

Bray v Matias

2011 NY Slip Op 33337(U)

November 28, 2011

Supreme Court, Richmond County

Docket Number: 102836/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 102836/09
Motion No.: 2 & 3

WILLIAM BRAY

Plaintiff

against

JOSÉ MATIAS

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

JOSÉ MATIAS

Third-Party Plaintiff

against

KEVIN WAGNER

Third-Party Defendant

The following items were considered in the review of the following motion and cross-motion for summary judgment

| <u>Papers</u> | <u>Numbered</u> |
|--|--------------------|
| Notice of Motion and Affidavits Annexed | 1 |
| Opposition to Motion and Cross-motion for Summary Judgment | 2 |
| Answering Affidavits | 3 & 4 |
| Replying Affidavits | 5 |
| Exhibits | Attached to Papers |

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-motion is as follows:

The defendant, José Matias, moves for summary judgment dismissing the complaint of the plaintiff William Bray. The defendant's motion is denied. The plaintiff, William Bray, cross-moves for partial summary judgment against the defendant alleging *per se* liability based upon the defendant's violation of Labor Law § 240 (1). The plaintiff's cross-motion for partial summary judgment is denied.

Facts

The defendant was the owner of structures located at 418 Port Richmond Avenue, Staten Island, New York 10302. The structures consisted of a mixed-use commercial-residential building, with garage space for two cars detached from the main building. The third-party defendant, Kevin Wagner, sought to convert the garage into a commercial enterprise. For that purpose, Mr. Wagner engaged the non-party Mr. Juan Cuevas to refurbish, renovate, reconstruct, alter and paint the interior of the garage. In turn, Mr. Cuevas hired the plaintiff, William Bray, to assist him. The plaintiff who was painting a portion of the garage, says he fell from the aluminum A-frame ladder which was provided by José Matias, the defendant-owner.

The ladder was in the garage when the plaintiff arrived for work. The defendant, who owns the ladder, stated that he did not personally provide the ladder to the plaintiff. While the defendant claims he was aware that Kevin Wagner was performing work in the garage, he had no knowledge that anyone else, to include the plaintiff, William Bray, was working in the garage. The measured height of the ladder and whether the ladder's feet were covered with a non-slip coating are not specified. The ladder has been estimated to be more than six feet in height and less than twelve feet, but it is not stated whether this is in the opened or unopened position. Before the incident, the plaintiff noted no defects to the A-frame ladder upon opening it. It is not stated whether the ladder was inspected after the incident.

An architect retained by the defendant took measurements of the garage. The height of the ceiling above the floor was measured and increased from a minimum of eight feet two inches to a maximum of eleven feet. The floor of the garage is concrete, and has a sloping gradient of one-half to five-eighths inch per foot.

The sole person present at the time of the incident was the plaintiff, who relates he had been painting for five hours when he fell. For three hours before the fall, the plaintiff had been using the A-frame ladder to paint. The plaintiff has alleged that the ladder was shaking when he was

working on it. At the time the plaintiff fell, he states the ladder slipped on the sloping floor. The plaintiff fell on his back and his leg was injured, suffering a comminuted fracture.

Discussion

The plaintiff's action is founded upon alleged violations of New York Labor Law § 240. The plaintiff alleges that the defendant was negligent in that the equipment provided for the plaintiff's work at a height differential was not safe and secure. The plaintiff moves for summary judgment against the defendant on the matter of violation of Labor Law § 240. The defendant cross-moves for partial summary judgment against the plaintiff on the matter of violation of Labor Law § 240.

Labor Law § 200 provides that: “[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.”¹ Labor Law § 240 specifically applies to accidents that occur when there is a disparity of height between the work required and the base from which the workman stands. “All contractors and owners and their agents ... in ... painting ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, ... ladders... which shall be so constructed, placed and operated as to give proper protection to a person so employed.”² In support of his motion for partial summary judgment, the plaintiff states that a fall from an unsecured and improperly placed ladder, where no other protective devices were supplied imposes absolute liability. However, an accident does not establish a violation of Labor Law § 240, but, instead, violation establishes strict or absolute liability for an accident.³ Therefore, to invoke Labor Law § 240 as strict or absolute liability, the plaintiff must show there is a violation of that law.

¹Labor Law § 200 (1).

²Labor Law § 240 (1).

³*Blake v. Neighborhood Hous. Serv. of N.Y. City, Inc.*, 1 NY 3d 280, 289 [2003].

The plaintiff was provided with a type of ladder known as an A-frame ladder or a trestle ladder.⁴ Such ladders may be used for interior painting at elevations less than twenty feet in height.⁵ The maximum ceiling height of the garage was measured at eleven feet by the defendant's expert, and estimated at twelve feet by the plaintiff. Where the working platform is ten feet or more above the floor, a ladder must be braced.⁶ Here, the ceiling height determines that the height of the plaintiff's working platform must have been less than ten feet, and therefore no bracing was required based solely on the working elevation. Ladders with spreading bases must be equipped with properly locking type spreaders.⁷ There is no documentation or allegation that the spreaders on the ladder in question were defective.

The main building located at 418 Port Richmond Avenue, Staten Island, New York 10302, is partly used for commercial purposes, but two of its units are residential. The structures being painted by the plaintiff were garages and the floors of private garages must be made of concrete.⁸ For motor vehicle storage facilities on the premises of a new multiple residence dwelling, the floor must be sloped to a floor drain,⁹ but no angle or gradient is actually specified for the main section of flooring of the parking area itself. The defendant's expert asserts that the slope of the floor was proper for the structure. None the less, all ladder footing must be firm, and slippery and insecure surfaces are not suitable as ladder footing.¹⁰ When required, an A-frame ladder must be either secured, or its feet must be provided with nonskid devices to insure it remains

⁴12 NYCRR § 23-1.4 (56).

⁵12 NYCRR § 23-5.16 (a) and (d).

⁶12 NYCRR § 23-5.16 (b).

⁷12 NYCRR 23-1.21 (8)..

⁸New York City Administrative Code [Building Code] § 27-477.

⁹9 NYCRR § 1506.1 ©.

¹⁰12 NYCRR 23-1.21 (4) (ii).

stable and erect.¹¹ Without either protection, a ladder provided may fail to protect from working at a height and may violate Labor Law § 240.¹²

Owners and contractors are required to provide protective devices when there is a significant risk inherent in a particular task because of the relative elevation at which the task must be performed.¹³ Given particular circumstances, a two-foot working height by itself may not be a significant risk or dangerous circumstance for a worker for which Labor Law § 240 was intended.¹⁴ The injury must be due either to a failure to provide, or providing inadequate protective devices required for safely working at an elevation from the worker's base level.¹⁵ Merely ascending or descending from a vehicle used at a construction site did not fall within the purview of Labor Law § 240.¹⁶ Therefore, it is not only a specific measured height that determines whether it is a significant risk. Here, the plaintiff was actively engaged in the task assigned for which he was sent up the ladder. The fall was adequate to cause a comminuted fracture where fragments of fractured bone penetrated muscle and were exposed through broken skin. Consequently, the risk of falling while doing his assigned task must have been the kind of significant risk envisioned by Labor Law § 240.

Here, the plaintiff alleges the ladder slipped on the sloping floor of the garage. The defendant's expert architect states he is experienced in testing for the coefficient of friction for floor surfaces. However, the defendant's expert has not stated he tested the floor and the feet of

¹¹*McNair v. Salamon*, 199 AD 2d 170, 171 [1st Dept 1993].

¹²*Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 AD 3d 616, 618 [2d Dept 2008].

¹³*Abreo v. URS Greiner Woodward Clyde*, 60 AD 3d 878, 880 [2d Dept 2009].

¹⁴*Bray v. State of New York*, 28 AD 3d 583, 584 [2d Dept 2007].

¹⁵*Toefer v. Long Island R.R.*, 4 NY 3d 399, 408 [2005].

¹⁶*Toefer v. Long Island R.R.*, 4 NY 3d at 408-409; see *Bond v. York Hunter Construction, Inc.*, 95 NY 2d 883, 884-885 [2000]; and *Dilluvio v. City of New York*, 95 NY 2d 928, 929 [2000].

the ladder to determine the coefficient of friction, nor has he calculated the forces and angles that might have been involved in the plaintiff's fall. Therefore, there is no documentation that forces of friction of the supplied ladder adequately opposed those forces applied by the plaintiff's work that would have caused the footing of the ladder to slip. Nonetheless, the defendant's expert opines that the plaintiff's fall was not due to a problem with the ladder's security and stability against the surface of the floor.

In opposition, the defendant asserts that the ladder must have been proper since the plaintiff's inspection did not reveal any defects when he inspected the ladder before use. However, the absence of visual defects does not guarantee that the ladder was proper for the surface upon which it was to be used, and the slope of the floor is not a sole determinant for whether an A-frame ladder might be subject to forces that would cause side-ways slippage of the ladder's feet when it is in use and shaking.

To successfully move for summary judgment when there is a fall from a ladder, a defendant must raise the issue of fact that the plaintiff's conduct was the sole proximate cause of the fall and make a *prima facie* showing that there was no violation of Labor Law § 240.¹⁷ Here, the defendant presented evidence in admissible form that the plaintiff was the sole cause of his injuries. Further, the defendant asserts that he complied with Labor Law § 240 by providing a ladder compatible with all requirements without specifying that the feet of the ladder had non-slip coatings or that non-slip coatings were not required. However, the plaintiff affirms that he fell because the ladder shook and slipped on the floor. Consequently, there are issues of fact and the motion for summary judgment made by the defendant for summary judgment is denied.

In further opposition to the plaintiff's cross-motion, the defendant asserts that the cross-motion was untimely because the plaintiff supposedly improperly obtained an adjournment. Since the plaintiff's cross-motion is denied on the merits, this issue is moot.

¹⁷*Gonzalez v. AMCC Corp.*, ___ AD 3d ___, 2011 NY Slip Op 7602 *1, *2-*3 [2d Dept 2011].

The plaintiff has also crossmoved for summary judgment. The plaintiff met his initial burden by presenting evidence in admissible form that there is a *prima facie* case against the defendant. In opposition, the defendant has introduced evidence in the form of expert testimony that asserts the plaintiff shared in the causation of his injuries, and that Labor Law § 240 does not apply because the ladder complied with the requirements of the law. Regarding the available evidence in the light most favorable to the non-movant, and providing to the defendant the benefit of favorable inference, there are issues of fact that must be resolved. Therefore, the cross-motion for summary judgment made by the plaintiff is denied.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by the defendant José Matias against the plaintiff William Bray is denied; and it is further

ORDERED, that the cross-motion for summary judgment made by the plaintiff William Bray against the defendant José Matias is denied; and it is further

ORDERED, that the parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor**, for a pre-trial conference at **9:30 AM** on **December 15, 2011**.

ENTER,

DATED: November 28, 2011

Joseph J. Maltese
Justice of the Supreme Court