Ferguson v Durst Pyramid LLC
2018 NY Slip Op 32417(U)
September 27, 2018
Supreme Court, New York County
Docket Number: 161274/2014
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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SHONDEL FERGUSON, SHAREMA FERGUSON,

Plaintiff,

- v -

DURST PYRAMID LLC, THE DURST ORGANIZATION INC., HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C.

Defendant.

INDEX NO 161274/2014

MOTION DATE 9/26/18

MOTION SEQ. NO 002

DECISION AND ORDER

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were read on this motion and cross-motion to/for JUDGMENT - SUMMARY.

Based on the foregoing, it is determined that plaintiff's motion for summary judgment is denied; defendants' cross-motion for summary judgment is granted.

Plaintiff Shondel Ferguson, an ironworker employed by non-party subcontractor Enclos Corp. (Enclos) to work on a building located at 625 West 57 Street in the city, state, and county of New York, sustained personal injuries on October 29, 2014, when he fell a few feet to the ground. Plaintiffs move for summary judgment on their claims under Labor Law §§ 240(1), 241(6), and 200. Defendants, who are the owners, Durst Pyramid LLC and The Durst Organization Inc., and the general contractor, Hunter Roberts Construction Group, LLC, (Hunter Roberts) jointly oppose the motion and cross-move for summary judgment dismissing all of plaintiffs' claims.

Facts

Shondel Ferguson (plaintiff) was working with two other ironworkers and the foreman on a platform known as the crane pad on the day of the accident. Plaintiff's job, as a journeyman ironworker, was to uncrate the curtain wall panels for the building, erect them, and attach straps to the panels for the crane to hoist them. Sometimes, he would have to drill holes and attach chokers to the panels (NYSCEF doc no 54 – Ferguson tr at 116-118). At the time of the accident, plaintiff left the crane pad to enter the building to check on the power cord to the sawzall that had lost power. When he returned, he used an inverted five- or six-gallon plastic bucket

to reach the crane pad. The bucket "kicked out" after he placed his right foot on it and about to place his left foot on the crane pad. He fell about four feet to the ground (*id.*, at 119, 124, 127).

Plaintiff testified that the crane pad, about the size of half a football field, was about three and one-half to four feet from the ground. Defendants' expert engineer calculated that the crane pad measured 116 feet long, 24 feet wide, and, at plaintiff's accident location at the south end, 3 feet, 3 inches high. The crane pad at the northeast end was lower at 1 to 2 feet from the ground. The lower section of the crane pad was about 26 feet from plaintiff's accident location (NYSCEF doc no 132 – Lorenz aff at ¶ 5a, e).

Plaintiff claims that while there were stairs available to reach the crane pad, he was instructed by his foreman, Bryan Clark, not to use the stairs but to use the inverted plastic bucket Clark had placed by the north side of the crane pad (*id.*, at 127-128, 131). Plaintiff testified that although there was a staircase on the northwest side of the crane pad, it was cordoned off, and he could not see the stairs because of the crates around the area (*id.*, at 133-134, 137-138). Plaintiff had accessed the crane pad from the east side and did so by stepping "debris, pieces of wood" that were on the ground (*id.* at 133). According to plaintiff, Enclos directed plaintiff's work and the tools he used belonged to Enclos (*id.*, at 125-126). Clark denied instructing plaintiff to use the bucket to climb up to the crane pad but had observed people use the bucket to "go up and down them all the time because there's no stairs, no railings, no stairs." (NYSCEF doc no 57 – Clark tr at 30:5-13).

In contrast, Surendra Ramperschad, the assistant superintendent for defendant Hunter Roberts, averred that there were three points of access to the crane pad at the time of plaintiff's accident – two staircases and a stepdown. Defendants' expert engineer, Bernard Lorenz, through his visit to the site and from the construction activity reports, confirmed that there were two sets of stairs and a stepdown that was on the east side of the crane pad on the date of the accident. The stepdown access was 50 feet from the location where plaintiff used the bucket (NYSCEF doc no 132 at ¶¶ 5a, b, and e; NYSCEF doc nos. 139 and 140). The building of the stairs and the installation of the wooden step for the stepdown were done by non-party Exterior Wall and Building Consultants on October 17, 2014 (NYSCEF doc no 61 – Miller tr at 5, 7, 9, 11-13). There was also testimony that about a ten-foot section of the east side of the crane pad from the north corner was at a lower grade that rose higher at the south end (NYSCEF doc no 55 – Freshnock tr at 36-37).

