Natoli v City of New York
2016 NY Slip Op 30928(U)
May 19, 2016
Supreme Court, New York County
Docket Number: 154612/12
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NICHOLAS NATOLI, Index No.: 154612/12

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

----------x

Edmead, J.:

This is an action to recover damages for personal injuries sustained by plaintiff Nicholas Natoli, a journeyman laborer, when he slipped and fell on sand while working on the third-floor roof of Fashion Industry High School (the Roof) located at 225 West 24th Street, New York, New York (the Premises) on July 6, 2011.

Defendants the City of New York (the City), the New York City Department of Education (the DOE) and the New York City School Construction Authority (the SCA) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.

Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim.

BACKGROUND

On the day of the accident, the City owned the Premises where the accident occurred. At this time, the Premises was under the care, custody and control of the DOE, and the SCA served as the City's representative in regard to a construction project underway at the Premises (the

Project). Pursuant to a contract with the SCA, plaintiff's employer, nonparty Admiral Construction (Admiral), served as the Project's general contractor.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was working for Admiral as a journeyman laborer. Admiral was the Project's general contractor. The Project involved, among other things, brick layers performing masonry work on all the roofs at the Premises. Just prior to the time of the accident, plaintiff and his coworker, Javier Gutierrez, were instructed by their Admiral supervisor to clean and remove debris from the Roof. When they arrived at the Roof, plaintiff observed that it was covered with sand. Plaintiff explained that the sand was used to even out the floor during its installation. Specifically, plaintiff described the floor of the Roof as "like sand at the beach. It was all over the place . . . like piles, different elevations" (plaintiff's tr at 97).

Plaintiff testified that, while he and Gutierrez "were on these four by eight sheets of plywood that they used to make a path to where [we] were working," and while utilizing an A-frame dolly, they began removing plywood sheets from the third floor, "shak[ing] the sand off each sheet of plywood and then pick[ing] up the board and put[ing] it on the . . . [dolly]" (*id.* at 103).

Thereafter, plaintiff's supervisor directed them to remove a three-to-four-foot-wide and six-foot-long solid wood skid/pallet (the Skid), which plaintiff's supervisor described as "garbage" (*id.* at 106). At this time, the Skid was leaning up against a wall in a vertical position (*id.* at 106). Plaintiff described the weight of the Skid as "[h]eavy as one of [the men]," approximately "200 pounds" (*id.* at 112-113).

Due to the presence of the sand under their feet, as well as the fact that the Skid was "too heavy for [them] to physically lift," plaintiff and Guitierrez decided that they could not pick it up (*id.* at 114). Therefore, in order to remove it, the two men found it necessary to "shift" it off the wall and "topple it over toward the A frame [dolly]" (*id.*). The two men planned to "roll [the Skid] back into the building and get it to where it had to go which was downstairs" (*id.* at 123).

As the two men stood on opposite sides of the Skid, Gutierrez lifted his end of the Skid and tilted it at a 45-degree angle. At this time, plaintiff was holding his end of the Skid with both of his hands. Plaintiff testified that the Skid then "shifted out . . . and all the weight came at [him]. And [his] foot slipped out from under [him] in the sand and [he] went down on one knee and all the weight came to [his] arm" (*id.* at 136). Plaintiff maintained that the Skid fell in the direction of his face, and that, when he used his right arm to try to prevent the Skid from striking him, his arm could not handle the weight and "it ripped" (*id.*).

Plaintiff further testified that he reported solely to his Admiral supervisor, and that he never received any work instructions or direction from any of the defendants. In addition, plaintiff never requested any additional equipment that might have assisted him and Gutierrez in the Skid's removal from the Roof.

Affidavit of Robert Murphy (SCA's Senior Project Officer)

In his affidavit, Robert Murphy stated that he was SCA's senior project officer on the day of the accident. As senior project officer, Murphy oversaw the construction underway at the Premises. He also attended biweekly safety meetings. Murphy explained that Admiral served as the Project's general contractor, and that "SCA did not supervise, control, instruct, direct or otherwise manage the means and methods of the labor being performed by Admiral's employees

and/or subcontractors working on the construction site" (Murphy aff). In addition,"[t]he [DOE] did not maintain a presence on the site, and no other representative of the City of New York provided any supervision, control, instruction, direction or management over the means and methods of the labor being performed by Admiral's employees and/or subcontractors" (*id.*).

