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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 109698/2005
SULLIVAN, RICHARD
vs
GPH PARTNERS
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 11/24/06
MOTION SEQ. NO. 001
MOTION CAL. NO. 10

The following papers, numbered 1 to 6 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... of Amended Notice of Motion	1-4
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

"is determined in accordance with the annexed memorandum decision and order."

FILED

DEC 05 2006

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MICHAEL D. STALLMAN J.S.C.

Dated: 11/27/06

J.S.C.

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 7**

----------x

RICHARD SULLIVAN and KELLY SULLIVAN,

Index No.: 109698/05

Plaintiffs,

Decision and Order

-against-

GPH PARTNERS LLC and
BOVIS LEND LEASE LMB, INC.,

Defendants.

----------x

HON. MICHAEL D. STALLMAN, J.:

This is an action to recover damages for personal injuries sustained by a journeyman iron worker when he fell from a leg of a crane that collapsed at a construction site. Plaintiffs move, pursuant to CPLR 3212, for summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants GPH Partners LLC (GPH) and Bovis Lend Lease LMB, Inc. (Bovis).

BACKGROUND

Plaintiff Richard Sullivan was employed by Burgess Steel to erect a derrick crane for structural steel work necessary for the renovation of the premises known as the Gramercy Park Hotel and Annex located at 2 Lexington Avenue, New York, New York (the Project). GPH was the owner of the premises under construction, and Bovis was the construction manager of the Project. Bovis supervised and coordinated all of the trades on the job, and performed the daily safety inspections at the construction site. Sullivan received all of his job instructions and directions from his foreman, Michael Hartley, also a Burgess Steel employee.

On the morning of June 21, 2005, Sullivan sustained injury when he fell approximately 25 to 30 feet from the leg of a crane that was being used as a boom. The leg was about 50 feet long and was supported approximately 25 feet in the air by two roust-a-bouts and a cable hoist. Sullivan

testified that, at the time of his alleged accident, he was instructed by Hartley to climb on the leg in order to loosen the roust-a-bouts, which would in turn raise the leg higher. After unfastening the second roust-a-bout, Sullivan turned to begin climbing down from the leg, when Hartley instructed him to remain on the leg of the crane in order to install a tag line to the crane. As Sullivan proceeded to crawl further up the leg of the boom to attach the tag line, he heard co-workers begin to scream as the leg began to move. Sullivan was then injured when he was thrown off the side of the leg, as the crane collapsed 25 to 30 feet to the roof below.

DISCUSSION

"'The 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 eliminate any material issues of fact'" (Wolff v New York City Tr. Auth., 21 AD3d 956, 956 [2d Dept 2005], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 (1), also known as the Scaffold Law, 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.

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Hous. Servs. of NY City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]).

As a threshold matter, although plaintiffs contend that both GPH and Bovis violated Labor Law § 240 (1), they fail to address whether the statute applies to Bovis, a construction manager. "Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (id. at 863-864; Millard v Hueber-Breuer Construction Company, Inc., 4 AD3d 817, 818 [4th Dept 2004]; Falsitta v Metropolitan Life Insurance Company, Inc., 279 AD2d 879, 375 [3d Dept 2001]). The record does indicate that Bovis's activities, such as holding safety meetings, supervising and coordinating the trades, and performing daily inspections, may support a finding that it the statutory agent of the owner. However, plaintiffs do not address the issue of Bovis's liability under the statute as a construction manager, and therefore do not meet their prima facie burden. The Court may not search the record and grant summary judgment on an issue not raised by the motion (Baseball Office of Commr v. Marsh & McLennan, Inc., 295 AD2d 73, 82 [1st Dept 2002]).

As to GPH, a contract between GPH and Bovis establishes that, for the purposes of Labor Law § 240 (1), it is the owner of the premises where Sullivan was allegedly injured. The undisputed collapse of the crane, which Sullivan was directed to use as a makeshift device to allow him to work

at a height, is prima facie evidence of a Labor Law § 240 (1) violation (see Cosban v New York City Tr. Auth., 227 AD2d 160, 161 [1st Dept 1996] [crane that toppled on its side for no apparent reason constituted a prima facie violation of Labor Law § 240 (1)]; Aragon v 233 West 21st Street, Inc., 201 AD2d 353, 354 [1st Dept 1994]). At the time of Sullivan's alleged accident, he was wearing a safety harness and a hard hat that had been provided to him (Amended Notice of Motion, Mayer Affirm., Ex 3 [Sullivan Dep.], at 100-101). However, Sullivan stated that there was no area or independent structure to which his harness could be tied off (id. at 101, 112-114).

