Kettler v City of New York
2013 NY Slip Op 33408(U)
December 17, 2013
Supreme Court, New York County
Docket Number: 116920/08
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ALAN KETTLER,

Plaintiff,

INDEX NO. 116920/08

-against-

MOTION SEQ. NO. ~~001~~ 002

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY WELSBACH ELECTRICAL CORP. and WDF, INC.,

Defendants.

The following papers were read on this motion by plaintiff's for summary judgment on Labor Law 240(1) and defendant's cross motion dismissing plaintiff's Labor Law 200 and 241(6) and common law negligence claims.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

This is a personal injury action brought by Alan Kettler (plaintiff) to recover damages for injuries allegedly sustained on June 16, 2008 when plaintiff was injured while climbing down a fixed ladder at the Dykerman Street Substation rehabilitation project. Plaintiff was an employee of Fine Construction Services, a subcontractor at the job site. Plaintiff was working on top of a catwalk that runs 30 feet above the substation main floor scraping and painting steel tresses that connected to the ceiling. As he went for his lunch break plaintiff was assigned to a different place to do scraping and painting of steel tresses. After lunch, plaintiff returned to the previous catwalk to retrieve his tools, which he placed in his pockets, and was injured descending down the fixed ladder from the catwalk. Plaintiff was hands free, wearing a full

body safety harness with two six feet safety lanyard straps. A pelican hook that was affixed to one end of plaintiff's safety lanyard became entangled around the ladder, and in an effort to extricate himself he fell from the ladder approximately twenty (20) feet landing on his heels and then falling forward striking his head.

Plaintiff then commenced this action by the filing of the Summons and Verified Complaint on December 18, 2008, and asserts claims against the City of New York, New York City Transit Authority, Metropolitan Transit Authority, Welsbach Electrical Corp., the general contractor and Wdf, Inc., (collectively, defendants) for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Specifically, in his bill of particulars, plaintiff alleges unspecified violations of New York State Industrial Code and OSHA Rules and Standards. Before the Court is a motion by defendants for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's claims as asserted against them. Also before the Court is a cross-motion by the plaintiff for summary judgment, pursuant to CPLR 3212, for liability based on defendants violation of Labor Law §240(1). Defendants are in opposition to plaintiff's cross-motion. Discovery in this matter is complete and the Note of Issue has been filed.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect*

Hospital, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

I. *Defendants' motion and Plaintiff's Cross-motion on Labor Law § 240(1) Claim*

Labor Law § 240(1) imposes absolute liability upon owners and general contractors who fail to fulfill their statutory obligation to furnish or erect safety devices adequate to give proper protection to a worker who sustains gravity-related injuries proximately caused by such failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Bland v Manocherian*, 66 NY2d 452 [1985]). Specifically, Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant

part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed" (*id.*).

The statute was enacted 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*'" *(Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish its goal, the statute places responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility" (*Ross*, 81 NY2d at 500). The statute is to be liberally construed to achieve this purpose (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

For liability to attach under Labor Law § 240(1), "'the owner or contractor must breach the statutory duty . . . to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries'" (*Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 471 [1st Dept 2013], quoting *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Thus, to prevail on this claim, plaintiff must show (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks); and (2) that the statutory violation was a contributing or proximate cause of the injuries sustained *(see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). Upon making such a showing, "[t]he burden then shifts to defendant[s] to establish that 'there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident'" (*Kosavick v Tishman Constr. Corp. of*

N.Y., 50 AD3d 287, 288 [1st Dept 2008], quoting *Blake*, 1 NY3d at 289 n. 8). "If defendant[s'] assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment" (*Blake*, 1 NY3d at 289 n.. 8). Contributory or comparative negligence is not a defense to absolute liability under the statute (*Jamison v GSL Enters.*, 274 AD2d 356 [1st Dept 2000]; *Johnson v Riggio Realty Corp.*, 153 AD2d 485 [1st Dept 1989]).

Labor Law § 240(1) imposes liability regardless of any contributory or comparative negligence on the part of plaintiff (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]). Thus, where a violation of the statute is a contributing cause of an accident, any negligence on the part of the plaintiff cannot be deemed solely to blame for it, and cannot defeat the plaintiff's claim (*Blake*, 1 NY3d 280, 290; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]).

In support of their motion defendants claim that plaintiff was furnished with all necessary and adequate safety devices, and that he disregarded their proper use and safety protocol by descending the ladder in an unsafe manner. Defendants proffer that plaintiff improperly used his safety harness by failing to properly secure at least one of his snap hooks to his lanyard, that this was the proximate cause of plaintiff's accident, and therefore they are not liable.

Plaintiff argues in opposition to the motion that he properly used the safety harness. In support of his cross-motion plaintiff proffers that he has established that he was subjected to an elevation-related risk while working and that the fixed ladder that plaintiff used to descend the catwalk was itself an unsafe egress. Defendants proffer in opposition that the fixed ladder was not the only egress from the catwalk as there were man lifts available to descend the catwalk. Defendants also assert that plaintiff was given a proper fall protection system, his safety harness and lanyard, which he improperly used, and plaintiff's insistence that another type of fall safety device should have been provided is misplaced.

