

Gaynor v One Bryant Park LLC

2011 NY Slip Op 31371(U)

May 20, 2011

Sup Ct, NY County

Docket Number: 100404/08

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C.

PART 1

Index Number : 100404/2008
GAYNOR, VINCENT
vs.
ONE BRYANT PARK
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO.

100404/08

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits 1-1

Answering Affidavits — ~~Exhibits~~

Replying Affidavits - Exh. 1

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 20, 2011

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 1

-----X

VINCENT GAYNOR,

Plaintiff,

-against-

ONE BRYANT PARK LLC and TISHMAN
CONSTRUCTION CORP.,

Defendants.

-----X

MARTIN SHULMAN, J.:

Index No.: 100404/08

DECISION & ORDER

FILED

MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action. Plaintiff was working at a construction site located at Sixth Avenue between 42nd and 43rd Streets in New York City on October 12, 2007 when he fell from an A-frame ladder. Pursuant to the contract between the property owner, One Bryant Park, LLC and Tishman Construction Corp. ("Tishman"), Tishman was engaged as the construction manager for the project and agreed:

to provide all the labor, materials and services with the assistance of construction contractors ("Contractors") and to do all things described in Article 2 for the proper construction and completion of the work ... [and]

supervise and direct the work and shall be responsible for all construction, construction scheduling, sequencing of contractors, and for coordinating all portions of the work.

Motion, Ex. 7.

At the time of the accident, plaintiff was using a 10-foot-tall A-frame ladder to install a pipe into a hanger that was suspended from the ceiling, approximately 13 feet off the ground. Plaintiff's EBT, at 56-57, 59, 62-63. Plaintiff's deputy foreman had

instructed him to use that ladder. *Id.* at 25, 41, 46. Plaintiff stated that, prior to using the ladder, he inspected it and found nothing wrong with it. *Id.* at 60. When the accident occurred, plaintiff was working with a co-worker, Allen Ballek ("Ballek"), who was at ground level using a device called a "roustabout" that would lift the pipe up to the level of the hanger, whereby plaintiff could then guide the pipe into the hanger. *Id.* at 42-44, 55-58. Plaintiff was positioned two rungs down from the top of the ladder. *Id.* at 129-130.

Plaintiff testified that he remembered Ballek screaming and the ladder feeling as though it was shifting to the left. Plaintiff said that the front right side of the ladder had "busted" and, as the ladder started to tilt, the other side of the ladder "busted out." *Id.* at 64-66. Plaintiff claims that, as a result of the ladder breaking he fell to the concrete floor. *Id.* at 124. Plaintiff observed that the ladder was "broken in pieces," and he avers that there were no other safety devices available to him at the time of the accident. *Id.* at 124, 127.

In support of plaintiff's motion Ballek submits an affidavit in which he states that, at the time of the occurrence, he heard a sound like splitting wood, looked up and saw one of the legs of the ladder on which plaintiff was standing break away. The ladder collapsed and plaintiff's fall resulted. Motion, Ex. 10.

According to the patient care report filed by Medcor, the on-site emergency medical technicians, plaintiff was found supine on the floor surrounded by pieces of a broken wood ladder. This report indicates that plaintiff told the technician that he fell from the top of the ladder when it broke. Motion, Ex. 6.

In opposition to the instant motion, defendants argue there is a material question of fact as to what caused the ladder to break. They maintain that, as plaintiff testified, at the time of the accident he was focused on the pipe and was not looking at the ladder. According to the photographs of the ladder attached to plaintiff's motion, defendants further maintain that the bottom portion of the ladder initially broke and it is possible that Ballek, who was moving about at the bottom of the ladder with the roustabout, caused the roustabout to hit the ladder, causing it to break.

Moreover, defendants contend that a mere fall from a ladder itself is insufficient to render them liable under Labor Law § 240 (1) absent a showing that the ladder was defective, inadequately secured or otherwise failed to perform properly. Further, defendants argue that merely establishing that a ladder collapsed does not establish that it was defective.

Finally, defendants aver that plaintiff was the sole proximate cause of his injuries because he was reaching away from the ladder in order to guide the pipe. Defendants argue that plaintiff should have placed the ladder closer to the hanger. However, the court notes that defendants do not allege that other safety devices were available to plaintiff at the job site.

In reply, plaintiff notes that it is uncontroverted that the ladder upon which he was standing broke, causing him to fall. The ladder was not secured or braced and plaintiff was not provided with any other safety devices. Moreover, plaintiff points out that defendants have failed to address the cases he cites holding that a ladder's collapse is prima facie evidence of a Labor Law § 240 (1) violation.

Further, plaintiff argues that it is not his burden to show that the roustabout did not hit the ladder, causing it to break. However, plaintiff notes that there is nothing in Ballek's affidavit that even hints that he was pushing the roustabout near the ladder at the time of the occurrence.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Section 240 (1) of the New York Labor Law provides in pertinent part:

All contractors and 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, 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.

As stated in *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991):

It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. . . In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *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 [internal quotation marks and citations omitted].

Labor Law § 240 (1) was designed to protect workers against elevation-related risks. “In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of his injuries.” *Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 (2d Dept 1998).

In the case at bar, it is undisputed that the ladder upon which plaintiff was standing broke, thereby causing him to fall, and that there were no other safety devices available to him. “[The] uncontested testimony that the ladder broke by itself established prima facie a violation of Labor Law § 240 (1) and that the violation was a proximate cause of plaintiff’s injuries.” *Weber v Baccarat, Inc.*, 70 AD3d 487, 487-488 (1st Dept 2010); *Panek v County of Albany*, 99 NY2d 452 (2003)(the allegation that the ladder gave way was uncontested and defendants failed to create an issue of fact regarding proximate cause); *Dhillon v Bryant Assoc.*, 306 AD2d 40 (1st Dept 2003). In this context, the cases relied upon by defendants are distinguishable in that the ladders involved in those accidents did not break or collapse. *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 (2d Dept 2008); *Xidias v Morris Park Contr. Corp.*, 35 AD3d 850 (2d Dept 2006).

Moreover, despite defendants' argument regarding plaintiff's actions,

[a]ny negligence on plaintiff's part could not have been the sole proximate cause of his accident, since the accident was caused, at least in part, by defendant's failure to satisfy its statutory duty to provide an adequate safety device to protect plaintiff from the risk of falling (citation omitted). There was no evidence that plaintiff either misused an adequate ladder or failed to use a readily available device that would have protected him from a fall [bracketed matter added].

Cevallos v Morning Dun Realty, Corp., 78 AD3d 547, 548 (1st Dept 2010).

Further, defendants' failure to provide any safety device for plaintiff's protection is, in and of itself, sufficient to find them liable under Labor Law § 240 (1). *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 (1st Dept 2004). As stated in *Cammon v City of New York*, 21 AD3d 196, 201 (1st Dept 2005):

[A] defendant is not absolved from liability where, as here, a plaintiff's injuries are at least partially attributable to the defendant's failure to provide protection as mandated by the statute. Accordingly, plaintiff is entitled to [judgment] on his Labor Law § 240 (1) claim [internal citation omitted].

See also, *Ray v City of New York*, 62 AD3d 591 (1st Dept 2009).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action is granted.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
May 20, 2011

FILED

MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE 6


Martin Shulman, J.S.C.