

Read v Edison Ave. Realty Corp.

2013 NY Slip Op 33757(U)

November 12, 2013

Supreme Court, Westchester County

Docket Number: 57703/11

Judge: Mary H. Smith

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DECISION AND ORDER

FILED & ENTERED
11/12/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

-----X
ROBERT READ, SR.,

MOTION DATE: 11/1/13
INDEX NO.: 57703/11

Plaintiff,

-against-

EDISON AVENUE REALTY CORP AND O EDISON AVENUE,

Defendants.
-----X

The following papers numbered 1 to 8 were read on this motion by plaintiff for partial summary judgment on his Labor Law section 240, subdivision 1, cause of action, and on this motion by defendant for summary judgment dismissing the complaint.

Papers Numbered

Notice of Motion - Affirmation (Vesnaver) - Exhs. (A-C)	1-3
Notice of Motion - Affirmation (Dargon) - Exhs. (Collectively) ¹	4-6
Answering/Replying Affirmation (Vesnaver)	7
Replying Affirmation (Dargon)	8

Upon the foregoing papers, it is Ordered and adjudged that these motions are disposed of as follows:

¹This Part's published Rules requires separately tabbed exhibits.

Defendant O Edison Avenue Realty Corp. ("O Edison") is a holding company for real estate where non-party J&R Tours Limited ("J&R"), a bus company, conducts its business. The building out of which J&R operates is "a massive bus terminal," 10,000 square feet with three floors. Plaintiff, an electrician, employed at the time by non-party Otto Rusch Contracting, seeks to recover for personal injuries he allegedly had sustained, on June 24, 2010, at defendants' premises, as a result of his falling off an extension ladder he had been climbing to access a mezzanine level open work area approximately 30 feet above the first floor, where, to plaintiff's understanding, he was to install an electrical box for J&R.² Although plaintiff previously had performed work for J&R at this location, the June 24, 2010, accident date had been the first time that plaintiff would be accessing the mezzanine area to work in an "open" "new machine room."

Upon his arrival at J&R on that day, plaintiff had testified that he immediately had checked in with "Jim," J&R's principal. According to plaintiff, they had been standing outside of the building and Jim had told plaintiff that plaintiff would be installing electrical wiring in "the air compressor up in the new

²According to James DiDonato, principal and president of O. Edison, the electrical work being performed by plaintiff's employer, Otto Rusch Contracting, had been on behalf of O. Edison and not J&R.

machine room ...” When plaintiff had asked Jim how Jim expected him “to get up there,” Jim had replied, “You can either go upstairs in my office and jump over the dock, jump over the dock to get there, but you better let me have a man bring a ladder and set you up.” Plaintiff claims that he said nothing in response, having voiced no opinion as to which method he had preferred, and he then waited outside the building for a man to bring the ladder.

When plaintiff had entered the building about five minutes later, he had observed a tall Hispanic man and a vertical leaning 30-foot aluminum extension ladder. Plaintiff testified that he had asked the man, “what is this?” to which the man had replied, “this is the ladder that we use to get up to the deck of the new machine room.” “It’s all set up.” Plaintiff testified that he had not inspected the ladder prior to his climbing up it, but that he had observed it leaning at “no more than 45” degrees angle, and that there were two hooks, halfway up the ladder, which appeared to be securing the ladder in place; plaintiff had tested the ladder with his hands as he had climbed on to it. Plaintiff testified that he had climbed to more than half way up the ladder and then had stopped because he felt the “ladder weaken.” He then had felt the ladder “slide” and “move” to the left. Plaintiff unsuccessfully had tried to reach for the deck above, but he and the ladder fell together. Although plaintiff had been wearing an OSHA hard hat at

that time it had fallen off during the fall and his head hit the ground.

During his deposition, plaintiff had testified that he had never seen a scaffold at J&R on any of the prior occasions when he had worked there, nor had he ever observed a scissor lift, and that no one had asked him prior to his fall on his accident date whether he had wanted to use a scissor lift. Plaintiff expressly had denied having refused on the accident date the use of a scaffold and/or a scissor lift because "it was too inconvenient."

