

Brennan v Trump, Inc.
2011 NY Slip Op 31550(U)
June 6, 2011
Sup Ct, NY County
Docket Number: 104500/06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PART 10

Index Number : 104500/2006 J.S.C.

BRENNAN, TERENCE

vs
TRUMP

Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/6/11


HON. JUDITH J. GISCHE J.S.C.
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 10

-----X
TERRENCE BRENNAN and DEBBIE BRENNAN,

Plaintiffs,

-against-

TRUMP, INC., LC MAIN, LLC, LC WHITE
PLAINS RESIDENTIAL, LLC, CAPPELLI
ENTERPRISES, INC., and GEORGE A.
FULLER COMPANY, INC.,

Defendants.
-----X

DECISION/ORDER

Index No.: 104500/06

Seq. No.: 003

PRESENT:

Hon. Judith J. Gische

J.S.C.

FILED

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

Papers	Numbered
Pltfs' n/m (3212) w/MD affirm, exhs	1
LC Main, LC White Plains, Capelli, & Fuller's opp w/RBP affirm	2
Pltfs' reply w/MD affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries allegedly sustained by plaintiff, Terrence Brennan ("Brennan" or "plaintiff"). Defendants are Trump, Inc. ("Trump"), LC Main, LLC ("LC Main"), LC White Plains Residential, LLC ("LC White Plains"), Cappelli Enterprises, Inc. ("Cappelli"), and George A. Fuller Company, Inc. ("Fuller"). Plaintiff claims his injuries were proximately caused by defendants' negligence and he alleges violations of Labor Law §§ 200, 240(1), and 241(6).

Issue has been joined and Brennan seeks partial summary judgment on his Labor Law § 240(1) claim. LC Main, LC White Plains, Cappelli, and Fuller, who are

jointly represented (collectively “the answering defendants”), oppose plaintiff’s motion. It appears as though Trump has not appeared in this action. This motion was timely brought after plaintiff filed his note of issue. Since the motion is timely, it can and will be decided on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004).

Arguments Presented

On March 11, 2006, the date of the accident, Brennan was employed by non-party, Roger & Sons Concrete, Inc. (“Roger”)¹, as a journeyman iron worker. He was injured at approximately 1:00 p.m. while working at a construction site, located at 221 Main Street, White Plains, New York (the “Premises”). LC White Plains is the owner of the Premises and Fuller was hired as construction manager. It is unclear from the record exactly what Cappelli and LC Main’s respective roles were. Nobody, however, disputes that they fall under the definition of “contractors and owners and their agents.” Labor Law § 240(1).

Brennan provided a bill of particulars and was deposed. During his examination before trial (“EBT”), Brennan testified that he began working for Roger approximately one month before the accident and that his duties involved carrying, placing, and tying steel bars together. Brennan testified that, at the time of the accident, “I was walking [a]cross plywood, plywood floor” which was up against a beam. Brennan stated that it was a reinforced beam with rebar in it, approximately 3 feet wide and over 10 feet long. Brennan testified, “while I was walking on the deck towards the beam, there was just

¹The third-party action against Roger & Sons Concrete, Inc. was discontinued on September 25, 2009, as per stipulation separately filed.

debris. And I went around the debris, just to the side of it and I caught something and went right over and . . . landed on the deck below.” Brennan stated that, as he was walking around the debris, his right foot hit a pipe and he tripped, causing him to fall to the level below, which was “approximately 3 to 4 feet down.”

Steven J. Feinstein (“Feinstein”) was also deposed. Feinstein testified at his deposition that he is employed as a senior project manager for Fuller and is responsible for overseeing high-rise construction projects. Feinstein stated that on the date of the accident, he was similarly assigned to the Renaissance Square Project located at the Premises, which consisted of constructing a below-ground parking garage, two towers, and a hotel. Feinstein, however, had no personal knowledge of the accident.

The answering defendants contend that summary judgment should be denied because there are questions of material fact regarding whether defendants failed to provide an adequate safety device to prevent the incident from occurring. The answering defendants argue, *inter alia*, that plaintiff’s accident was the result of a routine hazard, plaintiff’s three-foot fall is not an elevation related risk, and further protection was not necessary.

Applicable Law

“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.” Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party

who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64 (1980). Only if this burden is met, will it then shift to the opposing party, 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*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003)

Discussion

Labor Law § 240 (1)

Labor Law § 240(1), commonly known as the "scaffold law," was enacted 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) *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 (1995). The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed. Panek v. County of Albany, 99 N.Y.2d 452 (2003).

The statute is not intended to protect construction workers from routine workplace risks, but from pronounced risks arising from construction work site elevation differentials. This means that there is no liability under this statute unless the accident is attributable to that kind of risk. Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 (2009). It is well-established law that not every worker who falls at a construction site is entitled to the extraordinary protections of Labor Law § 240(1) imposing absolute liability upon an owner and contractor. Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. See: Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993); Cohen v. Memorial Sloan-Kettering Cancer Center, 50 A.D.3d 227 (1st Dept 2008). Thus, the court has to evaluate and decide whether the particular task that plaintiff was engaged in created an elevation-related risk of the kind that the safety devices listed in section 240 (1) are likely to protect against. Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675 at 681 (2007). The single decisive issue of whether plaintiff has a claim under Labor Law § 240(1) is whether his injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Runner, supra.

In arguing that plaintiff fell "a mere three feet," the answering defendants urge the court to deny summary judgment on the grounds that a fall from such height is not dangerous. However, it is not the height of the fall that dictates the danger entailed because falls are not subject to exacting numerical quantifications. Amos v. Little Rapids Corp., 301 A.D.2d 698, 701, *app dismissed* 1 N.Y.3d 558 (2003). A fall from as low

as the 2nd rung of a ladder has been found to be within the protections of Labor Law § 240 (1). See: Cohen v. Memorial Sloan-Kettering Cancer Center, *supra*. Examining the circumstances of plaintiff's fall, the court finds that he did not fall from a *de minimus* height.

Brennan testified that he tripped over a pipe and "went right over and . . . landed on the deck below." It is undisputed that Brennan fell 3 to 4 feet from an elevated surface and landed on a lower surface. It is also undisputed that defendants failed to provide safety devices, such as harnesses, safety rails, etc.

Plaintiff has, therefore, made a *prima facie* showing that defendants violated Labor Law § 240(1) and that the violation was a proximate cause of plaintiff's injuries.

The answering defendants' contention, that plaintiff's accident was the result of a routine hazard and that protection was not necessary, is rejected by the court, as it is directly contradicted by the language of the statute, which provides that "[a]ll contractors and owners and their agents . . . in the erection . . . of a building or structure shall furnish or erect . . . 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). "A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff misstepping off its side. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident." Vergara v. SS 133 West 21, LLC, 21 A.D.3d 279, 280 (1st Dept. 2005).

Since plaintiff has proved his *prima facie* case under Labor Law § 240(1), and defendants have failed to set forth material factual disputes that require a trial before the issue of liability can be decided, plaintiff's motion for summary judgment on his Labor Law 240(1) claim is granted.

Plaintiff's time to move for entry of a default judgment against Trump has expired. CPLR § 3215. Accordingly, the complaint, as against Trump only, is severed and dismissed.

Conclusion

Plaintiff has met his burden of proving he is entitled to summary judgment on his Labor Law § 240(1) claims on the issue of liability against defendants. Therefore, his motion for partial summary judgment on that claim is granted. The defendants' motion on those claims is denied. Neither plaintiff nor defendants move with respect to the remaining causes of action in plaintiff's complaint for violation of Labor Law §§ 200, 241(6), negligence, loss of companionship. Since discovery is complete and the note of issue has been filed, this case is ready to be tried.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff, TERRENCE BRENNAN and DEBBIE BRENNAN's motion for summary judgment is granted as to its cause of action for violation of Labor Law § 240(1) against defendants, LC MAIN, LLC, LC WHITE PLAINS RESIDENTIAL,

LLC, CAPPELLI ENTERPRISES, INC., and GEORGE A. FULLER COMPANY, INC.;
and it is further

ORDERED that the complaint, as against Trump only, is hereby severed and
dismissed; and it is further


ORDERED that this case is ready for trial. The plaintiff is directed to immediately
serve a copy of this decision on the Office of Trial Support, so that the issue of liability
as to the remaining causes of action and the issue of damages as to plaintiff's Labor
Law § 240(1) claim may be tried; and it is further

ORDERED that any relief requested, but not expressly addressed has
nonetheless been considered by the court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
June 6, 2011

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED

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