Pesantez v Allstate Dismantling Corp.
2025 NY Slip Op 35326(U)
April 3, 2025
Supreme Court, Queens County
Docket Number: Index No. 721297/2020
Judge: Frederick D.R. Sampson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

----------X

CARLOS PESANTEZ,

Plaintiff,

-against-

ALLSTATE DISMANTLING CORP., BROOKFIELD PROPERTIES MANAGEMENT LLC, BSREP III NERO LLC, TURNER CONSTRUCTION COMPANY, and NEW LAND INTERIORS CORP.,

Defendant.

----------X

NEW LAND INTERIORS CORP.,

Third-Party Plaintiff,

-against-

MILLENNIUM SERVICES LLC,

Third-Party Defendant.

----------X

Index No: 721297/2020
Motion Date: 08/28/2024
Motion Cal. No: 11, 12, 13
Motion Seq. No: 1, 2, & 3

The following papers numbered E 94 to E 208 read on the motion, (Seq 1), by the defendant Allstate Dismantling Corp., (Allstate), for summary judgment pursuant to CPLR 3212 seeking dismissal of plaintiff's claims, and any and all cross-claims asserted against Allstate, that are alleged pursuant to Labor Law §§ 240 (1), 241.6, 200, and common law negligence, and on plaintiff's cross-motion for summary judgment against all the defendants for violations of Labor Law §§ 240 (1), 241.6, 200, and common law negligence, and, on the motion by New Land Interiors Corp., (New Land), (Seq 2), seeking summary judgment against the plaintiff dismissing all claims and causes of action against New Land, and dismissal of any and all cross-claims made by any of the defendants, and, on the motion by the defendants Brookfield Properties Management LLC, (Brookfield), BSREP III Nero LLC, (Nero), and Turner Construction Company, (Turner), (Seq 3), seeking dismissal of plaintiff's complaint in its entirety as against the defendants, and the dismissal of any and all cross-claims asserted by any party.

	Papers Numbered
Notices of Motion- Affidavits - Exhibits	94-108; 109-115; 116-123
Notice of Cross-Motion- Affidavits - Exhibits.....	127-141
Answering Affidavits - Exhibits.....	142-155; 156-168; 169-181;182, 183; 184; 186, 187;188; 193-195; 196;197, 198
Reply Affidavits	199, 200, 201-202, 203, 204,205 206, 207, 208

Upon the foregoing papers it is ordered that the motions and cross-motion are determined as follows:

This action arises from the personal injuries sustained by the plaintiff, Carlos Pesantez, (Pesantez), employee of third party defendant Millenium Services, LLC, (Millenium), the subcontractor hired by defendant subcontractor New Land to perform demolition work on the project undertaken by the general contractor, Turner Contracting Company. The plaintiff alleged, that, while performing his duties, he followed the orders of his team leader and foreman, co-workers at Millenium, who told him to climb up into the rear of a garbage truck owned and operated by Allstate, hired to transport the debris from the premises. While maneuvering about the rear hopper, and attempting to exit, he got his foot stuck in an apparent hole, or opening in the debris field and fell 3-4 feet to the ground below, resulting in his injuries. The plaintiff alleged violations of Labor Law § 240 (1), in that he fell from a height, and alleged that he was not provided the appropriate safety equipment, of the type enumerated in the statute to prevent such a fall. He also asserted that Labor Law § 241 (6) and certain provisions in the Industrial Code were violated, causing his injuries. Additionally, he alleged the violation of Labor Law § 200, in that the defendants controlled the job site, and the manner of work, and in so doing, failed to adequately provide a safe working environment, and/or a safe manner of work, thus causing plaintiff to sustain his injuries. Furthermore, he alleged common law negligence, in that, the defendants violated their duty to keep the premises in a safe,

proper and secure manner, in good repair and free from obstruction and defects. The plaintiff contends that the work conditions inside the hopper of the garbage truck was unsafe and dangerous, providing no adequate warning or prohibition to enter that area, and was told to work there without adequate safety equipment so as to prevent the happening of the event.

