Samuel v CRP/RAR III Parcel J, L.P.

2023 NY Slip Op 33216(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 102684/2011

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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LESLIE T. SAMUEL,

Plaintiff,

- v -

CRP/RAR III PARCEL J, L.P, CPR/EXTELL PARCEL K., L.P., BOVIS LEND LEASE LMB, INC.,URBAN FOUNDATION/ENGINEERING, LLC

Defendants.

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INDEX NO. 102684/2011

MOTION DATE 02/25/2022, 02/25/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 115, 119, 120, 124, 126, 127

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 116, 121, 122, 125, 128

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

In this Labor Law action arising out of a construction site accident, defendants/third-party plaintiffs CRP RAR III Parcel J, L.P. (CRP/RAR) and Bovis Lend Lease LMB Inc. (Bovis) move for summary judgment pursuant to CPLR § 3212: (1) dismissing plaintiff-administrator Leslie T. Samuel's complaint and (2) granting their third-party claims against defendant/third-party defendant Urban Foundation/Engineering, LLC (Urban) (motion seq no 004). Urban also moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint and the third-party complaint (motion seq no 005). The motions are consolidated for disposition.

BACKGROUND

Plaintiff-decedent Samuel Cornwall was injured on March 5, 2008 at a construction site located at 400 West 63rd Street, New York, New York (the premises) (Urban Statement of

Material Facts, ¶ 5, NYSCEF Doc No 78). The construction project was to build a mixed useresidential/commercial building (the project) (*id.* at ¶ 6). It is undisputed that CRP/RAR owned the premises and Bovis was the construction project manager (*id.* at ¶¶ 7-8). Bovis hired Urban as a subcontractor to perform foundation work and construct the foundation walls surrounding the perimeter of the premises (*id.* at ¶¶ 10, 12).

Cornwall was employed as a laborer for Urban at the project (*id.* at ¶ 13). His job involved carrying concrete forms (made out of plywood, wood, and/or vinyl) weighing approximately sixty to eighty pounds from one location to another (*id.* at ¶¶ 16-18). In order to perform this task Cornwall could traverse two paths—an approximately thirty feet long path that ran underneath horizontal beams used to brace the building or an approximately hundred-foot-long path that did not cross under beams (*id.* at ¶¶ 22-24). Cornwall chose the path with the beams, three of which were only five feet above ground (*id.* at ¶¶ 25-26). Cornwall was approximately six-feet two-inches tall so he had to duck under the beams in order to pass (*id.* at ¶¶ 15, 27). On the date of the accident, while traversing this path, Cornwall hit his hard hat on one of the beams by failing to sufficiently duck (*id.* at ¶ 38). Cornwall testified that he had previously used that path at least fifteen times and right before impact saw the beam but "just thought the beam was higher" (*id.* at ¶¶ 37-42; Cornwall EBT, pp 39, 128, 156, NYSCEF Doc No 107).

Plaintiff's complaint asserts causes of action under Labor Law §§ 200, 240 (1) and 241 (6).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 10-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Labor Law § 200

Labor Law § 200, "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states in pertinent part, as follows:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such

> places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section

(Labor Law § 200 [1]). However, the duty does not extend to "hazards which are part of or inherent in the very work which the contractor is to perform" or "condition[s], or even defects, risks or dangers that may be readily observed" (*Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963]; *see also Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171-72 [1st Dept 2004]).

Here, Cornwall testified he was aware of and saw the beam before attempting to duck under it, had passed through this path at least fifteen times before the accident without incident, and failed to identify any condition demonstrating that the brace was not installed correctly (NYSCEF Doc No 107, pp 39, 128, 156). Cornwall's testimony thereby demonstrates the brace was readily observable and not inherently dangerous (*see Alvarez v City of New York*, 155 AD3d 416 [1st Dept 2017]). Additionally, the maneuvering undertaken by Cornwall was inherent in nature to the type of job Cornwall was employed to perform (Montano EBT, pp 60-63, NYSCEF Doc No 109; *see Bombero*, 10 AD3d at 171-72 [no duty owed to worker traversing rebar because his job required him to do so]).

Moreover, Cornwall had the option of taking an alternative route that did not require ducking but he chose instead to expose himself to the condition of which he injured himself. As such, defendants did not owe plaintiff a duty for not only was the beam "clearly 'part of or inherent in' plaintiff's job . . . [and] readily observable[, but also] '[w]hen a worker confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources . . . to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself'" (*Bodtman v Living Manor Love, Inc.*, 105

AD3d 434, 435 [1st Dept 2013], quoting *Marin v San Martin Rest., Inc.*, 287 AD2d 441, 442 [2001]).

Accordingly, defendants' motions for summary judgment dismissing plaintiff's Labor Law § 200 and negligence claims will be granted.

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

> 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, 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 (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, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280, 287-89 [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]). 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" (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 [1991]). Here, the record demonstrates that Cornwall neither fell nor was struck by a falling object. Therefore, his accident does not fall within the ambit of Labor Law § 240 (1).

Accordingly, defendants' motions for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim will be granted.

Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part, as follows:

> All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:
> ***
> 6. All 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross v Curtis-Palmer Hydro-*

Elec. Co., 81 NY2d 494, 504-05 [1993]). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

In support of the Labor Law § 241 (6) claim, plaintiff relies on Industrial Codes 12 NYCRR (IC) §§ 23-1.8 (c) (1), 23-1.33 (a), and 23-2.2 (a)-(e). IC § 23-1.8 (c) (1) provides that "[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat." Here, Cornwall testified that he was wearing a hard hat at the time of the accident (NYSCEF Doc No 107, p 44). Therefore, IC § 23-1.8 (c) (1) was not violated.

IC § 23-1.33 (a) (1) provides that "[r]easonble and adequate protection and safety shall be provided for all persons passing by areas, buildings or other structures in which construction, demolition or excavation work is being performed." "This section does not apply to any city in the State of New York having a population of one million or more persons" (*id.* § 23-1.33). Nor "does [i]t apply to workers on a construction site" (*Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2d Dept 2002]). Here, since the accident took place in New York City, a city with a population well above one million, and Cornwall was a construction worker, IC § 23-1.33 (a) does not apply.

IC § 23-2.2 provides requirements for concrete work such that concrete forms and braces must be structurally safe, inspected, and any unsafe condition remedied immediately. Here, though plaintiff was carrying plywood forms and was struck by a wood-braced beam (*see*

Cornwall EBT 2, NYSCEF Doc No 107, p 106) there is no indication that the accident occurred due to a defect or something wrong with the beam or that the accident in any way involved working with concrete. Therefore, IC § 23-2.2 does not apply (*see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1583 [4th Dept 2010] [internal quotations omitted] ["12 NYCRR 23-2.2 does not apply because plaintiff's injury was not caused by an unstable form, shore or bracing during the place of concrete"]; *Mueller v PSEG Power N.Y., Inc.*, 83 AD3d 1274, 1276 [3d Dept 2011] ["As the forms here were not being used in" the manner proscribed by the Industrial Code "but were in the process of being stored, the regulation does not apply."]; *Rodriguez v D & S Builders, LLC*, 29 Misc3d 1217[A] [Sup Ct, Queens County 2010] ["Industrial Code provision 12 NYCRR 23-2.2 also does not apply here because the decedent was not engaged in concrete work at the time of his accident."]).

Accordingly, defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim will be granted.

Third-Party Claims

Since defendants have not been found liable and plaintiff's complaint will be dismissed, CRP/RAR and Bovis' motion for summary judgment on their third-party claims against Urban will be denied as moot.

Accordingly, CRP/RAR and Bovis' motion for summary judgment on their third-party claims against Urban will be denied.

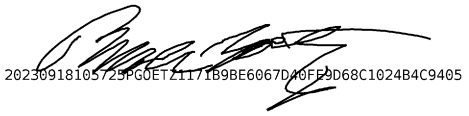
CONCLUSION

Based upon the foregoing, it is

ORDERED that defendants' motions for summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) and negligence claims are granted; and it is further

ORDERED that CRP/RAR and Bovis' motion for summary judgment on their third-party claims against Urban is denied and the third-party claims are dismissed as moot; and it is further

ORDERED that plaintiff's complaint is dismissed with costs and disbursements awarded to defendants and the Clerk shall enter judgment accordingly



9/18/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE