

Segar v Turner Constr. Co.

2008 NY Slip Op 32682(U)

September 30, 2008

Supreme Court, New York County

Docket Number: 116564/06

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

Index Number : 116564/2006

SEGER, KEVIN

vs.

TURNER CONSTRUCTION

SEQUENCE NUMBER : 001

STRIKE

INDEX NO.

116564/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3, 4, 5

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.**

FILED

OCT 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/30/08


MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
KEVIN SEGAR and MARIA SEGAR,

Plaintiff(s),

Index No.: 116564/06

- against -

TURNER CONSTRUCTION COMPANY and
MEMORIAL SLOAN KETTERING HOSPITAL
CENTER,

Defendant(s).

DECISION/ORDER

FILED

OCT 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

In this Labor Law action, plaintiff sues for injuries sustained when he fell off a ladder while working at a construction site on June 14, 2006. Defendants Turner Construction Company (“Turner”) and Memorial Hospital for Cancer and Allied Diseases (“Memorial”) moved to strike plaintiff’s complaint for plaintiff’s alleged failure to comply with discovery orders. They withdrew this motion by stipulation dated May 15, 2008. Plaintiff’s cross-motion for summary judgment on his Labor Law § 240(1) cause of action remains for disposition. Defendants in effect request that the court search the record and dismiss this cause of action.

The following relevant facts are undisputed: Memorial owned the premises and Turner was the general contractor for the construction project. Plaintiff was employed as a draftsman by non-party C.W. Sheet Metal (“CW”), which was doing duct work at the premises. At the time of the accident, plaintiff was attempting to look at a valve in the ceiling that would later have to be re-routed. Plaintiff testified as to his accident as follows: In order to get a close look at the valve, he went up on a ladder that was leaning “right up against the wall.” (P.’s Dep. at 32.) “I went up a couple of steps on the ladder...And when I went to kind of turn to look at the valve,

* 3] ,
either the ladder kicked out or it got knocked and I just went flying.” (Id.)

It is undisputed that plaintiff did not open the ladder prior to climbing on to it. (Id. at 33.) Plaintiff testified that he could not open the ladder because “there was too much, you know... Gang-boxes and welding equipment and guys all working right there. It – there was no room to open it.” (Id. at 35.) It is also undisputed that plaintiff was not provided with any other safety devices, and that plaintiff did not ask anyone to hold the ladder. Defendants contend that plaintiff was the sole proximate cause of the accident because he failed to move the gang box in order to open the ladder, and/or failed to ask a co-worker to hold it.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

Labor Law § 240 (1) provides:

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

[* 4]

(Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [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.)

It is well settled that “failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1).” (Hernandez v Bethel United Methodist Church, 49 AD3d 251, 252 [1st Dept 2008] [internal quotation marks and citation omitted]. Accord Kosavick v Tishman Constr. Corp., 50 AD3d 287 [1st Dept 2008]; Peralta v American Tel. & Telegraph Co., 29 AD3d 493 [1st Dept 2006]; Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173 [1st Dept 2004]; Wise v 141 McDonald Ave., LLC, 297 AD2d 515 [1st Dept 2002]; Jamil v Concourse Enters., Inc., 293 AD2d 271 [1st Dept 2002].)

However, it is further well settled that “that proof of a fall from a ladder does not, by itself, establish liability under section 240(1), unless there is also evidence that the fall was proximately caused by a violation of the statute (see Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280, 288-290 [2003]). Thus, “where a plaintiff’s own actions are the sole proximate cause of the accident, there can be no liability” under the statute. (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004].) To defeat liability under Labor Law § 240(1), the defendant must establish that the “plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.” (Cahill, 4 NY3d at 40. See Kosavick v Tishman Constr. Corp., 50 AD3d 287 [1st Dept 2008].)

On this record, plaintiff makes a prima facie showing of entitlement to liability under

section 240(1). Plaintiff's uncontroverted testimony was that the ladder was unsecured, and that he fell when the ladder either kicked out or was knocked. (See P.'s Dep. at 32.) On the above authority, this evidence makes a prima facie showing that the ladder did not provide adequate protection.

In opposition, defendants fail to raise a triable issue of fact on their sole proximate cause defense. Plaintiff testified that he was using the closed ladder merely to inspect the valve, and not for purposes of performing work on the valve. (See P.'s Dep. at 48.)¹ As noted above, plaintiff also testified without opposition that he could not open the ladder because there was no room to do so. (See id. at 35.) Moreover, it is undisputed that the room where plaintiff was working was "being used as a storage room," that "everybody [was] taking their stuff out of the areas where they [were] finishing and kind of moving it into there," and that in addition to gang boxes, there was welding equipment at or near the base of the ladder. (Id. at 34, 35.) Defendants' own safety report specifically acknowledges that the area of the accident was "congested with gang box, ladder and tin." (D.'s Opp. to Cross-Motion, Ex. A.)

Defendants do not submit any testimony by plaintiff's supervisor or any other evidence by a person with personal knowledge of the work site that it was unsafe for plaintiff to use the ladder in the closed position and that plaintiff therefore should have moved the ladder. (Compare Cohen v Memorial Sloan-Kettering Cancer Ctr., 50 AD3d 227, 229 [1st Dept 2008] [plaintiff entitled to summary judgment on Labor Law § 240[1] claim where undisputed evidence showed that ladder was placed in the "only possible position" at the location]; and Sztachanski v Morse

¹ Defendants' contention that plaintiff admitted that he did not have to be careful is based on a misreading of his testimony. Plaintiff's testimony was that the work was "routine," not something that appeared to involve danger. (See P.'s Dep. at 44, 137.)

Diesel Intl., 9 AD3d 457 [2d Dept 2004] [defendants found liable to plaintiff under section 240[1] where he “had to use the A-frame ladder in the closed position to access that portion of the ceiling” as the walls were curved]; with Meade v Rock-McGraw, Inc., 307 AD2d 156 [1st Dept 2003] [triable issue of fact raised as to defendant’s sole proximate cause defense where where plaintiff’s supervisor testified that there was room for plaintiff to have opened the closed ladder from which he fell].)

Nor do defendants submit any evidence by anyone with personal knowledge of the work site that plaintiff could have opened the ladder. Defendants’ sole basis for claiming that plaintiff could have done so appears to be plaintiff’s testimony the gang boxes “are on wheels” and “one individual could probably push it out of the way.” (P.’s Dep. at 136.) Defendant’s reliance on this testimony ignores, however, that plaintiff also testified that gang boxes, if full, weigh three to four hundred pounds and that usually there are “two guys involved” in moving gang boxes. (Id.) Defendant also fails to make any showing that there was room to move the gang boxes, given that the area in which they were located was concededly congested. On this record, defendants thus fail to raise a triable issue of fact on whether plaintiff’s failure to open the ladder was the sole proximate cause of his accident.

Contrary to defendants’ assertion, plaintiff’s failure to ask a co-worker to hold the ladder also does not raise a triable issue of fact as to sole proximate cause. Plaintiff’s action, at most, amounted to comparative negligence, which is not a defense to a section 240(1) claim. (See Hernandez, 49 AD3d at 253; Velasco v Green-Wood Cemetery, 8 AD3d 88 [1st Dept 2004].)

Accordingly, plaintiff’s motion for summary judgment is granted to the extent that it is ORDERED that plaintiff is awarded judgment as to liability against defendants Turner Construction Company and Memorial Hospital for Cancer and Allied Diseases on his Labor Law

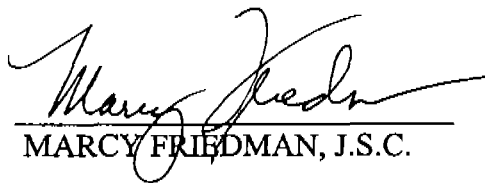
§ 240(1) cause of action; and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any other disposition of the underlying action, upon the filing of a note of issue and payment of the proper fees, if any; and it is further

ORDERED that, within 30 days from the date of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon the defendants, and all other parties or their attorneys, by ordinary first class mail, and shall file same, together with proof of service, with the Clerk of this Court and the Clerk of the Trial Support Office (Room 158).

This constitutes the decision and order of the court.

Dated: New York, New York
September 29, 2008


MARCY FRIEDMAN, J.S.C.

FILED
OCT 03 2008
COUNTY CLERK'S OFFICE
NEW YORK