SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

NECDET TASDELEN,
Plaintiff,

- v -

555 TENTH AVENUE II LLC, 555 TENTH AVENUE LLC, PINNACLE INDUSTRIES II LLC and PINNACLE INDUSTRIES III LLC,
Defendants.

INDEX NO. 151449/2015
MOTION DATE 09/20/17
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3; 4 - 6
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 9

Cross-Motion: X Yes ☐ No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion to amend the Verified Bill of Particulars pursuant to CPLR §3025[b], is granted. Plaintiff's motion for summary judgment on liability pursuant to CPLR §3212, is granted to the extent of granting summary judgment on Plaintiff's Labor Law §240[1] claim, the remainder of the motion is denied. Defendant Pinnacle Industries III LLC's cross-motion for summary judgment is granted, the Verified Complaint is dismissed against it. Defendants' cross-motion for summary judgment is granted to the extent that Plaintiff's Labor Law §241[6] claims based on violations of Industrial Code Sections §23-1.5, §23-1.8, §23-1.15, §23-1.17, §23-2.1, §23-3, §23-4, §23-5 and §23-6 are dismissed and Plaintiff's Labor Law §200 and common law claims against 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC are dismissed. The remainder of Defendants' cross-motion is denied.

On February 10, 2015 Plaintiff commenced this action for personal injuries sustained in a construction accident. Plaintiff was employed by non-party Rebar Steel Corp. ("Rebar") to work as a journeyman union ironworker and install rebar for a project located at 555 Tenth Avenue, New York, New York ("Construction Project"). On January 29, 2015 Plaintiff fell from a ladder he was climbing to reach the ninth floor when his hand slipped. Plaintiff alleges the ladder was slippery due to snow.

Defendants 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC owned the property. They hired non-party Gotham Construction ("Gotham") as the general contractor for the Construction Project. Gotham hired Defendant Pinnacle Industries II LLC ("Pinnacle") as a subcontractor responsible for the Building's concrete superstructure. Pinnacle subcontracted Rebar for concrete superstructure work.

Plaintiff now moves to amend his Verified Bill of Particulars and for summary judgment on liability on his Labor Law §240[1] and §241[6] claims. Defendants oppose the motion and cross-move for summary judgment dismissing the Verified Complaint.

"Leave to amend a pleading shall be freely given" (CPLR §3025[b]). In the absence of unfair surprise or prejudice to the Defendant, failure to identify an Industrial Code section is not fatal to a Labor Law §241[6] claim and may be rectified by amendment (Walker v Metro-North Commuter R.R., 11 AD3d 339, 783 NYS2d 362 [1st Dept. 2004]). A defendant is not

prejudiced when there are "no new factual allegations or theories of liability" (Flynn v 835 6th Ave. Master L.P., 107 AD3d 614, 969 NYS2d 13 [1st Dept. 2013]).

The evidence presented demonstrates Plaintiff fell from an access ladder while going from the eighth to the ninth floor as his hand slipped off the ladder. Industrial Code §23-1.7[f] states:

> (F) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided (N.Y. Comp. Codes R. & Regs. tit. 12, §23-1.7).

Defendants cannot demonstrate surprise or prejudice by Plaintiff rectifying the Verified Bill of Particulars to include Industrial Code §23-1.7[f]. Plaintiff's motion to amend the Verified Bill of Particulars to add Industrial Code §23-1.7[f] is granted.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Defendant Pinnacle Industries III LLC's ("Pinnacle III") cross-motion for summary judgment dismissing all claims against it, is granted. Pinnacle III has put forth prima facie evidence, which demonstrates it had no connection to the Construction Project and therefore cannot be liable. Plaintiff has conceded that only Defendant Pinnacle II contracted with non-parties Gotham and Rebar for the Construction Project *(Moving Papers Exs. 5, 6).

The "public policy [of] protecting workers require that the [Labor Law] statutes in question be construed liberally to afford the appropriate protections to the worker" (Kosavick v Tishman Constr. Corp. of New York, 50 AD3d 287, 855 NYS2d 433 [1st Dept. 2008]). A plaintiff may not recover under common law negligence or New York Labor Law §200, §240[1] or §241[6] when the plaintiff was the sole proximate cause of the injuries (Blake v Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280 [2003]). Labor Law §240[1] and §241[6] only applies to owners, general contractors and their agents (Russin v Picciano & Sons, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [1981]).

The court is not persuaded by Defendants' assertion that Plaintiff was the sole proximate cause of his injuries. Navandra Omrao, a laborer for Rebar and eye-witness, stated in the accident report that "[Plaintiff] was returning from lunch to work location and slipped off icy wooden ladder falling about 20' [feet] and landing on top of Andre Morgan" (Moving Papers Ex. 7). This admissible evidence refutes Defendants contention that Plaintiff was the sole witness of his accident. Defendants' contention

that there is conflicting testimony is unavailing. While Peter Salvato, a Gotham Employee, stated in his deposition that he did not observe any snow or ice when arriving on site of the accident, he further stated that he arrived half an hour after the accident, did not inquire whether any laborers cleaned the ladder after the accident and believed that laborers most likely used the ladder from the time of the accident to his arrival (Id. at Ex. 4). Finally, Defendants contention that Plaintiff was a recalcitrant worker for his failure to wear a harness is unavailing as Mr. Salvato testified that there was nowhere to secure a safety harness and lanyard to protect from a potential fall (Id).

The purpose of the strict liability Labor Law §240[1] statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514, 583 NE2d 932, 577 NYS2d 219 [1991]). "The special hazards covered by Labor Law §240[1] are limited to such specific gravity-related accidents as falling from a height [including falls from ladders] ... (Runner v N.Y. Stock Exch., Inc., 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009] *citing* Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). The protection extends to "all workman on the job" engaged in work limited to: erection, demolition, repairing, or alterations of buildings and structures (Haimes v N.Y. Tel. Co., 46 NY2d 132, 412 NYS2d 863, 385 NE2d 601 [1978]). Upon a showing that a protected worker was injured as a result of a violation of the statute, absolute liability against the owner, contractor or agent is established as it is not relevant whether Defendant's conduct conformed with the customs or practices, or whether it actually exercised control or supervision over the work that led to the injuries (Zimmer v Chemung Cty. Performing Arts, Inc., 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 [1985]).

Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law for his §240[1] claim. Plaintiff was a protected worker who was injured while employed to perform work expressly protected by Labor Law §240[1] when he slipped and fell from the ladder. In accidents involving ladders, prima facie evidence is established for a Labor Law §240[1] claim when it is established that the ladder was defective or that it slipped, tipped, was placed improperly or otherwise failed to support the worker (Felker v Corning Inc., 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 [1997]). Plaintiff's prima facie burden is met as his hand slipped while he was climbing due to the ladder being icy.

Defendants fail to produce contrary evidence in admissible form to require a trial of Plaintiff's Labor Law §240[1] claim. Defendants Tenth Avenue II and Tenth Avenue LLC were the owners of the Building and are strictly liable. Defendant Pinnacle, the subcontractor, was a statutory agent as it had the authority to supervise and control the specific work area where the accident occurred (Nacimento v Bridgehampton Construction Corp., 86 AD3d 189, 924 NYS2d 353 [1st Dept. 2011], Moving Papers Ex. 5). Pinnacle had over one hundred (100) employees on site including superintendents monitoring the progress of Pinnacle's and Rebar's work location (Moving Papers Ex. 3). Furthermore, Pinnacle built the ladder used by Plaintiff and was responsible for cleaning and removing snow and ice accumulation in the relevant work area (Id. at Ex. 5). Plaintiff is entitled to judgment on liability on his Labor Law §240[1] claim.

"Labor Law §241[6] imposes a nondelegable duty of reasonable care upon workers and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto, supra). To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation (Ross v Curtis-Palmer Hydro-Electric Co., 81

NY2d 494, 618 NE2d 82, 601 NYS2d 49 [1993]). The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence (Id). The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury (Buckley v Columbia Grammar & Preparatory, 44 AD3d 263, 841 NYS2d 249 [1st Dept. 2007]). Plaintiff's §241[6] claim rests on various alleged violations of the Industrial Code including: §23-1.5, §23-1.7, §23-1.8, §23-1.15, §23-1.17; §23-1.21, §23-2.1, §23-3, §23-4, §23-5, §23-6 and now §23-1.7[f].

Plaintiff's assertion that Defendants violated §241[6] for failure to comply with Industrial Codes (12 NYCRR) §23-1.5, §23-1.8, §23-1.15, §23-1.17, §23-2.1, §23-3 §23-4, §23-5 and §23-6 must be dismissed as they are either too general to support liability under Labor Law §241[6] (Kochman v City of New York, 110 AD3d 477, 973 NYS2d 114 [1st Dept. 2013]) or are inapplicable to the facts of this case and cannot form a basis for the claim (Gasques v State of New York, 15 NY3d 869, 937 NE2d 79, 910 NYS2d 415 [2010]).

The remaining Industrial Code sections cited and relied upon are adequate and applicable to the Plaintiff's accident and construction project. Plaintiff's reliance on: §23-1.7 [Protection from General Hazards], §23-1.7(f) [Vertical Passage], and §23-1.21 [Ladders and Ladderways] are sufficiently specific to support Plaintiff's claim under Labor Law §241[6]. However, both Plaintiff's and Defendants' motion and cross-motion on Plaintiff's §241[6] claims based on these Industrial Code Violations must be denied as issues of fact remain as to the proximate cause of Plaintiff's injury.

Labor Law §200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v L.A. Wenger Contracting Co., 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [1998]). In a §200 claim, liability can only be found if defendant exercised control or supervision over the work (Zak v UPS, 262 AD2d 252, 692 NYS2d 374 [1st Dept. 1999]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). Without a showing of control or supervision, there must have been notice of the dangerous condition that caused the accident (Loreto v 376 St. Johns Condominium, Inc., 15 AD3d 454, 790 NYS2d 190 [2nd Dept. 2005]). Unlike §240[1] and §241[6] claims, general supervisory duties are insufficient to support liability under §200 (Buccini v 1568 Broadway Assocs., 250 AD2d 466, 673 NYS2d 398 [1st Dept. 1998]).

Defendants 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC make a prima facie showing of entitlement to judgment as a matter of law on Plaintiff's §200 and common-law negligence claims. No evidence has been presented to demonstrate that Defendants 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC directed or controlled Plaintiff's work, nor has any evidence been provided that they had any notice of the dangerous condition of the ladder. Defendants 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC are entitled to summary judgment on their cross-motion on Plaintiff's Labor Law §200 and common law negligence claims against them.

Issues of fact remain for Defendant Pinnacle as they have failed to establish they had no control and authority over the work being done by Plaintiff. Although Plaintiff testified that he did not directly take orders from Pinnacle, it had supervisory and safety control over the area and ladder where Plaintiff was working.

Accordingly, it is ORDERED, that Plaintiff's motion for leave to amend the Verified Bill of Particulars pursuant to CPLR §3025[b] is granted, and it is further,

ORDERED, that the Verified Bill of Particulars is amended as annexed to the Plaintiff's moving papers Exhibit 11, and it is further,

ORDERED, that the Verified Bill of Particulars as amended in the proposed Amended Verified Bill of Particulars annexed to the Plaintiff's moving papers as Exhibit 11 is deemed served upon the named Defendants upon service on their attorneys of a copy of the Verified Bill of Particulars together with a copy of this Order with Notice of Entry, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on liability on his Labor Law §240[1] claim against Defendants 555 Tenth Avenue II LLC, 555 Tenth Avenue LLC and Pinnacle Industries II LLC, is granted, and it is further,

ORDERED, that the remainder of Plaintiff's motion for summary judgment is denied, and it is further,

ORDERED, that Defendant Pinnacle Industries III LLC's cross-motion for summary judgment dismissing the Verified Complaint against it pursuant to CPLR §3212 is granted, and it is further,

ORDERED, that the causes of action in the Verified Complaint asserted against Defendant Pinnacle Industries III LLC, are hereby severed and dismissed, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

NECDET TASDELEN,

Plaintiff,

-against-

555 TENTH AVENUE II LLC, 555 TENTH AVENUE LLC, and PINNACLE INDUSTRIES II LLC,

Defendants.

, and it is further,

ORDERED, that Defendants 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC's cross-motion for summary judgment dismissing Plaintiff's Labor Law §200 and common law claims against it, is granted, and it is further,

ORDERED, that Plaintiff's Labor Law §200 and common law claims asserted against Defendants 555 Tenth Avenue II LLC and 555 Tenth Avenue LLC are hereby severed and dismissed, and it is further,

ORDERED, that Defendants' cross-motion to dismiss Plaintiff's Labor Law §241[6] claim is granted to the extent that Plaintiff's §241[6] claims on violations of Industrial Code §23-1.5, §23-1.8, §23-1.15, §23-1.17, §23-2.1, §23-3 §23-4, §23-5 and §23-6 is granted, and it is further,

ORDERED, that Plaintiff's §241[6] claims on violations of Industrial Code §23-1.5, §23-1.8, §23-1.15, §23-1.17, §23-2.1, §23-3 §23-4, §23-5 and §23-6 are hereby severed and dismissed, and it is further,

ORDERED, that the remainder of Defendants cross-motion is denied, and it is further,

ORDERED, that the remaining causes of action in the Verified Complaint asserted against Defendants 555 Tenth Avenue II LLC, 555 Tenth Avenue LLC and Pinnacle Industries II

LLC remain in effect, and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order Plaintiff shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order, Plaintiff shall also serve a copy of this Order with Notice of Entry upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B), who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: September 27, 2017

Manuel J. Mendez
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE