

Martin v S3 Tunnel Constr., Inc.
2011 NY Slip Op 31933(U)
June 30, 2011
Sup Ct, NY County
Docket Number: 101675/09
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Gregory B. Martin and Maria Martin,

INDEX NO. 101015/09

- v -

MOTION DATE 4/24/11

S.E. Turner Contractors, et al,

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 21 were read on this motion to/for an order to show cause

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

PAPERS NUMBERED

1-8

Answering Affidavits — Exhibits _____

9-20

Replying Affidavits _____

21

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

JUL 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 30, 2011

Joan M. Kenney
JOAN M. KENNEY
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 8**

-----X
GREGORY S. MARTIN and MARIA MARTIN,

Plaintiffs,
-against-

DECISION & ORDER
Index No.: 101675/09

S3 TUNNEL CONSTRUCTORS, INC.-A JOINT
VENTURE, SKANSKA USA, CIVIL NORTHEAST,
INC., MTA CAPITAL CONSTRUCTION COMPANY,
CITY OF NEW YORK, METROPOLITAN
TRANSPORTATION AUTHORITY, PAUL BAGONA and
BRENDAN WALSH,
Defendants.

FILED
JUL 14 2011

-----X
JOAN M. KENNEY, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1 - 8
Affirmation in Opposition, Affidavits and Exhibits	9 - 20
Reply Affirmation	21

Upon the foregoing cited papers, the Decision and Order of this Motion is as follows:

In this Labor Law action, plaintiffs seeks partial summary judgment their favor, pursuant to CPLR 3212, on their Labor Law § 240(1) claims against defendants S3 Tunnel Constructors, Inc.-A Joint Venture (S3) and Metropolitan Transportation Authority (MTA).

FACTUAL BACKGROUND

Briefly, it is alleged in the complaint that plaintiff, Gregory S. Martin, was employed by Roadway Contracting, Incorporated (RCI) for the purpose of doing excavation work on the Second Avenue Subway extension project owned and/or being constructed by the named defendants (the project). RCI was a subcontractor for the project and was responsible for re-installing sewer and electrical services which had been removed during various phases of the project. Defendants S3 and

the MTA were the general contractors and/or owners of the project.

Plaintiff was a "timberman" at RCI for this project. As a "timberman," plaintiff basically "put in barricades and braces to hold the earth back, so people can work inside the [excavated] structures that we build; the wooden [sic] structures inside the ground" (see transcript of plaintiff, Gregory S. Martin's January 25, 2010 deposition, pg. 29, lines 12-19; Exhibit "C"). Specifically, on March 22, 2008, plaintiff was the "top man" at street level, while two or three men were in the excavated hole approximately 18 feet deep (the trench). Plaintiff was responsible for bringing the materials needed in the trench area. Plaintiff avers that as part of his assignment, he was responsible for the safety of the men working below in the trench and to that end plaintiff was to make and supply bracing materials for the excavated site. One of those bracing materials is a 12 x 12 inch wood timber, known as a "whalers" used to hold sheathing back.

At the construction site, an excavator machinery was used to clear debris from the work site by placing debris inside of a bucket attached to the excavator machinery that would haul the debris away from the construction site. There is no dispute that plaintiff assisted defendants Brendon Walsh (Mr. Walsh) and Paul Magagna¹ (Mr. Magagna), both employed at the time by defendant S3, place debris inside the bucket attached to the excavator. There is also no dispute that in order to get the the whalers down into the trench area, plaintiff solicited the assistance of Mr. Walsh and Mr. Magagna and obtained permission from them to use the excavator to transport the whalers to the men in the trenches. To this end, after construction debris was placed inside the bucket, plaintiff then attached straps and rigged the whalers to the excavator so that the whalers were right below the bucket

¹Paul Magagna was incorrectly sued as Paul Bogona. An application to amend the caption has not been interposed.

(Martin transcript at page 54, lines 19-25). Plaintiff also testified at his deposition that he believed he attached a "tag line" to the whalers to keep it from swinging while the excavator machinery was in motion (Martin transcript at page 53, lines 10 - 24).

