

Picano v Rockefeller Ctr. North, Inc.

2008 NY Slip Op 32854(U)

October 15, 2008

Supreme Court, New York County

Docket Number: 115832/04

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHÉ
J.S.C.

PART _____

Index Number : 115832/2004
PICANO, CORRADO
vs.
ROCKEFELLER CENTER NORTH
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

OCT 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/15/08

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 10

-----X
CORRADO PICANO and KATHLEEN PICANO,

Plaintiffs,

-against-

ROCKEFELLER CENTER NORTH, INC. and
TIME INC.,

Defendants.
-----X

ROCKEFELLER CENTER NORTH, INC. and
TIME INC.,

Third-Party Plaintiffs,

-against-

McCANN, INC.,

Third-Party Defendant.
-----X

DECISION/ORDER

Index No.: 115832/04

Seq. No.: 001

Hon. Judith J. Gische
J.S.C.

FILED
OCT 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltf's n/m (§3212) w/JSW affirm, exhs	1
Defs' n/x-mot (§3212) w/JG affirm, exhs	2
Pltf's JSW reply/opp affirm	3
Defs' JG reply affirm	4

Upon the foregoing papers the court's decision is as follows:

In the main action, plaintiff Corrado Picano ("Picano") seeks to recover monetary damages for personal injuries he claims to have sustained as a result of defendants'

[* 3]
violation of the labor laws. Plaintiff Kathleen Picano is Picano's wife and has asserted a claim for loss of consortium.

Defendants are Rockefeller Center North, Inc. ("Rockefeller") and Time, Inc. ("Time"). Third-party defendant McCann, Inc. ("McCann") has not appeared in this action.

Plaintiffs move for summary judgment on the issue of defendants' liability on Picano's claim under Labor Law § 240 (1). CPLR § 3212. Defendants oppose the motion and cross-move for summary judgment in their favor dismissing plaintiffs' claims under Labor Law § 200, 240 (1) and 241 (6).

Issue has been joined and the note of issue has not yet been filed. Therefore, the motion and cross-motion will be considered on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Many of the relevant facts are undisputed. On April 17, 2003, the date of Picano's accident, Rockefeller was the title owner of a building located at 1271 Avenue of the Americas, New York, New York (the "building"). Time was the principal tenant of the building and had a leasehold interest in the 22nd floor of the building where Picano's accident took place. Time contracted with McCann to have the renovation work performed on the 22nd floor of the building.

The following facts are based upon Picano's deposition testimony. On April 17, 2003, Picano was employed by Pace Plumbing. Picano was told by his supervisor that a water line had to be repaired at the building. Thereafter, Picano reported to the building, where a McCann employee directed Picano to repair water pipes located in a

[*4]

ten-foot high ceiling of a bathroom on the 22nd floor. Picano worked with a partner named Stefan. Picano needed to cut four water pipes and solder caps to them. In order to do this work, Picano supplied his own torch, saws, brushes and solder but utilized a six foot wooden A-frame ladder which was already on the 22nd floor, despite having a ladder in his truck.

Picano testified that on the 22nd floor surface, "there was broken tiles, ceiling tiles, ... bathroom stalls ... laying all over the [concrete] floor." Picano stated that because of this debris, he had trouble repositioning the ladder on the floor, which he maintained he was required to do to perform his work. Picano stated that sometimes he had to place his ladder on the debris. When Picano spoke to the general contractor about the debris, Picano was told to do the best he can.

Picano was working on the third water pipe when he fell. Picano testified that he was coming down the ladder with a one-pound roll of solder in his right hand and an 18-inch long torch in this left hand when the ladder suddenly shifted to the left and Picano fell to his right. The ladder then fell onto its side. Picano did not hold onto the ladder with either of his hands as he descended it. Picano testified that although he thought he placed the ladder on the concrete floor when he repositioned the ladder the last time before his accident, he believed the ladder shifted because it must have been resting on debris. No one held the ladder and the ladder was not otherwise secured. Picano also testified that although the ladder did not shift at any other time prior to his accident, the ladder did wobble because of the debris on the floor.

