Bong Ae Kim v Stellar 11 E. 75, LLC
2020 NY Slip Op 33479(U)
October 22, 2020
Supreme Court, New York County
Docket Number: 161451/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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BONG AE KIM, AS EXECUTOR OF
THE ESTATE OF KEON EOM

Plaintiff, DECISION AND ORDER

- v - Index No. 161451/14
MOT SEQ 003
STELLAR 11 EAST 75, LLC, SAGE BUILDERS CORP., KUDOS CONSTRUCTION CORPORATION,

Defendants.
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this personal injury action seeking to recover damages for injuries sustained by Keon Eom[1] (Eom) at a construction site, Stellar 11 East 75 LLC (Stellar) and Sage Builders Corp. (Sage) move pursuant to CPLR 3212 to dismiss the complaint. The plaintiff opposes the motion and cross-moves for partial summary judgment on the Labor Law § 240(1) claim. The motion is granted in part and the cross-motion is denied.

II. BACKGROUND

On May 6, 2014, Eom, now deceased, was a laborer employed by non-party Champion Building Consulting (Champion). Champion was retained to replace flooring in the five-story building

[1] Keon Eom passed away on September 10, 2017 from causes unrelated to injuries incurred in this accident. By an order dated January 11, 2019, Bong Ae Kim, as the executor of Eom's estate, was substituted as the plaintiff in this action.

located at 11 East 75th Street in Manhattan as part of a project to convert the multiple-family dwelling into a single-family dwelling. Stellar owned the building. Defendant Kudos Construction Corporation was initially the general contractor on the construction project but was later replaced by Sage, who assumed all of Kudos' contracts. Pursuant to its contract, Champion was to remove the wooden joists underlying the floors in the building and replace them with metal joists. The wooden joists were approximately 15 feet long and weighed approximately 80 to 100 pounds.

According to the deposition testimony of Eom and Felipe Garsia, another more senior Champion employee, they were working at the site with foreman Sam Shim. They were all in the process of removing the wooden joists by having two employees on scaffolding saw or cut a joist free and use a rope to attach it to a pulley system. Eom and one other Champion employee, who were both on the floor beneath the scaffolding, would assist in slowly lowering and guiding the joist down.

Eom testified that he had been working on the joist removal job a few days and usually took direction from Garsia, but "no particular directions were given" on this site. Eom testified that he and his co-workers would talk to each other as they guided each joist down to the floor below. At the time of the

accident, he and his co-workers were in the process of preparing one of the joists to be lowered to Eom's level. They had already successfully lowered six joists that day. The joist that hit Eom similarly had been secured by a rope to be lowered. Eom and one of his co-workers were holding onto the other end of the rope which they would slowly release to guide the joist down once the workers on the second floor positioned the joist over the hole that it would be lowered through. Eom testified that, before beginning to lower the joist, as he was still holding on the rope tightly, he heard workers yell from a floor above that the joist was falling, and then saw the joist, which was then supposed to be in a horizontal position, falling vertically. Eom testified that he believed something on the second floor caused the joist to become dislodged. The co-worker on his floor let go of his end of the rope. Eom was unable to move out of the way.

Garsia, at his deposition, testified that he saw only part of the accident but recalled seeing Eom begin to pull the rope without first waiting for any signal from those above. He testified that this caused the joist to dislodge, fall, hit the wall and then hit Eom. Garsia testified that a co-worker named Vincente was lowering the joists to Eom and that Eom was instructed by Vincente to wait until Vincente told him to pull the rope, and he did not. According to Garsia, Eom was experienced at this job site and would have received instruction

from Shim, but Garsia would also help him out when necessary. The whole team had worked on other floors doing the same joist removal before the accident.

The joist struck Eom's head and shoulder. He briefly lost consciousness, rested for a short time and took the subway home. Eom, who was wearing a helmet when struck, claimed to have suffered traumatic brain injury, post-concussion syndrome, disc herniations and bulges, and a torn labrum in his left shoulder and torn meniscus in the left knee. He underwent surgery on his shoulder and knee.

The instant action ensued. In his complaint, Eom alleged causes of action for negligence and violations of Labor Law §§ 200, 240(1), and 241(6). The defendants answered the complaint offering general denials and asserted affirmative defenses including that Eom was the sole and proximate cause of his injuries. Stellar asserted cross-claims against co-defendant Kudos. Discovery was conducted and a Note of Issue was filed. In the meantime, Eom died and the executor of his estate was substituted as plaintiff. The action as discontinued against Kudos by stipulation filed January 22, 2016.

Defendants Stellar and Sage now move for summary judgment claiming, *inter alia*, (i) that the Labor Law § 240(1) claim must be dismissed because Eom was a recalcitrant worker who caused

his own injuries, (ii) that the negligence and Labor Law § 200 claim must be dismissed because they did not have the authority to supervise or control Eom's work, and (iii) that the Labor Law § 241(6) claim must be dismissed because the Industrial Code violations alleged by the plaintiff are inapplicable.

The plaintiff opposes the motion and cross-moves for partial summary judgment on the Labor Law § 240(1) claim arguing that the pulley system in place was insufficient to protect Eom from the falling joist. The defendants oppose the cross-motion.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in

admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of their motion for summary judgment, Stellar and Sage submit, *inter alia*, the deposition transcripts of Eom and Garsia, as set forth above. They also submitted the deposition transcript of Sam Kim, the project manager for Kudos, and later Sage. Kim testified that the Champion employees were using scaffold, hoists, pulleys and ladders for the joist removal, which he described as a "three to four-man operation." Kim was notified of the accident by a foreman from Champion, and

investigated. From discussions with Champion employees, including Garsia, he learned that Eom was having difficulties following instructions and had "personality conflicts" with other workers. Eom was not following the foreman's direction, was pulling on the rope in an unsafe manner, was not waiting for his fellow employees to secure the rope before pulling on it.

Stellar and Sage also submit the testimony of John Kratz, employed as a project manager for Stellar, and was an assistant project manager for the subject project, reporting to project manager Kelly Peterson. He could not recall any discussions about how the joists should be removed, since Sage would leave the "means and methods" to the contractors. He walked through the project about once a month. He was informed by Peterson of Eom's accident a year or two later and had little recall of the details. He could not recall seeing any part of the joist removal during demolition.

B. Labor Law § 240(1)

The defendants' submissions are insufficient to establish Stellar and Sage's entitlement to summary judgment on the plaintiff's Labor Law § 240(1) claim.

Labor Law § 240(1), provides, in relevant part, as follows:

> "All contractors and owners and their agents 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."

"Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure." Jock v Fien, 80 NY2d 965, 967-968 (1992); see also Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991). "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." Ross v Curtis Palmer Hydro Elec. Co., 81 NY2d 494, 501 (1993); Willinski v 334 East 92nd Housing Development Fund Corp., 18 NY3d 1 (2011). To impose liability under Labor Law § 240(1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. See Blake v Neighborhood Hous. Sews. of N.Y. City, 1 NY3d 280 (2003).

A recalcitrant worker defense relieves a party of liability under Labor Law § 240(1) where there was an adequate and available safety device of the type listed in § 240(1) which was provided for the plaintiff's use, the plaintiff was expected to use the device, the plaintiff voluntarily elected not to use the device and had plaintiff used the device, the injury would not have occurred. See Stolt v General Foods Corp, 81 NY2d 918 (1993); Gonzalez v Rodless Properties, L.P., 37 AD3d 180 (1st Dept. 2007); Mayancela v Almat Realty Dev. LLC, 303 AD2d 207 (1st Dept. 2003).

Stellar and Sage argue that the deposition testimony of Garsia and Kim demonstrates that the plaintiff was a recalcitrant worker, as he did not properly follow Garsia's orders that he wait for a signal before pulling the rope. However, neither witness testified that Eom failed to use an adequate safety device provided to him, which is the critical inquiry on a recalcitrant worker defense. As such, Eom's purported failure to wait for a signal is insufficient, alone, to establish a recalcitrant worker defense. No contrary authority is provided by the movants.

Stellar and Sage further argue that the plaintiff's Labor Law § 240(1) claim should be dismissed as their submissions show that Eom was the sole proximate cause of his own injury, not any

purported defect with the pulley system. However, Stellar and Sage's submissions include Eom's deposition testimony which directly contradicts Stellar and Sage's claims that the plaintiff prematurely pulled the rope and caused his own injury. As such, Stellar and Sage's submissions fail to eliminate all material triable issues of fact. See Jacobsen v New York City Health & Hosps. Corp., supra. Instead, their submissions raise issues of fact themselves, specifically whether Eom prematurely pulled the rope, and whether Eom prematurely pulling the rope is what caused the joist to fall.

Additionally, in opposition, the plaintiff points to the portions of Garsia's deposition where he testified that he did not witness the entirety of the accident and conceded that he did not know whether a signal to begin pulling had been given, as he was then a distance from the accident and maybe out of earshot. These inconsistencies in the testimony raise issues of fact and credibility that are best determined by a finder of fact and not on a motion for summary judgment. See Vega v Restani Const. Corp., 18 NY3d 499 (2012); cf. Rivera v Dafna Const. Co., 27 AD3d 545(2nd Dept. 2006); McCaffery v Wright & Co. Const., 71 AD3d 842, (2nd Dept. 2010).

Moreover, even though the plaintiff fails to identify any specific defect in the pulley system, that is not sufficient to

warrant summary disposition in favor of the defendants. The proper inquiry is whether the safety equipment was adequate to provide the laborer with proper protection, not whether the safety equipment was free from defect. See Runner v New York Stock Exch., Inc., 13 NY3d 599 (2009).

Since the parties' submissions raise issues of regarding the Labor Law § 240(1) claim, the plaintiff's cross-motion for summary judgment on that claim is also denied for the same reason.

C. Labor Law § 200 and Negligence

Labor Law § 200(1) codifies landowners' and general contractors' common-law duty to maintain a safe workplace. See Ross v Curtis-Palmer Hydro-Elec. Co., supra. "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 the authority to supervise or control the performance of the work." Ortega v Puccia, 57 AD3d 54, 61 (2nd Dept. 2008).

Stellar and Sage move for summary judgment on the plaintiff's Labor Law § 200 and common-law negligence claims arguing that they did not have the authority to supervise or control Champion's work. In support, they cite the portions of

Eom's deposition testimony in which he testified that he received his orders from one of Champion's employees, Mr. Shim, and deposition transcripts from representatives for both defendants wherein the witness testified that they did not have authority to supervise or control Champion. However, Sage's witness Garsia, in his deposition, testified that one of Sage's other employees, Carlos Cuji, would give instructions and supervise Champion's work, and could stop unsafe work practices.

As to Stellar, however, the defendants' submissions establish that it did not supervise or control Eom's work. The plaintiff does not address the portion of Stellar's motion for summary judgment on the negligence and Labor Law § 200 claims, and thus fails to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

D. Labor Law § 241(6)

"Labor Law § 241(6) ... 'requires owners and contractors 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.'" St. Louis v Town of N. Elba, 16 NY3d 411, 413 (2011), quoting Ross v Curtis-Palmer Hydro Elec Co., supra. Labor Law § 241(6) is not self-executing because it depends upon an outside source, the Industrial Code. See Long v Forest-Fehlhaber, 55

NY2d 154 (1982). Therefore, to recover under Labor Law § 241(6), "the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code." Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 488 (1st Dept. 2018).

Sage and Stellar contend that the provisions of the Industrial Code alleged to have been violated, 12 NYCRR 23-1.7, 1.8, 3.2, 3.3, and 6.1, are either too general to support a claim under the Labor Law, are inapplicable to Eom, or are irrelevant to Eom's accident.

Sage and Stellar correctly argue that the claims under 12 NYCRR 23-6.1(b), (c), and (h) are too general to support a claim under Labor Law § 241(6). See Morrison v City of New York, 5 AD3d 642 (2nd Dept. 2004). They are also correct in arguing that NYCRR 23-3.2, which is designed to protect third-parties from potential damages arising from demolition, is inapplicable here, and that the claims under NYCRR 23-1.8, 3.3, and 6.1 are irrelevant to Eom's accident.

In regard to NYCRR 23-1.8, which requires personal protective equipment to be provided, it is not disputed that Eom was provided with personal protective equipment and that his injuries were not caused by a lack of such equipment. The cited subdivisions of NYCRR 23-3.3, which all require various

protections to ensure that workers are not injured by any compromising of the building structure during demolition are also irrelevant as there is no claim that the building became compromised or unsafe by the work being performed.

The cited subdivisions of NYCRR 23-6.1, which require all hoisting equipment to be properly maintained in good repair and proper operating condition and not overloaded and that there be a signal system are also irrelevant to Eom's injuries. Specifically, section 23-6.1 provides that "material hoists shall be operated only in response to a signal system and all operators and signalmen shall be able to comprehend the signals readily and to execute them properly" and "such signal system shall consist of manual signs, telephone communications or visual or audible signal code."

There are no allegations that Eom's injuries were caused by any deficiency in the hoisting equipment and there is no dispute that a signal system was being used at the project site. There is, however, an issue as to whether Eom properly complied with signals being used.

The plaintiff appears to concede that summary judgment dismissing the Labor Law §241(6) claim pursuant to the aforementioned codes is warranted, as it does not oppose the motion with regard to those codes, but only the portion seeking

to dismiss the claim under 12 NYCRR 23-1.7. In that regard, the plaintiff is correct in arguing that Sage and Stellar fail to establish that 12 NYCRR 23-1.7 is inapplicable.

12 NYCRR 23-1.7(a) requires that "every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable protection." While Sage and Stellar maintain that the location of the accident is not a place where persons were normally exposed to falling material or objects, it was, in fact, an area where he and his co-workers were cutting joists out of the floor above them and lowering them to a floor below. Stellar and Sage offer nothing more in that regard. Therefore, the motion is denied as to the portion of the Labor Law §241(6) claim premised on a violation of 12 NYCRR 23-1.7(a).

IV. CONCLUSION

The motion is granted in part as discussed above, and the cross-motion denied, leaving for trial only the claims for common-law negligence and violation of Labor Law §200 as against defendant Sage Builders Corp. and the portion of the Labor Law §241(6)claim premised on a violation of Industrial Code 23-1.7(a) (22 NYCRR 23-1.7[a])as against both defendants.

Accordingly, it is hereby,

ORDERED that the motion by defendants Stellar 11 East 75, LLC and Sage Builders Corp. for summary judgment dismissing the complaint is granted to the extent that the claims for common-law negligence and violations of Labor Law § 200 are dismissed as against Stellar 11 East 75, LLC, and all claims for violations of the Industrial Code under Labor Law § 241(6), with the exception of the claim for a violation of 12 NYCRR 23-1.7(a), are dismissed as against both parties,; and the motion is otherwise denied, and it is further,

ORDERED that the plaintiff's cross-motion for partial summary judgment on the claim for violations of Labor Law § 240(1) is denied; and it is further,

ORDERED that the parties shall contact chambers on or before November 30, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

Dated: October 22, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON