Pineda v HW Ditmas Realty LLC
2023 NY Slip Op 33145(U)
August 31, 2023
Supreme Court, Kings County
Docket Number: Index No. 522579/2019
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part LL1

Index Number 522579/2019
Seqs. 001 & 002

DECISION/ORDER

REYNALDO FLORES PINEDA,

Plaintiff,

against

HW DITMAS REALTY LLC. AND BENTZYS CONSTRUCTION, Inc.,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2–3
Replying Affidavits	4
Exhibits	
Other	

Upon the foregoing papers, defendant HW Ditmas Realty LLC (Ditmas)'s motion for summary judgment (Seq. 001) and plaintiff's cross-motion for summary judgment (Seq. 002) are decided as follows:

Factual Background

Plaintiff commenced this action for injuries he claims were sustained when he fell from an A-Frame ladder on March 11, 2019 (Pineda EBT at 24–26). Plaintiff worked for Feni Painting (Feni) and his foreman's name was Julio Felipe (*id.* at 15–16). Plaintiff was applying compound and plaster to the ceiling of Unit F3 in the premises located at 1002 Ditmas Avenue, Brooklyn, NY on the date of his accident (*id.* at 21). It is undisputed that the defendant is the owner of the premises. Plaintiff's co-worker Fausto Rojas was present on the date of the accident, although he was working in another room and did not witness the accident (*id.* at 25, 49). The ceilings were approximately nine to ten feet high, and both plaintiff and Mr. Rojas were working on eight-foot ladders to apply compound to the ceiling (*id.* at 26–27).

Plaintiff alleges the following: because plaintiff's co-worker was using the only available ladder owned by Feni, plaintiff was told by Mr. Felipe to ask the superintendent of the building for a ladder (Pineda EBT at 27–28). Mr. Felipe directed the plaintiff to retrieve a ladder from the basement, and after speaking with the superintendent, plaintiff did so (*id.*). The ladder from the basement had a crack in the spreader which plaintiff did not notice when he retrieved it (*id.* at 27–28, 31).[1] The ladder was also missing one of its rubber feet (*id.* at 32). The floor had not yet been leveled and plaintiff "put it on the unlevel part" after lunch and resumed work (*id.* at 45). When plaintiff ascended to the fourth rung of the ladder he felt it move, became scared, and began to descend the ladder (*id.* at 42). While descending the ladder, plaintiff testified that the "the ladder got unbalanced and I got scared, and my leg got tangled in the ladder" (*id.* at 42). Plaintiff's right leg went toward the floor and his left leg became stuck between the second and third rungs of the ladder (*id.* at 47). Plaintiff further testified that before using the ladder he called Mr. Felipe and told him that the ladder looked "loose," and that plaintiff was directed to continue to work (*id.* at 52–53).

Mr. Rojas, plaintiff's co-worker who was working in a different part of the apartment at the time of plaintiff's accident, testified that the ladder on which plaintiff was working was one of the ladders provided by Feni (Rojas EBT at 17). Mr. Rojas testified that that, after assisting the plaintiff, plaintiff said that "he was coming down the ladder and that one of his feet got trapped in between two rungs, something like that (*id.* at 22). Mr. Rojas contends that plaintiff used the same ladder involved in his accident the next day (*id.* at 26). Additionally, Mr. Filipe testified as follows: there were two ladders on the site, and they were identical aluminum A-

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[1] Although in his deposition testimony plaintiff calls this piece a "hook," it seems clear from his description that the component of the ladder that was allegedly broken was the part commonly referred to as a "spreader" or "spreader assembly," which stabilizes an A-frame ladder by connecting the front side rails and the rear side rails.

frame ladders that were six feet tall (Felipe EBT at 17–18). The ladders were brought to the job by Feni, and they were in "very good shape" (*id.* at 19). The ladders were inspected when moved between job sites to ensure that they were in good condition (*id.* at 24).

Mr. Filipe also testified that he knew of a superintendent at the building named "Fidel," and had interacted with him to obtain keys or to shut the water off when the workers needed to do plumbing work, but that Fidel did not provide supplies (*id.* at 20). Mr. Felipe testified that plaintiff called Mr. Felipe after his accident and said that he skipped a step while coming down the ladder, and got stuck (*id.* at 25).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Defendant argues that the plaintiff's cross-motion is untimely, as it was filed 115 days after note of issue. However, as the substance is identical to the substance of defendant's motion, the motion shall be considered on the merits.

Additionally, plaintiff fails to provide a word-count certification, and counsel's papers are 21 pages long, in violation of Uniform Rule § 202.8-b. As the papers were a joint affirmation in opposition to the primary motion and in support of the cross-motion, plaintiff's papers will be considered. However, counsel is admonished to abide by the word count and certification requirements in future submissions to avoid rejection of submitted papers (*see Macias v City of Yonkers*, 65 AD3d 1298 [2d Dept 2009]).

Labor Law § 240 (1)

Labor Law § 240 (1) imposes a non-delegable duty on owners and general contractors to provide safety devices necessary to protect workers from gravity-related risks, including falling from a ladder (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). Liability attaches where a plaintiff proves that the defendant violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]). Absent proof of a statutory violation, the mere fact that a plaintiff fell from a ladder is insufficient to establish Labor Law § 240 (1) liability (*Delahaye v St. Anns School*, 40 AD3d 679, 682 [2d Dept 2007]).

Both parties seek summary judgment based on the condition of the ladder upon which plaintiff was working. Defendant argues, based on the testimony of Mr. Rojas and Mr. Felipe, that plaintiff was provided with a ladder in good condition by Feni Painting, and that there is therefore no statutory violation. Plaintiff argues that he was directed to retrieve a ladder from the basement, that the ladder was missing a rubber foot and had a broken spreader which made it unstable, and that the defective ladder plus his need to work on an unlevel floor caused his accident (citing *Gillani v 66th Woodside Prop., LLC*, 63 AD3d 678 [2009]).

Each party has offered admissible evidence to support their version of events; there is therefore a question of fact about the cause of the plaintiff's accident. Defendant's second argument that the plaintiff was the sole proximate cause of his accident is rebutted by the plaintiff's testimony that the ladder he was told to use was defective (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 290 [2003] [plaintiff cannot be the sole proximate cause where there is a statutory violation]). Therefore, both parties are denied summary judgment as to Labor Law § 240 (1).

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In the instant action, plaintiff predicates his Labor Law § 241 (6) claim on alleged violations of Industrial Codes 23- 1.21 (b) (3) (iv) and (4) (ii) (prohibition on using defective ladders and requiring proper footing). As an initial matter, the plaintiff does not provide opposition to defendant's request for summary judgment on the alleged violation of Rule 23-1.7; therefore this alleged violation is dismissed from consideration.

As explained in the foregoing Labor Law § 240 (1) analysis, a question of fact remains about the condition of the ladder plaintiff was using. Defendants offer testimony that the ladders at the site were in good condition, and that plaintiff was using one of these ladders. Plaintiff testifies otherwise. Both parties are therefore denied summary judgment due to this question of fact.

Labor Law § 200

"Labor Law § 200 is a codification of the common law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, violations of Labor Law § 200 are evaluated using a basic negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition on the premises, or had actual or constructive notice of it without remedying

it within a reasonable time; or (2) if there are allegations of the use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991 92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]).

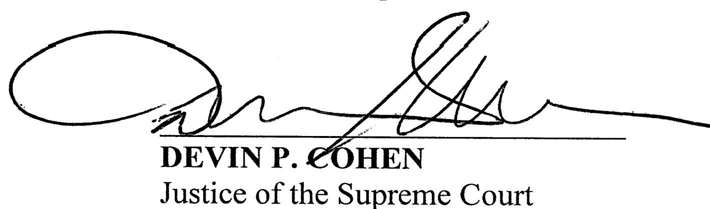
Here, there is no evidence in the record that anyone other than Feni's foreman, Mr. Felipe, supervised or controlled the work at the site, which is sufficient for defendant to show prima facie entitlement to summary judgment on plaintiff's Labor Law § 200 claim. Plaintiff does not oppose defendant's request for summary judgment on his Labor Law § 200 claim. Therefore, summary judgment is granted to the defendant on plaintiff's the Labor Law § 200 claim.

Conclusion

Defendant's motion for summary judgment (Seq. 001) is granted as to the plaintiff's Labor Law § 200 claim, and as to plaintiff's § 241 (6) claim only insofar as it is predicated on a violation of Industrial Code § 23-1.7; the motion is otherwise denied.

Plaintiff's motion (Seq. 002) is denied.

This constitutes the decision and order of the court.



August 31, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court