SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Part 41

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NOZIM NASRIDDINOV,

Plaintiff,

-against-

QUINCY ESTATES 186 LLC,

Defendant.

Index no. 516280/2016
DECISION/ORDER
ms#2 + ms#3

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion and cross motion for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Affidavits Annexed	2
Answering Affidavits	2
Replying Affidavits	3
Sur-Reply Affidavits	

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

Plaintiff Nozim Nasriddinov commenced the instant action against defendant Quincy Estates 186 LLC for personal injuries incurred on June 17, 2016 while plaintiff was unloading a shower door from his truck. Plaintiff alleges violations of Labor Law §§ 200, 240(1) and 241(6).

Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's complaint. Defendant contends that Labor Law § 240(1) is inapplicable to the facts and circumstances of this case; that Plaintiff has failed to establish and cannot establish a proper predicate to support a claim under Labor Law § 241(6); and that Plaintiff has no valid cause of action under Labor Law § 200 or common law negligence.

Plaintiff cross moves, pursuant and CPLR 3212 for partial summary judgment in Plaintiff's favor on his claims under Labor Law §§ 240(1) and 241(6) and moves to strike Defendant's Answer for failing to comply with and fully respond to discovery demands served on September 28, 2017 and the Preliminary Conference Order dated November 14, 2017 or to preclude

Defendant from offering testimony or other evidence at the time of trial relating to any aspect of discovery sought in the aforementioned Orders and demand.

FACTUAL BACKGROUND

Plaintiff was employed by All City Glass where he would assist in the installation of shower doors, including delivering the glass doors and other equipment to various worksites. On June 17, 2016, Plaintiff, along with five other All City Glass employees, delivered glass doors to 186 Quincy Street in Brooklyn, New York and was to assist in installing the sliding doors at this address.

The glass doors were loaded in an All City Glass truck the night before. The truck was parked in front of the building on the street and the doors were being unloaded.

Immediately before the accident, Plaintiff was by himself inside the back of the truck removing the shower doors from boxes. As he removed the doors, Plaintiff was walking backwards to the outside of the truck. The floor of the truck was approximately three feet off the ground with a step at approximately 1.5 feet off the ground. Facing the inside of the truck, Plaintiff began descending the truck by placing his left foot down on the step. Plaintiff then went to place his right foot on the street. Plaintiff first testified that his right foot tripped on the curb of the concrete sidewalk, stating that the sidewalk was broken and crooked. Plaintiff then testified, after stating he did not understand the question, that his left foot was on the step and his other foot was loose and he fell. Plaintiff fell on the street on his left side.

ANALYSIS

Summary Judgment Standard

"[T]he proponent of a summary judgment motion must make 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also*, *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to

produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, supra, 49 N.Y.2d 557 [1980]).

Labor Law § 240(1) Claim

Defendant contends that Labor Law § 240(1) is inapplicable to the instant case and causes of actions based upon an alleged violation of that statute should be summarily dismissed.

Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . 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."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240 (1) is nondelegable and... an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500).

Defendant argues that Plaintiff's assertion of liability on the basis that Plaintiff was injured from a fall from his employer's truck in the process of unloading the shower doors do not constitute a cause of action under Labor Law § 240(1). Indeed, Defendant provides several case law where courts have held that unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the bed of the truck (*See Bond v York Hunter Const., Inc.*, 95 NY2d 883 [2000]; *Dilluvio v City of New York*, 95 NY2d 928 [2000]; *Toefer v Long Island Railroad*, 4 NY3d 399 [2005]; *Jacome v State of New York*, 266 AD2d 345 [2d Dept

1999]; *Samuel v A.T.P Dev. Corp*, 276 AD2d 685 [2d Dept 2000]; *Cabezas v Consolidated Edison*, 296 AD2d 522 [2d Dept 2002]; *Tillman v Triou's Custom Homes, Inc.*, 253 AD2d 254 [4th Dept 1999]).

In *Eddy v John Hummel Custom Builders, Inc.*, the Appellate Division, Second Department stated that "[t]he Court of Appeals and this Court have repeatedly held that because the distance between the back of a pickup or flatbed truck and the ground is so small, the risk of a worker falling off the back of a pickup or flatbed truck is, as a matter of law, not an extraordinary elevation-related risk protected by Labor Law § 240(1), but rather, one of the usual and ordinary dangers of a construction site" (147 AD3d 16, 2-21 [2d Dept 2016]) and not the type of hazard contemplated by Labor Law § 240(1).

Defendant has made a prima facie showing of entitlement to judgment as a matter of law. In opposition, Plaintiff failed to raise any triable issues of fact. Accordingly, Plaintiff's causes of action based on liability under Labor Law § 240(1) are hereby dismissed.

Labor Law § 241(6) Claim

Defendant also contends that Plaintiff's causes of action under Labor Law § 241(6) should also be dismissed as Plaintiff has failed to establish a proper violation of the Industrial Code as required under the statute.

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

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth a concrete standard of conduct

rather than a mere reiteration of common-law principles (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

Defendants argues that the Industrial Code §§ 23-1.7(d), 23-1.7(e)(1) and 23-1.7(e)(2) are inapplicable and therefore do not support Plaintiff's Labor Law § 241(6) claims.

Industrial Code § 23-1.7(d) provides, in pertinent part, that:

> 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.

Section 23-1.7(d) is inapplicable to the facts because Plaintiff testified that he tripped and does not testified that he slipped on any substance or slippery condition as contemplated by this provision (*see Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619 [2d Dept 2003]).

Industrial Code § 23-1.7(e)(1) and (e)(2) provides, in pertinent part, that:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Section 23-1.7(e)(1) is inapplicable because it applies to tripping hazards in passageways and the bed of the truck is not a passageway as contemplated by this provision. Section 23-1.7(e)(2) is also inapplicable because Plaintiff does not allege to have tripped from accumulations of dirt and debris, scattered tools and materials and from sharp projections.

Defendant made a prima facie showing of entitlement of judgment as a matter of law for claims under Labor Law § 241(6). Plaintiff's opposition to this branch of Defendant's motion fails to raise any triable issues of fact. While Plaintiff argues that the Courts have recognized that even a plaintiff's failure to identify the precise Industrial code provision violated in his complaint or bill of particulars is not fatal to such claim; the case law cited by Plaintiff for this proposition are all cases where the Plaintiff made a belated allegation of a violation of an identified Industrial Code provision. Here, Plaintiff has not made any belated allegations of a violation of an identified

Industrial Code either in its opposition to Defendant's motion or in its cross motion or in a supplemental bill of particulars.

Accordingly, Defendant's motion for summary judgment based on Plaintiff's claims under Labor Law § 241(6) is hereby granted and such claims are dismissed.

Labor Law § 200/Common-Law Negligence Claims

Defendant also moves to dismiss Plaintiff's cause of action under Labor Law § 200/common-law negligence

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]).

On the other hand, "when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had authority to supervise or control the performance of the work" (*id.*). General supervisory authority to oversee the progress of the work is insufficient to impose liability. Rather, [a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62). Further, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2] [internal quotation marks omitted]). As a final matter, "[w]here an accident is alleged to involve both a dangerous condition on the premises and the 'means and

methods' of the work, a defendant moving for summary judgment [on a Labor Law § 200 claim] is obligated to address the proof applicable to both liability standards" (*Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 777 [2015]).

The Court would first note that Plaintiff has not submitted opposition to Defendant's summary judgment motion under Labor Law § 200/common-law negligence nor did Plaintiff cross move for partial summary judgment on liability under this cause of action.

Second, it is not clear whether Plaintiff is alleging that the accident involved a dangerous condition or the means and methods of the work, and the Court will therefore analysis both categories for purpose of this summary judgment motion.

According to Plaintiff's testimony, he tripped on the curb of the sidewalk as he was descending from the bed of the truck., Defendant argues that the curb of a sidewalk is not within the legal responsibility of Defendant adjacent property owner, but rather, remains the responsibility of the City of New York. The Court of Appeals and the Second Department have both held that the curb is not part of the sidewalk (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]; *Bounviaggio v Parkside Associates, L.P.*, 120 Ad3d 460 [2d Dept 2014]).

As to the means and methods of the work, Plaintiff has made no allegations that Defendant had authority to supervise or control the work of unloading the truck.

Thus, Defendant made a prima facie showing of entitlement to summary judgment as a matter of law for claims under Labor Law § 200/common-law negligence and such claims are hereby dismissed.

Plaintiff's Cross Motion

Plaintiff's cross motion for partial summary judgment on liability under Labor Law §§ 240(1) and 241(6) are denied. Plaintiff's cross motion to strike Defendant's Answer for failing to comply with and fully respond to discovery demands served on September 28, 2017 and the Preliminary Conference Order dated November 14, 2017 or to preclude Defendant from offering testimony or other evidence at the time of trial relating to any aspect of discovery sought in the aforementioned Orders and demand is also denied.

SUMMARY

In summary, the court rules as follows: (1) Defendant's motion for summary judgment dismissing Plaintiff's causes of action under Labor Law §§ 240(1), 241(6), 200 and common-law negligence cause of action is granted; (2) Plaintiff's cross motion for partial summary judgment is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: October 10, 2019

HON. LARRY D. MARTIN
J.S.C.

KINGS COUNTY CLERK
FILED
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HON. LARRY D. MARTIN
Justice of the Supreme Court