Seferovic v Atlantic Real Estate Holdings, LLC
2013 NY Slip Op 33898(U)
May 14, 2013
Supreme Court, Queens County
Docket Number: 15917/11
Judge: Denis J. Butler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12
Justice

----------x

IFET SEFEROVIC and MURATKA SEFEROVIC,

Plaintiffs,

-against-

ATLANTIC REAL ESTATE HOLDINGS, LLC. and SIGMA TRANSPORTATION, INC.,

Defendants.

----------x

Index No.: 15917/11

Motion Date: March 5, 2012

Cal. No.: 114
Seq. No.: 1

The following papers numbered 1 to 40 read on this motion by plaintiff for summary judgment pursuant to Labor Law §240(1) and §241(6); cross-motion by defendant Atlantic Real Estate Holdings, LLC ("Atlantic") for dismissal of plaintiffs' complaint for spoliation pursuant to CPLR §3126 ; and cross-motions by defendant, Sigma Transportation, Inc. ("Sigma")for dismissal on spoliation pursuant to CPLR §3126 and for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3112.

	Papers Numbered
Order	1
Plaintiffs' Notice of Motion, Affirmation, Exhibits	2-12
Defendant Sigma's Affirmation in Opposition, Exhibit	13-14
Defendant Atlantic's Affirmation in Opposition	15
Reply Affirmation, Exhibit	16-17
Supplemental Reply Affirmation	18
Defendant Atlantic's Notice of Cross-Motion, Affirmation, Exhibits	19-23
Plaintiffs' Affirmation in Opposition, Affidavit, Exhibit	24-26
Reply Affirmation	27
Stipulation	28
Defendant, Sigma's Notice of Cross-Motion, Affirmation	29-30
Defendant, Sigma's Notice of Cross-Motion, Affirmation, Exhibits	31-37

Plaintiff's Affirmation in Opposition,
Exhibit..... 38-39
Reply Affirmation..... 40

Upon the foregoing papers, it is ordered that this motion and cross-motions are determined as follows:

Pursuant to an Order of this Court dated March 12, 2013, this motion originally submitted before Centralized Motion Part on March 5, 2013, was set down for and oral argument was conducted on March 19, 2013.

Plaintiffs commenced this action for personal injuries sustained by Ifet Seferovic ("Seferovic" or "plaintiff") arising from an accident on June 7, 2011 at a building owned by defendant Atlantic and leased by defendant Sigma. Plaintiffs asserted causes of action for negligence and for violations of the Labor Law.

Plaintiff, the owner of a home improvement business, allegedly sustained personal injuries when a "five or six month old" A-frame ladder he "had purchased new" (Ex. F, p. 32) and was climbing "fell" (Ex. B, ¶12), "buckled or twisted" (Ex. F, p. 38), causing plaintiff to fall. Plaintiff contends he is entitled to summary judgment on liability pursuant to Labor Law §240(1) and §241(6), as both sections, inter alia, impose a non-delegable duty on owners and contractors to protect workers. Plaintiff further claims that defendants violated the Industrial Code (12 NYCRR §23-1.21[b][1] and §23-1.2[b][3]), regarding the properties and maintenance of ladders. Defendant Sigma opposes this motion alleging that defendant Sigma was a tenant at the premises pursuant to a lease with defendant Atlantic (Opposition, Ex. A), never entered into a contract with anyone to perform labor at the premises, did not exert any control over the work site, and did not supply the subject ladder to plaintiff. As such, defendant Sigma contends it was not liable to plaintiff under the Labor Law or under common law negligence. Plaintiff alleges that defendant Sigma and defendant Atlantic "were in effect one entity and acted together as a single owner (Reply, ¶2).