Murphy stated that, "[t]ypically, a 4' x 4" x 6" . . . empty pallet weighs approximately 75-100 lbs," and that it was "accepted safety practice at the site" for "two workers [to] remove the pallets/skids by lifting them, and carrying them off site" (*id.*). Murphy was "unaware of any complaints" regarding "the surface of any roof, and the presence of sand on the roof" (*id.*).

Deposition Testimony of John Amodeo (SCA's Safety Inspector)

John Amodeo testified that he was SCA's managing safety inspector on the day of the accident. As safety inspector, Amodeo conducted random safety inspections at the Premises. During his inspections, Amodeo photographed the Project's progress and any unsafe conditions that he observed. He also "just observe[d] what's going on to see if there's anything that's potentially wrong" (Amodeo tr at 16). If Amodeo noticed an unsafe situation, he would tell whichever superintendent that he was with to "stop whatever the activity is and fix it" (*id.* at 19).

Amodeo testified that the Project required bricklayers to make use of a bedding material, i.e., sand, on the roofs in order to level out the deck. Accordingly, it would not be "unusual for [workers] to walk through it" (*id.* at 36). He noted that the bedding material was "very thin," and thus, it was not of any concern to him (*id.* at 37). However, if he saw laborers lifting a skid while they were standing in a pile of the bedding material, he "might" tell them to "[t]ake a better path" (*id.* at 36). Amodeo noted that his reports contained no references to any safety issues concerning any of the roofs located at the Premises.

DISCUSSION

"'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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. Plaintiff cross-moves for summary judgment in his favor as to liability on said claim. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), 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) was designed to prevent those types of accidents in which the

scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "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). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Defendants assert that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Defendants point out that the Skid was on the floor and leaning against a wall at the time that the two men attempted to move it. Therefore, as it was located on the same level as plaintiff at the time of the accident, the statute does not apply.

However, importantly, it should be noted that in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule,

which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured four inches in diameter. As in the instant case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner*, 13 NY3d at 605); *see also Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Runner* and *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the Skid and he were on the same level, but, given the significant amount of force that it generated during its fall onto plaintiff, his accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner*, 13 NY3d at 603). In addition, in light of the fact that the floor of plaintiff's work area was slippery due to the presence of sand, and as there were no protective devices, such as slings or ropes, provided to secure the Skid from falling on him, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*id.*).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Thus, defendants are not entitled to dismissal of the Labor Law § 240 (1) claim against them, and plaintiff is entitled to summary judgment in his favor as to liability on said claim.

The Labor Law § 241 (6) Claim

Defendants move for dismissal of the Labor Law § 241 (6) claim against them. Labor Law § 241 provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502. However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Industrial Code 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface

> which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Here, defendants are entitled to dismissal of the part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (d), because the sand that plaintiff slipped on was a byproduct of the bricklayers' work, which was used to even out the floor during its installation, and thus, it was not a "foreign substance," as required by the provision (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007] [rebar steel that the plaintiff tripped over was not debris, scattered tools and materials, or a sharp projection, but rather, it was an integral part of the work being performed]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003] [section 23-1.7 (e) (2) inapplicable where plaintiff testified that he tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed]).

It should be noted that it is of no consequence that the byproduct was not related to plaintiff's work, as the defense also applies when the material is the byproduct of other work underway at the site (*see Bond v York Hunter Constr.*, 270 AD2d 112, 113 [1st Dept 2000], *affd* 95 NY2d 883 [2000] ["the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"]).

Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (d).

Industrial Code 12 NYCRR 23-2.1 (a) and (b)

Initially, section 12 NYCRR 23-1.2.1 (b), which addresses "[d]isposal of debris" is not

sufficiently specific to support a Labor Law § 241 (6) claim (*see Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]; *Mendoza v Marche Libre Assoc.*, 256 AD2d 133, 133[1st Dept 1998]). Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of this section.

In addition, while section 23-2.1 (a) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]; *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149, 149 [1st Dept 1999]), this provision, which addresses "[s]torage of material or equipment," does not apply to the facts of this case, because neither the sand that plaintiff slipped on, nor the Skid that the two men were removing at the time of the accident, were being stored at the time of the accident. In any event, as noted previously, the sand was a byproduct of the paving work going on at the accident location.

Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-2.1 (a).

Finally, while plaintiff generally refers to various OSHA violations in his bill of particulars, OSHA regulations cannot serve as a predicate to liability under Labor Law § 241 (6) (*Vernieri v Empire Realty Co.*, 219 AD2d 593, 598 [2d Dept 1995]).

The Common-Law Negligence and Labor Law § 200 Claims

Defendants also move for dismissal of the common-law negligence and Labor Law § 200 claims against them. 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' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as

follows:

> "1. 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]). "Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over the plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff was injured as he was lifting a beam, and no evidence was put forth that the

defendant exercised supervisory control or had any input into the method of moving the beam]).

As noted previously, plaintiff's fall and resulting injuries were caused by the means and methods utilized in removing the Skid from the Roof, as well as those utilized in the paving and installation of the Roof's floor. Accordingly, plaintiff's accident must be analyzed under the means and methods theory.

Here, defendants have sufficiently demonstrated that none of them directed or supervised the injury-producing work, i.e., the removal of the Skid and/or the creation of the sand byproduct that caused the accident. Plaintiff testified that his work was supervised solely by his Admiral supervisor, and Murphy testified that none of the defendants were involved in Admiral's work. While it is true that Amodeo testified that he conducted inspections of the site, he also testified that, in the event that he observed an unsafe situation, he requested that the responsible supervisor fix it. In opposition, plaintiff has failed to raise a triable issue of fact as to this issue.

It should be noted that plaintiff argues that the presence of sand in the accident area constituted an unsafe condition, and, as such, the accident should be analyzed under an unsafe condition analysis. However, plaintiff's argument fails, because the sand was not a defect inherent in the property, but rather, it was a byproduct of the means and methods of the paving work. In any event, in opposition, plaintiff has failed to demonstrate that a triable issue of fact exists as to whether defendants created or had actual or constructive notice of said alleged unsafe condition.

Thus, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

The Timeliness of Defendants' Motion

Finally, plaintiff argues that the court should not grant defendants' motion to dismiss the complaint, because, pursuant to CPLR 3212 (a), it is untimely. CPLR 3212 (a) states:

> "(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

"'[G]ood cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

As plaintiff asserts, the court set a deadline for the filing of motions at 60 days from the filing of the note of issue. Plaintiff filed his note of issue on August 19, 2015, and, thereafter, defendants' motion for summary judgment was served on October 19, 2015, which was 61 days after the note of issue was filed. However, as defendants contend, their motion is timely, nonetheless, as October 18, 2015 fell on a Sunday, and, pursuant to General Construction Law § 25-a, the 60-day period to file the motion actually lapsed on the next business day, October 19, 2016. Specifically, General Construction Law § 25-a (1) states, in pertinent part, as follows:

> "When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or public holiday, such act may be done on the next succeeding business day . . . "

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendants the City of New York, the New York City Department of Education and the New York City School Construction Authority's (collectively, defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them is granted, and these claims are dismissed, and the motion is otherwise denied; and it is further

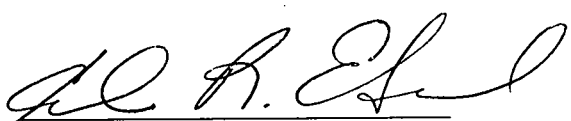
ORDERED that plaintiff Nicholas Natoli's cross motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim is granted; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for plaintiff.

DATED: May 19, 2016

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.