

Singh v City of New York

2010 NY Slip Op 32961(U)

August 6, 2010

Supreme Court, Richmond County

Docket Number: 102528/06

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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MALKIT SINGH,

Part C-2

Plaintiff,

Present:

-against-

HON. THOMAS P. ALIOTTA

**CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION, NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY and
D&K CONSTRUCTION CO., INC.,**

DECISION AND ORDER

Index No. 102528/06

Motion No. 1339-003

Defendants.

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The following papers numbered 1 to 3 were marked fully submitted on the 30th day of June, 2010.

	Papers Numbered
Notice of Cross Motion for Summary Judgment by Plaintiff Malkit Singh, with Supporting Papers, Exhibits, and Memorandum of Law (dated March 26, 2010).....	1
Affirmation in Opposition by Defendant D&K Construction Co., Inc., with Exhibits and Affidavit (dated June 24, 2010).....	2
Reply Affirmation with Exhibits (dated June 25, 2010).....	3

Upon the foregoing papers, plaintiff’s cross-motion for summary judgment is denied for the reasons stated herein.

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Plaintiff Malkit Singh (hereinafter "plaintiff") cross-moves for an order pursuant to CPLR 3212 granting him summary judgment on his causes of action predicated on Labor Law §§240(1) and (2). Defendant D&K Construction Co., Inc. (hereinafter "D&K") opposes the motion¹.

In this litigation, plaintiff seeks to recover damages for personal injuries allegedly sustained on April 1, 2004 as a result of his fall from a scaffold located seven to twelve feet above the ground at P.S. 46 on Staten Island. At the time of the accident, plaintiff was employed by K&D Construction, Inc. as a laborer. K&D was hired as a sub-contractor by D&K to paint exterior windows around the school pursuant to a contract with co-defendants the City of New York, its Department of Education and the New York City School Construction Authority². At the time of accident, plaintiff was painting a window and wearing a safety belt which was attached to a lifeline that allegedly may have been too long to prevent his injury when the scaffold on which he was working moved, causing plaintiff to fall. He landed on a handicap railing, injuring his abdomen (Transcript of Singh 50-h hearing on June 27, 2006, pp 10-18). Plaintiff filed a notice of claim upon the City of New York (hereinafter the "City") on or about May 1, 2006 and on or about

¹At oral argument, the companion motion (Seq. No. 002) by defendants the City of New York and the New York City Department of Education was granted to the extent that said defendants were granted (1) leave to serve an amended answer pursuant to CPLR 3025(b), and (2) summary judgment on their cross claim against D&K. However, their further application to dismiss the complaint pursuant to CPLR 3211(a)(7) was denied with a direction to "settle order on notice".

²More specifically, D&K was hired as general contractor to perform said work by the Department of Education of the City of New York, Division of School Facilities pursuant to an agreement dated November 6, 2003.

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August 21, 2006, filed and served a summons with complaint upon the City and D&K³. Issue was joined by the service of an answer by the City on or about November 13, 2006⁴.

In support of his cross motion, plaintiff has submitted an attorney's affirmation, a memorandum of law, his own affidavit, an expert affidavit, D&K's purchase order, an accident report prepared by his employer, and a copy of the deposition testimony of Naser Hamoudeh (an employee of the New York City Department of Education), Bhupinder Ghotra (the owner of D&K) and himself. Based upon these submissions, plaintiff contends that he is entitled to an order granting him summary judgment on the issue of liability pursuant to Labor Law §§240(1)(2).⁵

In opposition, D&K has submitted an attorney's affirmation, an affidavit by its owner, Bhupinder Ghotra, and pictures of the safety harness allegedly worn by plaintiff.

Initially, this Court concludes that plaintiff is not entitled to summary judgment since the papers submitted in support of his cross motion fail to include copies of all of the pleadings filed in this action, as required by CPLR 3212(b) (*see Wider v Heller*, 24 AD3d 483). Notwithstanding the omission, plaintiff's submissions fail to establish any prima facie entitlement to judgment as a matter

³The action against defendant New York City School Construction Authority was discontinued by stipulation dated September 17, 2007. The caption will be amended accordingly herein.

⁴In moving for summary judgment, plaintiff has failed to attach a copy of all of the pleadings as required by CPLR 3212(b). Accordingly, it is not known when defendant D&K filed or served their answer.

⁵Subdivision (2) of the same section merely provides details regarding the specifications for scaffolding or staging more than 20 feet in height, and does not constitute a separate basis for liability. Accordingly, all subsequent statutory references will be to Labor Law §240(1) only.

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of law. A plaintiff cannot recover under Labor Law §240 (1) if his own actions were the sole proximate cause of the accident (*see* Weininger v. Hagedorn & Co., 91 NY2d 958, 960; Camlica v Hansson, 40 AD3d 796).

Labor Law § 240(1) provides as follows:

"All contractors or owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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... ladders... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed".

Clearly, this section was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Ross v Curtis Palmer Hydro-Elec Co., 81 NY2d 494, 501 [*emphasis deleted*]). In order to best accomplish this goal, the ultimate responsibility for the failure to provide such safety devices was placed upon those parties deemed best suited to compensate workers for injuries proximately caused by its breach, *i.e.*, owners, general contractors and their agents (Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520). Moreover, the duty thus imposed was specifically made nondelegable, absolute and independent of the presence of either supervision or control over the work from which the injury arose (Ross v Curtis Palmer Hydro-Elec. Co., 81 NY2d at 500; Koenig v Patrick Constr. Corp., 298 NY 313, 318-319; Otero v Cablevision of New York, 297 AD2d 632). While the Court of Appeals has repeatedly held that the statutory language is to be construed liberally to accomplish

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its intended purpose, it has also cautioned that the statute must not be given a strained interpretation that would encompass risks which the legislature never intended to include (*see e.g.*, Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 292). Thus, as the Court of Appeals has repeatedly held, Labor Law § 240(1) is properly applied only to that narrow class of cases which entail the “special hazards” attributable to the effects of gravity “where protective devices are called for either because of a difference between the elevation level of the...work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or loads being hoisted or secured”(Rocovich v Consolidated Edison Co., 78 NY2d 509, 514). Among the kinds of injury-producing accidents that fall within this category are those wherein the plaintiff-worker has fallen from a height as the result of a failure to provide adequate safety devices (*id.*).

In this case, it is undisputed that plaintiff was provided with appropriate safety devices for his work, including a safety harness. In addition, plaintiff testified at his deposition that: (1) he was trained in the proper use of a safety belt and scaffold; (2) he got dizzy, lost his balance and fell off the scaffold; and (3) he set his own lifeline too long (Singh EBT pp 13-23). Thus, by his own admission, plaintiff has raised triable issues of fact as to the proximate cause of his accident.

Summary judgment is a drastic remedy and 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). Moreover, in ruling upon such a motion the Court is required to view the evidence in a light most favorable to the party opposing the motion, here, D&K (*see* Glennon v Mayo, 148 AD2d 580). Thus, on the

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present papers, it cannot be said that plaintiff has demonstrated prima facie his entitlement to judgment in his favor as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320, 324).

Accordingly, it is

ORDERED that the cross motion is denied; and it is further

ORDERED that the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MALIK SINGH,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION, and
D&K CONSTRUCTION CO., INC.,

Index No. 102528/06

Defendants.

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And it is further

ORDERED, that the Clerk mark his records accordingly.

E N T E R,

Hon. Thomas P. Aliotta
J.S.C.

Dated: August 6, 2010