Almodovar v Port Authority
2014 NY Slip Op 31945(U)
July 22, 2014
Sup Ct, New York County
Docket Number: 100631/12
Judge: Carol R. Edmead

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Almodovar, Wilfredo

-v-

Port Authority

INDEX NO. 100631/12

MOTION DATE 6/4/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this Labor Law action for personal injuries, defendant The Port Authority of New York and New Jersey (the "Port Authority"), Tishman Construction Corporation of New York and Tishman Construction Corporation ("Tishman"), (collectively, "defendants") and plaintiff Wilfredo Almodovar ("plaintiff") each move for summary judgment in their favor on plaintiff's Labor Law 240 claim.

Factual Background[1]

Prior to September 27, 2011, the date of the accident, Tishman was hired as the general contractor for the construction of One World Trade Center, which is owned by the Port Authority.

On September 27, 2011, plaintiff was working as an apprentice for AABCO Sheet Metal, which included assisting the welder in installing ducts inside the One World Trade Center construction site. At the time of the accident, plaintiff was performing "fire watch" duties, which included inspecting the floor for garbage, pieces of wood, or "open holes" that could catch fire from sparks emanating from his co-worker Giovanni Valmon's duct-welding machine.

Valmon ascended an eight-foot A-Frame ladder and climbed onto duct work to work on

[1] The Factual Background is taken from the defendants' and plaintiff's moving papers.

Dated: _____ _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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the ducts. When plaintiff saw that the ducts were improperly aligned, he moved the A-Frame ladder a few feet, ensured that the ladder was fully opened and positioned on a flat and level surface, and ascended three rungs of the ladder to correct the alignment of the ducts. Plaintiff then clamped shut an opening in one of the connections between two ducts (Plaintiff EBT, pp 33-34). After correcting the alignment, he descended the ladder. When plaintiff stepped down from the third rung to the second rung, his right foot came into contact with a rebar protruding from the floor, causing him to lose his balance and fall three feet from the ladder to the floor (EBT, pp. 34, 47-48, 51). The rebar did not have any orange cap on top of it or sprayed with orange paint that the concrete subcontractor, Collavino Construction, was supposed to put on to allow workers to see the exposed rebar.

Plaintiff's foreman Kesner Adams ("Adams") testified at his deposition that when he arrived to the scene after the accident, plaintiff stated that his "pant leg got caught on a rebar" and he "fell off the ladder" (EBT, p. 27). Adams saw the ladder in a standing position, and that it was in perfect working condition (EBT, p. 28).

Defendants argue that under the circumstances of plaintiff's fall, no Labor Law 240(1) liability exists, because the rebar was not the hazard that the A-Frame ladder was designed to protect against and it was not the A-Frame ladder/safety device that contributed to his fall. Thus, this claim should be dismissed.

In response, plaintiff argues that he was injured as a result of falling from a height (EBT, pp. 33-34) and was exposed to an elevation differential while engaged in a protected enumerate activity. Plaintiff contends that the rebar that got caught in his right pants leg did not have an orange cap placed on top of it, was not sprayed an orange color, and was not covered with a pipe, and therefore, was difficult to see since it had rusted dark and blended in with the area (Adam EBT, p. 31; Valmon EBT, p. 19). Based on Certified Site Safety Manager, Kathleen V. Hopkins ("Hopkins"), defendants violated Labor Law 240(1), defendants did not provide plaintiff with any safety devices or safety equipment, including hoist/scissor lift, to use for the work he was performing, to protect him from getting caught on the rebar. Further, defendants' violation was a direct, substantial and proximate cause of plaintiff's accident. Hopkins attests that the ladder was unsafe as it did not prevent plaintiff from falling after his right leg got caught on the rebar. Use of a hoist such as a scissor lift placed next to the duct would have provided plaintiff with a device equipped with safety railings and would have prevented from falling as he would not have come in contact with any pieces of rebar extending above the floor. Further, the caselaw defendants cite is distinguishable. Therefore, dismissal of the Labor Law 240(1) claim should be denied.[2]

Discussion

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 (Supreme Court, New York County 2012], affd, 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra,*

[2] Other than the motion and cross-motion, no other submissions were provided to the Court.

citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184 [1st Dept 2006]).

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.

Labor Law §240(1), also known as the "Scaffold Law," imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235, 885 NYS2d 28 [1st Dept 2009]). To establish a cause of action under Labor Law §240, a plaintiff must show that the statute was violated, and the violation was a proximate cause of the worker's injury *(Tounkara v Fernicola*, 80 AD3d 470, 914 NYS2d 161 [1st Dept 2011] ("Plaintiff made a prima facie showing of defendants' liability under § 240(1) by asserting that defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of the accident"); *Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). "The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] [citations omitted]).

However, in clarifying the statute's scope, the Court of Appeals explained that "we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, 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, 922 NE2d 865 [2009] [emphasis added]). The Court continued: "[T]he governing rule is to be found in the language from *Ross* . . . . where we elaborated more generally that Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*id.*, quoting *Ross* at 501 [emphasis in original]).

Thus, "[n]o Labor Law § 240 (1) liability exists where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place *(Cohen v. Memorial Sloan–Kettering Cancer Center,* 11 NY3d 823, 868 NYS2d 578 [2008]).

It is uncontested that plaintiff's accident occurred when, as he was descending a ladder, his pant leg got caught in an unseen rebar, which caused him to lose balance and fall to the floor three feet below. It is also uncontested that the ladder was not defective, in and of itself.

In *Cohen v Memorial Sloan–Kettering Cancer Center* (50 AD3d 227, 228–229 [1st Dept 2008], *revd* 11 NY3d 823 [2008]), the plaintiff was tasked with installing metal racks in a certain ceiling, and was provided a six-foot ladder to perform the task. When the ladder was positioned, "a metal rod protruded from" a wall (for plumbing) and "another cast iron rod protruded a few inches behind the ladder's second rung." (*Id.*, at 229). As a result of the metal rod protruding from the wall, plaintiff had to step directly from the second rung to floor to descend the ladder. When plaintiff began to step down with his right foot from the second rung, his left foot "got caught between the second run and rod behind it [and] his knee twisted"; while grabbing his knee, he fell to the concrete floor.

The Supreme Court dismissed the Labor Law 240(1) claim, and on appeal, the First Department modified, reasoning that plaintiff demonstrated that the ladder he was provided, "although not itself defective," "was insufficient to permit him to safely perform the elevated task at that particular part of the worksite" (id., p. 230).

On further appeal, the Court of Appeals reversed. The Court of Appeals, citing to *Nieves v Five Boro A.C. & Refrig. Corp.* (93 NY2d 914 [1999]), held that the presence of two unconnected pipes protruding from a wall was not "the risk which brought about the need for the [ladder] in the first instance" but was one of "the usual and ordinary dangers at a construction site" (*id.*) to which the "extraordinary protections of Labor Law § 240 (1) [do not] extend" (11 NY3d at 825 [internal quotation marks and citation omitted]).

In *Nieves*, plaintiff was working on the installation of ceiling sprinkler system. Plaintiff's accident occurred when he stepped from the bottom rung of a ladder onto the floor with his left foot, and his left foot hit a concealed portable light located underneath the drop cloth covering the floor. Plaintiff's right foot was on the ladder when his left foot hit the light, causing him to twist his ankle and fall. The Court of Appeals dismissed the Labor Law 240(1) claim, reasoning that the "core objective of section 240 (1) was met" since the ladder was "effective in preventing plaintiff from falling during the performance of the ceiling sprinkler installation" (93 NY2d at 916). The Court of Appeals also noted that there was "no evidence of any defective condition of the ladder or instability in its placement." (*Id.*). Therefore, the risk to plaintiff was not type of peril Labor Law 240(1) was designed to prevent. "Rather, [plaintiff's] injuries were the result of the usual and ordinary dangers at a construction site."

Here, the record establishes that plaintiff's injuries were not the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Instead, plaintiff, who was a descending a ladder, fell because of the presence of an object protruding into his line of descent, that interfered with his foot reaching down to the rung below.

That plaintiff's descent was from the third rung to the second, as opposed to the second to the floor (in Cohen) or the first to the floor (as in Nieves) is inconsequential, given that as in all three cases, the ladder was effective in preventing the plaintiffs from falling during the performance of task which required the use of the ladder in the first place. In descending the ladder, the hazard which caused the injury was unrelated to elevation-related risk which

necessitated the use of the ladder. As such, plaintiff's expert affidavit fails to raise an issue of fact or establish that the absence of appropriate devices was a proximate cause of plaintiff's injuries.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the plaintiff's Labor Law 240(1) cause of action is granted, and such cause of action is severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion for judgment in his favor on his Labor Law 240(1) is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 7/22/14

J.S.C.

HON. CAROL EDMEAD

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