SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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MARK DEFRONZO,

Plaintiff,

DECISION/ORDER
Index No. 154050/2013

-against-

CANON U.S.A., INC., TURNER CONSTRUCTION COMPANY

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Mark Defronzo commenced the instant action seeking to recover damages for injuries he allegedly sustained while performing work on a construction site. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting him summary judgment against defendants Canon U.S.A. Inc. ("Canon") and Turner Construction Company ("Turner") on his Labor Law § 240(1) claim. Defendants cross-move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), 241(6) and common law negligence claims. For the reasons set forth below, plaintiff's motion is granted and defendants' cross-motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff was employed by non-party Island International Exterior Fabricators, LLC ("Island") and was working on the construction of a building that was intended to serve as Canon's American headquarters located at One Canon Park in Suffolk County (hereinafter referred to as the "building" or the "Project"). Canon was the owner of the Project and Turner was the general contractor on the Project.

Plaintiff alleges that on July 30, 2012, using an A-frame ladder, he was installing refrigerator panels on the outside of a bulkhead that was part of the vertical extension of the fifth floor of the building.

Specifically, plaintiff alleges that his accident occurred as follows. The ladder, which was not secured to anything, was fully opened and placed on the Masonite flooring that was all around the extension to protect the roof underneath. Plaintiff alleges that when he put the ladder down on the Masonite right before his accident occurred, he observed that the Masonite was wet and slippery. Plaintiff then ascended the ladder to remove a tarp that covered the bulkhead to protect the open portion of the building. When plaintiff was two to four feet up the ladder, the ladder slid to the right and plaintiff fell to the left off the ladder to the roof below causing him to sustain injuries.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to plaintiff's motion for summary judgment on his Labor Law § 240(1) claim. Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, 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 enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute.

Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well-settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1)." *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1st Dept 1998), *citing Schultze v. 585 W. 214th St. Owners Corp.*, 228 A.D.2d 381 (1st Dept 1996). Further, "[i]t is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent." *Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 291 (1st Dept 2002). Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452, 462 (1985). Only where the plaintiff's actions were the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550, 551 (2006).

In the present case, plaintiff has established his *prima facie* right to summary judgment on his Labor Law § 240(1) claim as plaintiff has shown that he fell from a ladder that was not properly secured and that defendants failed to provide any adequate safety device to prevent plaintiff from falling to the ground after the ladder he was standing on slipped and shifted to the right. Here, plaintiff's injury clearly occurred due to a gravity-related hazard as plaintiff fell from a ladder after it slipped and shifted. There is no explanation for the accident other than the fact that the ladder was improperly secured, thus causing it to slip and shift and causing plaintiff to fall and become injured. The fact that the ladder slipped and shifted and plaintiff fell to the floor below is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1).

In opposition, defendants fail to raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment on his Labor Law § 240(1) claim. Defendants' assertion that plaintiff's motion should be denied and that they should be granted summary judgment dismissing plaintiff's Labor Law § 240(1) claim on the ground that plaintiff was the sole proximate cause of the accident because he placed the ladder onto the Masonite knowing that the surface was wet and slippery is without merit as it is well-settled that a plaintiff worker will not be found to be the sole proximate cause of an accident based on "the manner in

which plaintiff set up...the ladder...where there is no dispute that the ladder was unsecured and no other safety devices were provided." *Vega v. Rotner Management Corp.*, 40 A.D.3d 473, 473-74 (1st Dept 2007).

Further, defendants' assertion that plaintiff's motion should be denied and that they should be granted summary judgment dismissing plaintiff's Labor Law § 240(1) claim on the ground that plaintiff was a recalcitrant worker is without merit. Specifically, defendants assert that plaintiff was a recalcitrant worker based on the testimony of Michael Mintz, Turner's assistant superintendent on the Project, who testified that immediately before plaintiff's accident, he instructed plaintiff not to go up on the ladder until he obtained pieces of blue board to place under the ladder to protect the roof but that plaintiff went up on the ladder despite such instruction. However, such testimony is insufficient to raise an issue of fact as to whether plaintiff was a recalcitrant worker. To support a "recalcitrant worker" defense, a defendant must show a "safety device...was both available and visibly in place at the immediate worksite of the injured employee" and that the employee "deliberately refused to use it." *Powers v. Lino Del Zotto and Son Builders Inc.*, 266 A.D.2d 668 (3d Dept 1999). *See also Gallagher v. New York Post*, 14 N.Y.3d 83 (2010)(granting plaintiff's motion for summary judgment on his 240(1) claim on the ground that "[t]here is no evidence...that [plaintiff] knew where to find the safety devices that [defendant] argues were readily available or that he was expected to use them" and there was no evidence "that [plaintiff] had been told to use such safety devices.") Here, there is no evidence that Mr. Mintz's instruction to plaintiff not to ascend the ladder was given so that Mr. Mintz could provide plaintiff with a safety device. In fact, Mr. Mintz testified as follows:

Q: What did you say to him?
A: I asked him to wait before going up the ladder so that I can get proper protection for the roof.
Q: And what was proper protection for the roof?
A: There was a pile of blue board approximately 30 feet behind me. I turned to go grab the blue board.

...

I wanted to protect the roof. I didn't want him to go on the ladder.

Thus, it is clear from Mr. Mintz's testimony that his instruction to plaintiff not to ascend the ladder was given in order to protect the roof and there is no evidence that plaintiff disregarded an instruction to use a safety device or that plaintiff chose not to use an available safety device. Earlier in his deposition, Mr.

Mintz testified generally regarding what he would do if he saw a worker using a ladder on top of Masonite and he testified that he would have told the worker to stop working "to properly protect the roof." When asked whether such instruction was "a concern to th[e] worker's safety" or whether "it [was] a concern that the roof be protected" Mr. Mintz responded that it was "both." However, when asked to clarify why such instruction would protect a worker attempting to ascend a ladder on top of Masonite, Mr. Mintz responded that he had no idea whether there was a danger to a worker ascending a ladder placed on top of Masonite.

The cases cited by defendants in support of their arguments that the plaintiff was the sole proximate cause of the accident and that plaintiff was a recalcitrant worker are distinguishable. Indeed, *Mayancela v. Almat Realty Dev.*, 303 A.D.2d 207, 208 (1st Dept 2003) involved a plaintiff who clearly misused a ladder from which he fell "despite specific, repeated and recent instructions from his employer respecting the ladder's proper and improper use." Further, *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35 (2004) involved a plaintiff who "received specific instructions to use a safety line while climbing, and chose to disregard those instructions." Here, there is no evidence that plaintiff misused the ladder from which he fell or that he was instructed to use a safety device or offered a safety device and chose to disregard such instruction or the use of a safety device.

Thus, as this court has granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is denied.

The court next turns to that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. "Section 200 of the Labor Law 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." *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143 (1st Dept 2012). "Where an existing defect or dangerous condition caused the injury, liability attaches

if the owner or general contractor created the condition or had actual or constructive notice of it." *Id.* at 143-44. "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work." *Id.* at 144.

In the instant action, the court finds that defendants' motion for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims is granted. Initially, this court finds that the proper standard to apply is the "manner and means of the work" standard as the court finds that plaintiff's accident was caused by plaintiff's performance of work on an unsecured ladder. In applying the "manner and means of the work" standard, the court finds that defendants are entitled to summary judgment as they have established that they did not exercise supervisory control over plaintiff while he was performing the work. Plaintiff testified that he did not receive instruction from any of the defendants' employees. The mere fact that Mr. Mintz had the authority to supervise the work being performed on the Project and to stop work he thought was unsafe is insufficient to establish liability under Labor Law § 200. *See Griffin v. Clinton Green South, LLC*, 98 A.D.3d 41 (1st Dept 2012)("[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200")(internal citations omitted).

To the extent plaintiff asserts that the court should instead apply the "defect and dangerous condition" standard on the ground that plaintiff's accident was caused by the wet and slippery Masonite on which the ladder was placed, such assertion is without merit as the cause of plaintiff's accident was the unsecured ladder and not the wet and slippery Masonite. Indeed, if the ladder was properly secured while plaintiff was standing on it, the wet and slippery Masonite would not have played a role in plaintiff's accident.

The court next turns to that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law 241(6) claim. Pursuant to Labor Law § 241(6),

> 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, 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.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

Here, this court finds that defendants' motion for summary judgment dismissing plaintiff's Labor Law 241(6) claim predicated on 12 NYCRR 23-1.21(b)(4)(i) and 12 NYCRR 23-1.7(d) is denied as defendants have failed to establish, as a matter of law, that they did not violate said provisions. 12 NYCRR 23-1.21(b)(4)(i) requires that "[a]ll ladder footings shall be firm" and prohibits the use of slippery surfaces as ladder footings. Further, 12 NYCRR 23-1.7(d) provides as follows:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Here, plaintiff alleges that his accident was caused by the wet, slippery surface of the Masonite on which the ladder was standing and defendants have not established that plaintiff's accident was not caused by such conditions. Thus, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law 241(6) claim predicated on either 12 NYCRR 23-1.21(b)(4)(i) or 12 NYCRR 23-1.7(d).

However, defendants are entitled to summary judgment dismissing plaintiff's Labor Law 241(6) to the extent such claim is predicated on any other Industrial Code provision asserted by plaintiff, without opposition.

Accordingly, plaintiff's motion for summary judgment on his Labor Law 240(1) claim is granted and defendants' cross-motion for summary judgment is granted to the extent that plaintiff's common law negligence and Labor Law § 200 claims are dismissed and plaintiff's Labor Law 241(6) claim predicated on any Industrial Code provision other than 12 NYCRR 23-1.21(b)(4)(i) and 12 NYCRR 23-1.7(d) is dismissed. This constitutes the decision and order of the court.

DATE : 4/6/17

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.