

Torres v Dormitory Auth. of the State of N.Y.

2011 NY Slip Op 32515(U)

September 21, 2011

Sup Ct, NY County

Docket Number: 106246/08

Judge: Louis B. York

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

LOUIS B. YORP

PRESENT:

PART 2

Index Number : 106246/2008

TORRES, ERIC

INDEX NO. _____

vs

DORMITORY AUTHORITY

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~is granted as follows~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

SEP 23 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/21/11

[Signature]
LOUIS B. YORP 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 2

-----x

ERIC TORRES and MELISSA TORRES,

Plaintiffs,

Index No.: 106246/08

-against-

DECISION

THE DORMITORY AUTHORITY OF THE STATE OF
NEW YORK and LIRO PROGRAM & CONSTRUCTION
MANAGEMENT a/k/a LIRO ENGINEERS, INC.,

Defendants.

-----x

LOUIS B. YORK, J.:

FILED

SEP 23 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' causes of action based on common-law negligence and violations of Labor Law §§ 200 and 240 (1). Plaintiffs cross-move, pursuant to CPLR 3212, for summary judgment on the complaint, which alleges causes of action based on common-law negligence, violations of Labor Law §§ 200, 240 (1) and 241 (6), and a derivative action on behalf of Melissa Torres.

BACKGROUND

According to the bill of particulars, Eric Torres (Torres) was injured when he was struck by an allegedly inadequately hoisted and unsecured pipe while he was working at a construction site. At the time of the occurrence, Torres asserts that he was working in a confined space that was cluttered with dirt, debris

and refuse. Defendant Liro Program & Construction Management a/k/a Liro Engineers, Inc. (Liro) was the construction manager for the project, which was the gut rehabilitation of a building in order to create a new school, and Torres was employed by one of the prime contractors, Framan Mechanical, the HVAC contractor. Defendant the Dormitory Authority of the State of New York (Dormitory Authority) is a municipal corporation and the owner of the premises.

At his examination before trial, Torres testified that, at the time of the accident, he was in the process of welding together a ten foot section of 4-inch carbon steel piping to a pipe run of nearly 100 feet, which was sitting upon steel arms that came off the concrete wall and stuck out approximately 1½ feet into the tunnel area where he was working. Torres EBT, at 18-19. Torres stated that he was

"welding the pipe, getting ready to weld and was - I'm welding, my shield is down, I heard a very, extremely loud noise. And I flipped up my shield to see what it was, and I saw the pipe falling down off the arm; the steel supports coming off the wall, the pipe that I was working on. So I ran to get out of the way."

Torres averred that the pipes were not secured to the steel brackets, but were simply resting atop them. Torres also said that, besides his face shield, he was wearing a protective jacket and insulated gloves, and that he had no idea what caused the pipe to fall off the steel supports. Torres further testified

that the pipe that struck him was approximately 10 feet long.

According to Torres, his hand was struck as he was trying to get away from the falling pipe and, but for the inadequate lighting and debris on the floor, which caused him to trip, he would have avoided the falling pipe. Torres said that he had complained about the poor lighting and the debris the day before the accident. Torres also stated that he is six feet tall.

Torres' assertions regarding the poor lighting and debris on the floor of the work area is confirmed by an affidavit of Gregory Michaelski, a co-worker who was never deposed, who also affirmed that he had made complaints about these work conditions prior to the date of Torres' accident.

Pursuant to the contract between Liro and the Dormitory Authority, Liro had the responsibility to maintain and supervise safety precautions and programs at the job site, but the contract does not provide that Liro had the authority to exercise supervision, direction or control over the means and methods used by the various contractors in the performance of their work. In addition, the contract states:

"The relationship created by this Contract between the OWNER and CONSTRUCTION MANAGER is one of independent CONSTRUCTION MANAGER and it is in no way to be construed as creating an agency relationship between the OWNER and the CONSTRUCTION MANAGER nor is it construed as, in any way or under any circumstances, creating or appointing the CONSTRUCTION MANAGER as an agent of the OWNER for any purpose whatsoever.

* * *

The CONSTRUCTION MANAGER shall, at all times, take

every precaution against injuries to persons or damage to property and for the safety of persons engaged in the performance of the work on the jobsite. The CONSTRUCTION MANAGER shall establish and maintain, at all times, safety procedures in connection with the WORK as required by the current New York Labor Law and Regulations of the Occupational Safety and Health Act (O.S.H.A.).

* * *

The CONSTRUCTION MANAGER shall make daily observations of the safety practices and subcontractor work activities on the jobsite and check their compliance with municipal, state and federal safety requirements. If a safety violation is found, the CONSTRUCTION MANAGER shall give the prime contractor or subcontractor immediate written notice of the deficiency and require correction of the safety violation before work continues. The CONSTRUCTION MANAGER shall conduct weekly safety meetings with all prime contractors and their subcontractors to review compliance with the safety precautions required by their respective contracts."

John A. Zurita (Zurita), the Dormitory Authority's field representative who was onsite on a daily basis, provided an affidavit in which he affirms that the Dormitory Authority did not assume or exercise the responsibility to maintain and/or supervise safety precautions and programs in connection with the work of the various on-site contractors at the project, nor did the Dormitory Authority have the authority to exercise supervision, direction or control over the means and/or methods utilized by the various contractors. ~~Manoj John~~ Further, Zurita states that the Dormitory Authority was not made aware of poor illumination in the area in which Torres was working, or that there was garbage and debris in that area.

Manoj John (John), the assistant project manager for Torres'

employer, was deposed in this matter. John testified that, on the day of the accident, Torres' partner was late for work and John instructed Torres to do the preparation work for that day's job until his partner arrived. John said that the work that Torres was doing was a two-man job, and that he would never have just one person do it alone. According to John, the next time that he saw Torres was at approximately 9:30 A.M., when Torres came to his office to report that a pipe had fallen on his hand and that his, Torres', right hand was injured. John further testified that Torres had never complained about inadequate lighting or debris in the tunnel where he was working. John said that, after the accident, he went to view the tunnel where Torres was working and that he did not see any debris on the floor and he stated that the lighting was perfect.

Sean Bronson, a consultant for Liro, was also deposed in this matter and testified that he went to the accident location several days after the accident to take photographs. Bronson described the tunnel where Torres was working as about 6½ feet tall, square in shape, and approximately 150 feet long, with pipes attached to brackets on the walls, running the entire perimeter of the tunnel. Bronson also stated that the steel brackets upon which the pipes were placed were installed by B&N Welding and were installed prior to Framan commencing any work at the site.

According to Bronson, the laborers were responsible for debris removal, and they were to pile the debris from their areas for removal by Glenman Construction (Glenman). However, Bronson stated that Glenman did not always remove the debris in a timely manner.

Christopher Wuest, the project manager for the Dormitory Authority, was deposed in this matter and testified that the Dormitory Authority hired a site safety management company, Total Safety, which employed Thomas McBride as its site safety manager. Wuest stated that part of McBride's duties was to walk the site and check for debris, tripping hazards and lighting.

James Gaspari, an assistant project manager for Liro, was also deposed and confirmed that Total Safety was engaged as the Dormitory Authority's safety consultant and that McBride was employed by Total Safety. Gaspari averred that the steel brackets upon which the pipes were placed were installed by B&N Welding, another subcontractor for the project.

The accident report that was filed in connection with this incident indicates that, while preparing to weld the pipe to support a section of the tunnel, Torres dropped the pipe on his hand.

It is defendants' contention that Torres cannot maintain an action based on a violation of Labor Law § 240 (1) because the pipe that struck Torres was neither being hoisted nor secured at

the time of the accident. Further, defendants argue that the pipe was not substantially elevated so as to sustain a Labor Law § 240 (1) claim. At oral argument on this motion, it was ascertained that Torres was kneeling at the time that he was hit by the pipe.

