SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

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MARIO GALVEZ,

Plaintiff,

-against-

COLUMBUS 95TH STREET LLC, XUNCAS RESTORATION CORP. and PINNACLE RESTORATION LTD, LLC,

Defendants.

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COLUMBUS 95TH STREET LLC,

Third-Party Plaintiff,

-against-

PINNACLE RESTORATION LTD, LLC,

Third-Party Defendant.

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Index No.: 300059-2013

DECISION AND ORDER

Hon. Sharon A.M. Aarons

Third-Party Index No.: 83941-2013

Defendant Xuncas Restoration Corp. (hereinafter Xuncas) moves for summary judgment dismissing plaintiff Mario Galvez's complaint. Defendant Pinnacle Restoration LTD, LLC (hereinafter Pinnacle) and defendant Columbus 95th Street LLC (hereinafter Columbus) separately cross move for similar relief. Columbus also cross moves for summary judgment on its indemnification claim against Pinnacle. Plaintiff opposes these motions and cross-moves for summary judgment and for leave to amend the bill of particulars. The motion by Xuncas is granted in part and denied in part. The cross motion of Pinnacle is granted. The cross motion of Columbus is denied as moot to the extent that Columbus seeks summary judgment on its indemnification claim against Pinnacle and is otherwise granted. The cross motion by plaintiff is denied.

Columbus is the owner of the subject building located at 95 West 95th Street, New York, New York. Columbus and Pinnacle, the general contractor, entered into a contract where Pinnacle was to provide labor and construction, restoration and renovation services on the exterior of the building. Pinnacle, in turn, subcontracted with Xuncas, who was hired to perform the restoration of the exterior on the building. Plaintiff was employed by Xuncas[1] and was assigned the task of painting the edifice of the subject building. On September 26, 2012, plaintiff was standing on a motorized scaffold with has back pressed against the wall of the building. Pinnacle provided the motorized scaffolds but Xuncas employees erected them. Plaintiff had no issue rising on the motorized scaffold as he progressed to the 28th floor of the building. But, once plaintiff reached the 28th floor, in order to paint the higher floors, as the motorized scaffold went up, he had to push off the building so that the scaffold would not scrape the building. As plaintiff pushed off the building with his back, he felt pain and subsequently commenced this action.

As an initial matter, defendants contend that plaintiff's cross motion is untimely. While plaintiff's cross motion for summary judgment was served beyond the 120-day deadline, because the cross motion seeks relief identical to what the initial moving papers, which were timely, seek, the Court may entertain plaintiff's cross motion (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013]).

As to the merits, defendants are entitled to dismissal of the Labor Law Section 240(2) claim inasmuch as the alleged accident was not caused by the failure to have safety railings. Indeed, plaintiff testified that the motorized scaffold had a safety railing. Defendants are also

[1] While plaintiff alleged and testified that he was employed by Pinnacle, in his cross motion, plaintiff clarified that he was in fact employed by Xuncas.

entitled to dismissal of the Labor Law Section 240(3) claim as there is no evidence that the motorized scaffold could not support four times its weight, which is a precondition to recovery under that subsection (*see Kyle v City of New York*, 268 AD2d 192, 199 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Plaintiff makes no argument in opposition to the dismissal of these causes of action and, therefore, they are dismissed.

The Labor Law Section 240(1) cause of action must be dismissed. This is not a case where a falling object struck plaintiff or he fell off the scaffold (*see e.g. Santiago v Rusciano & Son, Inc.*, 92 AD3d 585 [1st Dept 2012]; *Smizaski v 784 Park Ave. Realty, Inc.*, 264 AD2d 364 [1st Dept 1999]). Indeed, plaintiff alleged that "[h]e was injured while standing on and pushing the scaffold away from the wall of the building." Furthermore, this is not a case in which defendants failed to provide adequate safety devices (*see e.g. Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]) inasmuch as plaintiff acknowledged that he was utilizing a safety harness and belt and was hooked up to a safety line at the time of the accident. While plaintiff was at an elevated height when his accident occurred, plaintiff testified that he felt pain in his back after pushing off from the building. The effects of gravity, if any, were, at most, only tangentially related to plaintiff's alleged injuries (*see Gasques v State of New York*, 59 AD3d 666 [2d Dept 2009]). As such, plaintiff was not exposed to an elevated-related risk contemplated by Labor Law Section 240(1) (*compare Berrios v 735 Ave. of Americas, LLC*, 82 AD3d 552 [1st Dept 2011]). This claim is therefore dismissed.

Plaintiff's Labor Law Section 200/common-law negligence cause of action must be dismissed insofar as asserted against Columbus and Pinnacle. There is no evidence that either Columbus or Pinnacle controlled the means or methods of plaintiff's work or provided any direction to plaintiff. Contrary to plaintiff's argument, the authority of Pinnacle to stop unsafe

work at the construction site does not suffice to impose liability under this statute (*see Alonzo*, 104 AD3d at 449). Absent any evidence that Columbus or Pinnacle supervised or controlled plaintiff's work, plaintiff cannot maintain a Labor Law Section 200 claim against either of them (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Grant v Solomon R. Guggenheim Museum*, 139 AD3d 583, 584 [1st Dept 2016]; *Barreto v Metropolitan Transp. Auth.*, 110 AD3d 630 [1st Dept 2013]).

While plaintiff also contends that Pinnacle can be liable for an unsafe condition – i.e., a defective scaffold – at the construction site, there is no evidence that Pinnacle was made aware that the scaffold was dangerous. After its assembly, the scaffold was inspected periodically, as well as on the day of the accident. No complaints were made about the condition of the scaffold. Accordingly, even though Pinnacle supplied the scaffold, because it did not have notice that it was defective, no liability attaches under Labor Law Section 200 (*see Wysocki v Balais*, 290 AD2d 504, 505 [2d Dept 2002]; *compare Higgins v 1790 Broadway Assocs.*, 261 AD2d 223, 225 [1st Dept 1999] [Labor Law Section 200 claim reinstated where "principals of the management company were aware of the defective condition of the ladder prior to the accident"]).

A question of fact, however, exists as to whether Xuncas may be held liable under Labor Law Section 200 or common-law negligence principles. Mr. Sosa, the Xuncas foreman, testified that he instructed plaintiff and other workers to use their feet and legs when pushing off the building when operating the motorized scaffold and that he never told them to use their backs. Plaintiff, however, testified that Mr. Sosa was the person who instructed him to use his back when maneuvering the scaffold. In light of this conflicting testimony concerning the direction given by Mr. Sosa as to the way plaintiff should push off the building, Xuncas is not entitled to dismissal of the Labor Law Section 200/common-law negligence claim (*see Kochman v City of*

New York, 110 AD3d 477, 478 [1st Dept 2015]; *Havlin v City of New York*, 17 AD3d 172, 172 [1st Dept 2005]).

Plaintiff alleged a host of Industrial Code violations to support his claim under Labor Law Section 241(6). Most of them, however, are either not sufficiently specific or inapplicable to the facts of this case. In this regard, plaintiff cannot premise his Labor Law Section 241(6) claim on purported violations of 12 NYCRR 23-1.5, 23-1.15, 23-1.16, or 23-1.17 inasmuch as these regulations are too general to support such a claim (*see Mouta v Essex Market Dev. LLC*, 106 AD3d 549, 550 [1st Dept 2013]) or because plaintiff "failed to specify any particular subsection(s) and subdivision(s) of these provisions" (*McLean v Tishman Constr. Corp.*, __ AD3d __, __, 2016 NY Slip Op 07754, *1 [1st Dept, Nov. 17, 2016]) .

12 NYCRR 23-1.7 does not apply to the facts of this case in that this provision governs passageway and areas that expose workers to overhead hazards and falling objects (*see Francescon v Gucci America, Inc.*, 105 AD3d 503, 504 [1st Dept 2011]). 12 NYCRR 23-1.6(a) and (b) do not apply because plaintiff does not allege that the failure to have safety belts, harnesses, tail lines or lifelines proximately caused his injuries (*see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799 [2d Dept 2013]), and even if such allegation existed, plaintiff testified that he was wearing a safety belt and harness at the time of his accident. Plaintiff's reliance on 12 NYCRR 23-5.1(h), which requires that the erection of a scaffold be done under the supervision of a designated person, is without merit inasmuch as the scaffold was erected in the presence and under the supervision of Mr. Sosa (*see Atkinson v State of New York*, 49 AD3d 988 [3d Dept 2008]). For this reason, plaintiff's reliance on 12 NYCRR 23-5.8(c)(1), which requires "[t]he installation or horizontal change in position of every suspended scaffold shall be in charge of and under the direct supervision of a designated person," is unavailing.

Plaintiff also cannot premise his Labor Law Section 241(6) claim on purported violations of 12 NYCRR 23-5.7(a), (c)(1) or (2) or 12 NYCRR 23-5.8(b) or (c)(2). While these regulations impose requirements for scaffolds suspended on the outside of buildings, as discussed, defendants demonstrated that there was no issue with the scaffold. Indeed, prior to the accident date, plaintiff used the scaffold without any issue. As such, the scaffold did not play a role in plaintiff's alleged injuries and any purported failure to comply with these regulations was not a proximate cause of such injuries (*see Egan v Monadnock Const., Inc.*, 43 AD3d 692 [1st Dept 2007]).

In support of his cross motion for summary judgment, plaintiff submits an expert affidavit from Stuart K. Sokoloff, a construction engineer, in arguing that defendants did not comply with 12 NYCRR 23-5.8(c)(2). As an initial matter, defendants assert that this Court should disregard plaintiff's expert affidavit based upon plaintiff's failure to serve an expert disclosure under CPLR 3101(d). Defendants, however, has not demonstrated any willfulness in or prejudice by plaintiff's failure to timely serve an expert disclosure (*see Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 431 [1st Dept 2015]). This Court therefore exercises its discretion and will consider the expert affidavit (*see Keneally v 400 Fifth Realty LLC*, 110 AD3d 624 [1st Dept 2013]).[2] Nevertheless, Mr. Sokoloff's affidavit is insufficient to raise an issue of fact on the issue of proximate cause or establish plaintiff's entitlement to summary judgment on

[2] CPLR 3212(b), as amended, provides that a court shall not decline to consider an expert affidavit on a summary judgment motion on the ground that an expert disclosure was not furnished prior to service of the motion. The amendment, however, applies to all motions made after December 2015. Because the instant motions were made prior to the effective date of the amendment, whether to consider the expert affidavit rests in this Court's discretion.

this cause of action. First, Mr. Sokoloff's calculation as to applied horizontal force[3] is premised on facts not in the record. More specifically, Mr. Sokoloff stated that "[t]he standard suspended scaffold is approximately four (4) ft. wide and at each end . . . ," but there is no evidence indicating that this was the size of the scaffold in use during plaintiff's accident. Indeed, there is no statement by Mr. Sokoloff that he examined or inspected the scaffold in question. His calculation is therefore without probative value. Second, even if Mr. Sokoloff's calculations were proper, his conclusory statement that "[t]he failure of Columbus and Pinnacle was a proximate cause of Galvez' injury," without any further explanation, is insufficient to establish proximate cause or raise an issue of fact on that issue. Hence, defendants are entitled to dismissal of the Labor Law Section 241(6) claim (*see Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 551 [1st Dept 2014]).

Finally, plaintiff's cross motion to the extent that it seeks leave to amend the bill of particulars to add violations of New York City's Building Code is denied. Plaintiff did not seek such relief until almost six months after defendants separately moved or cross-moved for summary judgment and almost one year after the note of issue was filed. Plaintiff provides no reasonable excuse for the delay in seeking leave (*see McGowan v RPC Realty Corp.*, 46 AD3d 771, 772 [2d Dept 2007]). As such, that part of plaintiff's cross motion seeking leave to amend the bill of particulars is denied (*see Lopez v City of New York*, 80 AD3d 432 [1st Dept 2011]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 218 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

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[3] 12 NYCRR 23-5.8(c)(2) provides that "[t]he horizontal displacement of any suspended platform in a direction perpendicular to the face of a building or other structure by means of an applied horizontal force shall not exceed one-tenth of the vertical distance from the elevation of the scaffold platform to its point of suspension."

In light of the dismissal of the claims asserted against Columbus and Pinnacle, Columbus' motion for summary judgment seeking indemnification from Pinnacle is denied as moot.

Accordingly, the motion for summary judgment by Xuncas is granted to the extent of dismissing all claims in plaintiff's complaint except for the Labor Law Section 200/common-law negligence cause of action. The cross motion for summary judgment by Pinnacle is granted in its entirety. The cross motion for summary judgment by Columbus is granted to the extent of dismissing plaintiff's complaint, and that portion of Columbus' motion seeking indemnification from Pinnacle is denied as moot. Plaintiff's cross motion for summary judgment and for leave to amend the bill of particulars is denied in its entirety. It is hereby

ORDERED that the claims in plaintiff's complaint are dismissed to the extent they are asserted against only defendants Pinnacle and Columbus, and it if further

ORDERED that plaintiff's claims under Labor Law Sections 240(1), 240(2), 240(3) and 241(6) are dismissed against defendant Xuncas.

This constitutes the Decision and Order of the Court.

Dated: November 21, 2016

SHARON A.M. AARONS, J.S.C.