No. 226

Luis F. Ortiz,
Appellant,
v.
Varsity Holdings, LLC., et al.,
Respondents.

Richard Paul Stone, for appellant.
Timothy J. Dunn, for respondents.
Defense Association of New York, Inc.; New York State Trial Lawyers Association, amici curiae.

PIGOTT, J.:

Plaintiff Luis F. Ortiz was injured while engaged in demolition work at an apartment building being renovated in Brooklyn. The property was owned by defendant Varsity Holdings LLC and managed by defendant Mag Realty Corp. Ortiz and his coworkers were taking debris from the building and placing it in

a dumpster outside. According to Ortiz, the dumpster was about 6 feet high, 8 feet wide, and 14 feet long. The ledge at the top of the dumpster was about 8 inches in width.

After several hours of work, the dumpster was filling up, and Ortiz and his colleagues climbed up it, using foot holds built into the side, and began to rearrange the debris inside to make more room. It started to rain, making the surface of the dumpster slippery. Ortiz was injured when, while holding a wooden beam and standing at the top of the dumpster, with at least one foot on the narrow ledge, he lost his balance and fell to the ground.[1]

Ortiz commenced this action, claiming violations of Labor Law §§ 200, 240 (1), and 241 (6). Defendants moved for summary judgment as to all of plaintiff's Labor Law claims. Ortiz cross-moved for summary judgment on his Labor Law § 240 (1) claim, insisting that defendants should have provided a scaffold to prevent his fall. In his affidavit in support of his cross-motion and in opposition to defendants' motion, Ortiz stated that the task he was instructed to carry out required him to stand on the eight-inch ledge while placing heavy debris in open areas of the dumpster.

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[1] In his deposition testimony, Ortiz recalled that he had one foot on the ledge and one foot on the garbage in the dumpster. In his affidavit in opposition to defendants' motion and in support of his cross-motion, Ortiz stated that both feet were on the ledge.

Supreme Court granted defendants' motion, and denied Ortiz's cross-motion. On appeal, Ortiz challenged the dismissal of his § 240 (1) cause of action, and the denial of his cross-motion on that claim. The Appellate Division affirmed, simultaneously granting Ortiz leave to appeal to this Court and certifying the question whether its order was properly made. We now modify.

Defendants and amicus The Defense Association of New York argue that, as a matter of law, the task Ortiz was performing – loading a dumpster and rearranging the debris therein – did not create an elevation-related risk of the kind that the safety devices listed in Labor Law 240 (1) protect against. Defendants cite Toefer v Long Is. R.R. (4 NY3d 399 [2005]), noting our holding that "[a] four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240 (1)'s coverage" (id. at 408).

It is true that courts must take into account the practical differences between "the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)" (id. at 407, quoting Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc., 84 NY2d 841, 843 [1994]). A worker may reasonably be expected to protect himself by exercising due care in stepping down from a flatbed truck. However, the present case, with the facts considered in the light

most favorable to the non-moving party, is distinguishable from Toefer. Ortiz's particular task of rearranging the demolition debris and placing additional debris in the dumpster, as he describes it, required him to stand at the top of the dumpster, six feet above the ground, with at least one foot perched on an eight-inch ledge. Moreover, defendants failed to adduce any evidence demonstrating that being in a precarious position such as this was not necessary to the task. Nor do defendants demonstrate that no safety device of the kind enumerated in § 240 (1) would have prevented his fall.

On this record, therefore, we cannot say as a matter of law that equipment of the kind enumerated in § 240 (1) was not necessary to guard plaintiff from the risk of falling from the top of the dumpster. Consequently, defendants have not demonstrated entitlement to summary judgment.

However, we agree with defendants that Ortiz's cross-motion for summary judgment was properly denied. To recover under § 240 (1), Ortiz must establish that he stood on or near the ledge at the top of the dumpster because it was necessary to do so in order to carry out the task he had been given (see Broggy v Rockefeller Group, Inc., 8 NY3d 675, 681 [2007]). Ortiz failed to adduce evidence, through testimony or other means, to establish what he asserted in his affidavit – that he was required to stand on or near the ledge. While that assertion is enough, in the context of this case and without contradictory

evidence from defendants, for plaintiff to ward off summary judgment, it is not sufficient by itself for plaintiff to win summary judgment.

Moreover, to prevail on summary judgment, plaintiff must establish that there is a safety device of the kind enumerated in § 240 (1) that could have prevented his fall, because "liability is contingent upon . . . the failure to use, or the inadequacy of" such a device (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). Because this too is a triable issue of fact, plaintiff is not entitled to summary judgment.

Viewing the facts in the light most favorable to defendants, as we must when we consider plaintiff's summary judgment motion, a question of fact remains regarding whether the task Ortiz was expected to perform created an elevation-related risk of the kind that the safety devices listed in § 240 (1) shield workers from.

Accordingly, the order of the Appellate Division should be modified, without costs, by denying defendants' motion for summary judgment as to plaintiff's Labor Law § 240 (1) cause of action, and, as so modified, affirmed, and the certified question should not be answered as unnecessary.

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Order modified, without costs, by denying defendants' motion for summary judgment as to plaintiff's Labor Law § 240(1) cause of action, and as so modified, affirmed and certified question not answered as unnecessary. Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided December 20, 2011