

Mennis v Commet 380, Inc.

2008 NY Slip Op 30553(U)

February 22, 2008

Supreme Court, New York County

Docket Number: 0108714/2005

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN

PRESENT: _____

PART 57

Justice

Index Number : 108714/2005

INDEX NO.

108714/05

MENNIS, MARCOS

MOTION DATE

vs

COMMET 380

MOTION SEQ. NO.

004

Sequence Number : 004

MOTION CAL. NO.

SUMMARY JUDGMENT

motion ~~is~~/for Summary judgment

and cross-motion

Notice of Motion/ ~~Order to Show Cause~~ — ~~Affidavits~~ — Exhibits

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1, 2

Replying Affidavits _____

3-5

6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/22/08

Marcy Friedman

MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

MARCOS MENNIS,

Plaintiff,

- against -

COMMET 380, INC., et al.,

Defendants.

_____ x

Index No.: 108714/05

DECISION/ORDER

FILED

FEB 29 2008

NEW YORK
COUNTY CLERK'S OFFICE

In this Labor Law action, defendant COMMET 380, INC. ("COMMET") moves for summary judgment dismissing the complaint against it and for other relief. Plaintiff Marcos Mennis cross-moves for summary judgment on his Labor Law § 240(1) claim.

On its motion, COMMET wholly fails to address relevant facts and law governing the issue of whether COMMET, an out of possession owner of the premises where plaintiff's accident occurred, is subject to liability under Labor Law § 240(1). In particular, it does not address whether the net lessee of the premises, TAG 380 LLC ("TAG"), performed the work at issue with or without COMMET'S permission and/or knowledge; whether the leases required TAG to obtain COMMET'S permission for such work; and whether liability may be imposed under governing law. (See c.g. Abbatiello v Lancaster Studio Assocs., 3 NY3d 46 [2004]; Morales v D&A Food Serv., 41 AD3d 352 [1st Dept 2007].) Defendant COMMET's motion will accordingly be denied on this inadequately developed record.

Turning to the cross-motion, the court finds that plaintiff makes a prima facie showing of defendants' liability under Labor Law § 240(1). This statute provides:

* 3]

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.

“The purpose of this section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.”

(Gordon v. Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v. Consolidated Edison Co., 78 NY2d 509, 513 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury.” (Gordon, 82 NY2d at 559.)

In the instant case, plaintiff’s accident occurred when he fell from a ladder. The ladder was affixed to a wall leading from the 23rd floor to the roof. Plaintiff claims that the ladder was wet from dripping water from cooler pumps located on the roof. (See P.’s Dep. at 92-93.) Plaintiff further claims that he fell because the ladder was slippery. (Id. at 34.)

It is well settled that not every fall from a ladder involves a violation of Labor Law § 240(1). (See Blake v Neighborhood Housing Servs., 1 NY3d 280, 289 [2003]; Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001].) However, “[w]here the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute.” (Cruz v Turner Constr. Co., 279 AD2d 322, 322-323 [1st Dept 2001].)

Here, TAG does not dispute that there was water on the ladder from the cooler pumps or that it was unforeseeable, given the location of the ladder in relation to cooler pumps, that water would drip onto the ladder. Plaintiff thus makes a prima facie showing that his accident

[* 4]
involved an elevation-related hazard within the meaning of Labor Law § 240(1).¹

In opposition, TAG claims that plaintiff was the sole proximate cause of his accident and that TAG is therefore not liable under section 240(1). However, TAG fails to raise a triable issue of fact in this regard. TAG's building manager acknowledges that TAG made two routes available to plaintiff and his employer to reach the roof – the ladder leading from the 23rd floor to the roof from which plaintiff fell, and an interior stairway. (Cuddy Aff. [Ex. C to TAG Aff. In Opp.].) As both routes were made available, TAG cannot be heard to argue that plaintiff's decision to use the ladder was the sole proximate cause of his accident. (See Lajeunesse v Feinman, 218 AD2d 827 [3d Dept 1995].)

The court rejects TAG's further argument that plaintiff's failure to follow safety practices in ascending the ladder was the sole proximate cause of his accident. In support of this contention, TAG submits the affidavit of its expert, Werner Laag, a safety engineer, who attests that "an individual must maintain a three point contact with the ladder while climbing" (i.e., both feet and one hand or both hands and one foot), and that "three point contact was difficult to maintain" because plaintiff was carrying a can of paint during the ladder ascent. However, TAG makes no showing that plaintiff did not maintain such three point contact, and does not controvert plaintiff's testimony that he was holding onto the ladder with his left hand while climbing. (See P.s' Dep. at 35.) TAG's expert further asserts that "[t]he preferred technique for lifting tools and materials to an elevated work surface is to utilize a rope to hoist those items up

¹In so holding, the court does not rely on the affidavit of plaintiff's engineer, Nicholas Bellizzi, attesting that the clearance of the ladder from the wall was inadequate, thereby creating "substandard foot space" which in turn created a "potential fall hazard." (Bellizzi Aff., ¶ 12.) This contention is irrelevant, as plaintiff claims that he fell because the ladder was slippery from water, not because he lacked adequate space for stepping. (See P.s' Dep. at 33-35.)

after the individual has safely ascended the ladder.” However, Laag cites no authority for this assertion that hoisting is the “preferred technique,” and does not state that hoisting is mandatory when carrying a gallon of paint up a ladder.

Even assuming arguendo that plaintiff violated accepted safety techniques by carrying the gallon of paint while ascending the ladder, such act cannot have been the sole proximate cause of his accident, as the failure to maintain the ladder in a dry condition was also a cause of his accident. It is well settled that “if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.” (Blake, 1 NY3d at 290; Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173 [1st Dept 2004].)


TAG also fails to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injury based upon the testimony of plaintiff’s co-worker that he smelled alcohol on plaintiff’s breath prior to the accident. (Dep. of Santos Rodriguez at 41-43.) Plaintiff testified that he had not been drinking any alcohol for 24 hours prior to the accident. (See P.’s Dep. at 81.) While this testimony raises a credibility question as to whether he was drinking at all, defendant fails to submit any evidence to show “how much plaintiff had to drink, when he drank it, whether or not he was intoxicated, or whether or not his intoxication was even a contributing cause of the accident, let alone the sole cause.” (Kijak v 330 Madison Ave. Corp., 251 AD2d 152, 154 [1st Dept 1998]. See also Tate v Clancy-Cullen Stor. Co., 171 AD2d 292 [1st Dept 1991].) In any event, as held above, the ladder’s failure to provide proper protection to plaintiff was a proximate cause of his accident. Plaintiff’s alleged intoxication therefore cannot be found to be the sole proximate cause. (See Podbielski v KMO-361 Realty Assocs., 294 AD2d 552 [2d Dept 2002], lv denied 98 NY2d 613.)

It is accordingly hereby ORDERED that defendant COMMET 380 INC.'s motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion is granted to the extent that plaintiff is awarded summary judgment against defendants COMMET 380 INC., Solow Management Corp., and TAG 380 LLC as to liability on his Labor Law § 240(1) claim, and the issue of the amount of damages shall be determined at the trial of the action.

This constitutes the decision and order of the court.

Dated: New York, New York
February 22, 2008


MARCY FRIEDMAN, J.S.C.

FILED
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