SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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PETER NJAMCU, DECISION/ORDER

Plaintiff, Index no. 153684/2013

-against- Mot Seq. 003

SOHO GREENE ASSOCIATES LLC and
SHAWMUT WOODWORKING & SUPPLY, INC.,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for damages for personal injuries arising from an alleged accident at a construction site. Defendants, SoHo Greene Associates LLC ("SoHo Greene") and Shawmut Woodworking & Supply, Inc. ("Shawmut") (collectively "Defendants") now move pursuant to CPLR 3212 for summary dismissal of the complaint ("Complaint") plaintiff, Peter Njamcu ("Plaintiff").

Factual Background

Plaintiff, a construction worker, alleges that he was injured while performing work at a construction site. Plaintiff was employed by a sub-contractor hired by Shawmut, a general contractor, to perform work at the premises where his accident allegedly occurred. Plaintiff alleges that on the date of his accident he was caused to fall on an interior staircase while carrying materials up the subject staircase. Plaintiff further alleges that the accident occurred because of, among other things, Shawmut's failure to provide him with a safe place to work and with a safe method of moving steel from one

location to another. The Complaint alleges the violation of, *inter alia*, Labor Law §§ 200, 240 (1), and 241 (6).

Defendants' Motion

As to SoHo Greene, defendants argue that it did not own, manage or operate the premises where Plaintiff's alleged accident occurred. Moreover, Defendants contend that SoHo Greene neither had knowledge that construction work was being performed, nor authorized the work. Specifically, SoHo Greene indicates that it was the condominium sponsor, and that all the condominium units had been sold as of the date of Plaintiff's alleged accident.[1]

As to Shawmut, Defendants argue that Labor Law § 240 (1) does not apply to plaintiff's accident. Specifically, Defendants' argue that the staircase on which Plaintiff tripped was a permanent staircase and appurtenance to the building. Defendants state that the subject staircase is considered a permanent passageway or normal appurtenance to the building, and not a device for accessing the elevated worksite. Further, Defendants argue that Plaintiff's fall was not the type of elevated related risk covered by Labor Law § 240 (1).

Defendants further argue that Plaintiff's claim under Labor Law § 241 (6) should be dismissed as to Industrial Code § 23-6.1, which requires that material hoisting equipment be maintained in good repair and operating condition. Defendants contend that

[1] Plaintiff's opposition fails to address the branch of Defendants' motion to dismiss the Complaint against SoHo Greene, thus, all claims against SoHo Greene are dismissed (*see Perez v. Folio House*, Inc., 123 A.D.3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them]; *Kronick v. L.P. Thebaull Co.*, 70 A.D.3d 648, 649 [2d Dept 2010] [plaintiff abandoned her claim "by failing to oppose the branch of the defendant's motion which was to dismiss it"]).

§ 23-6.1 is inapplicable since Plaintiff was admittedly carrying a piece of steel up a flight of stairs when his accident took place.[2]

Additionally, Defendants argue that Plaintiff's Labor Law § 200 and common law negligence claims should be dismissed, since Shawmut was not responsible for supervising, controlling and directing Plaintiff's work or the means and methods by which such work was performed. Defendants contend that Plaintiff's testimony establishes that he only received instructions from his employer. Moreover, Defendants argue that no one from Shawmut ever directly spoke with Plaintiff or gave him instructions.

Plaintiff's Opposition

In opposition, Plaintiff argues that Defendants are not entitled to dismissal of the Labor Law § 240 (1) claim against Shawmut because the subject staircase is a gravity related safety device which was inadequate to shield Plaintiff from a gravity related harm. Specifically, Plaintiff contends that the subject staircase was the sole means used to access higher and lower levels of the work site, and thus, a substitute for a temporary device under Labor Law § 240 (1). Moreover, Plaintiff argues that while the subject stairway was a passageway, it may also be considered a device under Labor Law § 240 (1).

Further, Plaintiff argues, as to his Labor Law § 200 and common law negligence claims, that his accident did not arise solely out of Shawmut's methods of work; it was partially caused by the dangerous conditions on the subject stairway. Plaintiff additionally argues that even if his claim was predicated upon Shawmut's methods,

[2] Plaintiff's opposition concedes that its Labor Law § 241 (6) claim under Industrial Code § 23-6.1(b) is inapplicable, and consents to its dismissal (Rigelhaupt Aff., ¶15).

Plaintiff testified that Shawmut directed Plaintiff's employer that it could not use the elevator in the building where the construction was taking place. Further, Plaintiff argues that Shawmut failed to demonstrate that it did not have constructive notice of the dangerous conditions on the subject staircase, since Shawmut failed to present when it last inspected the staircase. Finally, Plaintiff argues that Defendants fail to address whether Shawmut had the power to stop work at the construction site for safety reasons.

Defendants' Reply

In reply, Defendants argue that Plaintiff fails to deny that he was injured on a permanently installed staircase and that he slipped and fell onto a stair, as opposed from a height. Moreover, the case law cited by Plaintiff in support of his argument under Labor Law § 240 (1) is distinguishable from the facts of this case.

