

Bowers v Boston Properties Inc.

2005 NY Slip Op 30192(U)

August 23, 2005

Supreme Court, New York County

Docket Number:

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 125180/2002

BOWERS, ROBERT

vs

BOSTON PROPERTIES

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/12/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 26 2005
COUNTY CLERKS OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for summary judgment in his favor under Labor Law § 240 (1), is denied, and the branch of defendants' cross-motion for summary judgment dismissing such claim is denied; and it is further

ORDERED the branch of defendants' cross-motion to dismiss plaintiff's Labor Law 200 and common law negligence claims is granted; and it is further

ORDERED that the branch of defendants' motion to strike plaintiff's allegations under Industrial Code regulations §§ 23-5, 23-2.1, 23-1.8, and 23-6, and OSHA regulations is granted solely to the extent that Industrial Code regulations §§ 23-2.1 and 23-6, and allegations of OSHA violations are stricken from the complaint.

This constitutes the decision and order of the Court.

Dated: 8/23/05

J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X

ROBERT BOWERS,

Plaintiff,

-against-

BOSTON PROPERTIES INC. and
AMEC, INC.,

Defendants.

----- X

BOSTON PROPERTIES INC. and AMEC, INC.
f/n/a MORSE DIESEL INTERNATIONAL, INC.

Third-Party Plaintiffs,

-against-

GLASSALUM INTERNATIONAL CORPORATION
and DIAMOND INSTALLATIONS, INC.,

Third-Party Defendants.

-----X

HON. CAROL EDMEAD, J.S.C.

In this personal injury action, plaintiff moves pursuant to CPLR 3212 for summary judgment arguing that defendants violated Labor Law § 240 (1) as a matter of law by failing to provide him with adequate safety devices to prevent his fall from an elevated platform.

Plaintiff, an iron worker, was employed by Diamond Installations, which was involved in repairing the facade of the premises known as Five Times Square, New York, New York. On the date of the accident, plaintiff and his foreman were assembling a two-level pipe scaffold on the sidewalk. They intended to complete the scaffold and use it as a platform in order to hang pieces of curtain wall on the exterior facade between the 1st and 2nd floors on the premises. Although it was raining, plaintiff's foreman decided to continue working in order to complete the project by

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**MEMORANDUM
DECISION**
Sequence #002

Index No. 590289-2005

the following day.

At the time of the accident, plaintiff had climbed onto the second rung of the scaffold, approximately 6-8 feet from the ground at the first level platform. The horizontal rungs were 3-4 feet vertically apart. Plaintiff stepped 1-2 feet to his left, passing a 3-inch pin to his foreman who was constructing the upper level of the scaffold. He then moved horizontally to his right along the scaffold and intended to come down the scaffold by stepping to the lower rung. When the foreman pushed the pin through, the scaffold shook, causing plaintiff to lose his grip of the scaffold and his right foot to slip from the scaffold. Plaintiff fell 6-8 feet to the ground.

Plaintiff argues that scaffold movement in and of itself, and the failure to have guardrails on same or provide adequate safety devices to prevent his fall from the scaffold establish plaintiff's entitlement to summary judgment. Further, the act of plaintiff's foreman in attempting to attach a pin to the scaffold causing the scaffold to shake does not constitute an unforeseeable, independent, intervening act.

In response, defendants Boston Properties Inc. and AMEC, Inc. ("defendants"), cross move pursuant to CPLR 3212 for partial summary judgment on various grounds. Defendants seek dismissal of plaintiff's Labor Law § 200 and common law negligence claims, arguing that they had no control over the plaintiff, or the means or methods by which plaintiff was performing his job, and did not create the condition that caused plaintiff's accident.

Defendants also request that certain Industrial Code regulations alleged in plaintiff's complaint, namely §§ 23-2.1 (dealing with maintenance and housekeeping of materials stored and removal of debris), 23-1.8 (dealing with eye protection, foot protection, and protective apparel), and 23-6 (dealing with hoisting of materials), are factually inapplicable to the case at

bar. Defendants argue that such regulations cannot serve as predicates to plaintiff's 241 (6) claim, and should be stricken from the complaint and bill of particulars. It is further argued that a violation of OSHA regulations does not impose a non-delegable duty on the owner or general contractor and may not be used as a predicate for a 241(6) claim.¹

Furthermore, defendants seek dismissal of plaintiff's 240 (1) claim, or denial of plaintiff's request for summary relief under 240 (1). Defendants argue that prior to climbing onto the scaffold, plaintiff was aware that the scaffold was not completely assembled, that it was not being used for its intended purpose, that he was provided with a safety harness, which could not be tied in, that the scaffold was wet, and that he could have accomplished his tasks without getting on the scaffold. Defendants point out that since plaintiff passed up pieces to the foreman and did not climb up the scaffold to finish completing the scaffold after his accident, plaintiff could have accomplished his task without the need to get on the partially assembled scaffold. Defendants argue that under these circumstances and caselaw, the scaffold was not a furnished safety device for elevation related purposes. And, plaintiff never testified that he was told to climb onto the scaffold.

Defendants further claim that in light of the worker's compensation document, which reports that plaintiff fell off uneven scaffold, and hospital records which indicate that plaintiff slipped on a ladder, issues of fact preclude summary relief. According to defendants, plaintiff never testified that the scaffold was uneven, and both documents, which indicate two different

¹ The Court notes that defendants did not seek any relief pertaining to plaintiff's claim, in his bill of particulars, under Industrial Code regulation § 23-1.7 (Protection from general hazards). And, as to plaintiff's claim in his bill of particulars under Industrial Code regulation § 23-5 (Protection in Construction, Demolition and Excavation Operations pertaining to scaffolding), defendants merely cite to this section in their papers (Cross-motion ¶ 47) and fail to set forth any arguments in support of its dismissal.

locations, warrant denial of plaintiff's motion under 240 (1).

In reply and opposition to defendants' cross-motion, plaintiff argues that there are no issues of fact as to the accident location, and the documents, which are inadmissible hearsay, are not materially inconsistent with his testimony. Plaintiff also maintains that his foreman in fact directed him to assist in the construction of the scaffold, and argues that in order to build the higher levels of the scaffold, one would need to climb up on the completed lower portions. According to plaintiff's deposition, the rungs were used as a ladder and plaintiff was required to climb upon the scaffold since no alternative scaffold or safety device was presented. Plaintiff points out that the only time he remained on the ground level while his foreman continued to work on the scaffold was after the scaffold had been built and after the accident occurred. Also, plaintiff contends that whether he was directed to use the scaffold and did not need to climb the scaffold to perform his task is irrelevant, since 240 (1) applies even when the scaffold is alleged to have failed during the process of being dismantled or constructed. It is also claimed that without a specific instruction to use an alternative or safer method to accomplish his task, plaintiff cannot be deemed a recalcitrant worker. Further, plaintiff notes that defendants never asked plaintiff whether or not he could have built a two story scaffold without climbing onto the scaffold, and defendants' counsel's speculation that plaintiff could assist his foreman by handing up materials from ground level is inappropriate for summary judgment purposes.

With respect to his 241 (6) cause of action, plaintiff argues that he has a viable cause of action under Industrial Code § 23-1.8 (foot protection), given that it is unrefuted that plaintiff was permitted to work in the rain on a wet scaffold, and a jury may infer that defendants' failure to provide protective rubber pull over boots was a proximate cause of plaintiff's slip from the wet

and unstable scaffold. And, plaintiff contends, it is conceded that he was not provided with an independent line to attach to his lanyard and safety belt.

In reply and further support of their cross-motion for summary judgment, defendants insist that plaintiff's testimony indicates that he continued to assist his foreman complete the scaffold without climbing the scaffold, which at a minimum, creates an issue of fact. Defendants also deny asserting any recalcitrant worker defense. Furthermore, plaintiff has never alleged inadequate footwear and section 23-1.8 (foot protection), which requires the use of waterproof boots under certain circumstances, is not intended to insure dry feet.

Analysis

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form" (*Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067-1068 [1979]). The party "opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Labor Law § 240 (1)

Labor Law § 240 (1) imposes a nondelegable duty on owners to "furnish or erect, . . . scaffolding, hoists . . . , pulleys, . . . , and other devices which shall be so constructed, placed and operated as to give proper protection" to construction workers employed on the premises (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). A plaintiff, in order to be awarded summary judgment on a claim based upon Labor Law § 240 (1), must demonstrate, by

admissible evidence, that the statute was violated and that such violation was a proximate cause of his/her injuries (*Rocovich v Consolidated Edison Co.*, *supra*, at 513; *Robinson v NAB Constr. Corp.*, 210 AD2d 86; *Vencebi v Waldorf Astoria Hotel Corp.*, 143 AD2d 1004; *Mack v Altmans Stage Light Co.*, 98 AD2d 468).

Labor Law § 240 (1) has been held to apply in situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed (*see, e.g., Reed v State of New York*, 249 AD2d 719 [3d Dept 1998] [partially dismantled elevated scaffold tipped, causing plaintiff to fall]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012 [3d Dept 1990] [plaintiff fell 30 feet through floor of scaffold he was in the process of dismantling]; *Engel v Nedwitek*, 91 AD2d 794 [3d Dept 1982][plaintiff injured while dismantling scaffold]; *Kennedy v McKay*, 86 AD2d 597, 598 [2d Dept 1982] [where the Court held that the old rule, which stated that "anything which constituted a part of the work itself could not at the same time constitute a scaffold within section 240 ... (has) given way to the extent that the work itself may now become part of the place to work and may fall within the statute"]).

In *Kyle v City of New York* (268 AD2d 192 [1st Dept 2000]), upon which plaintiff relies, the plaintiff ironworker was working on a bridge repair project when a work platform being installed to the underside of the bridge by a crane collapsed, causing him to fall 30 feet in his safety harness. The Court found that while erecting or attaching the scaffold to the bridge, plaintiff could only perform this work while standing on the platform, as no alternative scaffolding was provided. Thus, the Court concluded that under such circumstances, the platform clearly constituted a scaffold within the parameters of Labor Law § 240 (1) and that such scaffold failed.

However, in *Guercio v Metlife Inc.*, 15 AD3d 153 [1st Dept 2005]), plaintiff was installing wall tile to a point five feet above the rim of a bathtub when he fell from the rim, sustaining injuries. To complete the required task, plaintiff had to reach, at most, 13 inches above his head, if standing on the floor or in the tub, in order to apply grout in the uppermost section of the work area. Standing on the bathtub rim was unnecessary. Under such circumstances, the First Department held that plaintiff was not exposed to the elevation-related risks contemplated by Labor Law § 240 (1) (see *Olson v Pyramid Crossgates Co.*, 291 AD2d 706 [3d Dept 2002] [Labor Law § 240 (1) claim where plaintiff neither pleaded nor proved that it was necessary to step on the platform to complete his wiring assignment, and that absent such need, no elevation-related risk was present]).

At the time of the accident, plaintiff and his foreman were in the process of building a two-story scaffold; each level was approximately six to eight feet high. Had the accident not occurred, plaintiff and/or his foreman would have used “just the one where we would have been standing on,” which would have been the top level of the scaffold (Ptf. EBT, page 47). In this regard, plaintiff had “already passed the piece of plank up there to” his foreman, who “was standing up there” on “the second level” (Ptf. EBT, page 47). Plaintiff testified that he “would climb up” the rungs of scaffold to the “second rung of the first level” of the scaffold, and hand his foreman the pieces, to wit: metal pins, 3 inches long (Ptf. EBT, page 43, lines 8-9; page 48, lines 8-24; page 49, lines 8-11; page 50, lines 3-11). Vertically, the rungs were 3-4 feet apart and the rung upon which plaintiff was standing was 6-8 feet from the ground. After handing his foreman the pin, plaintiff attempted to descend the scaffold, the scaffold shook, and plaintiff

slipped “because it was wet” (Ptf EBT, page 56, lines 9-16).² He did not request a ladder when assembling the scaffold; he was “Just told to use the scaffold, climb up the scaffold.” (Ptf EBT, page 63, lines 12-18). After the plaintiff fell, he continued to help his foreman complete the scaffold. When asked if he climbed up the scaffold again, plaintiff responded “No. I passed him like I might have stepped up with my left foot and just handed, you know, he was leaning over to get things at that time.” Ptf EBT page 77). When asked if he stepped on the first rung with his left foot, plaintiff stated “I may have, but I honestly don’t recall.” (Ptf. EBT page 77). Furthermore, plaintiff testified that “he couldn’t” climb onto the scaffold when it was later being disassembled (EBT page 79).

Contrary to defendants’ contention, whether plaintiff fell due to an “uneven” scaffold, or from a “ladder” (which is consistent with plaintiff’s deposition testimony the he used the rungs of the scaffold as a ladder) is of no moment.

However, it is unclear as to whether it was necessary for plaintiff to climb upon the scaffold he was assisting to build. To complete the required task, plaintiff, who is approximately 6 feet tall, had to reach several feet above his head in order to hand the materials to his foreman, who, after the accident, had to reach down several feet below to receive the materials. Although this appears to be a case where plaintiff had to reach several feet above to complete his task, necessitating the use of the rungs of the scaffold, plaintiff’s testimony also indicates that he assisted in the completion of the scaffold after his accident despite his inability to climb up the scaffold. Therefore, an issue of fact exists as to whether plaintiff was required to use the scaffold

² Plaintiff testified that he was wearing a safety harness, but that there was nothing to which to attach it because there “was no independent line to tie off the beams” . . . “You can’t attach it to the scaffold, obviously, because if the scaffold falls, you go with it” (Ptf. EBT, page 59).

as a ladder in order to complete his task, so as to expose plaintiff to the elevation related risks contemplated by Labor Law § 240 (1). Under the circumstances, it cannot be said, as a matter of law, that the relative elevation at which plaintiff was required to hand his foreman the materials could easily have been reached by this plaintiff without the use of the rungs of the scaffold, a ladder, step stool, or other device (*cf. Brooks v City of New York*, 212 AD2d 435 [1st Dept 1995] [to complete the required task plaintiff, at most, had to reach ten and one half inches above his head; thus, plaintiff was not exposed to the elevation related risks contemplated by the statute]). Although a jury could infer from plaintiff's testimony that he had to climb onto the rungs of the scaffold because he could not reach his foreman from the ground level, they could also conclude that such acts were unnecessary since plaintiff may have been able to complete his task without standing on the rungs of the scaffold.

Therefore, plaintiff and defendants' motions for summary relief in their favor concerning plaintiff's Labor Law § 240 (1) claim are denied.

Labor Law § 200 and negligence

As plaintiff has not opposed the dismissal of his Labor Law 200 and common law negligence claims, such claims are dismissed.

Labor Law § 241 (6)

Plaintiff does not contest that §§23-2.1 (dealing with maintenance and housekeeping of materials stored and removal of debris) and 23-6 (dealing with hoisting of materials), are factually inapplicable to the case at bar. Therefore, such sections are stricken from the complaint and bill of particulars.

As to § 23-1.8 (c) (foot protection), which is alleged in the bill of particulars, defendants

failed to demonstrate that this section is inapplicable to the case at bar. Section § 23-1.8(c)

provides:

(2) Foot protection. Every person required to work or pass in water, mud, wet concrete or in any other wet footing shall be provided with waterproof boots having safety insoles or with pullover boots or rubbers over safety shoes.

As the movants, defendants failed to prove, as a matter of law, that the construction boots worn by plaintiff at the time of the accident were waterproof with safety insoles, or constituted pullover boots, or “rubbers over safety shoes.” Accordingly, the branch of defendants’ motion to strike the allegation that defendants violated § 23-1.8 (c) is denied.³

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment in his favor under Labor Law § 240 (1), is denied, and the branch of defendants’ cross-motion for summary judgment dismissing such claim is denied; and it is further

ORDERED the branch of defendants’ cross-motion to dismiss plaintiff’s Labor Law 200 and common law negligence claims is granted; and it is further

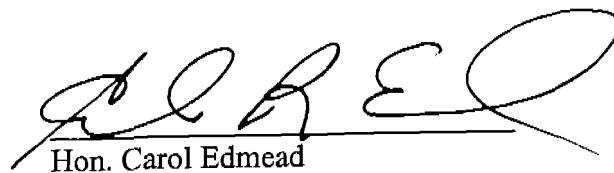
ORDERED that the branch of defendants’ motion to strike plaintiff’s allegations under Industrial Code regulations §§ 23-5, 23-2.1, 23-1.8, and 23-6, and OSHA regulations is granted

³The Court notes, however, that to properly rely on this section at trial, plaintiff must come forward with proof in evidentiary form concerning the type of footwear he was wearing and show that the failure to provide him with the proper footwear was the proximate cause of the accident and his injury (*see Shannon v Lake Grove Centers, Inc.*, 118 FSupp2d 343 [EDNY 2000]).

solely to the extent that Industrial Code regulations §§ 23-2.1 and 23-6, and allegations of OSHA violations are stricken from the complaint.

This constitutes the decision and order of the Court.

Dated: August 23, 2005



Hon. Carol Edmead

FILED
AUG 26 2005
COUNTY CLERK'S OFFICE
NEW YORK