GPH does not submit any evidence refuting its ownership of the premises. Rather, GPH and Bovis contend that plaintiffs are not entitled to partial summary judgment because they have not established that the accident happened due to a defect in the crane. Sullivan testified that the crane, although not new, seemed to be in good condition before his alleged accident, that the roust-a-bout and cable grab were secure, and that no one had mentioned any problems with the crane (Sullivan Dep., at 100). Defendants also argue that Sullivan's failure to use his safety belt was the sole proximate cause of the accident. Sullivan acknowledged that "it is a general rule" to "tie off to something solid, something that's not going to move" (id. at 112). Sullivan also testified that he did not mention to anyone that there was no place to tie off, and that "[i]t never crossed his mind" that it might be unsafe to be on the leg without being tied off, as he was just following an order that he was given (id. at 113-114). Thus, defendants contend that an issue of fact arises to whether Sullivan acted reasonably when he believed there was no place to tie off his safety harness.

The collapse or malfunction of a safety device for no apparent reason creates a presumption in plaintiffs' favor that the device was not good enough to afford proper protection (Blake v Neighborhood Hous. Serv. of New York City, 1 NY3d 280, 289 n8 [2003]). Thus, plaintiffs do not

need to demonstrate a specific defect in the crane to make out a prima facie case of liability under the statute (see Bonanno v Port Authority of New York and New Jersey, 298 AD2d 269, 270 [1st Dept 2002]; Raczka v Nichter Utility Constr. Co., 272 AD2d 874 [4th Dept 2000]; Cosban v New York City Tr. Auth., 227 AD2d 160, supra). In any event, Bovis's own Incident Investigation Report states, in relevant part, "A flange at the pivot point of the boom failed. The boom swung off axis pushing Mr. Sullivan off his perch and against the building and subsequently allowing him to fall about 8 feet to the roof deck below" (Amended Notice of Motion, Mayer Affirm., Ex 5).

Defendants do not raise a triable issue of fact as to whether Sullivan's actions were the sole proximate cause of the accident. Defendants fail to offer any evidence that Sullivan could have attached his safety harness to something that would have prevented his fall. Hartley corroborated Sullivan's testimony that, at the time of his alleged accident, Sullivan "was wearing his hard hat and safety harness but there was no where to tie off" (Amended Notice of Motion, Mayer Affirm., Ex 4 [Hartley Aff.] ¶ 2).

Aragon v 233 West 21st Street, Inc. (201 AD2d 353, supra) is instructive. In Aragon, plaintiff's decedent was performing brick restoration when the scaffold upon which he stood collapsed. The Court ruled that the plaintiff was entitled to summary judgment on the issue of liability, inasmuch as the collapse of the scaffold was prima facie evidence of a violation of Labor Law § 240 (1), which shifted the burden to the defendants to raise a factual issue on liability. The record lacked evidence from which an inference could be made that the decedent "refused" to avail himself of the available safety harness. The Court also reasoned that "the duty to see that safety devices are furnished and employed rests on the employer in the first instance" and "the proximate cause of the scaffold's collapse was the breaking of one of the supporting ropes, not the plaintiff's

decedent's failure to wear a safety harness" (Aragorn, 201 AD2d at 354).

Like the decedent in Aragorn, defendants do not raise any issue of fact as to whether the sole proximate cause of Sullivan's injuries was a refusal to tie off his safety harness. "A plaintiff under Labor Law § 240 (1) need only show 'that his injuries were at least partially attributable to defendant[s'] failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential'" (Pardo v Bialystoker Ctr., 308 AD2d 384, 385 [1st Dept 2003]). Here, Sullivan's fall is partially attributable to the collapse of the crane, which was used as a makeshift device to allow Sullivan to work at a heigh to attach a tag line. At most, Sullivan's actions constitute comparative negligence, which is not a defense to GPH's liability under Labor Law § 240 (1) (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]). Thus, plaintiffs are entitled to summary judgment on the issue of liability under Labor Law § 240 (1) as against defendant GPH.

CONCLUSION

Accordingly, it is hereby

ORDERED that the part of plaintiffs' motion for summary judgment, pursuant to CPLR 3212, on the issue of liability under Labor Law § 240 (1) as against defendant GPH Partners LLC is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 11/27/06
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN

FILED
DEC 05 2006
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