DiCarlo v New York City Sch. Constr. Auth.
2015 NY Slip Op 30396(U)
February 3, 2015
Sup Ct, Bronx County
Docket Number: 301019/2011
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

FRANK DiCARLO, et al.,

DECISION/ORDER

Plaintiffs,

-against- Index No.: 301019/2011

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, et als.

Defendants.

X

The following papers numbered 1 to 7 read on the below motions noticed on July 30, 2014 and duly submitted on the Part IA15 Motion calendar of **November 7, 2014**:

Papers Submitted	Numbered
Pl.'s affirmation in support of motion, memo of law, exhibits	1,2,3
Defs.' Cross-Motion, Exh.	4,5
Pl.'s Aff. In Reply, Exhibits	6,7

Upon the foregoing papers, the plaintiffs Frank DiCarlo (individually, "Plaintiff"), and Joan DiCarlo (collectively, "Plaintiffs"), move for summary judgment on the issue of liability on their Labor Law §240(1) claims asserted against defendants New York City School Construction Authority (individually, "Authority") and E.W. Howell Co., LLC (individually, "EWH")(collectively, "Defendants"). Defendants oppose the motion and cross-move for summary judgment, dismissing Plaintiffs' Labor Law §240(1) claims. Plaintiffs oppose the cross-motion.

I. Background

This matter arises out of an alleged construction site accident that occurred on July 14, 2010, during the construction of a public school. At the time, defendant Authority had entered into a contract with EWH to act as general contractor for the project. EWH hired subcontractors, including Plaintiff's employer, Interstate Masonry ("Interstate").

On the date of the accident, Plaintiff testified that he was told by his foreman, Anthony Cervoni, to work on an interior staircase to chop or "rake out" mortar from joints between concrete blocks in a staircase wall and to re-grout it. To perform his work, Plaintiff had to chisel out the joint and put a new joint in place to make it look finished. Plaintiff did this work on the staircase landing between either the second and third, or third and fourth floors. The landing had a finished floor and was painted concrete. To complete the job, Plaintiff was using one part or section of a two-part fiberglass extension ladder. Plaintiff believed he was using the "top part" of the extension ladder, which had no rubber feet on the bottom. He was told that there were no other ladders available at the job site. Plaintiff was working on a row of two to three continuous cinder blocks. The distance from the lowest edge of the block to the floor was fifteen feet, and the distance below Plaintiff's feet was more than ten feet. Just before the accident occurred, plaintiff was placing the mortar in the joint, and leaning his left hand against the ladder. When he released his right hand from the ladder to reach into his rear pocket, the ladder fell straight down. Plaintiff hit a light on the way down, and then struck the floor.

At his deposition, Plaintiff testified that he had asked his foreman for another ladder, but was informed that they had to work with what they had. The accident occurred when the ladder kicked out and slid down the wall. At his 50-h hearing, when asked if the ladder had rubber feet on the bottom, he responded "I don't recall, no, it didn't." At deposition, however, Plaintiff testified that the ladder he used had no rubber feet. The ladder at issue "just gave way" and Plaintiff "fell straight down." Plaintiff testified that he set the ladder up and decided where to position it with no input from anyone else.

Alan Yuen testified on behalf of the Authority. He testified, pertinently, that it would be unsafe practice for an employer to provide a portion of an extension ladder to a worker. The Authority never received notice from EWH of this incident.

Joseph Douso, the EWH superintendent, also testified in this matter. He was the construction supervisor for this project. He testified, pertinently, that he observed Interstate not providing its workers with proper safety equipment. He testified that extension ladders are required to be tied off. If it cannot be tied off, a kicker had to be put in place at the bottom of the ladder so it does not move. In addition, something is placed at the top of the ladder to prevent

movement. He testified that the more appropriate piece of safety equipment to use in this particular scenario was a scaffold, since the ladder could not be secured to the concrete floor without approval from the authority for a "kicker" to prevent slippage. Mr. Douso testified that on the day of the accident, he noticed Plaintiff using a ladder that was positioned upside-down, with its rubber cleated feet on top, rather than on the bottom. He then told Plaintiff to get off the ladder and indicated that it was upside down. After giving these directions, Mr. Douso continued walking a few steps away from the plaintiff, down a staircase, when he heard a crash. He turned around and went back, and saw Plaintiff lying on the ground next to the ladder. Mr. Douso testfied that rubber feet on the ladder provided built-in protection, and if the ladder was set up properly, it would not have slid out.

Joseph Barilla testified on behalf of EWH. At his deposition, the witness authenticated EWH's accident report which contained a statement by Philgermaine Collymore, who allegedly witnessed the accident. Mr. Collymore states that the accident occurred when Plaintiff's ladder slipped out from under him.

Plaintiffs argue that they are entitled to summary judgment on their Labor Law §240(1) claims, as the Defendants' provided an inadequate safety device in violation of the statute, which proximately caused Plaintiff's injuries.

In opposition to the motion, and in support of their cross-motion, Defendants' argue that this matter must be dismissed because Plaintiff was the sole proximate cause of his accident. The evidence demonstrates that Plaintiff was a "recalcitrant worker" by using the ladder upside-down. At the very least, Defendants argue that the Plaintiff's conduct raises a material issue of fact as to whether he is solely responsible for this accident, thus requiring denial of the motion. Defendants also contend that the Court should not consider the hearsay evidence submitted in support of Plaintiff's motion.

In reply, and in opposition to the cross-motion, Plaintiffs provide an affidavit of Mr. Cervoni to address Defendants' hearsay arguments. Plaintiff argues, *inter alia*, that he cannot be the sole proximate cause of this accident because Mr. Dauro confirmed at deposition that the ladder at issue was not an adequate safety device for the task to be performed.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Labor Law §240(1) imposes a duty of protection of employees upon owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The duty consists in providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." The foregoing devices are to be furnished in a manner sufficient to give "proper protection" to the workers. Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003]; *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). Specifically, the statute imposes liability in

situations where a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). The two elements of a 240(1) cause of action are that the statute was violated and that the violation was a proximate cause of the injury. *Blake, supra; Bland v. Manocherian*, 66 N.Y.2d 452 (1985), *Chacha v. Glickenhaus Doynow Sutton Farm Development, LLC*, 69 A.D.3d 896. It is true that "[w]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability." (*Cahill v. Triborough Bridge and Tunnel Auth.*, 4 N.Y.3d 35, 39 [2004].) But "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." (*Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d at 290, 771 N.Y.S.2d 484, 803 N.E.2d 757.) "[R]egardless of the precise manner in which the accident occurred, a defendant is not absolved from liability where ... a plaintiff's injuries are at least partially attributable to the defendant's failure to provide proper protection as mandated by the statute." (*Cammon v. City of New York*, 21 A.D.3d 196, 201, 799 N.Y.S.2d 455 [1st Dept. 2005].) It logically follows that to defeat summary judgment, a defendant needs to raise triable issue of fact as to whether Plaintiff's injuries were *exclusively* caused by his own wilful or intentional acts (see *Tate v. Clancy-Cullen*, 171 A.D.2d 292 [1st Dept. 1991]).

With respect to the "falling worker" claim, in order to impose absolute liability, the plaintiff must show that the worker's injuries were proximately caused by the absence or inadequacy of a type of safety device enumerated in the statute. *Felker v. Corning Inc.,* 90 N.Y.2d 219 (1997) and *Rocovich* at 513. Where a plaintiff's injuries arise from falling off of a ladder, he is not required to show that the ladder on which he was standing was defective in order to obtain absolute protection from Labor Law §240(1). *Montalvo v. J. Petrocelli Construction, Inc.*, 8 A.D.3d 173 (1st Dept. 2004). Rather, "[i]t is sufficient for purposes of liability under §240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent." *Id.*, citing *Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289 (1st Dept. 2002). As further elucidated in *Montalvo, supra,* "[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law §240(1)." *Id.*, citing *Kijak v. 330 Madison Ave. Corp.*, 251

A.D.2d 152 (1st Dept. 1998)(internal citations omitted); *See also Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433 (1st Dept. 2011).

In this case, Plaintiff has produced evidence that he was provided with an inadequate safety device to perform the task at hand, as the ladder he used, the only ladder on the construction site, did not have any rubber cleats or footing, was not otherwise secured from slipping, and there were no other devices available to prevent him from falling. Moreover, the defendants' representatives testified that a ladder could not have been secured in this area of the work site, since the floor was finished and the Authority did not want to install a "kicker" that would have produced holes in the finished concrete. Mr. Cervoni testified that the ladder did not have feet and there was nothing to tie the ladder off with. The affidavit provided in opposition to the defendants' cross-motion is properly before the court since it addressed arguments made in opposition, and did not advance new arguments in support of the motion (*see Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560 [1st Dept. 1992]). The foregoing evidence establishes Plaintiff's prima facie entitlement to summary judgment as a matter of law on his Labor Law §240(1) claims, as it is evident that the extension ladder supplied to Plaintiff was unsecured and inadequate (*Nacewicz v.* Schultze v. 585 W. 214th St. Owners Corp., 228 A.D.2d 381, 381, 644 N.Y.S.2d 722 [1st Dept. 1996]).

In opposition and in support of its cross-motion, Defendants' rely heavily on testimony of Mr. Douso, who stated that shortly before the accident, he observed Plaintiff using the ladder "upside down" with its rubber cleats on top instead of on the floor. Mr. Douso thereafter admonished Plaintiff, and told him to correct the condition. Shortly thereafter, however, he heard a "crash" and saw Plaintiff lying on the floor next to the ladder. Defendants' argue, *inter alia*, that Mr. Douso's observations establish that Plaintiff's misuse of the ladder was the sole proximate cause of this accident. In order to defeat the motion, however, Defendants' were to establish initially that the extension ladder provided to Plaintiff was an adequate safety device (*see Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 236 [1st Dept. 2009]). "Hence, in determining whether there is a violation of Labor Law §240(1) or whether a worker is the sole proximate cause of his injuries, the issue to be addressed first is whether adequate safety devices were provided, 'furnished,' or 'placed' for the worker's use on the work site" (*Id.*). Here, Defendants'

have failed to show that the Plaintiff was furnished an adequate safety device in the first instance. At his deposition, Mr. Douso later conceded that a ladder was the wrong device to complete the job at hand, and a scaffold should have been used. He further testified that when an extension ladder is in use, as here, it must be secured on top and on the bottom, regardless of whether or not it had rubber feet or cleats. It is, moreover, undisputed that the ladder at issue was not secured in this fashion prior to the accident. Defendants submissions, therefore, have failed to establish that the ladder provided to Plaintiff was an adequate or appropriate safety device to complete the task at hand (compare *Meade v. Rock-McGraw, Inc.*, 307 A.D.2d 156 [1st Dept. 2003]; *see also Hernandez v. Argo Corp.*, 95 A.D.3d 782 [1st Dept. 2012] [plaintiff conduct could not be considered the sole proximate cause of the accident where the defendants failed to rebut evidence that they provided an inadequate safety device and thus violated the statute]). Under these circumstances, the plaintiff's allege misuse of the ladder, at most, constitutes comparative negligence that is insufficient to ward off summary judgment (*see Torres v. Monroe Coll*, 12 A.D. 3d 261 [1st Dept. 2004]; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280 [2003]). Any alleged inconsistencies in the Plaintiff's testimony as to what Mr. Cervoni directed him to do, does not require denial of the motion. Accordingly, Plaintiff's motion for summary judgment is granted, and Defendants' cross-motion denied.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for summary judgment on the issue of liability, on their Labor Law §240(1) claims asserted against Defendants, is granted, and it is further,

ORDERED, that Defendants' cross-motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 2/3, 2015

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