Fernades v Skanska USA Bldg. Inc.
2007 NY Slip Op 34599(U)
September 21, 2007
Supreme Court, New York County
Docket Number: 109840/04
Judge: Rolando T. Acosta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Gabriel Fernades,

Plaintiff,

– against–

Skanska USA Building Inc. and Barney Skanska USA,

Defendants.

DECISION/JUDGMENT

Index No. 109840/04

Seq. No. 2

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing Plaintiff's motion for an order pursuant to CPLR 3212 granting him summary judgment against defendants or in the alternative striking defendants answer for spoliation of evidence

Papers	**Numbered**
Notice of Motion & Affirmation	**1 (Exhibits A-H)**
Affirmation & Affidavits in Opposition	**2 (Exhibits A-H)**
Defendant's Reply Affirmation	**3 (Exhibit A)**

Background

The following facts were previously discussed in this Court's decision regarding defendants motion to dismiss the complaint, also dated February 21, 2007 (motion Seq. 1). Defendant Skanska USA Building Inc ("Skanska") was the "Design/Builder" of a runway at JFK Airport.[1] According to Joseph Carzzarella, the lead superintendent for Skanska, Skanska's role was solely to provide construction management services, which was "limited to scheduling and coordinating the various contractors, monitoring the overall conduct and progress of the work, and taking steps . . . to assure that the contractors adhere to the terms

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1. According to Carzzarella, no company with the name "Barney Skanska USA" had anything to do with the project. A company named Barney Skanska Construction Company was one of two members of the Design/Builder joint venture that was merged in to defendant Skanska USA.

of their contracts. . ." Cazzarella Affidavit at ¶ 4. "Skanska did not control, supervise, direct, devise, or have any involvement at all with the means and methods by which any contractor . . . or its employees performed their work. The means and methods by which the work of any contractor . . . was done, and by which employees of any contractor. . . performed their work, were determined solely by that contractor and its own employees." Cazzarella Affidavit at ¶ 6.

Plaintiff was an employee of Ruttura & Sons Construction Co ("Ruttura"), who was the concrete contractor. On April 16, 2003, plaintiff was instructed to assist in the removal of certain concrete forms that were used to hold wet concrete in place until the concrete dried. The forms were held in placed by metal rods approximately three to three and one half feet in height and about two inches in diameter. The rods would be jack-hammered in the ground about six to ten inches. Plaintiff removed between fifty and sixty rods that day, most manually using what he referred to as a wrench.

For rods that could not be manually removed, Ruttura with Skanska's consent, according to plaintiff, devised a method by which a cable was attached to the bucket of a backhoe. The wrench was attached to the end of the cable. Plaintiff's job was to place the wrench on the top of the rod, which was held in place solely by friction, and the back-hoe operator would lift the basket and remove the rod from the ground. For one particular rod, the wrench kept slipping off, so plaintiff was instructed to hold the wrench in place while the back-hoe applied pressure. While doing so, the wrench slipped, and upon the release of the pressure on the back-hoe, the bucket came down and struck plaintiff on the head and cause injuries.

The difference in this motion is that defendants have now produced an affidavit from an Anthony Sirico, the operating engineer employed by Ruttura who was operating the backhoe. See Defendant's Exhibit A. According to Sirico, the accident did not occurred as plaintiff testified to at his deposition. Rather, according to Sirico, "[t]he top of the pin was below the level of [plaintiff's] knees, so he crouched over at the waist [to hold the pin puller – which plaintiff referred to as the wrench] . The bucket of the backhoe (which was connected to the pin puller by a short steel wire) was at roughly the level of his waist. [Sirico] pulled on the wire with the backhoe. The next thing [Sirico] saw was [plaintiff] straighten up from a crouching to an upright position with the pin puller still in his hands, and come backwards in the direction of the backhoe, which was now at about the level of his shoulders. [Plaintiff] struck the backhoe with his hardhat. He did not lose consciousness, and [Sirico] thought at first he was just joking when he said he was hurt." Sirico Affidavit at ¶ 4. Sirico went on to state, that "[a]t no time during this operation was the bucket of the backhoe ever above the level of [plaintiff's] head, and the bucket of the backhoe did not fall on or hit [plaintiff]. Rather, it was [plaintiff] who hit the bucket as a result of his own momentum." Sirico Affidavit at ¶ 5. "It appeared that when the pin puller came off the pin, his own

momentum carried him." Sirico Affidavit at ¶ 6.

In his complaint, plaintiff asserted Labor Law 240(1); 241(6); 200 causes of action, and by this motion, sought summary judgment against defendant.

Analysis

Labor Law 240(1) provides that:

> 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.

In Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 500-501 (1993), the Court of Appeals addressed the nature of the occupational hazards to which Labor Law § 240 (1) was addressed:

> Noting that the statute "'is to be construed as liberally as may be for the' accomplishment of the purpose for which it was ... framed' " (Koenig v Patrick Constr. Corp., 298 NY 313, 319, quoting Quigley v Thatcher, 207 NY 66, 68), we held in Rocovich v Consolidated Edison Co. [78 N.Y.2d 509] that Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device.
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> The "special hazards" to which we referred in Rocovich, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see, DeHaen v Rockwood Sprinkler Co., 258 NY 350). In other words, Labor Law § 240 (1) 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. The right of recovery afforded by the statute does not extend to other types of harm, even if the

harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist.

Thus, in Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001), Labor Law 240(1) did not apply when a worker on a scaffold was struck by a falling window totally unrelated to the work that he was performing. It applied, however, in Malloy v. Madison Forty-Five Co., 13 A.D.3d 55 (1st Dept. 2004), where the operator of a backhoe was struck by a metal beam it had transferred into an adjacent dumpster. The Appellate Division, First Department, held that Labor Law 240(1) applied because "defendants failure to provide adequate hoisting devices forced plaintiff to drop the beams into dumpster rather than placing them there." Likewise, in Sharp v. Scandic Wall Ltd. Partnership, 306 A.D.2d 39 (1st Dept. 2003), the Court held that the injury resulting from the failure to properly place and operate a hoisting device to lower an elevator to ground level was covered under labor law 240(1). The Plaintiff in Sharp was standing on top of the elevator. The Court noted that "while the case is unusual in that the load being hoisted was at the same level as the injured worker, it remains that plaintiff's injuries were the immediate result of the 'effects of gravity' . . . and the ultimate result of the lack of a hoist that was properly placed and operated so as to afford the protection required by the statute." Id at 40.

Here, viewing defendants' version of the accident in the light most favorable to them, the injury was nonetheless the immediate result of the effect of gravity and the ultimate result of a hoist that did not provide the required protection to do the job; that is, according to Sirico, "[i]t appeared that when the pin puller came off the pin, [plaintiff's] own momentum carried him." Whether the bucket hit him or he hit the bucket is of no moment. The fact remains that he was holding on to the cord, and was "carried" when the hoisting mechanism failed. It is also irrelevant that what caused the injury was the hoisting mechanism itself. Gabriel v. The Boldt Group, 8 A.D.3d 1058 (4th Dept. 2004). Accordingly, plaintiff has established his prima facie entitlement to summary judgment on his Labor Law 240(1) claim, and the burden thus shifted to defendant to raise triable issues of fact.

According to defendants' expert, Labor Law 240(1) does not apply to the facts of this case because the rods were being "pried" off the ground rather than being hoisted off the ground over plaintiff's head. As this Court previously noted in defendants' motion to dismiss the complaint (Seq.1), however, this argument lacks merit. Hoisting is defined as "to raise or haul up with a mechanical apparatus." The American Heritage College Dictionary, Third Edition. That is exactly what happened in this case. Metal rods approximately three feet long and two inches in diameter that had been imbedded into the ground about six inches were being hauled up by a mechanical apparatus. And, according to Sharp, the load did not have to be lifted over plaintiff's head. Rather, what is required is that the injury was caused by the effect of gravity and the lack of a proper hoist. Thus, based on the foregoing, plaintiff is granted summary judgment on liability against defendants on his Labor Law 240(1) claim.

There are, however, triable issues of fact as to whether defendants are liable under Labor Law 241(6) by violating Industrial Code Sections 23-9.4(e)(1)(2); 23-9.4(h)(5); 23-9.5(c), or Labor Law 200. See Motion under Seq. 1.

Accordingly, based on the foregoing, it is hereby

ADJUDGED that plaintiff's motion for summary judgment against defendant Skanska USA Building, Inc, on liability pursuant to Labor Law 240(1) is granted; and it is further

ORDERED that all other aspects of plaintiff's motion is denied.

This constitutes the Decision and Judgment of the Court.

Dated: September 21, 2007

ENTER SO ORDERED

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.