Degregorio v City of New York
2016 NY Slip Op 30447(U)
February 10, 2016
Supreme Court, Bronx County
Docket Number: 302814/13
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

Index No. 302814/13
Motion Calendar No. **16, 17**
Motion Date: 11/16/15

JOSEPH DIGREGORIO

Plaintiff(s),

-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF DESIGN & CONSTRUCTION,

Defendants,

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to for Summary Judgment:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibit thereto	**1**
Plaintiff's Affirmation in Opposition	**2**
Reply Affidavit	**3**

Upon the foregoing papers and after due deliberation, t the Decision/Order on this motion is as follows:

Plaintiff moves this Court for an Order granting summary judgment on the issue of liability as to Labor Law 240(1). Defendant moves this Court or an Order granting summary judgment and dismissing the plaintiff's complaint.

Plaintiff commenced this action seeking damages for injuries allegedly sustained as the result of a work site accident on May 12, 2012. NYDDCC was an agent of the City and. Plaintiff was employed by Torocom Construction Corp. (TOCOM).

Plaintiff testified that at the time of his accident, he was setting curbs. His job included excavating the area an making the trench. The backhoe operator would deliver the curb which was approximately 6 to 7 feet long and two feet wide. Plaintiff estimated that the granite curb weight approximately 600 or 700 pounds. He also assisted in cutting the curbs. The supervisors, Vincent Cambino or Sal would tell him what to do and where to go each morning. Plaintiff testified that he

did not receive his instructions from anyone working from the New York city Department of Design & Construction or the City of New York. After setting up the demo blade, he was instructed to make the trench. He then waited for the curb to come over. Plaintiff testified that a laborer ties two slings on the curb. The sling is put on the hook and connected to a bucket of the backhoe. It is then lifted up by the backhoe and brought over to the trench. The curb is then put on wooden wedges to be cut to size. On the date of the accident, after the carpenter made the wedges, the operator put the curb on the wedges, and when the sling was removed off the bucket, it was improperly placed on its edge and the curb fell on the plaintiff's foot. (Plaintiff EBT pgs 31-43).

Fares Adulrazzak testified that he is the Engineer in Charge for the Department of Design and Contstruction New York City. Trocom was contracted by the City to perform the subject work. His contact at Tocom was the super Nick Pasut.The Construction engineer was Ammann and Whitney. Their inspector was Hassanain Nawras. Although DDC had an office at the project, DDC did not have any inspectors on the project other than quality assurance. Mr. Abdulrazzak would visit and walk the site, although not on a daily basis. He attended weekly and monthly meetings, including some of the safety meetings regarding the Metropolitan Avenue Project. He testified that he was witnessed the cubs being hoisted by a strap on the backhoe. He testified that the laborer's would push the curb in place as it was lowered to the floor. He did not have any discussions with anyone about placing the curbs to be cut. Mr. Abulrazzak did not know the plaintiff.

It has long been held that summary judgment is a drastic remedy, the procedural equivalent of a trial which should only be granted when the evidence leaves no issue of material fact unresolved (Andre v. Pomeroy, 35 N.Y.2d 361 [1974] Chemical Bank v. West 195th Street Development Corp., 161 A.D.2d 218 [1st Dep't. 1990]) or where an issue is even debatable. Stone v. Goodson, 8 N.Y.2d 8 (1960). In deciding a summary judgment motion, it is not the function of a court to make credibility determinations or findings of fact, but is rather to identify material triable issues of fact or to point to the lack thereof. Vega v. Restani Constr. Corp. 18 N.Y.3d 499 (2012) *citing* Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Once the initial burden has been satisfied, the burden then shifts to the party opposing

the motion to produce sufficient evidence 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).

Labor Law 240(1) states in pertinent part that "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, 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. Labor Law 240(1) only applies to elevation related injuries. Plaintiff bears the burden of establishing a violation of this statute and that the violation proximately caused his injuries. Blake v. Neighborhood Housing Services of New York, 1 N.Y.3d 280 (2003); Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35 (2004). However, where plaintiff's actions are the sole proximate cause of the accident, there is no liability as to the owner and or general contractor under Labor Law 240(1).