James DiDonato had testified on behalf of defendants. He had testified that Otto Rusch Contracting had been hired to install "one electrical outlet" which needed to be "upgraded." When asked why it had needed to be upgraded, Mr. DiDonato had testified that a "future device ... was to be installed," "an air drier." According to Mr. DiDonato, portable scaffolding with an approximate height of 12 feet had been "somewhere on the property" on the date of plaintiff's accident, although not present in the mezzanine area where plaintiff had been working. Later during his deposition, Mr. DiDonato had testified that the portable scaffold was stored "just outside the building." Although Mr. DiDonato first had testified that he did not recall whether O Edison and/or J&R had owned an extension ladder on the accident date, he did testify that in June, 2010, there were fewer than five ladders located at the premises,

two of which were extension ladders, but that he did not know which of his two companies owned them. The extension ladders were stored in the wash bay. Mr. DiDonato had testified that he did not know which of his two companies owned the extension ladder that plaintiff had been using at the time of his fall. Mr. DiDonato had testified that no scissor lift was available at the premises.

According to Mr. DiDonato, plaintiff previously had performed electrical work at his premises on more than five but less than 10 prior occasions, and he believed that plaintiff previously had worked on the mezzanine level although he could not state what work he would have performed and he did not in fact know whether plaintiff had worked on the mezzanine. Mr. DiDonato had testified that he had not spoken with plaintiff on the morning of plaintiff's accident and that he did not know who had directed plaintiff with respect to the work that plaintiff was to perform but that he thought that plaintiff's boss, Otto Rusch, had instructed plaintiff as to what work to do.

Mr. DiDonato had testified that there are only two ways to access the mezzanine level, either by scaffold or by extension ladder; the area was not accessible through the office level. Mr. DiDonato had explained that the choice of whether one would use the scaffold or an extension ladder to access the mezzanine depended upon which side of the mezzanine one was working. Although it is

very unclear from the exchange between counsel and Mr. DiDonato at the latter's deposition, it appears that Mr. DiDonato had testified that the side of the mezzanine that plaintiff had been attempting to access should only have been accessed by a scaffold, but that in any event plaintiff should have placed his extension ladder on the other side of the mezzanine in order for him to have gained access to the area with the outlet where he was to work.

Mr. DiDonato further had testified that an employee of J&R, Carlos Olivera, had informed him that plaintiff had taken the extension ladder himself from the wash bay. Mr. DiDonato had testified that he previously had observed plaintiff work using an extension ladder and that on those occasions "he always had a helper. There was always two people." Mr. DiDonato had testified that neither O Edison nor J&R had provided plaintiff with any type of safety equipment, including safety nets, on the date of plaintiff's accident. However, Mr. DiDonato also testified that Carlos had informed him that Carlos had offered plaintiff a scaffold on the accident date, which plaintiff had declined.

This action ensued, plaintiff pleading causes of action for common law negligence and violations of Labor Law sections 200, 240 and 241.

Presently, plaintiff is moving partial summary judgment on his cause of action pursuant to Labor Law section 240 which imposes a

non-delegable duty upon property owners engaging in the repair or alteration of the premises.

Defendants oppose plaintiff's motion, arguing that plaintiff's actions had been the sole proximate cause of his own injuries, and thus no liability exists under either Labor Law section 240, subdivision (1), and Labor Law section 241, subdivision (6), and further that no liability exists for negligence or any violation of Labor Law section 200 because the facts demonstrate that defendants did not supervise or control plaintiff's work.³

Addressing first defendants dispositive motion with respect to plaintiff's claims for common law negligence and Labor Law section 200, it is settled law that Labor Law Section 200, which statute is a codification of the common law duty of an owner and general contractor to furnish a safe work place, is implicated in two broad categories; firstly, where a worker is injured as a result of a dangerous or defective condition on the property, in which case the worker must show that the owner had created the dangerous condition, or that it had adequate notice of it and failed to remedy it within a reasonable period of time, see Chowdhury v.

³The Court finds, contrary to plaintiff's characterization, that defendants' opposition does not include any argument that plaintiff's work is outside the statute of Labor Law section 240, subdivision (1) because it did not involve the "repairing" or "altering" of a building or structure and instead had involved only routine maintenance.

Rodriguez, 57 A.D.3d 121, 128 (2nd Dept. 2008); Murphy v. Columbia Univ., 4 A.D.3d 200, 202 (1st Dept. 2004), or secondly, as is here relevant, where the injury to the worker had been caused by the use of defective or dangerous equipment and the owner was possessed with the authority to supervise the means and way of the work. See Reyes v. Arco Wentworth Management Corp., 83 A.D.3d 47, 50-51 (2nd Dept. 2011).

Applying the foregoing standard to the action at bar, and in light of plaintiff's failure to have opposed this aspect of defendant's motion which is predicated upon the unrefuted facts that defendants did not supervise or control plaintiff's work or the work site, the Court grants defendants motion for summary judgment dismissing plaintiff's Labor Law section 200 and negligence causes of action. See Opalinski v. City of New York, _ A.D.3d _, 972 N.Y.S.2d 320, 322 (2nd Dept. 2013); Kajo v. E.W. Howell Co., Inc., 52 A.D.3d 659, 466, 469 (2nd Dept. 2008); Burkoski v. Structure Tone, Inc., 40 A.D.3d 378, 380 (1st Dept. 2007).

Addressing next the remainder of the parties' respective summary judgment motions, Labor Law Section 240, subdivision 1, provides that:

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.

This statute was specifically enacted to ensure that employees performing construction-related activities are protected from injuries through the providing of proper safety devices. See Joblon v. Solow, 91 N.Y.2d 457, 463 (1998). It is well-settled that the failure to provide appropriate protective devices for workers at an elevated work site, irrespective of any duty to supervise or control over the work site, establishes an owner or contractor's absolute liability as a matter of law. See Labor Law Section 240, subd. 1; Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 500-501 (1993); Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 513 (1991); Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 521-523 (1985).

Where however a "plaintiff's actions [are] the sole proximate cause of his injuries, ... liability under Labor Law § 240(1) [does] not attach" Weininger v. Hagedorn & Co., 91 N.Y.2d 958, 960 (1998); see also Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35 (2004); Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280 (2003). Instead, the 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. 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.

Robinson v. East Medical Center, LP, 6 N.Y.3d 550, 554 (2006).

Labor Law Section 241, subdivision (6) claim, said statute "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers," (citation omitted)," Brasch v. Yonkers Construction Company, 306 A.D.3d 508 (2nd Dept. 2004), and to comply with the Rules and Regulations established by the Department of Labor. See Norero v. Third Avenue Realty, LLC, 96 A.D.3d 727, 728 (2nd Dept. 2012). To support a viable Section 241 claim, a plaintiff must prove that an alleged regulation in the Industrial Code is applicable, that a violation occurred of a specific standard set forth in the Industrial Code and that the violation was the proximate cause of the plaintiff's injury. See Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343 (1998); Norero v. Third Avenue Realty, LLC, *supra*; Zimmer v. Chemung County Performing Arts, Inc., 102 A.D.2d 993 (3rd Dept. 1984), *revd. on other grnds.* 65 N.Y.2d 513 (1985).

Applying the foregoing principles of law to the action at bar, the Court grants plaintiff's motion for partial summary judgment on his section 240, subdivision (1), cause of action and concomitantly denies defendant's motion seeking dismissal of plaintiff's Labor Law section 240, subdivision (1), cause of action, and further

denies dismissal of plaintiff's Labor Law section 241, subdivision (6), cause of action.

