

Larrainza v Extell GT, LLC

2014 NY Slip Op 31747(U)

July 7, 2014

Sup Ct, New York County

Docket Number: 100219/12

Judge: Doris Ling-Cohan

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.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

CARLOS LARRAINZA,

Plaintiff,

INDEX NO. 100219/12

-against-

MOTION SEQ. NO. 001

EXTELL GT, LLC and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

The following papers, numbered 1 - 4 were considered on the motion for summary judgment:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|---|-----------------|
| Notice of Motion/Order to Show Cause, — Affidavits — Exhibits (& Memo) | <u>1, 2</u> |
| Answering Affidavits — Exhibits _____ | <u>3</u> |
| Replying Affidavits _____ | <u>4</u> |
| Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No | _____ |

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiff is decided as indicated below.

FILED
JUL 08 2014
FACTS
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff commenced this negligence action to recover damages for personal injuries he allegedly sustained when he fell approximately 30 feet through an opening in the steel structure of a building, while working as a Journeyman Union Ironworker, at the building owned by defendant Extell GT, LLC ("Extell"). Plaintiff alleges that he sustained injuries when he lost his balance while laying down metal sheets of decking approximately three (3) feet wide, 20 feet long, and weighing 75 pounds, onto the steel structure of the building, which would form the

* 2]

frame for what was the top floor of the building, at that point in time. While attempting to break a metal sheet of decking, the sheet slipped out of plaintiff's hand, causing him to lose his balance and fall over into a hole, initially falling 15 feet to an intermediary, then bouncing and falling down another 15 feet to the level below. In total, plaintiff fell approximately 30 feet, allegedly sustaining serious and severe career ending injuries, resulting in numerous hospitalizations and surgeries.

Although at the time of the accident plaintiff was wearing a safety harness, plaintiff contends, and defendants do not dispute, that there was no independent cable system or line for plaintiff to tie off from, in the area where the accident occurred. It is also undisputed that there were no additional safety devices, such as safety nets or scaffolding, and that the only line available that day, was around the crane shaft, a significant distance away from where plaintiff was working, at the time of the subject accident.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the issue of liability against defendants on his Labor Law § 240 (1) cause of action, and requests a trial on the issue of damages.

DISCUSSION

It is well established that "[t]he 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 . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once such a showing has been made, the party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (e.g. *Masucci v Feder*, 196 AD2d 416, 419-420 [1st Dept 1993]; *Zuckerman v New York*, 49

NY2d 557, 562 [1980]).

Labor Law § 240 (1) provides in relevant part:

“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.”

As explained by the Court of Appeals in *Blake v Neighborhood Hous. Servs. of New York City, Inc.* (1 NY3d 280, 287 [2003]), Labor Law § 240 (1) creates strict or absolute liability both in that: (1) it imposes a nondelegable duty that renders contractors and owners liable under the statute regardless of whether they supervise or control the work or not; and (2) so long as the breach of the statute was the proximate cause of the injury, the plaintiff's own negligence may not be asserted as a defense (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004], citing *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]).

In order for Labor Law § 240 (1) to apply, plaintiff must fall within the class of persons Labor Law § 240 (1) was designed to protect. In the instant case, plaintiff was employed by subcontractor DCM/Solera as a union ironworker engaged in the erection of a building at the time of the accident. The preliminary issue here is whether defendant Tishman Construction Corporation (“Tishman”), the construction manager that hired subcontractor DCM/Solera, was a statutory agent of defendant building owner Extell under Labor Law § 240 (1). The Court of Appeals in *Walls v Turner Constr. Co.* (4 NY3d 861, 863-864 [2005]) (internal citations omitted) determined:

“Although a construction manager of a work site is generally not

* 4]

responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury.”

The Court further outlined several factors to be considered in determining whether the construction manager was an agent of the owner, including:

“(1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) [the construction manager’s] duty to oversee the construction site and the trade contractors, and (4) [acknowledgment by the construction manager’s representative] that [the construction manager] had authority to control activities at the work site and to stop any unsafe work practices”

(*Walls*, 4 NY3d at 864.)

Here, the contract between defendant owner Extell and defendant Tishman contains explicit language creating an agency relationship (plaintiff’s exhibit 3). In addition, there was no general contractor and it is undisputed that defendant Tishman was responsible for coordinating the work of the subcontractors on site, hiring the subcontractors to work on the project, chairing the progress meetings on site, keeping the daily construction reports reflecting the various trades on site, keeping the safety manual for the project, and having full stop work authority on site (Osborne tr at 8-10, 22). Moreover, significantly, in opposition, defendants have submitted only an affirmation by their attorney, with no exhibits. However, an affirmation by an attorney who does not have personal knowledge of the facts is insufficient as it lacks probative value (*see Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 585 [1st Dept 1982], *affd* 59 NY2d 688 [1983]). Moreover, Tishman’s representative, Superintendent Edward Osborne, acknowledged that Tishman was responsible for carrying out such duties (Osborne tr at 4, 8-10, 22). Thus, defendant Tishman is liable under the statute as a direct agent of the defendant building owner,

Extell, and plaintiff falls within the very class of persons Labor Law § 240 (1) was designed to protect.

To prevail under Labor Law § 240 (1), plaintiff must show that the statute was violated and that the violation was the proximate cause of his injury (*Cahill*, 4 NY3d at 39). As explained by the Court of Appeals,

“[t]he legislative purpose behind this enactment is to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident.”

(*Rocovich v Consolidated Edison Company*, 78 NY2d 509, 513 [1991] [internal quotation marks and citation omitted]). Thus, “[t]he statute is to be interpreted liberally to accomplish its purpose” (*Striegel v Hillcrest Heights Development Corporation*, 100 NY2d 974, 977 [2003] [citation omitted]).

The Court of Appeals has identified the kinds of hazards that the statute contemplates as hazards that are related to the effects of gravity, “where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” (*Rocovich*, 78 NY2d at 514). Here, it is undisputed that plaintiff was subject to an elevation-related risk. He fell approximately 30 feet through an opening in the steel structure of a building, at an elevated work site, while engaged in the erection of the building. It is further undisputed that defendants failed to provide scaffolding, safety cable systems, life lines, and safety nets to prevent plaintiff’s fall from the elevated work site (Koch tr at 26, lines 20-25; at 57, lines 24-25; at 58-61). Hence, plaintiff’s accident in the

instant case is precisely the kind of hazard that Labor Law § 240 (1) was intended to protect against.

Furthermore, defendants' failure to provide protective devices required by Labor Law § 240 (1) was the proximate cause of plaintiff's injury. While plaintiff was wearing a safety harness at the time of the accident, a safety harness alone is not proper protection under Section 240 (1), if no independent lines or cable systems are erected for the worker to tie off from (*see Alzate v Trustees of the Masonic Hall Asylum Fund*, 303 AD2d 229 [1st Dept 2003]; *Stein v Yonkers Contr.*, 244 AD2d 474 [2d Dept 1997]). Plaintiff established and, defendants did not dispute, that there was no independent cable system or line to tie off to in the area where the accident occurred. The only independent line available was near the crane shaft, more than 20 feet away from the area where the accident occurred, and, as testified to by Thomas Koch, who was acting as a foreman on the day of the subject accident, such line was too far for plaintiff to tie off to, from where plaintiff was working (Koch tr at 58-61). Moreover, it is undisputed that there were no additional safety devices, such as safety nets or scaffolding in the area where the accident occurred.

Even when viewed in the light most favorable to the non-moving party, there are no issues of triable fact as to defendants' liability. Thus, summary judgment is granted in plaintiff's favor as to liability, and this case shall proceed to trial for an assessment of damages, pursuant to CPLR 3212(c).

DECISION

Accordingly, it is

ORDERED that plaintiff Carlos Larrainza's motion for summary judgment is

granted on the issue of liability on plaintiff's Labor Law § 240 (1) cause of action; and it is further

ORDERED that this case shall proceed to trial on the issue of damages; and it is further

ORDERED that plaintiff shall, within 30 days from entry of this order, serve a copy of this order with notice of entry.

This is the decision and order of the court.

Dated: _____

7/7/14

DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

J:\Summary Judgment\Larrainza v Extell GT - scaffold law_lc.wpd

FILED
JUL 08 2014
NEW YORK
COUNTY CLERK'S OFFICE