

Head v Pike Co., Inc.
2014 NY Slip Op 33836(U)
August 5, 2014
Supreme Court, Tompkins County
Docket Number: 2011-0687
Judge: Robert C. Mulvey
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF TOMPKINS

AARON C. HEAD,

Plaintiff,

vs.

Index No. 2011-0687

**THE PIKE COMPANY, INC. and
ITHACA COLLEGE,**

Defendants.

**BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice**

APPEARANCES: CARDINALE & DELVECCHIO LAW FIRM

By: Michael R. Cardinale, Esq.
Attorneys for Plaintiff
8432 Brewerton Road
Cicero, New York 13039

GOLDBERG SEGALLA, LLP

By: Michael Rubin, Esq.
Attorneys for Defendants
5786 Widewaters Parkway
Syracuse, New York 13214

DECISION & ORDER

Mulvey, Robert C., J.

The plaintiff seeks an award of partial summary judgment against the defendants The Pike Company and Ithaca College on the issue of liability under Section 240(1) of the Labor Law. The plaintiff moved for this relief on a prior occasion yet the motion was denied without prejudice to renew upon completion of discovery. Discovery has now been completed.

The defendants contend that issues of fact exist which preclude summary judgment, arguing that the plaintiff's conduct was the sole proximate cause of his injuries in that he chose not to use an available aerial lift, and that he was a recalcitrant worker in that he disregarded his employer's directive to use only the aerial lift and prohibiting the use of another employer's equipment.

A third-party action has been discontinued by stipulation entered on February 28, 2014.

FACTS

Plaintiff Aaron C. Head, an employee of John C. Lowery, Inc., was working at a construction site on the campus of Ithaca College on April 14, 2010, when he fell while descending an extension ladder. The ladder collapsed, causing him to fall forty-five feet to the ground, sustaining multiple injuries including a leg injury resulting in amputation. The ladder was owned by contractor Charles F. Evans, Inc.

The plaintiff testified that his foreman, Pat Jordan, told him that it was "okay for us to use the ladder to get to the area where we needed to work" (plaintiff's deposition transcript, p. 44). Mr. Jordan testified that the equipment provided to the workers on the day of the accident to get to the elevated work areas were "boom lifts, scissor lifts and the ladder in question" (Jordan deposition transcript, p. 13), and that he told Lowery employees to use "boom lifts, scissor lifts and the ladder" to get to those areas (p. 14). Jordan acknowledged that Lowery had a company policy "not to use equipment owned by other subcontractors at the site" (p. 14) yet he made arrangements with Evans to use that ladder.

Mark Sipes, safety coordinator for John C. Lowery, Inc., testified that the plaintiff and other Lowery employees were instructed to use lifts to get to elevated work areas (Sipes deposition transcript, p. 20) yet he did not know how they received that instruction (p. 21). He testified that a "verbal company policy" existed "that employees do not use

other company's equipment" and that it was "expressed to Lowery employees prior to the April 14, 2010 incident" (p. 26).

The key undisputed facts are as follows:

- the plaintiff was severely injured when a ladder collapsed while he was descending from a roof at a work site on the Ithaca College campus
- the ladder was improperly placed and secured and failed to provide proper protection to the plaintiff
- the ladder was intended to support a worker at an elevated height and failed
- the failure of the ladder to support the plaintiff was a proximate cause of his injury
- the plaintiff's foreman obtained permission from the ladder's owner to use it
- the plaintiff's foreman authorized his employees to use the ladder

DISCUSSION

The Court finds that the plaintiff has met his burden in establishing, prima facie, that the defendants violated Section 240(1) of the Labor Law and that said violation was the proximate cause of his injuries. This shifts the burden to the defendant to come forward with proof in admissible form demonstrating the existence of genuine issues of material fact.

The defendants contend that they did not breach their duty to provide adequate safety devices because they made an aerial lift and other equipment readily available. They argue that the plaintiff was specifically instructed to use that lift and that he knew or should have known that the aerial lift or other available safety devices should have been used. They cite the deposition testimony of Mark Sipes, the safety coordinator for plaintiff's employer, John C. Lowery, Inc., that the plaintiff was expected to use either one of two boom lifts or a scissor lift to reach the elevated work area, and that it was "verbal company policy" that employees "do not use other company's equipment." Finally, the defendants argue that the plaintiff's experience as a union carpenter and his admission that he was aware of the boom lifts on the site establish that he should have known that the boom lift was the proper means of accessing the elevated area.

They argue that these facts also establish that he was a recalcitrant worker because he deliberately disobeyed these directives.

The undisputed facts confirm that the collapse of the ladder was a proximate cause of the plaintiff's injuries. Once that is established, the plaintiff's actions are irrelevant as a matter of law, **Blake v. Neighborhood Housing Services of NYC**, 1 NY3d 280 (2003) ("if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it") **id.**, at 290. The fact that lifts were available and that the plaintiff was instructed to use them does not raise a triable issue, see **Portes v. New York State Thruway Authority**, 112 AD3d 1049, 1051 (Third Dept., 2013) *motion for leave to appeal dismissed by* 22 NY3d 1167 (2014).

Where the uncontroverted evidence shows that the plaintiff's foreman directed him in his actions regarding the use of the device, the plaintiff, as a matter of fact and law, cannot be the sole proximate cause of his injuries, **Harris v. City of New York**, 83 AD3d 104, 110 (First Dept., 2011), citing **Pichardo v. Aurora Contrs., Inc.**, 29 AD3d 879 (Second Dept., 2006). Here the testimony of the plaintiff's supervisor is unrebutted by the defendants - that he authorized the plaintiff and his fellow employees to use the ladder in question.

The defendants' reliance on **Stewart v. Playland Center, Inc.**, 8 AD3d 74 (First Dept., 2004) is misplaced; in that case, the Court noted that shortly before the accident the plaintiff had been specifically instructed to use an available scissor lift instead of a ladder to perform his assigned task. The Court held that this proof was sufficient to raise a triable issue as to whether plaintiff was a recalcitrant worker. **Id.** The defendants also cite **Isnardi v. Genovese Drug Stores** [242 AD2d 671 (Second Dept., 1997)] on this issue yet in that case the record revealed that the plaintiff admitted that he was instructed to use a pipe scaffold yet decided to use a less stable scaffold, with the same result. The distinguishing feature of the case at bar is the absence of proof of a specific instruction to use only the lifts, and the unrebutted proof that the plaintiff was authorized by his supervisor to use this ladder.

Consequently, the plaintiff's motion for partial summary judgment is granted.

This shall constitute the Order of the Court.

Signed this 5th day of August, 2014 at Ithaca, New York.

Hon. Robert
C. Mulvey

Digitally signed by Hon. Robert C. Mulvey
DN: cn=Hon. Robert C. Mulvey,
o=Tompkins County Supreme Court,
ou=NYS Supreme Judge,
email=tpkmulvey_chambers@nycourts.gov
, c=US
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