

Winters v Atlantic State Dev. Corp.

2021 NY Slip Op 31309(U)

April 16, 2021

Supreme Court, New York County

Docket Number: 153548/2019

Judge: Richard G. Latin

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

PRESENT: HON. RICHARD G. LATIN PART IAS MOTION 46

Justice

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INDEX NO. 153548/2019

MICHAEL WINTERS,

MOTION DATE 04/15/2021

Plaintiff,

MOTION SEQ. NO. 003

- v -

ATLANTIC STATE DEVELOPMENT CORP. AND LAURAN
WALK,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for

JUDGMENT – SUMMARY

Upon the foregoing documents, it is ordered that defendant Atlantic State Development Corp.'s unopposed motion, pursuant to CPLR 3212, for summary judgment is determined as follows:

Plaintiff Michael Winters commenced the instant action to recover for injuries he allegedly sustained on January 23, 2019, while working as a supervisor for non-party Taconic Builders in an apartment in a one family home owned by defendant Lauran Walk located at 71 Murray Street, New York, New York. Plaintiff claims that while using two ladders to install strip light lenses, he transferred his weight from one ladder to another when he missed a rung causing him to fall.

Defendant Atlantic State Development Corp. now seeks summary judgment on the basis that plaintiff cannot make out a claim under Labor Law §§ 240(1) and 241(6) since plaintiff's actions were the sole cause of the accident and the work was not being supervised or directed by defendant Atlantic State Development Corp. Moreover, movant asserts that it did not create the condition nor have any knowledge of any defective condition as none existed.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of the motion, defendant submits, inter alia, plaintiff's deposition testimony.

Plaintiff testified that he was assigned by his employer, Taconic Building as a supervisor at the job site located at 71 Murray Street, New York, New York. He stated that Atlantic State Development Corp. had contracted with the Walk family to build and deliver the job completed. He further stated that Atlantic State Development Corp. encountered some problems with the job and the principal of Atlantic, Russell reached out to plaintiff's boss at Taconic to send over a supervisor to fix the job. It was the plaintiff's understanding that Taconic was doing a favor for Atlantic and was not making any money on the job. Plaintiff described the arrangement between the two companies as a "symbiotic relationship." Moreover, it was plaintiff's understanding that there was no written contract between Atlantic and Taconic for this particular job. He averred that he had been working exclusively at the job site for five or six months prior to the accident.

The plaintiff testified that on the morning of the accident, he was finishing the low voltage strip lighting in the hallways, installing the diffuser lens caps. He also stated that no other co-workers were assisting him on the date of the accident with the installation of the diffusion lens covers, despite numerous complaints about understaffing to his boss, Tom Ryan. With respect to work equipment, plaintiff averred that Taconic would provide tools to some degree, and Atlantic would provide other tools. He further stated that by the time of his accident, Atlantic had removed all their ladders from the job site, so he used the building's ladders, without any formal permission, to complete the job. He stated that Taconic never provided ladders to use on the job. Additionally, he testified that even though he is a supervisor, when he was without men to assist on a job, in order to meet schedule and satisfy his boss, he would complete the job himself. The plaintiff stated that for weeks on end he asked both companies, Taconic and Atlantic for more men to assist at the job site, and ten percent of the time he was provided with additional support. On the date of the accident, he had been using the building's ladders, which he had been using fairly frequently for several months.

As to the condition of the building's ladders plaintiff was utilizing, he testified that the ladders were made of fiberglass, had an A frame and were in good condition. He further stated that one ladder was 5 feet and the other 6 feet. The plaintiff testified that on the date of the accident, he placed the ladders about 4 or five feet apart starting from the center of each ladder. He further explained that, "those two ladders were intended for two men...and having to get it done, I put one foot on one ladder and one foot on the other and positioned myself with the appropriate height and began to install the lenses." Moreover, he stated that, "[w]hen you are standing on two ladders...you can reach an entire four feet from the center of those ladders in one direction, and an entire four feet in the other direction, which would have covered the length or the span that I needed to address." Plaintiff stated that each time he would have to cover more area, he would reposition the ladders. He further testified that to install the plastic cover onto the aluminum clips would require both hands and a good deal of exertion. Prior to plaintiff's accident, he received eight hours of assistance in total on two occasions from a Taconic worker and an Atlantic worker to install the plastic covers onto the aluminum tracks.

As to safety, the plaintiff testified that up until the point of the accident he had no complaints of any safety issues or concerns. Plaintiff claims that he only complaint was that there should have been another person assisting him. With respect to the condition of the ladder, the plaintiff averred that it was in “very good condition”, was positioned on a flat surface on the floor, the hooves on the ladder were in place, the horizontal bars on both ladders were locked, however the ladders did not stay in position on the floor. Additionally, he stated that in order to keep himself secure on the ladder the plaintiff stated that he used his head as a pressure against the ceiling for stability. On the date of the accident he was wearing boots, no goggles, or gloves. At the time of the accident, plaintiff states that he was going to transfer his weight from one side of the ladder to the other side and was going to bridge his legs on the ladders, but missed the top tread, when he fell to the ground. Plaintiff further testified that, “having an assistant would have— this never would have happened. I’m not blaming anyone. If anything, it was my carelessness, but I wouldn’t have been in that position if I had a helper.” Moreover, he stated that the ladders nor the work site was defective.

Labor Law § 241(6) imposes a nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation, or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). The ultimate responsibility for safety practices at a building construction site lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). Thus, the owner of the subject property and the general contractor had a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish their liability (*see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]).

In order for a Labor Law § 241(6) to survive, a plaintiff must claim that there was a violation of a regulation that provides a specific standard of conduct and cannot simply rely on general common-law safety principles (*id.*). Here, as stated in plaintiff’s complaint and bill of particulars, plaintiff alleges that defendants violated, “applicable provisions of the Industrial Code Rule 23.” The movant contends that plaintiff does not specify the concrete specifications allegedly violated and as such his Labor Law § 241(6) claim should be dismissed. Moreover, the movant asserts that if the court were to consider Industrial Code Rule 23 sufficient, there was no violation of the Code.

Here, the plaintiff did not rely upon a sufficient specific Industrial Code regulation to form the predicate for his Labor Law § 241(6) claim. As stated above, plaintiff testified that he had no complaints or concerns about the safety of the work site or the ladders he was using. Moreover, he also testified that the ladders were steady, locked and in good condition. He stated that the reason for his fall was due to his inattention to where he was stepping and the he missed the rung of the second ladder when he attempted to straddle two ladders. Accordingly, plaintiff’s Labor Law § 241(6) claim under Industrial Code Rule 23 is dismissed.

As to plaintiff’s Labor Law § 240(1) claim, § 240(1) states that, “[a]ll contractors and owners and their agents, except owners of one or two-family dwellings who contract

for but do not direct or control the work, in the erection, demolition, 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.”

Here, plaintiff testified that the ladders he used were fully open, stable, on level ground, and were not defective. Plaintiff further admitted that he missed a rung when trying to straddle onto the second ladder. Moreover, plaintiff stated that his accident was solely due to his actions and his failure to pay attention. Since there was nothing defective with respect to the ladders used by plaintiff, plaintiff’s claim under Labor Law § 240(1) is also dismissed.

Lastly, as to plaintiff’s Labor Law § 200 claim or common law negligence, to impose liability on an owner or general contractor under Labor Law § 200, there must be a showing that the owner or general contractor directly oversaw or controlled the actual work in which plaintiff was engaged at the time of his injury (see *Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [1st Dept 2007]). In the instant case, the movant did not control, supervise, or direct the manner of plaintiff’s work. Additionally, the movant was not present on the date of the accident and did not create or have notice any alleged hazardous condition since none were present according to plaintiff’s testimony. As such, plaintiff’s Labor Law § 200 and common law negligence causes of action are hereby dismissed.

Accordingly, it is

ORDERED that, defendant Atlantic State Development Corp’s motion for summary judgment is granted and plaintiff’s complaint and claims pursuant to Labor Law §§ 200, 240(1), and 241(6) are dismissed in their entirety; and it is further

ORDERED that, defendant Atlantic State Development Corp. shall serve a copy of this order on plaintiff, within 30 days of the date of this order, together with notice of entry.

This constitutes the decision and order of the court.

<u>4/16/2021</u> DATE	 RICHARD G. LATIN, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE