Burdier v New York City Hous. Auth.
2019 NY Slip Op 33665(U)
December 17, 2019
Supreme Court, New York County
Docket Number: 160908/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**

Justice

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ALEJANDRO BURDIER,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, TECHNICO CONSTRUCTION SERVICES INC.,

Defendants.

---X

INDEX NO. 160908/2016

MOTION DATE

MOTION SEQ. NO. 003, 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70-84, 138, 142, 143, 146, 149

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 122-136, 139-141, 145

were read on this motion for summary judgment.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment on liability pursuant to Labor Law §§ 240(1) and 241(6) against defendants and directing an assessment on damages (mot. seq. three). Defendants oppose.

By notice of motion, defendants move pursuant to CPLR 3212 for an order granting them summary dismissal of plaintiff's common law negligence and Labor Law §§ 200, 240, and 241(6) claims (mot. seq. five). Plaintiff opposes.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

On June 1, 2016, plaintiff was employed by non-party GNA Environmental, Inc., a subcontractor working on a project at the Albany Houses in Brooklyn, New York. Defendant

New York City Housing Authority (NYCHA) owns the premises, and Technico Construction Services, Inc. was the general contractor. (NYSCEF 1). Their contract requires that Technico "provide proper fall protection" for the roof where work will be conducted, and as related to asbestos removal, it must ensure that a scaffold erected for such removal be covered with sheeting with a tarp hung below to catch falling debris. Technico also agreed to pay "particular attention . . . to fall protection of roof debris during [asbestos] abatement" work. (NYSCEF 78).

Plaintiff offered the following pertinent testimony at his depositions (NYSCEF 81):

GNA's role at the project was to remove asbestos-containing bricks from the building's roof. No other company on site was removing asbestos. Technico replaced the bricks with new bricks. GNA placed the old bricks in a bag which it brought down from the roof. Broken bricks were left on the roof or on a scaffold until an employee bagged them.

It was GNA's responsibility to protect against falling materials by placing caution tape or cones around areas below where the work was being performed to protect against bricks falling to the ground. Plaintiff did not know if GNA employees put anything on the scaffold to prevent bricks from falling off. GNA did nothing to protect against falling bricks, other than instruct employees to refrain from working below the roof and prohibit employees from doing so absent a supervisor's approval.

Before his accident, plaintiff had never seen bricks fall from the roof and was unaware of anyone being hit by falling material, although he had heard other workers complain that bricks were "always" falling from the roof.

On the day of the accident, plaintiff was told to prepare the work area on the ground floor by putting plastic on the walls below the hoist. He did not recall if there was caution tape or other warnings placed on the ground floor below where GNA was working. While GNA was working

on the roof that day, no work was performed when plaintiff was working on the ground floor, as the plastic had to be put up on the ground floor before work could commence on the roof, and plaintiff's supervisor had told him that the work had stopped on the roof so that he could do his work. A site safety supervisor also told him that the work above him had stopped. He did not know if any Technico employees or others were working on the roof before his accident.

As plaintiff was putting up the plastic, pieces of brick fell from the roof and hit his back. While he saw no bricks falling, he felt them hit his back and looked at the floor and saw bricks of different sizes. Later, he noticed many bricks on the floor. He was the sole witness to his accident.

A jobsite incident report prepared that day and signed by plaintiff reflects that plaintiff had asked the site safety company's representative to contact a supervisor on the roof and asked that all work stop until he completed his task. While placing the plastic, debris started falling from the roof and struck him in the back. (NYSCEF 76).

II. LABOR LAW § 240(1)

A. Contentions

Plaintiff alleges that defendants violated Labor Law § 240(1) by: (1) failing to secure the bricks to prevent them from falling from the roof and striking him, and (2) failing to provide him with safety devices to protect him and prevent bricks from striking him. (NYSCEF 71).

Defendants claim that as plaintiff did not see how the bricks or debris had fallen from the roof or what had caused them to fall or how many pieces fell, and as he saw nothing until after he was hit, he is unable to establish that the debris that fell on him was "loose" or was being hoisted or secured at that time or that it fell because of the absence or inadequacy of an enumerated safety device. Moreover, if plaintiff alleges that the bricks that hit him were those

that were being removed, then there is no Labor Law § 240(1) violation. (NYSCEF 138).

In reply, plaintiff maintains that the falling bricks were objects that required securing for the undertaking, ie.. the roof abatement work, and that they fell because there was no safety device to keep them from falling off. Nor were bricks being removed when plaintiff was working, and even if they were, they were not supposed to fall, but were to be put into bags and brought down. Moreover, plaintiff knows how the accident happened, having testified that bricks fell off of the roof and hit him. (NYSCEF 142).

B. Analysis

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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 designed 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). It protects workers against "'special hazards' that arise when the work site is either elevated or positioned below the level where 'materials or load [are] hoisted or secured,'" and the hazards are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross*, 81 NY2d at 501, quoting *Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 [1991]).

Liability under Labor Law § 240(1) requires a showing that either safety equipment was

provided but was defective or that no equipment was provided but should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish that there is safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

In cases involving falling objects, the plaintiff must demonstrate that the object which fell was either being hoisted or secured or required securing, or, in essence, that the object fell because of the absence or inadequacy of a safety device. (*Fabrizi v 1095 Ave. of the Am.*, 22 NY3d 658 [2014]).

Here, as plaintiff testified that workers had been removing bricks from the roof before his accident, that there was nothing preventing the bricks from falling from the roof, and that bricks fell and hit him, he establishes that they fell on him due to the absence of overhead protections, and thus demonstrates, *prima facie*, that defendants violated Labor Law § 240(1). (*See Garcia v SMJ 210 W. 18 LLC*, AD3d , 2019 WL 6703889 [1st Dept 2019] [violation of Labor Law § 240(1) shown by evidence that workers were performing work on façade above plaintiff and piece of façade fell and hit plaintiff]; *Gonzalez v Paramount Group, Inc.*, 157 AD3d 427 [1st Dept 2018] [plaintiff injured while performing work on opening and cinder blocks above opening fell and hit him; cinderblocks were falling objects which required securing for the purposes of undertaking]; *Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014] [plaintiff struck by falling brick due to lack of overhead netting or other such protective devices]).

Even if the workers were removing bricks, they were not to do so in such a manner as to let them fall or throw them to the ground. Rather, they were to be bagged upon being removed

and brought down in bags. In *Wilinski v 334 E. 92nd Hous. Dev. Fund. Corp.*, the Court distinguished an instance where unsecured pipes, not part of a demolition project, fell and hit the plaintiff, from an instance where falling objects are expected to fall. In the latter instance, "imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical." (18 NY3d 1 [2011]).

III. LABOR LAW § 241(6)

As plaintiff opposes dismissal of this claim only as to a violation of Industrial Code § 23-1.7(a)(1), he is deemed to have waived reliance on any other Code violations to support his Labor Law § 241(6) claim.

Pursuant to Industrial Code § 23-1.7(a),

> Overhead hazards. (1) 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 . . .

Given plaintiff's testimony that the area where he was working was exposed to falling bricks and others had complained before the accident that bricks had fallen from the roof, that his supervisor had told him that it was safe for him to perform his work that day since the work on the roof had been stopped, and that his employer's responsibility and practice was to secure the area by placing tape or cones around it to keep people from walking in the area while work was being performed on the roof, defendants fail to establish that the area was not one normally exposed to falling materials or objects. (See e.g., *Garcia v SMJ 210 W. 18 LLC*, __ AD3d __, 2019 WL 6703889 [1st Dept 2019] [defendants' cross motions to dismiss Industrial Code violation properly denied where plaintiff hit by falling façade as there was triable issue as to whether work area was normally exposed to falling materials or objects]).

Moreover, in light of defendants' contract which presupposes the possibility and danger

of falling bricks from the roof and requires safety precautions related thereto, plaintiff demonstrates that the area was normally exposed to falling bricks and that defendants' failure to take adequate safety precautions violated the Industrial Code.

IV. LABOR LAW § 200 and COMMON LAW NEGLIGENCE

While plaintiff contends that his accident occurred as a result of a dangerous condition on the premises, rather than the means and methods of his work, which was undisputably not controlled by defendants, an object which falls as a result of the manner in which a worker performs or does not perform his work does not implicate a dangerous condition. (*See Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [dangerous condition arises from defect inherent in property, and is not one created by manner in which work performed). Here, plaintiff alleges that the brick fell because other workers had failed to secure it and that he was injured due to defendants' failure to provide overhead protection from falling objects. (*See Turgeon v Vassar Coll.*, 172 AD3d 1134 [2d Dept 2019], *lv denied* 34 NY3d 902 [2019] [accident arose from means and methods and not dangerous condition, as objects which fell on plaintiff were caused to fall by other employee's work]).

Therefore, as plaintiff does not address defendants' arguments that they had no control over and/or the authority to control the means and methods of his work, defendants are entitled to dismissal of plaintiff's Labor Law § 200 and common law negligence claims.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on liability on his Labor Law § 240(1) claim is granted (mot. seq. three), and his damages related thereto are to be determined at trial; it is further

ORDERED, that defendants' motion to dismiss plaintiff's claims (mot. seq. five) is granted as to plaintiff's Labor Law § 200 and common law negligence claims and his Labor Law § 241(6) claim premised on any violations of the Industrial Code other than 12 NYCRR § 23-1.7(a)(1), and is denied as to dismissal of plaintiff's Labor Law § 241(6) claim premised on a violation of Industrial Code 23-1.7(a)(1); and it is further

ORDERED, that pursuant to CPLR 3212(b), plaintiff is granted summary judgment on liability as to his Labor Law § 241(6) claim premised on a violation of Industrial Code § 23-1.7(a)(1), with damages related thereto to be determined at trial.

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12/17/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	