

Maraio v L&M 2180, LLC
2014 NY Slip Op 33737(U)
February 19, 2014
Supreme Court, New York County
Docket Number: 158486/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FRANK and DONNA MARAIO,

Plaintiffs,

Index No. 158486/12

-against-

DECISION/ORDER

L&M 2180, LLC, ROSE ASSOCIATE, INC. and
PLAZA CONSTRUCTION CORP.,

Defendants.

-----x
L&M 2180, LLC, ROSE ASSOCIATE, INC. and
PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

TSC 2012, LLC and B&R REBAR CONSULTANTS,

Third-Party Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action to recover damages for injuries allegedly
sustained by plaintiff Frank Maraio on September 21, 2012, while performing foundation
waterproofing at a construction site. Plaintiffs now move for an Order pursuant to CPLR § 3212

granting partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). By separate notices of motion, third-party defendants move for an order severing the third-party action. These motions are consolidated for disposition purposes and, for the reasons set forth below, plaintiffs' motion and third-party defendants' motions are denied.

The relevant facts are as follows. On September 21, 2012, plaintiff Frank Maraio (hereinafter referred to as "Maraio" or "plaintiff") was performing work at the construction site located at 2182-2192 Broadway, New York, NY (the "Project"). The premises where the Project was being constructed was owned by defendant L&M. Defendant Rose Associates, Inc. ("Rose") was retained by L&M to be its representative at the Project and defendant Plaza Construction Corp. ("Plaza") was retained to serve as the construction manager for the Project. Plaintiff's employer Civetta Cousins Contracting ("Civetta") was a subcontractor of Plaza. Civetta was hired to perform the excavation and construction of the building's foundation that was being erected at the Project.

On September 21, 2012, plaintiff was working as a waterproofer at the Project. In order for him to complete his work, he was required to work from the scaffolding that was erected at the Project. Specifically, to reach the walls of the building, plaintiff was required to use the outriggers that were built to connect the scaffolding to the wall. The outriggers consisted of triangular-shaped metal brackets attached to the outside of the scaffold's pipe frame with wooden planks placed on top of those brackets. At the time of his accident, plaintiff alleges that he was walking from one section of the outrigger to the next, which required him to unhook his security harness, when he was caused to trip and fall forward. It is undisputed that the outrigger section plaintiff fell on was missing one of its planks and plaintiff fell through the opening landing on

the outrigger one floor below.

The court first turns to plaintiffs' motion for partial summary judgment on this issue of liability pursuant to Labor Law § 240(1). Pursuant to Labor Law § 240(1),

All contractors and owners and their agents . . . who contract for but do not control the work, 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) was enacted to protect workers from hazards 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 materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006); *see also Fajardo v. Trans World Equities Co.*, 286 A.D.2d 271 (1st Dept 2001).

In the present case, as an initial matter, plaintiffs' motion for partial summary judgment

as against defendant Rose on the issue of liability is denied as they have failed to demonstrate that Rose is L&M's agent. Pursuant to explicit statutory language, § 240(1) liability only attaches to "contractors and owners and their agents." "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured." *Medina v. R.M. Resources*, 107 A.D.3d 859 (2nd Dept 2013); *see also Kennan v. Simon Prop. Goup, Inc.*, 106 A.D.3d 586, 589 (1st Dept 2013). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law." *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 864 (2005). Here, plaintiffs have failed to present any evidence demonstrating that Rose had any supervisory control or authority over Maraio's work at the Project. Indeed, plaintiff only asserts that Plaza had authority to oversee and coordinate Maraio's work.

However, plaintiffs have established their prima facie right to summary judgment on the issue of liability as against defendants L&M and Plaza as they have shown that Maraio's injuries were caused due to said defendants failure to provide adequate safety devices to prevent him from falling while performing his work at the Project in violation of § 240(1). As an initial matter, plaintiff's injuries clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto plaintiff when he was stepping from one outrigger to the next, tripped and was caused to fall approximately six feet to the outrigger one floor below. Additionally, although plaintiff does not dispute that he was wearing a harness at the time of the accident, he testified that such harness was insufficient under the statute as it required him to unhook the harness completely in order to move from one section of the

outrigger to the next. Additionally, plaintiff alleges that the scaffolding provided was inadequate as a plank was missing from the outrigger he was stepping onto, which caused him to fall approximately six feet below when he tripped.

In response, however, defendants have presented evidence raising an issue of fact as to whether sufficient safety devices required by Labor Law § 240(1) were indeed provided to plaintiff, and, in that case, whether plaintiff's failure to properly use the provided safety devices was the sole proximate cause of his injuries. Although plaintiff alleges that he was only provided with a single lanyard harness that required him to unhook the harness completely in order to move along the outriggers, this fact is contradicted by the testimony of Joseph Koacia ("Koacia"), Civetta's Safety Manger on the Project, and Battista Bonello ("Bonello"), Civetta's Site Supervisor, which are put forward by defendants. According to the affidavit of Kolacia, plaintiff was provided with a double lanyard safety harness prior to performing any work on the Project. Additionally, Kolacia attests that he instructed plaintiff to have one lanyard tied-off to the scaffold frame at all times while working on the Project. Bonello also testified that plaintiff was provided with a double lanyard safety harness. Thus, there is conflicting evidence as to what safety harness was provided to plaintiff precluding summary judgment as to liability under § 240(1).

The court now turns to third-party defendants' motions to sever the third-party action. Pursuant to CPLR § 603, "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." Here, third-party defendants contend that severance should be granted as the third party action was not commenced until after the Note of Issue was filed and as such they will be prejudiced by

