Hill v City of New York
2015 NY Slip Op 30404(U)
February 18, 2015
Supreme Court, Bronx County
Docket Number: 301526/2013
Judge: Julia I. Rodriguez
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX IA- PART 27

INDEX 301526/2013

NICHOLAS HILL,

Plaintiff,

-against-

DECISION & ORDER

THE CITY OF NEW YORK and C&C MEATS CORP.,

Defendants.

CITY OF NEW YORK,

Third Party Plaintiff,

-against-

Third Party Index
Number 83921/2013

C&C MEATS CORP.,

Third Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in review of motion by Plaintiff for summary judgment pursuant to sections 240(1) and 241(6) of the Labor Law:

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	1, 2, 3
City's Affirmation in Opposition & Exhibits	4, 5
C&C's Affirmation in Opposition & Exhibits & Memorandum of Law	6, 7, 8
Plaintiff's Reply Affirmation & Exhibits	9, 10

Plaintiff commenced this action alleging injuries sustained after an accident at his work site on August 14, 2012, when he fell from a ladder. It is undisputed that Plaintiff was employed as a HVAC mechanic at the time of the accident, and that he was in the process of installing an overhead refrigerator unit at the premises leased by Defendant C&C Meats Corp. ("C&C").

Plaintiff moves for summary judgment [CPLR §3212] contending that Defendants are strictly liable pursuant to §§240(1) and 241(6) of the Labor Law of the State of New York for the happening of Plaintiff's accident. Plaintiff contends that the ladder was an inadequate safety device which did not provide proper protection in that it wobbled and caused plaintiff to fall [Labor Law §240(1)]. Plaintiff further contends that the ladder was in violation of New York State Industrial Code because it was defective as it was missing two of its four rubber feet causing it to move and the accident to ensue [Labor Law 241(6) and §12 NYCRR 23-1.21(b)(3)].

Defendants City of New York ("the City") and C&C oppose Plaintiff's motion in its entirety, alleging, *inter alia*, that: (1) the motion is premature because discovery is incomplete; (2) the deposition testimony of **Brian Kenny**, Plaintiff's supervisor, has not been conducted and said

testimony is necessary to authenticate the C-2 report generated in response to Plaintiff's incident, in which he allegedly stated that he lost his balance; (3) the deposition testimony of **Ed Kerrisk**, Plaintiff's co-worker, has not been conducted and said testimony is necessary with respect to the ladder at issue and the availability of a scissor lift; and (4) Defendants should be afforded a full opportunity to establish their defenses that the ladder was not defective and that there is no violation of §§240(1) or 241(6) of the Labor Law.

In support of summary judgment Plaintiff submitted, *inter alia*, an Affidavit by a safety expert, **William Marletta**, PhD., Plaintiff's deposition transcript and the deposition testimony of **Ernesto Conde,** C&C's owner.

Labor Law §240 (1) requires, *in pertinent part*, that: "all contractors and owners and their agents . . . shall furnish . . . ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed." Section 240(1) provides for extra safety protection to the laborer engaged in certain contemplated occupational hazards that involve elevation risk and are related to the effects of gravity. *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494 (1993). The occupational hazards entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *Toeffer v. Long Island Rail Road,* 4 N.Y.3d 399 (2005). Specifically, the statute imposes liability in situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated work site. *Rocovich v. Consolidated Edison Co,* 78 N.Y.2d 509 (1991). "The extraordinary protections of the statute extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity." *Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 N.Y.2d 914 (1999). Where a Plaintiff's actions are the sole proximate cause of his injuries, liability will not attach. *Weininger v. Hagedorn & Co.,* 91 N.Y.2d 958 (1998). Finally, 'not every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law 240(1). . . rather liability is contingent upon the existence of a hazard contemplated in 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v. Manhasset Bay Associates*, et al., 96 N.Y.. 259, 267, 727 N.Y.S.2d 37, 41 (2001).

