SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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THOMAS SANCHEZ

Plaintiff,

-against-

EDWARD D. BURKE REALTY CO., INC, individually and doing business as WATERSIDE CONDOMINIUM, and MORLEY PROPERTY MANAGEMENT, INC.

Defendant.

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TRIAL PART: 21
NASSAU COUNTY

INDEX NO: 14116/06

MOTION SEQ. NO: 01

SUBMIT DATE: 1/18/08

The following papers having been read on this motion:

Notice of Motion 1
Plaintiff's Memorandum ... 2
Opposition 3
Reply.....4

Motion by the attorneys for the plaintiff for an order pursuant to CPLR §3212 and Labor Law § 241(1) granting summary judgment to the plaintiff on the issue of liability is granted.

This action arises out of an accident that occurred on May 6, 2005, at a construction site owned by the defendant Edward D. Burke Realty Co., Inc., where the plaintiff, a subcontractor, was injured when he fell from an allegedly defective and dangerous scaffold as he was performing his work. According to the plaintiff, the alleged accident occurred when the scaffold upon which he was standing suddenly fell over due to improper footing on the scaffold. As a result of the alleged improper footing, the plaintiff alleges one of the scaffold's legs sunk into the newly installed asphalt upon which it was situated.

Edward D. Burke Realty Co., Inc. (Burke) acted as the general contractor with regard to the construction of the project, the hiring of the trades and the inspection of their work. Plaintiff, an

independent contractor, was hired to install leaders and gutters on the construction project. Edward Burke, the sole proprietor of defendant Edward D. Burke Realty Co., Inc. testified that the defendant had on the property pump jacks, stepladders six to 14 feet high, extensions ladders, 20, 30, 36 and 40 feet high, and planking (pp. 21-22 Burke EBT). There was also scaffolding which was 40 separate pieces of six foot tubular braces. Additionally, there were separate pieces of feet and wheels to go under the scaffolding, as well as extension pins so that they could be stacked. The equipment was kept in the garage of the building (pp. 23-23 Burke EBT). Plaintiff did not have any employees or helpers that he brought to the jobsite (p. 25 Sanchez EBT). When Mr. Sanchez started the job he was under the impression that except for the equipment he himself brought to the site there was no other equipment available to him (p. 29 Sanchez EBT). Prior to the subject accident, Mr. Sanchez completed the leader and gutter work on three of the building sides (p. 27 Sanchez EBT and p. 19 Burke EBT). The work performed prior to the incident was done by Mr. Sanchez using his own ladders (p. 27 Sanchez EBT and pp. 19-20 Burke EBT).

The height on the fourth (east) side of the building was higher than the rest of the building. A few days before the subject accident, since Mr. Burke did not have a ladder tall enough to reach the roof edge on the east side of the building, plaintiff placed his own ladder on top of his truck so that the ladder would reach high enough for his work (pp. 46-48 Sanchez EBT, p. 32 Burke EBT). Mr. Sanchez advised Mr. Burke that the roof line was too high for his ladders to reach on their own, and that is why he had placed his ladder on the top of his truck (p. 47 Sanchez EBT). Mr. Burke was of the opinion and "specifically told" Mr. Sanchez that the ladders were not to be placed on top of the truck, that "that was not to be done again" and was "not a safe operation" (p. 32 Burke EBT). Mr. Burke testified as follows (pp. 34-35 Burke EBT):

Q. Other than instructing Mr. Sanchez not to use his truck in the fashion he was using it for as the base of the ladder, did you have any discussions about his work at that time?
A. I recall pointing out to Mr. Sanchez that we had other equipment that was available for his use. We had scaffolds, pump jacks, and 40-foot ladders.
Q. Did you direct Mr. Sanchez to use any such equipment?
A. I did not direct him.
Q. Other than telling him that such equipment was available for his use, was there any other discussion regarding any such equipment?
A. No.
Q. Did you direct anyone else at the job site to set up any equipment for Mr. Sanchez?
A. No.

The plaintiff described the scaffold and ladder set up he was working on as follows: There was the six-foot high by eight-foot long tubular scaffold, with a wooden platform on it (p. 42 Sanchez EBT). On top of the tubular scaffolding there was a wooden platform, and on the top of the platform Mr. Sanchez's 36-foot extension ladder (pp. 42-43 Sanchez EBT). The ladder was nailed to the platform on the scaffold (p. 52). There was no feet attached to the legs of the scaffold, which were on an asphalt driveway (p. 45 Sanchez EBT). A second 32-foot extension ladder was set up around the corner of the building on the ground. There was one ladder jack on each of the two ladders and a wooden platform laying on top of the two ladder jacks. A rope form the 32-foot ladder on the ground was tied to a pump jack which was left at the corner of the building by other workers (pp. 52-55 Sanchez EBT; also pp. 14-17 non-party John Weeks EBT).

On the morning of May 6, 2005 plaintiff climbed up the ladder on the scaffold and onto the wooden platform braced between the two extension ladders (see pp. 51-52, 57, Sanchez EBT). He was attempting to secure the corner where to gutters meet and reinforce the gutters by riveting a plate inside the gutters (pp. 51-52, Sanchez EBT). As he was preparing to work Mr. Sanchez felt a vibration and then:

> "I had no time to look, just my entire body, the ladder began to shake, I grabbed the gutter, and I grabbed the ladder. And it just became so violent. I had thought to run across the plank. I didn't have time. Everything collapsed" (p. 58 Sanchez EBT).
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> "I had no chance to run across. Uh, I remember just taking this hand (indicating) and wrapping it around the ladder and just riding it down" (p. 59 Sanchez EBT, Exhibit C).

The complaint alleges that the defendant violated Labor Law § 240(1). Plaintiff seeks summary judgment against the defendant based on Labor Law § 240(1).

Labor Law § 240(1) provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

The plaintiff was a worker within the class of persons intended to be protected by Labor Law § 240(1). The statute imposes absolute liability on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards. Breach of the statutory duty must be the proximate cause of the injury. The statute is to be interpreted liberally to accomplish its purpose. (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-514; *see also Striegel v Hillcrest Heights Dev. Corp.*, 100 NY2d 974).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it.(*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant.(*Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). The plaintiff has made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form.(*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient.(*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd.* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557).

In opposition to the plaintiff's motion the attorneys for defendant contends that the plaintiff's conduct was the sole cause of his accident.

A defendant is not liable under Labor Law § 240(1) in the absence of proof of a violation of the statute and a showing that plaintiff's own negligence was the sole proximate cause of the accident. As stated by the Court of Appeals in *Blake v Neighborhood Housing Services of New York City, Inc.*, (1 NY3d 280, at p. 290),

> Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. **Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation** (emphasis added).

Blake (*supra*) and its progeny have clarified the concept that Labor Law § 240(1) is not an absolute or strict liability statute, such as a claim involving blasting activities or the keeping of wild animals where the terms "strict" (or absolute) liability, are used to signify "liability without fault." In short, a fall from a scaffold or ladder does not in and of itself give rise to an award of damages to the injured party. The plaintiff must show a statutory violation. There must be proof that the plaintiff's actions were the **sole** cause of the injuries. Not even a *de minimus* amount of comparative negligence on the part of the plaintiff would be a defense under Labor Law § 240(1). *(See Weininger v Hagedorn & Co.*, 91 NY2d 958).

Citing *Montgomery v Federal Express Corp.*, (4 NY3d 805) and *Robinson v East Medical Center, LP*, (6 NY3d 550), the defendant argues that it did not breach its statutory duty under Labor Law § 240(1) since it provided adequate safety devices but the plaintiff misused them. Defendant denies it set up the scaffold. Plaintiff claims the scaffold was already set up when he arrived for work on the morning of the incident. Mr. Burke asserts he performed an inspection of the jobsite at

approximate 8:30 PM the evening before the alleged accident, and the subject scaffold was not erected. Also, Mr. Burke claims that at the time of the inspection there were no workers present at the job site (pp. 36-37 Burke EBT). Mr. Burke argues that the plaintiff's allegation that someone other than the plaintiff erected the subject scaffold is a canard on the plaintiff's part to avoid the responsibility associated with Mr. Sanchez's improperly erecting the scaffold. Defendants' expert opines that had the plaintiff properly erected the scaffold, i.e., installed the available footings, the accident would never have happened (Affidavit of William Marletta, Ph.D., CSP).

Assuming *arguendo* that the plaintiff, and not Burke, installed the scaffold, as a matter of law, the Court finds that plaintiff's own negligence was not the sole proximate cause of the accident. The plaintiff testified at his deposition that he never used scaffolding before the subject accident and would not have known that the four (4) "tubular legs" should have been attached to the tubes (p. 45 Sanchez EBT). The scaffolding was owned by Burke (p. 42 Burke EBT). The plaintiff had not used any of the scaffolding or equipment owned by Burke and available to the plaintiff prior to the subject accident. There is no evidence on the record nor is it claimed that after the scaffold was erected Burke inspected the scaffold to ascertain that it was installed in a safe manner. Safety meetings were held between Burke and the framers, plumbers and electricians during the framing process when the building was being framed. No safety meeting were ever held where the plaintiff was present (p. 58, Burke EBT). Not only must the defendant make the components of the scaffold available to the defendant, but it must instruct the plaintiff as to how to properly assemble the components into a safe scaffold in the absence of the defendant itself erecting the scaffold. The defendant has failed to show it made any attempt to instruct the plaintiff as to how to erect the scaffold in a safe manner. *(Balbuena v. New York Stock Exchange, 45 A.D.3d 279; Salazar v United Rentals, Inc.*, 41 AD3d 684; Walls v. Turner Corp., 10 A.D.3d 26; *Cf., Cahill v Triborough Bridge & Tunnel Authority*, 4

NY3d 35, [where the defendant provided specific instructions on the use of a safety line while climbing, and the plaintiff chose to disregard those instructions]).

Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim is granted on the issue of liability granted.

This constitutes the decision and order of this Court.

ENTER

DATED: February 6, 2008

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J.S.C.

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