Cummings v City of New York
2020 NY Slip Op 30041(U)
January 8, 2020
Supreme Court, New York County
Docket Number: 153884/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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WADE CUMMINGS,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, WDF, INC.

Defendant.

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INDEX NO. 153884/2016

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendants for summary judgment dismissing plaintiff's complaint is granted in part and denied in part.

Background

In this Labor Law action, plaintiff was installing rough piping in the ceiling of a classroom at a school in Manhattan when he fell off an A-frame ladder. On the day of the accident, plaintiff was employed by a plumbing subcontractor and claims he reported to an employee for the general contractor (defendant WDF, Inc.). Plaintiff insists that he was forced to work with an A-frame ladder because his requests for a baker scaffold were rejected by WDF.

Defendants move for summary judgment on the ground that plaintiff was the sole proximate cause of his accident. They claim that plaintiff was the plumbing foreman, had more than three decades of experience and he decided to place the ladder three to four feet away from

his work area. Defendants claim that plaintiff's decision to reach away from the ladder rather than work directly underneath his work area caused ladder to shift and plaintiff to fall. They also blame plaintiff for reaching from the seventh rung of the ladder. Defendants question why plaintiff did not investigate whether the desk that was purportedly in the way (and apparently caused him to have to reach over to access the correct portion of the ceiling) could be moved. They point out that plaintiff did not attempt to move the desk despite the fact that he controlled the means and methods of his work.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec,*

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 240 (1) & Labor Law § 200

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

Here, the Court finds that there is an issue of fact with respect to whether there was a Labor Law violation. Although defendants correctly point out ways in which plaintiff might bear some responsibility for his fall, the fact is that he was using an A-frame ladder and he fell off of it while performing work covered under the Labor Law (*see Saavedra v 111 John Realty Corp.*, 2020 WL 61556 [1st Dept 2020] [finding that even an instruction to avoid an unsafe practice does not absolve the requirement to provide a worker with equipment to complete the work safely]). Moreover, plaintiff claims that he asked for a different piece of equipment (a

baker scaffold) and was told to use the ladder instead. Plaintiff also contends he was told the desk that was in the way could not be moved. That is enough to raise an issue of fact.

The Court also observes that case law compels the Court to deny the instant motion. In *Nieto v CLDN NY LLC* (170, AD3d 431, 93 NYS3d 553 (Mem) [1st Dept 2019]), the First Department reversed a lower court ruling that found an issue of fact with respect to whether plaintiff was the sole proximate cause of his accident. The plaintiff in *Nieto* was also working on a ladder and installing fixtures in the ceiling when the ladder shifted and he fell. Rather than move the ladder so that he was directly underneath the fixture he was installing, he turned his body sideways and used the ladder in an abnormal way, which contributed to plaintiff's loss of balance and subsequent fall. Nevertheless, the First Department awarded plaintiff summary judgment (*id.*). Similarly, here, defendants allege that plaintiff was using a ladder in an abnormal way-- reaching three to four feet to the side instead of working directly under the area of the ceiling where he was installing the pipes. But that contention is not enough to grant defendants summary judgment.

For the reasons discussed above, the Court also finds that there is an issue of fact with respect to plaintiff's Labor Law § 200 claim (the codification of common law negligence). The fact is that plaintiff claims his request for necessary equipment (that may have made his job safer) was denied.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law

principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff claims that defendants violated Sections 23- 1.5(c); 23-1.7(e)(2); 23-1.7(h), 23-1.8; 23-1.8(c)(4); 23-1.14(a)(5); 23-1.14(b)(1-4); 23-1.25(a)(b)(c)(d)(f); 23-1.30 and 23-2.1 of the Industrial Code. Defendants argue that these provisions are either inapplicable or that plaintiff has failed to establish that defendants violated them. Defendants contend that a violation of 23-1.5(c) cannot support a Labor Law claim and that 23-1.7(e)(2) does not apply because plaintiff was working on a ladder. They also point out that 23-1.7(h) and 1.8(c)(4) are not relevant because those provisions deal with corrosive materials. Moreover, Sections 23-1.14(a)(5), 1.14(b) and 1.25 are not applicable because plaintiff was not working with combustion devices using liquified gas or welding. Defendants insist that 1.3 has no relevance here because plaintiff did not claim that he has issues seeing in his work area.

In opposition, plaintiff only addresses Section 23-1.21(b). Curiously, although plaintiff mentioned this Industrial Code provision in his complaint (paragraph 86), he omitted it from his bill of particulars. And defendants did not address this provision in their moving papers. In reply, defendants contend that their expert conclusively refutes any violation of 1.21(b).

The Court grants this branch of defendants' motion. Plaintiff did not offer any substantive arguments in his opposition papers regarding which Industrial Code sections were violated. Offering conclusory assertions that certain sections were violated is not enough. And, with respect to Section 1.21(b), the Court observes that this section has numerous subsections. Plaintiff's opposition mentions "level footing," "anchorage," "slippage," and "movement." The Court cannot guess which portion of 1.21(b) applies.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment is granted only to the extent that plaintiff's claims based on Labor Law § 241(6) are severed and dismissed and denied as to the remaining branches of the motion.

1/8/2020
DATE

ARLENE P. BLUTH, J.S.C.

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