[*5]

Summary of the Parties' Arguments

Plaintiffs have asserted causes of action under Labor Law §§ 200, 240 (1) and 241(6). In support of their motion for summary judgment on the § 240 (1) claim, plaintiffs argue that the testimony establishes the ladder slipped and/or shifted and was improperly secured, resulting in injury to Picano, thereby establishing *prima facie* liability. Plaintiffs also contend that the failure of the defendants to provide any safety devices to plaintiff such as harnesses or equipment blocks, also constitutes a clear violation of Labor Law § 240 (1). Plaintiffs oppose defendants cross-motion for summary judgment dismissing the Labor Law § 241 (6) claim, but voluntarily withdraw the Labor Law § 200 because "there is no evidence that [defendants] were present at the site on the date of the accident."

Plaintiffs have provided a sworn affidavit from Howard I. Edelson ("Edelson"), a Safety Consultant. Edelson states that he has more than forty years of experience in construction, industrial, product and general safety and is a Board Certified Safety Professional and a member of the American Society of Safety Engineers. Based on a review of the pleadings and other discovery in this action, Edelson opines that Picano should have been performing the work on a mobile Baker scaffold or main lift. Edelson claims that either of these safety devices would have permitted Picano to "freely use both hands without having to hold onto the scaffold while working."

Defendants argue that Picano was the sole proximate cause of his own accident in that he lost his balance and fell because he failed to hold onto the ladder while he descended. Attorney Groubert, in his affirmation, maintains that Picano should have

[*6]

placed some of the items he had in his hands while descending the ladder on the top rung of the ladder so that he would have one hand free to hold onto the ladder while descending. Defendants also contend that where a plaintiff has fallen from a ladder not otherwise shown to be defective, the issue of whether the ladder was a proper safety device is a triable question of fact.

Defendants also argue that plaintiffs' Labor Law § 241 (6) should be dismissed because the claimed Industrial Code violations do not apply to the facts of this case.

Discussion

At the outset, the court grants defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claim.

Applicable Law on a Summary Judgment Motion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Only if it meets this burden, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form that would require a trial of this action (Zuckerman v. City of New York, *supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

[*7]

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

Since each party has moved for summary judgment, each bears the initial burden of establishing entitlement to such relief on their respective motions.

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law, was intended "to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site" (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1st Dept 2007]).

Labor Law § 240 (1) provides that:

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.

Labor Law § 240 (1) imposes absolute liability for a breach which has

proximately caused an injury (Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]). "Proximate cause is demonstrated where the plaintiff generally shows that the defendant's negligence was a substantial cause of the events that produced the injury, and the plaintiff need not demonstrate that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable" (Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 [1st Dept 1996], quoting Public Adm'r of Bronx County v Trump Vil. Constr. Corp., 177 AD2d 258, 259 [1st Dept 1991]). Labor Law § 240 (1) is to be liberally construed so as to accomplish the purpose for which it was enacted (Rocovich v Consolidated Edison Co., *supra*).

A *prima facie* case is established where a plaintiff shows that there is a Labor Law § 240 (1) violation and that such violation proximately caused the injuries sustained (Quattrocchi v. F.J. Sciamè Const. Corp., 44 AD3d 377 [1 Dept. 2007]). Summary judgment should be granted under Labor Law § 240 (1) where the effects of gravity cause an injury due to the failure of one of the devices enumerated in the statute to be properly constructed, operated or placed.

Labor Law § 240 (1) "requires that the safety device made available must not only allow the worker to safely perform the work at an elevation without falling, but also to safely ascend to the necessary height, and safely descend back to the floor thereafter" (Cohen v. Memorial Sloan-Kettering Cancer Center, 50 AD3d 227 [1st Dept 2008] (internal citations omitted)). A ladder is within the category of "safety devices" under Labor Law § 240 (1). Where a ladder is offered as a work-site safety device, it must provide the proper protection; the failure to properly secure a ladder, to ensure

that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1) (Schultze v. 585 W. 214th St. Owners Corp., 228 AD2d 381 [1st Dept 1996]).

Here, there is no dispute that the only elevation-related safety device provided to Picano was the ladder, which shifted and then suddenly kicked out. While there is no evidence that the device itself was defective, there is evidence that it was improperly placed on flooring littered with debris. It is of no moment whether Picano placed the ladder on concrete and/or debris. Picano testified that the general contractor told him to work around the debris as best he could, and took no steps to clean the floor before directing Picano to work.

Plaintiffs have also shown that the ladder was the wrong device in the first instance, based upon the unrefuted evidence that a scaffold, rather than a ladder, should have been provided, because plaintiff needed both of his hands to perform his job. Even if the ladder was the correct device, other safety devices should have been provided to secure the ladder (see Tavarez v. Weissman, 297 AD2d 245 [1st Dept 2002]; see also Rudnik v. Brogor Realty Corp., 45 AD3d 828 [2d Dept 2007]; Guaman v. New Sprout Presbyterian Church of New York, 33 AD3d 758 [2d Dept 2006]; Morin v. Machnick Builders, Ltd., 4 AD3d 668 [3d Dept 2004]). The court rejects defendants' argument that Stefan was a safety device contemplated by the statute that Picano failed to use (see McCarthy v. Turner Const., Inc., 52 AD3d 333 [1st Dept 2008]). Therefore, plaintiffs have established that these violations were each a proximate cause of the accident.

Defendants argue that Picano's failure to hold onto the ladder with both hands

while descending is what caused Picano to lose his balance and fall. Notwithstanding that Labor Law § 240 (1) is an absolute liability statute, if plaintiff's conduct was the sole proximate cause of the accident, then no liability will attach (Blake v. Housing Services of NYC, Inc., 1 NY3d 280 [2003]).

Picano admits that he did not hold onto the ladder while descending because he was using both hands to hold the materials and tools necessary for him to perform his work. This admission, standing alone, does not refute plaintiffs' *prima facie* case that there were other contributing causes as well. It does not refute the testimony that the floor upon which the ladder was placed was strewn with debris and the ladder listed to one side before plaintiff fell. Plaintiff's failure to hold onto the ladder would not have caused the ladder to tip over. Nor does this admission refute the testimony that no other safety devices were available. Whether plaintiff had other ladders in his truck is also irrelevant because the violation of the Labor Law was not due to the condition of the ladder *per se*, but rather, its placement and/or the failure of defendants to provide other safety devices at the site. Where plaintiff's negligence is, at most, only a concurrent cause of the accident it is not a defense to liability under Labor Law §240 (Oşario v. BRF Construction Corp., 23 AD3d 202 [1st Dept 2005]; Ranieri v. Holt Construction Corp., 33 AD3d 425 [1st Dept 2006]; see also Figueirido v. New Palace Painters Supply Co., Inc., 39 AD3d 363 [1st Dept 2007]).

The court also rejects defendants' contention that plaintiffs have failed to meet their burden of proof on their motion for summary judgment. Plaintiffs do not need to show that the ladder was defective. Rather, plaintiffs established defendants' liability

[11]

under Labor Law § 240 (1) by demonstrating that adequate safety devices to prevent the ladder from slipping or to protect Picano from falling were absent (see McCarthy, supra).

Contrary to defendants' position, that plaintiffs' experts' affidavit is irrelevant, Mr. Edelson's expert opinion is based on the fact that the condition of the floor made repositioning of the ladder difficult, and a scaffold or lift would have alleviated this problem. Also Mr. Edelson maintains that the ladder was not an appropriate safety device because Picano needed to use both hands to perform the assigned tasks which made it impossible for Picano to hold onto the ladder with a free hand. Based on this record, plaintiffs have established that the ladder was not an appropriate safety device for the work Picano was directed to perform.