Next, Defendants argue that Plaintiff's claims under Labor Law § 200 and common law negligence fail, since Plaintiff only received direction from his employer. Defendants contend that Shawmut only gave general instructions on the work, and did not tell Plaintiff specifically how to do his work. Further, Defendants argue that there was no service elevator to access the worksite and that all the trades were prohibited from using the passenger elevator. Additionally, Defendants argue that Plaintiff fails to raise an issue as to the alleged dangerous condition of the subject staircase other than the missing handrail. Defendant contends that the missing handrail cannot be a basis for liability since Plaintiff testified that the wall where the missing handrail would have been was out of his reach at the time of his fall. Further, Defendants argue that Plaintiff fails to specifically identify what caused him to fall.

Discussion

Summary Judgment

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 Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). 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.*).

Labor Law § 240(1)

Labor Law § 240(1) provides, in relevant 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 N.Y.2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant

elevation differential" (*Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 [2009]).

However, the protections of Labor Law § 240 (1) "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]). "Not 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 N.Y.2d 259, 267 [2001]).

In the instant matter, Plaintiff's injuries were not the result of the direct force of gravity, as Plaintiff testified that his accident occurred when his right foot slipped as he was walking up the staircase (Lewkowski Aff., Ex. E, Plaintiff Trans., 65:25-67:10). Thus, the cause of Plaintiff's accident is unrelated to the hazard that brought about the need for the stairway: the elevation-related risk of accessing higher and lower floors within a construction site (*see Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97 [2015], quoting *Melber v. 6333 Main St., Inc.*, 91 N.Y.2d 759, 763 [1998] ["[t]he relevant and proper inquiry is whether the hazard plaintiff encountered . . . was a separate hazard wholly unrelated to the hazard which brought about [the] need [for a safety device] in the first instance" (internal quotation marks omitted)]; *Nieves v. Five Boro A.C. & Refrig. Corp.*, 93 N.Y.2d 914, 916 [1999]; *Serrano v. Consol. Edison Co. of New York Inc.*, 146 A.D.3d 405, 406 [1st Dept 2016], *lv. dismissed* 29 N.Y.3d 1118, 83 N.E.3d 851 [1st Dept

2017]). Accordingly, the branch of the motion of Defendants pursuant to CPLR 3212 for summary dismissal of Plaintiff's Labor Law § 240 (1) claim is granted.

Labor Law § 200

Labor Law § 200, provides, in relevant part,

> "All 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."

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" (*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, 143–144 [1st Dept 2012]).

To be held liable under Labor Law § 200 or common-law negligence where the alleged injury arises from the contractor's methods, a construction manager must be found to have exercised supervision or control over the injury-producing work (*see McCrea v. Arnlie Realty Co. LLC,* 140 A.D.3d 427, 429 [1st Dept 2016]; *Conforti v. Bovis Lend Lease LMB, Inc.,* 37 A.D.3d 235, 236 [1st Dept 2007]; *Hughes v. Tishman Const. Corp.*, 40 A.D.3d 305, 306 [1st Dept 2007]; *Dalanna v. City of New York*, 308 A.D.2d 400, 400 [1st Dept 2003]).

"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" (*Cappabianca*, 99 A.D.3d 144, citing *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 9 [1st Dept. 2011]). Whether the general contractor or owner supervised the plaintiffs work is irrelevant (*Minorczyk v. Dormitory Auth. of the State of N. Y.*, 74 A.D.3d 675, 675 [1st Dept 2010]).

Here, Shawmut makes a *prima facie* showing that they did not supervise the injury-producing work. However, Plaintiff raises a question of fact as to this issue through his testimony that a Shawmut employee directed Plaintiff's foreman that the elevator may not be used (Lewkowski Aff., Ex. E, Plaintiff Trans., 38:8-39:11). Plaintiff further testified that he witnessed the same Shawmut employee direct Plaintiff's foreman that materials be brought up the subject stairway (*id.*, 43:2-23). The direction by Shawmut to the trades to not use the elevator and instead to use the stairs in order to transport materials to the penthouse raises a question of fact as to whether Shawmut controlled the aspect of Plaintiff's work which ultimately caused his injury, *i.e.*, the transport of materials between floors. Thus, the branch of Defendants' motion which seeks dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

Moreover, Defendants' moving papers fail to address Plaintiff's allegation that his accident was caused by a dangerous condition on the worksite. Defendants may not, for the first time in their reply, argue that Plaintiff's claim lacks merit (*see Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 [1992] ["the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"]; *see also Gonzalez v. Sun Moon Enterprises Corp.*, 53 A.D.3d 526, 526-527 [2d Dept 2008]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Defendants' motion seeking dismissal of the Complaint as against defendant SoHo Greene Associates LLC is granted. It is further

ORDERED that the Clerk enter judgment accordingly. It is further

ORDERED that the action is severed and continues against defendant Shawmut Woodworking & Supply, Inc.; and it is further

ORDERED that the branch of the motion relating to Shawmut is granted only to the extent that the Labor Law § 240 (1) claim is dismissed, as are allegations relating to Industrial Code § 23-6.1.

ORDERED that counsel for defendants SoHo Greene Associates and Shawmut Woodworking & Supply, Inc. shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: February 2, 2018

Hon. Carol Robinson Edmead, J.S.C

HON. CAROL R. EDMEAD
J.S.C.