Arnez v East 102nd St. Realty LLC
2005 NY Slip Op 30579(U)
December 12, 2005
Supreme Court, New York County
Docket Number: 100387/04
Judge: Carol R. Edmead

[* 1]

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

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ORLANDO ARNEZ,

Index No. 100387/04

Plaintiff,

-against-

DECISION/ORDER

EAST 102nd STREET REALTY LLC, J.E. LEVINE BUILDERS, INC.M STEPHEN B. JACOBS GROUP, P.C., ALL SAFE HEIGHTS SCAFFOLD & EQUIPMENT CORPORATION, INTERSTATE MASONRY, and GLENWOOD MANAGEMENT CORP.,

Defendants.

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EDMEAD, J.S.C.

MEMORANDUM DECISION

In motion sequence 002, plaintiff, Orlando Arnez ("plaintiff")[1] moves for an order, pursuant to CPLR 3212, granting partial summary judgment against defendants East 102nd Street Realty, LLC ("East 102nd") and J.E. Levine Builders, Inc. ("J.E. Levine") (collectively "defendants"), on the issue of liability under §240(1) of the Labor Law, imposing absolute liability on the owner and general contractor of the premises known and numbered 333 East 102nd Street, New York, New York (the "subject premises").

According to the Verified Complaint, on or about September 27, 2003, defendant East 102nd owned the subject premises, and defendant J.E. Levine was hired, pursuant to a written contract and/or agreement, to act as the general contractor and/or construction manager for the construction, renovation and/or alteration of the subject premises. Defendant Commercial Brick

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[1]At his deposition, plaintiff withdrew the loss of consortium cause of action, and Rossana Escobar Arnez is no longer a plaintiff in this action, as plaintiff was not married to Rossana Escobar Arnez on the date of his accident or the date of his deposition.

Corp. ("Commercial") was hired and/or retained as a subcontractor to perform work at the subject premises by J.E. Levine. Plaintiff was an employee of Commercial.

According to plaintiff's deposition, prior to his accident, plaintiff had been working at the subject premises for about four or five months, Monday through Friday, and sometimes on Saturday. (Pl. dep. at p. 26, lines 13-25) On Saturday, September 27, 2003, at about 8:00 am, plaintiff worked at the subject premises. His job was to erect and dismantle pipe and easy scaffolds; not the type that hang off the side of a building, but a free standing scaffold that rests on the ground. (Pl. dep. at p. 30, lines 19-25) His work at the subject premises was on the exterior of the six-story building. (Pl. dep. at p. 32, lines1-8) On the date of his accident, the scaffold he was working on was about 15 feet high. (Pl. dep. at p. 35, lines 20-23) Safety meetings were conducted at the site, in English, and plaintiff understood what was said. At the safety meetings there were discussions on such topics as how to use hard hats, how to use harnesses, how to use gloves and protection. Plaintiff had a safety harness. (Pl. dep. at pp. 42-43) He was also provided with a rope or a safety line to attach to the hook on the back of his safety harness. (Pl. dep. at p. 44, lines 1-25) Whenever he worked at an elevation, he always wore his safety harness. And, the harness was always attached to something. (Pl. dep. at p. 45, lines 11-20) Every morning when he began work, he was always instructed to wear his harness and be completely equipped. (Pl. dep. at p. 46, lines 1-4) When he worked on the sidewalk bridges at the site, plaintiff would wear the harness, hard hat, gloves and boots; however, there was no safety line provided or used. (Pl. dep. at p. 48, lines 3-25)

The accident occurred when plaintiff was on the top of the sidewalk bridge. (Pl. dep. at p. 57, lines 20-24) He had never been up on that bridge at all before the day of his accident. (Pl.

