

Poplawski v IAC/Georgetown 19th St., LLC

2009 NY Slip Op 30809(U)

April 6, 2009

Supreme Court, New York County

Docket Number: 116635/05

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. M. Ladd

PART 1

Index Number : 116635/2005
POPLAWSKI, MIROSLAW
VS.
IAC/GEORGETOWN 19TH STREET
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 11-17-09

MOTION SEQ. NO.

MOTION CAL. NO.

his 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 is decided in accordance with the answered Memorandum Decision + order.

FILED
APR 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 6, 2009

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: IAS PART 11

-----X
 MIROSLAW POPLAWSKI,

Plaintiff,

-against-

Index No. 116635/05

IAC/GEORGETOWN 19TH STREET, LLC,
 TURNER CONSTRUCTION COMPANY,
 HTRF VENTURES, LLC, and BREEZE
 NATIONAL INC.,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, defendants HTRF Ventures, LLC (HTRF), Turner Construction Company (Turner), Georgetown 19th Street Development LLC (Georgetown)¹, and Breeze National, Inc. (Breeze) now move, pursuant to CPLR 3212, for summary judgment dismissing the verified complaint. Plaintiff opposes the motion to the extent that it seeks to dismiss his claim under Labor Law § 240(1).

BACKGROUND

HTRF and Georgetown were, respectively, the owner and developer of the premises located at 537 West 18th Street, New York, New York ("the premises"). Turner was retained as a general contractor to construct a new building on the premises. Turner hired Breeze as a subcontractor to perform demolition of the building located on the premises. Breeze, in turn, engaged non-party East Coast Hazmat Removal (East Coast) to perform asbestos abatement prior to the demolition work.

¹There is a discrepancy as to the name of this defendant. In defendants' moving papers, defendants state that the motion was made on behalf of Georgetown 19th Street Development LLC. However, in their reply, defendants state that it was made by IAC/Georgetown 19th Street Development LLC.

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Plaintiff, who was employed as an asbestos abatement worker by East Coast, was injured on April 5, 2004 while he was on a ladder hanging temporary lighting, and then stepped onto a pipe which subsequently collapsed, causing him to fall to the ground, injuring his back and left knee. On the morning of the accident, plaintiff's supervisor, Chris Stanek, instructed him to hang temporary lighting using a ladder in a basement boiler room in preparation for the asbestos removal (Plaintiff Dep., at 16, 37, 70). According to plaintiff, "it was up to [him] to decide where to start" (*id.* at 60). Plaintiff testified that he took a six-foot A-frame ladder to install the lighting (*id.* at 55-57, 67). Only six-foot ladders were available at the site (*id.* at 67, 168). Plaintiff testified that the basement had a 13-foot high ceiling (*id.* at 45). There were pipes protruding from the ceiling which were held in place by brackets attached to the ceiling (*id.* at 74-75). Plaintiff stated that he climbed the ladder in order to hang the lighting, and then stepped with both feet off the ladder and onto a pipe (*id.* at 58, 61). The pipe was about two feet wide and was located a foot above the fourth or fifth rung of the ladder (*id.* at 61, 70). Plaintiff intended to hang the lights on a rod at the ceiling level, but could not reach that spot from the ladder (*id.* at 60, 66, 70). However, he admitted that the type of temporary lights used could be attached to any protruding surface (*id.* at 58, 71). While standing on the pipe, plaintiff felt the pipe start to break (*id.* at 75). Plaintiff then fell with the pipe six or seven feet to the floor, as he did not have time to descend from the pipe (*id.* at 75, 78).

When asked at his deposition whether he could have performed his job had he been given a taller ladder, plaintiff stated "possibly," and that he "would have had to step on [the pipe] at least with one foot" (*id.* at 168). Plaintiff had complained about the lack of taller ladders on prior occasions (*id.* at 171-172). He also testified that there were no safety harnesses at the site that

day (*id.* at 80). Plaintiff further stated that there was one scaffold available on the job site that day, but it could not have been set up in the boiler room because of space constraints (*id.* at 68-69, 165-166). According to plaintiff, that was the reason why his supervisor instructed him to use a ladder (*id.* at 69).

Plaintiff's foreman, Jan Kowalski, testified that there were eight-foot ladders available at the site, but that they were inappropriate for plaintiff's task given the low height of the ceiling (Kowalski Dep., at 53-54). Kowalski testified that there were no scaffolds available at the site (*id.* at 56-57). Plaintiff's supervisor, Chris Stanek, did not recall whether any scaffolds were available that day (Stanek Dep., at 44). Stanek stated that plaintiff was not provided with a safety harness, since they are normally given to workers working at heights over six feet (*id.* at 58). According to Stanek, the lights were eventually hung on the pipe hangers in the boiler room after plaintiff's accident (*id.* at 54).

By summons and complaint dated November 28, 2005, plaintiff commenced an action against Georgetown and Turner under Index No. 116635/05, seeking recovery pursuant to Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. Thereafter, plaintiff commenced a separate action under Index No. 104681/07 against HTRF, Georgetown, and Breeze, asserting the same legal theories. On July 10, 2007, the court consolidated the second action under the first index number.

In moving for summary judgment, defendants contend that plaintiff's Labor Law § 240 (1) claim should be dismissed, since the statute was not violated. They argue that plaintiff was given an adequate, fully functional ladder to perform his task. Defendants contend that plaintiff was not required to step off the ladder, and that the pipe is not a device within the meaning of the

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statute. Defendants also contend that the pipes were only a foot from the ceiling and thus it would have been impossible for plaintiff to stand of the pipes, and thus his description of the accident is not credible.² Defendants point out that the lighting was eventually hung using the ladders provided by East Coast. Thus, defendants argue that plaintiff was the sole proximate cause of his injuries as a matter of law since he chose to use an improvised measure to reach the ceiling, rather than take steps to obtain a more suitable safety device. Additionally, defendants contend that although there were no scaffolds in the room where plaintiff was working, scaffolds were readily available elsewhere on the job site.

Defendants also move for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, contending that they neither supervised or controlled plaintiff's work, nor created or knew of any dangerous condition with the pipe. Defendants also seek summary judgment on the Labor Law § 241 (6) claim on the basis that plaintiff has failed to sufficiently allege a violation of the New York State Industrial Code.

Plaintiff does not oppose defendants' motion to the extent it seeks to dismiss his claims under Labor Law § 200, for common-law negligence and under Labor Law § 241 (6) and conceded at oral argument the summary judgment was appropriately granted with respect to these claims. With respect to the Labor Law § 240 (1) claim, plaintiff contends that there are issues of fact as to whether defendants provided adequate safety devices since there is evidence that

²This argument is based on the deposition testimony of plaintiff's supervisor Chris Stanek who estimated that the ceiling was eight feet high and that the pipes were seven feet off the ground. (Stanek Dep., at 16, 30-31). During oral argument, defendants counsel argued that the pipes were two to three feet below the ceiling. Either way, as indicated herein, the argument is not dispositive since plaintiff's testimony as to how the accident happened raises triable issues of fact.

plaintiff was only given a six-foot ladder to hang lighting in a room with a 13-foot ceiling. Plaintiff argues that he was required to place the lighting near the top of the wall, but was unable to place the ladder close to the wall because the pipe obstructed access to the wall. He maintains that he should also have been given a safety harness to complete his task. According to plaintiff, there is also evidence that scaffolds were not available, and that even if they were, they could not have been set up in the boiler room. Plaintiff further contends that he cannot be the sole proximate cause of his injuries as a matter of law because the lack of a taller ladder was a proximate cause of his accident. He posits that, had a taller ladder been provided, standing on the pipe would not have been necessary.

In support of his position, plaintiff submits his affidavit in which he states that he intended to place the temporary lights as high up as possible, and that this was always how it was done (Plaintiff Aff., ¶ 9). He asserts that he did not see any available scaffolds at the site, and that it would have been difficult to set up scaffolds in the boiler room because it was very dark (*id.*, ¶ 5). Plaintiff also states that there were no taller ladders on site, except for two shaky and damaged ladders (*id.*, ¶ 7). He avers that if he had been provided with a safe 10-foot or 12-foot ladder he would not have had to stand with both feet on the pipe (*id.*, ¶ 11). In another affidavit, plaintiff's co-worker, Smodrek Mieczyslaw, states that there was no scaffold on site, but there were two unstable ladders between six and 10 feet tall (Mieczyslaw Aff., ¶ 2). According to Mieczyslaw, these ladders could not be used because they were unsafe (*id.*).

In reply, defendants contend that East Coast stored other equipment, including scaffolding, in a warehouse. If workers needed additional equipment, it would be brought from the warehouse or purchased from a hardware store. Additionally, defendants contend that the

court should not consider the affidavits submitted by plaintiff, as they directly contradict his deposition testimony.

DISCUSSION

It is well settled that summary judgment is proper where there are no issues of fact for trial (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The movant on a motion for summary judgment must “make a prima facie showing of entitlement to judgment as a matter of law, [by] tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the motion’s opposing party to lay bare its evidentiary proof and present a genuine, triable issue of fact (*id.*). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240 (1), commonly known as the Scaffold Law, provides as follows:

“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 statute is “to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991] [internal quotation marks and citations omitted]). The statute imposes a nondelegable duty and

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absolute liability on owners and contractors for failing to provide adequate safety devices to workers who sustain gravity-related injuries (*Jock v Fien*, 80 NY2d 965, 967 [1992]; *Rocovich*, 78 NY2d at 513). Labor Law § 240 (1) applies to “risks related to elevation differentials,” including “those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level” (*Rocovich*, 78 NY2d at 514). To impose liability under Labor Law § 240 (1), the plaintiff need only prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]).

Initially, defendants argue that the court should disregard plaintiff’s affidavits submitted in opposition to the motion. It is true that “[a] party’s affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment” (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see also Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). At the same time, however, the statements in a party’s affidavit may be considered when they amplify rather than contradict plaintiff’s deposition testimony (*Bosshart v. Pryce*, 276 AD2d 314 [1st Dept 2000][denying summary judgment when allegations by plaintiff in opposition to the motion though more detailed did not contradict her earlier deposition testimony]; *Lesman v. Weinrib*, 221 AD2d 601 [2d Dept 1995][court did not err in considering affidavit which did not contradict plaintiff’s deposition testimony]).

Here, the majority of the statements in plaintiff’s affidavit, including his statement that

the other ladders were unstable, and that he would have needed a taller ladder to complete his assignment, do not directly contradict his prior deposition testimony. On the other hand, when asked at his deposition whether a scaffold was available, plaintiff stated that there was one, but it could not be set up in the boiler room because of the size of the room (Plaintiff Dep., at 68-69), while in his affidavit, plaintiff states that he did not see any available scaffolds at the site (Plaintiff Aff., ¶ 5). The court agrees that plaintiff's affidavit is inconsistent with his prior deposition testimony to the extent that it states that he did not see a scaffold, and thus the court will not consider this statement. Nonetheless, as explained below, defendants have not established entitlement to summary judgment.

In the instant case, defendants have failed to show that there was no statutory violation, or that plaintiff was the sole proximate cause of his injuries. First, there are issues of fact as to whether plaintiff was required to stand on the pipe to complete his assignment. Here, plaintiff avers that, in his experience, temporary lights were always hung as high up as possible since lighting is better that way (Plaintiff Aff., ¶ 9). However, plaintiff's supervisor testified that "[a]s long as there is light, it is done correctly," despite acknowledging the fact that temporary lighting should ideally be placed overhead (Stanek Dep., at 19, 52). Additionally, plaintiff testified that he was instructed to use a ladder to hang the lights, and that the height of the ceiling was 13 feet, and that the pipe was located a foot above the fourth or fifth rung of the six-foot ladder (Plaintiff Dep., at 45, 67, 70). By contrast, plaintiff's foreman testified that the height of the ceiling was about eight feet, while his supervisor stated that it was seven or eight feet high, and that pipes were only a foot below the ceiling (Kowalski Dep., at 35; Stanek Dep., at 11, 16, 25). In view of these inconsistencies, there are issues of fact as to whether plaintiff was subject to an elevation-

related hazard (*see Guercio v Metlife Inc.*, 15 AD3d 153, 154 [1st Dept], *lv denied* 5 NY3d 714 [2005] [where plaintiff was installing tile, the record clearly showed that he had to reach at most 13 inches above his head, and thus was not exposed to an elevation-related hazard]; *Olson v Pyramid Crossgates Co.*, 291 AD2d 706, 707-708 [3d Dept 2002] [where plaintiff neither pleaded nor proved that it was necessary to stand on plywood platform to complete his wiring assignment, no elevation-related risk was present]; *Brooks v City of New York*, 212 AD2d 435, 436 [1st Dept 1995] [plaintiff was not exposed to an elevation-related hazard where he was six feet and one-half inches tall and the record clearly showed that plaintiff had to reach 10 and one-half inches above his head to do his work]).

Where a plaintiff's actions are the sole proximate cause of the accident, liability does not attach under the statute (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake*, 1 NY3d at 290 ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"]). Such actions may include where adequate safety devices are available at the job site, but the plaintiff either does not use them or misuses them (*Robinson*, 6 NY3d at 554-555; *see also Quattrocchi v F.J. Sciamè Constr. Corp.*, 44 AD3d 377, 381-382 [1st Dept 2007], *aff'd* 11 NY3d 757 [2008]). Notably, "[t]he mere presence of [safety devices] somewhere at the worksite" does not satisfy a defendant's duty (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054 [1985]).

Several Court of Appeals decisions are instructive. In *Robinson* (6 NY3d 550, *supra*), the plaintiff was injured when he used a six-foot ladder for a job that he knew required an eight-foot

ladder. The plaintiff was also aware that there were eight-foot ladders available at the job site. The Court of Appeals held that the plaintiff was the sole cause of his injuries as a matter of law, stating that “[p]laintiff’s own negligent actions – choosing to use a six-foot ladder that 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” (*id.* at 555).

In *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]), the plaintiff, an elevator mechanic, was assigned to do work in an elevator “motor room.” The plaintiff was injured when he climbed on an inverted bucket, and then jumped down to the roof from the motor room. Although there was no ladder in the immediate vicinity, there were ladders available on the job site. The Court held that, since ladders were readily available, “plaintiff’s ‘normal and logical response’ should have been to go get one” (*id.* at 806). As a result, the plaintiff’s own actions were the sole proximate cause of his injuries as a matter of law.

Here, unlike the circumstances in *Robinson* and *Montgomery*, the record does not establish that other safety devices were available to plaintiff. Plaintiff testified that there were only six-foot ladders available at the job site (Plaintiff Dep., at 67, 168). In his affidavit, plaintiff states that there were two ladders taller than six feet, but that they were shaky and damaged (Plaintiff Aff., ¶ 7). Plaintiff’s co-worker, Smoderek Mieczyslaw, also states that there were two unstable ladders between six and 10 feet tall, and that these ladders could not be used because they were unsafe (Mieczyslaw Aff., ¶ 2). Although plaintiff acknowledged that there was a scaffold on site, he also stated that a scaffold could not be set up in the boiler room given the size of the room (Plaintiff Dep., at 68-69, 165-166). While plaintiff’s foreman, Jan Kowalski, testified that there were eight-foot ladders on site (Kowalski Dep., at 53-54), defendants have not

presented any evidence that plaintiff knew that he was expected to use these ladders (*see Gallagher*, 55 AD3d at 490 [issues of fact as to sole proximate cause where safety devices were available on job site and there was a standing order that workers use devices when working near floor openings]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 289 [1st Dept 2008] [where plaintiff was injured when a section of pipe he cut hit his ladder, defendants presented no evidence that plaintiff was told to use a chain to secure the pipe and that he had “no good reason not to do so”]). Furthermore, it is undisputed that plaintiff was not given a safety harness to hang the lights (Plaintiff Dep., at 80; Stanck Dep., at 58).

Additionally, the court rejects defendants’ contention that other safety devices were “available” because they were stored at a warehouse and could also have been purchased at a hardware store. A defendant’s duty is not satisfied by the fact that safety devices may be available somewhere at the job site or off site (*see Zimmer*, 65 NY2d at 520; *but see Miro v Plaza Constr. Corp.*, 38 AD3d 454, 457-458 [1st Dept], *affd as mod* 9 NY3d 948 [2007]). Moreover, as previously noted, there is no evidence that plaintiff knew that a taller ladder could have been obtained from this warehouse or from another location.

Finally, the court notes that defendants’ reliance on *Albert v Williams Lubricants, Inc.* (35 AD3d 1115 [3d Dept 2006]) is misplaced. In that case, the plaintiff was injured when a portion of the ladder on which he was working slid down a wall. The plaintiff and his co-worker were able to adequately perform the required task after the plaintiff’s fall. The Third Department held that providing one ladder did not violate the statute, stating that “this ability to safely complete the task with the equipment provided tempers plaintiff’s contention that it was necessary for him to resort to the actions he took in carrying out his duties” (*id.* at 1117). Here, in contrast, there is

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no evidence that the lights were hung using the ladders provided. Plaintiff's supervisor, Chris Stanek, testified that the lights were later hung on the pipe hangers, but did not state how it was done (Stanek Dep., at 54; *see also* Kowalski Dep., at 60).

Accordingly, defendants' motion for summary judgment dismissing this cause of action is denied.

CONCLUSION

Accordingly, for the above reasons, it is hereby

ORDERED that the motion (sequence number 001) of defendants HTRF Ventures, LLC, Turner Construction Company, Georgetown 19th Street Development LLC, and Breeze National, Inc. for summary judgment is granted to the extent that the Labor Law §§ 200 and common-law negligence and 241 (6) causes of action (the first, second, and fourth causes of action) are severed and dismissed, and is otherwise denied; and it is further

ORDERED that a pretrial conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY on April 16, 2009 at 2:30 p.m.

Dated: April 6, 2009

J.S.C.

