

Vocson v Port Authority of New York

2014 NY Slip Op 32373(U)

August 15, 2014

Supreme Court, Bronx County

Docket Number: 304788/2012

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MICHAEL VOCSON,

Plaintiff,

DECISION AND ORDER

Index No. 304788/2012

- against -

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, SILVERSTEIN PROPERTIES, INC. and
TISHMAN CONSTRUCTION CORPORATION,

Defendants.
-----X

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated April 30, 2014 and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof; defendants' notice of cross-motion dated May 21, 2014 and the affirmation, affidavits (2) and exhibits submitted in support thereof; plaintiff's affirmation in reply dated July 16, 2014 and the exhibit submitted therewith; defendants' affirmation in reply dated July 30, 2014; and due deliberation; the court finds:

Plaintiff moves for partial summary judgment on the issue of defendants' liability with respect to plaintiff's cause of action under Labor Law § 240(1); defendants cross-move to dismiss such cause of action. Plaintiff, an ironworker apprentice, testified that at the time of the accident he was ascending a thirty-foot metal ladder to the next floor to ask the welders if they needed anything and to inform them of a coffee break. In addition to rungs, the ladder was also equipped with handrails; however, plaintiff was using the rungs as handholds. Approximately fifteen feet up, he felt a "big gust" of wind, felt the ladder shift toward him, and he fell backward. The ladder did not fall. The ladder was tied off to a steel beam at the top right and the footings of the ladder rested in a furrow of the corrugated flooring. While plaintiff had a safety harness, he testified that there was no

“retractable” in the vicinity to tie it to. The ladder normally “shifted” a little under his weight, meaning that it was not completely stiff and rigid, and the shifting at the time of the accident was “significant” enough to “jar” him, although he had not perceived any shifting, normal or otherwise, prior to the accident.

Carl Curatola (“Curatola”), Tishman Construction Corporation’s senior site safety manager, testified on behalf of defendants. He interviewed plaintiff at the on-site paramedic office and memorialized his findings in a report. After interviewing plaintiff he went to the site of the accident. The ladder was tied off to a steel beam at the top right and the footings of the ladder rested “perfectly” in a furrow of the corrugated flooring, as he had observed whenever he previously saw the ladder. The height differential between the low and high points of the corrugations was four inches. Whenever he had used the ladder previously (a few dozen times or so), he experienced “just the normal little bit of sway that a 30-foot ladder would give, but that’s it.”

Pursuant to Labor Law § 240(1), owners, contractors and their agents “shall furnish or erect, or cause to be furnished or erected . . . devices which shall be so constructed, placed and operated as to give proper protection.” Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers from risks inherent in elevated work sites. *See McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011). Plaintiff must demonstrate a violation of the statute and that the violation was a proximate cause of the injury. *See Blake v. Neighborhood Hous. Servs.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). Merely because an item enumerated in the statute might have been useful in preventing the injury does not mean that the injury was a gravity-related one contemplated by the statute. *See Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001).

“[F]ailure to properly secure a ladder to insure that it remains steady and erect while being

used constitutes a violation of Labor Law § 240(1).” *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 437, 921 N.Y.S.2d 42, 45 (1st Dep’t 2011) (citation omitted). A wholly unsecured ladder would be found inadequate to prevent plaintiff’s accident. *See Lipari v. AT Spring, LLC*, 92 A.D.3d 502, 938 N.Y.S.2d 303 (1st Dep’t 2012). However, “[a] fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection.” *Campos v. 68 E. 86th St. Owners Corp.*, 117 A.D.3d 593, 593, 988 N.Y.S.2d 1, 2 (1st Dep’t 2014). “Defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction.” *Ellerbe v. Port Auth. of N.Y. & N.J.*, 91 A.D.3d 441, 442, 936 N.Y.S.2d 39, 40 (1st Dep’t 2012).

Plaintiff argued that the ladder was inadequate and plaintiff was not provided with a tie-off point for his safety harness. Defendants raised issues of fact precluding the grant of summary judgment to any party.

Defendants submitted the affidavits and reports of Curatola and plaintiff’s employer’s safety representative, both of whom interviewed plaintiff shortly after the accident and both of whom found to the ladder to have been adequately secured. Both reports indicated that plaintiff stated he did not know what caused him to fall. Defendant further submitted the records and Workers’ Compensation Board accident report of the on-site paramedic who also reported that plaintiff denied knowing the cause of his fall. Thus, regardless of the presence of a violation of the statute, the conflicting accounts raise issues as to proximate cause. *See Ellerbe, supra*. Furthermore, plaintiff testified to “purposely” letting go of the ladder, and it is inappropriate for the court to assess issues of credibility on a motion for summary judgment. *See Gaspari v. Sadeh*, 61 A.D.3d 405, 406, 876 N.Y.S.2d 46, 48 (1st Dep’t 2009); *Chunn v. New York City Hous. Auth.*, 55 A.D.3d 437, 866 N.Y.S.2d 145 (1st Dep’t 2008).

Defendants' other arguments do not warrant judgment in their favor. First, an unwitnessed accident does not preclude a plaintiff from moving for and being granted summary judgment. *See Verdon v. Port Auth. of N.Y. & N.J.*, 111 A.D.3d 580, 977 N.Y.S.2d 4 (1st Dep't 2013).

Defendants argue that they did not violate Labor Law § 240(1) because the ladder was not defective; thus, plaintiff's negligence by "misusing" the ladder was the sole cause of the accident. The facts that the ladder may have been secured and fully functional are not necessarily dispositive to the issue of a statutory violation and do not necessarily render any additional protective device redundant. "Where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute." *Cruz v. Turner Constr. Co.*, 279 A.D.2d 322, 322-23, 720 N.Y.S.2d 10, 11 (1st Dep't 2001). It is apparent that plaintiff was not prevented from falling by the ladder. *See Yu Xiu Deng v. A.J. Contr. Co.*, 255 A.D.2d 202, 255 A.D.2d 303, 680 N.Y.S.2d 223 (1st Dep't 1998).

"To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained." *Nacewicz v. Roman Catholic Church of the Holy Cross*, 105 A.D.3d 402, 402-3, 963 N.Y.S.2d 14, 16 (1st Dep't 2013). There is no evidence that plaintiff used the ladder in any manner other than that normally expected. *See Eustaquio v. 860 Cortlandt Holdings, Inc.*, 95 A.D.3d 548, 944 N.Y.S.2d 78 (1st Dep't 2012). Losing one's balance or footing is not "misuse" and in any event the conflict between plaintiff's initial statements and his deposition testimony raises issues of fact. *See Ellerbe, supra*.

Defendants next argue that the act of asking other workers whether they need anything is at best "investigatory" and not covered under Labor Law § 240(1). However, for the purposes of

determining whether work is covered under the statute, it has been stated that “the relevant inquiry here is not whether the plaintiff picked up a tool to effect a repair, but whether he had been hired to take any part in the repair work.” *Campisi v. Epos Contr. Corp.*, 299 A.D.2d 4, 8, 747 N.Y.S.2d 218, 221 (1st Dep’t 2002). Inasmuch as plaintiff’s role of determining the welders’ needs was “ongoing and contemporaneous with the other work,” *Prats v. Port Auth.*, 100 N.Y.2d 878, 881, 800 N.E.2d 351, 353, 768 N.Y.S.2d 178, 180 (2003), it cannot be said that defendants eliminated all questions of fact as to whether plaintiff performed covered work.

Defendants also argued that the ladder constituted “a permanent staircase not designed as a safety device to afford protection from an elevation-related risk,” *Griffin v. New York City Transit Auth.*, 16 A.D.3d 202, 203, 791 N.Y.S.2d 98, 99 (1st Dep’t 2005); *see also Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285, 860 N.Y.S.2d 38 (1st Dep’t 2008), but submitted no admissible evidence tending to establish this, *see Zuckerman v. New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

Defendants also argued that the wind constituted an unforeseeable intervening act. An “outside force, such as a gust of wind” may be deemed an independent cause of an accident, *see Cosban v. New York City Transit Auth.*, 227 A.D.2d 160, 161, 641 N.Y.S.2d 838, 840 (1st Dep’t 1995); *see also MacNair v. Salamon*, 199 A.D.2d 170, 606 N.Y.S.2d 152 (1st Dep’t 1993), attenuating a defendant’s failure to provide adequate safety devices, *see Chacha v. Glickenhau Doynow Sutton Farm Dev., LLC*, 69 A.D.3d 896, 894 N.Y.S.2d 480 (2d Dep’t 2010). However, wind at a highly elevated construction site is not necessarily extraordinary, *see Williams v. 520 Madison Partnership*, 38 A.D.3d 464, 834 N.Y.S.2d 32 (1st Dep’t 2007), and merely raises an issue of fact, *see Allen v. Village of Farmingdale*, 282 A.D.2d 485, 723 N.Y.S.2d 219 (2d Dep’t 2001); *Zeitner v. Herbmax Sharon Assocs.*, 194 A.D.2d 414, 599 N.Y.S.2d 234 (1st Dep’t 1993).

The court notes that while plaintiff's papers were untimely served for CPLR 3212(a) purposes, plaintiff served identical papers timely on April 2, 2014 that were rejected by the court pursuant to 22 NYCRR § 202.5 for a filing deficiency. Therefore, the court finds good cause to entertain the motion. Also, defendants' cross-motion was not served within one hundred twenty days after the filing of the note of issue and was untimely. *See* CPLR 3212(a). However, inasmuch as defendants limited their cross-motion to the same cause of action as plaintiff's motion, the court considers the cross-motion. *See Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dep't 2006), *appeal dismissed*, 9 N.Y.3d 862, 872 N.E.2d 878, 840 N.Y.S.2d 765 (2007).

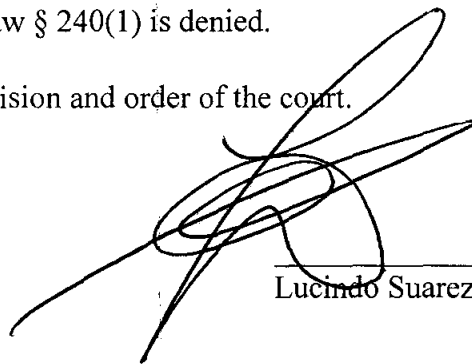
Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendants' liability on his cause of action premised upon Labor Law § 240(1) is denied; and it is further

ORDERED, that defendants' cross-motion for summary judgment on plaintiff's cause of action premised upon Labor Law § 240(1) is denied.

This constitutes the decision and order of the court.

Dated: August 15, 2014



Lucindo Suarez, J.S.C.