

Pinkhasov v J. Kokolakis Contr., Inc.

2013 NY Slip Op 31481(U)

July 3, 2013

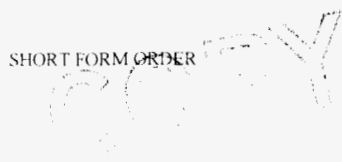
Supreme Court, Suffolk County

Docket Number: 09-48039

Judge: Daniel Martin

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INDEX No. 09-48039
CAL. No. 12-01635OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

P R E S E N T :

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 11-28-12
ADJ. DATE 3-19-13
Mot. Seq. # 001 - MG

-----X	:	
JOSIF PINKHASOV,	:	DINKES & SCHWITZER, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	112 Madison Avenue
	:	New York, New York 11016
- against -	:	
	:	CONGDON, FLAHERTY, et al.
J. KOKOLAKIS CONTRACTING, INC.,	:	Attorney for Defendant
	:	333 Earle Ovington Boulevard, Suite 502
Defendant.	:	Uniondale, New York 11553-3625
-----X	:	

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 19; Replying Affidavits and supporting papers 20 - 21; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 (e) granting partial summary judgment on the issue of liability on his third cause of action for violation of Labor Law § 240 is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on May 7, 2009 while performing construction work when a machine pumping concrete through a hose that he was holding on his shoulder was suddenly activated causing him to be knocked off of an approximately 15-foot high scaffold. The accident occurred on premises located at 25 Baiting Place Road, Farmingdale, New York where a building was under construction for the Armed Forces Reserve Center project. At the time of the accident, plaintiff was employed by non-party Giaquinto Masonry Inc. (Giaquinto). Plaintiff alleges that defendant, J. Kokolakis Contracting, Inc., was acting as general contractor and exercised general supervision and control over the work, materials and personnel with respect to the construction at said premises. Plaintiff's complaint includes a third cause of action for violation of Labor Law § 240.

Plaintiff now moves for partial summary judgment on the issue of liability on his third cause of action for violation of Labor Law § 240. In support of his motion, plaintiff submits the affidavit of his

expert Kathleen Hopkins, a Certified Site Safety Manager, the pleadings, his original bill of particulars dated March 15, 2010, his deposition transcripts dated August 3, 2010 and April 16, 2012¹, and the deposition transcript of defendant by Victor J. Carrero.

In opposition to the motion, defendant contends that plaintiff is not entitled to summary judgment because at the time of the accident, unbeknownst to defendant's employees, plaintiff was standing at the direction of a co-worker on the top level of the scaffold which was to be used only for the placement of materials, and a lack of safety devices was not the proximate cause of his fall, rather, the extreme pressure from the pump through the hose caused plaintiff to fall. Defendant further contends that there exist questions of fact as to whether defendant violated Labor Law § 240 and if so, whether such violation was the sole proximate cause of plaintiff's injuries, or whether plaintiff's negligence in standing on the top level of the scaffold was the sole proximate cause of his injuries. In support of its opposition, defendant submits the pleadings, plaintiff's original and supplemental bills of particulars, and the note of issue.

In reply, plaintiff argues that defendant failed to rebut the contents of his expert's affidavit through the submission of its own expert affidavit and that defendant failed to submit any evidence that the missing planks and/or missing safety railings on the scaffold did not constitute violations of Labor Law § 240. In addition, plaintiff argues that defendant's knowledge or lack thereof of plaintiff's location on the scaffold is irrelevant given that defendant is strictly liable as general contractor and notice of a violation is not required. Plaintiff further argues that he was not negligent inasmuch as he did not voluntarily select where he was to work but was instructed to work on the top level of the scaffold by his foreman Lou Giaquinto as well as his co-worker Rafael. Plaintiff adds that in any event he cannot be the sole proximate cause of the accident where as here defendant violated Labor Law § 240 and defendant's violation was at least a proximate cause of the accident.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

"Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 929 NYS2d 556 [2011]; *Gaspar v*

¹ The Court notes that plaintiff's second deposition transcript does not contain any information relevant to the subject accident's occurrence.

Pace Univ., 101 AD3d 1073, 1074, 957 NYS2d 393 [2d Dept 2012]). “To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Lopez–Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479, 949 NYS2d 165 [2d Dept 2012]; see *Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904, 861 NYS2d 607 [2008]; *Robinson v East Med. Ctr., L.P.*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289, 771 NYS2d 484 [2003]; *Gaspar v Pace Univ.*, 101 AD3d 1073, 1074, 957 NYS2d 393). “Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)” (*Treu v Cappelletti*, 71 AD3d 994, 997, 897 NYS2d 199 [2d Dept 2010]; see *Canosa v Holy Name of Mary Roman Catholic Church*, 83 AD3d 635, 920 NYS2d 390 [2d Dept 2011]; *Silvas v Bridgeview Invs., LLC*, 79 AD3d 727, 912 NYS2d 618 [2d Dept 2010]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 847 NYS2d 141 [2d Dept 2007]; *Bonilla v State of New York*, 40 AD3d 673, 835 NYS2d 690 [2d Dept 2007]; *Marin v Levin Props., LP*, 28 AD3d 525, 812 NYS2d 645 [2d Dept 2006]). However, an injured worker’s contributory fault or assumption of the risk does not constitute a defense to the imposition of liability under Labor Law § 240 (1) (see *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 808 NYS2d 696 [2d Dept 2005]; *La Lima v Epstein*, 143 AD2d 886, 533 NYS2d 399 [2d Dept 1988]).

Plaintiff’s deposition testimony of August 3, 2010 reveals that he was a laborer for Giaquinto, that he had been working on the subject project for five months prior to the accident, and that his work for approximately one month prior to the accident had involved standing on a scaffold and filling a wall of concrete blocks with cement from a flexible hose attached to a pump machine owned by Giaquinto. In addition, plaintiff testified that he had been performing this work with five other Giaquinto co-workers, including Rafael Iglesias, and that they followed the instructions of their foreman, Lou Giaquinto. Plaintiff stated that his foreman told him to work with Rafael, who had more experience with the pump machine, and that Rafael was responsible for the remote control for the pump machine. He explained that he had to use a scaffold to pump the concrete into the blocks. According to plaintiff, the scaffold that he was standing on was built by a Giaquinto co-worker and the top level of the scaffold had only three planks, where six were required, and there was no guardrail or ropes, and plaintiff had no safety harness. Plaintiff also testified that his foreman knew of these deficiencies, and that plaintiff and his co-workers received no training on how to use the machine. Plaintiff explained that just prior to the accident, he was standing on the top level of the scaffold pursuant to Rafael’s instruction with the hose over his shoulder, Rafael was standing one level below him holding the hose, and the pump machine was at ground level. He further explained that the hose had clogged, Rafael had gone down to the pump machine and returned to stand one level below plaintiff when Rafael unexpectedly turned on the pump machine. According to plaintiff, the pressure within the hose caused him to fall off of the top level of the scaffold to the left, hit an unfinished wall, and fall onto a pile of concrete debris.

Victor J. Carrero testified on behalf of defendant on August 2, 2010 that defendant is a general contractor, that on the date of the subject accident he was a senior project manager, and that he was present at the work site on the date of said accident. He explained that defendant was contracted by the Division of Naval and Military Affairs, the owner of the site, as the general contractor for the construction of the Armed Forces Reserve Center project in October 2008. Mr. Carrero stated that Giaquinto was one of the subcontractors on the project and was hired to install masonry. In addition, he

explained that he would be present at the site three days a week, in the mornings, to facilitate meetings with the owner and the subcontractors, with whom he met with once a week. Mr. Carrero testified that prior to being able to work on site, all subcontractors and their employees were required to attend a safety orientation meeting that was usually run by defendant's site safety manager, John Meyer, and subcontractors were required to submit an OSHA safety certificate, a safety manual and the records of a tool box meeting. However, Mr. Carrero testified that he had no personal knowledge of whether a safety meeting was held with any representatives of Giaquinto after the company was hired. In addition, he testified that although he was present at the job site on the date of the subject accident, he did not perform any inspections that day of any of the work being done and he did not witness the accident. Mr. Carrero recalled seeing the top section of the subject scaffold with three planks, which he recognized not as a working platform but as a platform for material. He added that he never saw or was notified that any Giaquinto employee was working on the top platform of the scaffold and that if he had seen or received such notice, he would have considered working on the top platform an OSHA violation.

Here, the adduced evidence reveals that plaintiff was injured when the high-pressure cement hose pump was unexpectedly turned on by a co-worker and the pressure of the cement in the hose caused plaintiff to fall off of a scaffold. Said evidence also reveals that the scaffold, which had been constructed by Giaquinto and plaintiff had been directed to use, had no side rails, and that no other protective device was provided to plaintiff to prevent him from falling (*see Madalinski v Structure-Tone, Inc.*, 47 AD3d 687, 850 NYS2d 505 [2d Dept 2008]; *see also Moran v 200 Varick Street Assoc., LLC*, 80 AD3d 581, 914 NYS2d 307 [2d Dept 2011], *lv to appeal dismissed* 17 NY3d 756, 929 NYS2d 70 [2011]). Thus, plaintiff's proof was sufficient to establish that he was engaged in an activity covered under Labor Law § 240 (1) (*see Rivers v Sauter*, 26 NY2d 260, 263, 309 NYS2d 897 [1970]; *id. Tylman v School Constr. Auth.*, 3 AD3d 488, 489, 770 NYS2d 433 [2d Dept 2004]), and that the failure to provide proper protection constituted a proximate cause of his injuries (*see Podbielski v KMO-361 Realty Assoc.*, 294 AD2d 552, 553-554, 742 NYS2d 664 [2d Dept 2002]; *Lightfoot v State of New York*, 245 AD2d 488, 489, 666 NYS2d 706 [2d Dept 1997]; *Bellafiore v L & K Holding Corp.*, 244 AD2d 443, 443-444, 664 NYS2d 353 [2d Dept 1997]).

In opposition, defendant failed to present evidence sufficient to raise a triable issue of fact as to whether a statutory violation occurred or whether plaintiff's own conduct was the sole proximate cause of the accident (*see Norwood v Whiting-Turner Contr. Co.*, 40 AD3d 718, 836 NYS2d 222 [2d Dept 2007]). Plaintiff's deposition testimony reveals that he was required to stand on the top level of the scaffold to be able to reach the concrete blocks that he was instructed to fill with cement. The parties' deposition testimony also reveals that plaintiff was not specifically instructed by anyone on how to use the cement pump or that he should not stand on the top level of the scaffold. The proffered proof shows that defendant failed to furnish plaintiff with certain safety devices, or to provide him with "immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device" (*Walls v Turner Constr. Co.*, 10 AD3d 261, 262, 781 NYS2d 13 [1st Dept 2004], *affd on other grounds* 4 NY3d 861, 862, 798 NYS2d 351 [2005]; *Ortiz v 164 Atlantic Ave., LLC*, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; *cf. Reyes v Khan*, 90 AD3d 734, 934 NYS2d 328 [2d Dept 2011]; *Canosa v Holy Name of Mary Roman Catholic Church*, 83 AD3d 635, 920 NYS2d 390). In light of the statutory violation, even if plaintiff was negligent in some respect, his comparative negligence would not

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bar liability under Labor Law § 240 (1) (see *Gabus v New York City Hous. Auth.*, 105 AD3d 699, 963 NYS2d 161 [2d Dept 2013]; *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 808 NYS2d 696).

Accordingly, the instant motion is granted.

Dated: JULY 3, 2013.



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION