

Stephens v Triborough Bridge & Tunnel Auth.

2007 NY Slip Op 33395(U)

October 12, 2007

Supreme Court, New York County

Docket Number: 0124384/2002

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 124384/2002
STEPHENS, BRYAN
vs
TRIBOROUGH BRIDGE AND TUNNEL
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

s 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 *and cross motion are*
granted per attached

FILED
OCT 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/07

[Signature]
EMILY JANE GOODMAN ^{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: IAS PART 17

-----X
BRYAN STEPHENS and JOANNE STEPHENS,

Plaintiffs,

-against-

THE TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY,

Defendant.
-----X

Index No. 124384/02

FILED

OCT 22 2007

NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.:

In this action arising out of a construction site accident, defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs cross-move for summary judgment on the issue of defendant's liability under Labor Law §§ 240 (1) and 241 (6).

BACKGROUND

On March 19, 2002, plaintiff Bryan Stephens (plaintiff) was employed by non-party American Bridge/Koch Skanski JV (Am Bridge) as an ironworker, engaged in erecting a temporary stair tower (stairwell) against a concrete anchorage on the Queens side of the Triborough Bridge. How the accident happened is unclear, but somehow, during the course of his work that day, plaintiff was injured.

According to his complaint, bill of particulars and notice of claim, plaintiff was injured "when he was struck and/or while moving out of the way of a steel load that was improperly

constructed, placed, operated and maintained; [and] that [defendant] allowed steel members in the form of pre-fabricated stairwells to be hoisted in an unsafe, improper, dangerous and unsecure manner" (Complaint, ¶ SEVENTH; Bill of Particulars, ¶ 3-5 [adding that the steel load was "improperly braced"]; Notice of Claim, ¶ 3).

According to the Am Bridge accident report, dated two days after the accident, March 21, 2002:

Employee stated he was setting up a stair cage and was pushing with his legs when he felt pain in his lower back. Incident occurred on 12/19/02 [sic]. He reported to his foreman. He was [illegible] and continues to work on 3/20/02. He returned to work. He experience pain in lower back. Request to be taken to hospital. Treated and released.

NATURE AND EXTENT OF INJURY: lower back strain - Dr. Hendix.

In his handwritten Am Bridge Statement of Injured, dated March 25, 2002, plaintiff related that he

was working with Randy Meche [his Am Bridge foreman] was putting up stair tower was pushing stair tower out from wall to put in angle iron to secure tower to ancorage pushing with my legs and win I went down stairs to go down starting to have sharpe pains in back and all away down legs.
3/19/02

At his 50 (h) hearing on November 5, 2003, plaintiff testified that the stairwell he was installing was approximately 20 feet high, and about eight feet square (Hearing, at 87, 126).

He stated that a cherry picker had transferred the stairwell from a truck to the ground (*id.* at 98), but that the rigging was no longer attached to the stairwell at the time of his accident (*id.* at 134). According to plaintiff,

[w]e was starting to hug it down and put that angle iron in and it started swaying a little bit, and I slipped, and when I went to put my foot down and I slipped on an anchorage and I caught my foot on the side of it and I slipped and caught my foot about a foot down and slipped down and caught my back and when I caught my back, I just caught on the back side of that stairwell and pulled myself back up

Well, we were just right there on the -- kind of like where I was at, on that flat plate and all. We was right there and I was kind of easing myself down on the edge there, and it started wobbling, you know. ... And it was rocking It was just wobbling, so I went to kind of ease myself back, and when I went to ease myself back, I felt it slip, so I kind of -- my legs just slipped off the edge there. ... Both of [his legs slipped off the platform,] [s]o I jammed it into that anchorage, the concrete.

Q. How close to the anchorage was the platform at the time that you said your feet were slipping off the edge?

A. It's about three foot away from the platform.

Q. Well, when you put your feet out, where was the rest of your body?

A. It was sliding down.

Q. Sliding down where?

A. The side of the stairwell.

It was going towards the outside, and my arms caught in the back, and I hit the anchorage, which is on the outside edge, with my feet.

Q. And what was supporting, if anything, the upper portion of your body?

A. That's where my arms was. ... on the top part of that plate, on the part of the staircase. ... [The stairwell] was moving back. ... It had moved back away from the anchorage. It shook back. ... I don't have any idea why it moved back.

Q. And are you saying that you slipped as a result of the stairwell moving; is that correct?

A. I'm not saying that slipped. I'm saying that I felt the stairwell move, and when it moved, my foot slipped ... and went down about a foot. When it went down about a foot is when I fell back and caught on the stairwell.

Q. Did Randy do anything to cause the stairwell to move?

A. No, not that I know of

(*id.* at 138, 140-142, 143-144, 144-145, 146). As he slipped, his upper shoulders made contact with the top part of the stairwell, but when he was asked if he was afraid that he was going to fall, plaintiff answered, "No" (*id.* at 154, 159). The entire incident

took place in less than three seconds (*id.* at 162-164).

Plaintiff was deposed on February 8, 2006. He testified that at the time of his accident, he, his foreman, and another man were installing the first prefabricated 40-foot high section of a temporary stairwell (Plaintiff's Depo., at 39-40). In order to do this, plaintiff and the others were installing an angle iron to stabilize the stairwell (*id.* at 37). Plaintiff was working on the outer edge, towards the anchorage, at the top of the section, which was covered by a three- by four-foot metal plate which had a three- by five-foot hole in it (*id.* at 41, 42, 47). At the time of his accident, plaintiff was crouched on the plate, holding an angle iron, while his foreman, Randy Meche, was a couple of stairs below, using a two by four to pry the top of the stairwell away from the anchorage (*id.* at 49). Once the stairwell was sufficiently apart from the anchorage, plaintiff was to insert the angle iron between the stairwell and the anchorage, so the angle iron would fit snugly (*id.* at 50). He felt the stairwell move, and "that's when I went down and hit my feet to the anchorage and fell back onto the plate ... to catch myself from going in the hole" (*id.* at 50-51). He felt pain in his back "as soon as I got back up onto the plate and rolled over ... [b]ut I felt it pop as soon as it happened" (*id.* at 52).

Earlier this year, on February 15, 2007, plaintiff attested in an affidavit that at the time of the accident, he was

atop a 20-foot high stairwell, on a plate that was approximately three and a half feet square (Plaintiff's 2/15/07 Aff., ¶ 2).

Randy and I were trying to get the stairwell away from the anchorage so a piece of angle iron would fit flush with the top part of the stairwell. In order to accomplish this Randy had a two by four in between the anchorage and the stairwell. He was prying back on it to make the top part of the stairwell go back. ... As I was crouched down, I felt the stairwell wobble and suddenly move back away from the anchorage that I was facing. The stairwell moved back away from the anchorage approximately three feet, creating a three foot hole. ... I continued to slide down a little and stopped my fall by pushing my feet against the anchorage and falling back to catch myself on the top of my work platform, to prevent myself from falling all the way into the hole. ... I pushed with my feet and moved with my shoulders and I was able to get back on top of the platform

(*ibid.*).

It is uncontested that plaintiff was wearing a hard hat and a harness, but that his harness was not attached to anything.

Plaintiffs' complaint consists of two causes of action, the first alleging common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6), and the second, plaintiff's wife's claim for loss of consortium.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing

Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). "Once the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*id.*, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200, the codification of the common law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work" (*Buckley v Columbia Grammar and Preparatory*, ___ AD3d ___, 841 NYS2d 249, 257 [1st Dept 2007]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (*see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 [2d Dept 2007]).

All of the different versions of how the accident

happened have at least one thing in common, i.e., that the accident happened as a result of the means and methods that plaintiff and his foreman were using to attach the stairwell to an anchorage on the Queens side of the Triborough Bridge. In such a situation, an implicit precondition to imposing liability is that

the party charged with [the responsibility to provide workers with a safe place to work] have the authority to control the activity bringing about the injury. Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 [internal quotation marks and citations omitted]

(*Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; see also *Buckley*, ___ AD3d at ___, 841 NYS2d at 257).

In his testimony at his 50 (h) hearing, plaintiff attested that his Am Bridge foreman, Randy Meche, gave him his work assignments and told him how to move the stairwell (50 [h] Hearing Trcpt., at 85, 99). At his deposition, TB's construction project manager, Daniel Papa, testified that his responsibility was general oversight of the project and funding, basically to make sure that the MTA/TB got what they paid for, and to make sure that the contractors were working in accordance with MTA-approved plans and specifications (Papa Depo., at 6-7). TB's consultants which provided construction support services, GPI, observed Am Bridge's work, recorded the work being done, and

filed written reports which were reviewed by GPI's resident engineer (*id.* at 22, 23, 17). Papa also received most of these reports, which gave him insight into the progress being made at specific locations (*id.* at 18-19). GPI did not have direct responsibility for project safety, but they alerted a contractor or the contractor's supervisory staff if they saw an unsafe activity (*id.* at 45). If they noticed something dangerous, the MTA/TB could and would stop it, but the GPI people handled such situations on their own, and Papa did not have to intervene (*id.* at 45-46, 48-49). Specifically, TB never had to intervene with respect to Am Bridge (*id.* at 48-49). The MTA/TB's engineering safety officer was notified after an accident was reported to them, but they did not do investigations (*id.* at 51). At times, Papa went to the work site to see what was happening. The number of times he went depended on the needs and stage of the project. If he had payments to prepare, he worked in his office; if not, he would go to the field, to see what was going on (*id.* at 38).

"[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Construction Corp.*, 40 AD3d 305, 311 [1st Dept 2007]). No evidence has been adduced that defendant had anything more than general supervisory duties at this site. Thus, the part of defendant's motion which seeks the dismissal of

plaintiffs' Labor Law § 200 and common-law negligence claims is granted.

Labor Law § 240 (1)

"Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 880 [2003]). The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). The Legislature's intent in enacting the statute was to provide "exceptional protection" against the "special hazards" that arise when a worker is exposed to an elevation-related hazard at a work site (*id.* at 500-501). An accident that results from a general hazard of the workplace does not fall within the intendment of the statute (*see e.g. id.* at 501 ["exceptional protection" afforded by the statute is not intended to "encompass any and all perils that may be connected in some tangential way with the effects of gravity" (emphasis in original)]); *Zdunczyk v Ginther*, 15 AD3d 574, 575 [2d Dept 2005]

["The fact that the force of gravity was involved is not enough, by itself, to support the plaintiff's claim"]; *Sahota v Celaj*, 11 AD3d 308, 309 [1st Dept 2004]; *O'Donoghue v New York City School Construction Authority*, 1 AD3d 333, 335 [2d Dept 2003] ["The fact that gravity worked upon the hatchway cover and caused the injury is insufficient to support a Labor Law § 240 (1) claim"]).

The parties vigorously contest the issues of whether plaintiff's accident was the result of an elevation-related risk, and whether, since plaintiff did not fall completely through the gap between the stairwell and the anchorage, his accident falls within the intendment of Labor Law § 240 (1). Defendant maintains that plaintiff fell onto the platform of the stairwell, and thus, that he did not fall from a height (citing *Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400 [1st Dept 2004] [plaintiff did not fall from ladder, but was still on ground and slipped on wet floor]). Plaintiff insists that he fell into the gap up to his waist, and was injured as a result of his efforts to keep from falling further (citing *Carpio v Tishman Construction Corp. of New York*, 240 AD2d 234 [1st Dept 1997] [plaintiff fell three feet into uncovered hole]; see also *Pesca v City of New York*, 298 AD2d 292, 293 [1st Dept 2002] [plaintiff did not fall from ramp, but injuries sustained as result of his preventing his fall "may be compensable under Labor Law § 240 (1) if shown to have resulted from a failure to provide a proper safety device in

accordance with the requirements of (Labor Law § 240 [1])").

The question of "whether plaintiff was exposed to 'an elevation-related risk which called for any of the protective devices of the types listed in section 240 (1)' [citation omitted]" may be a question of fact (*Reale v H.B.S.A. Industries*, 233 AD2d 923, 924 [4th Dept 1996]; see also *Public Administrator of Kings County v 8 B.W., LLC*, 40 AD3d 834, 835 [2d Dept 2007] [issues of fact as to how accident occurred; question whether accident arose from elevation-related risk]; *Guaman v Ginestri*, 28 AD3d 517, 518 [2d Dept 2006] [issue of fact as to how accident occurred, and whether plaintiff was exposed to elevation-related risk]; *McCombs v Cimato Enterprises*, 20 AD3d 883, 884 [4th Dept 2005] [issue of fact whether plaintiff was exposed to elevation-related risk]). Here, plaintiff has alleged multiple explanations of how the accident occurred, leaving numerous questions of fact as to whether the accident was elevation-related, whether a safety device of the kind enumerated in the statute was required, and even whether Labor Law § 240 (1) applies.

In addition to considering the extent of plaintiff's fall, the height at which plaintiff was working is also a relevant factor, but neither party has established this fact, either.

Because neither defendant nor plaintiffs have

demonstrated their entitlement to summary judgment on the Labor Law § 240 (1) claim, the part of defendant's motion which seeks summary judgment dismissing this claim, and the part of plaintiffs' cross motion which seeks summary judgment on the issue of defendant's liability under the statute are both denied.