Plaintiff claims that on March 22, 2008, he was walking alongside the excavator being operated by defendant, Mr. Walsh, when the excavator hit an "uneven pavement" and a piece of plywood debris that plaintiff claims was negligently placed on the bucket of the excavator by defendant Mr. Magagna, fell from an elevated height and struck the plaintiff, Gregory Martin, on his head causing injuries (the accident).

Plaintiff was rendered unconscious for an unknown period of time and while at the construction site, plaintiff received an ice pack for his neck. He claims to have had neck and back pain immediately after the accident (Martin transcript at page 74, lines 10-17) but emergency services were not called for at the construction site. After the accident, plaintiff stayed at the construction site for about 20 minutes before deciding to drive home. As plaintiff was driving home, he had to pull over after feeling numbness on his right arm and shortness of breath. Emergency services were then called and they arrived to assist plaintiff.

Defendants, S3 and the MTA have a different version of how the accident occurred. First, defendants assert that no one actually witnessed a piece of plywood fall on plaintiff's head, insinuating that plaintiff was never struck by the fallen plywood debris. Defendants also assert that a "tag line," used to control a swinging load (Walsh transcript at page 49, lines 1-3), was not used on the particular hoist which is the subject of this litigation (Walsh transcript at page 49, lines 4-8; page 70, lines 7-9), despite the fact that tag lines were available (Walsh transcript at page 59, lines 22-24). Mr. Magagna also testified that "tag lines" were used on this project, but could not recall

whether or not plaintiff used tag lines regarding the hoist in question (Magagna transcript at page 24, lines 24-25; and page 25, lines 1-8). Lastly, defendants claims that plaintiff himself placed the fallen piece of plywood debris on the bucket of the excavator and was therefore the sole cause of his own accident.

Plaintiff contends, however, that the particular plywood debris which fell on him was specifically removed by him after he saw how big it was. He allegedly advised defendants that he would cut the plywood into smaller pieces and then reloaded same onto the bucket. Plaintiff claims, though, that he never got around to reloading the piece of plywood and that instead defendant, Mr. Magagna reloaded the piece of plywood debris onto the bucket without ever cutting it into smaller pieces.

The MTA's own Investigation Report (annexed as Exhibit "A" to the papers in opposition), states that the accident occurred because: (1) the whalers were lifted with construction debris in the bucket; (2) a tag line was not used to keep plaintiff away from the load/whalers; and (3) the strap used to secure the whalers to the excavator was too long. Additionally, defendant S3's incident Investigation Report concluded that the root cause of the accident was caused because: (1) Mr. Walsh should have first dumped the debris out of the bucket prior to making the lift with the whalers; (2) plaintiff should have used a shorter strap to secure the whalers to the excavator machinery; and (3) plaintiff should have used a tag line and positioned himself in front of the load to avoid being beneath the bucket of the excavator (see Exhibit "B" to the papers in opposition).

ARGUMENTS

Plaintiffs contends that summary judgment must be granted on their Labor Law § 240(1) claims against defendants, S3 and MTA, because as a direct consequence of the application of the

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force of gravity, plaintiff was injured when the plywood debris dislodged from the excavator's bucket, falling and striking plaintiff on his head and a safety device failed to prevent plaintiff from being injured.

Defendants argue that the instant application must be denied because: (1) factual disputes exists as to whether plaintiff was the sole cause of his own accident since he was the one who loaded the fallen piece of plywood onto the bucket; (2) plaintiff failed to use a "tag line," as instructed to do so in prior meetings, which was a safety device used to keep workers a safe distance away from the load bearing portion of the excavator; and (3) there are factual disputes preventing the granting of summary judgment at this juncture of the litigation.

DISCUSSION

"It has long been settled that 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'" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; see also *Penava Mechanical Corp. v Afgo Mechanical Services*, 71 AD3d 493, 496 [1st Dept 2010] [proponent of motion "bears the initial burden of coming forward with evidence showing prima facie entitlement to judgment as a matter of law, and, unless that burden is met, the opponent need not come forward with any evidence at all"]). Once the movant has met its burden, "the party opposing such motion must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]) 'by producing evidentiary proof in

admissible form" (*Meridian Management Corp.*, 70 AD3d at 510, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens*, 70 AD3d 563, 565 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility [interior citations omitted]" (*Meridian Management Corp.*, 70 AD3d at 510-511). "When there is any doubt as to the existence of triable issues, summary judgment should not be granted" (*Udoh*, 70 AD3d at 565).

Labor Law § 240 (1)

Labor Law § 240 (1) entitled, "Scaffolding and other devices for use of employees," provides, in relevant 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). While "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003] [internal quotation marks and citation omitted]), the statute "is to be liberally construed" to accomplish its purpose of better protecting "work[ers]

engaged in certain dangerous employments" (*Sherman v Babylon Recycling Ctr.*, 218 AD2d 631, 631 [1st Dept 1995] [internal quotation marks and citation omitted]).

If the worker is found to have been engaged in an activity protected by the statute, the analysis shifts to whether the accident was gravity-related, such that the protections of the statute are triggered. While Labor Law § 240 (1) claims are typically grouped into "falling worker" and "falling object" cases, "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 elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). "The statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices" (*Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]), and "is not applicable where the injury sustained resulted from other types of hazards" (*Georgopoulos v Gertz Plaza*, 13 AD3d 478, 479 [2d Dept 2004]).

In the case before this Court, the parties do not dispute that the work being performed by plaintiff was within the ambit of Labor Law § 240(1) and that the incident in question was a "gravity-related" accident. It is also noted that at the time of the accident, the piece of plywood debris that struck the plaintiff, fell from an elevated height within the meaning of the applicable Labor Law statute.

With respect to what constitutes adequate protection from falling objects, the Court of Appeals has held that liability arises "only when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]) but, liability "is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciamè Constr. Corp.*, 11 NY3d 757, 758-759 [2008]; see also *Stawski*

v Pasternack, Popish & Reif, 54 AD3d 619 [1st Dept 2008]). However, where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (see *Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]; *Montgomery v Federal Express Corporation*, 4 NY3d 805, 806 [2005]; and *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; and *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d at 290).

"...[T]he owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries" (*id.* at 554; *Gittleson v Cool Wind Ventilation Corporation*, 46 AD3d 855, 856 [2d Dept 2007]). "These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*id.*; *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d at 856). However, "[w]hen the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

Defendants unsuccessfully seek to create a factual dispute as to the existence of the accident itself, claiming that no one actually saw the piece of plywood debris fall on plaintiff's head. Defendant, MTA's own supervisor's accident investigation report however, (Exhibit "A" to the papers in opposition) states that what occurred was that a "piece of plywood came out of the bucket

and *struck the [plaintiff] on the top of his head* [emphasis added]. Moreover, nothing in the deposition transcripts submitted by the parties, in support of or in opposition to the motion relief sought herein, substantiates a finding that there was ever a dispute as to the fact that a piece of plywood fell on plaintiff's head (see also, transcript of defendant, Mr. Magagna's May 6, 2010 deposition at page 22, lines 7-20; Exhibit "E" to moving papers).

In this Court's opinion, it is of little consequence who put the piece of plywood debris in the bucket in determining the applicability of Labor Law § 240(1) to this case. The fact is that this type of material, plywood pieces, was debris that could be placed inside of the bucket and plaintiff, Mr. Walsh and Mr. Magagna did place these types of debris inside excavator's bucket. Whether or not the piece of plywood in question was too big to place inside the excavator bucket has no bearing on whether or not Labor Law § 240 (1), is applicable, although this factual dispute may be a factor in determining any general negligence claims asserted in the complaint. When analyzing the applicability of Labor Law §240(1), it is "the absence of a safety device adequately constructed, placed, and operated" that is relevant and the "contributory negligence by the injured worker is of no consequence," (see *Mary Jane DePalma, Appellant, v. Metropolitan Transportation Authority et al.*, 304 A.D.2d 461 [1st Dept 2003]). In sum, the relevant question in this case is what securing devices, if any, were in place to prevent the type of accident that occurred here: to wit, to prevent debris from dislodging from the excavator bucket and falling on a worker, causing injuries. The answer, none. There was no securing device in place that would have prevented the piece of plywood debris from falling out of the bucket. Moreover, although use of a tag line may have spared plaintiff from injury by being a safe distance from the excavator machinery, recovery pursuant to Labor Law § 240(1) is not precluded since there was no safety device in place to shield plaintiff from this type

of gravity related injury (see, *Lopez v Boston Properties, Inc. Et al.*, 2007 NY Slip Op 5368 [1st Dept 2006]).

Here, Mr. Walsh, who operated the excavator machinery, testified at his deposition on March 19, 2010, that there was no strap or mesh or anything used to cover the bucket to keep the debris materials from tumbling out of the excavator bucket and falling out once the machine was engaged in moving (see transcript at page 29, line 25; and page 30, lines 1-7). Mr. Magagna also testified at his deposition that discussions were had between the workers wherein it was opined that workers are suppose to be more careful when they have debris in the bucket, because as the bucket is being elevated, debris could fall out of the bucket (see transcript at page 19, lines 17 - 20). It is clear, then, that there was nothing securing the debris from falling out of the excavator bucket which may account for defendants' investigative findings that the bucket should have been emptied out before using the excavator to transport the whalers (see Exhibits "A" and "B" of papers in opposition).

Although there may be a factual dispute as to whether or not a "tag line" was used to control the swinging of the whalers, there was no discussion as to whether or not a "tag line" would have protected workers at the site and prevented the plywood debris from dislodging from the bucket - especially where the terrain was uneven and caused the excavation machinery to move forward in an unbalanced way. The fact remains that the bucket was not properly secured and the tag line could not have prevented the contents of the bucket from falling out under the circumstances.

Any arguments raised concerning the length of the straps used to secure the whalers to the excavator machinery is unavailing and falls short of defeating the within summary judgment motion. The claim, essentially, is that a shorter strap would have helped keep the bucket more balanced/leveled and/or kept the bucket at a certain angel. However, the use of the strap in this case

was solely used as a securing device to hold the whalers in place and there is no allegation that the whalers themselves dislodged and caused plaintiff's injuries. The fact remains that what caused the excavator machinery to become unbalanced was that the operator drove over an "uneven pavement," causing the unsecured plywood piece of debris to fall out of the bucket, striking the plaintiff. Accordingly, it is

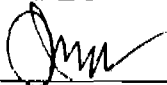
ORDERED that plaintiff's motion for partial summary judgment on their Labor Law § 240(1) claims against defendants S3 Tunnel Constructors, Inc.-A Joint Venture and Metropolitan Transportation Authority, is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment on the issue of liability with respect to the Labor Law § 240(1) claims in favor of plaintiffs and against defendants S3 Tunnel Constructors, Inc.-A Joint Venture and Metropolitan Transportation Authority, and the award of damages, if any, is to be determined at the trial of this action; and it is further

ORDERED that the parties proceed to mediation.

Dated: June 30, 2011

FILED
JUL 14 2011
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


Hon. Joan M. Kenney
J.S.C.

COURT OF COMMON PLEAS

IN SENATE CHAMBERS

DOVER, DE. 1968

Walter J. Blinn

Attorney General

State of Delaware

vs.

James A. ...

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

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Gregory S. Martin and Maria Martin,

INDEX NO. 101075/09

- v -

S3 Tunnel Constructors, et al,

MOTION DATE 4/22/11

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 21 were read on this motion to/for § 87(2)(b) on LL § 2100(1) claim

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Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-8</u>
<u>9-20</u>
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Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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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):