

Alvarez v Durr Mechanical Constr., Inc.

2011 NY Slip Op 31701(U)

June 16, 2011

Supreme Court, New York County

Docket Number: 101180/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

FERNANDO ALVAREZ,

Plaintiff,

INDEX NO. 101180/09

- against -

MOTION DATE _____

**DURR MECHANICAL CONSTRUCTION, INC., and
NASSAU ENERGY CORPORATION f/k/a NASSAU
DISTRICT ENERGY CORP.,**

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Defendants.

The following papers were read on this motion by plaintiff, and cross-motion by defendant Nassau Energy Corp. f/k/a Nassau District Energy Corp., for summary judgment.

FILED

PAPERS NUMBERED

Notice of Motion — Affidavits — Exhibits

1

Answering Affidavits — Exhibits (Memo) JUN 27 2011

2

Replying Affidavits (Reply Memo) _____

3, 4

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

In this action arising from a construction site accident, plaintiff alleges negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Defendant Nassau Energy Corporation f/k/a Nassau District Energy Corp. (hereinafter "Nassau"), leaseholder of the site of the subject incident, contracted with plaintiff's employer, Eagle Scaffolding Services (hereinafter "Eagle"), to construct scaffolding to allow access to certain leaking tubes within a boiler at the site.¹ At the time of the subject incident, plaintiff was standing on an intermediate level of the scaffolding, about six feet above the ground, and passing metal poles from a worker below him

¹The scaffolding was erected in order to allow defendant Durr Mechanical Construction Corp., a contractor separately hired by Nassau, to repair the leaking tubes. Durr was not involved in the incident and has been removed from the case pursuant to the Court's order dated March 18, 2011.

on the ground up to another worker above him. Apparently, a scaffold guardrail pole about twenty feet above plaintiff came free of its socket and fell, striking plaintiff's hard hat and allegedly causing injury.

Plaintiff now moves for partial summary judgment against Nassau on its cause of action for violation of Labor Law § 240(1), known as the "Scaffold Law" (*Misserritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). Nassau cross-moves for summary judgment to dismiss the plaintiff's complaint in its entirety. For the reasons stated below, plaintiff's motion should be granted, and Nassau's cross-motion should be denied as to the Scaffold Law cause of action and should otherwise be granted.

Plaintiff contends that it is entitled to summary judgment on its Scaffold Law claim against Nassau because Nassau was the owner of the subject site, and plaintiff was injured by a collapsing scaffold. Plaintiff further contends that summary judgment is appropriate because Nassau failed "to provide Plaintiff with such scaffolding, hoists, stays, ladders, safety devices, safety chains, life lines, safety nets or any work platforms . . . to shield him from harm directly flowing from the application of the force of gravity to an object . . ." (Plaintiff's Affidavit at ¶3). Plaintiff submits, among other things, his own deposition transcript, the signed deposition transcript of Nassau Plant Manager David Petty ("Petty"), and an incident report created by Petty that discusses the subject incident. The incident report states that:

What Happened: . . . Apparently while assembling a 3' long guard rail post at the top into a socket the socket rotated and the pipe then rolled out and fell to the floor. A heads up shout was given but the 3' pipe impacted one employee . . .

Why It Happened: Assembling scaffolding is a relatively hazardous operation. The knuckle not being fully tightened allowed the unit to rotate and cause the pipe to slip out and down to the floor. This in conjunction with not being aware of what is occurring above them contributed to the incident.

(Plaintiff's Motion, Exhibit H.) Plaintiff contends that these submissions establish that, during the course of erecting the scaffolding, a pole fell from a height and struck the plaintiff, which

constitutes a strict liability violation of the Scaffold Law.

Nassau opposes, contending that none of plaintiff's submissions are admissible as evidence on a motion for summary judgment. Even if the submissions are admissible, Nassau maintains that plaintiff's deposition does not establish that something hit him from above, as he states that he did not see what hit him. Nassau also maintains that the incident report, to the extent that it establishes what occurred, is hearsay, as it was made by a person with no personal knowledge of the event, and it is not certified as a business record. Furthermore, Nassau notes that the guardrail pole was not an item that was being hoisted or required securing within the meaning of the Scaffold Law.

In reply, plaintiff states that Petty's incident report is admissible as both a business record and as a statement against interest. Plaintiff submits two additional affidavits from coworker eyewitnesses to the incident. The additional affidavits aver that the subject pole had been in the process of being secured by plaintiff's foreman when it fell, striking the plaintiff. Plaintiff maintains that it is permitted to submit additional evidence in its reply because it had been relying on Nassau's failure to deny in its answer that plaintiff had been struck by a falling object, and Nassau's position in opposition represented a novel defense. Plaintiff does not address Nassau's common law negligence, Labor Law § 200 statutory negligence, or Labor Law § 241(6) Industrial Code violation arguments.