With respect to Torres' common-law negligence and Labor Law § 200 causes of action, defendants assert that no recovery can be had as against the Dormitory Authority because it had no notice of the allegedly unsafe manner in which the work was being performed, and no recovery can be had as against Liro, since Liro did not supervise, direct or control the work that allegedly caused the accident. Further, defendants state that they had no notice of any unsafe condition in the area in which Torres was working.

In opposition to the instant motion, and in support of his cross motion, Torres argues that, pursuant to Labor Law § 240 (1), the object that falls due to the force of gravity does not have to be in the process of being hoisted or secured at the time of the fall, but simply must be shown to have been improperly hoisted or secured. Torres also maintains that, but for the debris on the floor and the poor lighting, he would have been able to avoid injury, and that defendants' failure to remedy those unsafe work conditions render them liable, pursuant to common-law negligence and Labor Law § 200.

In reply, defendants state that a permanently installed wall bracket does not present a foreseeable elevation risk so as to render them liable for Torres' injuries pursuant to Labor Law § 240 (1). Moreover, defendants maintain that there was no significant elevation differential between Torres and the pipe, thereby negating any potential liability under Labor Law § 240 (1).

Lastly, defendants claim that plaintiffs' assertions of negligence amount to no more than mere speculation unsupported by any actual evidence.

The court notes that neither party has provided any argument with respect to the cause of action based on an alleged violation of Labor Law § 241 (6).

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. "In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that this violation was a proximate

cause of his injuries." *Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 (2d Dept 1998).

For section 240 (1) of the Labor Law to apply,

"a plaintiff must show more than simply that an object fell causing injury to a worker. A 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).

Further, a worker claiming damages for injuries resulting from a falling object, pursuant to Labor Law § 240 (1), must demonstrate that he or she was positioned below the level where the falling object was hoisted or secured. *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 (1993).

"'[F]alling object' liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured.' Rather, liability may be imposed where an object or material that fell, causing injury, was 'a load that required securing for the purposes of the undertaking at the time it fell' [internal citations omitted]."

Kyu-To v Triangle Equities, LLC, 84 AD3d 1058, 1059-1060 (2d Dept 2011).

In the case at bar, it is uncontroverted that the pipe that fell was merely resting on the steel bracket that was attached to the wall; however a question exists as to whether the pipe needed to be secured at that time or whether the pipe was in the process of being welded for later attachment.

In *Novak v Del Savio* (64 AD3d 636 [2d Dept 2009]), the Court

held that a pipe that fell, injuring a worker, did not give rise to a claim under Labor Law § 240 (1) because the pipe did not need to be secured for the purpose of affixing it to the ceiling. In the case at bar, Torres testified that the pipe that fell was the one that he was working on, welding another section to it. The facts presented do not indicate whether the pipe that fell was in what would be its eventual position, which might require securing, or whether this was just one section of the total that would not be secured until all the parts were welded together. Hence, a triable issue of fact precludes summary judgment on the Labor Law § 240 (1) cause of action, inasmuch as it is uncertain whether the pipe needed to be secured during assembly.

Quattrocchi v F.J. Sciame Construction Corp., 11 NY3d 757 (2008).

Defendants also argue that Labor Law § 240 (1) does not apply because there was no significant elevation differential between Torres and the pipe. It is noted that, from the evidence presented, Torres is six feet tall, the height of the tunnel was approximately 6½ feet high, and the pipe was four inches in diameter and 10 feet long. At the time of the occurrence, Torres had been kneeling down but, when he heard the noise, he attempted to run away. Therefore, Torres and the pipe were at the same elevation level and, at most, the pipe fell only a few feet.

Plaintiffs argue that the amount of the differential is immaterial, provided that the injury resulted from an object

falling due to the force of gravity.

In *Runner v New York Stock Exchange, Inc.* (13 NY3d 599, 604 [2009]), the Court of Appeals held that the appropriate inquiry in falling object cases is whether the "harm flows directly from the application of the force of gravity to the object." However, in that case, the object that fell a few feet weighed approximately 800 pounds, and the Court of Appeals noted that the distance that it fell could not be considered de minimis because of the extreme weight of the object.

Case law holds that a cause of action pursuant to Labor Law § 240 (1) will not lie where the elevation between the object and the worker is de minimis (see e.g. *Melo v Consolidated Edison Company of New York, Inc.*, 92 NY2d 909 [1998]), and since Torres and the pipe were at the same level at the time that the pipe fell, the incident is not necessarily attributable to an elevation differential. *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 71 AD3d 538 (1st Dept 2010) (worker hit in the head by two unsecured pipes that were standing against a wall at the same level as the worker).

However, in other cases in which the falling object fell a relatively short distance, the weight of the object was also a factor considered by the courts in determining Labor Law § 240 (1) liability. *Harris v City of New York*, 83 AD3d 104 (1st Dept 2011) (a one-ton slab of concrete fell a few feet onto the 4x4 on

which the worker was perched, causing him to be thrown to the ground).

In the case at bar, no evidence has been presented with respect to the weight of the pipe that struck Torres. Therefore, it cannot be determined from the facts presented whether the incident comes within the purview of Labor Law § 240 (1).

The court notes that the cases relied upon by plaintiffs for the proposition that the elevation differential is irrelevant concern falling persons, not falling objects, and are, therefore, distinguishable (*Gordon v Eastern Railway Supply, Inc.* 82 NY2d 555 [1993]; *Gettys v Port Authority of New York and New Jersey*, 248 AD2d 226 [1st Dept 1998]).

Based on the foregoing, summary judgment cannot be granted to either party on the Labor Law § 240 (1) cause of action.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. See e.g. *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 (2d Dept 2007).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident, and, under such theory, the defendant's supervision and control over the work being performed is irrelevant. See *Murphy v Columbia University*, 4 AD3d 200 (1st Dept 2004). Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. See *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009). General supervision over the job site is insufficient to render an owner or general contractor liable under Labor Law § 200. See *Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347 (1st Dept 2006).

In the instant matter, plaintiffs argue that a contributing factor in Torres' injuries was the dangerous condition of the tunnel where Torres was working, specifically, the poor lighting and debris on the floor, which hindered Torres' attempt to get out of the way of the falling pipe.

General awareness that a dangerous condition may be present is insufficient to hold an owner or general contractor liable. See *Gordon v American Museum of Natural History*, 67 NY2d 836

(1986). Further, any notice of a dangerous condition must call attention to the specific defect or hazardous condition and its specific location. *Mitchell v New York University*, 12 AD3d 200 (1st Dept 2004).

The evidence presented provides conflicting testimony as to whether defendants had actual or constructive knowledge of the allegedly hazardous condition of the tunnel where the accident took place.

Torres and Michaelski state that the tunnel presented a dangerous condition, and that they complained about such conditions prior to the accident. Conversely, Zurita and John state that defendants had no prior knowledge of such conditions and that no complaints about such conditions were made prior to the date of the accident.

Conflicting testimony present questions of credibility, and questions of credibility are to be resolved by the trier of fact, not the court on a summary judgment motion. *Venetal v City of New York*, 21 AD3d 1087 (2d Dept 2005); *Greco v Posillico*, 290 AD2d 532 (2d Dept 2002). Therefore, the court cannot grant either party summary judgment on the causes of action based on common-law negligence and Labor Law § 200.

Lastly, even though plaintiffs request summary judgment on the complaint, neither side has presented any argument with respect to the cause of action based on a violation of Labor Law

§ 241 (6), and so the court cannot grant this branch of plaintiffs' cross motion.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment on the causes of action based on common-law negligence and violations of Labor Law §§ 200 and 240 (1) is denied; and it is further

ORDERED that plaintiffs' cross motion for summary judgment on the complaint is denied.

Dated: 9/21/11

ENTER:

LY
Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

FILED

SEP 23 2011

**NEW YORK
COUNTY CLERK'S OFFICE**