Lien v Realty Income Corp.
2013 NY Slip Op 31188(U)
May 23, 2013
Sup Ct, Suffolk County
Docket Number: 08-38993
Judge: Denise F. Molia
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SHORT FORM ORDER

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INDEX No. 08-38993
CAL No. 12-01293OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 6-22-12 (#001)
MOTION DATE 11-19-12 (#002)
ADJ. DATE 2-8-13
Mot. Seq. # 001 - MD
002 - XMotD

JOHN LIEN and SALLY ANN LIEN,

Plaintiffs,

- against -

REALTY INCOME CORPORATION and SPLISH SPLASH AT ADVENTURELAND, INC.,

Defendants.

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Upon the following papers numbered 1 to 45 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 18 - 32 ; Answering Affidavits and supporting papers 33 - 39; 40 - 41 ; Replying Affidavits and supporting papers 42 - 43; 44 - 45 ; Other plaintiffs and defendants' memoranda of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability with respect to their claim under Labor Law §240 (1) is denied; and it is

ORDERED that the cross motion by defendants for summary judgment dismissing the complaint is granted to the extent indicated herein, and is otherwise denied.

Plaintiff John Lien commenced this action to recover damages for personal injuries he allegedly sustained on April 23, 2008, while he was engaged in construction work at the Splish Splash Water Park in Riverhead, New York. The accident allegedly occurred when an inverted plastic bucket on which plaintiff was standing to take measurements for the installation of new bathroom partitions collapsed, causing him to fall and strike his head against the ground. At the time of the alleged accident plaintiff was employed by non-party Festival Fun Parks, LLC, which managed and operated the amusement park The alleged owner of the subject premises is defendant Realty Income Corporation. On March 31, 2011,

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plaintiff filed an amended complaint which named Splish Splash at Adventureland, Inc. ("Splish Splash"), the alleged owner of the park, as a party to the action. By way of the amended complaint, plaintiff alleges causes of action against the defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). The amended complaint also asserts a claim by plaintiff's wife, Sally Ann Lien, for loss of services and reimbursement of medical expenses.

Plaintiff now moves for partial summary judgment on his Labor Law §240 claim, arguing that he was engaged in construction work at the time of the accident, that such work benefitted both defendants as the respective owner and lessee of the premises, and that they failed to provide him with adequate and/or appropriate safety devices designed to prevent or break his fall. Defendants oppose the motion and cross-move for summary judgment dismissing the complaint on the grounds plaintiff fell from a de minimis height, that plaintiff's unreasonable refusal to use available devices was the sole proximate cause of his injuries, and that they neither supervised nor controlled his work at the time of the accident. Defendants further argue that plaintiff's claim under Labor Law§241(6) is predicated upon inapplicable sections of the Industrial Code. Defendants' submissions include, inter alia, copies of the pleadings, the transcripts of the parties' deposition testimony, and an affidavit by the water park's director of maintenance, Ray White.

At his examination before trial, plaintiff testified that he utilized the inverted bucket as a make-shift step stool because a nearby A-frame ladder, which was 12 feet in length, could not fit inside the bathroom, the ceiling of which measured only eight feet high. He testified that there was no way to utilize the A-frame ladder outside the bathroom's ceiling, as it would have placed him too far away from the beam he was attempting to measure. Plaintiff testified that the bucket was placed in an inverted position like a makeshift step stool when he arrived at the bathroom, and that he previously observed other unspecified workers at the park utilizing inverted buckets in a similar manner. Plaintiff testified that the bucket did not have any visible cracks or defects, and that he fell when it suddenly shifted beneath him. Plaintiff further testified that he was not aware of the availability of any other ladder or step stool stored elsewhere at the amusement park at the time of the accident.

At his examination before trial, Ray White testified that he was employed by Festival Fun Parks, LLC, as the park's director of maintenance at the time of the accident, and that he was responsible for the oversight of all the park's maintenance workers, including plaintiff. He testified that plaintiff was hired during 2008, and was familiar with the storage of equipment, including ladders, at various locations throughout the park. Mr. White further testified that employees of the water park were expected to use appropriate safety devices to perform their work, and that he had no recollection of any employee, including plaintiff, using an inverted bucket as a make-shift step stool.

The affidavit by Ray White states that defendants owned and maintained several ladders that were stored in the water park's filter building at the time of the accident. The affidavit states that members of the water park's maintenance team, including plaintiff, went to the filter building several times a day to obtain tools and equipment, and that it was customary practice that they used such ladders in connection with their work at the premises. The affidavit further states that ladders were also stored at the water park's warehouse where workers ate lunch and breakfast, and that plaintiff had easy access to such ladders throughout the work day. Finally, the affidavit indicates that Mr. White completed the

installation of the wooden partitions after plaintiff's accident, and that no step-stools or ladders were required for completion of the project.

It is well settled that on a motion for summary judgment the court's function is not to resolve issues of fact or to determine matters of credibility, but rather to determine whether issues of fact exist precluding summary judgment (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Therefore, the movant bears the initial burden of establishing his cause of action or defense sufficiently to warrant the court to direct judgment in his favor as a matter of law (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Altieri v Golub Corp.***, 292 AD2d 734, 741 NYS2d 126 [2d Dept 2002]).

Labor Law §240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work performed (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses 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'"(***Zaher v Shopwell, Inc.***, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005], *quoting* ***Copertino v Ward***, 100 AD2d 565, 566, 473 NYS2d 494 [1984]). Labor Law § 240 (1) requires that building owners and contractors "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." There is no bright-line minimum height differential that determines whether an elevation hazard exists (*see* ***Thompson v St. Charles Condominiums***, 303 AD2d 152, 154, 756 NYS2d 530, 532 [1st Dept 2003], *lv dismissed* 100 NY2d 556, 763 NYS2d 814 [2003]; *see e.g.* ***Arrasti v HRH Constr., LLC***, 60 AD3d 582, 583, 876 NYS2d 373, 375 [1st Dept 2009] [finding that 18 inches was sufficient to create an elevation hazard]). Rather, the relevant inquiry is whether the hazard is one "directly flowing from the application of the force of gravity to an object or person" (***Prekulaj v Terano Realty***, 235 AD2d 201, 202, 652 NYS2d 10 [1st Dept 1997], *citing* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]).

To demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240 (1), a plaintiff must establish that there was a violation of the statute, and that such violation was the proximate cause of his or her injuries (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 289, 771 NYS2d 484 [2003]). However, liability under Labor Law § 240(1) does not attach when the safety devices that a plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and the plaintiff knew he or she was expected to use them but for no good reason chose not to do so, causing an accident (*see* ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; ***Cherry v Time Warner, Inc.***, 66 AD3d 233, 885 NYS2d 28 [1st Dept 2009]). In such cases, the plaintiff's own negligence is the sole proximate cause of his or her injury (*see*

Gallagher v New York Post, 14 NY3d 83, 88, 896 NYS2d 732 [2010]; ***Cahill v Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 39-40, 790 NYS2d 74 [2004]). Thus, a worker is required as a "normal and logical response, to get a safety device rather than having one furnished or erected for him . . . when [the] worker[ ] know[s] the exact location of the safety device or devices and where there is a practice of obtaining such devices because it is a simple matter for [him] to do so" (***Cherry v Time Warner, Inc.***, 66 AD3d 233, 238, 885 NYS2d 28 [1st Dept 2009]; *see* ***Robinson v East Med. Ctr., LP***, *supra*).

Although plaintiff demonstrated that he was engaged in a covered activity at the time of the alleged accident, and that the only ladder available to him was too large to fit beneath the bathroom ceiling where the beam was located (*see* ***Powers v Lino Del Zotto & Son Builders, Inc.***, 266 AD2d 668, 698 NYS2d 74 [3d Dept 2008]; ***McKeighan v Vassar Coll***, 53 AD3d 831, 862 NYS2d 396 [3d Dept 2008]; ***Priestly v Montefiore Med. Ctr.***, 10 AD3d 493, 781 NYS2d 506 [3d Dept 2004]), in opposition defendants raised significant triable issues as to whether plaintiff could have completed his work with the ladder that was available to him, whether he knew that other ladders were available at the park and that it was customary practice for workers to utilize them when needed, and, if so, whether plaintiff's unreasonable failure to obtain and utilize such safety equipment was the sole proximate cause of his injuries (*see* ***Probst v 11 W. 42 Realty Invs., LLC***, __AD3d__, 2013 NY Slip Op 03074 [2d Dept 2013]; ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; ***Garlow v Chappaqua Cent. School Dist.***, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]). Therefore, plaintiff's motion for partial summary judgment on the issue of liability with respect to his Labor Law §240 (1) claim is denied. The existence of such triable issues also requires denial of the branch of defendants' cross motion for summary judgment dismissing plaintiffs' Labor Law §240 (1) claim.

