

Cullen v New York Times Bldg., LLC

2008 NY Slip Op 32229(U)

July 29, 2008

Supreme Court, New York County

Docket Number: 0115813/2005

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER

PART 19

Justice

Index Number : 115813/2005

CULLEN, BRIAN

INDEX NO. _____

vs

NEW YORK TIMES BUILDING

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

is 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM

~~*in accordance with accompanying memorandum dated 8/29/08.*~~

FOR THE FOLLOWING REASON(S):

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: ||| 29 2008

wh
J.S.C.

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REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
BRIAN CULLEN,

Plaintiff,

-against-

Index № 115813/05

NEW YORK TIMES BUILDING, LLC,
AMEC CONSTRUCTION MANAGEMENT GROUP
and DCM ERECTORS,

Defendants.
-----X

EDWARD H. LEHNER, J.:

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Brian Cullen ("Cullen") moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor on his claim under Labor Law § 240 (1). Defendants New York Times Building, LLC (NY Times), AMEC Construction Management Group (AMEC), and DCM Erectors (DCM), all of whom are represented by the same counsel, cross-move for an order, pursuant to CPLR 3212, dismissing plaintiff's Labor Law § 240 (1) claim. The portions of the motions that related to discovery were resolved prior to oral argument (tr. p. 2).

Cullen, an iron worker employee of non-party Benson Industries (Benson), was injured while working at a construction site owned by defendant NY Times. It is plaintiff's allegation that on October 17, 2005 he sustained serious and permanent physical injuries when a piece of wood plank fell on him from scaffolding owned, operated, and maintained by defendant DCM.

Labor Law § 240 (1), commonly referred to as the "scaffold law," requires that:

[a]ll 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 Court of Appeals has consistently held that Labor Law § 240 (1) is to be liberally construed so as to accomplish the purpose for which it was enacted, to protect employees at construction sites from elevation-related, gravity-related, hazards and to accomplish this, the statute requires owners and contractors, and their agents, to provide adequate safety devices to protect the workers from the risks associated with height differentials (Misseritti v Mark IV Constr. Co., 86 NY2d 487, 491 [1995]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Zimmer v Chemung County Performing Arts, 65 NY2d 513, 523 [1985]; Quattrocchi v F.J. Sciamè Constr. Corp., 44 AD3d 377 [1st Dept 2007]); and Outar v City of New York, 286 AD2d 671, 672 - 673 [2nd Dept 2001], affd 5 NY3d 731 [2005]). To prevail on a Labor Law § 240 (1) claim, a plaintiff must demonstrate not only that defendants violated this statute, but that such violation was a proximate cause of the plaintiff's injuries (Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]).

At the time of his accident Cullen was working on the outer edge of the third-floor cantilever of the NY Times building which, at that point in its construction, was less than half its intended height, and consisted primarily of steel beams and concrete slabs. Cullen's foreman, non-party Alexander Prusi (Prusi), had assigned him the job of installing window clips on the third floor perimeter. Wearing protective gear consisting of a hard hat and harness, Cullen was working, kneeling down and facing the outside of the building, when he was struck by a falling wooden plank. Central to his statutory claim is that he was injured as a result of inadequate and missing safety equipment in that the wood plank became loose as a consequence of not being properly secured, and that because there was a lack of safety netting in place to protect those working below the scaffolding, the falling plank struck him in the head.

According to Prusi, on the morning of October 17, 2005 he was standing by the third-floor shanty with other Benson employees when he suddenly heard a "crash" as a wood plank struck a structural beam, and then he saw the plank ricochet inside the building and "crack" Cullen in the head. He and some of the other Benson employees ran over to Cullen, who appeared to be unconscious and was covered with blood. Prusi described the wood plank (which he saw lying near Cullen), as sawed-through and broken, and approximately one-third the length of a full 12-foot plank. Prusi testified that when he then looked up over the edge of the cantilever to make sure nothing else was coming down, he saw a scaffold with a structural wood platform from which iron workers were welding. Alternately referring to these men as "welders," "structural guys," and/or "iron workers," Prusi identified them as employees of DCM based on his knowledge of DCM as the only subcontractor doing structural iron work at the NY Times job site.

Prusi testified that after the ambulance arrived to take Cullen to the hospital, he walked up the interior construction site stairs until he found the welders. He located them on the 12th floor, which was still in the early stages of construction. There he observed a disassembled scaffold platform consisting of pipe scaffolding and platform/structural wood planks which were piled up near the exterior beam. In response to being asked about how he came to the conclusion that the piece of plank which fell came from the scaffolding he found on the 12th floor, Prusi stated that, although he did not directly match up the two sides of the wood plank,¹ he could see an eight-foot section of plank randomly placed within the pile of 12-foot long wood planks, and which looked as if it had been cut through, and readily appeared to be, from its size and from the manner in which

¹He explained that he did not take control of either section of plank because they belonged to other contractors.

it was cut, the other side of the shorter, broken section of plank which had struck Cullen.

Prusi further testified that both the AMEC "safety guy," Robert Link (Link), and the DCM "insurance guy," later identified as Rick Jordan (Jordan), came to the third-floor scene when they heard about the accident. He stated that he showed the "insurance guy" the broken wood plank which struck Cullen, and then walked with him back up to the 12th floor and showed him the cut-through eight-foot section of wood plank. He stated that it was Link who, on behalf of AMEC, took possession of the wood plank which struck Cullen. Finally, both in his written affidavit and at his oral deposition, Prusi emphasized the lack of safety netting in place between the workers on the scaffold at the 12th floor level and the third-floor cantilever where Cullen was working.

Cullen's testimony contains probative value only as to matters before and after the moment he was injured because, according to him, his knowledge as to what actually struck him comes from what he was told because he did not actually see the wood plank either fall or hit him. He also submits a copy of the "C-2" accident report filled out by and/or at the direction of Link, who held the position of AMEC site safety manager at the NY Times project. The C-2 accident report confirms essential aspects of plaintiff's allegations and Prusi's account of the accident, and states, in relevant part:

INJURY INFORMATION

Source of injury: Plank fell from above

Type of Accident: Struck by falling object

INCIDENT INFORMATION

Area/Unit of Occurrence: 12th floor tower

Description of Incident: Plank fell from the floor above and hit him in the head

PRIMARY CAUSE OF INCIDENT

Actions: Failure to check surroundings/improper position for task

Conditions: Inadequate or improper protective equipment

Plaintiff's evidence establishes that, at the time of his accident, he was engaged in construction work which subjected him to the elevation and gravity-related risks contemplated by Labor Law § 240 (1). The fact that the accident occurred when an object, the wood plank, somehow became loose due to being inadequately secured and, due to the force of gravity, fell and struck Cullen, is precisely the type of accident contemplated by the statute, and he has made a prima facie showing of entitlement to partial summary judgment on his Labor Law § 240 (1) claim. See, *Metus v. Ladies Mile Inc.*, 51 AD3d 537 (1st Dept. 2008); *Zulaga v. P.P.C. Construction, LLC*, 45 AD3d 479 (1st Dept. 2007).

To successfully oppose plaintiff's motion, defendants must show facts sufficient to require a trial of a material issue, and such showing must be made by the production of evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To this end, defendants contend that there are questions of material fact which preclude summary judgment. They argue that: (1) the protections afforded under Labor Law 240 § (1) apply only to a narrow class of dangers and do not encompass the manner in which Cullen was injured; (2) Prusi's testimony is both inconsistent and inaccurate; and (3) there are questions of fact as to where the plank actually came from which struck Cullen. Defendants offer Link's deposition testimony and that of DCM field superintendent, Brian Murphy (Murphy), as proof that there were no wood scaffolds on the exterior of the building, that the DCM workers only used steel cage scaffolds, and therefore, that it was implausible, if not impossible, for the wood plank to have come from a DCM scaffold. Both Link and Murphy testified to having looked, but having been unable to determine, the origins of the wood plank. Defendants also submit a sur-reply affirmation, dated April 9, 2008, which contains a copy of an affidavit from insurance representative Jordan, dated April 8, 2008, which they assert

directly contradicts Prusi's testimony. In the affidavit Jordan states, in relevant part:

3. . . . Shortly after the incident, on the same day, I inspected each and every floor of the building on foot with [Murphy and Link]. I never determined from where the wood piece came from and never observed, nor learned of, any activity that could have generated such a piece of wood.

4. At no time did I inspect or walk the floors of the building, including the 12th floor, with Alexander Prusi of Benson Industries.

5. At no time did Alexander Prusi, or any other worker at the site, direct my attention to any activity on the upper floors that could have caused a wooden plank to fall onto the worker.

6. At no time during the inspection did I observe DCM employees, welders, ironworkers, or any other trade, working or standing near a pile of wooden planks on any floor.

Defendants' attempt to generate a factual issue by submitting a copy of this affidavit does not alter the uncontradicted, competent evidence that a proximate cause of Cullen's accident was a falling section of wood plank which, regardless of what precipitated it to fall, was not caught or deflected by safety netting.

A review of Link and Murphy's respective deposition transcripts reveals acknowledgments by both witnesses that wood planking, similar to that which struck plaintiff, was used at the NY Times construction site. According to Murphy, who explained that, while DCM used a specially constructed steel scaffolding system for work on the cantilevers, it did employ wood planking as cover for temporary areas, as skids placed underneath pieces of steel, and as an integral part of the scaffolding's work platforms. He stated that the wood planking material tended to come in one size, approximately 10 feet in length and two inches thick, and that when planks were used, they were generally tied down. He also testified that the planks were not supposed to be cut for use in the scaffold platforms, that the planks normally have cleats on their bottoms to prevent them from shifting, and that on the day after the accident, either Link or Jordan or both, he was not sure, showed him the piece of plank which struck Cullen, and that the plank had cut marks on it and looked to him like it had been cut with a saw.

At his deposition, Link, like Murphy, confirmed DCM's use of steel cage scaffolds at the NY Times site. He described these steel scaffolds as having wood planks, specifically, two or three planks which were laid into channels and were not secured in another manner because the planks "just fit" right into the channels. He testified that DCM also used the more commonplace scaffolds at the site, describing them as regular pole scaffolds, made with cross bracing guard rails and having platforms made of wood planking which were laid horizontally between the pole scaffold rungs. Link acknowledged that wood planking and screens were used at the site to fill voids prior to the completion of decks.

Accordingly, defendants' arguments with respect to the implausibility of the subject wood plank having emanated from DCM are a mis-characterization of the evidence. Their effort to defeat plaintiff's entitlement to partial summary judgment by suggesting that the plank may have been thrown rather than dropped, is without any evidentiary basis. Moreover, contrary to defendants' arguments, Prusi's written affidavit and oral deposition transcript are not discrepant. An examination thereof reveals these accounts to be consistent, and does not raise questions of credibility.

Finally, defendants' proof that safety netting was used at the NY Times construction site does not, by itself, rebut plaintiff's proof, nor does it constitute competent evidence that safety netting was in place in the area below the iron workers and above Cullen on the day and at the time of the accident.

Defendants have failed to submit proof in evidentiary form sufficient to rebut plaintiff's prima facie evidence that a wood plank fell from the DCM workers at the NY Times site and struck Cullen as he installed window clips on the third-floor cantilever pursuant to his work assignment.

Instead, defendants offer unsubstantiated argument and “[r]ank speculation [which does not] substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and defeat a motion for summary judgment” (Warden v Orlandi, 4 AD3d 239, 242 [1st Dept 2004], citing Tungsupong v Bronx-Lebanon Hosp Center, 213 AD2d 236, 238 [1st Dept 1995] See also, Alvarez v Prospect Hosp., 68 NY2d 320, 324 - 325 [1986]).

Accordingly, it is

ORDERED that the branch of plaintiff’s motion for partial summary judgment as to the issue of liability against defendants under his claim pursuant to Labor Law § 240 (1) is granted; and it is further

ORDERED that the branch of defendants’ cross motion which seeks a dismissal of plaintiff’s Labor Law § 240 (1) cause of action is denied; and it is further

ORDERED that those aspects of the consolidated motions in which plaintiff and defendants demand relief related to further discovery are denied as moot; and it is further

ORDERED that in all other respects the motions are denied.

Dated: July 29, 2008

ENTER:



J.S.C.

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