Defendant Atlantic opposes this motion, contending that plaintiff had disposed of the subject ladder shortly after the accident and, as a result, allegations of a defective, unsafe ladder could not be defended by Atlantic, due to the spoliation of such evidence by plaintiff. Plaintiff alleges that his testimony at deposition with respect to the ladder, at which time he stated "I got mad and threw it away" at a place "where we

throw garbage" (Ex. F, p. 70-71) was misconstrued. In an affidavit attached to his opposition to the cross-motions herein, plaintiff contends he actually told his helper to "store the remainder of the ladder" in a basement where plaintiff "stored discarded or used items" (Ex. A, ¶3-4) and actually still has the ladder in his attorney's office at this time. Plaintiff asserts, apparently correctly, that no request has ever been made to inspect the subject ladder.

The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (see, Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 [1991]), and a violation of the duty results in absolute liability (see, Wilinski v. 334 East 92nd Housing Development Fund, 18 N.Y.3d 1 [2011]; Bland v Manocherian, 66 N.Y.2d 452 [1985]; Jamindar v. Uniondale Union Free School Dist., 90 A.D.3d 612 2 Dept. 2011]; Paz v. City of New York, 85 A.D.3d 519 [1 Dept. 2011]). "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (Cahill v. Triborough Bridge and Tunnel Authority , 4 N.Y.3d 35, 39 [2004]). A defendant cannot avoid liability unless the plaintiff worker's own actions were the sole proximate cause of the accident (see, Cahill v. Triborough Bridge and Tunnel Authority, supra; Blake v. Neighborhood Housing Services of New York , supra.)

Labor Law §240 protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis Palmer Hydro-Electric Company, 81 N.Y.2d 494, 501 [1993]). The harm must flow "directly ... from the application of the force of gravity to an object or person" (Ross v Curtis Palmer Hydro-Electric Company, supra at 501).

In order to prove a cause of action arising under Labor Law §240(1), a plaintiff must show that a violation of the statute occurred and that the violation was a proximate cause of his injury (see, Nelson v. Ciba-Geigy, 268 A.D.2d 570 [2 Dept. 2000]). Further, "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 Exchange, Inc., 13 N.Y.3d 599, 603 [2009];see, Wilinski v. 334 East 92nd Housing Development Fund, supra).

No Labor Law §240(1) liability would arise where an injury results from a separate cause wholly unrelated to the hazard of gravity (see, Cohen v. Memorial Sloan-Kettering Cancer Center, 11 N.Y.3d 823 [2008]). "The fact that a worker is injured while

working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by section 240(1) of the Labor Law" (Striegel v. Hillcrest Heights Development Corp., 100 N.Y.2d 974, 977 [2003]).

In the case at bar, plaintiff failed to establish prima facie that the failure to supply him with a safe ladder was the proximate cause of his injuries. As the subject ladder has not been displayed, plaintiff's conclusory statement that said ladder broke is insufficient to entitle plaintiff to summary judgment on liability. The evidence submitted presents triable issues of fact as to whether the ladder violated the statutes and whether plaintiff may have been the sole cause of the accident (see, Hernandez v. Ten Ten Co., 31 A.D.3d 333 [1 Dept. 2006]).

A cause of action based on Labor Law §241(6) must refer to a violation of the specific standards set forth in the implementing regulations, here 12 NYCRR Part 23 (see, Martinez v. City of New York, 73 A.D.3d 993 [2 Dept. 2010]; Vernieri v Empire Realty Co., 219 A.D.2d 593 2 Dept. 1995]). "[T]he particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (Misicki v. Caradonna, 12 N.Y.3d 511, 515 [2009]).

A plaintiff asserting a cause of action under Labor Law §241(6) has the burden of establishing that there was a violation of the Industrial Code and that such violation was a proximate cause of his injuries (see, Melchor v. Singh, 90 A.D.3d 866 [2 Dept. 2011]; Blair v. Cristani, 296 A.D.2d 471 [2 Dept. 2002]; Beckford v. 40th Street Associates, 287 A.D.2d 586 [2 Dept. 2001]).

In the case at bar, plaintiff failed to demonstrate his prima facie entitlement to judgment as a matter of law on the issue of liability under Labor Law §241(6) by failing to produce evidence that defendants violated the relevant Industrial Code sections relating to the strength and maintenance of the subject ladder or that any violation proximately caused his injuries. (see, Melchor v. Singh, supra). Further, plaintiff has failed to eliminate any question of fact with regard to whether defendant Sigma and defendant Atlantic should both be considered "owners" of the subject property (see, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876 [1993]; Passananti v. City of New York, 268 A.D.2d 512 [2 Dept. 2000]).

Defendant Sigma's cross-motion for summary judgment seeking dismissal of the complaint is based on the contention that said defendant was not an owner of the premises, did not contract to have the labor performed at the premises, and did not direct or control the work to be performed (see, Duda v. John W. Rouse Construction Corp., 32 N.Y.2d 405 [1973]). However, plaintiff's testimony alleges that plaintiff entered into an oral agreement with a male named Singh for the subject work to be performed. It is agreed by defendants that Mr. Mandip Singh was the owner of defendant Sigma and Ms. Gunika Singh, Mandip Singh's daughter, was the owner of defendant Atlantic. A lessee is liable under relevant sections of the Labor Law "only where it can be shown that it was in control of the work site" (Guzman v. L.M.P. Realty Corp., 262 A.D.2d 99, 99 [1 Dept. 1999]; see, Guclu v. 900 Eighth Ave. Condominium, LLC, 81 A.D.3d 592 [2 Dept. 2011]). One test of control is the hiring of a general contractor (see, Guzman v. L.M.P. Realty Corp., supra). Thus, despite Gunika Singh's testimony that she retained plaintiff's employer for the job (Ex. G, p. 18-22), plaintiff raises a question of fact as to who actually retained plaintiff's employer and on behalf of which defendant. As mere surmise and conjecture are insufficient to entitle one to summary judgment (see, Fredette v. Town of Southampton, 95 A.D.3d 939 [2 Dept. 2012), the evidence produced by defendant Sigma raises a question of fact with regard to whether defendant Sigma was an "owner" within the meaning of Labor Law ¶240 (see, Bardouille v. Structure-Tone, Inc., 282 A.D.2d 635 [2 Dept. 2001]), and, as such, the cross-motion of defendant Sigma is denied.

Defendants Atlantic and Sigma cross-move for sanctions and dismissal resulting from plaintiff's alleged spoliation of evidence, i.e., the subject ladder. As revealed by plaintiff in opposition to the instant motion, the subject ladder has not been destroyed or thrown out with the garbage, but is being held by plaintiff's attorney at this time. As such, no spoliation actually occurred herein and defendant is not "prejudicially bereft of appropriate means to confront a claim with decisive evidence" (Lamb v. Maloney, 46 A.D.3d 857 [2 Dept. 2007]). As such, defendants' cross-motions regarding spoliation are denied.

However, plaintiff's contention that the ladder was thrown away shortly after the accident, and recent revelation that said ladder still exists, has created a situation in which significant, relevant discovery could not have taken place prior to plaintiff's affidavit herein. Despite plaintiffs' disingenuous argument that no request for the inspection of the ladder had been made by defendants, it is evident that defendants could not have been expected to doubt plaintiff's statement that the ladder

was not available at the time of the commencement of this lawsuit. Accordingly, the note of issue and certificate of readiness filed by plaintiff on October 25, 2012 is hereby vacated and the action is stricken from the trial calendar. Defendants are directed to serve a notice for inspection of the subject ladder upon plaintiffs' counsel within fifteen (15) days of service upon them of a copy of this Decision and Order with Notice of Entry by plaintiff, or such inspection will be deemed waived.

Plaintiffs are directed to serve a copy of this Decision and Order with Notice of Entry, upon counsel for defendants, the County Clerk of Queens County and the Clerk of the Supreme Court, Queens County, within twenty (20) days of such entry.

The remaining argument and contentions of the parties either are without merit or need no be addressed in light of the foregoing determinations.

Accordingly, plaintiffs' motion seeking summary judgment is hereby denied and defendants' cross-motions are hereby denied in their entirety. The note of issue and certificate of readiness, filed on October 25, 2012, is hereby vacated.

This Constitutes the Decision and Order of the Court.

Dated: May 14, 2013

Denise J. Butler, J.S.C.