

**Eddy v John Hummel Custom Bldrs., Inc.**

2014 NY Slip Op 33807(U)

March 12, 2014

Supreme Court, Suffolk County

Docket Number: 09-18896

Judge: Joseph C. Pastoressa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY**COPY****P R E S E N T :**Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme CourtMot. Seq. # 003 - MD  
# 004 - MD  
# 005 - XMG-----X  
MARK EDDY,

Plaintiff,

- against -

JOHN HUMMEL CUSTOM BUILDERS, INC.,  
DAVID BERKMAN and PAMELA BERKMAN,Defendants.  
-----XRAPPAPORT GLASS, GREENE &  
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Upon the following papers numbered 1 to 22 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 14; Notice of Cross Motion and supporting papers 16 - 18; Answering Affidavits and supporting papers 19 - 20; Replying Affidavits and supporting papers 21 - 22; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that plaintiff's motion for partial summary judgment in his favor on the issue of liability is granted; and it is further

**ORDERED** that the motions (003 & 004) by defendant John Hummel Custom Builders, Inc. for summary judgment dismissing plaintiff's complaint against it is denied.

Plaintiff Mark Eddy commenced this action to recover damages for personal injuries he allegedly sustained on October 2, 2007, while working at a construction site of a new home located at 541 Daniels Lane, Sagaponack, New York. At the time of the accident plaintiff was employed by Patrick Bistrain, Jr. Inc., a subcontractor hired by defendants David Berkman and Pamela Berkman to lay the foundation and provide excavation services for their new home. The general contractor for the project was defendant John Hummel Custom Builders, Inc. ("Customer Builders"). Plaintiff allegedly was injured when he fell through the open train gate of a moving pick-up truck and was struck in the head by an unsecured iron

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grate that also fell from the truck. By way of his complaint, plaintiff alleges causes of action against the defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6).

Custom Builders now moves for summary judgment dismissing the complaint on the grounds it did not control or direct plaintiff's work, and that neither plaintiff's fall from the truck nor the fall of the iron grate on top of him constitutes an actionable claim under Labor Law §240(1). Additionally, Custom Builders assert that plaintiff's claim under Labor Law §241(6) fails as a matter of law, since he did not allege the violation of any specific applicable provisions of the Industrial Code. Custom Builders also served an amended notice of motion dated May 31, 2013, which seeks identical relief. Plaintiff concedes that he failed to state a valid claim under section 200 of the Labor Law. However, plaintiff opposes the remainder of Custom Builders' motion and cross-moves for summary judgment in his favor on the issue of liability arguing, inter alia, that defendants failed to ensure that adequate safety devices were in place to secure the iron grate or prevent it from falling out of the truck and striking him in the head as he was laying on the ground. Plaintiff further asserts that defendants violated 12 NYCRR 23-9.7( c) and 12 NYCRR 23-9.7(e), which regulate, respectively, the securing of heavy loads during transit, and seating for workers permitted to ride on the exterior of trucks or similar vehicles.

Initially, the Court notes that plaintiff's untimely cross motion for partial summary judgment on the issue of liability as to his Labor Law §240 (1) claim may be considered, as it raises identical issues already before the court (see McCallister v 200 Park, L.P., 92 AD3d 927 [2012]; Whitehead v City of New York, 79 AD3d 858 [2010]; Grande v Peteroy, 39 AD3d 590 [2007]). Further, the amended notice of motion by Custom Builders superseded its original motion for summary judgment. Accordingly, the original motion is denied, as moot.

"To establish entitlement to recovery under [Labor Law §240 (1)], a plaintiff must demonstrate both that a violation of the statute —i.e., a failure to provide the required protection at a construction site— proximately caused the injury and that 'the injury sustained is the type of elevation-related hazard to which the statute applies'" (Oakes v Wal-Mart Real Estate Bus. Trust, 99 AD3d 31, 34 [2012], quoting Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011]; see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]). The hazards contemplated by Labor Law § 240(1) "are those 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 v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). In cases involving falling objects, a plaintiff must show more than that an object fell, thereby causing injury to a worker (see Narducci v Manhasset Bay Assoc., 96 NY2d 259 [2001]). Rather, a plaintiff must demonstrate that the object fell while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute (see Narducci v Manhasset Bay Assoc., supra; Novak v Del Savio, 64 AD3d 636 [2009]). While not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1) (see Narducci v Manhasset Bay Assoc., supra), a plaintiff who is injured by such an object may recover where he or she shows that at the time the object fell it was "being hoisted or secured" (Narducci v Manhasset Bay Assocs., supra at 268) or "required securing for the purposes of the undertaking" (Novak

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v Del Savio, supra; see Quattrocchi v F.J. Sciamè Constr. Corp., 11 NY3d 757 [2008]).

Here, plaintiff established his prima facie entitlement to partial summary judgment on his Labor Law §240 (1) claim by submitting evidence that he was struck by an unsecured iron grate that fell three feet from the open train gate of a moving pick-up truck that was being used to transport the object to another area of the worksite (see Outar v City of New York, 5 NY3d 731 [2005]; DiPalma v State of New York, 90 AD3d 1659 [2011]; Gonzalez v Glenwood Mason Supply Co., Inc., 41 AD3d 338 [2007]). Significantly, nonparty witness Mark DiSunno, who was present at the time of the accident, testified that the accident occurred while he and plaintiff were transporting building material from a staging area to another section of the worksite. He testified that the iron grate had been placed at the end of the open truck gate because the bed of the truck was filled, and that plaintiff was sitting on top of the unsecured grate just before he and the grate fell from the truck. DiSunno further testified that due to the short distance they were going to travel, none of the materials placed on the truck bed, including the iron grate, were secured.

In opposition, Custom Builders failed to raise any triable issues with regard to a violation of Labor Law §240 (1), or as to whether the plaintiff was the sole proximate cause of his own injury (see Gallagher v New York Post, 14 NY3d 83 [2010]; McCallister v 200 Park, L.P., supra). Although Labor Law § 240 (1) generally does not apply when construction workers are injured by material which fall a minuscule height as it is being loaded or unloaded from a truck (see Farrington v Bovis Lend Lease LMB, Inc., 51 AD3d 624 [2008]; Landa v City of New York, 17 AD3d 180 [2005]), the statute applies, where, as here, the falling object required securing for the purposes of the undertaking and posed a foreseeable risk of tumbling over the edge of the truck due to a elevation differential (see Outar v City of New York, supra; Narducci v Manhasset Bay Assocs., supra; Boyle v 42nd St. Dev. Project, Inc., 38 AD3d 404 [2007]). Moreover, even a small elevation differential will not be viewed as de minimis, where the falling object – a one hundred pound iron grate – is capable of generating significant force over the course of a relatively short descent (see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1 [2011]; Runner v New York Stock Exch., Inc., 13 NY3d 599 [2009]; DiPalma v State of New York, supra). Additionally, Oakes v Wal-Mart Real Estate Bus. Trust, 99 AD3d 31 (2012) and Davis v Wyeth Pharm, Inc., 86 AD3d 907 (2011) are distinguishable, since both cases relate to accidents where virtually no elevation differential existed because the plaintiffs were on the same level as the falling object when the accident occurred. In this case, the unsecured iron grate fell three feet before it struck plaintiff who had already fallen to the ground. Nor can plaintiff be considered the sole proximate cause of his alleged injuries, since he was not provided with any safety devices to secure the iron grate to the bed of the truck (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 290; Ball v Cascade Tissue Group - N.Y., Inc., 36 AD3d 1187 [2007]). Accordingly, plaintiff's cross motion for partial summary judgment in his favor on his Labor Law §240 claim is granted.

Inasmuch as Custom Builders is liable for plaintiff's claim under Labor Law §240(1), Custom Builder's arguments concerning the validity of the other theories of liability contained in the complaint are academic, since the plaintiff's damages are the same under any of the theories of liability and he can only recover once (see Yost v Quartararo, 64 AD3d 1073 [2009]; Torino v KLM Constr., Inc., 257 AD2d 541 [1999]; Covey v Iroquois Gas Transmission Sys. L.P., 218 AD2d 197 [2009]). Therefore,

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defendants' motion for summary judgment dismissing the complaint is denied.

Dated: March 12, 2014

  
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**HON. JOSEPH C. PASTORESSA, J.S.C.**

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION