

Peters v The New School

2011 NY Slip Op 31707(U)

June 13, 2011

Supreme Court, New York County

Docket Number: 106570/2008

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

JOHN PETERS,
Plaintiff,

NYS SUPREME COURT
RECEIVED

Index No.: 106570/08

-against-

JUN 08 2011

Motion Seq.: 001

THE NEW SCHOOL,
Defendant.

MOTION SUPPORT OFFICE

The following papers, numbered 1 to 5 were read on this motion by plaintiff for partial summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
FILED
2,3,4
JUN 27 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

In an action arising from a construction site accident, plaintiff alleges, *inter alia*, negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Plaintiff moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability on his cause of action based on a violation of Labor Law § 240 (1).

BACKGROUND

At the time of the alleged accident, September 26, 2007, plaintiff was employed by Richter + Ratner as a union construction worker at a project located at 66 West 5th Street, New York, New York, premises that are owned by defendant. According to plaintiff, at the time that he was injured, he was in the process of picking up plywood that had been placed on 3 foot by 5 foot planks. While lifting up the plywood with his foreman, the plank that was supporting plaintiff broke, causing him to fall approximately 15 to 20 feet to the ground below.

In his affidavit in support of the instant motion (Motion, Ex. A), plaintiff attests that he was not provided with any safety equipment, including a lifeline, safety net or safety harness.

Plaintiff states that there was one safety harness on the site that had broken sometime before his accident, and that the harness was never repaired or replaced. Plaintiff further avers that, prior to the accident, he had brought the fact that the harness was broken to the attention of his supervisor, but the supervisor did not reply. As a result of the accident, plaintiff claims that he was seriously injured.

Plaintiff's motion includes the affidavit of Stephen Vargas, who was working with plaintiff at the time of the accident, and who confirms that they were not provided with safety harnesses, that the safety harness at the site was broken, and that the beam that was supporting plaintiff broke, causing him to fall to the ground (Motion, Ex. G).

In opposition to the instant motion, defendant has provided the affidavit of Robert Marino (Marino), the project superintendent employed by Richter + Ratner, who attests that safety apparatus was present on the site at the time of plaintiff's accident. Marino further states that proper and functioning safety harnesses and tie-off equipment was present and available to plaintiff, and that he was never told, nor is he aware of anyone else being told, that any safety harness was broken. According to Marino, weekly safety meetings were held, during which the need to use safety harnesses and tie-offs was underscored. As part of his function as the project superintendent, Marino was required to prepare and file a safety report immediately after the accident and, according to that report, there were no witnesses to the occurrence (Marino Aff., Ex. 1). Specifically, Marino avers:

"If plaintiff was not wearing a safety harness on the date of his accident, it was because he chose not to, despite the availability of working and appropriate safety harnesses and lifelines of which plaintiff was well aware from his prior work at the site and his attendance at toolbox meetings where the use and location of safety harnesses and lifelines was discussed" (Marino Aff., ¶ 12).

Defendant proffers two arguments as to why the instant motion should be denied: first,

defendant contends that there are contradictory affidavits regarding the accident and the availability of safety harnesses, which raise questions of fact and credibility that preclude granting summary judgment; and second, plaintiff was a recalcitrant worker who refused to use the proper and functioning safety equipment that was made available to him.

In reply, plaintiff asserts that defendant has failed to establish the viability of a recalcitrant worker defense because it has not shown that plaintiff refused to use the available safety equipment.

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 states, 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 by the Court in *Rocovich v Consolidated Edison Company* (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.

However, courts have interpreted Labor Law § 240 (1) "to provide defendants with a 'recalcitrant worker' defense in a statute that otherwise requires absolute liability. The defense is premised on the principle that 'the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it" [internal citations omitted] (*Jastrzebski v North Shore School District*, 223 AD2d 677, 679 [2d Dept 1996], *affd* 88 NY2d 946 [1996]).

In a Labor Law § 240 (1) action summary judgment should not be granted in an employee's favor, when instructions to use safety equipment were provided before the accident, the employer had safety devices available, and the employer gave the employee extensive instructions on their use (*see Wonderling v CSX Transportation, Inc.*, 11 Misc 3d 1061(A), *3, 2006 NY Slip Op 50337(U) [Sup Ct, Monroe County], *affd* 34 AD3d 1244 [4th Dept 2006]; *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35 [2004]). "[Where] testimony raise[s] triable issues of fact regarding the availability of adequate safety devices and the plaintiff's conduct as a recalcitrant worker who deliberately refused to use such devices, summary judgment should [be] denied' [internal citations omitted]" (*Palacios v Lake Carmel Fire Dept., Inc.*, 15 AD3d 461, 463 [2d Dept 2005]).

"The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since the conflicting affidavits and accident report raise questions of fact and credibility with respect to the availability of adequate safety devices and plaintiff's decision whether or not to use them, it would be error to grant plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim (see *Moracho v Open Door Family Med. Ctr., Inc.*, 74 AD3d 657, 658 [1st Dept 2010]).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability on his cause of action based on a violation of Labor Law § 240 (1) is denied, and it is further,

ORDERED that the parties are directed to appear at a pre-trial/compliance conference on July 13, 2011, at Part 7, 60 Centre Street, New York, New York 10007 at 11:00 a.m., and it is further,

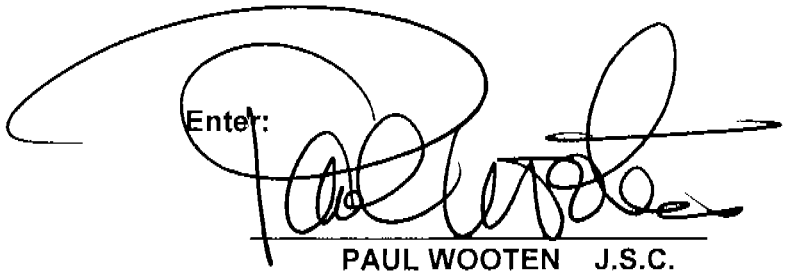
ORDERED that defendant shall serve a copy of this Order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 6-13-11

FILED

JUN 27 2011

Enter: 
PAUL WOOTEN J.S.C.

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Check one:

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REFERENCE