Vigil v Flatbush-Fulton Realty Assoc., L.P.
2017 NY Slip Op 30041(U)
January 6, 2017
Supreme Court, New York County
Docket Number: 152607/2014
Judge: Joan M. Kenney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

---x

LUIS VIGIL,

Plaintiff,

-against-

Index No.: 152607/2014

FLATBUSH-FULTON REALTY ASSOCIATES, L.P.,

Defendant.

---x

KENNEY, J.:

Plaintiff Luis Vigil (plaintiff) moves, pursuant to CPLR 3212, for an order granting summary judgment as to his claims for violations of Labor Law §§ 240 (1) and 241 (6) against defendant Flatbush-Fulton Realty Associates, L.P (defendant).

Defendant cross-moves, pursuant to CPLR 3212, to dismiss plaintiff's causes of action alleging violations of Labor Law §§ 200, 240 (1), and 241 (6).

FACTUAL ALLEGATIONS

Plaintiff testified that he was injured in an accident which took place on March 26, 2013, at 2:30 p.m., at 2 Flatbush Avenue, Brooklyn, New York. On the date of his accident, plaintiff was working for Skyline Demolition (Skyline). Plaintiff had previously been performing demolition work for Skyline for two and a half years. While at Skyline, plaintiff would demolish walls and sheet rock, cut steel, and push containers full of garbage. Plaintiff maintains that ladders would be brought to the site when a job commenced and would be kept at the site. The ladders ranged in size from six, eight, 10 and 12 feet, and plaintiff could determine what size ladders to utilize.

Plaintiff testified that he was on the subject job for two weeks before his accident. He maintains that, on the day of his accident, there were eight workers performing demolition work.

Plaintiff was working at the site on the ground level which included four rooms. The room in which plaintiff was working was 15 feet long and 12 feet wide, and had ceilings which were 15 to 16 feet tall. He maintains that six and eight-foot A-frame ladders made of fiberglass were brought to the subject site. Plaintiff testified that he needed a 10-foot ladder as the ceiling in the room was high, but as there was no such ladder at the location, he utilized the eight-foot ladder which belonged to Skyline.

Plaintiff states that his boss "Ronald", who was at the site every day, marked a wall indicating that it was to be taken down. He maintains that from 7:00 a.m. until 12:00 p.m., he was demolishing two 10-foot sheet rock walls. For this work, he did not need to use a ladder, as he was pulling the sheet rock by hand. After lunch, plaintiff was told by Ronald to demolish another wall made of plywood. For this work, plaintiff needed to use a ladder. As he was utilizing the ladder, Joseph, a co worker held the ladder from both back sides. Plaintiff maintains that he noticed that there was nothing wrong with the ladder before his accident. Plaintiff did not ask Ronald for a taller ladder, did not have a hard hat, and was not using goggles.

At the time of his accident, plaintiff was standing on the seventh, out of the eighth, rung of the A-frame ladder. Plaintiff was facing the wall, and the ladder was about three to four feet from the wall. Plaintiff was holding a six-pound bar which was curved like a cane and which was between three and four feet long. Plaintiff was using the bar like a lever to remove the wood and pry it off. Plaintiff started the wood removal process from the top of the ceiling and worked his way down. Plaintiff was leaning his left hand on the wall, while his right hand was utilizing the bar to pry the wood. Plaintiff maintains that, as he was using the bar, a piece of wood that

was three feet high, four feet long, four inches thick, and which weighed 80 pounds, fell from the wall, striking the legs of the ladder. Joseph let go of the ladder when the wood fell.

When the wood struck the ladder, the leg of the ladder broke, and plaintiff proceeded to lose his balance, causing him to fall to the ground. Plaintiff maintains that the ladder fell to the right, while he fell off to the left. After plaintiff hit the ground, he experienced pain in his hand and in his left thigh. Ronald, who came over when he fell, proceeded to call an ambulance. When plaintiff was lifted up, he saw that the left side of the ladder was broken.

In his verified bill of particulars dated May 21, 2014, plaintiff alleges that he suffered injuries to his left leg and left shoulder, and has a comminuted displaced intra articular left distal radius fracture. The bill of particulars further states that plaintiff had a surgical implantation of an artificial internal device with an abnormal reaction, and an "ORIF" with 12 screws and plates. Plaintiff alleges that he was confined to the hospital for four days and was out of work for four weeks.

On March 18, 2014, plaintiff filed a complaint against defendant. In his complaint, plaintiff alleges that defendant was negligent and violated Labor Law §§ 200, 240, and 241 (6). Plaintiff also alleges that defendant violated sections 23-1.16 (b), (d), and (e), and sections 23-1.21 (b) (4) (i), (ii), (iii), (iv), and (v) (e) (2) (3) of the Industrial Code.

William Mizel (Mizel), a board-certified safety professional, submitted an affidavit dated June 6, 2016 on behalf of plaintiff. Mizel states that his specialty includes construction site investigations, hazard analysis, and causation. He states that his investigation regarding the subject accident included reviewing the deposition transcript of plaintiff, the verified bill of particulars, photos of the site, defendant's motion papers, and the affidavit of Robert J. O'Connor,

P.E. (O'Connor). Mizel states that his opinions are based upon his professional education, training, certification, and experience in the construction industry, as well as his knowledge of standards and practices, accepted construction safety practices, federal laws, New York's Labor Law, and sections of the Industrial Code.

Mizel concludes that, in his opinion, defendant did not provide a safe working environment for its employees and violated Labor Law §§ 240 (1) and 241 (6), section 23-3.3 (c) of the Industrial Code, and OSHA regulations. Mizel states that the ladder which was supplied to plaintiff was not appropriate for the work which plaintiff was performing at the time of his accident and did not provide him with proper protection. He maintains that plaintiff should have been provided with either an aerial lift with appropriate fall protection, or a scaffold of sufficient height and design to allow plaintiff access to the work area to protect him from falling. As the ladder was only eight feet tall, plaintiff was forced to use the top step of the ladder in order to reach the necessary height in order to perform his work, in violation of the manufacturer's safe use guidelines. Mizel states that if plaintiff was provided with a scaffold or an aerial lift with appropriate fall protection, plaintiff would have been able to complete his work in a safe manner.

Mizel maintains that he disagrees with an affidavit submitted by O'Connor. Mizel states that the affidavit ignores that by working on an eight-foot ladder, plaintiff was forced to reach and forcefully pry the plywood off the wall, creating the risk of loose material. Mizel contends that O'Connor also ignores the fact that the risk of being struck by material could have been prevented through the use of scaffold or an aerial lift with appropriate fall protection.

Mizel states that the subject ladder was too short, that its was inadequate, as it was incapable of supporting or withstanding falling debris, and that the debris was falling in an

uncontrolled manner. He maintains that, if appropriate safety equipment was provided, plaintiff would have been able to reach the plywood, with the debris directed to a barricaded area for safe disposal. Mizel states that if continuous inspections of the work had taken place, plaintiff's accident could have been prevented.

O'Connor submits an affidavit dated April 5, 2016. O'Connor is a safety expert and a licensed professional engineer who was retained by defendant. O'Connor reviewed the verified complaint, the bill of particulars, the transcript of Vigil's deposition, construction industry regulations and standards, and other documents and materials commonly relied upon by experts in the field of construction, site safety and engineering. O'Connor maintains that the ladder which plaintiff was utilizing at the time of his accident was appropriate and adequate for the work he was performing and that defendant did not violate Labor Law §§ 240 (1), and 241 (6), or sections of the Industrial Code.

O'Connor states that the ladder did not slip, tip, or collapse due to a defective condition, or malfunction. Rather, the ladder was broken by a heavy, external object, which struck the leg of the subject ladder. He maintains that, based upon plaintiff's testimony, there would have been no purpose, or practical way to use hoists, pulleys or similar devices to secure the wall covering which plaintiff was removing. O'Connor further concludes that plaintiff was not using a "leaning ladder," and that plaintiff's injury was not the result of a structural instability, but was due to an object dropping which was related to plaintiff's own construction work.

DISCUSSION

"The 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 eliminate any

material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Plaintiff alleges that defendant violated Labor Law § 240 (1). Labor Law § 240 (1) provides, in 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."

" 'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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.' " *John v Baharestani*, 281 AD2d 114, 118 (1st Dept 2001), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.* 81 NY2d 494, 501 (1993). In order to prevail on a Labor Law § 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. *See Torres v Monroe Coll.*, 12 AD3d 261, 262 (1st Dept 2004).

Plaintiff argues that it is undisputed that, at the time of his accident, plaintiff was located at an elevated height and was performing work for the project. Plaintiff contends that as defendant was the owner of the property, it was responsible to provide proper safety protection to workers and that the wood which was being taken down should have been secured for the purpose of the undertaking. Plaintiff argues that the failure to provide a safety device was the

proximate cause of the accident and plaintiff was not the sole proximate cause of the accident nor was a recalcitrant worker. Plaintiff argues that because the ladder failed to provide him with adequate protection, the part of plaintiff's motion seeking summary judgment on plaintiff's cause of action alleging a violation of Labor Law § 240 (1) must be granted.

Defendant argues that there is no evidence that the ladder which plaintiff was utilizing was defective or that the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries. Defendant contends that it remains unclear how a different size ladder would have prevented the accident and that the height of the ladder was not the proximate cause of the accident as plaintiff fell because he lost his balance.

Defendant also contends that the section of the wall which fell onto the ladder was not a load which had to be secured by the use of devices enumerated in section 240 (1) of the Labor Law. Defendant maintains that the wood, which was located at the same elevation as plaintiff, was itself the target of the demolition and that it would be illogical to impose liability on defendant for failing to provide protective devices to prevent it from falling.

The Court of Appeals has held that:

> "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."

Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 (2001); *see also Sung Kyu-To v Triangle Equities, LLC,* 84 AD3d 1058, 1059-1060 (2d Dept 2011) (holding that "[f]alling object liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured. Rather, liability may be imposed where an object or material that fell,

causing injury, was a load that required securing for the purposes of the undertaking at the time it fell" [citations and quotation marks omitted]).

Here, a dispute remains as to whether the safety device, specifically, the ladder, was adequate and whether scaffolding or another device should have been utilized as the large pieces of debris which plaintiff was removing were capable of falling and striking plaintiff's ladder. While O'Connor states that the ladder was an adequate safety device and that there would have been no purpose or practical way to use hoists, pulleys, or similar devices to secure the wall covering, Mizel states that other safety devices should have been utilized. Mizel concludes that, if appropriate safety equipment has been provided, plaintiff would have been able to reach the plywood, and the debris could have been directed to a barricaded area for safe disposal. Mizel also states that plaintiff should have been provided with either an aerial lift with appropriate fall protection or a scaffold of sufficient height to allow accessability and protection from falling debris.

As it remains unclear from the conflicting expert affidavits if another type of safety device would have prevented the accident from occurring and whether the wood could have been secured for the undertaking, the part of plaintiff's motion seeking the grant of summary judgment as to his claims of a violation of Labor Law § 240 (1) must be denied. Furthermore, the part of defendant's cross motion seeking summary judgment dismissing the claim of an alleged violation of Labor Law § 240 (1) must also be denied.

Plaintiff alleges that summary judgment should also be granted as to his claim of a violation of Labor Law § 241 (6). Labor Law § 241 (6) provides, in part:

"All contractors and owners and their agents . . . when constructing or

> demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

"Labor Law § 241 (6) . . . requires owners and 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." *Ross*, 81 NY2d at 501-502 (quotation marks omitted).

Plaintiff alleges in his verified and supplemental bill of particulars that defendant violated sections 23-2.21 (b) (4) (iv), 23-1.21 (e) (3), and 23-1.16 (b), (d) of the Industrial Code. While plaintiff alleges in his complaint that section 23-1.16 (e) and 23-1.21 (b) (4) (i) (ii) (iii) (v), (e) (2) have also been violated, plaintiff fails to specifically address these sections of the Industrial Code, and thus, they are deemed abandoned. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (holding that because plaintiff did not oppose that branch of defendant's summary judgment motion which dismissed the wrongful termination cause of action, plaintiff's claim for wrongful termination was abandoned).

Plaintiff alleges that Section 23-1.21 (b) (4) (iv) of the Industrial Code was violated. Section 23-2.21 (b) (4) (iv) provides:

> "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical

> means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

Based upon the testimony of plaintiff, plaintiff was not utilizing a "leaning ladder" which the section of the Industrial Code specifies, but he was using an A-frame ladder which was being steadied in place by Joseph. Therefore, this section of the Industrial Code which discusses the securing of a leaning ladder against a side slip is inapplicable.

Plaintiff alleges that section 23-1.21 (e) (3) of the Industrial Code was violated. This section provides:

> "[s]tanding stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means."

Based upon the testimony of plaintiff, the eight-foot ladder which plaintiff was utilizing was being held by Joseph. Therefore, this section of the Industrial Code is inapplicable.

Section 23-1.16 (b) of the Industrial Code provides:

> "[e]very approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Here, plaintiff does not testify that there was a safety belt or harness provided, or that he was directed to use a safety belt or harness by his employer for this work. Therefore, this section

of the Industrial Code is inapplicable.

Section 23-1.16 (d) of the Industrial Code provides:

"[t]he length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet. Such tail line shall be attached to a hanging lifeline or to a substantial structural member at a point no lower than two feet above the working platform or working level. Tail lines shall be first grade manila or synthetic fibre rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds or shall be fabricated of other approved materials."

Here, there is no allegation that plaintiff was utilizing a tail line or could use a tail line for the subject work. Therefore, this section of the Industrial Code is inapplicable. *See Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1056 (4th Dept 2004) (holding that "[b]ecause there was no safety railing and plaintiff was not provided with a safety belt, harness, tail line or lifeline, neither of those sections is applicable here" [citations omitted]).

In his expert affidavit, Mizel states that section 23-3.3 (c) of the Industrial Code was violated. Although defendant maintains that this alleged Code violation was first discussed in Mizel's affidavit, "[a]lthough a plaintiff asserting a Labor Law § 241 (6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code, a failure to identify the Code provision in the complaint or bill of particulars is not fatal to such a claim." *Kelleir v Supreme Indus. Park,* 293 AD2d 513, 513-514 (2d Dept 2002) (internal citations omitted). Here, this claim does not involve new factual allegations as to how the accident took place and does not appear to cause any prejudice to the defendant.

Section 23-3.3 (c) of the Industrial Code provides:

"[d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person

resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

Section 23-3.3 (c) of the Industrial Code has been held to be sufficiently specific to support a Labor Law § 241 (6) claim. *See Ortega v Everest Realty LLC*, 84 AD3d 542, 544 (1st Dept 2011). Defendant argues that case law specifies that section 23-3.3 (c) of the Industrial Code was designed to protect a worker when a structure is weakened by the progress of demolition, and does not apply to material which is deliberately loosened. *See Maldonado v AMMM Props. Co.*, 107 AD3d 954, 955 (2d Dept 2013) (holding "defendants demonstrated that the provisions of 12 NYCRR 23-3.3 (b) (3) and (c), relied on by the plaintiff, are inapplicable, as the hazard arose from the plaintiff's actual performance of the demolition work itself, rather than from structural instability caused by the progress of the demolition").

Here, it remains unclear from the record whether anyone was inspecting the area in which plaintiff was working or whether an inspection may have revealed a potential hazard or weakened wall. It is also unclear from the record whether the debris fell solely because of the demolition work or if it was already unstable due to loosened or weakened material.

As neither party explains whether inspections were taking place, a question of fact exists as to whether this section was violated. Therefore, the court declines to dismiss plaintiff's section 241 (6) claim based on section 23-3.3 (c) of the Industrial Code.

Defendant argues that the cause of action alleging that it violated Labor Law § 200 must also be dismissed. Defendant contends that there is no evidence that it exercised any direct supervisory control over the work activity which brought about plaintiff's injury. Defendant argues that plaintiff testified that his work was supervised by his Skyline demolition manager,

Ronald, and by his employer, George, the owner of Skyline. Plaintiff testified that he did not know who defendant was.

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Cruz v Toscano*, 269 AD2d 122, 122 (1st Dept 2000) (quotation marks and citation omitted). Labor Law § 200 states, in pertinent part, as follows:

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

The Court of Appeals has held that "where such a claim arises out of alleged defects or

dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross*, 81 NY2d at 505 (citations omitted).

Here, based upon the record, plaintiff fails to meet his burden to demonstrate that defendant had any type of supervisory control over the manner of his work. Therefore, the part of defendant's cross motion seeking summary judgment dismissing the alleged violation of Labor Law § 200 cause of action must be granted.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that the part of plaintiff Luis Vigil's motion seeking summary judgment as to his claim alleging a violation of Labor Law § 240 (1) is denied; and is further

ORDERED that the part of plaintiff's motion seeking summary judgment as to his claim of a violation of Labor Law § 241 (6) is denied; except to the extent that the claim alleges a violation of section 23-3.3 (c) of the Industrial Code; and it is further

ORDERED that the part of defendant Flatbush-Fulton Realty Associates, L.P.'s cross motion seeking summary judgment dismissing plaintiff's cause of action alleging a violation of Labor Law § 200 is granted; and it is further

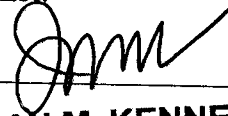
ORDERED that the part of defendant's cross motion seeking summary judgment dismissing plaintiff's section 241 (6) claim is granted with the exception of the part of the causes of action based on section 23-3.3 (c) of the Industrial Code, which is not dismissed; and it is further

ORDERED the part of defendant's cross motion seeking summary judgment dismissing plaintiff's claim of violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that Note of Issue and Certificate of Readiness be filed NO LATER THAN January 31, 2017 and the parties proceed to mediation/trial forthwith.

Dated: January 6, 2017

ENTER:



JOAN M. KENNEY
J.S.C.