

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

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JOSEPH MORA and DULZENIR MORA, his wife,

Plaintiff,

-against-

DECISION / ORDER
Index No. 305640/2009

SKY LIFT DISTRIBUTOR CORP., et als,

Defendants.

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The following papers numbered 1 to 10 read on the below motions noticed on March 19 and March 24, 2014 and both duly submitted on the Part IA15 Motion calendar of **April 23, 2014:**

Papers Submitted	Numbered
Sky Lift's NOM, Exhibits	1,2
Pls' NOM, Exhibits, Memo of Law	3,4,5
1200 First Ave. Aff in Opp to Sky Lift	6
1200 First Ave. Aff in Opp to Pl.	7
Sky Lift Aff in Partial Opp.	8
Sky Lift Aff in Reply, Exh.	9,10

Upon the foregoing papers, defendant Sky Lift Distributor Corp., ("Sky Lift") moves for leave to reargue its previously-filed motion for summary judgment, and upon reargument, an Order granting that motion, dismissing the complaint of the plaintiffs Joseph Mora (individually, "Plaintiff") and Dulzenir Mora (collectively, "Plaintiffs") and all cross-claims, pursuant to CPLR 2221(d) and 3212. Separately, Plaintiffs move for leave to reargue their previously-filed motion for summary judgment, and upon reargument, an Order granting that motion, awarding summary judgment to Plaintiffs on the issue of liability against defendants 1200 Fifth Associates, LLC., and the Chetrit Group, LLC ("collectively "1200 Fifth"), on Plaintiff's claims asserted under Labor Law §240(1). 1200 Fifth opposes both motions. Sky Lift submits an affirmation in partial opposition to Plaintiffs' motion.

I. Background

On December 6, 2008, plaintiff Joseph Mora was working for his employer Par Mechanical ("Par"), who had been hired to aid in replacing a cooling tower located on the roof of

property located at 1200 Fifth Avenue, New York, New York. Par hired subcontractor Sky Lift, a rigging company, to remove the old cooling tower with a crane, and to rig the new cooling tower in sections. The purchase order also specified "tower over sized loads moved after hours at night, job done on overtime." Using a crane, Sky Lift removed the old tower in sections and placed the upper portion of the old tower onto a flat bed truck. Before this tower section could be safely transported from the work site, a fan cowl cover located on the top of the old tower had to be removed. Plaintiff testified that his supervisor instructed him to stand on the street and direct traffic while another Par employees detached the cowl cover and pushed it off the cooling tower, intending to move it onto the bottom of the flatbed. The cover, however, struck and slid off of the flatbed and into the street, striking the plaintiff's right leg and ankle. Plaintiffs thereafter filed this lawsuit, alleging violations of common law negligence and Labor Law §§240(1) and 200.

Thereafter, defendant Sky Lift moved for summary judgment, dismissing Plaintiffs' complaint and all cross-claims. Plaintiffs cross-moved for summary judgment on the issue of liability against 1200 Fifth on their claims asserted under Labor Law §240(1). 1200 Fifth opposed the cross-motion, and cross-moved themselves for summary judgment, dismissing Plaintiffs' complaint and all cross-claims. By Decision and Order entered January 21, 2014, this Court denied Sky Lift's motion, granted that portion of 1200 Fifth's motion seeking dismissal of Plaintiff's Labor Law §200 and common law negligence claims asserted against it, and denied the remaining portions of 1200 Fifth's motion, and denied Plaintiffs' summary judgment liability motion. Sky Lift now seeks to reargue their motion for summary judgment, and upon reargument, and order granting summary judgment. Plaintiffs also seek reargument of their previously-denied motion.

II. Standard of Review

A motion for leave to reargue is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d]. *see Foley v. Roche*, 68 AD2d 558, 567 [1st Dep't 1979]). Whether to grant reargument is discretionary with the court in the interests of justice (*Sheridan v. Very, Ltd.*, 56 A.D.3d 305 [1st Dept. 2008], citing *Sciasca v. Nevins*, 130

A.D.2d 649, 650 [2nd Dept. 1987]).

III. Applicable Law and Analysis

Sky Lift's Motion to Reargue

Sky Lift initially stresses that the original motion was unopposed by Plaintiffs. Plaintiffs' cross-motion did not seek any relief as to the moving defendants. Sky Lift contends that since no opposition was served in response to their motion papers, the facts and arguments offered must be deemed admitted.

Sky Lift asserts that the Court should not have found that there was an issue of fact as to whether it was responsible for removing the fan cowl cover and/or supervising or directing its removal. Sky Lift argues in its moving papers that the Court essentially relied on speculation in concluding that the task of removing and "moving" the cooling tower also required Sky Lift to remove the fan cowl cover. There was no language in the purchase order that delegated that specific task to Sky Lift. Brad Allecia, of Sky Lift, testified that Par was responsible for removing the fan cowl cover prior to Sky Lift's arrival on the site. Plaintiff's supervisor at Par, Keith Bielawne, only "assumed" that Sky Lift would assist with the removal of the fan cowl cover due to its size. He went on to testify that he believed Par employees were capable of safely removing the cover themselves. Accordingly, the movants assert that there is no evidence beyond speculation that Sky Lift supervised or controlled the injury-producing activity and therefore Plaintiff's Labor Law §200 and common law negligence claims should have been dismissed.

Sky Lift also argues that the Court should have dismissed Plaintiff's Labor Law §240(1) claims since Sky Lift was not a "statutory agent" of Par. The scope of Sky Lift's work here was very limited, and did not contain directives to remove the fan cowl cover. Moreover, the record demonstrated that no one directed or instructed Plaintiff on how to remove the fan cowl cover aside from his direct supervisor, Mr. Bielawne. The evidence also demonstrates that Sky Lift had completed its rigging job and left the work site at approximately 3:00PM, approximately 2 hours before this accident allegedly occurred.

Plaintiffs do not oppose the motion to reargue. Co-defendant 1200 Fifth submits an affirmation in opposition, arguing that this Court correctly decided on the original motion papers

that Sky Lift did not meets its initial prima facie burden. 1200 Fifth contends that the purchase order and testimony did not eliminate all material issues of fact as to whether removal of the fan cowl cover was a part of Sky Lift's responsibilities. They assert that Sky Lift does not raise any new issues in its motion so as to establish a misapprehension or mis interpretation of controlling law.

A. Labor Law §200 and Common Law Negligence Claims

Initially, it must be noted that while Sky Lift stresses that Plaintiff did not oppose the motion, it was still Sky Lift's burden to demonstrate its entitlement to summary judgment. Failure to make such prima facie showing required denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

Upon further review, however, the Court agrees that the subject purchase order did not require Sky Lift itself to remove the subject fan cowl cover, as this was generally done was a matter of course before Sky Lift would arrive to haul away the old cooling tower. In the original Decision and Order, this Court determined that the cover removal was a part of the "moving" operation in order to safety transport the older tower components through city streets, and thus found factual issues regarding Sky Lift's responsibilities at the work site. Even if the fan cowl cover removal was "required" as a part of the complete tower removal process, however, the record demonstrates here that laborers other than Sky Lift contractors were to "prep" the tower and remove the fan cowl cover as "protocol" before Sky Lift would commence its work. This is, indeed, what happened here, as it is uncontradicted that Par was told to take the cover off when Sky Lift arrived. Keith Bielawne's testimony is insufficient to raise a genuine issue of fact as to whether Sky Lift, a subcontractor, directed or controlled this injury-producing work. Mr. Bielawne and Plaintiff confirmed that Par laborers removed the fan cowl cover, completely under the direction and instruction of Mr. Bielawne, the supervisor. Mr. Bielawne only assumed that Sky Lift would be providing more man power due to the size of the cover - and he later testified that Par workers were capable of doing the job themselves.

Upon reargument, this Court finds that an "assumption" on the part of Mr. Bielwane cannot raise an issue of fact as to whether Sky Lift had any duty to remove the fan cowl cover, or directed the method it was removed. Mr. Allecia noted that Par was directed to remove the fan cowl cover, only because that was "protocol" and would allow Sky Lift to transport the old

tower. At best, the record demonstrates that Sky Lift may have only given general instructions, which are not enough to impose liability under Labor Law 200 and common law negligence (*Foley v. Consol. Ed. Co. of New York, Inc.*, 84 A.D.3d 476 [1st Dept. 2011]). Those claims are, therefore, dismissed as to Skylift.

B. Labor Law §240(1) Claims

Upon reargument, this Court also grants Sky Lift their previously-denied motion for summary judgment, dismissing Plaintiff's Labor Law §240(1) claims. The purchase order between Par and Sky Lift only required Sky Lift to "...SUPPLY CRANE, LABOR, PERMITS AND TRUCKING TO REMOVE OLD COOLING TOWER, RIG NEW COOLING TOWER IN SECTIONS. TOWER OVER-SIZED LOADS MOVED AFTER HOURS AT NIGHT. JOB DONE ON OT." Although this court originally viewed that order as including the removal of the fan cowl cover – as noted above – there is simply not enough evidence to demonstrate that Sky Lift actually had the affirmative duty to perform this task or engaged in any supervision of Par employees (*compare Britez v. Madison Park Owner, LLC.*, 106 A.D.3d 531 [1st Dept. 2013]). As noted above, the evidence does not reveal an issue of fact as to whether Sky Lift directed or controlled the injury-producing work over and above general instruction. Plaintiff himself confirmed that no one from the "rigging company" ever told him how to do his job. Rather it was his own supervisor who instructed him how to perform the work. Mr. Bielwane's speculative testimony is not enough to raise an issue of fact as to whether Sky Lift "obtained the concomitant authority to supervise and control that work" so as to be viewed as Par's statutory agent (*see Walls v. Turner Constr. Co.*, 4 N.Y.3d 861 [2005]; *Russin v. Picciano & Son*, 54 N.Y.2d 311 [1981]).

Plaintiff's Motion to Reargue

Plaintiffs seek to reargue their previously-denied motion for summary judgment against 1200 Fifth on his Labor Law §240(1) claims. Plaintiffs argue *inter alia* that the motion should have been granted since the Decision and Order already determined that the plaintiff's injury arose as a consequence of the application of the force of gravity on the fan cowl cover, which

required securing. It must necessarily follow that the absence of any safety device was, at the very least, a proximate cause of Plaintiff's injuries and he is therefore entitled to summary judgment. In opposition, 1200 Fifth argues that the Court did not misapprehend any facts or overlook relevant case law in deciding the motion. Plaintiff failed to meet its burden of demonstrating that any protective device as contemplated by the statute was necessary to remove the fan cowl cover.

Upon reargument, the Court will find that Plaintiffs are entitled to summary judgment against 1200 Fifth on his Labor Law §240(1) claims, since he has established both a statutory violation, which was a proximate cause of this injury. To prevail on a motion for partial summary judgment on a cause of action under Labor Law §240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries. (*Auriemma v. Biltmore Theatre, LLC.*, 82 A.D.3d 1 [1st Dept. 2011][internal citations omitted]). Plaintiff bears the burden of proving that the defendants failed to provide an adequate safety device, and the lack of an adequate safety device caused his injury (*Berg v. Albany Ladder Co., Inc.*, 10 N.Y.3d 902 [2008]).

This Court previously decided that Plaintiff's original submissions were insufficient to entitle him to win summary judgment on this issue (*see Fabrizi v. 1095 Avenue of the Americas, LLC*, 98 A.D.3d 864 [1st Dept. 2012]). In so holding, the Court noted that Labor Law §240(1) applied to this fact pattern, but considered the record unsettled as to whether removal of the fan cowl cover removal could have been performed without the use of safety equipment. Plaintiff's supervisor testified at deposition that the removal of the fan cowl cover was a "simple task" and that the employees who were assigned to remove the cover, including the Plaintiff, were "more than capable of doing the task" without further assistance and in a safe and professional manner.

Upon reargument, however, the Court finds that the evidence indeed established Plaintiff's entitlement to judgment as a matter of law. It is of no moment that Plaintiff's supervisor believed that his employees were capable of removing the fan cowl cover without the use of additional equipment. What is evident is that the 250-lb cover constituted "material" or a "load" that "required securing for the purposes of an undertaking" (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259 [2001]; *Quattrocchi v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757 [2008]). It was therefore necessary that Plaintiff be provided with some sort of device that would guard

against the risk of the cover's "unchecked or insufficiently checked descent" (*Apel v. City of New York*, 73 A.D.3d 406 [1st Dept. 2010], *citing Runner v. New York Stock Exchn., Inc.*, 13 N.Y.3d 599, 604 [2009]). It is undisputed here that the cover was not secured when it was being removed, and the work was only being performed by the laborers themselves without any tools or machinery. The subsequent descent of the cover, and its contact with Plaintiff causing injury, was therefore proximately caused by the lack of any device that could have guarded against that precise risk. While 1200 Fifth argues that Plaintiffs have not provided any expert testimony regarding the need for a safety device, such testimony is not necessary here, since a plaintiff is not required to prove what particular safety devices would have prevented the accident (*Noble v. AMCC Corp.*, 277 A.D.2d 20 [1st Dept. 2000]). Plaintiff's motion for summary judgment on the issue of liability will therefore be granted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Sky Lift's motion for leave to reargue is granted, and upon reargument, Sky Lift's motion for summary judgment, dismissing the complaint and all cross-claims, is granted, and it is further,

ORDERED, that Plaintiffs' motion for leave to reargue is granted, and upon reargument, Plaintiffs' motion for summary judgment on the issue of 1200 Fifth's liability under Labor Law §240(1) is granted.

This constitutes the Decision and Order of this Court.

Dated: 7/14, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.