Franz v School Constr. Auth.
2008 NY Slip Op 30635(U)
March 6, 2008
Supreme Court, New York County
Docket Number: 0101703/2006
Judge: Carol R. Edmead
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SCANNED ON 3/7/2008

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Franz

INDEX NO. 101703/06

MOTION DATE 11/30/07

MOTION SEQ. NO. 001

- v -

MOTION CAL. NO.

School Construction Authority

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision,

ORDERED that the part of plaintiff Matthew Franz's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim, as well as his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.3 (f) as against defendant The City of New York Department of Education is granted; and it is further

ORDERED that the part of plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (f) and 23-5.1 (j) as against The City of New York Department of Education is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: This constitutes the decision and order of the Court.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

HON. CAROL EDMEAD

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

MATTHEW FRANZ,

Plaintiff,

-against-

SCHOOL CONSTRUCTION AUTHORITY and THE CITY OF NEW YORK DEPARTMENT OF EDUCATION,

Defendants.

Index No.: 101703/06

DECISION/ORDER

FILED
MAR 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

Edmead, J.:

MEMORANDUM DECISION

This is an action to recover damages sustained by a worker when he fell from a scaffold at a construction site located at 1615 Madison Avenue, New York, New York on August 17, 2005. Plaintiff Matthew Franz ("plaintiff") moves, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against defendant The City of New York Department of Education (defendant).

BACKGROUND

On the date of his accident, plaintiff, who was employed by non-party Ace Scaffolding Company, Inc. (Ace), was involved in the erection of a scaffold deck as part of a renovation project for a public school that was owned by defendant. Plaintiff testified that in order get up and down from the level of the scaffold that he was working on, he had to use the scaffold's crossbars, as "there were no ladders on the site" (Plaintiff's Notice of Motion, Exhibit D, Franz Deposition, at 17). Plaintiff stated that, prior to the day of his accident, he had complained about the lack of ladders at the job site to the shop steward, as well as to his foreman, whose name he

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could not recall. Plaintiff stated that his foreman responded by telling plaintiff not to "worry about it" (id. at 18). Plaintiff further maintained that, every morning when the workers arrived at the job site, they would inquire about the ladders that were supposed to have been provided. In addition, plaintiff noted that, although he was told by his foreman and the shop steward to wear a safety harness, there was no place to "clip off to" (id. at 24).

Plaintiff also testified that, just prior to his accident, his foreman had told him to come down off the scaffold. Plaintiff explained that he then descended the scaffold in his usual manner, which entailed stepping down on the crossbars with his back towards the street and while holding on to a metal beam. As plaintiff stepped with his right foot on one of the scaffold's crossbars, the crossbar came loose and "swung [him] off," causing plaintiff to fall 12 to 14 feet onto a school bus (id. at 35). Plaintiff noted that, at the time of his accident, at least five other workers, including his foreman, were present in the area.

Jean Clerie (Clerie), a project officer for defendant School Construction Authority, testified that, at the time of plaintiff's accident, she was supervising the renovation project at the school. Clerie testified that she did not recall ever observing plaintiff at the job site, and only became aware of plaintiff's accident when she received the C-2 form, the equivalent of an accident report, which had been prepared by the general contractor of the project in August of 2005. Clerie also testified that, prior to the date of plaintiff's accident, she had never observed any ladders in the area of plaintiff's accident.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

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material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

Before considering plaintiff's motion for partial summary judgment, it is first necessary for this court to address the issue of whether the affidavit of John Butler (Butler) (the Butler affidavit), dated June 22, 2007, which was submitted by defendant in opposition to plaintiff's motion, should be precluded due to defendant's failure to timely disclose that witness's identity in its discovery responses submitted prior to plaintiff's filing of the Note of Issue.

In his affidavit, Butler stated that, on the day of plaintiff's accident, not only was there a ladder available on the job site, "which was specifically for the Ace workers to use to climb up and down from the sidewalk bridge," but prior to plaintiff's accident, he had instructed all of Ace's workers, including plaintiff, to use the ladder to do so (Defendant's Affirmation in Opposition, Exhibit B, Butler Affidavit, at 2).

On March 21, 2006, in his cross notice of discovery and inspection, plaintiff served a formal discovery demand upon defendants seeking, among other things:

(g) The names and addresses of any and all witnesses to:

> 1. The occurrence complained of herein;
> 2. Any defects, act[s], omissions or conditions that caused such occurrence;
> 3. Any actual notice given to the party that you represent ... of any condition that caused occurrence;
>
> * * *
>
> 5. Witnesses to the notice or lack thereof to the alleged condition ...
> 6. Any and all witnesses defendants intend to call to testify at trial regarding any issue of the damages claimed in this action ...
>
> * * *
>
> (q) If any defendant is claiming that an individual or entity exists that is in any manner responsible for causing or contributing to the injuries or other damages ... claimed by plaintiff and that individual is not a party to this action, then identify the name and address of that individual or entity
>
> * * *
>
> In the event of failure or refusal to comply with this demand, plaintiff shall seek to preclude the testimony of any such witnesses at trial

(Plaintiff's Reply Affirmation, Exhibit 1, Plaintiff's Cross Notice for Discovery and Inspection).

On April 27, 2006, plaintiff served a supplementary discovery demand specifically seeking "the names of all individuals working at the subject accident location on August 17, 2005" (Plaintiff's Reply Affirmation, Exhibit 2, Plaintiff's Supplemental Notice for Discovery and Inspection). As no names were exchanged by defense counsel in response to said demand, subsequently, in a compliance conference order, dated February 6, 2007, defendant was required to respond to plaintiff's April 27, 2007 discovery demand within 30 days. Defendant failed to respond to said discovery demand.

On June 13, 2006, a preliminary conference order was issued requiring that "all parties on

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or before 45 days hereof shall exchange names and addresses of all eye witnesses and notice witnesses" (Plaintiff's Sur Reply, Exhibit E, June 13, 2006 Preliminary Conference Order). In response, on October 23, 2006, defendant served a formal discovery response, wherein defendant stated that it "had not yet ascertained whether there were any witnesses to the accident. Upon discovery of the names of any witnesses, they will be exchanged" (Plaintiff's Sur Reply, Exhibit F, Defendant's Response Pursuant to Preliminary Conference Order).

In a letter to defendant's counsel, dated March 21, 2007, plaintiff's attorney, Ricardo Rengifo (Rengifo), noted:

> Please be advised that we have not received a response to plaintiff's demand for discovery dated 4/27/06 requesting the names of the Shop Steward, Safety Man and individuals working at the subject location on 8/17/05. Attached hereto is a copy of the demand.
>
> Please be advised that we will object to and move to preclude the defendants from offering witness statements or witness testimony in opposition to any motions or at trial.
>
> Your 10/23/06 discovery response does not list any witnesses

(Plaintiff's Sur Reply, Exhibit G, March 21, 2007 Rengifo Letter).

Finally, on April 27, 2007, after plaintiff filed the Note of Issue and more than 13 months after plaintiff's initial request for the identity of possible defense witnesses, in their response to plaintiff's supplemental notice for discovery and inspection, defendant acknowledged that Butler was present at the scene on the day of plaintiff's accident, though defendant did not provide Butler's address. It should also be noted that the court gave defense counsel the opportunity to cure its defect by producing Butler for a deposition prior to the motion return date of October 31, 2007. Although said deposition was scheduled for October 8, 2007, Butler never appeared for

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this deposition.

"Preclusion is a drastic remedy" and should be denied absent any showing that the party's conduct was "willful and contumacious" (Spitzer v 2166 Bronx Park East Corporations, 284 AD2d 177, 177 [1st Dept 2001]).

Here, the Butler affidavit will not be considered by the court in determining plaintiff's motion for summary judgment, as defendant's failure to advise plaintiff of Butler's identity as a possible witness, prior to plaintiff's filing the Note of Issue, and despite multiple discovery demands, a court order and a final letter from plaintiff stating that if the witness names were not exchanged in a timely manner, plaintiff would object to these unnamed witnesses being used by defendant in opposing plaintiff's future motion, rose to the level of willful and contumacious conduct (see Shvartsberg v City of New York, 19 AD3d 578, 579 [2d Dept 2005] [the affidavits of plaintiff's daughters could not be considered in opposing defendant's motion for summary judgment, where plaintiff denied having any notice witnesses and subsequently filed a note of issue and certificate of readiness, certifying that discovery had been completed]; Concetto v Pedalino, 308 AD2d 470, 470-471 [2d Dept 2003] [consideration of the affidavit of a purported notice witness was precluded due to the plaintiff's failure to properly disclose that witness in her discovery responses]; Salzo v Bedding Showcase, Inc., 238 AD2d 180, 180-181 [1st Dept 1997] [court erred when it considered the affidavit of plaintiff's purported expert, whose identity was never revealed to defendant despite demand for such discovery and whose expertise could not be ascertained from his one-half page affidavit]; Robinson v New York City Housing Authority, 183 AD2d 434, 434-435 [1st Dept 1992] [IAS court did not abuse its discretion in precluding the testimony of plaintiff's notice witnesses, where at the preliminary conference, plaintiff

maintained that she had no such witnesses, and only disclosed the identities of those witnesses in opposition to a motion for summary judgment more than a year later]).

In addition, as plaintiff maintains, plaintiff would be prejudiced in the event that the court considered the Butler affidavit in deciding plaintiff's motion, as plaintiff had no way of knowing that defendant intended to use Butler as a material witness to demonstrate that plaintiff was offered a ladder which he refused to utilize. To that effect, defendant's witness, Clerie, testified in her deposition that she was not aware of any witnesses to plaintiff's accident, nor had she ever seen a ladder in the area of plaintiff's accident.

Moreover, defendant offers no explanation or excuse for its failure to reveal the existence of the subject witness to plaintiff earlier in the discovery process (see Andujar v Benenson Investment Company, 299 AD2d 503, 503 [2d Dept 2002]; Masucci-Matarazzo v Hoszowski, 291 AD2d 208, 208 [1st Dept 2002]; Ortega v New York City Transit Authority, 262 AD2d 470, 470 [2d Dept 1999]).

LABOR LAW § 241 (6) CLAIM

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide

reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Although plaintiff alleges violations of Industrial Code 12 NYCRR 23-1.7 (f), 23-5.1 (j) and 23-5.3 (f) in his bill of particulars, with the exception of Industrial Code 12 NYCRR 5.3 (f), plaintiff failed to address those Industrial Code violations in his moving papers. Thus, this court deems that part of plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (f) and 23-5.1 (j) as against defendant as abandoned, and plaintiff is not entitled to partial summary judgment on those alleged Industrial Code violations (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Industrial Code 12 NYCRR 23-5.3 (f) provides:

> Access. Ladders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level.

Initially, it should be noted that Industrial Code 12 NYCRR 23-5.3 (f) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (see Sopha v Combustion Engineering, Inc., 261 AD2d 911, 912 [4th Dept 1999]).

Industrial Code 12 NYCRR 23-5.3 (f) applies to the facts of this case. Plaintiff's work

required him to climb up and down from the platform level of a metal scaffold located 12 to 14 feet above the ground. As such, defendant was required to provide "[l]adders, stairs or ramps" for the safe performance of plaintiff's work.

Here, the preclusion of the Butler affidavit necessarily results in partial summary judgment in plaintiff's favor on his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.3 (f), as without it, defendant has not established that a question of fact exists to refute plaintiff's contention that said safety equipment was not provided by defendant in this case. Thus, plaintiff is entitled to partial summary judgment in his favor on his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.3 (f) as against defendant. LABOR LAW § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting ... shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... 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'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's

injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]).

Defendant asserts that plaintiff is not entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim, as plaintiff was the sole proximate cause of his accident in that plaintiff was provided with a ladder, yet he chose not to use it. Where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (see Robinson v East Medical Center, LP, 6 NY3d 550, 554 [2006] [plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; Montgomery v Federal Express Corporation, 4 NY3d 805, 806 [2005] [plaintiff was the sole proximate cause of his injuries where plaintiff chose to jump down from the motor room instead of using a ladder that was readily available to him]; Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d at 290).

However, where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]). In such a case, comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes absolute liability once a violation is shown (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Dos Santos v State of New York, 300 AD2d 434, 434 [2d Dept 2002]; Jamison v GSL Enterprises, Inc., 274 AD2d 356, 361 [1st Dept 2000] [Labor Law § 240 (1) applied although

plaintiff's injuries were caused in part by his fateful decision to abandon a tilting scaffold in order to escape to the roof]).

Here, in support of his motion for partial summary judgment, plaintiff maintains that he was not supplied with a ladder to climb up or down the scaffolding that he was assembling, but rather that he and his coworkers were forced to use the scaffold's inadequately secured crossbars to get to and from the scaffold's deck. In addition, although plaintiff was provided with a safety harness, there was no place to tie the harness off. As such, that defendant's actions or omissions were a proximate cause of plaintiff's injuries is established as a matter of law by the undisputed fact that, while subjected to an elevation-related risk, plaintiff fell because he was not provided with the devices necessary to safely perform his work (see Ranieri v Holt Construction Corporation, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; Lopez v Melidis, 31 AD3d 351, 351 [1st Dept 2006]; Samuel v Simone Development Company, 13 AD3d 112, 113 [1st Dept 2004] [defendant's failure to provide a properly secured ladder or any safety devices was a proximate cause of plaintiff's fall, and plaintiff's alleged drug use could not be the sole proximate cause of his injuries]).

In addition, plaintiff submits that this is not a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (see Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those

instructions]; Olszewski v Park Terrace Gardens, Inc., 306 AD2d 128, 128-129 [1st Dept 2003]; Morrison v City of New York, 306 AD2d 86, 87 [1st Dept 2003]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]).

Here, preclusion of the Butler affidavit necessarily results in partial summary judgment in plaintiff's favor on his Labor Law § 240 (1) claim as against defendant, as without it, defendant has not established that a question of fact exists as to whether plaintiff was provided with a necessary ladder, or other safety devices, which he refused to utilize after being instructed to do so, so as to be considered either the sole proximate cause of his accident or a recalcitrant worker. Thus, plaintiff is entitled to partial summary judgment in his favor on his Labor Law § 240 (1) claim as against defendant.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff Matthew Franz's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim, as well as his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.3 (f) as against defendant The City of New York Department of Education is granted; and it is further

ORDERED that the part of plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on his Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (f) and 23-5.1 (j) as against The City of New York Department of Education is denied; and it is further

[* 14]

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: March 6, 2008

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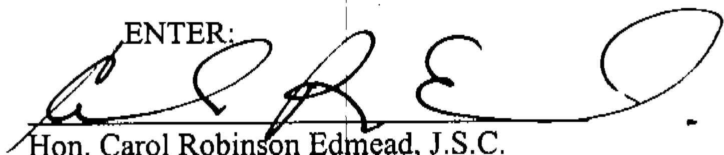

Hon. Carol Robinson Edmead, J.S.C.

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