Nolan v Memorial Hosp. for Cancer & Allied Diseases
2022 NY Slip Op 32831(U)
August 19, 2022
Supreme Court, New York County
Docket Number: Index No. 153139/2018
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY, *Justice* — **PART** 56M

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JOHN NOLAN and JILL NOLAN,

Plaintiffs,

- v -

MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES and TURNER CONSTRUCTION COMPANY,

Defendants.

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INDEX NO. 153139/2018

MOTION DATE 05/25/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 67, 68, 69, 70, 72, 73, 74

were read on this motion to/for SUMMARY JUDGMENT-AFTER JOINDER.

In this action to recover damages for personal injuries arising from a construction accident, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted to the extent that the defendants are awarded summary judgment dismissing so much of the cause of action alleging common-law negligence and violation of Labor Law § 200 as was based on claims that the accident arose from the means and methods of the work, and so much of the Labor Law § 241(6) cause of action as was based on alleged violations of 12 NYCRR 23-1.5, 23-1.7(e)(1), 23-1.11, 23-1.15, 23-1.30, 23-2.1, 23-5.1-5.22, and 23-6.1-6.3. The motion is otherwise denied.

The facts of this dispute are set forth in detail in this court's decision and order disposing of Motion Sequence 001. In short, the plaintiff John Nolan (Nolan), in the course of his job as an ironworker. was carrying heavy metal embeds in each arm, when he exited a building hoist at the 20th floor of a building under construction, walked several feet along a wooden landing platform adjacent to the hoist, attempted to descend from the platform to a corrugated metal floor approximately two feet below by means of two stacked foam insulation boards or blocks

that had been placed under the platform, slipped on the upper board or block, and fell, thus sustaining injuries. The standards applicable to summary judgment motions and liability for common-law negligence and violations of Labor Law §§ 200 and 241(6) also were analyzed at length in that order.

In the order deciding Motion Sequence 001, the court awarded the plaintiff partial summary judgment on the issue of whether the defendants violated 12 NYCRR 23-1.7(f) and 12 NYCRR 23-2.7(b). The court found that the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on the issue of whether the defendants violated 12 NYCRR 23-1.7(e). The court, however, denied that branch of their motion seeking summary judgment on the issue of liability on their Labor Law § 241(6) cause of action, concluding that, even though they established that the defendants violated two sections of the Industrial Code, the defendants raised triable issues of fact as to whether those violations actually constituted negligence under the circumstances of this case, and whether that negligence proximately caused the plaintiff's accident and injuries.

The court, upon concluding that Nolan's accident implicated both a dangerous premises condition and the means and methods of work, also denied that branch of the plaintiffs' motion seeking summary judgment on the issue of liability on their common-law negligence and Labor Law § 200 causes of action, regardless of whether those claims were based one or the other of those theories. In that regard, the court concluded that the plaintiffs established their prima facie entitlement to judgment as a matter of law on the common-law negligence and Labor Law § 200 causes of action to the extent that they were based on the presence of a dangerous premises condition, but that the defendants raised triable issues of fact in opposition. With respect so much of those causes of action as were based on the means and methods of work, however, the court concluded that the plaintiffs failed to make a prima facie showing of entitlement to judgment as a matter of law in the first instance.

In light of the foregoing, and for the reasons set forth in the order deciding Motion Sequence 001, that branch of the defendants' instant motion seeking summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action, to the extent that the claims were based on the presence of a dangerous premises condition, namely, an inadequate or missing stairway, staircase, or ramp, is denied, as is the branch of the defendants' motion seeking summary judgment dismissing the Labor Law § 246(1) cause of action to the extent that it was based on alleged violations of 12 NYCRR 23-1.7(f) and 12 NYCRR 23-2.7(b).

With respect to the plaintiffs' cause of action alleging a violation of Labor Law § 240(1), that statute provides, in relevant part, that:

> "All contractors and owners and their agents . . . 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, block, 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 absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 6 [2011] [internal quotation marks and citation omitted]). To establish liability under Labor Law § 240(1), the plaintiff must prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The purpose of the statute is to "protect[ ] workers by placing ultimate responsibility for safety practices . . . on the owner[s] and general contractor[s], instead of on workers, who are scarcely

in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985] [internal quotation marks and citations omitted]). Consequently, the negligence of the injured worker is not a defense to liability (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

As explained by the Appellate Division, First Department, in connection with a Labor Law § 240(1) cause of action, "'[t]he plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations,' but only that it 'proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person'" (*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014], quoting *Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [1st Dept 2007]). In *Nunez v Bertelsman Prop.* (304 AD2d 487, 488 [1st Dept 2003]), the plaintiff fell down a staircase connecting two levels of scaffolding. The staircase had been installed without handrails. The Court held that "there is no question that his injuries were at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential, and thus that grounds for the imposition of liability pursuant to Labor Law § 240 (1) were established" (*id.*; *see Priestly v Montefiore Med. Ctr.*, 10 AD3d 493, 494 [1st Dept 2004] [plaintiff established entitlement to partial summary judgment Labor Law § 240(1) where he fell down a ladder that wobbled and swayed, was only two feet wide, lacked side rails for gripping, and where there was a slippery substance on the very narrow, round rungs]; *Crimi v Neves Assocs.*, 306 AD2d 152, 153 [1st Dept 2033] [plaintiff was entitled to partial summary judgment under Labor Law § 240(1) where he fell down a steep ladder with narrow rungs]).

The question for the court here is whether Nolan's injury "'flow[ed] directly from the application of the force of gravity to the [panel].'" *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 10 [2011], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d at 604). In determining whether an elevation differential is physically significant, thus triggering Labor Law

§ 240(1), or de minimis, thus rendering the statute inapplicable, the court must consider not only the height differential itself, but also the mass or weight of a falling worker or object and the amount of force that the worker or object was capable of generating, even over the course of a relatively short descent (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d at 10). "The fact that [plaintiff] fell only a short distance does not remove the protection afforded by section 240(1)" (*McGarry v CVP 1, LLC*, 55 AD3d 441, 441 [1st Dept 2008]), as the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk" (*Rocovich v Consolidated Edison Co.*, 78 NY2d at 514; *see Norton v Bell & Sons*, 237 AD2d 928, 929 [4th Dept 1997] ["(T)he determination whether Labor Law § 240(1) applies does not depend upon the distance that a worker falls"]). Where a temporary stairway is used as an elevation device, "the shortness of the distance of plaintiff's fall--at least two feet according to plaintiff, no more than 16 inches according to defendants--is irrelevant" (*Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163, 164 [1st Dept 2003]). In light of the applicable law, as well as the sharply disputed issue as to whether the foam insulation boards or blocks were being used at the time of Nolan's accident as an elevation device, there is no basis upon which to award the defendants summary judgment dismissing the Labor Law § 240(1) cause of action.

With respect to the so much of the common-law negligence and Labor Law § 200 causes of action as was based upon the contention that the accident implicated the means and methods of work, the defendants established their prima facie entitlement to judgment as a matter of law by establishing that they did not have the authority to control or supervise Nolan's specific work, which, here, consisted of carrying steel welding embeds to the 20th floor. In opposition to that showing, the plaintiffs failed to raise a triable issue of fact, as Nolan conceded that his employer controlled and supervised his work. The mere fact that Turner had authority to stop work to prevent or correct unsafe conditions, and directed its employees to "walk" the premises to ascertain the progress of the work and note such unsafe conditions, is insufficient to raise a triable issue of fact on the issue of control (see *Villanueva v 114 Fifth Ave. Assoc. LLC*,

162 AD3d 404, 406 [1st Dept 2018]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007]). Hence, the defendants are entitled to summary judgment dismissing so much of the common-law negligence and Labor Law § 200 causes of action as was based upon the contention that the accident implicated the means and methods of work.

Inasmuch as the defendants established that the accident location was not a "passageway" within the meaning of 12 NYCRR 23-1.7(e), but was part of the "work area" at the time, they demonstrated that that Industrial Code provision is inapplicable (*see Coaxum v Metcon Constr., Inc.*, 93 AD3d 403, 404 [1st Dept 2012]; *Canning v Barneys N.Y.*, 289 AD3d 32, 34-35 [1st Dept 2001]). Although the plaintiffs submitted evidence that vertical space constituting the drop from the hoist landing platform to the corrugated metal floor decking was being used as a "vertical passage" within the meaning of 12 NYCRR 23-1.7(f), the area of the floor on which the foam boards had been placed nonetheless is excluded from the definition of "passageway," which suggests a conveyance from one portion of a surface to another portion of the same surface. Hence, the defendants must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was based upon 12 NYCRR 23-1.7(e).

In addition, the defendants established, prima facie, that Industrial Code provisions 12 NYCRR 23-1.5, 23-1.11, 23-1.15, 23-1.30, 23-2.1, 23-5.1-5.22, and 23-6.1-6.3, which were enumerated in the plaintiffs' bill of particulars, either are inapplicable, or do not support a Labor Law § 241(6) cause of action. In opposition to the defendants' showing in this regard, the plaintiffs do not address the defendants' contention, and, hence, they failed to raise a triable issue of fact.

22 NYCRR 23-1.5(a) provides that

> "[a]ll places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to

> provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule)."

Although the Court of Appeals has held that 22 NYCRR 23-1.5(c)(3), requiring "[a]ll safety devices, safeguards and equipment in use" to be kept "sound and operable," and all such equipment to be "immediately repaired or restored or immediately removed from the job site if damaged," is sufficiently concrete and specific to support of Labor Law § 241(6) cause of action (*see Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009], *see also Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]), courts have concluded that the other sections and subsections of 22 NYCRR 23-1.5 are not sufficiently specific (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010] [22 NYCRR 23-1.5(c)(1)]; *McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016] [22 NYCRR 23-1.5(a), (c)(1), and (c)(2)]; *Stewart v ALCOA*, Index No. 1876/2015 [Sup Ct, Broome County, Jun. 6, 2019], *affd* 184 AD3d 1057, 1060 n 2 [3d Dept 2020] [22 NYCRR 23-1.5 generally]). Since the plaintiffs' claim here was not predicted on the defendants' failure to keep safety devices sound and operable or in good repair, but rather upon the defendants' general obligation to maintain a safe workplace, the defendants must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised upon a violation of 22 NYCRR 23-1.5.

22 NYCRR 23-1.11 imposes obligations upon owners and general contractors in connection with the quality of lumber used in the construction of equipment and temporary structures. Since there is no allegation that any equipment or temporary structure was erected with or constructed of inferior quality lumber, this Industrial Code provision is inapplicable, and the defendants must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised upon a violation of that provision. Similarly, 22 NYCRR

23-1.15 sets forth the requirements for the composition and size of safety railings. Inasmuch as there is no allegation that any safety railing that actually had been installed failed to comport with the standards set forth in that rule, the defendants must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised upon a violation of that rule. Likewise, 22 NYCRR 23-1.30 addresses the minimum standards for illumination of a work site, a claim that is inapplicable to the accident here. Hence, the defendants also must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised upon a violation of 22 NYCRR 23-1.30.

22 NYCRR 23-2.1(a)(1) provides that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." Although there is a dispute as to whether the two foam boards were situated for the purpose of creating an improvised, temporary staircase, or whether they were properly laid down upon the corrugated metal decking to prevent tripping accidents, the parties agree that the boards were not materials that were being stored, and the court already has determined that, whatever their purpose, they were not obstructing a "passageway." Hence, the court also concludes that they were not obstructing a walkway or other thoroughfare. Moreover, if the boards were in fact a stairway, as claimed by the plaintiffs, they could not be "obstructing" a stairway. Hence, that Code provision is inapplicable. 22 NYCRR 23-2.1(a)(2) regulates the weight of "stored" material and, hence, also is inapplicable to the facts of this case. 22 NYCRR 23-2.1(a)(2) provides that "[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area." Again the parties, in effect, agreed that the placement of the two foam insulation boards did not constitute the disposal of debris, as the plaintiffs characterize the boards as a makeshift stairway, and the defendants characterize them as material laid down to prevent tripping hazards. Accordingly, the

defendants also must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised upon a violation of 22 NYCRR 23-2.1.

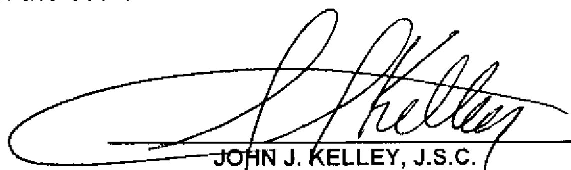
Finally, 22 NYCRR part 23-5 regulates the use, installation, and particulars of scaffolding, while 22 NYCRR part 23-6 regulates material hoisting. The allegations in the complaint and the circumstances underlying Nolan's accident do not mention or implicate these Industrial Code provisions and, hence, the defendants must be awarded summary judgment dismissing so much of the Labor Law § 241(6) cause of action as was premised upon a violation of those provisions.

The parties' remaining contentions are with merit.

Accordingly, it is

ORDERED that the defendants' motion is granted to the extent that they are awarded summary judgment dismissing (a) so much of the causes of action alleging common-law negligence and a violation of Labor Law § 200 as was based on claims that the accident arose from the means and methods of the work of the plaintiff John Nolan, and (b) so much of the Labor Law § 241(6) cause of action as was based on alleged violations of 12 NYCRR 23-1.5, 23-1.7(e)(1), 23-1.11, 23-1.15, 23-1.30, 23-2.1, 23-5.1-5.22, and 23-6.1-6.3, those claims are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.



8/19/2022
DATE

JOHN J. KELLEY, 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