SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

JOSE MARCELINO RODRIGUEZ-HERNANDEZ

INDEX NO. 151623-2019

MOT. DATE

- v -

MOT. SEQ. NO. 1&2

40 EAST END AVE. ASSOCIATES LLC et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is an action for personal injuries sustained at a construction site. There are two summary judgment motions pending. In motion sequence 1, plaintiff moves for summary judgment on liability against Defendants, 40 East End Ave. Associates LLC and Bravo Builders, LLC on his Labor Law §§ 240[1] and 241[6] causes of action. In motion sequence 2, defendants move for summary judgment dismissing plaintiff's Labor Law §§ 200, § 240[1], § 241[6], and common-law negligence claims. At the outset, plaintiff has not opposed the portion of defendants' motion seeking summary judgment dismissing his Labor Law § 200 and common-law negligence claims. Thus, these claims are severed and dismissed as abandoned. The parties otherwise oppose each other's respective motion. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts are as follows. Defendant 40 East End Ave. Associates LLC (the "owner") is the fee owner of the property located at 40 East End Avenue in Manhattan (the "premises"). On December 19, 2018, the date of plaintiff's accident, there was an ongoing construction project at the premises where a twenty-story residential building was being newly constructed (the "project"). The owner hired Bravo Builders, LLC ("Bravo") as the construction manager for the project. On December 19, 2018, Gotham Drywall (hereinafter "Gotham"), Plaintiff's employer, was working at the project as a subcontractor. Plaintiff had been working for Gotham at the project for approximately three months.

At his deposition, plaintiff testified that his job involved delivering materials throughout the job site. Plaintiff specifically testified that he would load the materials onto an A-frame cart to move them where they were needed, and that the A-frame cart was made of metal, had four wheels, and Plaintiff would always move it with another worker. Before the accident, plaintiff's foreman directed plaintiff to bring sheetrock to Gotham installers using the metal A-frame cart. According to plaintiff, he and a coworker

Dated: 9-6-22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

Q Do you know what caused the cart to tip over?

A Maybe the amount of the load.

Q Do you know for sure or are you just guessing, because we don't want you to guess?

A If you have a cart filled with such a heavy load and you're not holding onto it, it's going to tip over. It's going to turn over.

Q But you were holding onto the A-frame cart; correct?

A Yes. Yes.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Section 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "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" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

named Jaime stacked approximately ten to twelve sheets of sheetrock on the cart on their sides and leaned against the back of the cart. Each sheet of sheetrock weighed between sixty to seventy pounds.

Plaintiff testified that he and Jaime then took the A-frame cart to an apartment on the eighteenth floor where the sheetrock was needed. Plaintiff and Jaime made two successful trips transporting the materials via the A-frame cart the morning before the accident. On the third trip, while Plaintiff was pushing the cart with Jaime pulling it from the front, into the apartment towards the bedroom, the accident occurred as follows:

Q Why were you and Jamie unable to enter the bedroom, during your third time to the 20 18th floor?

A He was already inside and I was outside. At that point, Jamie let go of the Sheetrock and it fell on top of me, because it seems that he had let go for a brief moment to move some cables out of the way and he didn't tell me. He didn't notify me. So, when he left, the Sheetrock fell on me.

Plaintiff testified that Jaime let go of the cart to remove cables that were obstructing the way into the bedroom. On the two prior trips to the bedroom that day, the cables were not on the floor. Plaintiff explained:

Q Those two times that you and Jamie had transported the Sheetrock to the bedroom on the 18th floor, how did you both turn the cart into the bedroom?

...

A The same way but there just weren't any cables in the middle.

Q Did the cables only appear during your third trip to the bedroom on the 18th floor?

A Yes, because they were working there, and it seems like the workers left something there.

Q But the workers were performing construction work with the cables, right around the time of your accident; correct?

...

A Yes.

...

Q Did you see Jamie leave the cart, right before your accident occurred?

A No.

Q Just so I understand, you were pushing the Sheetrock cart when it turned over; correct?

...

A I was holding onto it as he turned it.

Q Were you also pushing the cart as he was turning it?

A Yes.

Plaintiff argues that the defendants are liable under Labor Law § 240[1] because the sheetrock was not secured to the A-frame cart, no other safety devices were utilized to prevent the sheetrock from falling and given the weight of the sheetrock and the force it was able to generate over a short distance, the elevation differential was not *de minimis*. Plaintiff cites *Touray v. HFZ 11 Beach St. LLC* (180 AD3d 507 [1st Dept 2020]) and *Marrero v. 2075 Holding Co. LLC* (106 AD3d 408 [1st Dept 2013]). Both cases involved A-frame carts which suddenly tipped. Defendants contend that plaintiff's accident occurred solely because plaintiff failed to communicate with his coworker. Defense counsel attempts to distinguish the facts here with *Touray* and *Marrero*, claiming that plaintiff's cart contained less weight than the carts in the First Department cases and plaintiff's cart did not malfunction and there were no issues with its wheels. The court disagrees with defendants.

The A-frame cart which was supplied to plaintiff to perform his work was inadequate to shield him from the harm directly flowing from the application of the force of gravity on the sheetrock in the cart. That the sheetrock weighed less than the items contained in the carts in *Touray* and *Marrero* is of no moment, since even defendants concede the sheetrock weighted at least 700 pounds, thus transforming plaintiff's accident from the usual and ordinary dangers of a construction site which Section 240[1] was not designed to protect against. Accordingly, plaintiff is granted summary judgment on the Section 240[1] claim.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff argues that he is entitled to summary judgment on his Labor Law § 241(6) claim predicated upon alleged violations of the following sections of the Code: 12 NYCRR 23-1.7(e)(1) and 23-1.7(e)(2).

Section 23-1.7(e)(1) of the Code states in pertinent part as follows:

> All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

Plaintiff contends that the defendants violated Labor Law § 241(6) by: 1) failing to keep the hallway clear of obstructions that disrupted the movement of the cart and caused the accident; and 2) failing to keep an area where the workers were required to pass free from debris.

Defendants argue that although the accident occurred in the doorway of the bedroom, the obstruction according to plaintiff's version of events was inside the bedroom. On this point, the court agrees with the defendants, and thus Section 23-1.7(e)(1) is inapplicable. As for Section 1.7(e)(2) of the Code, this provision provides as follows:

> The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and

materials and from sharp projections insofar as may be consistent with the work being performed.

Plaintiff testified that the a-frame cart tipped over when Jaime's hand left the cart. The fact that there was debris on the floor was not a proximate cause of plaintiff's accident. Therefore, defendants are entitled to summary judgment dismissing the balance of plaintiff's Section 241[6] claim as well.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's Labor Law § 200 and common-law negligence claims are severed and dismissed; and it is further

ORDERED that plaintiff's motion is granted to the extent that he is entitled to partial summary judgment against the defendants on liability with respect to his Labor Law § 240[1] cause of action; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiff's Labor Law § 241[6] cause of action is severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9-6-22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.