Mosquera v Term Fulton Realty Corp.
2018 NY Slip Op 32997(U)
November 27, 2018
Supreme Court, New York County
Docket Number: 157650/2016
Judge: Carol R. Edmead

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

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RODRIGO MOSQUERA,

Plaintiff,

-against-

TERM FULTON REALTY CORP., 56 FULTON STREET LLC, and BRAVO BUILDERS, LLC,

Defendants.

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Index No. 157650/2016
Motion Seq. No. 001

DECISION AND ORDER

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

In a Labor Law action, defendants Term Fulton Realty Corp. (Term Fulton), 56 Fulton Street LLC (56 Fulton), and Bravo Builders, LLC (Bravo) (collectively, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. Plaintiff Rodrigo Mosquera (Plaintiff, or Mosquera) opposes the motion and cross-moves against Defendants for partial summary judgment on his Labor Law § 240 (1) and Labor Law § 241 (6) claims.

BACKGROUND

Plaintiff alleges that Defendants are liable for injuries he received on June 8, 2016. A carpenter working at the time for nonparty Park Side Construction Builders Corp. (Park Side) on the construction of a new building at 56 Fulton Street in Manhattan, Plaintiff alleges that he was injured when he attempted to prevent a jack from falling off the subject building.

At his deposition, Plaintiff testified that he was working on the fifth or sixth floor of the building at the time of the accident (Plaintiff's tr at 24, NYSCEF Doc. No. 23). More specifically, Plaintiff stated that "[w]hen one floor is constructed all the material is taken down" and then set up again to aid in construction of the subsequent floor (*id.*). This material includes plywood, held up by jacks, that serves as a makeshift ceiling or preliminary ceiling (*id.* at 25-27).

These jacks extend from floor to ceiling (*id.* at 28) and are telescopic in the sense that they extend up or down (30-31). A pin secures the jacks at the desired height for a given ceiling (*id.* at 31). Plaintiff did not take out the pin prior to his accident, but hit a screw on the jack with a hammer, to loosen it, which is a preliminary step in taking down the jack (*id.* 32-33). The jack started to move, as if it were going to fall off the side of the building (*id.* at 33-34). Plaintiff also testified that the pin which locks the jack into place flew out prior to the jack moving (*id.* at 35). He testified that he would not have been injured if the pin had not come out (*id.* at 36). The pin is normally removed after the screws are loosened and he had never had a pin fly out before and he does not know why it happened prior to his accident (*id.* at 36-37).

Mosquera testified that, had he not intervened when the jack moved, the jack would have fallen off the building to an area with an electric generator where his co-workers were doing work at the ground level (*id.* at 34). "[R]ather than having it hit a co-worker or that generator … I tried to grab it" (*id.*). This intervention, Plaintiff testified, redirected the jack, so that it landed on the floor he was working on rather than the ground several stories below (*id.* at 34-35). Mosquera testified that the head of the jack "is heavy" and that it landed on his hand, injuring him (*id.* at 34).

Plaintiff filed his Complaint on September 13, 2013 (NYSCEF doc No. 1). It alleges that Defendants are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1), 240 (2), 240 (3), and 241 (6) (*id.*).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v*

Eden Cent. School Dist., 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Plaintiff's opposition to Defendants' motion for summary judgment dismissing his Labor Law § 241 (6) claim, and for his own application for partial summary judgment as to liability on

the same claim is premised on alleged violations of two Industrial Code violations: 12 NYCRR 23-1.7 (a) (1) and 12 NYCRR 23-1.27 (b). Plaintiff abandons reliance on all other Industrial Code violations (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]). Thus, the branch of Defendants' motion seeking denial of all Industrial Code violations other than 12 NYCRR 23-1.7 (a) (1) and 12 NYCRR 23-1.27 (b) must be granted.

12 NYCRR 23-1.7 (a) (1)

12 NYCRR 23-1.7 (a) (1) is entitled "Protections from general hazards; Overhead hazards," and it provides:

> "Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

Courts have held that this provision is sufficiently specific to serve as a predicate to liability under section 241 (6) (*Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [1st Dept 2007] [partial summary judgment as to liability was appropriate where plaintiff was hit by a pipe that fell from several stories above him while he stood in area where there was a risk of falling debris that lacked the protections called for by 12 NYCRR 23-1.7 (a) (1)]).

While Plaintiff establishes the specificity of the regulation, he devotes no arguments in his memorandum of law as to why the regulation is applicable, except to assume, in conclusory terms, that it is. As Plaintiff has not established that he was standing in an area that is subject to the is risk of falling debris, and that the realization of this risk proximately caused his accident, he fails to establish that he is entitled to summary judgment as to liability on his section 241 (6) claim based on the violation of the 12 NYCRR 23-1.7 (a) (1).

In Defendants' motion, they argue that Plaintiff's allegations under 12 NYCRR 23-1.7 (a) (1) should be dismissed as there is no evidence in the record that the area where Plaintiff was working was one that is normally exposed to falling material. As Plaintiff fails to even address this argument, or present any evidence that Plaintiff was standing in such an area, the branch of Defendants' motion that seeks dismissal of Plaintiff's allegations relating to 12 NYCRR 23 1.7 (a) (1) must be granted.

12 NYCRR 23-1.27 (b)

12 NYCRR 23-1.27 is entitled "Mechanical, hydraulic and pneumatic jacks." Subsection b of the regulation is entitled "Overtravel," and it provides: "Every jack shall be provided with a positive stop to prevent overtravel." it has been held to be sufficiently specific to serve as a basis for Labor Law section 241 (6) liability (*Minter v Amigone*, 2003 WL 260733448 [Sup Ct, Erie County 2003]). Moreover, the Appellate Division has found that other subdivisions of 12 NYCRR 23-1.27 are sufficiently specific (*see e.g., Wegner v State Street Bank & Trust Co. of Connecticut Nat. Ass'n*, 298 AD2d 211 [1st Dept 2002] [but holding that the provision was inapplicable in the circumstances before the Court]; *Smith v LeFrois Development, LLC*, 28 AD3d 1133 [4th Dept 2006]). Here, while reference to this regulation is scarce in published Labor Law decisions, it is clear that it requires compliance with concrete specifications and is therefore sufficiently specific to sustain liability under section 241 (6).

Defendants do not address this regulation in their moving papers. In support of his cross motion for summary judgment, Plaintiff notes that this regulation is listed in its Second Supplemental Bill of Particulars, dated August 27, 2018. Plaintiff argues that the regulation requires that "positive stops" be functioning so as to "prevent overtravel." As the pin here did not function properly, and led to the collapse of the jack, Plaintiff argues that Defendants' have

violated 12 NYCRR 23-1.27 (b).

In its opposition to the cross motion, Defendants argue that Plaintiff's allegations relating to this regulation should be dismissed on procedural and substantive. The procedural arguments are unpersuasive as courts regularly allow plaintiffs to supplement section 241 (6) claims by adding additionally allegedly violated Industrial Code regulations (*see Cordeiro v TS Midtown Holdings*, LLC, 87 AD3d 904 [1st Dept 2011]).

As to the substantive arguments, Defendants argue that the regulation is not applicable because the jack in question was not mechanical, hydraulic or pneumatic jack. Defendants provide no evidence, aside from their attorney's conclusion on this matter. The memorandum of law makes an oblique reference to Plaintiff's deposition testimony, which was translated, and at which Plaintiff described the jack as being telescopic. This characterization does not rule out the possibility that the jack was mechanical, hydraulic, or pneumatic, as such jacks presumably also go up and down. Thus, Defendants fail to make a *prima facie* showing of entitlement to judgment. Accordingly, their application for summary judgment dismissing Plaintiff's allegations under 12 NYCRR 23-1.27 (b) must be denied. More broadly, Defendants application for summary judgment dismissing Plaintiff's Labor Law section 241 (6) claim must be denied.

However, there is a question of fact as to whether a violation of this regulation was a proximate cause of Plaintiff's accident. That is, it is unclear from the evidence presented on this motion whether Defendants' failed to provide a "positive stop" for a mechanical, hydraulic and pneumatic jack and that failure proximately caused Plaintiff's accident. Thus, the branch of Plaintiff's cross motion that seeks partial summary judgment on his section 241 (6) claim based on a violation of 12 NYCRR 23-1.27 (b) must be denied. More broadly, the branch of Plaintiff's cross motion seeking partial summary judgment as to liability on its Labor Law 241 (6) claim

must be denied.

II. 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 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 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 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Defendants argue, in support of summary judgment dismissing Plaintiff's section 240 (1), that the height differential was *de minimis* and that the jack did not fall as a result of an absent or inadequate safety device. Plaintiff, in support of his cross motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim argues that the floor to ceiling jack was heavy enough to represent a significant gravity-related risk and that the lack of net on the side of the building to prevent it from falling proximately caused Plaintiff's accident.

In support of their argument, Defendants cite *to Wilinski v 334 E. 92nd Hous. Dev. Fund*

Corp. (18 NY3d 1 [2011]). The plaintiff in *Wilinsky* was injured when an unsecured, 10-foot long pipe fell on him during a demolition (*id.* at 4). Applying the then recently-articulated principle of *Runner*, the Court of Appeals held that the "plaintiff is not precluded from recovery under section 240 (1) simply because he and the pipes that struck him were on the same level" (*id.* at 10). Thus, the Court reversed the Appellate Division's decision that granted the defendants summary judgment dismissing the section 240 (1) claim (*id.* at 11). However, the Court held that there was an issue of fact as to whether the absence of a protective device was the cause of Plaintiff's accident (*id.* ["(p)laintiff asserts, but does not demonstrate, that protective devices such as blocks or ropes could have been used to secure the pipes and prevent the accident. Defendants assert, but fail to demonstrate, that no protective devices were called for]). Thus, the Court denied summary judgment applications of both the plaintiff and the defendants on the issue of liability under section 240 (1).

Plaintiff also cites to *Wilinsky* in support of his application for partial summary judgment on his section 240 (1) claim. However, *Wililnsky* would seem to cut against both Plaintiff and Defendants' arguments for summary judgment. Plaintiff asserts that protective netting would have prevented the accident, as he would not have had to risk his own safety to prevent the jack from falling several stories to a work area below if netting was protecting against that same risk. However, Plaintiff provides no expert opinion that netting should have been used in this circumstance. Similarly, Defendants provide no expert opinion to support their contention that no safety devices were appropriate.

Here, as in *Wilinsky*, Plaintiff faced a gravity-related risk. As in *Wilinsky*, neither Plaintiff nor Defendants have demonstrated that a protective device would or would not have prevented Plaintiff's accident. Thus, both applications for summary judgment must be denied.

A recent Appellate Division case cited by Plaintiff, *Bonaerge v Leighton House Condominium* (134 AD3d 648 [1st Dept 2015]), underlines why both motions must be denied. The plaintiff in *Bonaerge* was injured when a steel beam in the shape of the letter "U" slipped as co-workers were lowering the beam into his arms (*id.* at 649). The Court held that summary judgment as to liability in favor of the plaintiff was warranted. It reasoned that the trial court had "properly found a connection between the object's inadequately regulated descent and plaintiff's injury" (*id.* [internal quotation marks and citation omitted]). The Court further reasoned that "[b]y submitting an expert affidavit, plaintiff met his initial burden of showing that the beam required securing for the purposes of the undertaking and that statutorily enumerated safety devices could have prevented the accident (*id.* [internal quotation marks and citation omitted]).

Here, neither Plaintiff nor Defendants have met their initial burden. Thus, as there is a question of fact as to whether the absence of a safety device caused Plaintiff's accident, both Plaintiff and Defendants' applications for summary judgment on the issue of section 240 liability must be denied.

III. Labor Law § 200 and Common-law Negligence

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 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

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York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, Defendants argue that the accident was caused by the methods and materials of Plaintiff and that they did not have supervisory control over his work. In support of this argument, Defendants point to a portion of Plaintiff's deposition transcript in which he testifies

that he took instruction only from someone named Juan who, Plaintiff thought, was also a Park Side employee (NYSCEF doc No. 23 at 17-18).

In opposition, Plaintiff challenges the scope of "supervisory authority" as defined by *Hughes*. That is, Plaitniff argues that general authority to supervise the work is sufficient in this context. In support, Plaintiff cites to *Burke v. Hilton Resorts Corp.* (85 AD3d 419 [1st Dept 2011]), which did not interpret the scope of supervisory authority in the context of section 200 analysis, but instead in the context of statutory agency under the Labor Law. *Hughes* and *Burke* show that the First Department interprets the term "supervisory authority" differently in the context section 200 analysis and the analysis of statutory agency under the Labor Law.

Plaintiff also cites to a Second Department case, *Grasso v New York State Thruway Auth.* (159 AD3d 674 [2d Dept 2018]). *Grasso* interprets the term "supervisory control" in the section 200 context as encompassing general supervisory authority:

> "The requisite supervision or control exists for Labor Law § 200 purposes when the property owner bears responsibility for the manner in which the work is performed. The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right"

(id. at 678).

The clear conflict between *Grasso* and *Hughes* represents a split between the Second Department and the First Department. While the First Department may decide to adopt the *Grasso* and reject its own definition of "supervisory control" in *Hughes*, or the Court of Appeals may settle the split, but this Court is not at liberty to do so and must follow the First Department holding in *Hughes*. Accordingly, the court rejects Plaintiff's argument that general authority to supervise the work is sufficient to sustain liability in a methods-and-materials section 200 claim.

However, the court must nevertheless deny Defendants application to dismiss Plaintiff's section 200 claim as Defendants' fail to make a *prima facie* showing. Defendants rely on

Plaintiff's testimony as to who he relied on for instruction. That testimony was equivocal as Plaintiff was not sure who "Juan" worked for. Such equivocal testimony may not be the basis of summary judgment. Moreover, this appears to be the "rare" hybrid cases in which "both theories of liability may be implicated" (*Grasso*, 159 AD3d at 678 [internal quotation marks and citation omitted]). In the 240 (1) context, Plaintiff has argued that the absence of netting on the side of the building was a defective condition that proximately caused his accident. While it is a question of fact whether it was a defective condition, Defendants have provided no evidence that they did not have actual or constructive notice of the absence of such netting (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014]). Thus, as Defendants fail to make a *prima facie* showing as to the lack of supervisory control or as to the lack of the alleged defect on the premises, their application for dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted only to the extent that Plaintiff's allegations relating to Industrial Code violations, except for those allegations relating to 12 NYCRR 23-1.27 (b) are dismissed; and it is further

ORDERED that the remainder of Defendants' motion is denied; and it is further

ORDERED that Plaintiff's cross motion for partial summary judgment on its Labor Law §§ 240 (1) and 241 (6) claims is denied; and it is further

ORDERED that counsel for Defendants is to serve a copy of this decision, along with notice of entry, on all parties within 15 days of entry.

Dated: November 27, 2018

ENTER:

Hon. CAROL R. EDMEAD, JSC

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