SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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INDEX NO. 150872/2020

WILSON MINAYA TORRES,

Plaintiff,

MOTION DATE 06/04/2024, 06/05/2024

MOTION SEQ. NO. 002 003

- v -

40 EAST END AVE. ASSOCIATES LLC,BRAVO BUILDERS, LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 48, 50, 51, 52, 53, 54, 55, 60, 61, 62, 63, 64, 65

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 49, 56, 57, 58, 59, 66, 67

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

Upon the foregoing documents, these motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

There are two motions pending in this action for personal injuries sustained at a construction site arising from alleged violations of the Labor Law. In motion sequence 2, plaintiff moves for partial summary judgment on the issue of liability against defendants 40 East End Ave. Associations LLC (Owner) and Bravo Builders, LLC (Bravo) on his Labor Law § 240(1) claim. Defendants oppose that motion and move in motion sequence 3 for summary judgment dismissing plaintiff's complaint. Issue has been joined and plaintiff's motion-in-chief was timely brought after note of issue was filed. Therefore, plaintiff's motion is properly before the court.

Plaintiff's counsel points out that defendants' motion was filed on June 5, 2024, 121 days after note of issue was filed. While technically a late motion, the court will consider it upon good cause shown, good cause being that defense counsel believed June 5, 2024 to be the deadline to file defendants' motion, the delay was seemingly inadvertent and not tactical, and plaintiff is not prejudiced by the *de minimus* delay. Therefore, summary judgment relief is available to both sides and the court's decision follows.

Plaintiff was injured on December 18, 2018 while working as a laborer for nonparty EMC Construction at the construction site located at 40 East End Avenue, New York, New York (the "site"). The site was owned by Owner and Bravo served as the construction manager/general contractor for the construction project at the site.

At his deposition, plaintiff explained that he was injured when a coworker using a pallet jack lowered the load with the hydraulic lift, landing onto plaintiff's foot. In connection with the plaintiff's accident, Neil Rohrbacher, an Assistant Superintendent for Bravo, prepared a written Incident Report, which contains the following description of the accident:

> [Plaintiff] was guiding a pallet of compound while a co-worker was pushing the load. The worker who was pushing the pallet suddenly released the hydraulic lever dropping the full load of the pallet on [plaintiff's] foot. The corner of the pallet, landed on top [sic] of [plaintiff's] inside boot.

According to the incident report, the cause of plaintiff's accident was listed as "[w]orker error, lack of communication while moving material."

Plaintiff argues that he has established defendants' prima facie liability as a matter of law under Labor Law § 240(1) because he was injured due to the operation of gravity and defendants failed to provide proper safety devices. Meanwhile, defendants argue that plaintiff's accident was caused by the manner in which he and his coworker performed their work, not due to an alleged absence or inadequacy of any protective devices. Defendants further argue that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed because defendants lacked supervisory control over the injury-producing work. Defendants relatedly argue that the remainder of plaintiff's Labor Law claims should be dismissed because his injury was not caused by inadequate safety devices.

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]).

At the outset, defendants have established that they are entitled to summary judgment dismissing plaintiff's Labor Law § 241-a claim without opposition. Accordingly, that cause of action is severed and dismissed. The court next turns to plaintiff's Section 240[1] claim.

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]).

Fatal to plaintiff's Section 240(1) claim is the fact that plaintiff has not identified specifically what safety device should have been provided to him to prevent his accident. Indeed, plaintiff argues that this case is factually similar to *Schoendorf v. 589 Fifth TIC I LLC* (206 AD3d416 [1st Dept 2022]), which involved a appellate jack that was too small to allow the platform to rest on it properly, and *Ramos-Perez v. Evelyn USA, LLC,* (168 AD3d 1112 [2d Dept 2019]), which involved a skid that fell off a hydraulic left. Here, we have plaintiff's coworker who accidentally lowered the lift, causing plaintiff's injuries. The lift itself was not inappropriate for the work that plaintiff was tasked to perform, and plaintiff has not otherwise identified what safety device he should have been provided with in order to prevent the underlying accident. Therefore, plaintiff cannot demonstrate a prima facie cause of action under Section 240(1) and survive summary judgment. Accordingly, plaintiff's motion is denied and defendants' motion is granted to the extent that plaintiff's Section 240(1) claim is severed and dismissed.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

There is no dispute that plaintiff's accident was caused by the manner or means in which the work was performed. Further, the court agrees with defendants that they have established prima facie that they did not exercise supervisory control over the injury-producing work. Therefore, defendants' motion is also granted to the extent that plaintiff's Section 200 and common law negligence claims are also severed and dismissed.

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 asserts that Industrial Code § 23-9.8 (h) was violated as a matter of law and has abandoned all other alleged violations of the Industrial Code.

Industrial Code § 23-9.8 (h) states in pertinent part as follows:

> (h) Support of pallets. Loaded pallets shall be kept level at all times. Masonry units used as pallet supports shall be securely lashed to the pallet and shall be of proper quality and number to provide stable footing for the load. Loose material and other unstable supports for pallets shall not be used.

While this Industrial Code provision is sufficiently specific, plaintiff has failed to allege any facts which would support his claim that this provision was violated. The accident was caused by the undisputed fact that plaintiff's coworker accidentally dropped the pallet on the lift. Plaintiff's accident was not caused by the pallet being mis-leveled, or pallet supports not being securely lashed and of proper quality and number to provide stable footing, nor are there any facts to suggest that loose material or other unstable supports for pallets were used. Therefore, this provision is inapplicable and insufficient to support plaintiff's Section 241(6) claim.

Accordingly, the balance of plaintiff's complaint is dismissed.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on liability on his Section 240(1) claim is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed.

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

12/17/2024
DATE

LYNN R. KOTLER, J.S.C.

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