Booth v Lincoln Ctr. for the Performing Arts, Inc.
2024 NY Slip Op 33957(U)
November 7, 2024
Supreme Court, New York County
Docket Number: Index No. 150977/2022
Judge: Lisa S. Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

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ROBERT BOOTH, STACY BOOTH,

Plaintiff,

- v -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,LINCOLN CENTER DEVELOPMENT PROJECT, INC.,THE METROPOLITAN OPERA FOUNDATION, TURNER CONSTRUCTION COMPANY, SAFWAY ATLANTIC, LLC

Defendant.

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INDEX NO. 150977/2022

MOTION DATE 02/26/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

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

I. The Parties

Plaintiff, Robert Booth ("plaintiff"), worked at a construction site located at 10 Lincoln Center Plaza, New York, New York 10023 ("subject premises"), also known as the Lincoln Center for the Performing Arts Inc. Co-plaintiff, Stacy Booth is Robert Booth's wife. Plaintiff, Robert Booth, was employed by non-party, Lafayette Metal & Glass, as an ironworker foreman.

The defendants are Lincoln Center for the Performing Arts, Inc. and Lincoln Center Development Project, Inc. (collectively, "Lincoln Center"), The Metropolitan Opera Foundation, Turner Construction Company; and Safway Atlantic ("the defendants").

The defendant, Metropolitan Opera Foundation, owned the premises located at the time of the subject incident. Defendant, Lincoln Center, was in possession of the subject premises, and hired co-defendant, Turner Construction Company, as the construction manager to conduct renovations. Defendant, Turner Construction Company, hired co-defendant Safway Atlantic as the scaffolding subcontractor to erect a multi-leveled scaffolding system. Defendant, Turner Construction Company, hired the plaintiff's employer, Lafayette Metal & Glass, to install guardrail glass throughout the subject premises.

II. Background

In the Complaint filed on February 1, 2024, the plaintiff alleges that on January 18, 2022, at the subject premises, while he was walking on the steel scaffolding platform, he suddenly stepped onto an uncovered hole. Plaintiff alleges that the scaffolding was missing a plank, and as a result, he immediately fell through the hole up to his chest and prevented himself from falling all the way

down by using his arms to catch the scaffold and pulled himself out of the hole. Plaintiff Robert Booth alleges that due to the fall he was rendered disabled and was confined to his bed. In addition, plaintiff demands relief against the defendants for his serious and severe personal injuries, conscious pain and suffering, and loss of enjoyment. (*See, NYSCEF Doc. No. 32*).

In the Complaint, the plaintiffs assert that the defendants permitted unsafe tripping hazards to persist, debris hazards to persist, failed to train and oversee laborers on site, failed to follow their own safety guidelines in violation of *Labor Law §§ 200, 240, 240(1), 240(2), 240(3) and 241(6)*, and *Rule 23 of the Industrial Code of the State of New York*, specifically but not limited to *23-1.5 (and all sub-sections), 23-1.7 (and all sub-sections), 23-1.8 (and all sub-sections), 23-1.15 (and all sub-sections), 23-1.16(and all sub-sections), 23-1.17(and all sub-sections), 23-1.21(and all sub-sections), 23-2.1(and all sub-sections), 23-4(and all sub-sections), 23-5(and all sub-sections), 23-6 (and all sub-sections), 23-7 (and all sub-sections), 23-8(and all sub-sections), Article 1926 of O.S.H.A,* and was otherwise negligent, careless and reckless.

Plaintiff, Robert Booth, seeks damages for past and future medical expenses, lost wages and union benefits, and all other recoverable items under New York State law. In addition, plaintiff, Stacey Booth, seeks damages due to her husband's injuries for loss of support, services, love, companionship affection, society, sexual relations, solace of her husband, and her happiness in society.