dep. at p.58, lines5-8) His work assignment that day was to mount an easy scaffold there on the bridge. (Pl. dep. at p. 59, lines 3-5) Plaintiff went up on the bridge, he put on his safety equipment - harness, hard hat, gloves and boots. He did not get a safety line. The sidewalk bridge was approximately 15 feet high. (Pl. dep. at pp. 61-62) He and another worker, Juan went out on the bridge and they began to measure where the bases were going to go. Plaintiff was measuring with a measuring tape, every seven feet, and every 21 feet where the bases were going to go. (Pl. dep. at p. 68, lines 14-25) Juan was holding the measuring tape, and plaintiff was walking with the tape. (Pl. dep. at p. 69, lines 18-22) Plaintiff was marking the location for the bases. As plaintiff was measuring on the sidewalk bridge where the setback was, he stepped closer to the edge of the sidewalk bridge. He was about three feet from the netting, and he was looking at the wall. He tried to step closer to the wall. (Pl. dep. at p.75-78)

Plaintiff tried to push the netting with his foot toward the wall, he lost his balance because his foot started to twist and he fell. (Pl. dep. pp. 84-86)

In sum, plaintiff argues that he was injured while working at an elevated height on a eight-story multiple residential dwelling, when he fell through the gap between the sidewalk bridge on which he was laboring and the building structure as there were no safety devices or equipment constructed, operated and placed to prevent him from falling through the gap.

In opposition, defendants's substantive argument relies on the unsworn witness statement of plaintiff's co-worker, Juan Perazza ("Perazza") who was standing on the sidewalk bridge with plaintiff when the accident occurred. In said statement, Perazza claims that he and plaintiff were standing on the sidewalk bridge; that they were both taking measurements in preparation for erecting the scaffolding; that they were holding the opposite ends of the measuring tape; that

plaintiff was walking backwards away from Perazza and that plaintiff walked off the bridge. In sum, plaintiff's conduct in walking backwards was the sole proximate cause of his accident. As such, defendants are not liable under Labor Law §240(1).

In reply, plaintiff argues that whichever version of the facts as to how the accident occurred is considered, each version concurs that plaintiff was caused to fall from the sidewalk bridge because of a gap between the scaffold and the subject premises. Regardless of which version of the incident is accepted by the court, there is not doubt that at the moment and precise place when the accident occurred there was no safety device or equipment in place to prevent plaintiff from falling in and through the aforesaid gap.

Further, defendants' argument that plaintiff was the sole proximate cause of his accident is erroneous, since defendants failed to provide even minimal safety equipment, and plaintiff's actions must then intentionally undermine the safety provided by defendant.

Analysis

CPLR 3212: Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor *(Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for

summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that

material triable issues of fact exist (*Zuckerman, supra* at 562). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Although a motion for summary judgment may be denied if the facts essential to establish opposition "may exist but cannot then be stated" (CPLR 3212[f]), "'[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion" (*Fulton v Allstate Ins. Co.*, NYLJ Jan. 18, 2005 p 26 col 3, citing *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*,, 133 AD2d 669 [1987]).

Labor Las § 240(1)

Labor Law § 240 (1) provides, in relevant 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."

Labor Law § 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514, 577 NYS2d 219 [1991]), the Court of Appeals defined the scope of Labor Law § 240 (1) as encompassing special hazards inherent in elevation-related tasks (*Gill v Samuel Kosoff & Sons*, 229 AD2d 824 [3rd Dept 1996]). The Court again addressed the scope of Labor Law § 240 (1) in *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993]), wherein it stated that the section "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*supra*, at 501 [emphasis in original]). Thus, pursuant to Labor Law § 240 (1), owners and contractors have the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the work site (*Drew v Correct Manufacturing Corp.*, 149 AD2d 893 [3rd Dept 1989]).

In enacting this statute, the legislative intent was to protect workers "by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 N.Y. Legis. Ann., at 407), instead of on workers, who 'are scarcely in a position to protect themselves from accident' [citation omitted]" (*Zimmer v Chemung County Performing Arts,* 65 N.Y.2d 513, 520, 493 N.Y.S.2d 102, [1985]). As the *Zimmer* court noted, "this statute is one for the protection of workmen from injury and

undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*id.* at 520-521, *quoting Quigley v Thatcher,* 207 N.Y. 66, 68, 100 N.E. 596 [1912]). The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v Eastern Ry. Supply*, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127, 626 N.E.2d 912 [1993]; *Ross,* 81 N.Y.2d 494, 500, *supra*; *Rocovich,* 78 N.Y.2d 509, 513, *supra*).

Sole Proximate Cause

This is not a case where the evidence was sufficient to demonstrate, *prima facie*, that the sole proximate cause of the plaintiff's fall was his own conduct in failing to use the safety equipment provided, not violations of Labor Law §§ 240(1) (*see Blake,* 1 N.Y.3d 280, *supra*; *see also Gambino v Massachusetts Mut. Life Ins. Co.,* 8 A.D.3d 337, 777 N.Y.S.2d 713 [2nd Dept 2004]; *Plass v Solotoff,* 5 A.D.3d 365, 773 N.Y.S.2d 84 [2nd Dept 2004]; *Misirlakis v East Coast Entertainment Props.,* 297 A.D.2d 312, 746 N.Y.S.2d 307 [2nd Dept 2002]).

Nor is there a view of the evidence to support a finding that plaintiff's conduct was the sole proximate cause of the accident (*see e.g. Weininger v Hagedorn & Co.,* 91 N.Y.2d 958, 672 N.Y.S.2d 840, 695 N.E.2d 709 [1998]; *Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]). Unlike *Weininger,* where plaintiff stood on the crossbar of a ladder (*see Corrado v Allied Bldrs.,* 186 Misc.2d 780, 782, 720 N.Y.S.2d 888 [2000]), and *Blake,* where the jury implicitly found that the plaintiff used an extension ladder without locking the extension clips, there was no misuse of safety equipment, in the instant case, plaintiff was not provided safety equipment to use on the sidewalk bridge.

Conclusion

Labor Law § 240(1) imposes a nondelegable duty upon the owner and contractor to provide proper and adequate safety devices to protect workers at an elevation from falling (*Vergara v SS 133 W. 21 LLC,* 21 A.D.3d 279, 280, 800 N.Y.S.2d 134 [1st Dept 2005]). Plaintiff has demonstrated that he was not provided with the requisite protection for the work he was performing at the subject premises, and defendants' failure to provide proper safety devices was a proximate cause of the fall. Even if plaintiff's walking backwards on the sidewalk bridge may have caused him to fall, it was not the sole proximate cause of the accident such as would absolve defendants (*Samuel v Simone Dev. Co.,* 13 A.D.3d 112, 786 N.Y.S.2d 163 [1st Dept 2004]; *cf. Munford v Pressmad Corp.,* 277 A.D.2d 135, 716 N.Y.S.2d 303 [1st Dept 2000]).

At most, plaintiff's conduct would constitute negligence, not the sole proximate cause (*see Morin v Machnick Bldrs.,* 4 A.D.3d 668, 772 N.Y.S.2d 388 [3rd Dept 2004]). It is by now well settled that a diminishment of the defendants' liability under the doctrine of comparative negligence is inapplicable in cases involving a violation of Labor Law § 240(1). "The policy purpose underlying Labor Law § 240 is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland,* 66 N.Y.2d 452, *supra*, quoting *Zimmer,* 65 N.Y.2d 513, 521, *supra*).

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff, Orlando Arnez for an order, pursuant to CPLR 3212, granting partial summary judgment against defendants East 102nd Street Realty, LLC ("East 102nd") and J.E. Levine Builders, Inc. ("J.E. Levine") (collectively "defendants"), on the

issue of liability under §240(1) of the Labor Law, imposing absolute liability on the owner and general contractor of the premises known and numbered 333 East 102nd Street, New York, New York, is granted. It is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of this court.

Dated: December 12, 2005

Carol Robinson Edmead, J.S.C.