Moreno v 34-15 Parsons Blvd, LLC

2020 NY Slip Op 32118(U)

June 26, 2020

Supreme Court, New York County

Docket Number: 156681/2017

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

---X

GUSTAVO MORENO,

Plaintiff,

- v -

34-15 PARSONS BLVD, LLC,

Defendant.

---X

INDEX NO. 156681/2017

MOTION DATE 03/15/2020, 03/15/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 54, 55, 56, 57, 60, 62, 63, 64, 65
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 58, 59, 61
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, plaintiff moves for partial summary judgment pursuant to CPLR 3212 on his Labor Law § 240(1) claim under Motion Sequence No.1. Defendant moves for summary judgment dismissing the complaint in its entirety under Motion Sequence No. 2.

"[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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are

facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Labor Law § 240(1)

"Section 240(1) of the Labor Law, often referred to as the 'scaffold law,' provides that '[a]ll contractors and owners and their agents' engaged in cleaning a building or structure shall furnish or erect proper scaffolding, ladders and similar safety devices to protect employees in the performance of the work" (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]). The law "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" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993] [emphasis removed]). "[Courts] have adhered to the bedrock principle that the statute is to be construed liberally to achieve its purpose of protecting workers" (O'Brien v Port Auth. of N.Y. & N.J., 29 NY3d 27, 35-36 [2017] [Rivera, J., dissenting]). However, not every accident where a worker falls off a scaffold gives "rise to the extraordinary protections of Labor Law § 240 (1)" (Blake v Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280, 288 [2003], quoting Naducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001] [internal quotations omitted]).

In order to meet his prima facie burden, plaintiff must demonstrate both a violation of the statute and causation (see Blake, 1 NY3d at 289). To assist a plaintiff with meeting that burden, there is a presumption connecting the two "[i]n cases involving ladders or scaffolds that collapse or malfunction for no apparent reason" "that the ladder or scaffolding device was not good enough to afford proper protection" (id., n 8). "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" (id.; see O'Brien, 29 NY3d at 37). One necessarily negates the other: "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (Blake, 1 NY3d at 290).

In support of plaintiff's motion, plaintiff submits his examination before trial (EBT) testimony, wherein he testified that he was employed by non-party A&P Renovating, Inc. doing renovation work at defendant's premises (NYSCEF Doc. No. 34 [plaintiff's EBT] at 42, 76-77). On the date of the accident, July 6, 2017, plaintiff was assigned to plaster a room (id. at 80, 86), and used a "V"-shaped ladder that was made of "wood" (id. at 89). Plaintiff described the ladder as "very damaged," "very deteriorated," that it "didn't have a base" and didn't "lock well" (id. at 89, 97). He had used that ladder 30-40 times before without incident (id. at 91) and inspected it on the day of the accident by standing on the first step, checking to see it was secure or whether it moved, which it did not (id. at 97). On the day of the accident, plaintiff had gone up and down the ladder 20-30 times without incident and it had not moved (id. at 98-99). Before the accident happened, plaintiff was standing on the third step from the bottom of the ladder and was applying plaster to the ceiling (id. at 92-93). He claims that he was reaching overhead, applying plaster to the ceiling, with his feet on the steps of the ladder and his knees touching the next step, and then he "felt the ladder go that way" and he fell (id. at 92, 101; see id. at 101 [he "felt that the ladder fell and then [he] fell backward"]). He also testified as follows:

> Q. Can you tell us what happened leading up to the accident? What were you doing?
>
> * * *
>
> A. When I was putting plaster I felt the ladder go that way and I fell on the edge of a stove, I turned around, and I fell on the floor.
>
> Q. Which direction did the ladder move.

> A. No, no. I just felt that my feet were without a base and then just went. (id. at 92).

Based on plaintiff's testimony, the Court finds that plaintiff failed to meet his burden as the testimony raises conflicting inferences as to the cause of the accident. On the one hand there is testimony that the ladder "fell," which could refer to tipping over (see, e.g., Rom v Eurostruct, Inc., 158 AD3d 570, 570-71 [1st Dept 2018] [plaintiff established entitlement to summary judgment with his testimony that "the unsecured ladder on which he was standing suddenly shifted and kicked out from underneath him"]; Kebe v Greenpoint-Goldman Corp., 150 AD3d 453, 453-54 [1st Dept 2017] [plaintiff testified that the ladder he was using was missing rubber feet and wobbled before the ladder tipped]). On the other hand, he also testified that the ladder did not move during the accident (see, e.g., Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593 [1st Dept 2014]). Under the latter scenario, where the ladder did not move at all, there is no "collapse or malfunction" that would entitle plaintiff to the presumption connecting a statutory violation and the cause of his accident. Accordingly, these conflicting inferences as to how the accident happened cannot be resolved on summary judgment and the motion should be denied (see id.; see also Caceres v Std. Realty Assoc., Inc., 131 AD3d 433, 435 [1st Dept 2015] [Saxe, J., dissenting] [finding that plaintiff failed to meet his burden on summary judgment where he "testified that [the ladder] began to tip over causing him to lose his balance and fall, [but] he also stated that the feet of the ladder did not move before he lost his balance, and that he and the ladder fell at the same time"]).

In Campos v 68 E. 86th St. Owners Corp., the

> "[p]laintiff testified that he 'fell backwards and the ladder forward,' and submitted an affidavit in which he stated that the ladder suddenly went forward and he simultaneously fell backwards, and that he did not become dizzy or lose his balance. However, plaintiff also testified that he opened the ladder, locked it and checked that it was sturdy, that he was not experiencing any

> problems with the ladder while he was on it, that he did not remember how he fell off the ladder or know why he fell off, and that he did not feel the ladder move before he fell. When asked if remembered or knew if the ladder shook or wobbled, plaintiff responded, 'No.'" (117 AD3d at 594).

The Appellate Division, First Department, found that the plaintiff failed to meet his burden on summary judgment due to the conflicting evidence that the ladder fell but also that the ladder failed to move at all (see id.). The Court finds that the circumstances are substantially similar here. Accordingly, plaintiff's motion is denied without prejudice and there is no need to consider defendant's opposition papers (see Karwowski v Grolier Club of City of New York, 144 AD3d 865, 866 [2d Dept 2016], citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

A "defendant may be granted summary judgment if the record establishes conclusively that no Labor Law § 240(1) violation was shown to have been a proximate cause of the accident and that the accident was therefore caused solely by plaintiff's conduct" (Blake, 1 NY3d at 288-89, n 8). In other words, "a defendant is not liable under Labor Law § 240(1) where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident" (id., 1 NY3d at 290).

There is evidence in the record that the ladder plaintiff was using was defective, and plaintiff testified that the ladder just "fell." Although defense counsel argues that plaintiff only testified that he "felt" the ladder move and failed to state it actually moved, the testimony is subject to varied interpretation and cannot be resolved on a motion for summary judgment. Thus, given the evidence inferring that the ladder could have fallen, it is "conceptually impossible" to find that no violation occurred such that plaintiff was the sole proximate cause of the accident (see id.). Accordingly, that branch of defendant's motion is denied.

Labor Law § 241(6)

Labor Law § 241(6) requires owners, 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, 81 NY2d at 501-02; Everitt v Nozkowski, 285 AD2d 442, 443 [2d Dept 2001]). As with Labor Law § 240 (1), the duty imposed under Section 241 (6) is nondelegable (Ross, 81 NY2d at 502-503).

Initially, the Court grants that branch of defendant's motion seeking to dismiss plaintiff's § 241(6) claim insofar as premised upon the following regulations as unopposed by plaintiff: 12 NYCRR §§ 23-1.7(d), 23-1.15, 23-1.16, 23-1.17, 23-1.21(a), 23-1.21(b)(4) except subdivision (ii), 23-1.21(e)(2), 23-1.21(e)(5), 23-1.30, 23-1.32, 23-2.1, 23-2.8. The claim is also dismissed to the extent it is premised upon the Occupational Safety and Health Act (OSHA) and regulations promulgated thereunder (see Schiulaz v Arnell Const. Corp., 261 AD2d 247, 248 [1st Dept 1999], citing Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311, 311-13 [2d Dept 1997]).

Defendant argues that 12 NYCRR § 23-1.5 is not specific enough to serve as a predicate for liability. It is true that subdivision (a) is "insufficiently specific to support a section 241 (6) claim" (Carty v Port Auth. of New York and New Jersey, 32 AD3d 732, 733 [1st Dept 2006]). However, plaintiff argues in opposition that subdivision (c)(3) is different. That provision states that "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged" (12 NYCRR 23-1.5 [c][3]), and has been held to be sufficiently specific to support a § 241(6) claim (see Becerra v Promenade Apartments Inc., 126 AD3d 557, 558 [1st Dept 2015]; Contreras v 3335 Decatur Ave. Corp., 173 AD3d 496, 497 [1st Dept 2019]).

Accordingly, defendant met its burden as to subdivision (a), but failed as to subdivision (c), which requires denial of that branch of the motion. The Court notes that defendant advances a new argument in reply papers, claiming that § 23-1.5 applies solely to employers based on its title, "General responsibility of employers," and defendant is not plaintiff's employer but is the owner of the premises. The argument appears to be without merit[1] but will not, in any event, be considered by the Court (see Dannasch v Bifulco, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion"]).

The Court agrees with defendant that 12 NYCRR § 23-1.7(e) is not applicable in its entirety (see Booth v Seven World Trade Co., L.P., 82 AD3d 499, 501 [1st Dept 2011] ["This section is inapplicable because there is no evidence in the record to show that the object was debris, tools, or even a tripping hazard"]). Neither is 12 NYCRR § 23-1.7(f), as plaintiff "was not attempting to access another working level within the meaning of" the section (see Miranda v NYC Partnership Hous. Dev. Fund Co., Inc., 122 AD3d 445, 445-46 [1st Dept 2014], citing Torkel v NYU Hosps. Ctr., 63 AD3d 587, 588 [1st Dept 2009]). Defendant also has shown that 12 NYCRR 6 23-1.8 is not applicable (see, e.g., Flores v Infrastructure Repair Serv., LLC, 115

[1] Labor Law § 241 (6) imposes liability for nondelegable duties premised upon specific commands. "[T]he distinction that our case law has consistently drawn between general and specific commands continues to have critical legal significance, where, as in this case, the injured plaintiff is seeking to hold the landowner and general contractor liable for an alleged breach of a *nondelegable* duty") Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 504 [1993]). Because it is *nondelegable*, it means it cannot apply solely to employers but must extend to owners as well. The facts of the matter in Contreras are similar in that defendant's motion for summary judgment was denied on appeal, notwithstanding the fact that defendant was the owner and not plaintiff's employer (see Contreras v Decatur Ave. Corp., 2017 WL1437859 [Sup Ct, Bronx County 2017], revd sub nom. Contreras v 3335 Decatur Ave. Corp., 173 AD3d 496 [1st Dept 2019]).

AD3d 543 [1st Dept 2014]). Plaintiff's opposition fails to demonstrate an issue of fact with the foregoing.

12 NYCRR § 23-1.21(b) is also not applicable. Under the section entitled, "General requirements for ladders," it states: "(1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon." Here, there is no evidence that the ladder broke, or any component dislodged or loosened (see, e.g., Franklin v T-Mobile USA, Inc., 2018 NY Slip Op 30879[U], *10 [Sup Ct, New York County 2018] [Lebovits, J.], affd 2019 NY Slip Op 08510 [1st Dept 2019]). Further, defendant met its burden and plaintiff failed to demonstrate an issue of fact as to the applicability of subdivisions (i) through (iv) of 12 NYCRR § 23-1.21(b)(3) (see, e.g., Croussett v Chen, 102 AD3d 448 [1st Dept 2013]). Finally, there is no evidence in the record demonstrating that 12 NYCRR § 23-1.21(b)(4)(ii) or (e)(3) are applicable, which concern ladder footings.

In sum, 12 NYCRR § 23-1.5 is the only remaining predicate for plaintiff's Labor Law § 241(6) claim.

Labor Law § 200 & Common Law

"Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-17 [1981]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (id. at 317). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept

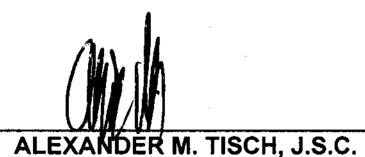
2012]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (id.).

Plaintiff does not contest that defendant did not exercise any supervisory control over plaintiff's work, but claims that defendant failed to address plaintiff's theory that a dangerous condition existed because "the presence of a stove in the middle of a room made it impossible for the plaintiff to place the ladder properly" (NYSCEF Doc. No. 58, ¶ 22). Accordingly, plaintiff presumably argues that defendant's motion fails because it needed to show that it did not have actual or constructive notice of the condition. However, the Court finds that the stove placement is not, in and of itself, a dangerous condition; rather, the placement of the ladder in relation to the stove would fall under the "manner and means of the work" category, and defendant met its burden by demonstrating that it did not exercise any supervisory control over plaintiff's work. As noted above, plaintiff failed to refute this.

In conclusion, it is hereby ORDERED that plaintiff's motion for partial summary judgment (motion sequence no. 1) is denied; and it is further

ORDERED that defendant's motion for summary judgment (motion sequence no. 2) is granted solely to the extent that plaintiff's Labor Law § 200 and common law claims are dismissed and is otherwise denied.

This constitutes the decision and order of the Court.



6/26/2020
DATE

ALEXANDER M. TISCH, 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	