III. <u>Plaintiff's Motion for Summary Judgment</u>

Before the Court is the plaintiffs' motion for an Order granting the plaintiffs partial summary judgment as to liability on their *Labor Law §§240(1)* and *241(6)* claims. (*See, NYSCEF Doc. No. 26*). Defendants, Lincoln Center for the Performing Arts, Inc., Lincoln Center Development Project, Inc., and Turner Construction Company filed opposition to the motion. (*See, NYSCEF Doc. No. 43*). Plaintiffs filed reply papers. (*See, NYSCEF Doc. No. 48*).

a. <u>Standard of Review</u>

"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 N.Y.3d 1060, 1062 (2016), *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "Failure to make such showing requires denial of the motion regardless of the sufficiency of the opposing papers." *Winegard v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 (1985) (internal citations omitted). "Once such *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. Rodriquez*, 72 A.D.3d 553, 553-554 (1st Dep't 2010).

Under *CPLR §3212*, "[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *CPLR §3212*. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) [internal citations and quotation marks omitted].

b. Plaintiff Robert Booth is Entitled to Summary Judgment under *Labor Law §240(1)*

Labor Law §240(1), also known as "New York's Scaffold Law" 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 N.Y.3d 1, 7 (2011). The Scaffold law provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

N.Y. Labor Law § 240(1)

The legislative intent behind the statute is to place the "ultimate responsibility for safety practices at building construction jobs…on the owner and general contractor, 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). To prevail in a *Labor Law § 240(1)* cause of action, the plaintiff must establish that the violation of the statute was a proximate cause of his or her injuries. *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d 280, 286 (2003). The duty imposed by *Labor Law § 240(1)* is nondelegable, meaning that an owner or contractor who violates this duty can be held liable for damages, regardless of whether they exercised actual supervision or control over the work. *See, e.g., Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136–137 (1978). Liability under the Scaffolding Law depends upon the injury having resulted from "the failure to use, or the inadequacy of ... a device" within the purview of the statute. *Ortiz v. Varsity Holdings, LLC,* 18 N.Y.3d 335, 340 (2011) (internal quotation marks omitted). "[T]here can be no liability under section 240(1) when there is no violation and the worker's actions ... are the sole proximate cause of the accident. *Cahill v. Triborough Bridge & Tunnel Auth.,* 4 N.Y.3d 35, 40 (2004).

Plaintiff, Robert Booth, testified in his deposition that he was standing on a scaffold approximately 50 feet high on the fifth floor, and submitted a photograph, which depicts an elevated surface. (*NYSCEF Doc. No. 35 at 102)*. Plaintiff testified that he fell when he stepped on a hole caused by a missing plank that should have measured 12-14 inches wide and 3 feet long. (*NYSCEF Doc. No. 35 at 107*). In his sworn testimony, Mr. Booth stated he was wearing a safety harness. (*NYSCEF Doc. No. 35 at 101*). In addition, plaintiff submits, *inter alia*, the affidavit of Tommy Dawson, who was also employed by Lafayette Metal & Glass. (*See, NYSCEF Doc. No. 31)*. Mr. Dawson attests that he "witnessed my co-worker Robert Booth fall through an opening in the scaffold. [He] remembers seeing his boots hanging beneath the hole he fell through." *(Id*). Mr. Dawson further attests that he "immediately went to help Robert. [He] witnessed Robert pull himself out of the hole in the scaffolding. [He] ended up staying with him and helping him get to City Med for x-rays." *(Id*).

In opposition, the defendants argue that plaintiff could have fallen simply because he was not paying attention, and there was conflicting witness testimony regarding whether they saw the accident, leaving uncertainty about the cause of the fall. (*NYSCEF Doc. No. 43 at 8*). Furthermore, the defendants contend that Plaintiff may have known about the hole before the accident and stepped into the opening without realizing it due to a prior argument with his supervisor. (*Id).*

Nonetheless, the defendants do not deny that there was an opening in the scaffold but argue whether the hole was large enough for the plaintiff to fall through. *(Id)*.

The Court finds that the defendants did not meet the requirements imposed by *Labor Law § 240(1)*. The plaintiff has demonstrated that the defendants did not provide a remedy to mitigate the risk – that being the hole in the scaffold. The statute aims to cover the types of risks arising from scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices. *See, Labor Law §240(1)*; *Runner v. New York Stock Exch., Inc*, 13 N.Y.3d 599, 603 (2009). Despite the defendants' argument that plaintiff's knowledge of the hole and/or his actions that may have caused him to fall, the issue of comparative negligence does not affect plaintiff's entitlement of relief under *Labor Law §240(1)*. *Id*. As such, the plaintiff's motion for summary judgment on the *Labor Law §240(1)* claim is granted.

c. Robert Booth is not Entitled to Summary Judgment under *Labor Law § 241(6)*

Labor Law §241(6) states:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, 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, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law §241(6).

Labor Law §241(6) requires owners and contractors to provide reasonable and adequate protection and safety for construction workers. *(Id)*; *see e.g.*, *Gervasi v. FSP 787 Seventh LLC*, 228 A.D.3d 459 (1st Dep't 2024). Specifically, the statute "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Ochoa v. JEM Real Estate Co., LLC*, 223 A.D.3d 747, 749 (2d Dep't 2024). To sustain a cause of action, pursuant to *Labor Law § 241(6),* a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of the following regulation applicable to the circumstances of the accident. *Id*.

12 NYCRR 23-1.7(b) states:

> (i) Every hazardous opening into which a person may step, or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part.
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
   (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
   (b) An approved life net installed not more than five feet beneath the opening; or
   (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

12 NYCRR 23-1.7(b).

Here, the defendants do not dispute that the plaintiff was on the scaffolding, however, the defendants contend that the opening of the hole was not big enough for the plaintiff to fall through it. The defendants contend there is a question of fact regarding the applicability of the "opening" to the protections required *by 12 NYCRR § 23-1.7(b)*, and in turn a violation of *Labor Law §241(6)* as a predicate. (*See, NYSCEF Doc. No. 43).* The provision, *12 NYCRR 23–1.7(b)(1)(i)*, applies to openings deep enough for a person to fall all the way through. *Messina v. City of New York,* 300 A.D.2d 121, 123, 752 N.Y.S.2d 608 (1st Dep't 2002). This Court finds that the defendants have raised an issue of fact as to whether the hole into which plaintiff fell, which was 12-14 inches wide, 3 feet long, and approximately 50 feet deep, could be considered a "hazardous opening" due to its size and significant depth. *See*, *D'Egidio v. Frontier Insurance Co.,* 270 A.D.2d 763, 765, 704 N.Y.S.2d 750 [a wiring and piping opening 5 by 12 inches wide and 15 to 24 inches deep into which plaintiff stepped and tripped was not a "hazardous opening" within the meaning of *12 NYCRR 23–1.7(b)(1)*]; *Keegan v. Swissotel New York, Inc.,* 262 A.D.2d 111, 692 N.Y.S.2d 39, *lv. dismissed* 94 N.Y.2d 858, 704 N.Y.S.2d 533, 725 N.E.2d 1095 [partially covered 18–inch opening to the floor below through which plaintiff's body partially fell did constitute a "hazardous opening"].

As such, plaintiff Robert Booth is not entitled to summary judgment under *Labor Law §241(6)*.

Accordingly, it is hereby

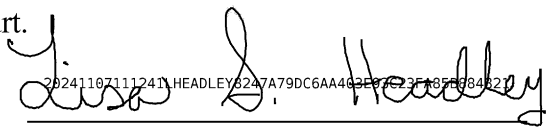
ORDERED that plaintiffs' motion for an Order, granting plaintiff partial summary judgment as to liability on his *Labor Law §240(1)* claim is GRANTED; and it is further

ORDERED that the portion of plaintiffs' motion for partial summary judgment as to liability on his *Labor Law §241(6)* claim is DENIED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, movant-plaintiff shall serve a copy of this Decision/Order upon the defendants with notice of entry.

This constitutes the Decision and Order of the Court.



11/7/2024
DATE

LISA S. HEADLEY, J.S.C.

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