In its cross-motion, Nassau states that its opposition to plaintiff's motion shows that there is no evidence that the falling pole was being hoisted or secured at the time of the subject incident, or that the pole fell because of the absence or inadequacy of a safety device. Nassau also notes that the pole was not an item that required securing pursuant to the Scaffold Law. Thus, there can be no Scaffold Law liability herein. Nassau argues that it cannot be liable under common law negligence or Labor Law § 200 statutory negligence, because Nassau had no supervisory control over Eagle's work. Nassau's involvement in plaintiff's work was limited

to Petty telling the Eagle foreman where the leaking tubes requiring repair were, from which the foreman determined where and how the scaffolding should be erected.

Nassau further argues that the facts alleged do not support a finding of a violation of any of the Industrial Code sections relied upon by plaintiff, and therefore summary judgment dismissing plaintiff's § 241(6) claim is appropriate. Nassau also briefly discusses the Industrial Code sections listed in plaintiff's bill of particulars, and argues that all are either inapplicable or do not set forth a concrete requirement sufficient to sustain a § 241(6) claim.

Nassau submits a reply on its cross-motion, in which it notes that plaintiff impermissibly presented new evidence and arguments in its reply papers. Nassau also argues that Petty's incident report is inadmissible because, even if it would be admissible as a business record or statement against interest, it is double hearsay. Petty's transcript establishes that he had prepared the report based upon the account relayed by plaintiff's foreman, but plaintiff failed to establish that the foreman was an eyewitness to the incident, or that he had any business obligation to report the incident.

Standards - Summary Judgment in Common Law Negligence and Labor Law

Summary Judgment

"The proponent of a summary judgment motion [pursuant to CPLR § 3212] 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" (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006]). The burden then shifts to the 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 228, 228 [1st Dept 2006]).

Scaffold Law

The Scaffold Law, Labor Law § 240(1), provides that contractors and owners “furnish or erect, or cause to be furnished or erected for the erection . . . of a building or structure, 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.” “[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials” (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). The Scaffold Law’s protection applies to workers utilizing hoisting or scaffolding devices as well as those who erect or demolish those devices (*Metus v Ladies Mile Inc.*, 51 AD3d 537, 538 [1st Dept 2008], citing *Kyle v City of New York*, 268 AD2d 192, 197 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Where a Scaffold Law violation exists, the injured worker’s contributory negligence is not considered in determining liability, unless the worker’s conduct was the sole proximate cause of the incident (*see Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280, 290 [2003]; *Cody v State of New York*, 52 AD3d 930, 931 [3d Dept 2008]).

In a Scaffold Law case, “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential” (*Runner*, 13 NY3d at 603). To prevail, the plaintiff must show that a violation of Labor Law § 240(1) proximately caused a foreseeable injury (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 10-12 [1st Dept 2011]); *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268 [1st Dept 2007]). In a Scaffold Law falling object case, the “plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 268 [2001]). This does not mean that liability is limited to a fall

while the item is actively being hoisted or secured, but rather that plaintiff must show that the falling object was a material being hoisted or secured for purposes of the undertaking (*see Quattrochi v F.J. Sciame Const. Corp.*, 44 AD3d 377, 380-81 [1st Dept 2007], citing *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Boyle v 42nd St Development Project, Inc.*, 38 AD3d 404, 406-08 [1st Dept 2007]).

To prevail on a Scaffold Law claim a plaintiff need not show which safety device would have prevented his injury (*Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]; *Cody*, 52 AD3d at 931). A plaintiff must still show proximate cause, so there can be no liability if there is "not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (*Narducci*, 96 NY2d at 268).

Common Law Negligence and Labor Law § 200

To prevail on a common law negligence cause of action, plaintiff must show that defendant breached a duty of care owed to plaintiff, and that such breach proximately caused plaintiff's injury. At construction sites, owners and general contractors have a duty of care to provide site workers with a safe place to work; Labor Law § 200 is a codification of the latter duty of care (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). At a construction site, both common law and Labor Law § 200 negligence are limited to parties who exercise supervision or control over the work out of which the injury arises, and also create or have actual or constructive notice of the unsafe condition that causes the injury (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Colon v Lehrer, McGovern & Bovis, Inc.*, 259 AD2d 417, 419 [1st Dept 1999]). Regarding construction site owners, "[i]t is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80

NY2d 290 [1992]).

Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation, or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). “In order to state a claim under Labor Law § 241(6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications” (*Reilly v Newireen Associates*, 303 AD2d 214, 218 [1st Dept 2003], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). To prevail on a motion for summary judgment on a Labor Law § 241(6) claim, the movant must show that there are no triable issues of fact as to the violation of that Industrial Code provision.

Discussion

Plaintiff’s Motion for Partial Summary Judgment

Contrary to Nassau’s contention, there is no question that plaintiff was struck by a guardrail pole that fell from a height.² Plaintiff presents case law to support its position that simply showing that a piece of scaffolding fell satisfies its prima facie burden, including *Kyle v City of New York* (268 AD2d 192 [1st Dept 2000]) and *Aragon v 233 West 21st Street, Inc.* (201 AD2d 353 [1st Dept 1994]). These cases are easily distinguished, however, as they each involve a person falling due to a scaffold collapse. When a scaffold, a § 240(1) enumerated

² Plaintiff’s deposition transcript is admissible, as it is certified by a reporter pursuant to CPLR § 3116(b), and may be treated as signed pursuant to CPLR § 3116(a). The incident report prepared by Petty is admissible, as it falls within the business record hearsay exception, and the requirement to certify business records is limited to records produced by non-parties (*see* CPLR §§ 4518[a] and 3122-a [certification requirement only applies to records produced under subpoena duces tecum pursuant to CPLR § 3120]; *cf* CPLR § 4518[c]). Further, Petty referred to the incident report at deposition, and the transcript thereof is included in the record on this motion. Any potential double hearsay problem is remedied by the affidavits annexed to plaintiff’s reply papers, which aver that plaintiff’s foreman was present at the time of the subject incident.

safety device, collapses, causing a person or load upon it to fall, then a prima facie violation of the Scaffold Law necessarily results, as the failure of the scaffolding violates the Scaffold Law's requirements for adequate and proper scaffolding. Here, to the extent that the Scaffold Law could theoretically be applicable, the guardrail pole would be considered a load or object that required securing, rather than a scaffold, and so its fall does not infer the failure of a safety device (*see also Quattrochi*, 44 AD3d at 381 [where planking used as scaffolding to hold up air conditioning unit, and planking fell on plaintiff, planking was falling object rather than defective safety device, and triable issue existed as to whether planking was adequately secured before plaintiff caused it to fall; First Department rejected lower court's "res ipsa analysis" that ignored plaintiff's conduct]).

Plaintiff's motion for summary judgment should nevertheless be granted, as plaintiff has made a prima facie showing of entitlement to summary judgment, and Nassau has failed to provide any evidence raising a triable issue of fact. Specifically, plaintiff has submitted evidence, produced by Nassau, that the incident occurred because the "knuckle [was] not [] fully tightened" (Plaintiff's Motion, Exhibit H).

As noted by plaintiff, this case closely parallels the similar case of *Boyle v 42nd St. Dev. Project, Inc.* (38 AD3d 404 [2007]). In *Boyle*, nuts holding up a threaded rod used in constructing a staircase were left loose to allow adjustment of the rod during the installation of other staircase components. While one of the *Boyle* plaintiff's coworkers was aligning such components using a hammer, the threaded rod came free, fell two stories, and struck the *Boyle* plaintiff. The First Department concluded:

It could not be stated more plainly that, if the nuts were not finally tightened, then the rods which the nuts were securing were not completely "secured" within the meaning of section 240 (1). Pursuant to the provisions of section 240 (1) they should have been completely "secured" or some safety device should have been used in the meantime to prevent the "special hazard" of a gravity-related accident such as "being struck by a falling object that was improperly hoisted or inadequately secured."

(*Boyle*, 38 AD3d at 408). Similarly, here the plaintiff has presented evidence that the knuckle holding the guardrail pole into place was not fully tightened, which resulted in the pole coming loose and falling onto the plaintiff.

In opposition, Nassau does not present evidence to the contrary that would establish a triable issue of fact. Instead, Nassau attempts to establish that the subject guardrail pole did not fall while being hoisted or secured. Nassau argues that, if the guardrail pole did not fall while being hoisted or secured, then as a matter of law there could be no Scaffold Law liability. This argument relies on a flawed interpretation of *Narducci v Manhasset Bay Associates* (96 NY2d at 268), which has since been rejected by the Court of Appeals (*Quattrochi*, 44 AD3d at 380 [“the Court made clear that the falling object liability is not limited to cases in which the falling object is being actively hoisted or secured at the time it falls”]), citing *Outar*, 5 NY3d at 732). Summary judgment should therefore be granted to the plaintiff on the Scaffold Law cause of action.

Nassau’s Cross-Motion for Summary Judgment

Nassau has made a prima facie showing of entitlement to summary judgment as to the common law negligence and Labor Law § 200 statutory negligence causes of action. Nassau did not have any supervision or control over the plaintiff’s work, did not proximately cause the subject incident, and could not have been on notice of any dangerous condition in the scaffolding during the time that Eagle was erecting same, and recovery in negligence is therefore impossible here. Summary judgment should be granted dismissing plaintiff’s common law and statutory negligence claims.

Regarding the portion of Nassau’s motion seeking dismissal of the § 241(6) cause of action, Nassau discusses the various Industrial Codes cited by plaintiff, and correctly notes that all are either not concrete enough to trigger § 241(6) (*Reilly*, 303 AD2d at 218), or are

inapplicable to the facts herein.³ As plaintiff proffered no argument against Nassau's prima facie showing of entitlement to summary judgment of the § 241(6) cause of action, summary judgment dismissing that cause of action is appropriate.

The only remaining cause of action is the Labor Law § 240(1) Scaffold Law claim. Regarding this cause of action, Nassau fails to meet its burden to show entitlement to summary judgment. Nassau points out that plaintiff does not show that the guardrail pole fell while being secured, or that the injury proximately resulted from the absence or failure of an enumerated safety device. As explained above, the former is irrelevant, and the latter inaccurate, and summary judgment should be granted to plaintiff.

³ Plaintiff's bill of particulars states the following in its list of allegedly violated statutes and regulations: "[S]pecifically, including but not limited to [sic] 23 [sic] NYCRR §§ 23-1.2(b); 23-1.5(a); 23-4 [sic]; [various sections of subparts 23-4 and 23-9;] 23-1.17; 23-2.6; 23-5.1; and 23-5.13 of the Industrial Code" (Plaintiff's Bill of Particulars § 18). The Court has reviewed these regulations and finds that §§ 23-1.2; 23-1.17; 23-2.6; 23-5.13; and the cited sections of subparts 23-4 and 23-9 do not contain any specifications or requirements applicable to the facts herein. Section 23-1.5 does not contain any concrete specifications upon which a § 241(6) claim may be based (*Sajid v Tribeca North Assoc.*, 20 AD3d 301, 302 [1st Dept 2005] [Section 23-1.5 is a "general safety directive, insufficient as a predicate" for § 241(6) liability]). Section 23-5.1, titled "General Provisions for All Scaffolds," is the only other Industrial Code section cited by plaintiff. None of the several subsections of § 23-5.1 contain any concrete specifications relevant to a case involving a guardrail falling during the course of constructing a scaffold.

For these reasons and upon the foregoing papers, it is therefore,

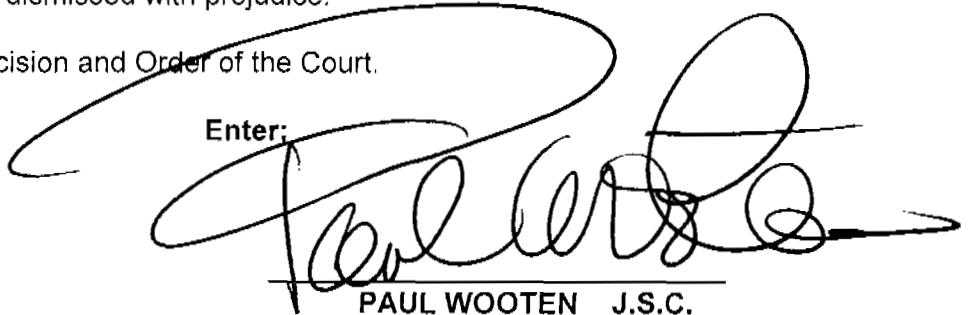
ORDERED that the motion by plaintiff for partial summary judgment on its cause of action alleging a violation of Labor Law § 240(1) is hereby granted; and it is further

ORDERED that the cross-motion by defendant Nassau Energy Corp. f/k/a Nassau District Energy Corp. for summary judgment is denied as to the cause of action alleging a violation of Labor Law § 240(1), and is otherwise granted, and all other causes of action in plaintiff's complaint are hereby dismissed with prejudice.

This constitutes the Decision and Order of the Court.

Dated: June 16, 2011

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE