Magpantay v New York City Sch. Constr. Auth.
2025 NY Slip Op 35384(U)
January 21, 2025
Supreme Court, Queens County
Docket Number: Index No. 718494/2023
Judge: Kevin J. Kerrigan
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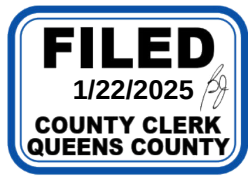
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice



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Bienvenido Magpantay,

Plaintiff,

- against -

New York City School Construction Authority, New York City Department of Education and City of New York,

Defendants.

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Index Number: 718494/23

Motion Date: 1/6/25

Motion Seq. No.: 2

The following papers numbered E22-E41 & E43 read on this motion by Plaintiff for summary judgment pursuant to Labor Law §§200; 240(1); and 241(6).

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law	E22-39
Affirmation in Opposition-Exhibit	E40-41
Reply	E43

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Plaintiff for summary judgment pursuant to Labor Law §§200; 240(1); and 241(6) is denied.

Plaintiff allegedly sustained injuries while working at P.S. 47 located at 9 Power Road, Broad Channel, in Queens County on November 23, 2022. Plaintiff alleges that at the forgoing time and place, someone dropped a "u-clamp" approximately thirty feet down a stairwell, hitting Plaintiff's head, face, neck, and shoulder.

Plaintiff alleges that the New York City Department of Education ("DOE") and the City of New York ("City") owned the subject premises and the New York City School Construction Authority ("SCA") acted as an agent for the owners and contracted

for the performance of construction work at the premises. It is at the very least undisputed that the DOE owned the premises and SCA was the contractor. However, there is no evidence on this record that the City of New York owned the premises. Indeed, the City and DOE are two separate and distinct legal entities (see Tanaysha T. v City of New York, 130 A.D.3d 916 [2d Dept. 2015]).

On the date of incident, Plaintiff was employed by non-party, Citnalta Construction Corp., which acted as a subcontractor on the job site. He was instructed by his foreman, Robert Frost, to help prepare the third floor staircase "for a rack for concrete." The forgoing was in furtherance of construction of a permanent staircase. There were other workers on the platform situated above Plaintiff. The preparation for installation of the rack included cleaning out the staircase so that the cement could be poured. As Plaintiff was working, he suddenly heard someone yell "yo, yo yo." He stood up, and a "u-head" hit his helmet, snapped his head back to the right, hit his chin, and his right shoulder. A u-head is a piece of metal typically used when building scaffolding. Plaintiff testified that a u-head is commonly used with a scaffolding beam and permits the beams to be sat on. It is approximately eight inches by ten inches and 20 to 25 pounds. After the incident, Plaintiff was assisted by Frost and several other workers on the job site, including Keron Williams and Patrick Smolka. Plaintiff testified that on the same morning and prior to his incident, a "c-clamp" was dropped by Williams. After that incident, Plaintiff made a complaint to the site safety director, Brendan Kelly of Citnalta. Plaintiff is unaware of who dropped the u-head that struck him or how he came to fall.

Plaintiff contends he is entitled to summary judgment pursuant to Labor Law §§200, 240(1), and 241(6). In support of the motion, Plaintiff proffers, inter alia, the affidavits of Keron Williams and Patrick Smolka. Williams affidavit provides that he was working with Plaintiff and cleaning the third floor stairwell when a u-clamp dropped and hit Plaintiff in the head and neck. Williams stated that he did not hit Plaintiff with the clamp, but he almost did. He apologized to Plaintiff and was reassigned thereafter. Williams observed other people throwing clamps until "after [his] mistake." Smolka's affidavit provides that he did not observe the incident but he heard Plaintiff yell and then observed him exiting the stairwell bleeding.

Labor Law §200

The branch of the motion for summary judgment on the Labor Law §200 claim is denied. Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d

343 [1998]).

At the outset, the instant branch of the motion is denied as against the City of New York, as the Plaintiff has failed to establish that the City was either an owner or contractor of the subject premises (see supra).

Where the unsafe condition of the work site was caused by the methods used by the contractor in performing the work, it must be established that the owner or contractor had supervisory control over the performance of the work in order to be liable under §200 (see Griffin v. NYC Transit Auth., 16 A.D.3d 202 [1st Dept. 2005]; Rippolo v. Mitsubishi Motor Sales of America Inc, 278 A.D.2d 149 [1st Dept. 2000]). It is generally accepted that an owner has supervisory control over the work for purposes of §200 when he "bears the responsibility for the manner in which the work is performed" (see Poulin v. Ultimate Homes, Inc., 166 A.D.3d 667 [2d Dept. 2018] [citing Ortega v. Puccia, 57 A.D.3d 54 [2d Dept. 2008]). A "general supervisory authority," meaning overseeing the general progress of the work and conducting inspections is insufficient to impose liability under §200 (see id.).