A curious circumstance at bar is the absence of knowledge as to what had caused the safety device extension ladder to fall since plaintiff himself had testified that before starting to climb the ladder he had observed what appeared to have been two hooks securing the ladder in place, which seemingly should have been adequate. Nevertheless, no further evidence on this issue has been presented and it is clear that this safety device ultimately had been inadequate in light of plaintiff's fall.⁴ The Court thus finds that plaintiff prima facie has demonstrated entitlement to liability judgment on his section 240 claim based upon defendants' failure to have furnished him with an adequate safety device. The Court further finds that defendants have failed in their burden to have raised a triable issue of fact with respect thereto, including specifically whether plaintiff's own actions had been the sole proximate cause of his injuries. Although this Court agrees that plaintiff's alleged refusal to have used the offered scaffold otherwise would have presented a triable issue of fact as to

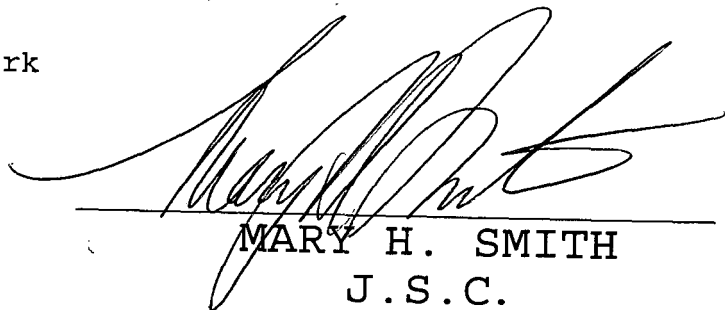
⁴The Court notes that it matters not whether plaintiff had failed to adequately check whether the ladder had been secure because any failure by plaintiff does not show his intentional misuse or other egregious misconduct and amounts, at most, to contributory negligence, which defense is inapplicable to a Labor Law § 240(1) claim. See Nacewicz v. Roman Catholic Church of the Holy Cross, 105 A.D.3d 402, 403 (1st Dept. 2013).

whether plaintiff's own actions were the sole proximate cause of his injuries because had he used a scaffold he would not have been injured, see Cahill v. Triborough Bridge & Tunnel Authority, 4 N.Y.3d 35, 39-40 (2004); Nacewicz v. Roman Catholic Church of the Holy Cross, supra, the inescapable fact is that there is no admissible evidence demonstrating that a scaffold had been readily available for plaintiff's use. Indeed, the only evidence on the availability issue comes from Mr. DiDonato himself. While he eventually had testified that the scaffold was "just outside the building," he never more specifically had identified where this scaffold had been located, and he at first had testified only that the scaffold was "somewhere on the property." The presence of safety devices somewhere at the work site does not discharge an owner's duty to provide proper protection to workers. See Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 11 (1st Dept. 2011); Szuba v. Marc Equity Properties, Inc., 19 A.D.3d 1176, 1177 (4th Dept. 2005); see, also Cherry v. Time Warner, Inc., 66 A.D.3d 233 (1st Dept. 2009); Miro v. Plaza Construction Corp., 66 A.D.3d. 233 (1st Dept. 2009), modf. 9 N.Y.3d 948 (2007). This Court is not persuaded that the mere hearsay testimony of Mr. DiDonato that Carlos had offered plaintiff the scaffold requires a different finding, especially since no photograph of this scaffold had been presented, no affidavit from Carlos on this issue has been

offered,⁵ cf. Guaman v. New Sprout Presbyterian Church of New York, 33 A.D.3d 758, (2nd Dept. 2006), and no other testimony from any other person with direct knowledge of the existence and whereabouts of the alleged scaffold had been offered. See Zimmer v. Chemung County Performing Arts, supra, 65 N.Y.2d at 524; Joseph v. Hemlock Realty Corp., 6 A.D.3d 392, 393 (2nd Dept. 2004). Therefore, the Court does not find that what is presented is a simple case of a factual discrepancies as to whether Carlos, defendants' employee, had offered a scaffold to plaintiff which plaintiff had refused.

The parties shall appear at 9:30 a.m., on January 16, 2014, in the Settlement Conference Part, Room 1600.

Dated: November 12, 2013
White Plains, New York



MARY H. SMITH
J.S.C.

⁵The Court notes that it had been stated that Carlos no longer works at defendant's company but no efforts to ascertain his whereabouts were set forth.