

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

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WALTER BERRY and EILEEN BERRY,

Index No.: 17291/04
Motion Date: 3/28/06
Motion Cal. No.: 3

Plaintiff(s),

-against-

THE TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY, THE NEW YORK CITY TRANSIT
AUTHORITY and CITY OF NEW YORK

Defendant(s).

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The following papers numbered 1 to 6 read on this motion by plaintiff for summary judgment

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1 - 3
Answering Affidavits-Exhibits	4 - 5
Replying Affidavits	6

Upon the foregoing papers, it is ordered that the motion is denied.

This action arises from personal injuries allegedly sustained when plaintiff, Walter Berry, fell from a roadway at a construction site on the Queens approach to the Triborough Bridge on July 1, 2003, where and when he was then employed.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the issue of liability under Labor Law §240 (1).

In his deposition and affidavit, plaintiff, an ironworker, stated that he had been working on the Triborough Bridge project for approximately two weeks. During that time, he used temporary extension ladders that were set up to provide access to the roadway from a platform underneath. The ladders were temporary in the sense that they were removed at the end of each workday for security reasons, and replaced at the commencement of the next workday. The platform, in addition

to providing a base for the ladders, also provided a foundation for the workers repairing the underside of the roadway.

On July 1, 2003, plaintiff used one of the temporary ladders to climb up from the platform to the area of the upper roadway where he was then assigned to work, near the Queens anchorage. At the end of his shift, he returned to the same place in the roadway to descend to the platform. When he reached that area of the roadway, the ladder was gone. He walked to two other areas where ladders had been placed, but those too were missing. He returned to the area where he had originally climbed up, but the ladder was still missing. Plaintiff alleges that he knew of no other means of access to or from the roadway besides the temporary ladders, so he tried to lower himself using the header above and the beams leading down to the platform below; as he did, however, his foot slipped off a plate and he fell ten to twelve feet to the platform below, injuring his ankle.

In an affidavit, submitted in support of the motion, Joseph Damiano states he too was working on the Triborough Bridge project. He confirmed that the ladders were the only way to go up and down from the roadway to the platform below. On July 1, 2003, at approximately 3:00 P.M., he too was allegedly forced to climb down on his own from the roadway to the platform because the temporary ladders were missing.

Dan Papa was deposed on behalf of the defendants. He testified that he was the construction project manager for the Triborough Bridge project on which plaintiff and Mr. Damiano were employed. Besides the temporary ladders leading from the roadway to the platform below, he testified that workers on the Queens approach to the bridge, as plaintiff was, could get down from the roadway using a stairway in the anchorage, as he saw other workers from the project do on countless occasions prior to July 1, 2003. He said the workers could also use the pedestrian walkway next to the roadway and walk off the bridge completely.

Both the plaintiff and Mr. Damiano, however, stated they were informed of the temporary ladders as the only means of access between the platform and the roadway.

Plaintiff contends the defendants are absolutely liable for a violation of Labor Law §240 (1) for failing to provide a ladder or any of the safety devices enumerated in the statute that would have prevented his fall from the roadway.

Defendants contend that plaintiff's actions were the sole proximate cause of his accident in that he failed to exercise any of the several options available for leaving the roadway besides attempting to climb down himself to the platform below.

Decision of the Court

The motion by plaintiff for summary judgment on the issue of liability under Labor Law §240 is denied.

The purpose of a summary judgment motion is "issue-finding, not issue determination" (Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521, 544 N.Y.S.2d 834 [1989]). Thus, summary

judgment is to be granted only when there are no genuine issues of material fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, [1986]). In determining whether summary judgment is appropriate, the “Court should draw all reasonable inferences in favor of the nonmoving party” (Asaf v Ropog Cab Corp., 153 A.D.2d at 521).

Labor Law §240 (1) provides, in pertinent part, as follows:

All contractors and owner and their agents 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.

The statute imposes absolute liability upon owners and contractors for injuries to a worker that is proximately caused by the failure to provide safety devices necessary to protect the worker from elevation-related risks and hazards, such as “falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501, [1993]; *see* Rocovich v. Consol. Edison Co., 78 N.Y.2d 509 [1991]). “Liability is contingent upon the existence of a hazard contemplated in §240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 267 [2001], citing Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d at 501).

To prevail in an action based upon violation of Labor Law §240 a plaintiff must prove that the statute was violated and that such violation was the proximate cause of the plaintiff’s injuries (*see*, Felker v. Corning, Inc., 90 NY2d 219 [1997]; Zimmer v. Chemung County Performing Arts, 65 NY2d 513 [1985]; Perez v. Spring Creek Assocs., 265 AD2d 314 [1999]).

Affording defendant “the benefit of the most favorable inferences which can reasonably be drawn from [the] evidence” (Nicholas v. Reason, 84 A.D.2d 915), triable issues of fact exist as to whether plaintiff was injured as a result of the lack of a safety device enumerated in Labor Law §240 (1). Here the question exists whether the temporary ladders provided the sole access for plaintiff to get to and from his worksites (*see*, Griffin v. New York City Transit Authority, 16 AD3d 202).

Accordingly, plaintiff’s motion for summary judgment on the issue of liability under Labor Law §240 (1) is denied inasmuch as the record discloses the existence of triable issues of fact respecting whether statutorily enumerated protective devices were necessary to afford plaintiff safety while performing his elevated work on the roadway of the bridge..

Dated: May 2, 2006

LAWRENCE V. CULLEN, J.S.C.