Labor Law §241(6) and has set forth a prima facie case of entitlement to summary judgment. In response, Plaintiff fails to raise a triable issue of fact. Accordingly, Defendant's motion for summary judgment is **GRANTED**, dismissing Plaintiff's cause of action for violations of Labor Law §241(6), as predicated on alleged violations of §§ 23-1.7 (e) (2), 23-2.1 (a) (1) and (a) (2).

Accordingly, it is hereby

ORDERED that Plaintiff's motion (Mot. Seq. # 2) for partial summary judgment as to Labor Law §240(1) and Labor Law §241(6) is **DENIED**; and it is further

ORDERED that Third-Party Defendant Premier's cross motion for summary judgment is **GRANTED IN PART**, and it is further

ORDERED that Plaintiff's claims made under Labor Law §241 (6), as predicated on violations of Industrial Code 12 NYCRR 23-1.7 (e) (2), 23-2.1 (a) (1) and (a) (2) are dismissed; and it is further

ORDERED that Third-Party Defendant Premier shall serve notice of entry of this order upon all parties to this action twenty (20) days of the date of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: January 28, 2025

HON. MYRNA SOCORRO, J.S.C.