SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PRESENT: Donna-Marie E. Golia, JSC Part 21

JOVACY CARLOS RAMOS,

Plaintiff,

v

Index No. 702185/2019
Motion Date: 5/17/2021
Motion Seq. No.: 002

DECISION & ORDER

BGY CITYVIEW LLC, BGY CITYVIEW HOLDINGS, LLC, BGY CITYVIEW DEVELOPMENT LLC, NEW LINE STRUCTURES & DEVELOPMENT LLC and NEW LINE STRUCTURES, INC.,

Defendants.

The following electronically filed documents numbered EF17 to EF32 and EF37 to EF41 read on this motion by plaintiff for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") 3212:

	Papers Numbered
Notice of Motion, Affirmation, Exhibits, Affidavit of Service.....	EF17 – EF32
Affirmation in Opposition.....	EF37 – EF39
Affirmations in Reply, Affidavit of Service	EF40 – EF41

Plaintiff Jovacy Carlos Ramos ("plaintiff") moves, pursuant to CPLR 3212 for summary judgment on liability against defendants BGY Cityview LLC ("BGY Cityview") and New Line Structures & Development LLC ("New Line"), pursuant to New York State Labor Law §§ 240 and 241(6). Defendants BGY Cityview, BGY Cityview Holdings LLC, BGY Cityview Development LLC, New Line Structures and New Line Structures Inc. ("defendants") oppose to the motion. Upon the papers submitted, plaintiff's motion is denied in its entirety, as discussed more fully below.

Plaintiff commenced this action for personal injuries he allegedly sustained on or about October 9, 2018 during the construction of the premises located at 23-15 44th Drive, Long Island City, New York (the "subject premises") when during the scope of his employment,[1] he fell as he was descending a ladder. Plaintiff claims that BGY Cityview, the owner of the subject premises, and New Line, the construction manager for the project, failed to provide him with proper equipment and/or safety devices to prevent him from falling from an elevated height in violation of Labor Law §§ 240 and 241(6).

[1] Plaintiff alleges that New Line contracted with his employer, Highbury Concrete, Inc. ("Highbury"), to perform concrete superstructure work at the subject premises.

In his motion, plaintiff argues that defendants were obligated to provide him with proper equipment and/or safety devices and that their failure to do so proximately caused his alleged injuries in violation of Labor Law § 240(1). Specifically, plaintiff contends that he fell approximately eight-to-nine feet off the ground while transporting plywood using a defective "makeshift job ladder." In that regard, plaintiff asserts that he could have used a crane to transport the plywood, however, his supervisor told him that the crane was not available and that it was urgent to proceed using the ladder.

Additionally, plaintiff argues that defendants violated Labor Law § 241(6) by violating, *inter alia*, Industrial Code § 23-1.21(b), which sets forth the general safety standards for ladders. Specifically, plaintiff notes that the ladder at issue violated Industrial Code §§ 1.21(b)(3)(iv) and 1.21(b)(4)(i) as it was constructed from two pieces of plywood put together on either side with steps in the middle and several sheets of plywood affixed to the center with no handrails. Plaintiff also avers that the ladder, which was the sole means of access between the two floors, was not nailed or otherwise securely fastened in place as required by Industrial Code § 1.21(b)(4)(i) since its top was leaning against the base of the floor above and its bottom was leaning against a newly-constructed wall below. In that regard, plaintiff points out that although the ladder was more than 27 feet in height, it was not held in place by a secured anchorage or safety feet or by anyone stationed at its feet. Similarly, plaintiff highlights that the ladder did not have rubber feet and was uneven at the bottom in violation of Industrial Code § 1.21(b)(4)(ii). Finally, plaintiff notes that the ladder's upper-end was not secured against side slip by its position or by mechanical means as required by Industrial Code § 1.21(b)(4)(iv).

In opposition, defendants argue that there are triable issues of fact as to whether plaintiff was the sole proximate cause of the alleged incident. Defendants aver that the affidavit of plaintiff's foreman, Rodolpho Da Silva ("Da Silva"), confirms that plaintiff fell from the ladder due to his failure to follow company protocol that requires concrete laborers to move plywood from floor to floor using a towline. According to defendants, "job-built ladders" were constructed in elevator shafts to allow workers to move from floor to floor more easily and were not intended to be used to move materials from floor to floor. Defendants further state that all Highbury workers were told not to carry any materials while climbing the ladders, and therefore, plaintiff could and should have used the towline that was available to move the materials.

Additionally, defendants argue that contrary to plaintiff's assertion that the ladder was unstable, he never complained to Da Silva about the ladder being "shaky or loose." Defendants also note that "job-built" ladders were not moved from one location to another as they were secured to the ground and had a towline next to them. Finally, defendants assert that plaintiff failed to prove that they violated a specific provision of the Industrial Code, and therefore, his claim under Labor Law § 241(6) must be denied.

In reply, plaintiff reiterates that the subject ladder proximately caused the alleged incident and that Da Silva's affidavit is silent on the condition of the ladder, if and how it was positioned and secured at the time of the alleged incident and the presence of other safety devices to transport the plywood. Finally, plaintiff avers that the Industrial Code

provisions that he cited are applicable as the ladder had defects and was not properly held in place.

DISCUSSION

Summary judgment pursuant to CPLR 3212 provides a mechanism for the prompt disposition, prior to trial, of civil actions which can be decided as a matter of law (see generally, Brill v City of New York, 2 NY3d 648, 650 [2004]). On a motion for summary judgment, the moving party must make out a *prima facie* case by submitting evidence in admissible form which establishes its entitlement to judgment as a matter of law (see, Marshall v Arias, 12 AD3d 423, 424 [2d Dept 2004]). Upon such a showing, the burden shifts to the non-moving party to present admissible evidence which demonstrates the necessity of a trial as to an issue of fact (see, Zolin v Roslyn Synagogue, 154 AD2d 369, 369 [2d Dept 1989]). The non-moving party must be afforded every favorable inference that can be drawn from the evidentiary facts established (see, McArdle v M & M Farms, 90 AD2d 538 [2d Dept 1982]). However, conclusory, unsupported allegations or general denials are insufficient to defeat a motion for summary judgment (see, William Iselin & Co., Inc. v Landau, 71 NY2d 420, 427 [1988]).

I. New York State Labor Law § 240(1)

Under Labor Law § 240(1), there is a "nondelegable duty" imposed upon "owners and general contractors, and their agents" "to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (Cain v Ameresco, Inc., 2021 WL 2345525, at *2 [2d Dept 2021]). Indeed, "'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'" (Ramos-Perez v Evelyn USA, LLC, 168 AD3d 1112, 1113 [2d Dept 2019] [citations omitted]). Specifically, "'[t]he contemplated hazards [of Labor Law § 240(1)] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured'" (Devoy v City of New York, 192 AD3d 665 [2d Dept 2021] [citations omitted]).

To obtain summary judgment on the issue of liability on a Labor Law § 240(1) cause of action, "'a plaintiff is required to demonstrate, *prima facie*, that there was a violation of the statute and that the violation was a proximate cause of his or her injuries'" (Cain, 2021 WL 2345525, at *2, supra). In that regard, "'[w]here there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)'" (Loretta v Split Dev. Corp., 168 AD3d 823, 824 [2d Dept 2019] [citations omitted]). Moreover, while "'mere fact that a plaintiff fell from a ladder does not, in and of itself, establish a violation of the statute,'" "a plaintiff may establish his or her *prima facie* entitlement to judgment as a matter of law on a Labor Law § 240(1) cause of action by showing both that he or she fell from a defective or unsecured ladder, and that the defect or failure to secure the ladder was a proximate cause of his or

her injuries" (Robinson v Goldman Sachs Headquarters, LLC, 95 AD3d 1096, 1097 [2d Dept 2012]; Jones v City of New York, 166 AD3d 739, 740 [2d Dept 2018]).

Here, while plaintiff has met his *prima facie* burden that defendants failed to furnish him with the proper safety equipment necessary to transport plywood between floors and that his use of a defective and unsecured ladder proximately caused him to fall and sustain injuries, defendants have raised triable issues of fact as to whether plaintiff was the sole proximate cause of the alleged incident (see, Pl. Exh. 4; Palamar v State, 186 AD3d 722, 723 [2d Dept 2020]). Indeed, defendants submit the affidavit of Da Silva, plaintiff's foreman who attests that he "never told the workers to move forms or plywood by hand, or to carry them up and down the job-built ladders" and "did not instruct anyone, including Mr. Ramos to carry any materials on the job-built ladders" (see, Aff. p. 3). Rather, contrary to plaintiff's assertion that the subject ladder was the sole means of access between the two floors, Da Silva stated that plaintiff was "required to set up a tow line, which [he] would use to raise plywood to an upper floor or lower it to a lower floor" (id. at p. 2). Moreover, while plaintiff described various defects in the subject ladder, including, *inter alia*, that it was "wobbly" and "not sturdy," Da Silva stated that plaintiff did not tell him that "the ladder he was using on the date of loss was shaky or loose" (id. at p. 3; Palamar, 186 AD3d at 723, supra; Loretta, 168 AD3d at 825, supra; Corchado v 5030 Broadway Properties, LLC, 103 AD3d 768, 769 [2d Dept 2013]; Robinson, 95 AD3d 1097–98, supra). Accordingly, as there are questions of fact as to whether the subject ladder was defective, whether any alleged defects in the subject ladder caused plaintiff to fall or whether plaintiff was the sole proximate cause of the alleged incident and his alleged injuries, the branch of plaintiff's motion for summary judgment on liability pursuant to Labor Law § 240 is denied (see, Palamar, 186 AD3d at 723, supra).

II. Labor Law § 241(6)

Additionally, plaintiff argues that he is entitled to summary judgment on his Labor Law § 241(6) cause of action based on defendants' violation of Industrial Code §§ 23-1.21(b)(3)(iv) and (4)(i), (ii) and (iv), which proximately caused his alleged injuries.

Under Labor Law § 241(6), there is "a nondelegable duty" imposed 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'" (Jones, 166 AD3d at 741, supra; Melchor v Singh, 90 AD3d 866, 868 [2d Dept 2011]). Therefore, to recover on a cause of action alleging a violation of Labor Law § 241(6), "a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards" (Forschner v Jucca Co., 63 AD3d 996, 998 [2d Dept 2009]; Jones, 166 AD3d at 741, supra).

Under Industrial Code § 1.21(b)(3)(iv), "[a]ll ladders shall be maintained in good condition" and "shall not be used" if it "has any flaw or defect of material that may cause ladder failure." Here, this provision of the Industrial Code is inapplicable to the facts and circumstances of this case. Indeed, plaintiff has failed to make any showing that the ladder at issue had any flaws or defect of material or that said flaws or defect caused the ladder to fail in any way. Similarly, plaintiff failed to establish that any purported flaw or defect in

the subject ladder proximately caused him to fall or sustain any injuries (see, generally, Melchor v Singh, 90 AD3d at 870, supra; Rakowicz v Fashion Inst. of Tech., 56 AD3d 747, 747 [2d Dept 2008]). Accordingly, because Industrial Code § 1.21(b)(3)(iv) is not applicable to the facts and circumstances of this case, plaintiff has failed to meet his *prima facie* burden. Therefore, the branch of plaintiff's motion for summary judgment on liability under Labor Law § 241(6) based on defendants' alleged violation of Industrial Code § 1.21(b)(3)(iv) is denied.

Additionally, under Industrial Code § 1.21(b)(4)(i), "[a]ny portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place." While plaintiff avers that the subject ladder was not nailed or otherwise securely fastened in place, this provision of the Industrial Code is not applicable to the facts of this case as the ladder at issue was not used as "a regular means of access between floors or other levels" (see, Artoglou v Gene Scappy Realty Corp., 57 AD3d 460, 462 [2d Dept 2008]; see, generally, Cain v Ameresco, Inc., 195 AD3d 677 [2d Dept 2021]). Rather, as defendants state and plaintiff concedes, the ladder was constructed as a temporary means to get plywood from one floor to another for a specific limited purpose. Indeed, plaintiff concedes that the "makeshift 'job ladder'" was utilized to "carry a piece of plywood [located on the second floor] for use in the construction of a concrete form" and that Da Silva stated that he was "putting up a ladder to see and if [he can] get up there through that ladder" (see, Affirm. p. 2; Pl. Trans. P. 91; Arigo v Spencer, 39 AD3d 1143, 1145 [4th Dept 2007]; Jamison v Cty. of Onondaga, 17 AD3d 1142, 1143 [4th Dept 2005]). Accordingly, because Industrial Code § 1.21(b)(4)(i) is not applicable to the facts and circumstances of this case, plaintiff has failed to meet his *prima facie* burden. Therefore, the branch of plaintiff's motion for summary judgment on liability under Labor Law § 241(6) based on defendants' alleged violation of Industrial Code § 1.21(b)(4)(i) is denied.

Likewise, Industrial Code § 1.21(b)(4)(ii) is inapplicable to the facts and circumstances of this case. Under Industrial Code § 1.21(b)(4)(ii), "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings" (see, Melchor, 90 AD3d at 870, supra). Here, there are no allegations that there were any slippery surfaces or that the subject ladder was placed on any insecure or unstable objects (see, Cain, 195 AD3d at 677, supra; Artoglou, 57 AD3d at 461, supra; Arigo, 39 AD3d at 1145, supra). To the extent that plaintiff claims that the subject ladder lacked a rubber footing, plaintiff failed to demonstrate that such violation proximately caused him to fall or sustain any injuries (see, e.g., Melchor, 90 AD3d at 870, supra; Harris v Arnell Const. Corp., 47 AD3d 768 [2d Dept 2008]). Accordingly, the branch of plaintiff's motion for summary judgment on liability under Labor Law § 241(6) based on defendants' alleged violation of Industrial Code § 1.21(b)(4)(ii) is denied.

Finally, under Industrial Code § 1.21(b)(4)(iv), "[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." Based on the facts and circumstances of this case, this provision of the Industrial Code is inapplicable as plaintiff was not performing any work from the subject ladder on the date of the alleged incident (see, Cain, 195 AD3d at 677, supra; Arigo, 39 AD3d at 1145, supra). Rather, plaintiff alleges that he used the subject ladder to gain access between two floors in order to transport plywood (see, id.; Kin v State, 101 AD3d 1606, 1608 [4th Dept 2012]). Accordingly, as no work was being performed from the ladder at issue on the date of the alleged incident, plaintiff has failed to meet his *prima facie* burden. Therefore, the branch of plaintiff's motion for summary judgment under Labor Law § 241(6) on liability based on defendants' alleged violation of Industrial Code § 1.21(b)(4)(iv) is denied.

Furthermore, since none of the cited Industrial Code sections pertain to this action, these causes of action must be dismissed. Indeed, a court "may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" (Dunham v Hilco Const. Co., 89 NY2d 425, 429–30 [1996]; Cerbone v Lauriano, 170 AD3d 942, 943 [2d Dept 2019]; Whitman Realty Grp., Inc. v Galano, 52 AD3d 505, 506 [2d Dept 2008]). In doing so, there must be "fair notice and an opportunity of a party to present his or her defenses" (see, id.). Here, the causes of action concerning defendants' alleged violation of Industrial Code §§ 23-1.21(b)(3)(iv) and (4)(i), (ii) and (iv) were the subject of the instant motion before this Court and both parties have had a full and fair opportunity to present their arguments, defenses and respective positions on said provisions and their individual applicability to the facts of this case (see, supra). Accordingly, upon searching the record, and determining that Industrial Code §§ 23-1.21(b)(3)(iv) and (4)(i), (ii) and (iv) are inapplicable to the facts and circumstances of this case, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) causes of action premised upon their alleged violations of Industrial Code §§ 23-1.21(b)(3)(iv) and (4)(i), (ii) and (iv) (see, e.g., Goldstein v Cty. of Suffolk, 300 AD2d 441, 442 [2d Dept 2002]).

In sum, plaintiff's motion for summary judgment on liability against defendants BGY Cityview LLC and New Line Structures & Development LLC pursuant to New York State Labor Law §§ 240 and 241(6) is denied. However, upon searching the record, the Court grants summary judgment in favor of defendants with respect to plaintiff's causes of action under Labor Law § 241(6) for alleged violations of Industrial Code §§ 23-1.21(b)(3)(iv) and (4)(i), (ii) and (iv). The Clerk of the Court is respectfully directed to enter judgment dismissing plaintiff's causes of action under Labor Law § 241(6) for alleged violations of Industrial Code §§ 23-1.21(b)(3)(iv) and (4)(i), (ii) and (iv).

This constitutes the Decision and Order of the Court.

Dated: November 18, 2021

Donna-Marie E. Golia, JSC

FILED
11/18/2021
COUNTY CLERK
QUEENS COUNTY