Alvarez v 210 Flatbush Ave. LLC
2018 NY Slip Op 33250(U)
December 14, 2018
Supreme Court, New York County
Docket Number: 506406/2014
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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REMIGIO ALVAREZ,

Plaintiff,

-against-

210 FLATBUSH AVENUE LLC, PINTCHIK, INC., and CORBEL CONSTRUCTION CO., INC.,

Defendants.

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CORBEL CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

S.K. PIPING & HEATING CORP.,

Third-Party Defendant.

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DECISION / ORDER

Index No. 506406/2014
Motion Seq. No. 11, 12
Date Submitted:10/25/18
Cal No. 1, 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants 210 Flatbush and Pintchik's motion and plaintiff's cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	190-206
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	208-212
Reply Affirmations.....	235, 237

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of plaintiff's fall from an A-frame ladder at a construction site. Plaintiff alleges violations of Labor Law §§ 240(1), 241(6), 200

and common law negligence.

Plaintiff was employed by third-party defendant S.K. Piping & Heating Corp., which was a plumbing subcontractor involved in the renovation of two apartments in a building at 210 Flatbush Avenue owned by defendant 210 Flatbush Avenue LLC. Defendant and third-party plaintiff Corbel Construction Co., Inc. was the general contractor. Their work contract was with defendant Pinchik Inc. (Exhibit Q to plaintiff's cross motion). Counsel represents both moving defendants (all defendants except Corbel) and does not ask to separate them and dismiss one as an improper party.

At the time of his accident, plaintiff was the only S.K. Piping employee at the job site. According to his EBT testimony, his helper did not come to work that day. He had been working at the job site for about three weeks, and he had been working for S.K. Piping for about four years. He had used the ladder during the first week at this site, to install the pipe he was now asked to shorten. At that time, he had a helper, who held the ladder while he was on it. On the day of the accident, April 4, 2014, plaintiff was standing on the 7th step of a 10-foot A-frame aluminum ladder provided by his employer and was attempting to cut an overhead pipe (a cast iron three inch diameter waste line pipe) with a corded "Sawzall," (a reciprocating saw) when the ladder "slipped" to the right, causing both plaintiff and the ladder to fall.

Defendants contend that they are entitled to summary judgment dismissing the complaint. They argue that the Labor Law § 200 and common law negligence claims should be dismissed because they had no notice of any dangerous condition in the means and methods of plaintiff's work or at its premises, nor did they direct, control or supervise plaintiff's work. They contend that the Labor Law § 240(1) claim should be dismissed

because plaintiff was provided with a 10 foot A-frame ladder, which was an appropriate safety device for the task, as attested to by their expert, Andrew Yarmus, P.E., and that plaintiff admitted that the ladder was stable and locked in place before he climbed up. They maintain that a fall from a ladder does not in itself establish that proper protection was not provided and that there is no evidence of any defect in connection with the ladder or with the premises. Movants also contend that the record lacks the requisite predicate evidence to support plaintiff's clams under Labor Law § 241(6), as the cited sections are either too general to support a Labor Law § 241(6) claim, are inapplicable to the subject accident, or were not violated.

Plaintiff contends that he is entitled to partial summary judgment on liability on his Labor Law § 240(1) claim based upon his expert's opinion (exhibit P) that Labor Law § 240(1) was violated because plaintiff should have been provided with a scaffold, scissor lift or other safety device instead of a ladder. In addition, plaintiff contends that defendants violated Industrial Code section 12 NYCRR 23-1.21(b)(4)(ii) because plaintiff was required to use a ladder on a concrete floor, which is always considered to be a slippery surface for a ladder, and thus the ladder had to be secured, but he had no helper to hold the ladder that day, and that defendants had constructive notice of the need to use a ladder on the concrete floor, which constitutes a dangerous premises condition and a violation of Labor Law § 200 and also demonstrates negligence under the common law.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial (*Zuckerman v City of New York*,

49 NY2d 557, 562 [1980]).

The court finds that defendants have established their entitlement to summary judgment dismissing the Labor Law §§ 241(6), 200 and common law claims and that plaintiff has failed to raise an issue of fact to the contrary. The court also finds that plaintiff has established his entitlement to summary judgment on liability on his Labor Law § 240(1) claim, and defendants have failed to raise an issue of fact to overcome plaintiff's prima facie case for summary judgment on this claim.

Labor Law § 240(1)

"Labor Law § 240(1) imposes a non-delegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992] [citations omitted]). This statutory duty is not diminished by a worker's contributory fault (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), and is imposed regardless of whether the owner, general contractor, or statutory agent with the authority to control actually exercises supervision or control over the plaintiff's work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). "Proper protection" requires that the device must be appropriately placed or erected so that it would have safeguarded the employee (*see Bland v Manocherian*, 66 NY2d 452, 460 [1985]), and that the furnished device itself must be adequate to protect against the hazards entailed in the performance of the particular task to which the employee was assigned (*see Bland v Manocherian*, 66 NY2d at 461; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996] ["Labor Law § 240(1) requires that safety devices such as ladders be so

'constructed, placed and operated as to give proper protection' to a worker"]).