Labor Law § 241 (6)

Section 241 (6) ... imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common law standard of negligence. The regulations must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*Buckley*, ___ AD3d at ___, 841 NYS2d at 256). Plaintiffs originally alleged violations of Industrial Code (12 NYCRR Part 23) §§ 23-1.5; 23-1.7; 23-1.15; 23-1.16; 23-1.17; 23-1.19; 23-1.21; and 23-5.1 - 23-5.22. They have since narrowed their allegations to 23-1.7 (b) (1) (i); 23-1.7 (b) (1) (iii) (c); 23-1.15; 23-1.16 (b), (d), and (e); and 23-5.1 (c) (2) and 23-5.1 (j) (1). All sections no longer alleged are deemed abandoned, and will not be considered.

Section 23-1.7 relates to protection from general

hazards. The subsections on which plaintiffs rely follow:

(b) Falling hazards.

(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

(c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

Section 23-1.7 (b) (1) (i) has been found to be specific enough to support a Labor Law § 241 (6) claim (see e.g. *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60 [1st Dept 1999]). However, it is inapplicable in this case. This is not a case involving a situation such as in *O'Connor*, where the worker fell into an opening in a floor when the plywood that covered the hole shifted and gave way. The gap here was created by plaintiff and his supervisor as they were working to place an angle iron

between the stairwell and the anchorage. The gap was not there prior to their work, and defendant had no opportunity to place any of the safety devices mentioned in this subsection prior to plaintiff's accident. The section does not apply here.

Section 23-1.7 (b) (1) (iii) has also been found specific enough to support a Labor Law § 241 (6) claim (see e.g. *Luckern v Lyonsdale Energy Ltd. Partnership*, 281 AD2d 884 [4th Dept 2001]). Whether subsection (c) is applicable in this matter cannot be determined at this time. There are questions of fact as to whether the safety belt and lifeline are appropriate safety devices for the kind of work plaintiff was engaged in, and whether the lack of such devices contributed in any way to the happening of the accident.

Section 23-1.15, "Safety railing," has no applicability in this matter. Not only was no safety railing involved, but this section only enumerates the way that such a railing must be constructed.

Section 23-1.16 refers to "Safety belts, harnesses, tail lines and lifelines," and has been held sufficiently specific so as to be able to support a Labor Law § 241 (6) cause of action (see e.g. *Farmer v Central Hudson Gas & Electric Corp.*, 299 AD2d 856 [4th Dept 2002]). Subsections 23-1.16 (d) and (e) are clearly inapplicable, as no tail lines or lifelines were involved in this matter. Subsection 23-1.16 (b) requires safety

belts or harnesses to be attached to some form of secure anchorage so that "if the user should fall such fall shall not exceed five feet." It is uncontested that plaintiff was wearing a harness, but that his harness was not attached to anything. Whether plaintiff could have fallen more than five feet because his harness was not attached to anything, such that the failure to attach the harness was a cause of his injuries, is a question of fact which cannot be resolved on these motions. Therefore, the part of plaintiff's claim which rests on this subsection of the Industrial Code shall not be dismissed.

Part 23-5 of the Industrial Code covers requirements for scaffolds. Plaintiffs aver that the stairwell in this case was the functional equivalent of a scaffold, and thus, that these provisions apply. Defendant, of course, disagrees. The Appellate Division, First Department, has stated that "whether or not a device is a scaffold [is] ordinarily [] a factual issue" (*Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993]). The court leaves determination of this issue to the trier of fact.

In sum, the part of defendant's motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim is granted to the extent that the claim is based on violations of Industrial Code §§ 23-1.5; 23-1.7; 23-1.7 (b) (1) (iii) (c); 23-1.15; 23-1.16; 23-1.16 (b); 23-1.17; 23-1.19; 23-1.21; 23-5.2 -

23-5.22; 23-5.1 (c) (2) and 23-5.1 (j) (1), and is otherwise denied. The part of plaintiffs' cross motion which seeks summary judgment on the issue of defendant's liability under Labor Law § 241 (6) is denied.

Accordingly, it is

ORDERED that the part of defendant's motion which seeks the dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is granted; and it is further

ORDERED that the part of defendant's motion which seeks the dismissal of plaintiffs' Labor Law § 240 (1) claim is denied; and it is further

ORDERED that the part of defendant's motion which seeks the dismissal of plaintiffs' Labor Law § 241 (6) claim is granted to the extent that the claim is based on violations of Industrial Code §§ 23-1.5; 23-1.7; 23-1.7 (b) (1) (iii) (c); 23-1.15; 23-1.16; 23-1.16 (b); 23-1.17; 23-1.19; 23-1.21; 23-5.2 -23-5.22; 23-5.1 (c) (2) and 23-5.1 (j) (1), and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: October 12, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
OCT 22 2007
NEW YORK
COUNTY CLERK'S OFFICE