The Court finds that there are triable issues of fact as to whether there was a proper fall protection system in place for the ladder, and whether plaintiff was the sole proximate cause of his accident by failing to use the fall protection system properly. As such, defendants' motion and plaintiff's cross-motion for summary judgment on plaintiff's Labor Law § 240(1) claim are denied as issues of fact exist, which precludes the granting of either motion.

II. *Defendants' motion to dismiss plaintiff's Labor Law § 241(6) Claim.*

Labor Law § 241(6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241(6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" *(Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [2003]), and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross*, 81 NY2d at 501). To sustain a cause of action under section 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*id.*, *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). However, while proof of a violation of a specific

Industrial Code regulation is required to sustain an action under Labor Law § 241(6), such proof does not establish liability, and is merely evidence of negligence (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]). Recovery under this section is dependent on plaintiff's ability to set forth the relevant and specific safety provisions of Part 23 of the New York State Industrial Code (12 NYCRR 23-1.1 et seq.), which were allegedly violated (*see Walker*, 11 AD3d at 340; *see also Ross*, 81 NY2d at 505). In addition, the provision must be applicable to the facts of the case (*see Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002]). Moreover, an owner or general contractor may raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 161 [1982]; *Misicki*, 12 NY3d at 515; *Ross*, 81 NY2d at 502, n 4).

Under the facts and circumstances herein, defendants have met their prima facie burden establishing their entitlement to summary judgment dismissing plaintiff's Labor Law § 241(6) claim. In opposition to defendants' motion, plaintiff relies on Industrial Code 23-1.7(b)(1)(iii)(c), which plaintiff asserts requires defendants to provide plaintiff with a particular type of safety device when working close to a hazardous opening.[1] However, the Court finds that Industrial Code 23-1.7(b)(1)(iii)(c) doesn't apply here since plaintiff was injured as he was descending the ladder, his injuries were not due to working near a hazardous opening. Accordingly, the portion of defendants' motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's claims for violations of Labor Law § 241(6) is granted.

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[1] The Court notes that in his supplemental bill of particulars, plaintiff asserts a violation of Industrial Code 23-1.7(a)(1)(iii)(c), however, in his opposition papers, he discusses Industrial Code 23-1.7(b)(1)(iii)(c). The Court will treat this mistake as a clerical error, and the motion will be decided as if the supplemental bill of particulars properly states a violation of Industrial Code 23-1.7(b)(1)(iii)(c). This does not prejudice a substantial right of any party since the defendants briefed their motion to include arguments regarding Industrial Code 23-1.7(b)(1)(iii)(c) (*see* CPLR 2001).

III. *Plaintiff's Common-Law Negligence and Labor Law § 200 Claims*

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to maintain a safe worksite (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Claims involving Labor Law § 200 generally fall into two broad categories: those where workers are injured as a result of the methods or manner in which the work is performed, and those where workers are injured as a result of a defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Where an accident is the result of a contractor's or worker's means or methods, it must be shown that a defendant exercised actual supervision and control over the activity, rather than possessing merely general supervisory authority (*Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]); *Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003]). Generally, monitoring, coordination, and oversight of the timing and quality of the work, as well as a general duty to supervise the work and ensure compliance with safety regulations, are insufficient to trigger liability under Labor Law § 200 (*see Vasiliados v Lehrer McGovern & Bovis*, 3 AD3d 400 [1st Dept 2004]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

Where the accident is the result of a dangerous or defective condition at the worksite, it must be shown that the owner or contractor either caused the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). "The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d at 201). Supervision and control need not be proven where the injury arose from a dangerous condition at the worksite (*see Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]).

Defendants argue that plaintiff's common-law negligence and Labor Law § 200 claims should be dismissed because the evidence establishes that it wasn't a dangerous condition at the work site that caused plaintiff's injury, but rather it was plaintiff's own negligence by failing to properly utilize the lanyard attached to his safety harness.

In opposition, plaintiff proffers that defendant's motion for summary judgment should be denied because defendants have submitted no evidence to suggest that they did not create the dangerous condition, the fixed ladder, or had no actual or constructive knowledge of same. Specifically, plaintiff maintains that in fact defendants knew about the dangerous condition of the ladder but still allowed plaintiff to use it to descend from the catwalk without the required safety devices. To obtain summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claim, the burden is on defendants "to demonstrate, beyond a material issue of fact, that [they] bore no responsibility for plaintiff's accident" (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). Defendants have failed to establish, through admissible evidence, that no issue of material fact exists as to whether defendants created a dangerous condition with the fixed ladder or had knowledge thereof. Accordingly, the portion of defendants' motion seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims is denied.

CONCLUSION

Accordingly, it is

ORDERED that the portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is denied; and it is further,

ORDERED that plaintiff's cross-motion for summary judgment on his Labor Law § 240(1) claim is denied; and it is further,

ORDERED that the portion of defendants' motion for summary judgment on plaintiff's claims for common law negligence and Labor Law § 200 is denied; and it is further,

ORDERED that the portion of defendants' motion for summary judgment on plaintiff's claim pursuant to section 241(6) of the New York Labor Law is granted, and said claim is hereby dismissed; and it is further,

ORDERED that defendants are directed to serve a copy of this Order with Notice of Entry upon the plaintiff, and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: ~~12/13/17~~ (PW) 12/17/13 JSC

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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