Plaintiff's motion for summary judgment under Labor Law 240(1) is granted. Although defendant argues that plaintiff's accident is not subject to scaffold law as there is no elevation risk involved. However, "Labor Law 240(1) applies to both "falling worker" and "falling object" cases." Narducci v. Manhasset Bay Associates, 96 N.Y. 2d 259 (2001). Labor Law 240(1) will apply n a falling object case where an object being hoisted is not adequately secured or improperly hoisted. Brown v. VJB Construction Corp., et al, 50 A.D3d 373 (1st Dept. 2015). In *Brown*, the plaintiff was injured by a slab of granite that fell on his hand when a clamp failed. The Court determined that a substantial elevation differential was necessarily determinative to bring a case into the ambit of Labor Law 240(1). Furthermore, the evidence was undisputed that the clamp failed as evinced by the slab falling and injuring the plaintiff. Brown v. VBJ Construction Corp., 50 A.D3d 376-377. The *Brown* case is similar to the case at bar. Plaintiff was injured when the slab was released when placed on the wedges fell on his foot. But for the lack of safety device to prevent the fall when the slab was placed, the plaintiff would not have been injured. As such, this Court grants summary judgment to the plaintiff under Labor Law 240(1). See also, Jordan v. City of New York, 126 A.D3d 619 (1st Dept. 2015) *contra* Maritnez, v. 342 Property LLC., 128 A.D.3d 408 (2015). Incidentally, that portion of defendant's motion which seeks to dismiss the plaintiff's complaint under Labor Law

240(1) is denied.

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Ross v. Curtis-Palmer Hydro-Electric Co., supra, 81 N.Y.2d 494 [1993]. As the duty to comply with the regulation is non-delegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the work site in order to establish a Labor Law § 241(6) claim. (See Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816; Ross v. Curtis-Palmer Hydro-Electric Co., supra, 81 N.Y.2d 494, 502 ["to the extent that plaintiff has asserted a viable claim under Labor Law § 241(6), he need not show that defendants exercised supervision or control over his work site in order to establish his right of recovery"]).

In order to impose liability under this section, the plaintiff must demonstrate that there existed a violation of a specific regulatory provision of the Industrial Code which resulted in injury to the plaintiff. If there was a breach of such a regulation, the general contractor and owner are vicariously liable for the resulting injury without regard to their fault. (See, Armer v. General Elec. Co., 241 A.D.2d 581, 659 N.Y.S.2d 916 [3d Dept. 1997], leave denied, 90 N.Y.2d 812, 666 N.Y.S.2d 101, 668 N.E.2d 1383 [1997]; Rizzuto v. L.A. Wenger Contracting Co., Inc., supra, 91 N.Y.2d 343 [absence of actual or constructive notice to owner or general contractor is irrelevant to the imposition of Labor Law § 241(6) liability]). However, a regulation which merely sets forth general safety standards (and thus is merely a reiteration of the common law) does not give rise to a non-delegable duty under this section (see Abreu v. Manhattan Plaza Assoc., 214 A.D.2d 526 [2nd Dept. 1995]).

Labor Law § 241(6) states in pertinent part . . .

> "All contractors and owners and their agents . . . when constructing . . buildings . . shall comply with the following requirements:
>
> All areas in which construction . . . 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, shall . . . comply with.

Plaintiff in opposition to the defendants motion for summary judgment, withdraws those Labor Law 241(6) claims premised under Industrial Code sections 23-1.7, 23-2.1, 23-6 and 23-8. Plaintiff's remaining claims allege violations of Sections 23-9.4(e)(1), 23-9.4(e)(2) and 23-9.4(h)(5) 23- 9.2(b), 23-9.2(g) and 23-9.5(f) which state as follows:

12 NYCRR 23-9.4

Where power shovels and backhoes are used for material handling, such equipment and the use thereof shall be in accordance with the following provisions:

(e) Attachment of load.

(1) Any load handled by such equipment shall be suspended from the bucket or bucket arm by means of wire rope having a safety factor of four.

(2) Such wire rope shall be connected by means of either a closed shackle or a safety hook capable of holding at least four times the intended load.

(h) General operation.

(5) Carrying or swinging suspended loads over areas where persons are working or passing is prohibited.

12 NYCRR 23-9.2

(b) Operation.

(2) Operators of power-operated material handling equipment shall remain at the controls while any load is being handled.

(g) Equipment at rest. The operators of material handling equipment shall not leave such equipment while loads, buckets or blades are suspended. Any such load, bucket or blade shall be brought to rest on blocks, shall be lowered to the ground, grade or equivalent surface or shall be brought to the lowest end of travel of the equipment

12 NYCRR 23-9.5

(f) Stopping or parking excavating machines. The operator of any excavating machine shall not leave the controls of such machine until he has lowered the bucket or blade into firm contact with the ground or grade surface

Defendants motion for summary judgment is denied as to Industrial Code 23-9.4(e)(1) and 23-9.4(e)(2) as questions of fact exist as to the manner in which the backhoe placed the granite slab which fell on the plaintiff's foot. Such issues are to be resolved at trial. Padilla v. Frances Shriver Housing Development Fund, 303 A.D2d 194 (1st Dept. 2003) *citing* Parelli v. City of New York, 277

A.D2d 167 (1st Dept. 2000). Industrial Code Section 23-9-4(h)(5), Section 23-9.2(b)(2), Section 23-9.2(g) and Section 23-9.5(f) are dismissed as being inapplicable to the facts herein.

Plaintiffs have failed to submit sufficient proof to raise a triable issue of fact as to Labor Law 200. As reiterated by the Appellate Division in Sheehan v. Gong , 2 A.D.3d 166 (1st Dept. 2003).

> "Section 200 of the Labor Law, which imposes a general duty to protect the health and safety of workers, is a codification of the common-law duty imposed upon property owners to provide a safe place to work (*see* Jurgens v Whiteface Resort, 293 A.D.2d 924, [2002]).However, a landowner will not be liable under section 200 or under common-law negligence principles for injuries sustained by workers on the property in the absence of evidence that the landowner exercised supervision or control over the work or had notice of the existence of a dangerous condition. (*see e.g.* Rosenberg v Eternal Mems., 291 A.D.2d 391[2002])."

"The right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications insufficient to impose liability under Labor Law 200 or for common-law negligence." Allan v. DHL Exp. (USA) Inc., 99 A.D.3d 828 (2nd Dept. 2013) (internal citations omitted); *See also*, Reinoso v. Biodi, 105 A.D3d 491(1st Dept. 2013).

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment under Labor 240(1) is hereby granted. It is further

ORDERED that defendants motion for summary judgment seeking to dismiss the plaintiff's complaint under Labor Law §241(6) is granted to the extent that the causes of action pursuant to Industrial Code Section23-1.7, section 23-2.1, section 23-6 and section 23-8, sections 23-9.4(e)(1), section 23-9.4(e)(2), section 23-9.4(h)(5), section 23- 9.2(b), section 23-9.2(g) and section 23-9.5(f) are hereby dismissed and is denied in all other requests. It is further

ORDERED that the defendants motion seeking summary judgment dismissing the plaintiff's complaint as to Labor law §241(6) as it applies to Industrial Code 23-9.4(e)(1) and 23-9.4(e)(2) is hereby denied. It is further

ORDERED that defendants motion for summary judgment is granted to the extent that the plaintiff's complaint is dismissed as to Labor Law §200. It is further

ORDERED that the Clerk of the Court shall mark the Court file accordingly. It is further

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order.

The Clerk of the Court is directed to mark the court file accordingly

FEB 10 2016

Date

HON. WILMA GUZMAN

Justice Supreme Court