

Vergara v SS 133 West 21, LLC

2004 NY Slip Op 30181(U)

November 16, 2004

Supreme Court, New York County

Docket Number:

Judge: Rosalyn H. Richter

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

PRESENT: ROSALYN Richter
Justice

PART 24

0120407/2001

VERGARA, RUBEN
VS
SS 133 WEST 21, LLC

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

FILED

NOV 18 2003

NEW YORK
COUNTY CLERK'S OFFICE

SEQ 3
PARTIAL SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

Dated: 11-16-04

Rosalyn Richter
MON. ROSALYN RICHTER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

-----X
RUBEN VERGARA and ODALIS VERGARA,

Plaintiffs,

Index No.: 120407/2001

-against-

SS 133 WEST 21, LLC, HMF CONSTRUCTION CORP.
and SCHOOL OF VISUAL ARTS, INC.,

Defendants.

-----X
SS 133 WEST 21, LLC,

Third-Party Plaintiff,

Third-Party
Index No.: 590615/2002

-against-

HMF CONSTRUCTION CORP. and SCHOOL OF
VISUAL ARTS, INC.,

Third-Party Defendants.

-----X
HMF CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

Second Third-Party
Index No.: 590045/2003

-against-

BAL CONSTRUCTION CORPORATION and ANGIE
CONSTRUCTION CORP.,

Second Third-Party Defendants.

-----X
ROSALYN H. RICHTER, J.:

Plaintiff Ruben Vergara (and his wife, derivatively) commenced this action to recover for personal injuries that Vergara allegedly sustained on August 20, 2001, while performing renovations on the fourth floor of a building owned by defendant SS 133 West 21, LLC (SS 133). SS 133 leased

all but the twelfth floor of the building to defendant/third-party defendant School of Visual Arts, Inc. (SVA). SVA allegedly contracted with defendant/third-party defendant HMF Construction Corp. (HMF) to perform renovations, and HMF allegedly hired second third-party defendant Bal Construction Corp. (Bal) as the principal painting/plastering subcontractor. Bal allegedly hired second third-party defendant Angie Construction Corp., Vergara's employer, to do plastering work.

Pursuant to CPLR 3212, plaintiffs now move for summary judgment against defendants for liability on plaintiffs' cause of action under Labor Law § 240 (1). The standards for summary judgment are well settled.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]).

Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to furnish proper safety devices and protection, so as to ensure the safety of workers exposed to elevation-related risks, such as falling from a height, during the construction, repair, demolition, painting, and alteration of a building or structure (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]).¹ A worker injured by a fall from an elevated work site must also prove

¹Labor Law § 240 (1) 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,

that the absence of, or defect in, a safety device was the proximate cause of his or her injuries (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]). Once the plaintiff makes a *prima facie* showing, the burden then shifts to the defendant, “who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence -- enough to raise a fact question -- that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident.” *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 289 n.8 (2003). The plaintiff must be accorded summary judgment only if the defendant fails to raise a question of fact as to these issues. *Klein v City of New York*, 89 N.Y.2d 833 (1996).

Vergara claims that he was plastering the ceiling while on a scaffold with wheels, approximately six feet off the ground, and that the scaffold suddenly toppled over, causing him to fall to the ground (Shaw Affirm., Ex E [Vergara Aff.], ¶¶ 2-3). According to Vergara, the scaffold had no guardrails, and had moved on prior occasions while he was standing on it (*id.* ¶¶ 3-4; *see also* Shaw Affirm., Ex F [Vergara Dep.], at 23). Vergara further claims that he was not given any equipment, such as a belt or harness, to secure him and keep him from falling (*ibid.*). “Plaintiff’s sworn statements that he was injured when the scaffold on which he was working toppled over establishe[s] a *prima facie* case under Labor Law § 240 (1)” (*Samuel v General Cinema Theaters*, 254 AD2d 85, 86 [1st Dept 1998]). The burden therefore shifts to defendants to raise any issue of fact warranting denial of plaintiffs’ motion.

Defendants contend that differing accounts of Vergara’s accident warrant denial of summary judgment, especially given that Vergara’s accident was unwitnessed. It is true that “the fact that

irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed .

plaintiff is the only witness to his accident does not present a bar to summary judgment where his testimony concerning the manner in which the accident occurred is neither inconsistent with his own account provided elsewhere nor contradicted by other evidence” (*Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996]). However, the court is persuaded that there is sufficient evidence for a jury to find that Vergara’s current account of the accident is inconsistent with his earlier statements and contradicted by the testimony of witnesses who arrived on the scene after the accident.