Ramperschad added that the area where plaintiff fell was cordoned off to workers, and plaintiff, who was just powering the Sawzall, was not an authorized worker in that area (NYSCEF doc no 131 – Ramperschad aff, ¶¶ 8-9, 14). The two areas for Enclos workers to get to the power source inside the building were at the

eastern end of both the north and south sides of the building (NYSCEF doc nos. 55 or 135 – Freshnock tr at 46-47). Defendants also claim that there was no need for plaintiff to step off the crane pad to check the power cord since there were power sources via extension cords on the crane pad, and, according to Clark, the sawzalls were cordless (*id.*, at 45, 81; NYSCEF doc no 137 – Clark tr at 24). Enclos also had plenty of step- and A-frame ladders available to its workers (NYSCEF doc no 131 – Ramperschad aff, ¶ 13).

Discussion

As both sides move for summary judgment, they, as movants, 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. Center*, 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065, 1067 [1979]). Once met, this burden shifts to the opposing party to demonstrate the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 240 (1)

Plaintiff argues that defendants breached their non-delegable duty under Labor Law § 240 (1) and are liable for his injuries because they failed to provide him with a safe means of access to an elevated platform to perform his work. Defendants contend that they fulfilled their duty under Labor Law § 240 (1) in that safe means of access were available and that plaintiff's fall of four feet at most from a bucket does not trigger the protections contemplated by Labor Law § 240 (1), commonly known as the scaffold law.

"Liability may ... be imposed under [Labor Law § 240 (1)] only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 33 [2017] quoting *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal citations omitted]). Liability attaches where there is a significant elevation hazard and protective devices were not afforded to protect against these risks (*O'Brien*, 29 NY3d at 33). The fact that a construction worker fell at a construction site does not in itself trigger the protections under Labor Law § 240 (1).

Plaintiff's work as an apprentice journeyman ironworker was to open the crates of the curtain wall panels that were on the crane pad, erect, and secure them to the crane for hoisting. The crane pad was described as a stable platform where a crane can maneuver about. The crane pad, at the south end where plaintiff fell, is three feet, three inches above the ground (NYSCEF doc no 132 – Lorenz aff at ¶ 5).

Plaintiff's specific activity at the time of the accident was to check on a power cord inside the building. In attempting to climb onto the crane pad at the south end, plaintiff used a five-gallon inverted plastic bucket. This is not the type of elevated risk encompassed by the scaffold law (*see Toefer v Long Island R.R.*, 4 NY3d 399, 408-409 [2011]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]; *Lombardo v Park Tower Mgt. Ltd*, 76 AD3d 497, 498 [1st Dept 2010]).

Plaintiff, of course needs to get onto the crane pad to conduct his work. However, even if the only then-existing staircase was inaccessible, and there's no stairs, no railings, no stairs" as plaintiff claims, plaintiff was unencumbered to walk to the stepdown part fifty feet away or the lower section twenty-six feet away. The fact that plaintiff was near the southeast end and the stepdown was fifty feet away at the northeast end of the crane pad translates to inconvenience to, not to the unavailability of a safe means of access.

In his reply to defendants' opposition, plaintiff submits an affidavit by another co-worker who witnessed the accident (NYSCEF doc no 159). This co-worker, Carl Fumia, asserts that the only access to and from the crane pad was from the south side as the north side staircase was blocked by the crane, and the crates barred access from the east to the west side. And on the south side, only the inverted plastic bucket was available to access the crane pad. Fumia's attestation does not refute the fact that there was a stepdown and a lower section available, even if it was not convenient to plaintiff at that point in time. Fumia attaches a post-accident photograph taken by an unknown party that, as Fumia explains, was defendants' remedial measures. Neither the photograph nor Fumia's comments thereon are accepted nor considered. Plaintiff's Labor Law § 240 (1) claim is dismissed.

Labor Law § 241 (6)

Pursuant to Labor Law § 241(6), owners and contractors are under a nondelegable duty to provide reasonable and adequate protection and safety for workers and comply with specific safety rules and regulations promulgated by Commissioner of Department of Labor. To support a claim under § 241(6), plaintiff must point to a specific violation of particular code specifications and not simply claim non-compliance with general safety standards (*see Comes v New York State Elec. And Gas Corp.*, 82 NY2d 876, 878 [1993] [finding that a plaintiff cannot prevail on a 241(6) cause of action if it alleges only violations of general safety standards and requiring plaintiff to show violations of "concrete specifications imposing a duty on defendant"]).

Plaintiff claims that defendants violated Industrial Code § 23-1.7 – protection from general hazards. Specifically, "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 or access shall be provided." (Industrial Code § 23-1.7 [f]).

The basis of plaintiff's argument on Industrial Code § 23-1.7 is that he was provided with only an upside-down plastic bucket to climb up to the crane pad. This argument fails as there is undisputed evidence that there were alternative safe means to access the crane pad – a stepdown and a lower section of the crane pad at the northeast end of the crane pad that were between twenty-six and fifty feet away from plaintiff's accident location. Plaintiff's Labor Law § 241(6) claim premised on a violation of Industrial Code § 23-1.7 [f] is dismissed.

As for the myriad of other alleged Industrial Code or OSHA violations, plaintiff merely mentions the sections but adds no factual allegations or identify the specific failures by defendants. Failure to do so extinguishes his Labor Law § 241 (6) claim based on those mentioned code violations. And plaintiff does not contest defendants' branch of motion seeking dismissal of the claims under the unspecified Industrial Code and OSHA violations.

Labor Law § 200

Labor Law § 200 codifies the "common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993].) To prevail on a Labor Law § 200 claim, plaintiff must demonstrate that defendant "supervised and controlled the plaintiff's work or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control or created the unsafe condition" (*Torkel v NYU Hosps. Ctr* 63 AD3d 587, 591 [1st Dept 2009] citing *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [2008]). To have supervisory control a contractor must have controlled "how the injury-producing work was performed" (*Hughes v Tishman Constr Corp*, 40 AD3d 305 [1st Dept 2007]). A defendant is not required to prove lack of notice "where the plaintiff failed to claim the existence of notice of the condition" (*Frank v Time Equities*, 292 AD2d 186, 186 [1st Dept 2002].)

Here, plaintiff fails to demonstrate that defendants supervised or controlled the work. Plaintiff testified that at the time of the accident he worked for Enclos, and was overseen by his foreman, Bryan Clark. Indeed, plaintiff testified that it was Clark who instructed him to use the upside-down bucket to access the crane pad. There was no indication that defendants placed the bucket at that location to be used as a step-ladder. Plaintiff's testimony was that Clark placed the bucket at that location for him and his crew to use. Thus, absent any evidence that showing defendants had supervision or control, or created the unsafe condition, or had actual or constructive notice of the unsafe condition, plaintiff failed to prove that defendants violated Labor Law § 200.

Given that plaintiff's substantive claims under Labor Law §§ 200, 240(1), and 241(6) are dismissed, co-plaintiff Sharema Ferguson's derivative loss of consortium claim is likewise dismissed (*see Kornicki v Shur*, 132 AD3d 403 [1st Dept 2015]).

Accordingly, it is ORDERED that plaintiff's motion for summary judgment on his claims under Labor Law §§ 200, 240(1) and 241(6) is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment on plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6) is granted; and it is further

ORDERED that plaintiffs' complaint is dismissed. The Clerk of the Court is directed to enter judgment in favor of defendants.

This constitutes the decision and order of the court.

9/27/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
AATLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF AATROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY AATOINTMENT		REFERENCE