

Mastakouris v NVA, LLC
2010 NY Slip Op 32183(U)
July 2, 2010
Sup Ct, Queens County
Docket Number: 23035/08
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
GEORGE MASTAKOURIS,

Plaintiff,

-against-

NVA, LLC and EKS CONSTRUCTION,

Defendants.
-----X

Index No: 23035/08
Motion Date: 4/7/10
Motion Cal. No: 9
Motion Seq. No: 1

The following papers numbered 1 to 10 read on this motion for an order, pursuant to CPLR 3212, granting partial summary judgment to plaintiff against defendant NVA, LLC, under Labor Law § 240(1).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibits-Memorandum of Law.....	6 - 10

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

This is a Labor Law action to recover personal injuries allegedly sustained by plaintiff George Mastakouris (“plaintiff”) on June 13, 2008, while he was performing renovation work at the premises owned by defendant NVA, LLC, (“defendant”), located at 32-08 38th Avenue, Long Island City, New York. Plaintiff was allegedly injured when the eight foot A-frame ladder upon which plaintiff was standing, “became wobbly and fell over,” causing him to fall to the ground. Plaintiff moves for partial summary judgment, pursuant to Labor Law § 240(1), against defendant.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of

New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide or cause to be furnished certain safety devices for workers at an elevated work site, including the provision of safety equipment to protect workers against falling from a height, and the absence of appropriate safety devices constitutes a violation of the statute as a matter of law. Narducci v Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); Misseritti v Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995); Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993); Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Riccio v. NHT Owners, LLC, 51 A.D.3d 897 (2nd Dept. 2008); Cambry v. Lincoln Gardens, 50 A.D.3d 1081 (2nd Dept. 2008); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). “[T]he purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves (citations omitted).” Panek v. County of Albany, 99 N.Y.2d 452 (2003). A cause of action under section 240(1) of the Labor Law is stated when an injury is the result of one of the elevation-related risks contemplated by that section. See, Rose v. A. Servidone, Inc., 268 A.D.2d 516 (2000). However, “[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity.” Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999); see, Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625 (2nd Dept. 2007); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). Thus, “liability cannot be imposed under Labor Law § 240(1) where ‘there is no evidence of violation and the proof reveals that the plaintiff’s own negligence was the sole proximate cause of the accident’ (citations omitted)” Destefano v. City of New York, 39 A.D.3d 581, 582-583 (2nd Dept. 2007); Blake v. Neighborhood Housing Services. of N.Y. City, 1 N.Y.3d 280 (2003).

Here, plaintiff asserts in his affidavit that he was hired approximately nine days before his accident on June 13, 2008 by George Bountovas to perform construction and renovation work on the third floor of the premises owned by defendant. He states that he was supervised by George Mouhlis and performed various demolition work and carpentry at the subject location. He further stated that on the day of the accident, he was standing on the second rung from the top of an aluminum A-frame ladder, covering old light fixture holes to be dry-walled and painted. He asserts the following:

While I was standing on the second rung down from the top of the ladder, the ladder started moving and fell over causing me to fall therefrom. The ladder was old and defective and did not have any rubber shoes on the bottom thereof. The floor where the ladder was placed was not level and also had depressions.

The accident occurred due to the dangerous and defective nature of the ladder as well as the uneven floor. There were no other ladders available to perform this task.

