

Aburto v City of New York

2011 NY Slip Op 31735(U)

June 17, 2011

Sup Ct, NY County

Docket Number: 107783/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

MARIO ABURTO,
Plaintiff,

Index No.: 107783/08

Motion Date: 07/15/10

- v -

Motion Seq. No.: 01

THE CITY OF NEW YORK, THE NEW YORK CITY
BOARD OF EDUCATION, THE NEW YORK CITY
DEPARTMENT OF EDUCATION and THE NEW YORK
CITY SCHOOL CONSTRUCTION AUTHORITY,
Defendants.

Motion Cal. No.: _____

FILED

JUN 27 2011

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits - Exhibits _____

3

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability with respect to his causes of action based on violations of Labor Law §§ 240 (1) and 241 (6).

On August 15, 2007, at approximately 6:45 p.m., plaintiff was working at Bard High School Early College (Bard), located at 525 East Houston Street, New York, New York, disassembling a Baker's scaffold. Bard is owned by defendant The City of New York,

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff had been hired as a plasterer as part of a renovation project at Bard. According to plaintiff, he did not construct the scaffold, but was instructed by his foreman about how to dismantle the scaffold, and what tools and equipment to use. At the time of the occurrence, plaintiff was standing on the platform of a mobile scaffold located on the 4th floor of the building, approximately five feet off the ground. Under the direction of his foreman, plaintiff climbed to the top of the scaffold when, moments later, the scaffold collapsed, causing plaintiff to fall to the ground, thereby sustaining serious injuries.

Plaintiff states that he was not provided with any safety devices, such as a harness or other device, that would have prevented him from falling. Further, plaintiff says that the scaffold was only equipped with one safety railing.

In his complaint, plaintiff alleges that defendants violated Labor Law §§ 200, 240 (1), 241 (6) and the following sections of the Industrial Code: 12 NYCRR 23-1.16, 23-1.17, 23-5.1 and 23-5.18.

In opposition to plaintiff's motion, defendants first assert that plaintiff's entire motion is only supported by his unsigned 50-H hearing transcript. However, defendants contend, that testimony is contradicted by the C-2, medical records, and an affidavit of Jeffery Hendrick (Hendrick), a superintendent

employed by WDF, Inc., the general contractor for the project at Bard that also employed plaintiff. Hendrick was an eye witness to plaintiff's accident.

According to Hendrick, when he entered the room in which plaintiff was working, shortly before the accident, he observed that the scaffolding was intact and integrated, that it had all safety devices in place, such as toe boards and safety railings, and that, prior to the day of the occurrence, he had received no complaints about the scaffolding in any way.

Hendrick goes on to aver that he observed plaintiff violently and forcefully shaking one of the top rails that was connected to the scaffold's side frame, and, as plaintiff was doing this, he observed the scaffolding pitching and swaying. Hendrick says that, seconds after he saw plaintiff shaking the rails and while plaintiff was still shaking the rails, the scaffold's side frame appeared to give way, causing the platform on which plaintiff was standing to fall through the scaffolding frame.

Hendrick also states that, according to his knowledge and observation of the scaffolding before the accident, it was absolutely pristine and had never been the subject of a repair, nor had it been taken out of service due to inadequacy or for safety reasons. As part of Hendrick's responsibilities, he prepared the C-2 Workers' Compensation accident report and he

categorically states that it was plaintiff's actions that caused the collapse of the scaffold.

In reply to defendants' opposition, plaintiff has submitted the affidavits of Scott Silberman (Silberman), an engineer, and Fernando Najera (Najera), plaintiff's co-worker who was assisting in the dismantling of the scaffold at the time of the occurrence.

Silberman states that, in his expert opinion, the Baker's scaffold could not have collapsed by removing or shaking the safety rail, and that any violent shaking could only cause the scaffold to tip over, but could not cause one of the vertical frames to break away. Silberman concludes by opining that the cause of the collapse of the scaffold was improper assembly or a structural defect.

In his one-page affidavit, Najera states that no safety lines, lanyards, harnesses or other safety equipment was furnished so as to give plaintiff proper protection, and that railings were also missing from the scaffold.

"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." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006) (internal quotation marks and citation omitted). 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, . . . 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] [internal quotation marks and citations omitted]),

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.

In order for a worker to establish a defendant's liability pursuant to Labor Law § 240 (1), the worker must evidence a statutory violation and proximate cause. The Court has stated

[A]n accident alone does not establish a Labor Law § 240 (1) violation or causation. This Court has repeatedly explained that 'strict' or 'absolute' liability is necessarily contingent on a violation of section 240 (1). ... [W]e noted that 'we have held that the statute establishes absolute liability for a breach which proximately causes an injury'.

Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 289 (2003) (citation omitted).

The failure to provide safety devices is a statutory violation under Labor Law § 240 (1). Id. However, in the instant matter, there are conflicting affidavits with respect to the presence of safety devices and railings. Whereas plaintiff says there was only one safety railing on the scaffold, his co-worker says there were none, and Hendrick, the superintendent who also witnessed the accident, testified that the scaffold was equipped with safety devices and railings. Based on these conflicting affidavits, material questions of fact exist which preclude granting plaintiff's motion for partial summary judgment on the issue of defendants' liability on his Labor Law § 240 (1) cause of action. Sagittarius Broadcasting Corp. v Evergreen Media Corp., 226 AD2d 261 (1st Dept 1996).

Furthermore, questions of fact exist as to whether plaintiff was the proximate cause of his own accident. Silberman,

plaintiff's expert who did not examine the scaffold in question, provided only conclusory opinions that plaintiff's shaking the scaffold could not have caused the accident, which opinions are insufficient to support a motion for summary judgment (DiMitri v Monsouri, 302 AD2d 420 [2d Dept 2003]), and Hendrick's affidavit regarding his eyewitness account contradicts that assertion.

Based on the foregoing, the court concludes that material questions of fact preclude granting plaintiff's motion with respect to his Labor Law § 240 (1) cause of action.

Labor Law § 241 (6) states:

Construction, excavation and demolition work. 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 (1998).

* 8]

In his motion, plaintiff asserts that defendants violated section 23-5.18 (b) of the Industrial Code. 12 NYCRR 23-5.18 (b) states

Safety railings required. The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule).

This regulation has been held to be sufficiently specific to support a claim under Labor Law § 241 (6). Ritzer v. 6 East 43rd Street Corp., 57 AD3d 412 (1st Dept 2008). However, as previously stated, a question of fact exists as to whether the scaffold was equipped with proper safety railings, which precludes granting plaintiff's motion with respect to his Labor Law § 241 (6) cause of action.

In addition to the foregoing, the court notes that the plaintiff has yet to be deposed, and that no discovery has yet taken place. At this point in the proceedings, it would be premature to grant summary judgment on the papers herein submitted. Wilson v. Yemen Realty Corp., 74 AD3d 544 (1st Dept 2010).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of defendants' liability with respect to plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) is denied; and it is further

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ORDERED that the parties are directed to attend a compliance conference on June 14, 2011 in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 2:30 P.M.

This is the decision and order of the court.

Dated: JUN 17 2011

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES

FILED

JUN 27 2011

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