

Maldonado v Klar Realty Corp.
2025 NY Slip Op 35438(U)
March 14, 2025
Supreme Court, Nassau County
Docket Number: Index No. 611383/2022
Judge: Catherine Rizzo
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SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

X

DARWIN N. CASTILLO MALDENADO,

TRIAL/IAS, PART 43
NASSAU COUNTY

Plaintiffs,

INDEX NO.: 611383/2022

-against-

KLAR REALTY CORP. D/B/A LEVITHOUSE,

MOTION SUBMISSION
DATE: 11/20/2024

Defendant.

MOTION SEQUENCE
NO.: 003 AND 004

X

The following e-filed documents for Motion Sequences 003 and 004 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 003

Notice of Motion and Affidavits/Affirmations..... X
Memorandum of Law in Support of Motion..... X
Affidavits/Affirmations in Opposition..... X
Reply Affidavit/Affirmation..... X

Motion Sequence 004

Notice of Motion and Affidavits/Affirmations..... X
Memorandum of Law in Support of Motion..... X
Affidavits/Affirmations in Opposition..... X
Reply Affidavit/Affirmation..... X

The defendant moves this Court (Motion Sequence 003) for an order dismissing the plaintiff's causes of action sounding in Labor Law §§240(1), 241(6) and 200/common law negligence pursuant to CPLR §3212. The plaintiff opposes the motion and cross-moves for an order granting the plaintiff partial summary judgment on the issue of liability with respect to his claims under Labor Law §§240(1) and 241(6). The defendant opposes the cross-motion. The defendant submits a reply. The plaintiff submits a reply.

The plaintiff initiated this proceeding by way of Summons and Verified complaint and alleges that on February 1, 2022 he was an employed by The Vinyl Siding Guys, who were engaged in construction work at the premises located at Willow Wood at Overton Preserve

3550NY 112, Unit 48, Coram, New York ("Premises"), which is owned by the defendant. On the date of the accident, the plaintiff allegedly working on roofing a "wing" after the upstairs roofing was completed. The plaintiff set up a nine-foot extension ladder against the Premises and secured the ladder by nailing it to the wood frame of the roof. The plaintiff was working at the top of the ladder using a staple gun and rolling out tar paper when the feet of the ladder slid back causing the plaintiff to fall backward.

The defendant argues in support of the motion that the plaintiff's claim under Labor Law §240(1) and §241(6) should be dismissed on the grounds that the plaintiff was the sole proximate cause of his injuries because he was the one who set up the subject ladder and failed to secure the safety harness he was wearing to one of the lifelines that were on the site.

"The question of whether a particular activity falls within section 240(1) must be determined 'on a case-by-case basis, depending on the context of the work.'" (*Hensel v. Aviator FSC, Inc.*, 198 AD3d 884, quoting *Prats v. Port Auth.*, 100 N.Y.2d 878, 882). "Labor Law §240(1) requires all contractors and owners to furnish or erect 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 construction workers employed on the premises." (*Jiron v. China Buddhist Ass'n*, 266 A.D.2d 347, 349). "The purpose of the statute is 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.'" (*Bianchi v. New York City Tr. Auth.*, 192 A.D.3d 745, 747-748, quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501).

"Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure." (*Hensel*, 198 AD3d at 887). "The various tasks in which these devices are customarily needed or employed share a common characteristic. All entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. 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." (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514).

"To recover under [§]240(1), the plaintiff must demonstrate that a violation of [§]240(1) proximately caused his or her injury." (*Mushkudiani v. Racanelli Constr. Group, Inc.*, 219 AD3d 613, 614). "Although comparative fault is not a defense to the strict liability of the statute, where the plaintiff is the sole proximate cause of his or her own injuries, there can be no liability under Labor Law §240(1). A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a 'recalcitrant worker,' he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available." (*Id.*).

Here, in support of its argument, the defendant relies on the plaintiff's testimony, and asserts that the plaintiff was wearing a safety harness that was not secured and, had the plaintiff secured said harness, his accident would not have occurred. According to the plaintiff's testimony, he was an employee of The Vinyl Siding Guys and was working as a roofing installer under the supervision of Louis Guartasaca ("Guartasaca") and Guartasaca's brother. Guartasaca provided the plaintiff with all the tools and equipment the plaintiff used to perform his job duties including the subject ladder, which was approximately eleven to twelve feet tall. The plaintiff stated that he put the subject ladder up on dirt before using it, secured the subject ladder by nailing it into the wood frame of the house, inspected the subject ladder to make sure it was secure before using it, and was wearing a helmet and safety harness that was not connected. (*Id.*). The defendant has established *prima facie* entitlement to summary judgment via the plaintiff's testimony and the burden shifts to the plaintiff to raise a material issue of fact.

The plaintiff in opposition argues in opposition to the defendant's motion and in support of his cross-motion that the defendant failed to protect the plaintiff because the subject ladder collapsed from underneath the plaintiff causing the plaintiff nine feet to the ground. Specifically, the plaintiff asserts that the defendant owed the plaintiff a duty to properly place and secure the subject ladder rather than leave it for the plaintiff to place to prevent it from collapsing while the plaintiff worked. The plaintiff supports this contention through his testimony that he was the one to set up the ladder before using it to perform his work.

The plaintiff further argues that the defendant has not established that although the plaintiff was harnessed, the defendant has failed to establish that a "lifeline" was readily available to the plaintiff as the ropes that were used for lifelines were on the other side of the roof and being used by other employees. The plaintiff relies on the plaintiff's testimony, which provides that although he was wearing a harness at the time of the accident, there was nowhere to connect the rope. The plaintiff also relies on the testimony of German Agueta ("Argueta"), an acquaintance of the plaintiff who testified that if he was working on the subject location he would place an anchor into the wood frame so that a rope could be connected. However, when shown a photograph of the Premises, Argueta testified that there were no anchors connected to the windows where the plaintiff was working immediately prior to the accident. Based on the plaintiff's and Argueta's testimony raises a question of fact as to whether the plaintiff was the proximate cause of his injuries, whether the defendant owed the plaintiff a duty to securely set up the ladder and whether the defendant failed to provide enough ropes for the plaintiff to connect his harness to. (*Id.*).

Considering the plaintiff has raised material issues of fact requiring trial, a finding of summary judgment is not warranted in favor of defendant or the plaintiff.

The Court next turns its attention to the plaintiff's claim under Labor Law §241(6). Labor Law §241(6) imposes a nondelegable duty on owners and contractors to comply with the rules set forth in the Industrial Code and "creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where, and only where, a 'specific, positive command' or a 'concrete specification' of a regulation promulgated by the Commissioner pursuant to the statute has been violated." (*Toefer v. Long Island Rail Road*, 4

NY3d 399, 409). “The meaning of ‘owners’ under Labor Law . . . §241(6) has not been limited to titleholders but has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.” (*Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 AD3d 616, 618).

The defendant asserts that the plaintiff’s claim of OSHA violations such as 29 CFR 1926.28, 29 CFR 1926.104, and 29 CFR 1926.502 cannot serve as a predicate for liability under Labor Law §241(6). It is well settled that “[t]o recover on a cause of action alleging a Labor Law §241(6) violation, a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards.” (*Cun-En Lin v. Holy Family Monuments*, 18 AD3d 800, 802). The plaintiff does not oppose the defendant’s contentions and, as such, a finding of summary judgment dismissing the plaintiff’s claims under Labor Law §241(6) alleging OSHA violations should be dismissed.

The defendant also established *prima facie* entitlement to summary judgment with respect to the plaintiff’s claims sounding in violations of New York Industrial Code §§3-1.5, 23-1.8, 23-1.21(e)(2), 23-1.21(e)(3) and 23-6.1(h). The plaintiff does not oppose defendant’s contentions with respect to these sections. It is well settled that “facts appearing in the movant’s papers which the opposing party does not controvert, may be deemed to be admitted.” (*Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539; see also *McNamee Construction Corp. v. City of New Rochelle*, 29 A.D.3d 544). Therefore, the plaintiff fails to raise a material issue of fact and a finding of summary judgment in favor of the defendant as to the aforementioned New York Industrial Code sections is warranted.

With respect to New York Industrial Code 23-1.16, the defendant argues that this section is inapplicable because the plaintiff was given a harness that he used earlier in the day and that at the time of the accident the plaintiff was able to use a lifeline but chose not to ask or wait for one to be available.

New York Industrial Code 23-1.16(b) (Attachment required) provides that

Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet. (12 NYCRR 23-1.16).

As discussed above, the testified that at the time of the accident he was wearing a harness but there was nowhere to connect the rope. In addition, Agueta, when shown a photograph of the

Premises, testified that there were no anchors connected to the windows where the plaintiff was working immediately prior to the accident. Thus, there is a question of fact as to whether the defendants failed to provide an adequate anchored tail line or lifeline in violation of New York Industrial Code 23-1.16(b). Considering there remains a question of fact for the jury to determine, a finding of summary judgment in favor of either the plaintiff or the defendant is not warranted under these circumstances.

Regarding New York Industrial Code 23-1.21(b), the defendant argues that this section is inapplicable because the plaintiff was not working from a height of ten feet. In support this contention, the defendant asserts that the plaintiff stated that the subject ladder was approximately eleven or twelve feet and that he was standing on the third step from the top at the time of the accident. In addition, the plaintiff stated that he nailed the top of the subject ladder into place into the wood frame. New York Industrial Code Section 23-1.21(b)(4)(iv) states in pertinent part that when work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. (12 NYCRR 23-1.21). In addition, 23-1.21(b)(4)(ii) provides that all ladder footings shall be firm. (*Id.*). While it is undisputed that the plaintiff was working at a height of less than ten feet at the time of the accident and that he placed the ladder on level ground. However, there remains a question of fact as to whether the ground beneath the ladder was firm enough to prevent the ladder from slipping. Since there is a question of fact as to whether the ground was firm so as to prevent the ladder from slipping a finding of summary judgment in favor of the defendant or the plaintiff is not warranted.

As to the plaintiff's claim alleging a violation of Labor Law §200, the defendant argues that the plaintiff's accident did not stem from a dangerous condition at the Premises based on the plaintiff's testimony that the ladder was not defective. In addition, Klar testified that the defendant neither gave the plaintiff with any equipment, tools or ladders to perform the work nor did the defendant give instructions to subcontractors for them to finish the work.

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. (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 352; *Comes v. New York State Electric and Gas Corp.*, 82 N.Y.2d 876, 631). An implicit precondition to this duty "is that the party charged with responsibility have the authority to control the activity bringing about the injury." (*Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317). Cases involving Labor Law §200 generally fall into two categories: those where workers are injured because of a dangerous condition at a work site, and those involving the manner in which work was performed. (*LaGiudice v. Sleepy's Inc.*, 67 A.D.3d 969, 890; *McFadden v. Lee*, 62 A.D.3d 966; *Ortega v. Puccia*, 57 A.D.3d 54).

When a premises condition is at issue, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident. (*Ortega v. Puccia*, 57 A.D.3d 54). Where the injury arises out of dangers in the methods or materials of the

work, recovery against the owner/general contractor cannot be had under Labor Law §200 and for common-law negligence unless it is shown that the owner/general contractor had the authority to supervise or control the performance of the work. (*LaGiudice v. Sleepy's Inc.*, 67 A.D.3d 969, 890; *McFadden v. Lee*, 62 A.D.3d 966; *Ortega v. Puccia*, 57 A.D.3d 54). Evidence of general supervisory authority to oversee the progress of the work, to inspect the work product, and/or make aesthetic decisions is insufficient to impose liability under Labor Law §200. (*McFadden* at 967; see *Orellana v. Dutcher Ave. Bldrs, Inc.*, 58 A.D.3d 612, 614; *McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 A.D.3d 796).

The defendant established *prima facie* entitlement to summary judgment through the plaintiff's and Klar's testimony. (*Ortega*, 57 A.D.3d at 54; *LaGiudice*, 67 A.D.3d at 969). The plaintiff's opposition does not address the defendant's contentions. As provided above, "facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted." (*Kuehne & Nagel, Inc.*, 36 N.Y.2d at 539). Therefore, the plaintiff fails to raise a material issue of fact and a finding of summary judgment in favor of the defendant as to the plaintiff's claim alleging a violation of Labor Law §200 is warranted.

In light of the foregoing, it is hereby

ORDERED, that branch of the defendant's motion (Motion Sequence 003) for an order granting summary judgment dismissing the plaintiff's claim alleging a violation of Labor Law §240(1) is denied, and it is further

ORDERED, that branch of the defendant's motion for an order granting summary judgment dismissing the plaintiff's claim alleging a violation of Labor Law §241(6) with respect to OSHA violations such as 29 CFR 1926.28, 29 CFR 1926.104, and 29 CFR 1926.502 and New York Industrial Code §§3-1.5, 23-1.8, 23-1.21(e)(2), 23-1.21(e)(3) and 23-6.1(h) is granted, and it is further

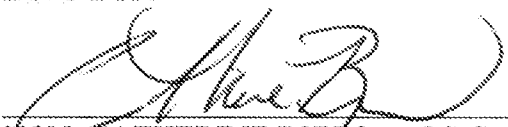
ORDERED, that branch of the defendant's motion for an order granting summary judgment dismissing the plaintiff's claim alleging a violation of Labor Law §241(6) with respect to New York Industrial Code §§23-1.16 and 23-1.21(b) is denied, and it is further

ORDERED, that branch of the defendant's motion for an order granting summary judgment dismissing the plaintiff's claim alleging a violation of Labor Law §200 is granted, and it is further

ORDERED, that the plaintiff's cross-motion (Motion Sequence 004) for an order granting summary judgment on the issue of liability with respect to his claims under Labor Law §§240(1) and 241(6) is denied.

This hereby constitutes the decision and order of this Court.

ENTER:



HON. CATHERINE RIZZO, A.J.S.C.

Dated: March 14, 2025

ENTERED

Mar 18 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE