Tenesaca v Criterion Group LLC
2014 NY Slip Op 30522(U)
January 13, 2014
Supreme Court, Bronx County
Docket Number: 309165/2011
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

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ISIDORO TENESACA,

Plaintiff,

-against-

DECISION / ORDER
Index No. 309165/2011

CRITERION GROUP LLC, CRITERION DEVELOPMENT GROUP, LLC., ALL-SAFE INC., 11-15 BROADWAY LLC., PINNACLE REALTY OF NEW YORK, LLC., NOGU CONDOS, LLC., and MACC,

Defendants.

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The following papers numbered 1 to 7 read on the below motions noticed on June 27, 2013 and duly submitted on the Part IA15 Motion calendar of **September 3, 2013:**

Papers Submitted	Numbered
Defs.'NOM, Exhibits	1,2
Pl.'s Cross-Motion, Exhibits	3,4
Defs.' Reply Aff., Exhibits	5,6
Pl.'s Reply Aff.	7

In an action seeking damages for personal injuries arising out of an alleged construction site accident, the defendants Criterion Group LLC., Criterion Development Group, LLC., and 11-15 Broadway LLC. move for summary judgment, dismissing the complaint of the plaintiff Isidoro Tenesaca ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion and cross-moves for partial summary judgment against the defendants on the issue of their liability under Labor Law §§240 and 241(6).

I. Background

This matter arises out of Plaintiff's injuries suffered as a result of an alleged construction work related accident. On August 18, 2011, Plaintiff was working on the interior first floor at a construction site located at 11-15 Broadway in Queens, New York, when he allegedly fell through a hole in the floor while conducting waterproofing activities on behalf of his employer, Astoria Construction and Carting, Inc. ("Astoria").

Plaintiff testified that he arrived at the job site at 6:45AM and retrieved his supplies, including a hard hat, goggles, and safety belt to begin waterproofing work. No one from Criterion gave him instructions on how to do his job. Prior to his accident, Plaintiff recalled that there were pieces of plywood covering openings in the floor. The plywood was level with the floor. Plaintiff was cleaning and pushing water across the floor and into plumbing drains when he walked over a piece of plywood. As he walked over it, the plywood moved forward and Plaintiff felt his feet push out forward. Plaintiff testified that he fell backwards into the opening, approximately "12-15 feet" to the basement floor below. Plaintiff admitted that he was wearing his hard hat and goggles at the time of the fall, but was not wearing his safety belt at the time because "there was no danger" that required its use. His hard hat and goggles remained on his head the entire time.

Criterion's project manager, Randhir Manglick, testified that at the time of the accident, Plaintiff was working for a Criterion subcontractor, Astoria, installing waterproofing as well as cleaning and sweeping. Plaintiff had told Mr. Manglick that he was cleaning the area when the accident occurred, but could not recall the specifics of his accident.

According to an accident report filled out by Criterion employee Anthony Mason, Plaintiff and another employee moved a piece of the plywood covering the floor opening. Plaintiff was squatting by the opening and suddenly lost his footing and fell into the hole.

Plaintiff thereafter commenced this action against, among others, the moving Defendants, asserting violations of Labor Law, as well as common-law negligence. Defendants now move for summary judgment, arguing that Plaintiff's Labor Law §200 and common-law negligence claims must be dismissed because they did not exercise any supervisor control over Plaintiff's activity. Defendants also argue that they are entitled to dismissal of Plaintiff's Labor Law §240(1) claim, because Plaintiff was the sole proximate cause of his injuries. Defendants contend that Plaintiff was provided with adequate safety devices - specifically a safety belt - but elected not to use the belt as he did not consider the activity he was performing at the time to be dangerous. Defendants argue that they are entitled to.dismissal of Plaintiff's Labor Law §241, and 241(6) claims, since Plaintiff's activity was not an enumerated activity protected under that statute.

Plaintiff opposes the motion and cross-moves for summary judgment on the issue of Defendants' liability under Labor Law §240(1) and 241(6).

II. Standard of Review

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Id.*) Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. (*Knepka v. Tallman*, 278 A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

III. Applicable Law and Analysis

Labor Law §240(1)

Plaintiff and Defendants both move for summary judgment with respect to Plaintiff's claims premised on a violation of Labor Law §240(1). Labor Law §240(1) imposes a duty of

protection of employees upon owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The duty consists in providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." The foregoing devices are to be furnished in a manner sufficient to give "proper protection" to the workers. Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494 (1993). Specifically, the statute imposes liability in situations where a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). The two elements of a 240(1) cause of action are that the statute was violated and that the violation was a proximate cause of the injury. *Blake, supra; Bland v. Manocherian*, 66 N.Y.2d 452 (1985), *Chacha v. Glickenhaus Doynow Sutton Farm Development, LLC*, 69 A.D.3d 896. With respect to the "falling worker" claim, in order to impose absolute liability, the plaintiff must show that the worker's injuries were proximately caused by the absence or inadequacy of a type of safety device enumerated in the statute. *Felker v. Corning Inc.,* 90 N.Y.2d 219 (1997) and *Rocovich* at 513.

To prevail on a motion for partial summary judgment on a cause of action under Labor Law §240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries. (*Auriemma v. Biltmore Theatre, LLC.*, 82 A.D.3d 1 [1st Dept. 2011][internal citations omitted]). In order to defeat such a motion, the defendants must raise an issue of fact as to whether the plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would have not been injured." (*Id.*, citing *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40 [2004]). The burden of providing a safety device is "squarely on the contractors and owners and their agents" (*Id*).

Here, Plaintiff's description of the accident at deposition establishes that he fell through an improperly guarded hole in the floor, allegedly covered by a piece of plywood that was not secured to the floor. Plaintiff testified that as he was pushing water around the area, he walked

over the plywood, which then moved forward under his feet and caused him to fall. It is of no moment that Plaintiff could not recall the precise mechanics of his accident or that there was no other witnesses (*see, e.g., Angamarca v. New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 A.D.3d 264 [1st Dept. 2008]). Mr. Manglick confirmed that when he arrived at the accident location he saw the piece of plywood adjacent to the hole, and testified that the plywood was covering the hole but was not nailed down or otherwise secured or guarded. This constitutes a prima facie showing that an appropriate safety device was not provided in this matter, which proximately caused Plaintiff's injuries (*see Id.*).

In opposition and in support of their own motion, Defendants argue that the accident report allegedly filled out by a witness at the scene establishes that Plaintiff himself removed the piece of plywood before falling into the hole and was therefore the sole proximate cause of this accident. Primarily, Defendants have not adequately laid the foundation for the admission of this report as a business record pursuant to CPLR 4518. Moreover, this hearsay account of the accident is insufficient by itself to establish that Plaintiff was the sole proximate cause of this accident, or to create a triable issue of fact (*Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446, 450 [1st Dept. 2013]; citing *Briggs v. 2244 Morris L.P.*, 30 A.D.3d 216 [1st Dept. 2006]). Plaintiff testified at deposition that he did not remove the plywood covering. His co-worker at the time, Manuel Montero, testified that he didn't witness the accident, but no one ever told him that Plaintiff removed the plywood before his accident. Even if Plaintiff had removed the covering – it was unmarked, unsecured, and unguarded, and thus constituted a violation of Labor Law §240. Where a violation of the Labor Law is a proximate cause of accident, the worker's conduct cannot be deemed solely to blame for it (*Valensisi v. Greens at Half Hollow, LLC*, 33 A.D.3d 693 [2nd Dept. 2006], citing *Blake v. Neighborhood Hous. Servs. of N.Y. City*, supra).

Defendants also argue that Plaintiff was the sole proximate cause of this accident because he failed to use the safety device provided to him – specifically, the safety belt/harness. At deposition, however, Plaintiff testified that he was not using the safety harness because his work at the time did not require it. Mr. Montero confirmed at deposition that he was working with Plaintiff before the accident and was not wearing a harness because they were on the first floor

with no risk of falling. He testified that they were only required to wear the harness when "working from a height of 6 feet or higher." (Montero EBT, at p. 74). There is no further indication that Plaintiff was "expected" to use the harness in this situation, or unreasonably elected not to use it while performing his work *(Auriemma v. Bitmore Theatre, LLC.,* 82 A.D.3d 1, 10 [1st Dept. 2011], citing *Cahill v. Triborough Bridge & Tunnel Auth., supra.*). Plaintiff is therefore entitled to partial summary judgment against Defendants on his Labor Law §240 claim, since the accident was caused, at least in part, by Defendants' failure to satisfy its statutory duty to provide an adequate safety device to protect Plaintiff from the risk of falling (*see Cervallos v. Morning Dun Realty, Corp.*, 78 A.D.3d 547 [1st Dept. 2010])

Contrary to the assertions of Defendants in reply, the evidence before this Court is legally sufficient to support entry of judgment in favor of Plaintiff on the issue of Defendants' liability under Labor Law §240, without the need for expert testimony (*see, e.g., Murphy v. Columbia Univ.*, 4 A.D.3d 200 [1st Dept. 2004]). Placing such a burden on the plaintiff under these circumstances would run contrary to the legislative intent of the statute (*see generally Ortega v. City of New York*, 95 A.D.3d 125 [1st Dept. 2012]). Accordingly, Plaintiff's motion for summary judgment on the issue of Defendants' liability under Labor Law §240(1) is granted, and Defendants' cross-motion for summary judgment with respect to this claim is denied.

Labor Law §200 and Common Law Negligence

Defendants argue that they are entitled to dismissal of Plaintiff's Labor Law §200 and common law negligence claims because they exercised no supervisory control over Plaintiff's work. This branch of Defendants' motion is not addressed by Plaintiff's opposition or cross-moving papers.

Labor Law §200 is essentially a codification of common-law negligence principles concerning the duty imposed upon an owner or general contractor to provide workers with a safe work environment. (See, *Comes v. New York State Elec. & Gas Corp.*, 82 NY.2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Electric Company et al.*, 81 N.Y.2d 494, 505 [1993]; *Dunham v. Hilco Construction Co.*, et al., 89 N.Y.2d 425, 429 (1996). It is well settled that an implicit precondition to this duty is that the party charged with that obligation have the authority

to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (See *Rizzuto v. LA. Wenger Contracting Co., Inc.*, 91 NY.2d 343, 352 [1998]). Liability does not attach "solely because the owner had notice of the allegedly unsafe manner in which the work was performed." (*Comes*, 82 N.Y.2d at 878, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Ortega*, 57 A.D.3d at 61, 866 N.Y.S.2d 323.).

Cases involving Labor Law § 200 claims generally fall into two categories: those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed. (*Ortega v. Puccia*, 57 AD3d 54, 61–62 [2nd Dept.2008]). Where 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. (*Id.*). By contrast, where, as here, the manner of work is at issue, no liability will attach to the owner simply because he or she may have had notice of the allegedly unsafe manner in which work was performed (*Id.*, citing, *Comes v. New York State Elec. & Gas Corp.*, 82 NY.2d 876, 877 [1993]). Instead, when a claim arises out of alleged dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*Id.* [citations omitted])." *Alonzo v. Safe Harbors of the Hudson*, 104 A.D.3d 446 [1st Dept. 2013]).

In this case, Defendants have presented evidence that they exercised no supervisory control over the manner and methods of Plaintiff's work. Plaintiff has not opposed that portion of the motion in his cross-motion for summary judgment. Plaintiff's claims against Defendants asserting violations of Labor Law §200 and common-law negligence are therefore dismissed.

Labor Law §241(6)

Defendants argue that Plaintiff's claims under Labor Law §241 and 241(6) must be dismissed because, at the time of the accident, Plaintiff was not engaged in an activity that was protected under the statute. Defendants initially contend that Plaintiff was only engaged in "cleaning" when he allegedly fell.

Labor Law §241(6) is meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition (*Nagel v. D&R Realty Corp.*, 99 N.Y.2d 98 [2002]). Courts have generally recognized that "construction" work is defined "expansively" under the statute (*see Martinez v. City of New York*, 73 AD3d 993 [2nd Dept. 2010]), to include "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting, or moving of buildings or other structures." (12 NYCRR 23-1.4[b][13]). It has been held that preparation for construction activity is covered by the statute (*see Dixson v. Waterways at Bay Pointe Home Owners Ass'n, Inc.*, 2013 N.Y. Slip. Op. 08591 [2nd Dept. 2013][power washing constituted surface preparation for painting, an activity enumerated under the Industrial Code]). Moreover, Courts will look to the overall nature and scope of the work being performed, as opposed to focusing on the worker's precise task at the moment of the accident. In *Rivera v. Ambassador Fuel and Oil Burner Corp.*, the First Department determined that the cleaning of a fuel tank could be related to construction and thus protected by the statute where it was not just a "simple cleaning" but rather "part of a more comprehensive, overall contract for the installation of a new boiler" (45 A.D.3d 275, 276 [1st Dept. 2007], citing *Nagel, supra*).

In this matter, Plaintiff testified that he was employed by Astoria to perform water proofing work on the first floor of the building. Plaintiff described his water proofing work involved prepping the area, cleaning it, painting it, and filling in holes, and to put up water proof sheets. At the time of the accident, as part of his duties, he was "cleaning" and pushing accumulated water across the floor and into plumbing holes or drains. Mr. Manglick testified that water proofing was an activity that had to be completed before brick work was started in the area. Water proofing also involved the application of a membrane with certain chemicals. Taking into account this testimony, it cannot be stated as a matter of law that Plaintiff was engaged in simply "cosmetic maintenance, decorative modification," or a task unrelated to construction at the time of his accident (*compare Anderson v. Schwartz*, 24 A.D.3d 234 [1st Dept. 2005]). Therefore, Plaintiff's Labor Law §241(6) claim cannot be dismissed on these grounds.

Defendants argue that they are nevertheless entitled to dismissal of Plaintiff's Labor Law §241(6) claims because Plaintiff has only pleaded OSHA violations or inapplicable sections of

the Industrial Code. Plaintiff has cross-moved for summary judgment on his Labor Law §241(6) claims. Plaintiff's Verified Bill of Particulars predicates his Labor Law §241(6) claims on alleged violations of 12 NYCRR 23-1.7(b)(1)(iii), 12 NYCRR 23-1.8(c)(1), and "applicable OSHA codes and regulations."

To the extent that a plaintiff asserts a viable claim under this section, the plaintiff must demonstrate that his injuries were proximately caused by a violation of an applicable Industrial Code regulation. *(Penta v. Related Cos., L.P.*, 286 A.D.2d 674 [2nd Dept 2001]). The regulation(s) relied on must be "concrete specifications" as opposed to general safety standards. *(Ross v. Curtis-Palmer Hydro Electric, et. al.*, 81 N.Y. 2d 494 [1993])

This Court agrees that Plaintiff's claims that the Defendants violated Occupational Safety and Health Rules and Regulations ("OSHA"), as they pertain to construction, must be dismissed since violation of OSHA standards do not provide a basis for liability under §241(6) (*Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247 [1st Dept. 1999]).

12 NYCRR 23-1.7(b)(1)(iii) requires that workers be protected from hazardous openings, but is only applicable where a possible fall is at least 15 feet (*see Dzieran v. 1800 Boston Road, LLC.*, 25 A.D.3d 336, 338 [1st Dept. 2006]). Here, there is insufficient evidence that Plaintiff's fall was the requisite distance. Plaintiff approximated his fall at "12-15 feet, more or less," Mr. Manglick testified that the distance between the first floor and the basement below was "9 to 10 feet," and Mr. Montero approximated the distance at "about 11 feet." Plaintiff's counsel alleges in reply papers that Plaintiff fell "approximately 11 feet from the first floor to the basement level." (Reply Aff., at 22). Accordingly, this code section is inapplicable to this action and must be dismissed.

12 NYCRR 23-1.8(c)(1) requires workers to have head protection where there is a danger of being struck by falling objects or materials, or there is a possibility of head injury. In this matter, however, it is undisputed that Plaintiff was provided a hard hat, and indeed was wearing it at the time of his accident. Accordingly, there is no violation of 12 NYCRR 23-1.8(c)(1).

Any claims of liability under Labor Law §241(6) predicated on an alleged violation of 12 NYCRR 23-1.16(b), as found for the first time in Plaintiff's cross-motion, must be dismissed, since this section of the Industrial Code was not specifically pleaded (*Conforti v. Bovis Lend*

Lease LMB, Inc., 37 A.D.3d 235 [1st Dept. 2007]; *see Pisciotta v. St. Johns Hosp.*, 268 A.D.2d 465 [2nd Dept. 2000])

In light of the foregoing, Plaintiff's claims under Labor Law §241(6) must be dismissed, and Plaintiffs' cross-motion for summary judgment on these claims is denied.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branch of Defendants' motion for summary judgment, seeking dismissal of Plaintiff's claims under Labor Law §240(1), is denied, and it is further,

ORDERED, that the branch of Defendants' motion for summary judgment, seeking dismissal of Plaintiff's claims under Labor Law §200 and common law negligence, is granted, and it is further,

ORDERED, that the branch of Defendants' motion for summary judgment, seeking dismissal of Plaintiff's claims under Labor Law §241(6) is granted, and it is further,

ORDERED, that the branch of Plaintiff's cross-motion for partial summary judgment against the moving Defendants on its Labor Law §240(1) claim is granted, and it is further,

ORDERED, that the branch of Plaintiff's cross-motion for partial summary judgment against the moving Defendants on its Labor Law §241(6) claim is denied.

This constitutes the Decision and Order of this Court.

Dated: 1/13, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.