In support of Allstate's motion for summary judgment, (Seq 1), the defendant submitted, among other things, his attorney's affirmation, a copy of the pleadings, a copy of plaintiff's deposition, a copy of the deposition of David Papendick, Project Superintendent for defendant Turner, the general contractor of the project, a copy of the deposition of Frank Rullo, owner of New Land, a copy of the deposition of Steve Srnic, current vice president of defendant Allstate, a copy of the deposition of Ralph Rose, senior property manager for defendant Brookfield, property manager for BSREP III Nero LLC, the owner of the premises, and a video "hyperlink" of the incident. In opposition, and in support of his cross-motion, plaintiff submitted, among other things, copy of the pleadings, a copy of his attorney's affirmation, and copies of the depositions of the parties. Also in opposition to Allstate's motion, (Seq 1), co-defendant Turner submitted its attorney's affirmation. In further opposition to Allstate's motion, Brookfield submitted, among other things, its attorney's affirmation. In opposition to the plaintiff's cross-motion, Brookfield submitted, among other things, its attorney's affirmation, and New Land submitted, among other things, its attorney's affirmation. In support of New Land's motion for summary judgment, (Seq 2), New Land submitted, among other things, a copy of its attorney's affirmation. In opposition, plaintiff submitted, among other things, his attorney's affirmation. Also in opposition, (Seq 2), co-defendant Turner submitted, among other things, its attorney's affirmation. In support of Brookfield and Nero's motion for summary judgment, (Seq 3), they submitted, among other things, a copy of the BSREP contract with Turner, a excerpt of a copy of the New Land contract with Turner, a copy of the New Land contract with Allstate, and a copy of the New Land contract with Millenium. In opposition, the plaintiff submitted his attorney's affirmation, and also in opposition to Seq 3, the co-defendant New Land submitted its attorney's affirmation. Each party submitted reply affirmations by their attorneys in further support of their respective motions.

On a motion for summary judgment, the court must view the evidence in the light most favorable to the non moving party. (*See Vega v Restani Const. Corp.,* 18 NY3d 499 [2012].) In doing so, the evidence submitted by the movants must eliminate all material issues of fact. (*Id.*)

" 'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder, ropes or other protective device proved inadequate to

protect a worker from harm directly flowing from the application of the force of gravity to an object or person.' " (*See Runner v New York Stock Exch., Inc.,* 13 NY3d 599, 604, quoting *Ross v Curtis-Palmer Hydro-Electric Co.,*81 NY2d 494, 501[1993].) This statute imposes a nondelegable duty upon owners, contractors, or their agents to provide appropriate safety devices for the protection of workers against risks inherent in elevated work sites. (*See McCarthy v Turner Constr., Inc.,* 17 NY3d 369 [2011]; *Caiazzo v Mark Joseph Contr., Inc.,* 119 AD3d 718 [2d Dept 2014].) The statute requires owners and contractors to provide workers with appropriate safety devices to protect against such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*See Ross,* 81 NY2d 494; *Ramos-Perez v Evelyn USA, LLC,* 168 AD3d 1112 [2d Dept 2019]; *Francis v Foremost Contracting Corp.,* 47 AD3d 672 [2d Dept 2008].)

> "Not every worker who falls at a construction site,...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. (see, *Ross v Curtis-Palmer Hydro-Elec. Co*, 81 NY2d 494, 501..." (*Narducci v Manhasset Bay Associates,* 96 NY2d 259 [2001].)

Similarly, Labor Law § 241 (6), provides that owners, general contractors, and their agents have nondelegable duties to comply with safety regulations pursuant to the Industrial Code, and must show that either they did not violate a specific safety rule, or that such violation was not a proximate cause of plaintiff's injuries. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.,* 91 NY2d 343 [1998].)

Generally, claims under Labor Law § 200 and common law negligence, fall into two categories, those where the injuries sustained are as a result of dangerous or defective conditions at the worksite, and those involving the manner in which the work is performed. (*See Ortega v Puccia,* 57 AD3d 54 [2d Dept 2008].) When a claim arises from the dangers in the methods or materials of the work, recovery against the owner, general contractor, or agent can not be had unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. (*Id.*) Regarding worksite dangers, an owner, general contractor, or subcontractor must show it did not have sufficient supervision and control over the workplace, or, either did not create the hazardous condition or have actual or constructive notice of such condition within a sufficient time to rectify it. (*See Mari v Liro Engineers, Inc.,* 159 AD3d 688 [2d Dept 2018].) Here, since it can be argued that both workplace and manner of work are the basis for plaintiff's claims, each party to be charged must demonstrate that it did not

create the dangerous condition, have actual or constructive notice of the dangerous condition nor have sufficient supervision or control over the premises to remedy it, (*See Russin v Louis N. Piciano & Son,* 54 NY2d 311 [1981]; *Marquez v L&M Development Partners, Inc.,* 141 AD3d 694 [2d Dept 2016]), and did not have sufficient authority to supervise and control the manner of work. (*Id.*)

Turning to plaintiff's cross-motion for summary judgment for alleged violations of Labor Law §§ 240 (1), it is the plaintiff's burden to demonstrate that the incident occurred because of the absence or insufficiency of an adequate safety device of the type enumerated in the statute resulting in a fall by the worker from the elevation risk for which the safety device was to prevent. (*See Narducci v Manhasset Bay Associates,* 96 NY2d 259 [2001].)

The testimony submitted demonstrates that the plaintiff was told by his immediate superiors, to climb into the rear of a garbage truck hopper, in order to remove improper concrete and other debris due to breach of disposal regulations requiring this debris to have been sorted prior to dumping into the garbage truck. The plaintiff's normal function on his job was to move portable bins loaded with pre-sorted debris from the job site to the garbage truck. The truck driver then supervised and operated the truck so as to pick up the bin, dump the debris into the rear hopper, return the bin to the ground, and if necessary, crush and pull the debris into the belly of the truck. According to the testimony, it was discovered that a certain bin was not sorted correctly, and perhaps prior bins were also not properly sorted, so that the rear of the garbage truck hopper contained debris that would not be permitted to be dumped at the designated location. The plaintiff's team leader, then phoned their foreman, for instructions on how to proceed. In the phone call placed on a speaker for all to hear, the foreman told them to get into the garbage truck and remove the debris that was not supposed to be there. The plaintiff was then told, to perform that task. The plaintiff testified that he had never performed this task before, and knew of no one else that had done it. The testimony of the other witnesses all seemed in agreement that this activity was dangerous and should not have been undertaken. Nevertheless, the plaintiff was told by his superiors to engage in this dangerous activity. The dangerous aspect of this work assignment was that it entailed rummaging through assorted metal, wood, and concrete debris which created poor footing and a hazardous condition that the plaintiff may fall either in, or in this case, out of the hopper, and cause severe injuries. Furthermore, a danger existed in the event the truck driver inadvertently activated the hopper's crushing mechanism.

In *Toefer v Long Island R.R.,* 4 NY3d 399 [2005], the court stated, "We decide in these cases that workers who fall when working on, or getting down from, the surface of a flatbed truck that is between four and five feet off the ground may not recover under

Labor Law § 240 (1), because their injuries did not result from the sort of "elevation-related risk" that is essential to a cause of action under that section." (*Id., at* 615.) Decided along with *Toefer,* was its companion case, *Marvin v Korean Air Inc.* Therein, the plaintiff Robert Marvin, (Marvin), was employed by a siding subcontractor to work on a cargo building for Korean Air Inc. Marvin was assigned to cut the steel straps that secured the material to a flatbed truck, the trailer was 4-5 feet off the ground. No ladder was present. As he began to step off the truck, his foot became entangled in a safety harness he was wearing and he fell, breaking his ankle. The Court of Appeals affirmed the lower court decision to dismiss the complaint.

However, *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011], provided a guideline for matters that may convert what normally may not be within the Labor Law§ 240 (1) protections, into ones that are. In *Ortiz*, the plaintiff therein was on the flatbed trailer 4-5 feet above the ground, but, asserted that, in order to perform the task at hand, he was required to assume a precarious pose upon demolition debris six feet above the ground. The Court found that in such a case, exacerbating conditions made the act of coming down from a height similar to a flat-bed truck, more dangerous. In that case, the court required the plaintiff to show that the dangerous activity was necessary to the performance of the task, and that a safety device of the type enumerated in the statute would have likely prevented the plaintiff's fall.

Here, the plaintiff was in the rear of a garbage truck approximately 3-4 feet above ground, which would normally not be considered a height sufficient enough to require statutory safety devices. In this case, it wasn't a simple matter of just alighting from the rear of the garbage truck, but to engage in the dangerous and hazardous activity of negotiating an unsure and treacherous "floor" of unsecured debris in the garbage hopper, and then to maneuver out of it to the pavement below. Since the plaintiff was told to engage in this activity, it was inherently necessary for him to take on the dangerous conditions while performing the task of removing the improper debris from the garbage hopper.

Reviewing the submissions and arguments made by the defendants, that Labor Law § 240 (1) is inapplicable due to the insufficient height differential, the aforementioned exacerbated dangerous activity necessary for performing the task overcomes this factor. (*See Ortiz*, 18 NY3d 335.) The assertion that a ladder was available, or that the plaintiff could have used the handrails on the garbage truck do not convince the court at this time that the prima facie burden of showing which safety device of the type enumerated in the statute could have prevented the fall has been met, or that the issue is resolved in the defendants' favor. Therefore, at this time, neither the plaintiff, nor the defendants, are able to meet their burdens for entitlement to summary

judgment with regard to Labor Law § 240 (1).