To the extent that Plaintiff claims liability based upon a dangerous or defective condition, Defendant must establish that it did not create, or have actual or constructive notice of, the alleged condition (see Pilch v. Board of Educatuion of City of New York, 27 A.D.3d 711 [2d Dept. 2006]). Despite the arguments set forth by Counsel for Plaintiff in support of the motion, the Plaintiff's injuries clearly stemmed from the alleged unsafe means and methods of the work performed, rather than a dangerous or defective condition. Plaintiff's Counsel conflates the two types of cases which may be established under Labor Law §200. Here, Plaintiff's accident did not occur as a result of a defective or dangerous condition, rather an alleged falling object. Indeed, in order for a "dangerous condition" claim to survive, the condition must be inherent to the premises *rather than* created from the manner in which work is performed (see Pilato v. 866 U.N. Plaza Assoc., LLC, 77 A.D.3d 644 [2d Dept. 2010]; Lindemann v. VNO 100 W. 33rd St. LLC, 223 A.D.3d 434 [1st Dept. 2024]; Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d 404 [1st Dept. 2018]). Clearly, the alleged falling object fits squarely within the latter type of case. Accordingly, the "actual or constructive notice" standard analyzed in support of the motion is wholly inapplicable.

Thus, in order to be entitled to summary judgment, Plaintiff was required to establish that the owner (DOE) or contractor (SCA), had supervisory control over the performance of Plaintiff's work in order to be liable pursuant to Labor Law §200. Plaintiff failed to

address the issue of supervisory control, and thus, failed to meet his prima facie burden on summary judgment. Accordingly, the branch of the motion for summary judgment pursuant to Labor Law §200 is denied regardless of the sufficiency of the opposition papers (see Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

Labor Law §240(1)

The branch of the motion for summary judgment pursuant to Labor Law §240(1) is denied. Labor Law §240(1) imposes liability upon owners or contractors who fail, inter alia, to furnish ladders that are "so constructed, placed and operated as to give proper protection to a person so employed" in the "erection, demolition, repairing, altering, painting, or cleaning of a building or structure" (see Labor Law §240[1]).

At the outset, the instant branch of the motion is similarly denied as against the City of New York, as the Plaintiff has failed to establish that the City was either an owner or contractor of the subject premises (see supra).

Labor Law §240(1) only applies to elevation-related hazards where the peril to be protected against, and the injury it affords a worker a cause of action for, is gravity-related. "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides" (Rocovich v Consolidated Edison Co., 78 N.Y.2d 509, 514 [1991]). The Court of Appeals subsequently found in Ross that the parameters of the statute's application, stated, "the 'special hazards' to which we referred in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity (see Ross v Curtis-Palmer Hydro-Elec. Co. 81 N.Y.2d 494, 501 [1993]). Rather, the 'special hazards' referred to are limited to specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (see id.). In other words, Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.

To prevail on summary judgment pursuant to Labor Law §240(1), a Plaintiff must demonstrate either the existence of a hazard contemplated by the statute and the defendant's failure to use, or the inadequacy of, a safety device enumerated therein (see Sarata v. Metropolitan Transp. Auth., 134 A.D.3d 1089 [2d Dept. 2015]). Notwithstanding, the Appellate Division, Second Department, has held that Labor Law 240(1) is inapplicable in falling object cases where a hoisting or securing device would not be necessary or expected (see Majerski v. City of New York, 193 A.D.3d 715 [2d Dept. 2021]; Moncayo v. Curtis Partition Corp., 106 A.D.3d 963 [2d Dept. 2013]). Here, it is undisputed that Plaintiff was injured as a result of a falling u-head or u-clamp from an elevated height.

Defendants aver that Plaintiff failed to meet his prima facie burden because he failed to establish why or how the u-head fell. The Court does not necessarily agree (see Torres-Quito v. 1711 LLC, 207 N.Y.S.3d 56, 60-61 [1st Dept. 2024] [finding that a plaintiff is "not required to show the exact circumstances under which the object fell, where a lack of protective device proximately caused the injuries."]). Indeed, even the failure to identify the object "is insufficient to rebut a showing of prima facie entitlement to summary judgment" (see id. at 60; see also Harsanyi v. Extell 4110 LLC, 220 A.D.3d 528 [1st Dept. 2023]). Rather, "the risk to be guarded against is the unchecked or insufficiently checked descent of the object" (see Torres-Quito, 207 N.Y.S.3d at 60). Plaintiff need only show that the object was either in the process of being hoisted or required securing for the purposes of the specific undertaking and that "the lack of overhead protection failed to shield against the falling object and therefore proximately caused Plaintiff's injuries" (see id.). Thus, so long as the Plaintiff here can establish that the object required securing, he may be entitled to summary judgment pursuant to Labor Law §240(1).

The evidence on this record, viewed in the light most favorable to the Defendants, fails to demonstrate that the u-head or u-clamp was a sort of material that was required to be secured or expected to fall. Indeed, not much information at all was adduced regarding the purpose of the u-head/u-clamp on the subject job site (see Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259 [2001]). Plaintiff merely avers that the object fell because it was not properly secured, and thus, Defendants are liable. However, as established supra, Plaintiff was also tasked with establishing that securing the object was necessary and/or expected. The Court is unconvinced that the one prior incident, which occurred mere hours prior to Plaintiff's incident, meets the requirement, and thus, Plaintiff failed to meet his burden on summary judgment. Accordingly, the branch of the motion for summary judgment pursuant to Labor Law §240(1) is denied regardless of the sufficiency of the

opposition papers (see Winegrad, 64 N.Y.2d at 853).

In considering the opposition, the instant branch of the motion must similarly be denied, as Defendants raised a question of fact with respect to how the u-head/u-clamp fell, or whether it was deliberately thrown. Indeed, Williams indicated in his affidavit that he observed individuals throwing clamps. Courts have found that Labor Law §240(1) is inapplicable where the falling object was deliberately thrown or dropped as a part of the method of work (see Roberts v. General Elec. Co., 97 N.Y.2d [2002]; Fried v. Always Green, LLC, 77 A.D.3d 788 [2d Dept. 2010]). Accordingly, there is a question of fact as to the applicability of Labor Law §240(1) here warranting denial of the instant branch of the motion.

Labor Law §241(6)

The branch of the motion for summary judgment pursuant to Labor Law §241(6) is denied. In order to establish a cause of action pursuant to Labor Law §241(6), it must be demonstrated that the owner (or agent of the owner) or contractor violated a specific rule or regulation of the Industrial Code and that such violation was a substantial factor in causing plaintiff's injuries (see Lopez v. Kamco Servs., LLC, 231 A.D.3d 1142 [2d Dept. 2024]; Parisi v. Loewen Dev. of Wappinger Falls, 5 A.D.3d 648 [2d Dept. 2004]).

Plaintiff alleged in his bill of particulars that the Defendants violated the following sections of the Industrial Code: 23-1.5(a), 23-1.5(c)(1), 23-1.5(c)(2), 23-1.5(c)(3), 23-1.6, 23-1.7(a), 23-1.7(b), 23-1.8, 23-1.15, 23-1.19, 23-1.21, 23-2.1(a), 23-2.1(b), 23-5.1, 23-5.1(b), 23-5.1(c), 23-5.1(d), 23-5.1(f), 23-5.1(j), 23-5.2, 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.7, 23-5.8, 23-5.9, 23-5.10, 23-5.13(a), 23-5.13(b), 23-5.13(c), 23-5.13(d), 23-5.18(b), 23-5.18(f), and 23-5.18(g). However, it appears that Plaintiff has solely moved for summary judgment pursuant to Labor Law §241(6), predicated upon a violation of Industrial Code Section 23-1.7(a)(1).

Section 23-1.7 of the Industrial Code is entitled "protection from general hazards." Subsection (a) is entitled "overhead hazards" and requires overhead protection for every person required to work in a place that is normally exposed to falling materials or objects. It requires tightly laid sound planking capable of supporting pounds per square foot. In order to succeed on summary judgment pursuant to Labor Law §241(6) and predicated on Section 23-1.7(a) of the Industrial Code, Plaintiff must establish that the work site was a place that is normally exposed to falling materials or objects (see Flores v. Fort Green Homes, LLC, 227 A.D.3d 672 [2d Dept. 2024]; Reyes v. Sligo Constr. Corp., 214 A.D.3d 1014 [2d

Dept. 2023]; Marin v. AP-Amsterdam 1661 Park LLC, 60 A.D.3d 824 [2d Dept. 2009]). The Court again notes that it is unconvinced the one prior incident, which occurred mere hours prior to Plaintiff's incident, meets the requirement of "normally exposed" pursuant to the applicable Industrial Code section. Thus, Plaintiff failed to meet his burden on summary judgment pursuant to Labor Law §241(6), and the instant branch of the motion is denied regardless of the sufficiency of the opposition papers (see Winegrad, 64 N.Y.2d at 853).

Accordingly, the motion is denied in its entirety.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: January 21, 2025

KEVIN J. KERRIGAN, J.S.C.