However, the branch of defendants' cross motion seeking summary judgment dismissing plaintiffs' Labor Law §200 claim is granted, as they demonstrated that they did not have the authority to supervise or control plaintiff's work at the time of the alleged accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Gray v City of New York***, 87 AD3d 679, 928 NYS2d 759[2d Dept 2011]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; *see also* ***Circosta v 29 Washington Sq. Corp.***, 2 NY2d 996, 163 NYS2d 611 [1957]). Where, as here, the alleged accident arises from the subcontractor's own work rather than a defective condition, and the defendants exercised no supervisory control over the method and manner of the work, no liability attaches under either the common law or Labor Law §200 (*see* ***Comes v New York State Elec. & Gas Corp***., 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Mas v Kohen***, 283 AD2d 616, 725 NYS2d 90 [2d Dept 2001]). In opposition, plaintiff's conclusory assertion that Splish Splash may have controlled his work since it was the lessee and operator of the water park is insufficient to rise a triable issue of fact, as it is undisputed that plaintiff and his supervisor worked for Festival Fun Parks, LLC, and plaintiff failed to proffer any evidence that they were controlled by Splish Splash or Realty Income Corporation (*see* ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]).

As to the branch of defendants' cross motion seeking summary judgment dismissing plaintiff's claim under Labor Law §241(6), the statute requires owners and general contractors to provide reasonable and adequate protection and safety for workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883

NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). To recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Hricus v Aurora Contrs., Inc.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). Moreover, the rule or regulation alleged to have been breached must be a specific, positive command, and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, plaintiff's bill of particulars asserts violations of various provisions of the New York Industrial Code, including 12 NYCRR 23-1.5, 12 NYCRR 23-1.6, 12 NYCRR 23-1.7, 12 NYCRR 23-1.15, 12 NYCRR 23-1.30, 12 NYCRR 23-2.2, 12 NYCRR 23-2.3, 12 NYCRR 23-2.4, 12 NYCRR 23-2.5, and 12 NYCRR 23-2.8. However, 12 NYCRR 23-1.5, and 12 NYCRR 23-1.15 set forth only general safety standards and, therefore, cannot serve as predicates for a claim under Labor Law § 241 (6) (*see* ***Mouta v Essex Mkt. Dev. LLC***, 103 AD3d 505, 960 NYS2d 372 [1st Dept 2013]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]). Additionally, 12 NYCRR 23-1.6, 12 NYCRR 23-1.7, 12 NYCRR 23-1.30 and 12 NYCRR 23-2.3, which regulate the use of safety belts, the illumination of work areas, the safety of falling objects, and the placement of structural steel members in buildings, are inapplicable under the circumstances of this case (*see* ***Timmons v Barrett Paving Materials, Inc.***, 83 AD3d 1473, 920 NYS2d 545 [4th Dept 2011]; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 870 NYS2d 111 [2d Dept 2008]; ***Verel v Ferguson Elec. Constr. Co., Inc.***, 41 AD3d 1154, 838 NYS2d 280 [4th Dept 2007]). Furthermore, the facts of this case do not support claims based upon alleged violations of 12 NYCRR 23-2.2, 12 NYCRR 23-2.4, 12 NYCRR 23-2.5, and 12 NYCRR 23-2.8, as these provisions regulate the safety of concrete work, flooring construction, shafts and painting procedures (*see* ***McLean v 405 Webster Ave. Assocs.***, 98 AD3d 1090, 951 NYS2d 185 [2d Dept 2012]; ***Giordano v Forest City Ratner Cos.***, 43 AD3d 1106, 842 NYS2d 552 [2d Dept 2007]; ***Gielow v Rosa Coplon Home***, 251 AD2d 970, 674 NYS2d 551 [4th Dept 1998]). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim under Labor Law §241(6) also is granted.

Hon. Denise F. Molia

Dated: 5-23-13

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**