A review of the specific provisions asserted by the plaintiff in the Industrial rules, fail to show an applicable provision upon which they can rely. Therefore, all Labor Law § 241(6) claims are dismissed.

With regard to plaintiff's claims involving Labor Law § 200, defendants Brookfield, Nemo and Turner did not have sufficient supervision or control over the premises, nor adequate time to obtain actual or constructive notice of the dangerous condition caused by New Land, Millenium and Allstate, so as to be able to rectify it. (*See Russin v Louis N. Piciano & Son,* 54 NY2d 311 [1981]; *Marquez v L&M Development Partners, Inc.,* 141 AD3d 694 [2d Dept 2016].) Therefore, as to Labor Law § 200, the motions for summary judgment dismissing that claim are granted as to Brookfield, Nemo and Turner. Merely being able to stop work upon notice or observation that work is being performed in an unsafe manner is insufficient for liability pursuant to Labor Law § 200. (*See Murphy v 80 Pine, LLC,* 208 AD3d 492 [2d Dept 2022].)

As to plaintiff's Labor Law §200 and ordinary negligence claims against New Land and Allstate, the evidence demonstrates that the plaintiff was spontaneously instructed to climb into the rear of a garbage truck by his immediate superiors, who were employees of Millenium, working directly under the supervision of New Land, for the purpose of correcting the improper sorting of debris supervised by New Land, which had been deposited into the garbage truck for disposal. The testimony of Rullo on behalf of New Land shows that New Land acted as the supervisor of the activities performed by Millenium employees. Rullo emphasized this point by describing New Land's role as the "general contractor for demolition" on the project. Rullo states that New Land "hired" no workers, but subcontracted Millenium to provide the labor for the job, while New Land consisted of the supervisors. Rullo further testified that David Cohen was New Land's on-site person who "ran the job", and was there daily. New Land had sufficient supervision and control of all demolition activities, including the collection, sorting, transporting of debris to the garbage truck, and assuring the garbage truck proceeded on its way to dispose of the debris in an appropriate repository for this type of materials. New Land also subcontracted Allstate to remove the debris by garbage truck to the appropriate dumping ground. Allstate's vice president Steve Srnic stated at his deposition that, Allstate's driver had the authority to prevent individuals from climbing into the rear of the garbage truck, which he acknowledged was an inherently dangerous activity. Rullo also supported this testimony as to the authority of the driver of the garbage truck.

All the testimony provided by each party demonstrated acknowledgment that this was an unusual activity apparently perceived to be necessary by those supervising this

task, in order to correct the failure of New Land to properly supervise its workers, including the Millenium employees under its supervision, to properly sort the debris as required for proper removal by garbage truck to the dump. New Land had supervisory authority and control over all the work being performed by the workers on site for demolition, including Millenium workers, for proper sorting, collection, transport to the garbage trucks, and Allstate workers for loading into garbage trucks of the debris from the job site and its proper disposal. The failure to adequately supervise these activities led to the plaintiff being used to correct the improper sorting so as to comply with the requirements to transport by garbage truck to the appropriate garbage repository. The same can be said of Allstate, which its vice president testified, had a driver present who had the authority to prevent individuals from climbing into the dangerous garbage hopper to correct the mistakes made as to proper sorting of debris. Apparently, the truck driver also had the authority to determine whether the unsorted debris be denied access to the hopper, and that ultimately, such should have been done. The extent to which either New Land and Allstate are liable is for a jury to decide, but the court finds that each contributed as a proximate cause to plaintiff's injuries, and share a degree of liability under Labor Law § 200, and/or common law negligence. (*See Comes v New York State Elec.and Gas Corp.,* 82 NY2d 876 [1993].)

Accordingly, plaintiff's cross-motion for summary judgment on his claims under Labor Law § 200, and common law negligence are granted as against New Land and Allstate, but denied as to defendant-owner Brookfield, Nero and general contractor Turner. Plaintiff's motion for summary judgment under Labor Law § 240 (1) as against all defendants, is denied, and his claim under Labor Law § 241 (6) against all defendants is dismissed. Defendant Allstate's motion for summary judgment is granted as to Labor Law § 241 (6), but denied in all other respects, and defendant New Land's motion for summary judgment is granted as to Labor Law § 241 (6), but denied in all other respects, and the motion for summary judgment brought by Brookfield et al, is granted in that, all claims under Labor Law § 200, common law negligence, and Labor Law § 241 (6), are dismissed as against each of the Brookfield defendants, as well as all cross-claims brought by New Land and Allstate against them are dismissed, but denied in all other respects.

Dated: April 3, 2025

J.S.C