

Josifi v Ping Lam Ng

2010 NY Slip Op 33456(U)

December 13, 2010

Supreme Court, New York County

Docket Number: 105903/2006

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

YLLI JOSIFI,

Plaintiff,

- against -

PING LAM NG and SUI KWAI NG,

Defendants.

INDEX NO. 105903/2006

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
FILED
1
2
DEC 17 2010

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Ylli Josifi ("plaintiff") brings this action under Labor Law §§ 240(1) and 241(6) to recover damages for injuries he allegedly sustained when he fell off a ladder while working on a renovation project on a building owned by defendants Ping Lam Ng and Sui Kwai Ng (collectively "defendants"). The parties have completed discovery and the Note of Issue was filed on December 30, 2009. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, granting judgment in his favor on the issue of liability as to his Labor Law §§ 240(1) and 241(6) claims, and an inquest on damages. Defendants oppose the motion on the basis that there are material issues of fact that preclude summary judgment.

BACKGROUND

In support of his summary judgment motion, plaintiff submits, *inter alia*, his own deposition; a deposition of Manny Aretakis ("Aretakis"); and the bill of particulars. In opposition, defendants submit Ping Ng's deposition. The following facts are undisputed.

Plaintiff is a construction and brick worker. Defendants are the owners of a three-story building located at 1222 60th Street, Brooklyn, New York. Defendants hired High Rise Construction, Inc. ("High Rise"), a company owned by Aretakis, to perform certain renovations to the building. High Rise, in turn, employed plaintiff to work on the renovation project on the building's facade. Plaintiff alleges that during the course of his work on July 30, 2004, he was injured when a six-foot tall A-frame ladder erected on a scaffold on the building collapsed while he was on the ladder. There were no eyewitnesses to the alleged accident.

Plaintiff testified at his deposition that the accident occurred while he was transferring from an extension ladder to the top of the A-frame ladder when a step "ran away from the base." He claims that on the day preceding the accident, he was present as a co-worker untied a rope that secured the A-frame ladder. When he returned to the worksite the next day, it did not cross his mind that the ladder was untied and he was in a hurry since light rain had begun to fall. He climbed up the extension ladder and then went to step off onto the A-frame ladder, which was "a little wet" and weak on the left side. He extended his left foot onto a step on the A-frame ladder. When he lifted his other foot to cross over, the legs of the ladder "went toward the wall of the building" and he fell.

There is conflicting testimony regarding whether the A-frame ladder was in an open or closed position at the time of the alleged accident. Plaintiff initially testified that the ladder was not opened and was just leaned on the edge of the plywood. He later testified that the ladder was opened and attached to the plywood. Aretakis testified at his deposition that the A-frame ladder was always used in a closed position and secured.

Aretakis denies that plaintiff was working at the building on the day of the incident, and testified that plaintiff was working at another location that day. Aretakis did not have any knowledge of an accident involving plaintiff until receiving notice of a workers' compensation hearing.

Ng testified that he contracted with High Rise to have the work performed, and that he was unaware of any complaints regarding the work. Ng first learned of the incident following commencement of the present action.

DISCUSSION

Plaintiff argues that he is entitled to summary judgment, as a matter of law, on his Labor Law §§ 240(1) and 241(6) claims on the issue of liability. He also requests an inquest to determine the amount of damages. Defendants argue that summary judgment should be denied as there is evidence that plaintiff was not present at the subject premises at the time of the alleged accident, and that even if he was present, there are triable issues of fact that preclude summary judgment.

As a threshold matter, as to the question of whether plaintiff was working at the building when the alleged accident occurred, plaintiff submits copies of decisions from his workers' compensation proceedings to demonstrate that he was in fact working at the premises that day. As this documentation is submitted for the first time in his reply papers, it will not be considered (*see McNair v Lee*, 24 AD3d 159, 160 [1st Dept 2005]). Nevertheless, the Court will assume, *arguendo*, that plaintiff was present and concludes, in any event, that issues of fact exist that preclude summary judgment.¹

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of

¹The Court also finds that to the extent that plaintiff was present, he was engaged in an activity that is within the ambit of Law §§ 240(1) and 246(1).

material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Labor Law § 240(1)

Plaintiff argues that he has established his entitlement to judgment as a matter of law on his Labor Law § 240(1) claim because the A-frame ladder was not adequately secured, and because proper safeguards were not provided to prevent his fall. He also argues that the ladder was defective because the left leg was not level with the right leg, the rope that secured the ladder was removed, and the ladder was not opened in the typical manner.

Defendants argue that there are triable issues of fact regarding whether the alleged statutory violation was the proximate cause of plaintiff's injuries. They maintain that the evidence does not support a conclusion that the fall occurred due to a collapse of the ladder, but rather that plaintiff slipped and fell when he was rushing down the ladder to avoid the rain and took the ladder down with him.

Labor Law § 240(1), known as the “scaffold” law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statute provides in pertinent part:

“All contractors and owners and their agents . . . 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.”

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff’s actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

The Court finds that plaintiff has established a prima facie violation of Labor Law § 240(1) through his undisputed deposition testimony that he fell from the ladder and that it was not adequately secured (*see Peralta v American Tel. & Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] “[u]nrefuted evidence that the unsecured ladder moved, combined with evidence that no other

safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240(1)"]; *Greenidge v Anchor Constr., Inc.*, 303 AD2d 179, 179 [1st Dept 2003]; *Davis v Selina Dev. Corp.*, 302 AD2d 304, 305 [1st Dept 2003]). "It is well settled that a failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; see also *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). Moreover, plaintiff is under no obligation to show that the ladder was defective in some manner (see *Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *aff'd* 89 NY2d 833 [1996]). To make out a section 240(1) violation, it "was sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling" (*Bonanno v Port Auth. of N.Y. & N.J.*, 298 AD2d 269, 270 [1st Dept 2002]).

However, there are triable issue of fact as to whether the statutory violation was the proximate cause of plaintiff's injuries (see *Blake*, 1 NY3d at 289-90). Plaintiff was the only eyewitness to the incident, and there is conflicting testimony regarding how the accident occurred. It is well-settled that where there is conflicting evidence as to how a plaintiff fell from a ladder, a triable issue may exist as to whether the plaintiff's "injury was attributable to a failure on defendants' part to provide adequate protective devices or was solely attributable to plaintiff's own conduct" (*Petrocelli v Tishman Const. Co.*, 19 AD3d 145, 145 [1st Dept 2005]; see also *Hamill v Mutual of Am. Inv. Corp.*, 2010 WL 4941956 [1st Dept 2010]).

Here, plaintiff asserts in his motion that the A-frame ladder collapsed causing him to fall. He testified at his deposition that the ladder was untied the day before, and that when he returned the next day he was in a hurry due to the rain. He claims that the ladder was a little wet and weak on the left side, and that the legs of the ladder went towards the wall as he was crossing onto it. He gave inconsistent testimony regarding whether the ladder was opened or closed. Aretakis, however, disputes that plaintiff was even present and claims that ladder was

always closed and secured. Since there is conflicting evidence as to how plaintiff fell from the ladder, summary judgment is inappropriate and resolution of plaintiff's credibility will be left to the jury to resolve (*see Hamill*, 2010 WL 4941956, *2 [conflicting testimony as to whether "ladder itself shifted and fell present[ed] a triable issue of fact whether plaintiff's injury was attributable to defendant's failure to provide adequate protective devices or was caused solely by plaintiff's own conduct"]; *Khan v Convention Overlook, Inc.*, 232 AD2d 529, 529 [2d Dept 1996] [finding issue of fact as to whether ladder failed to provide proper protection where the "injured plaintiff's deposition testimony [was] unclear as to whether he fell because of a 'bending' or 'buckling' of the ladder or simply because he lost his balance"]).

C. Labor Law § 241(6)

Plaintiff also argues that he is entitled to judgment as a matter of law as to his Labor Law § 241(6) claim on the issue of liability. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). Liability may be imposed under section 241(6) even where the owner or contractor did not supervise or control the worksite (*see id.*).

To support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a rule or regulation of the Commissioner of the Department of Labor ("Industrial Code") that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*see Ross*, 81 NY2d at 502-04; *Cammon v City of New York*, 21 AD3d 196, 198 [1st Dept 2005]). A violation of the Industrial Code does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]).

“Thus, once it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff’s injury” (*Rizzuto*, 91 NY2d at 350). If proven, the owner or contractor is vicariously liable without regard to his or her fault (*see id.*). The owner or contractor “may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence” (*id.*; *see also Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]).

Plaintiff has alleged several violations of the Industrial Code pertaining to ladders, which include several subsections of 12 NYCRR 23-1.21, that the Court finds sufficiently specific to support a Labor Law § 241(6) cause of action (*see Vargas v New York City Tr. Auth.*, 60 AD3d 438, 440 [1st Dept 2009]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]; *Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008]).² However, since issues of fact exist as to whether a violation of the Industrial Code was the proximate cause of plaintiff’s injuries, summary judgment is inappropriate (*see Hart*, 30 AD3d at 214; *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 176 [1st Dept 2004]).

Accordingly, plaintiff’s motion for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) is denied in its entirety.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff’s motion for summary judgment on the issue of liability under

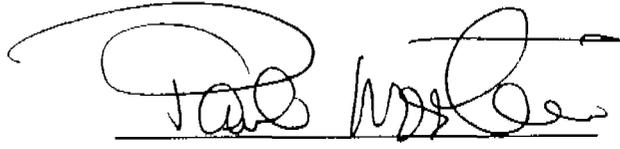
²Plaintiff alleges violations of 12 NYCRR 23-1.21(b)(1), (b)(3), (b)(4) and (e)(3), and 12 NYCRR 23-1.7(e).

Labor Law §§ 240(1) and 241(6) is denied; and it is further,

ORDERED that defendants shall serve a copy of this Order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: December 13, 2010



Paul Wooten J.S.C.

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