Accordingly, plaintiffs are entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants. Defendants cross-motion for summary judgment dismissing this claim is denied.

Labor Law § 241 (6)

Defendants cross-move to dismiss plaintiffs' cause of action under Labor Law § 241 (6).

Section 241 (6) of the Labor Law imposes a nondelegable duty upon an owner, general contractor, or their agents, to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations in a manner that provides for the reasonable and adequate protection of persons working at the site (Rizzuto v. L.A. Wenger Contracting Co., Inc.,

91 NY2d 343, 350 [1998]). Supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent (Rizzuto v. L.A. Wenger Contracting Co., Inc., *supra*; DeStefano v. Amtad New York, Inc., 269 AD2d 229 [1st Dept 2000]). To support a cause of action, plaintiffs must plead a concrete specification of the Industrial Code, that it was violated, and that the violation was a proximate cause of his injuries (Rizzuto v. L.A. Wenger, *supra*).

In plaintiffs' Supplemental Verified Bill of Particulars, they allege that defendants violated two sections of the Industrial Code: § 1.21 (b) (4) (ii) and § 23.1.1 (e) (3). The former section requires that "ladder footings shall be firm," and the latter section requires that "[s]tanding stepladders shall be used only on firm, level footings." Defendants argue that these sections are inapplicable to the facts of this case because Picano testimony "makes clear that, just prior to his accident, [Picano] himself had placed the ladder such that it was resting on the concrete floor and not on any of the debris."

Picano testified as follows:

- Q. Other than the one occasion when it happened, at any time that morning or afternoon before the actual accident, did the ladder ever wobble.
- A. You mean be non-stable? Yes, there was debris all over the floor.
- Q. You had placed, on other occasions, the ladder onto the debris so that it wasn't stable, or why was the

ladder not stable?

- A. We tried to move the debris as best as possible to make room where the ladder was supposed to go. The problem we ran into was the demolition work was never complete that day in those bathrooms. It was walls, ceiling tiles, tile walls, bathroom stalls. They were all over the floor, you know, and we had to get above the hung ceiling to cut the water lines.

...

- Q. When you repositioned the ladder the last time before you went up before your accident, did you look at the area where the ladder was positioned?

- A. Yes.

- Q. Did you observe if the ladder was resting on the concrete itself or was it resting on some of these items which you have described.

- A. I thought it was on the concrete.

...

- Q. Now, you said the ladder shifted. Can you describe to me what you mean by "the ladder shifted"?

- A. It shifted and went over to the side and that's when I fell.

- Q. Do you know what caused the ladder to shift?

- A. Not really. There was a tile – there were tiles on the floor that were broken.

...

I don't know if – the ladder probably was resting on one of the broken tiles.

Defendants' contention that Picano unequivocally testified that he did not place the ladder on any of the debris is contradicted by Picano's actual testimony. Although

Picano was not certain at the time of his deposition as to whether the ladder was resting on debris or just on the concrete just before his accident occurred, Picano has not merely speculated about the happening of his accident. There are sufficient facts from which a reasonable jury could conclude that the defendants did in fact violate the aforementioned Industrial Code provisions. Accordingly, defendants' cross-motion for summary judgment dismissing this claim is denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim is granted against defendants Rockefeller Center North, Inc., and Time Inc.; and it is further

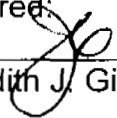
ORDERED that defendants' cross-motion for summary judgment is granted only to the extent that plaintiff's claim under Labor Law § 200 is dismissed; and it is further

ORDERED that defendants' cross-motion is otherwise denied.

Any requested relief that has not been addressed herein has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
October 15, 2008

So Ordered:

Hon. Judith J. Gische, JSC

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