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

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PHILIP MARK and LINDA MARK,

Plaintiff,

-against-

JUDITH D. BELLACH and CONTI OF NEW YORK, L.L.C.,

Defendants.

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Index No. 159941/13
Motion Seq. Nos. 003, 004,

DECISION AND ORDER

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

In a Labor Law action, Plaintiffs Philip Mark (Plaintiff or Mark) and Linda Mark move, pursuant to CPLR 3212, for partial summary judgment as to liability against defendants Judith Bellach (Bellach) and Conti of New York, L.L.C. (Conti) (motion seq. No. 003). Bellach and Conti move for summary dismissing the complaint (motion seq. No. 004). The motions are consolidated for disposition.

BACKGROUND

This action arises from remediation work done in the aftermath of Hurricane Sandy. In response to the damage caused by that storm in 2012, the New York City Department of Environmental Protection set up a "Rapid Repair Program" to provide heat and electricity to homes damaged by the storm. Bellach is the owner of one such home, located at 255 Freeborn Avenue in Staten Island. The City of New York contracted with Conti to serve as the general contractor for this project. Conti subcontracted some of the electrical work to Plaintiff's employer, Walsh Electric.

On January 17, 2013, Plaintiff was directed to remove and replace the electrical fixtures and wiring in Bellach's basement. Plaintiff described the basement as being strewn with debris,

such as toasters and bottles, and the floor being "sandy and wet and mud on the floor" (Plaintiff's tr at 56, NYSCEF doc No. 52). To do this work, Plaintiff used a ladder. At one point, while descending from the ladder, Plaintiff alleges that he slipped on mud and sand (*id.* at 71). He grabbed onto the ladder, which then fell into a hole leading to a sub-basement, while Plaintiff fell on a "pad to the left of the stairs (*id.*)." As he fell, Plaintiff alleges that he hit his head and back against a wall, injuring himself.

Mark filed the complaint on October 29, 2013, alleging that defendants are liable under Labor Law § 240 (1) and 241 (6), as well as common-law negligence and Labor Law § 200. Plaintiff Linda Mark brings derivative claims for loss of her husband's services.

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. Claims Against Bellach

Bellach submits an affidavit in which she states that she is the owner of the subject property located at 255 Freeborn Street in Staten Island, and that the property "has always been a single family dwelling" (NYSCEF doc No. 63, ¶ 1). Bellach also states that she had to move out of her home for a year following Hurricane Sandy while repairs were done pursuant to the Rapid Repair Program (*id.*, ¶ 3). Moreover, Bellach stated that she did not hire any of the contractors,

control their work, or provide any materials for the work (*id.*, ¶ 4).

Thus, Bellach argues that she fits within the exemption from liability under the Labor Law for owners of one- to two-family dwellings who "did not direct or control the work that allegedly caused the plaintiff's injuries" (*Pacheco v Halstead Communications, Ltd.*, 90 AD3d 877, 878 [2d Dept 2011]).

Plaintiff, in opposition, concedes that Bellach qualifies for this exception and explicitly withdraws all claims against her against. Accordingly, the branch of Defendants' motion that seeks dismissal of all claims as against Bellach is granted.

II. 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).

Here, Plaintiff's application for summary judgment is based on alleged violations of two Industrial Code provisions: 12 NYCRR 23-1.7 (d) and 12 NYCRR 1.7 (b).

12 NYCRR 23-1.7 (d)

12 NYCRR 23-1.7 is entitled "Protection from general hazards" and its subsection d is entitled "Slipping hazards." That subsection provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing"

Courts have held that this regulation is sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g. Stier v One Bryant Park LLC*,113 AD3d 551 [1st Dept 2014]). Here, Plaintiff argues that argues that his testimony that he slipped on sand and mud is sufficient to show that Conti violated 12 NYCRR 23-1.7 (d).

Here, Plaintiff makes a *prima facie* showing that a violation 12 NYCRR 23-1.7 (d) was a proximate cause of his accident. In opposition, Conti fails to address this provision of the Industrial Code. Accordingly, the branch of Plaintiff's motion that seeks summary judgment on his Labor Law section 241 (6) claim against Conti must be granted. As a corollary, Conti's application for dismissal of Plaintiff's section 241 (6) must be denied. For the sake of completeness, the court will also analyze 12 NYCRR 23-1.7 (b) (1).

12 NYCRR 23-1.7 (b) (1)

Subsection (b) (1) of 12 NYCRR 23-1.7 is entitled "Falling hazards; Hazardous openings and it provides:

"(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
(ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.
(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

(a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
(b) An approved life net installed not more than five feet beneath the opening; or
(c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Courts have held that this regulation is sufficiently specific to serve as a predicate to Section 241 (6) liability. Plaintiff argues that the opening to the sub-basement is clearly covered by the regulation as it was three-feet wide and went three steps down. Defendant argues, essentially, that any violation of the statute was not a proximate cause of Plaintiff's accident, as Plaintiff did not fall in the hole. In reply, Plaintiff argues that the opening played a role in Plaintiff's accident, as the ladder fell in the sub-basement opening as he grasped on to steady himself, which caused Plaintiff to fall.

Here, the opening in question was hazardous and the absence of protections shows a violation of the regulation. However, there is a question of fact as to whether the violation was a proximate cause of Plaintiff's accident. Thus, Defendants are not entitled to dismissal of Plaintiff's allegations under this regulation; nor is Plaintiff entitled to summary judgment based on a violation of this regulation. Finally, the branch of Defendants motion that seeks dismissal of all allegations relating to violations of Industrial Code provisions other than 12 NYCRR 23-1.7

(d) and 12 NYCRR 23-1.7 (b) is granted, as Plaintiff has effectively abandoned reliance on those regulations (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

III. 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]).

Plaintiff argues that a violation of the statute is present, as the Plaintiff was working on an unsecured ladder. Plaintiff cites, among others, to *Montalvo v J. Petrocelli., Inc.*, which held that the statute is violated when "safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]).

Defendants argue that Plaintiff's accident was a slip and fall rather than a fall from a

height. Defendants also argue, unpersuasively, that Plaintiff was the sole proximate cause of his own accident despite the absence of any evidence that Mark disregarded a safety directive (see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010] [holding that a worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident"]).

Here, a statutory violation is present. An unsecured ladder placed on a slippery floor covered with sand and mud is an inadequate protection for a worker who is subject to a gravity related risk, as Plaintiff was when he mounted the ladder to do electrical work on the ceiling (*see Bruce v 182 Main St. Realty Corp.*, 83 AD3d 433 [1st Dept 2011] ["failure to properly secure a ladder to insure that it remains steady and erect while being used … constitutes a violation of Labor Labor § 240 (1)"]).

However, there is a question of fact as to whether this violation was a proximate cause of Plaintiff's accident. That is, a reasonable factfinder could decide that the un-stabilized ladder caused Plaintiff's injuries, or that a Plaintiff, once he slipped, would have been injured even if the ladder had been properly stabilized. As there is a question of fact as to proximate causation, both Conti and Plaintiff's applications for summary judgment on the issue of Labor Law § 240 (1) must be denied.

IV. 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]).

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, Conti fails to make a *prima facie* showing that it is entitled to summary judgment, as it argues supervisory control where Plaintiff's accident clearly arose out of the dangerous condition constituted by the muddy, sandy floor in the basement. As Conti fails to make any showing as to notice. Thus, the branch of Defendants' motion that seeks dismissal of Plaintiff's

common-law negligence and Labor Law § 200 claims must be denied. Plaintiff did not move on these claims.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment (motion seq. No. 003) is granted to the extent that Plaintiff Philip Mark is entitled to partial summary judgment as to liability against defendant Conti of New York, L.L.C. (Conti) pursuant to Labor Law § 241 (6); and it is further

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

ORDERED that Defendant's motion (motion seq. No. 004) is granted to the extent that all claims as against defendant Judith D. Bellach are dismissed; and it is further

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

ORDERED that the Clerk is to enter judgment accordingly and the action is to proceed against defendant Conti; and it is further

ORDERED that counsel for Plaintiff is directed to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: February 21, 2019

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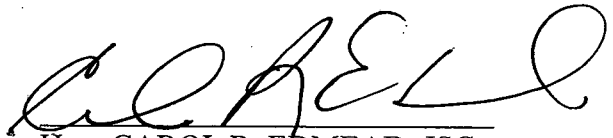

Hon. CAROL R. EDMEAD, JSC

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