Malan v Tegford Realty LLC
2021 NY Slip Op 33036(U)
December 10, 2021
Supreme Court, Bronx County
Docket Number: Index No. 22774/2016E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

JOSE MALAN,

Index No.: 22774/2016E

Plaintiff,

- against -

DECISION and ORDER

TEGFORD REALTY LLC,

Defendant.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion is whether he is entitled to judgment as to liability with respect to his Labor Law §§240(1) and 241(6) claims. Moreover, an additional issue raised in the instant motion is whether he should be granted leave to file an amended bill of particulars asserting Industrial Codes 12 NYCRR §§23-1.5(c)(3), 23-1.21(b)(3)(i), and 23-1.21(b)(4)(iv).

This court holds that Plaintiff established his *prima facie* burden as to his Labor Law §240(1) claim and Defendant failed to raise any triable issues of fact to preclude Plaintiff's entitlement to judgment. Further, this court holds that Plaintiff should be granted leave to amend his bill of particulars to assert Industrial Codes 12 NYCRR §§23-1.5(c)(1)(3), 23-1.21(b)(3)(i), and 23-1.21(b)(4)(iv). Lastly, this court holds that Plaintiff established his *prima facie* burden regarding his Labor Law §241(6) claim only as to Industrial Codes 12 NYCRR §§23-1.5(c)(3), 23-1.21(b)(3)(i), and 23-1.21(b)(4)(iv).

According to Plaintiff, on the day of his accident he was hired as a laborer by non-party Nova General Contracting ("GC") to paint fire escapes, which were affixed to the façade of Defendant's building. Plaintiff testified that in order to access the building's fire escapes he was

given a metal extension ladder by the GC. He claims that the ladder did not have the appropriate rubber base footings to secure the ladder. Plaintiff alleges that despite protesting to the GC that the he did not want to use the extension ladder nevertheless, the GC insisted that he use same. He testified that his supervisor placed the ladder leaning against Defendant's building and that he ensured him that he would hold the ladder at its base. Plaintiff claims that he ascended the extension ladder about ten feet to the second rung from the top where he was at level height with the bottom of the second-floor fire escape. After he finished painting the fire escape, he noticed that his supervisor was not holding the ladder but was on another fire escape putting out cones. At that moment, he alleges that his ladder fell backwards causing him to fall to the ground and sustain injuries.

I. Labor Law §240(1)

Plaintiff seeks summary judgment on his Labor Law §240(1) claim. Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo, 124 LLC,* 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must demonstrate that his injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

Plaintiff argues that he is entitled to judgment concerning his Labor Law §240(1) claim as he was provided a defective and unsecured ladder to accomplish his work. In addition, he

relies upon his expert witness, Scott Silberman, a licensed professional engineer who opined that Defendant departed from the accepted standards of construction safety. Mr. Silberman averred that Labor Law §240(1) was violated in that: (1) Defendant required Plaintiff to use a ladder for painting when no 3-point contact could be maintained; (2) Defendant failed to provide Plaintiff a scaffold which would have been an appropriate safety device considering Plaintiff's work; (3) the ladder was defective since it did not have the proper footings; (4) it directed Plaintiff to climb an extension ladder that was not secured; and (5) Defendant failed to inspect and supervise the work area.

In oppostion, Defendant does not contest the merits of Plaintiff's motion but rather it raises procedural issues with respect to the timeliness of the instant motion. Defendant contends that this motion is untimely by over three years as the note of issue was filed on October 3, 2017. Defendant relies upon the language of CPLR §3212(a), which requires that any summary judgment motion be filed no later than 120 days from the filing of the note of issue. Moreover, Defendants argue that Plaintiff failed to provide good cause for his tardy filing of this motion.

In reply, Plaintiff claims that the note of issue filed on October 3, 2017, was voluntarily withdrawn by the parties via a so-ordered stipulation dated November 18, 2019. Therefore, Plaintiff claims that upon the withdrawal of the note of issue that this action reverted to its pre-note status, thus, rendering the instant motion timely.

This court finds that Plaintiff made a *prima facie* showing of a Labor Law §240(1) violation as it is well settled that the failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law §240(1). *See Hill v. City of NY,* 140 A.D.3d 568, 35 N.Y.S.3d 307 (1st Dep't 2016). Therefore, since Defendant failed to

raise any triable issues of fact, Plaintiff is entitled to judgment with respect to liability on his Labor Law §240(1) claim.

This court further finds that Defendant's argument regarding the untimeliness of the instant motion is without merit. Plaintiff submitted the parties' so-ordered stipulation (which was also e-filed with NYSCEF) voluntarily withdrawing his note of issue as of November 18, 2019. Consequently, this action procedurally reverted to its status as a pre-note action, thus, making the instant motion timely. *See Andre v. Bonetto Realty Corp.*, 32 A.D.3d 973, 822 N.Y.S.2d 292 (2d Dep't 2006).

II. Leave to Amend Answer

Pursuant to CPLR §3025(b), a party may amend a pleading at any time by leave of court. A request to amend is determined in accordance with the general considerations applicable to such motion, including the statute's directive that leave "shall be freely given upon such terms as may be just." *See* CPLR §3025(b); *see also Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 23 N.E.3d 1008, 998 N.Y.S.2d 740 (2014). New York State Courts have consistently recognized that absent prejudice or surprise, courts are free to permit the amendment of pleadings. *Id.*

Plaintiff seeks leave to amend his bill particulars to include Industrial Codes 12 NYCRR §§23-1.5(c)(1)(3), 23-1.21(b)(3)(i), and 23-1.21(b)(4)(iv).[1] He argues that he should be allowed to amend his bill of particulars to add said Industrial Codes to conform to Plaintiff's expert witness' report.

