

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1529

CA 10-01057

PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

JAMES C. KUHN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CAMELOT ASSOCIATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

AUGELLO & MATTIELIANO, LLP, BUFFALO (JOSEPH A. MATTIELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BURGETT & ROBBINS LLP, JAMESTOWN (MARY SPEEDY HAJDU OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered March 29, 2010 in a personal injury action. The order granted the motion of defendant for leave to reargue and, upon reargument, adhered to the prior decision granting plaintiff's motion for partial summary judgment and denying defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working on the roof of a building owned by defendant. According to plaintiff, who was employed by nonparty Watkins Builders, Inc. (Watkins Builders) at the time of the accident, he stepped from the roof onto an elevated platform attached to a Gradall forklift (hereafter, forklift), and the forklift tipped over, causing him to fall to the ground. Supreme Court granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and denied defendant's cross motion for summary judgment dismissing the amended complaint. The court subsequently granted defendant's motion for leave to reargue its opposition to the motion and for leave to reargue its cross motion and, upon reargument, the court adhered to its prior decision. We affirm.

We reject at the outset the contention of defendant that plaintiff's motion was premature pursuant to CPLR 3212 (f). Even assuming, arguendo, that "facts essential to justify opposition" to the motion could be gleaned from depositions of employees of Watkins Builders (CPLR 3212 [f]), we conclude that defendant failed to demonstrate that such information was within plaintiff's "exclusive

knowledge and possession' " (*Wright v Shapiro*, 16 AD3d 1042, 1043; *cf.* *Terranova v Emil*, 20 NY2d 493, 497). Moreover, defendant failed to establish that it could not have deposed the nonparty witnesses during the approximately two-year period between the commencement of the action and plaintiff's motion (see *Guarino v Mohawk Containers Co.*, 59 NY2d 753; *Avraham v Allied Realty Corp.*, 8 AD3d 1079; *Witte v Incorporated Vil. of Port Washington N.*, 114 AD2d 359).

With respect to the merits, we conclude that plaintiff met his initial burden on the motion by establishing that he "was not furnished with the requisite safety devices and that the absence of appropriate safety devices was a proximate cause of his injuries" (*Williams v City of Niagara Falls*, 43 AD3d 1426, 1427; see *Felker v Corning Inc.*, 90 NY2d 219, 224; *Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1052). In opposition to the motion, defendant failed to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). Although defendant contends that plaintiff should have utilized a ladder as a safety device, it presented no evidence that plaintiff had been instructed to use a ladder or that plaintiff knew or should have known to use a ladder "'based on his training, prior practice[] and common sense'" (*Ganger*, 53 AD3d at 1053; see *Ewing v Brunner Intl., Inc.*, 60 AD3d 1323). The owner of Watkins Builders summarily asserted in an affidavit that "all employees knew" not to use the forklift to transport personnel, but he did not aver that he or anyone else instructed plaintiff to avoid using the forklift in that manner. Indeed, there is no evidence that plaintiff "received specific instructions to use a [ladder rather than the forklift] while [ascending and descending the roof] and chose to disregard those instructions" (*Cahill*, 4 NY3d at 39). To the contrary, the deposition testimony of plaintiff and his coworkers established that the forklift was provided to them at the job site and that it had been used to transport workers, as well as materials, during the weeks prior to plaintiff's accident. Further, it is undisputed that plaintiff's foremen observed, facilitated and participated in the use of the forklift for the transport of workers (see generally *Rico-Castro v Do & Co. N.Y. Catering, Inc.*, 60 AD3d 749, 750; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880-881). Indeed, one of the foremen, who had previously worked out of the forklift at an elevated height, had placed the forklift adjacent to the roof where plaintiff was working, and that foreman was operating the forklift at the time of the accident. The other foreman was on the roof with plaintiff when plaintiff used the forklift to descend therefrom. Thus, inasmuch as the forklift was furnished by plaintiff's employer and its use as an alternative safety device for transporting personnel was approved by plaintiff's supervisors, it cannot be said that plaintiff's decision to use the forklift rather than the ladder to descend from the roof is the sole proximate cause of the accident (see generally *Cahill*, 4 NY3d at 39; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290; *Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1137).

All concur except SMITH, J.P., and CARNI, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. In our view, Supreme Court erred in granting plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim upon granting defendant's motion for leave to reargue, *inter alia*, its opposition to plaintiff's motion. Defendant raised a triable issue of fact whether plaintiff's own conduct was the sole proximate cause of his injuries. The record establishes that, on the date of his accident, plaintiff was employed by nonparty Watkins Builders, Inc. (Watkins Builders) to perform roofing work. Plaintiff accessed the roof of a building owned by defendant by way of a ladder. Plaintiff, however, exited the roof by stepping onto a three-sided makeshift plywood box attached by chains to the forks of a raised Gradall forklift (hereafter, forklift), despite the fact that the ladder he had used to access the roof was still in place. Once plaintiff stepped onto the platform, the forklift tipped over, causing plaintiff to fall to the ground.

The record is devoid of evidence that anyone from Watkins Builders instructed plaintiff with respect to the appropriate means to access or exit the roof. Instead, the record establishes that the use of the forklift to access or exit the roof had been an informal practice devised by Watkins Builders' employees. Thus, plaintiff was presented with two means of descending from the roof, i.e., the forklift and the ladder, and he was neither encouraged nor discouraged from using either means. The record further establishes that plaintiff had received training from previous employers regarding the use of a ladder but that he had not received any training with respect to a forklift and had never used a forklift as a means of transporting workers before his employment with Watkins Builders. Consequently, we conclude that a triable issue of fact exists whether plaintiff, " 'based on his training, prior practice[] and common sense, knew or should have known' " to use the ladder instead of the forklift to exit the roof (*Gimeno v American Signature, Inc.*, 67 AD3d 1463, 1464, lv dismissed 14 NY3d 785; cf. *Montgomery v Federal Express Corp.*, 4 NY3d 805).

The majority relies on *Rico-Castro v Do & Co N.Y. Catering, Inc.* (60 AD3d 749, 750) and *Pichardo v Aurora Contrs., Inc.* (29 AD3d 879, 880-881) in support of its position that plaintiff's own conduct was not the sole proximate cause of his injuries because the foremen observed, facilitated and participated in the use of the forklift to transport workers. Those cases, however, are distinguishable from this case. Although the unsafe devices at issue in *Rico-Castro* and *Pichardo* were used by the plaintiffs in those cases at the direction of, or with the tacit approval of, their superiors, there were no other safety devices available for those plaintiffs to perform the required work (see *Rico-Castro*, 60 AD3d at 750-751; *Pichardo*, 29 AD3d at 880-881). In contrast, here, plaintiff unilaterally declined to use another available means of descending from the roof. Thus, "we conclude that defendant[] raised triable issues of fact whether safe alternative means of descending from the roof were available to plaintiff and whether his failure to use those alternative means was the sole proximate cause of his injur[ies]" (*Harris v Hueber-Breuer*

Constr. Co., Inc., 67 AD3d 1351, 1352-1353; see *Montgomery*, 4 NY3d 805; cf. *Willard v Thomas Simone & Son Bldrs., Inc.*, 45 AD3d 1276, 1277-1278). We would therefore modify the order by denying plaintiff's motion.