This testimony as to the happening of the accident was sufficient to establish plaintiff's prima facie entitlement to summary judgment on his cause of action based on Labor Law § 240(1). Plaintiff established judgment as a matter of law by submitting proof that defendant failed to provide him with adequate safety devices for the elevation-related risks of his work, and such failure was the proximate cause of his injuries. See, Reaber v. Connequot Cent. School Dist. No. 7, 57 A.D.3d 640 (2nd Dept 2008); Mingo v. Lebedowicz, 57 A.D.3d 491 (2nd Dept. 2008); Gilhooly v. Dormitory Authority of State of N.Y., 51 A.D.3d 719 (2nd Dept. 2008). Indeed, in cases involving falls from unsecured ladders, courts consistently have found in favor of plaintiff on motions for summary judgment. See, Barr v. 157 5 Ave., LLC 60 A.D.3d 796 (2nd Dept. 2009); see, also, Denis v. City of New York, 54 A.D.3d 803, 803-804 (2nd Dept. 2008)[plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action pursuant to Labor Law § 240(1) by showing that he was injured when he fell from the second step from the top of an unsecured ladder while removing guard frames from windows]; Ricciardi v. Bernard Janowitz Const. Corp., 49 A.D.3d 624 (2nd Dept. 2008)[plaintiff established his prima facie entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240(1) by submitting evidence that he was injured when he fell from the seventh rung of an unsecured A-frame ladder while installing a sprinkler system at a construction site]; Argueta v. Pomona Panorama Estates, Ltd., 39 A.D.3d 785, 786 (2nd Dept. 2007)[plaintiff met his burden of demonstrating his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action by submitting evidence establishing that he fell while climbing an unsecured ladder that had been placed on uneven dirt, which suddenly slid to the right].

Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasan v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001).

In opposition thereto, defendant asserts numerous contentions which allegedly raise issues of fact with regard to plaintiff's prima facie showing, including who is plaintiff's employer and "the right of plaintiff to be in the premises." Defendant asserts that it entered into a lease agreement for the subject property on June 27, 2008 with Nicholas George of Soccer World, Inc., two weeks after the accident, and the lease specifically stated that the tenant will not conduct renovations without the prior written consent of defendant. In support of this contention, defendant proffers the written lease agreement and the affidavit of Angelo Amen, a member of defendant, who states, in relevant part, the following:

Prior to June 27, 2008, as far as [defendant] knew, the premises were unoccupied. Other than [defendant], no party had the right to be in the premises, particularly to do any work. If plaintiff was in the space for any purpose, he was there without any legal right to be there.

He further makes allegations of the subterfuge employed by the tenant, who Mr. Amen contends was a person other than Mr. George who fraudulently signed the lease agreement, and contends that defendant received “calls from the local police stating that the illegal occupant was using the premises as an illegal late night club.” Mr. Amen further states:

Whomever was occupying the premises was an illegal squatter who entered pursuant to fraud, did not pay rent, used the premises for anything but what was supposed to occur and did work at the property without [defendant’s] knowledge, much less [defendant’s] consent.

After this litigation commenced, [defendant] received notice that plaintiff was going before the Workmen’s Compensation Board in conjunction with his claims of injury. [Defendant] had a representative attend these hearings.

At the hearings, the issue of [plaintiff’s] “employer” was raised. A few names were bandied about, none of which were the “tenant” or any other party with whom anyone at [defendant] had any contact.

[T]he verified complaint that was served in this action lists plaintiff’s employer as “Jinbos, Inc.,” yet, in his affidavit in support of the motion, plaintiff states he was employed by “George Bountovas.”

As a result, defendant contends that plaintiff has failed to demonstrate that there is a nexus between plaintiff and defendant, and relies upon Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46 (2004), the Court of Appeals decision which answered in the negative the question of whether a building owner may be held strictly liable under Labor Law § 240(1) for injuries sustained by a cable technician performing work on its property without its knowledge or consent. The Court stated, in pertinent part, the following [3 N.Y.3d 46, 51- 53]:

We have consistently “observed that the purpose of the statute is to protect workers by placing ultimate responsibility for safety

practices on owners and contractors instead of on workers themselves” (Panek v County of Albany, 99 NY2d 452, 457 [2003] [citations omitted]). Accordingly, the statute imposes absolute liability on owners and contractors for any breach of the statutory duty that proximately causes injury (see Blake, 1 NY3d at 287). To come within the special class for whose benefit absolute liability is imposed, a plaintiff must demonstrate that “he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or their agent” (Whelen v Warwick Val. Civic & Social Club, 47 NY2d 970, 971 [1979]).

Following the Whelen line of precedent, the First Department has generally held that a cable technician called to a building by a tenant without the knowledge or consent of the owner is not an employee for purposes of Labor Law § 240(1) and therefore is not afforded the protections of that statute against the owner (see Ceballos v Kaufman, 249 AD2d 40 [1st Dept 1998]). On the other hand, relying on Celestine v City of New York (86 AD2d 592 [2d Dept 1982], affd 59 NY2d 938 [1983]) and its progeny--Gordon v Eastern Ry. Supply (82 NY2d 555 [1993]) and Coleman v City of New York (91 NY2d 821 [1997])--the Second and Third Departments have held building owners strictly liable for the injuries of such workers on the ground that ownership alone may determine whether defendant is liable under section 240(1). Persuaded by the distinctions between Celestine and its progeny and the facts presented here, we refuse to impose absolute liability on an owner where a cable technician is injured while performing work without the owner's knowledge or consent.

Common to Celestine, Gordon and Coleman--and to all cases imposing Labor Law § 240(1) liability on an out-of-possession owner--is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest. Here, however, no such nexus exists. The injured plaintiff was on the owner's premises not by reason of any action of the owner but by reason of provisions of the Public Service Law.

Lancaster cannot be charged with the duty of providing the safe working conditions contemplated by Labor Law § 240(1) for cable television repair people of whom it is wholly unaware. Supreme Court correctly noted that, but for Public Service Law § 228,

plaintiff would be a trespasser upon Lancaster's property and Lancaster would neither owe a duty to plaintiff nor incur liability. Any permission to work on the premises was granted upon compulsion and no relationship existed between Lancaster and Paragon or the plaintiff.

Having found no nexus here, we conclude that plaintiff is not an employee for purposes of Labor Law § 240 (1) and that Public Service Law § 228 does not impose constructive notice on a building owner nor does it subject the owner to liability under Labor Law § 240 (1). We thus agree with Supreme Court that “[t]he Public Service Law was enacted to secure the right of the tenant to have access to cable television services, not to impose unconditional liability upon a defenseless fee owner. The interpretation suggested by the plaintiff goes far beyond the scope of the language employed in each statute, so as to create a new liability with respect to cable service workers which was not envisioned by the Legislature.” (188 Misc 2d 665, 676 [2001].)

Thus, defendant contends that the mere fact that a worker was injured does not give rise to a violation of the Labor Law, and under Abbatiello, there exist no nexus between the instant plaintiff, who purported to be injured on the subject premises two weeks before the tenant entered into the lease agreement, and defendant, to impose liability upon it. Further, defendant asserts that plaintiff puts misplaced reliance upon Sanatass v. Consolidated Investing Co., Inc., 10 N.Y.3d 333 (2008), a recent Court of Appeals decision which plaintiff contends limits Abbatiello, and stands for the proposition that an owner is strictly liable for a violation of Labor Law 240(1), even where the tenant contracted for the work without the owner’s knowledge and in violation of a notice provision in the lease. The Court of Appeals stated the following [10 N.Y.3d 333, 338- 342]:

Plaintiff argues that Consolidated is an “owner” within the meaning of Labor Law § 240 (1) and that Consolidated is liable for a statutory violation despite its lack of notice or control over the work. Consolidated counters that the courts below correctly applied Abbatiello in holding that an out-of-possession owner who has no knowledge of the work being done on its premises cannot be held liable under section 240 (1). Relying on the lease provision obligating the tenant to obtain the owner's permission before hiring a contractor to perform any alterations, Consolidated asserts that the tenant's breach severed any nexus between itself and plaintiff.

We do not write on a blank slate when interpreting Labor Law § 240 (1). Indeed, a number of well-settled principles provide us with

guidance. We have repeatedly stated that Labor Law § 240(1) “imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury” (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]; see also, *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). To be sure, we have cautioned that an owner is not “an insurer after having furnished a safe workplace” and that an accident, in and of itself, does not establish a statutory violation (*Blake*, 1 NY3d at 286, 289). But at the same time, it is clear that the statutory duty imposed by this strict liability provision is “nondelegable and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Additionally, section 240(1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed” (*Panek*, 99 NY2d at 457 [internal quotation marks and citation omitted]).

In a trio of cases, we examined the liability of out-of-possession owners under the Labor Law. First, in *Celestine v City of New York* (59 NY2d 938 [1983], affg for reasons stated below 86 AD2d 592 [2d Dept 1982]), a worker who sustained injuries while building a subway line commenced a Labor Law action against the Long Island Rail Road (LIRR), the property owner. LIRR moved for summary judgment dismissing the claim, submitting that it should not be deemed an “owner” for purposes of Labor Law § 241(6) because the property was subject to an easement in favor of the City of New York and the New York City Transit Authority. In declining to dismiss the section 241 (6) claim, the court rejected LIRR's argument, reasoning that the statute imposes a nondelegable duty on owners to furnish adequate protection to workers “regardless of the absence of control, supervision or direction of the work” (86 AD2d at 593).

Next, in *Gordon*, an employee of Ebenezer Railcar Services brought a Labor Law § 240(1) action against Eastern Railway Supply, the property owner, seeking damages for personal injuries occasioned when he fell from a ladder. On a motion for summary judgment, Eastern contended that it could not be liable as an owner under section 240(1) because it had leased the property to Ebenezer, its wholly owned subsidiary, and “neither contracted to have the work performed nor was the work performed for its

benefit” (82 NY2d at 559). Relying on *Celestine*, we disagreed and concluded that Eastern was responsible because liability “rests upon the fact of ownership and whether Eastern had contracted for the work or benefitted from it are legally irrelevant” (*id.* at 560).

Finally, in *Coleman v City of New York* (91 NY2d 821 [1997]), an employee of the New York City Transit Authority suffered elevation-related injuries while performing repair work and pursued a Labor Law § 240(1) claim against the City of New York as the property owner. The City claimed that it should not be strictly liable because it had leased the property to the Transit Authority and “lacked any ability” to protect Authority workers based on the statutory scheme creating the Authority and governing their relationship (*id.* at 823). We rejected the City’s position, finding that *Celestine* and *Gordon* articulated a “bright line rule” that section 240(1) applied to all owners regardless of whether the property was leased out and controlled by another entity or whether the owner had the means to protect the worker (*id.* at 822). In so ruling, we also disavowed *Robinson v City of New York* (211 AD2d 600, 600 [1st Dept 1995]), which had restricted the City’s liability as an owner under the Labor Law because it had leased property to the Transit Authority and “had no actual or potential control over the worksite and retained a right of re-entry for non-transit purposes only.” We determined that it was for the Legislature, not this Court, to carve out exceptions to the broad reach of owner liability under section 240(1).

Here, like the defendants in *Celestine*, *Gordon* and *Coleman*, Consolidated seeks to avoid liability under Labor Law § 240(1) by contending that it is not an “owner” for the purposes underlying the statute. Relying on its lack of knowledge of plaintiff’s work, undertaken at the behest of the tenant, Consolidated asks us to import a notice requirement into the Labor Law or, conversely, create a lack-of-notice exception to owner liability. But our precedents make clear that so long as a violation of the statute proximately results in injury, the owner’s lack of notice or control over the work is not conclusive—this is precisely what is meant by absolute or strict liability in this context (see *Blake*, 1 NY3d at 289). We have made perfectly plain that even the lack of “any ability” on the owner’s part to ensure compliance with the statute is legally irrelevant (see *Coleman*, 91 NY2d at 823). Hence, Consolidated may not escape strict liability as an owner based on its lack of notice or control over the work ordered by its tenant.

Consolidated's reliance on our recent decision in Abbatiello is misplaced. In that case, plaintiff, a cable repair technician, was dispatched by his employer to an apartment building owned by Lancaster Studio Associates in response to a complaint by one of the building's tenants. In the course of accessing a junction box on the exterior of the building, plaintiff's ladder bent, causing him to fall and sustain injuries. As a result, he commenced an action against Lancaster alleging a violation of Labor Law § 240 (1). Although we observed that Lancaster was unaware of and did not consent to the plaintiff's presence on the property, these facts alone were not determinative of our affirmance of the dismissal of the complaint.

Rather, in Abbatiello we carefully distinguished Celestine and its progeny, noting that in those cases a nexus existed between the out-of-possession owner and the plaintiff, be it by lease, easement or some other property interest. In Abbatiello, however, the injured cable technician was on the property solely "by reason of provisions of the Public Service Law" (3 NY3d at 51). Our analysis emphasized that section 228 of the Public Service Law established mandatory access for cable repair workers and that, but for this statute, the plaintiff "would be a trespasser upon Lancaster's property" (id. at 52). Public Service Law § 219 also rendered Lancaster "powerless to determine which cable company is entitled to operate, repair or maintain the cable facilities on its property, since such decision lies with the municipality-the franchisor" (id.). We concluded that, absent an adequate nexus between the worker and the owner, the cable technician was not entitled to the extraordinary protections of the Labor Law since he was not an "employee" for purposes of section 240(1); as such, Lancaster could not be liable for his injuries. Contrary to Consolidated's argument in the present appeal, Abbatiello did not announce a new notice requirement for section 240(1) cases.

Consolidated posits that, as in Abbatiello, it has an insufficient nexus with plaintiff to support absolute liability. We disagree. Consolidated leased the premises to a tenant who, in turn, hired plaintiff's firm to install a commercial air conditioning unit. True, Consolidated inserted a provision in the lease agreement requiring its tenant to obtain written permission before performing any alterations to the property. But the tenant's breach of this lease clause-while it may have some bearing on Consolidated's indemnification claim-did not sever the nexus. Plaintiff was

specifically employed by the tenant to perform work in Consolidated's building and, as between the owner and the worker, section 240(1) clearly places the burden on the owner should a violation of the statute proximately cause injury. Unlike the cable technician in Abbatiello, the plaintiff in this case was an “employee” for purposes of section 240(1) and cannot conceivably be viewed as a “trespasser.”

As a result, defendant contends that as Sanatass is distinguishable and there are triable issues of fact to be determined, the motion should be denied. This Court agrees.

“The primary purpose of Labor Law § 240(1) is to extend special protections to ‘employees’ or ‘workers’ (citations omitted). Inclusion in this ‘special class for whose benefit absolute liability is imposed’ requires a plaintiff to ‘demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or their agent’ (citations omitted).” See, Stringer v. Musacchia, 11 N.Y.3d 212, 215 (2008). Here, there is an issue of fact as to whether plaintiff is an “employee” within the meaning of the statute, as it is unclear as to who employed plaintiff. Moreover, there is an issue of fact as to whether there is a sufficient nexus between plaintiff and defendant to hold it strictly liable for the alleged injuries suffered by plaintiff. Though plaintiff correctly posits that the facts of this matter are more akin to those in Sanatass, as Abbatiello devolves from a peculiar set of facts, the common thread between Sanatass, Celestine v. City of New York, 59 N.Y.2d 938 (1983) and its progeny, is in those cases, the Court found that a nexus existed between the out-of-possession owners and the plaintiffs, be it by lease, easement or some other property interest. In Abbatiello, the Court found no nexus between the defendant owner and the plaintiff, as the plaintiff’s presence on the defendant owner’s property was compulsory. There was no affirmative act on behalf of the defendant owner, such as entering into a lease agreement with a tenant, which would compel the plaintiff’s presence. As the Court stated:

Common to Celestine, Gordon and Coleman--and to all cases imposing Labor Law § 240(1) liability on an out-of-possession owner--is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest. Here, however, no such nexus exists. The injured plaintiff was on the owner's premises not by reason of any action of the owner but by reason of provisions of the Public Service Law.

Although there is much ado about fraud and trickery in this matter, the issue to be determined is whether there is a sufficient nexus, via lease or other property interest, between plaintiff and defendant.

Consequently, based upon the foregoing, there are issues of fact which cannot be determined summarily. Accordingly, plaintiff's motion for summary judgment on his claim under section 240(1) of the Labor Law is denied.

Dated: July 2, 2010

J.S.C.