Aguilar v City of New York
2018 NY Slip Op 30306(U)
January 17, 2018
Supreme Court, Bronx County
Docket Number: 301790/11
Judge: Joseph E. Capella

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Index #: **301790/11**

JOSE AGUILAR,

Plaintiff,

- against -

THE CITY OF NEW YORK, CITY UNIVERSITY OF NEW YORK, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, and FRATELLO CONSTRUCTION CORP.,

Defendants.

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DECISION/ORDER

Present:
Hon. Joseph E. Capella
J.S.C.

The following papers numbered 1 to 9 read on this motion noticed on June 23, 2017, cross-motion noticed on August 30, 2017, and cross-motion noticed on October 4, 2017, and duly submitted as no. _____ on the Motion Calendar of _____.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	**1**
ANSWERING AFFIDAVIT AND EXHIBITS	**2 - 3, 6 - 9**
CROSS-MOTION AND AFFIDAVITS ANNEXED	**4 - 5**

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION AND CROSS MOTIONS ARE AS FOLLOWS:

Although the undisputed facts were discussed in this court's earlier decision dated January 12, 2018, a quick review is in order. The defendant, City University of New York ("CUNY"), entered into a contract with defendant, Fratello Construction Corp. ("Fratello"), to renovate part of the student center at Bronx Community College. The renovations included installation and/or upgrading of an HVAC system, and Fratello hired the defendant, Conair Corporation ("Conair"), as the mechanical subcontractor, who in turn hired the defendant, Ashlar Mechanical Corp. ("Ashlar"), to do the HVAC work. The plaintiff, an employee of Ashlar, was injured on March 18, 2010, while he and a co-worker were attempting to align a new steam pipe to an old one by tapping the new pipe

with a hammer in order to move it several inches. Without any warning, the new pipe fell onto the plaintiff.

By notice of motion dated May 20, 2017, the plaintiff seeks partial summary judgment (CPLR 3212) on the issue of liability. According to the plaintiff, since he was injured by a falling pipe which had not been secured with any bracing, stays or slings or other safety devices, he is entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). (*Wensley v Argonox*, 228 AD2d 823 [3rd Dept].) The plaintiff notes that the pipe in question weighed over 270 pounds, and he was not provided a necessary securing device, namely a chain block. The defendant, Dormitory Authority of the State of New York ("DASNY"), cross-moves for summary judgment and dismissal of plaintiff's Labor Law §§ 241(6), 200 and common law negligence claims, and also for summary judgment on its common law indemnification claim against Conair. According to DASNY, the subject accident occurred when the clamp that held the pipe in place failed. DASNY argues that since it did not install the clamp, nor did it exercise any supervisory control over the clamp/pipe installation, it could not have been on notice of this alleged dangerous condition. (*Rizzuto v L.A. Wenger*, 91 NY2d 343 [1998].) Based on the aforementioned, DASNY seeks dismissal of plaintiff's Labor Law § 200 and common law negligence claims. As for plaintiff's Labor Law §241(6) claim, DASNY argues that plaintiff's failure to identify a violation of any specific provisions of the Industrial Code warrants dismissal of same. (*Ross v Curtis-Palmer*, 81 NY2d 494 [1993].) Lastly, DASNY argues that since it was not actively negligent, and Conair had the authority to direct, supervise and control the work in question, it should be entitled to common law indemnification (*Perri v Goldbert*, 14 AD3d 681 [2nd Dept 2005]).

In addition to DASNY's cross-motion, the defendant, Fratello Construction Corp. ("Fratello"), cross-moves for summary judgment and dismissal of all of plaintiff's claims. According to Fratello, the beam clamp that broke was part of a hanger connected to an I-beam, a permanent structure, and therefore, not a falling object being hoisted or secured.

(*Fabrizi v 1095*, 22 NY3d 658 [2014].) And in opposition to plaintiff's suggestion that a chain block should have been used for safety purposes, Fratello argues that there is no proof that the use of same was feasible, or would have prevented injury. (*Blake v Neighborhood*, 1 NY3d 280 [2003].) Fratello also notes that plaintiff included the first five subsections of Labor Law § 241 in his complaint (ie, 241(1) - (5)); however, these sections do no apply as they relate to the installation of floors or the safeguarding of specific unrelated items such as elevators. As for plaintiff's Labor Law §241(6) claim, Fratello joins DASNY's argument that plaintiff's failure to identify a violation of any specific provisions of the Industrial Code warrants dismissal of same. (*Ross v Curtis-Palmer*, 81 NY2d 494 [1993].) Fratello also argues that plaintiff's common law negligence and Labor Law § 200[1] claims must be dismissed because Fratello did not create or have actual/constructive notice of the alleged dangerous condition, (*Gordon v American Museum*, 67 NY2d 836 [1986]), nor did it exercise any supervisory control over the work in question. (*Hughes v Tishman*, 40 AD3d 305 [1st Dept 2007].)

It is well-settled that in determining summary judgment (CPLR 3212), the ultimate issue is whether there exists an issue(s) of fact. (*Esteve v Abad*, 271 AD 725 [1st Dept 1947].) Here, the plaintiff's opposition papers dated October 2, 2017, only address his claim for Labor Law § 240(1) relief; therefore, those portions of the cross-motions by DASNY and Fratello seeking dismissal of plaintiff's other claims (i.e., Labor Law §§ 200, 241(1)-(6), and common law negligence) is granted and said claims are dismissed accordingly. As for that portion of the cross-motion by DASNY regarding common law indemnification against Conair; there are still issues of fact as to whether Conair was negligent and/or whether it exclusively supervised/controlled the work site. (*Reilly v DiGiacomo*, 261 AD2d 318 [1st Dept 1999].) Given the aforementioned, that portion of

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[1] Labor Law § 200 codifies the common law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work. (*Rizzuto v LA Wenger*, 91 NY2d 343 [1998].)

DASNY's cross-motion regarding common law indemnification is denied.

We are now left with plaintiff's Labor Law § 240(1) claim. As the Court of Appeals described in *Fabrizi*, (22 NY3d 658), in these falling object cases, the plaintiff must establish a type of hazard contemplated by Labor Law § 240(1), and the failure to use or the inadequacy of, a safety device of the kind enumerated by the statute. In other words, the plaintiff must show more than just an object falling that causes injury. (*Novak v Raymond*, 64 AD3d 636 [2nd Dept 2009].) The plaintiff must show that the object was being hoisted/secured or required some securing for the purpose of the undertaking, and it fell because of the absence or inadequacy of a safety device. (*Id.*) For example, a worker who is injured by falling objects that were part of the permanent structure of a building is not the type of accident covered by Labor Law § 240(1). (*Marin v AP-Amsterdam*, 60 AD3d 824 [2nd Dept 2009].) In the instant action, there appears to be very little doubt that the pipe in question fell when the beam clamp broke. There is also very little doubt that said beam clamp was part of the permanent structure of the building by virtue of its attachment to the I-beam, and not a falling object being hoisted or secured. (*Fabrizi*, 22 NY3d 658; *Marin*, 60 AD3d 824.) As such, Labor Law § 240(1) does not apply to these set of facts.

On the other hand, there does appear to be issues of fact regarding at least two items. The first one being whether the plaintiff was negligent. And when a plaintiff's own negligence is the sole proximate cause of the accident, then there can be no liability under Labor Law § 240(1). (*Robinson v East Medical*, 6 NY3d 550 [2006].) Here, there is some evidence to suggest that in attempting to move the steam pipe, the plaintiff did not strike the pipe but instead struck the hanger directly. This conflicting evidence creates issues of fact as to whether plaintiff's own negligence was the sole proximate cause of the accident. (*Cahill v Triborough*, 4 NY3d 35 [2004].) Secondly, issues of fact exist as to whether a chain block should have been used while attempting to move the steam pipe. Whereas the plaintiff alleges that a chain block should have been provided at

the time of the accident, Ashlar's project supervisor alleges that chain blocks are not used when moving an already installed steam pipe. The project supervisor also alleges that there was not enough space to locate a chain block. Given the aforementioned, issues of fact exist as to whether a chain block should have been used, and if so, whether there was enough space to accommodate same.

Based on the aforementioned, the plaintiff's motion is denied, the cross-motions by DASNY and Fratello are granted and denied in part, and DASNY is directed to serve a copy of this decision/order with notice of entry by first class mail upon all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

1/17/18
Dated

Hon. Joseph E. Capella, J.S.C.