This court finds that Plaintiff should be freely granted leave to amend his bill of particulars to include Industrial Codes 12 NYCRR §§23-1.5(c)(1)(3), 23-1.21(b)(3)(i), and 23-

[1] Plaintiff's request to amend his bill of particulars to add violations of ANSI A 14.2 American Standard for Ladders - Portable Metal - Safety Requirements and Table 22 of the ANSI is denied as violation of ANSI standards does not constitute a violation under Labor Law §241(6). *See Mueller v. PSEG Power NY, Inc.*, 83 A.D.3d 1274, 922 N.Y.S.2d 588 (3d Dep't 2011).

1.21(b)(4)(iv). An amendment to allege a specific section of the Industrial Code is appropriately permitted in the absence of unfair surprise or prejudice and Defendant cannot claim prejudice as the amendments entail no new factual allegations and raise no new theories of liability. *See Gjeka v. Iron Horse Transp., Inc.,* 151 A.D.3d 463, 56 N.Y.S.3d 304 (1st Dep't 2017); *see also Alarcon v. UCAN White Plains Hous. Dev. Fund Corp.,* 100 A.D.3d 431, 954 N.Y.S.2d 13 (1st Dep't 2012).

III. Labor Law §241(6)

Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

Plaintiff cites to Industrial Code 12 NYCRR §§23-1.5(c)(1)(2)(3), 23-1.21(b)(3)(i), and 23-1.21(b)(4)(iv) to support his Labor Law §241(6) claim, therefore, he abandoned all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *Burgos v. Premier Props. Inc.,* 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC,* 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

A. 12 NYCRR §23-1.5(c)(1)(2)(3)

Plaintiff alleges that Defendants violated 12 NYCRR §23-1.5(c)(1)(2)(3), which imposes upon employers a general responsibility to provide its workers with machinery or equipment that is in good repair and safe working condition.

Plaintiff relies upon his expert witness, Mr. Silberman, who averred that the ladder Plaintiff was given to accomplish his work was defective since it did not have the proper safety footings in violation of 12 NYCRR §23-1.5(c)(1)(2)(3).

This court finds that although Defendants did not proffer any oppostion, Plaintiff nonetheless failed to prove his *prima facie* burden with respect to Industrial Codes 12 NYCRR §23-1.5(c)(1)(2) since same are too general to serve as Labor Law §241(6) predicates. *See Jackson v. Hunter Roberts Constr. Group, LLC,* 161 A.D.3d 666, 78 N.Y.S.3d 310 (1st Dep't 2018).

However, with respect to Industrial Code 12 NYCRR §23-1.5(c)(3) this court finds that it is specific enough to serve as a Labor Law §241(6) predicate. *Contreras v. 3335 Decatur Ave. Corp.,* 173 A.D.3d 496, 99 N.Y.S.3d 879 (1st Dep't 2019). Moreover, this court finds that Plaintiff's unrebutted testimony that the metal extension ladder provided was defective as it did not have proper safety footings, established his *prima facie* burden of a violation of 12 NYCRR §23-1.5(c)(3). Further, this court finds that Defendant failed to raise any triable issues of fact to preclude Plaintiff's entitlement to judgment.

B. 12 NYCRR §23-1.21(b)(3)(i)(4)(iv)

12 NYCRR §23-1.21(b)(3)(i) provides in relevant part that all ladders shall be maintained in good condition and that a ladder shall not be used if it has a broken member or part.

Plaintiff argues that Defendant violated Industrial Code 12 NYCRR §23-1.21(b)(3)(i) in that he was working more than six feet above the ladder base, without any footing, and no one was stationed at the foot of the ladder. Furthermore, he maintains that the ladder was not secured in

its position or by mechanical means as required by this Industrial Code.

This court finds that Plaintiff established his *prima facie* burden regarding his Labor Law §241(6) claim predicated upon 12 NYCRR §23-1.21(b)(3)(i) given the undisputed facts that the metal extension ladder provided did not have proper ladder footings. *See Stankey v. Tishman Constr. Corp. of NY,* 131 A.D.3d 430, 15 N.Y.S.3d 48 (1st Dep't 2015).

C. 12 NYCRR §23-1.21(b)(4)(iv)

12 NYCRR §23-1.21(b)(4)(iv) in provides that: "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

As argued above, Plaintiff contends that Defendant violated Industrial Code 12 NYCRR §23-1.21(b)(4)(iv) in that he was working more than six feet above the ladder base, without any footing, and no was stationed at the foot of the ladder. Moreover, he argues that the ladder was not secured in its position or by mechanical means as required by this Industrial Code.

This court finds that Plaintiff demonstrated his *prima facie* burden that Defendant violated 12 NYCRR §23-1.21(b)(4)(iv) as Plaintiff's testimony that he was working above ten feet and the ladder he fell from did not have a person stationed at the base of the ladder nor was it secured by mechanical means went unrebutted.

Accordingly, it is

ORDERED, that Plaintiff's application seeking judgment on liability with respect to his Labor Law §240(1) is granted; and it is further

ORDERED, that Plaintiff's application seeking leave to amend his bill of particulars to add Industrial Codes 12 NYCRR §§23-1.5(c)(1)(3), 23-1.21(b)(3)(i), and 23-1.21(b)(4)(iv) is granted; and it is further

ORDERED, that Plaintiff's application seeking judgment on liability with respect to his Labor Law §241(6) claim is granted only as to the following predicates 12 NYCRR §23-1.5(c)(3) and 12 NYCRR §23-1.21(b)(3)(i)(4)(iv).

This constitutes the decision and order of the court.

Dated: December 10, 2021

Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.