The plaintiff has established his entitlement to partial summary judgment on liability as to Labor Law § 240(1). While the competing expert affidavits would generally raise an issue of fact as to whether plaintiff was provided with an adequate safety device with the provision of an A-frame ladder, the Court of Appeals explained in *Blake v Neighborhood Hous. Serv. of New York City, Inc.* (1 NY3d 280, 289 n 8 [2003]) as follows:

> In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, we have (ever since *Stewart v Ferguson*, 164 NY 553 [1900], *supra*) continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. *See Panek v County of Albany* (99 NY2d 452, 458 [2003] [summary judgment appropriate for the plaintiff where it was uncontroverted that a ladder collapsed beneath him, causing the fall]); *Styer v Walter Vita Constr.* (174 AD2d 662 [2d Dept 1991]); *Olson v Pyramid Crossgates Co.* (291 AD2d 706 [3d Dept 2002]). Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]).

(*See also Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] ["Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials"]).

Thus, while the mere fact that a worker fell from a ladder is insufficient to establish "that the 'proper protection' required by Labor Law § 240(1) was not provided" (*Avendano v Sazerac, Inc.*, 248 AD2d 340, 341 [2d Dept 1998], cit*ing Basmas v J.B.J. Energy Corp.*, 232 AD2d 594, 595 [2d Dept 1996]), a fall from a ladder that is unsecured and slips out from underneath an injured plaintiff, causing him to fall, establishes prima facie liability under Labor Law § 240(1) (*see Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598 [2d

Dept 2005], *citing Loreto v 376 St. Johns Condominium*, 15 AD3d 454 [2d Dept 2005]; *Blair v Cristani*, 296 AD2d 471 [2d Dept 2002]; *Guzman v Gumley-Haft, Inc.*, 274 AD2d 555 [2d Dept 2000]). Indeed, the situation here, where the ladder slipped and fell causing the plaintiff to fall while plaintiff was attempting to do the assigned task, is distinguishable from the cases upon which defendants rely, where workers fell from a standing ladder (*see e.g. Hugo v Sarantakos*, 108 AD3d 744 [2d Dept 2013] ["plaintiff, while standing on the second-highest rung of a 24-foot extension ladder . . . lost his balance and fell to the ground"]; *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 803 [2d Dept 2013] [plaintiff, who was working on a ladder, "lost his balance and fell to the ground"]; *Gaspar v Pace Univ.*, 101 AD3d 1073 [2d Dept 2012] ["In an effort to dislodge the mask from the cable, the injured plaintiff shook his head back and forth, during which time he lost his balance and fell from the ladder"]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 [2d Dept 2008] ["plaintiff allegedly was injured when he fell off an approximately 20-foot long ladder he was using to access the roof of the defendants' building"]; *Delahaye v Saint Anns Sch.*, 40 AD3d 679, 681 [2d Dept 2007] ["plaintiff allegedly was injured when he fell off a ladder while performing drywall taping work"]).

Plaintiff's expert, Kathleen V. Hopkins, R.N., CSSM, states that plaintiff's accident was caused by the effects of gravity, that Labor Law 240(1) is applicable and was violated, that the plaintiff had not received ladder safety training, but more importantly, "the defendants failed to furnish or erect or cause to be furnished or erected scaffolding, hoist such as a scissor lift, stays, blocks, braces, irons, ropes or other devices that were so constructed, placed and operated as to give proper protection to the plaintiff." While the ladder may have been sufficient protection with a helper to hold the ladder, plaintiff was

required to work alone, and in this circumstance, using a reciprocating saw, which had to be held with both hands and which vibrates, required, in the expert's opinion, a more secure device for plaintiff to stand on.

Thus, plaintiff has made a prima facie showing of his entitlement to summary judgment based upon the failure of the ladder to support him without slipping while he was doing the required task. Defendants have failed to raise an issue of fact to the contrary.

Labor Law § 200

The use of an A-frame ladder at the time of the accident was a matter of the means and methods of the plaintiff's work, which was work that the moving defendants did not control or supervise, so the Labor Law § 200 and common law claims must be dismissed (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [implicit precondition to common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work that Labor Law § 200 codifies is that the party charged with that responsibility has the authority to control the activity bringing about the injury]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505-506 [1993] [where the dangerous condition arises from a subcontractor's methods or materials, recovery against the general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation]). That is, where the injured worker's *employer* provides the allegedly defective equipment, the analysis turns on whether the defendant property owner had the authority to supervise or control the work (*see Ortega v Puccia*, 57 AD3d 54, 61-62, 866 N.Y.S.2d 323 [2d Dept 2008]).

Plaintiff has not overcome the motion by raising any issue of fact on the issue of

supervision and control, as he does not aver that the defendants supervised or controlled his work and instead argues that the accident involved a premises defect at the property, that is, a concrete[1] floor. However, the fact that the floor was made of concrete does not make it defective or inherently dangerous.

Labor Law § 241(6)

Labor Law § 241(6) imposes a non-delegable duty upon owners and general contractors to comply with applicable Industrial Code provisions, which are regulations which mandate compliance with stated specifications (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502, 505 [1993]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300 [1978]). The interpretation of an Industrial Code regulation and the determination whether a particular condition is within the scope of the regulation presents a question of law for the court (*see Messina v City of New York*, 300 AD2d 121, 122 [1st Dept 2002]). To establish liability under Labor Law § 241(6), a plaintiff must demonstrate a violation by defendant of an Industrial Code regulation mandating compliance with a specific, positive command (*Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]). A violation does not impose absolute liability on the defendant, but may be considered in evaluating the negligence of the parties (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 522 [1985]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 349-350). Upon proof of negligence, other statutorily responsible parties may become vicariously liable without regard to fault on their part (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at

[1] The parties use the words "cement" and "concrete" interchangeably, but cement is a component of concrete, which is made by mixing cement with water and sand, gravel or crushed stone.

502, n 4). Further, unlike Labor Law § 240(1), comparative negligence may be considered in a §241 (6) claim. (see *Misicki v Caradonna*, 12 NY3d at 515; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350; *Maza v University Ave. Dev. Corp.*, 13 AD3d at 66 ["Negligence on plaintiff's part may require an apportionment of liability but does not absolve defendants of their own liability under § 241(6)"]).

Defendants' attorney avers [¶52] that this section of the Industrial Code is inapplicable as there is no evidence that the floor where plaintiff placed the ladder was slippery. She notes that plaintiff testified that he checked the ladder after placing it on the floor and it was stable [EBT Page 66].

Plaintiff counters that the use of the A-frame ladder on a concrete floor was a violation of Industrial Code 12 NYCRR 23-1.21(b)(4)(ii)[2] because a concrete floor is inherently slippery. Plaintiff's expert, Kathleen V. Hopkins, R.N., CSSM, who did not inspect the floor in question, states, with regard to Labor Law §241(6), that "in construction and demolition, concrete is always considered to be a slippery surface for any ladder. Such a stepladder is always required to be secured in some manner but the stepladder in this case was not secured. This violation of Industrial Code Rule §23-1.21(b)(4)(ii) was a direct substantial and proximate cause of the plaintiff's accident." The court finds that her opinion that "concrete is always considered to be a slippery surface for any ladder" is unsupported by any evidence in the record, is not supported by any New York decisional law, nor is there any evidence that the concrete floor in these premises actually was slippery.

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[2]§ 23-1.21 Ladders and ladderways (b) General requirements for ladders. (4) Installation and use. (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

The United States Occupational Safety and Health Administration (OSHA) defines slippery surfaces as including, but not limited to, concrete surfaces that are constructed so they cannot be prevented from becoming slippery (29 C.F.R. § 1926.1053(b)(7)). Thus, a concrete floor can be a slippery surface under OSHA, but is not always slippery. (*See Melchor v Singh*, 90 AD3d 866, 866 [2d Dept 2011].) This OSHA regulation states that if a floor is slippery, a ladder should be secured or provided with slip-resistant feet, but slip resistant feet "shall not be used as a substitute for care in placing, lashing or holding a ladder that is used upon slippery surfaces." However, not only is an allegation of an OSHA violation not a basis for a Labor Law 241(6) claim, as a matter of law, but there is, as stated above, no evidence in the record that this floor was in fact slippery.

It is further noted that there was no evidence that the ladder was placed on an unstable surface. (*Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 462 [2d Dept 2008].) Plaintiff testified that he had used this same ladder at the same job site on a prior date, and that at no time did there seem to be anything wrong with it (*see e.g. Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 [1st Dept 2013]). He testified that before he used the ladder, he checked that it was stable [EBT Page 66]. He was not asked if the ladder had rubber feet at his deposition, so this information is not known. (*See Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014].)

Thus, the court concludes that defendants have established, as a matter of law, that this regulation was not violated and plaintiff has failed to overcome the motion and raise an issue of fact to the contrary. (*See Sochan v Mueller*, 162 AD3d 1621, 1624 [4th Dept 2018].)

Plaintiff has abandoned reliance on the remaining Industrial Code provisions cited

in his bill of particulars (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion or on appeal]). Consequently, the plaintiff's Labor Law § 241(6) claim must be dismissed.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the plaintiff's Labor Law §§ 241(6), 200 and common law negligence claims are dismissed, and it is further

ORDERED that plaintiff's cross motion is granted to the extent that plaintiff is granted partial summary judgment on the issue of liability against defendants 210 Flatbush Avenue LLC, and Pintchik, Inc. on the cause of action under Labor Law § 240(1).

This constitutes the decision and order of the court.

Dated: December 14, 2018

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court