

Erdman v Dell

2007 NY Slip Op 30869(U)

April 10, 2007

Supreme Court, Suffolk County

Docket Number: 0011303/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-3-07
ADJ. DATE 2-15-07
Mot. Seq. # 002- MG

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individually and d/b/a DELL & LITTLE, LLP,	:	
	:	
	:	
Defendants.	:	
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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18 - 31; Replying Affidavits and supporting papers 32 - 34; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiffs for an order pursuant to CPLR 3212 granting them summary judgment as to defendants' liability, is granted.

Plaintiff commenced this legal malpractice action to recover damages allegedly sustained when the defendants' law firm failed to adequately investigate and prosecute causes of action relative to an underlying Labor Law action. Injured plaintiff, Thomas E. Erdman, fell from a scaffold, while working in a building known as 100 Broadway, New York City, on July 30, 1998. On March 7, 2000, plaintiffs engaged defendants to prosecute their claims. On July 30, 2001, defendants mistakenly commenced an action against the owners of a building located at 100 Pine Street, New York City, and not 100 Broadway.¹ No action was commenced against the general contractor. When it was discovered that the

¹ It appears that plaintiff was confused about the correct address of the building because he always entered the building from Pine Street, not Broadway.

incorrect building owner had been sued, suit against the correct owner of the building at 100 Broadway was barred by the applicable statute of limitations. Plaintiffs now move for summary judgment as to defendants' liability for their failure to also sue the general contractor in the underlying action against the owner. They argue that since the general contractor would have been subject to the absolute liability imposed by Labor Law § 240 (1), summary judgment on their legal malpractice claim is appropriate.

Injured plaintiff testified at his depositions that he was a union pipe fitter with many years of experience. On the day of his accident, he and his partner were installing heating pipes in the ceiling of one floor of the building. He was standing on a baker scaffold, about six-feet high, which belonged to the general contractor. He had just completed the work for this floor, he threw his wrenches to the platform of the scaffold and was about to climb down. As he turned his body to begin his descent, the scaffold moved and it threw him off. He fell to the floor, sustaining the injuries complained off herein. The scaffold itself did not fall. Plaintiff also testified that, although the scaffold had locks for the wheels to prevent it from moving, he chose not to lock the wheels because he pulled himself along the overhead pipes to move the scaffold to the next area of work. It did not have side railings or other protective devices, and plaintiffs argue that the lack of safety railings on the scaffold, which would have prevented his fall, is a violation of Labor Law § 240(1).

On plaintiffs' motion for summary judgment they had the burden of demonstrating that but for the defendants' negligence they would have prevailed in the underlying action (*Holloway v Sacks & Sacks*, 275 AD2d 625, 713 NYS2d 162, *lv denied* 95 NY2d 770, 722 NYS2d 473 [2000]). Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable and an owner or general contractor who breaches that duty will be held liable in damages (*see, Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height (*Ross v Curtis-Palmer Hydro-Electric Co.*, *supra* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). Specifically, Labor Law § 240(1) requires that safety devices be "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]).

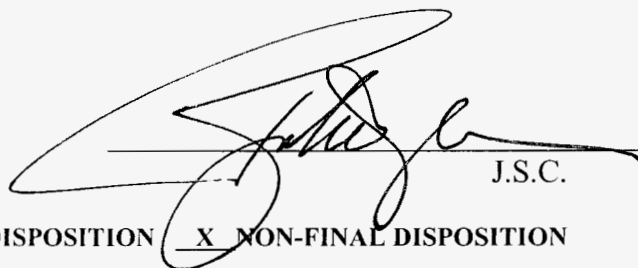
In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see, Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). An injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240(1) (*see, Raquet v Braun*, 90 NY2d 177, 184, 659 NYS2d 237 [1997]). Conversely, a defendant is not liable under § 240 (1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (*Blake v Neighborhood Hous. Serv. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

Once the plaintiff makes a prima facie showing of a statutory violation, 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. supra* at 289). Here, the uncontroverted facts established that the scaffold failed to protect plaintiff

from a specific gravity-related accident, the precise harm the statute is intended to prevent (*Ross v Curtis-Palmer Hydro-Elec. Co., supra; Rocovich v Consolidated Edison Co., supra*). Therefore, plaintiff made a prima facie showing of his entitlement to summary judgment in that he was not provided with the adequate protection required (*see, Vergara v SS 133 West 21, LLC, 21 AD3d 279, 800 NYS2d 134 [2005]; Crespo v Triad, Inc., 294 AD2d 145, 742 NYS2d 25 [2002]; Wright v State of New York, 110 AD2d 1060, 1061, 488 NYS2d 917, affd Bland v Manocherian, supra*) and defendants failed to raise a triable issue of fact. Because the absence of a safety railing or other device to prevent plaintiff's fall constituted a violation of Labor Law § 240(1), plaintiff's conduct in failing to lock the wheels would amount to comparative fault and thus cannot bar recovery under the statute (*LoVerde v 8 Prince St. Assoc., 35 AD3d 1224, 829 NYS2d 300 [2006]* citing to *Blake v Neighborhood Hous. Servs. of N.Y. City, supra* and *Bland v Manocherian, supra; see also, Vanriel v A. Weissman Real Estate, 262 AD2d 56, 691 NYS2d 446 [1991]*). Accordingly, plaintiffs are granted summary judgment as to defendants' liability (*Holloway v Sacks & Sacks, supra*).

Upon service of a copy of this order with notice of entry the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part for the next available trial date.

Dated: APR 10 2007



J.S.C.

 FINAL DISPOSITION NON-FINAL DISPOSITION