Vergara’s affidavit in support of this motion states that the scaffold “toppled over” (*see* Raso Opp. Affirm., Exs A-C). Likewise, in his deposition, Vergara stated that the scaffold fell over (Vergara Dep., at 27, 81). However, in the pleadings and bill of particulars, Vergara stated only that he “fell off” the scaffold. The allegedly tipping scaffold is not mentioned in the report of Vergara’s visit to the emergency room, which states that Vergara fell off the scaffold (Battista Opp. Affirm., Ex B). Nor is it mentioned in the C2 Workers’ Compensation form, which states only that Vergara “claims he fell backwards” (Raso Opp. Affirm., Ex D). In addition, immediately after the accident, Vergara allegedly told building superintendent Lorato Camilleri that he fell off the scaffold (Camilleri Dep., at 39, 51, 54). The Court concludes that the statements contained in the pleadings and bill of particulars, along with the medical records and Workers’ Compensation form are inconsistent with Vergara’s current claim that the scaffold tipped/toppled over, and thus create a significant fact issue as to how the accident occurred.

In addition, Vergara’s current claim that the scaffold fell over is contradicted by the deposition testimony of two witnesses who arrived on the scene after the accident. Vergara testified at his deposition that the scaffold had fallen over completely to the side, and that the wooden

platform of the scaffold came off (Vergara Dep., at 27, 81, 156). However, both Camilleri and Angel Figueroa, a Bal employee, testified at their depositions that they observed the scaffold in an upright position after the accident, and Camilleri added that the wood planking on top of the scaffold was still in place (Morse Opp. Aff., Ex A [Figueroa Dep.], at 24; *id.*, Ex C [Camilleri Dep.], at 52, 55). Furthermore, Vergara conceded that just before the accident happened, he was looking up the ceiling while walking on the scaffold (Vergara Dep. at 122-123). Thus, based on the testimony of Camilleri and Bal that the scaffold was upright and intact after the accident, Vergara's earlier statements that he fell off the scaffold, and Vergara's admission that he was walking on the scaffold and looking up at the ceiling, a reasonable jury could conclude that the scaffold did not tip over, as Vergara now contends, but rather that Vergara had fallen off because he stepped off the scaffold. *See Manna v. New York City Hous. Auth.*, 215 A.D.2d 335 (1st Dept. 1995) (where the manner of the happening of the accident is within the exclusive knowledge of the plaintiff, an award of summary judgment on liability is inappropriate because the defendant should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact).

In addition, there are issues of fact as to whether any alleged defects in the scaffold were a proximate cause of the accident and whether Vergara's actions were the sole proximate cause of his injuries. Although Vergara testified that the scaffold he was using had no locks on the wheels (Vergara Dep. at 20, 81), Figueroa stated that the scaffolds on site each had four brakes (Figueroa Dep., at 17), and that every morning he would check all the scaffolds to see if the brakes were working (*id.* at 22, 30-32). According to Figueroa, he did not recall finding any problems with any of the brakes on any of the scaffolds (*id.* at 32). In addition, although Vergara testified that the scaffold moved when he stood on it, he also testified that the movement did not cause him to fall,

and that he did not know what caused the scaffold to fall over (Vergara Dep., at 121-122, 125, 128).

Likewise, there is a factual dispute as to whether there were railings on the scaffold. Although Vergara maintains that the scaffold lacked railings, Figueroa testified that the scaffold had safety railings in the front and back, but not on the side (Figueroa Dep., at 40-41). In any event, the absence of safety railings alone does not constitute a violation of Labor Law § 240 (1), because Labor Law § 240 (2) requires rails only for scaffolds that are 20 feet or higher, while the Industrial Code provisions require rails for the open sides of all scaffolds higher than seven feet (*see* 12 NYCRR 23-5.1).² *See Beesimer v. Albany Avenue/Route 9 Realty*, 216 A.D.2d 853 (3d Dept. 1995)(where there was no evidence that the scaffolding was defective or otherwise failed to perform its function, the question of whether safety rails were necessary to provide the proper protection required by Labor Law § 240 (1) is generally a question of fact to be decided on the facts and circumstances of the particular case).

Since there are factual disputes as to whether any alleged defects in the scaffold were the proximate cause of the accident, summary judgment is inappropriate. *See Nohejl v 40 W. 53rd Partnership*, 205 A.D.2d 462 (1st Dept. 1994)(court found that issues of fact existed as to whether the scaffold's wheel locks were operational, or not used; whether safety railings were required for the scaffold; and whether other safety devices were required); *Weber v. 1111 Park Ave. Realty Corp.*, 253 A.D.2d 376 (1st Dept. 1998)(there are questions of fact as to whether, *inter alia*, the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices). Accordingly, it is

² As discussed previously, Vergara claims that the scaffold was six feet high (Vergara Aff., ¶ 3).

ORDERED that the plaintiffs' motion for summary judgment is denied.

This constitutes the decision and order of the Court

November 16, 2004



Justice Rosalyn Richter

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