At his deposition Plaintiff testified that he worked as an A mechanic installing refrigeration units for at least 19 years, and that he performed an average of four HVAC installations a year [Plaintiff Transcript pg. 60]. His job required him to use A-frame ladders on a daily basis [Tr. pg. 58]; he was involved in every step of the installation and the equipment used included forklifts, threaders, ladders and lifts [Tr. pg. 63]. During the installation Plaintiff would elect to use a lift over a ladder when the specific part was heavy, such as steel [Tr. pg. 66]; otherwise, in certain situations Plaintiff would use a lift if it was available [Tr. pgs. 65-67]. On August 13, 2012 Plaintiff was instructed by **Brian Kenney** that he would be "starting the connection" the next day at the F4 location [pg. 102]. Plaintiff retrieved his tools from another work site in preparation for work at the F4 location; the tools included wrenches, a threader and three A-frame ladders selected by **Mr. Kerrisk**, Plaintiff's co-worker [pgs. 105; 109-112; 114]. When Plaintiff commenced his work on August 14, 2012 he did not request a lift and determined that a lift was not necessary to do the job that day [pgs. 106-107]. Upon beginning work on August 14th Plaintiff "grabbed the first one" of the three ladders, opened the 8 foot ladder and locked the ladder's spreaders [pg. 128]. Plaintiff did not look to see if the ladder had foot pads; he steadied the ladder to the ground before he went up, and described the floor as "fine" [pg. 129]. After a few minutes on the ladder, "the ladder wobbled ... I lost my balance ... the wrench slipped and I fell backward" [pg. 137, l.23; pg. 138, l.10]. Before his fall Plaintiff was on the sixth step of the 8-foot ladder, and after his fall he noticed that two of the four rubber feet were missing on the ladder [pg. 138].

Under these facts, Plaintiff contends that Defendants are strictly liable pursuant to 240(1) for failure to provide him with required safety equipment to prevent him from falling, and further failed to assure that the ladder was property placed or situated. Plaintiff further contends that Mr. Conde, after viewing the surveillance video, corroborates his claim that the ladder wobbled causing him to fall to the ground.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Propect Hospital*, 68 N.Y..2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant or his or her day in court; the party opposing a motion for summary judgment is

entitled to all favor inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dep't 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

After consideration of Plaintiff's submission, the Court finds that Plaintiff failed to establish entitlement to summary judgment as a matter of law with respect to his claims pursuant to §§240(1) and 241(6), as the subject ladder has not been identified by Plaintiff, and the parties are in a dispute as to which ladder was used by Plaintiff on the date of the accident. Apparently, Mr. Kerrisk, Plaintiff's work partner, produced a ladder which Mr. Kerrisk believes was the ladder involved in Plaintiff's accident [Pl. Tr. pgs. 151 & 216]. On the one hand Plaintiff testified that he believed that is not the ladder involved in his accident because "the one I saw has all four feet" [Pl. pg. 151, line 13]. On the other hand, Plaintiff "couldn't say one way or the other" whether this was the ladder involved in his accident [Pl. pg. 152, line 8]. Inexplicably, Plaintiff testified that he saw this ladder in the back of a red utility truck, but was not able to observe whether the ladder had rubber feet from his vantage point [pgs. 216-217].

At his deposition Plaintiff was shown pictures of ladders used at the site [pgs. 156-172]. While Plaintiff recognized pictures of eight-feet A-frame ladders that were similar to the ladder involved in the accident, Plaintiff could not identify the exact ladder he used, even though he's worked for the same employer for 19 years, his job required him to use A-frame ladders on a daily basis [Tr. pg. 58], and he's never used ladders that weren't owned by his employer [pg. 221]. While Plaintiff could recognize an 8-foot ladder with two spreaders that opened and locked similar to the one he used [pgs. 159-160], he "could not tell" if that ladder had foot pads [pg. 160].

Plaintiff's expert, Dr. Marletta, recites that he appeared for a site inspection and inspection of the ladder on March 20, 2014, accompanied by the parties and their counsel. Apparently, Brian Kenney presented a ladder for inspection; according to Dr. Marletta, "there was no reason to believe that the ladder presented for inspection was the ladder involved in the accident" because:

- there was no chain of custody of the ladder involved in the accident;
- the ladder presented for inspection has been in active use at the site and was simply

pulled from use for the inspection;

- no records were kept regarding which ladders had been disposed of.

Dr. Marletta's assessment does not establish summary judgment in Plaintiff's favor; rather it sheds light on the "why and how" the parties are disputing the identify of the ladder involved in Plaintiff's accident.

Plaintiff further contends that Mr. Conde's testimony clearly supports Plaintiff's testimony that the ladder wobbled, causing Plaintiff to fall to the ground below [¶13 of Reply Affirmation]. However, a reading of said testimony indicates that Mr. Conde could observe Plaintiff from the waist down, that he observed *Plaintiff* wobble, rather than the ladder, and Mr. Conde could not recall whether after the accident the ladder remained standing or fell over:

Page 52, Lines 9-20:

A. Standing on the ladder, what I said was the - from the distance, from waist down I saw the ladder go right and then come left and that's when I saw him. As if he fell from that height and bounced on the ground, that's what I remember seeing.
He wobbled this way to the right; it went to the right which is correct and then went to the left, that's when it went too far and he tumbled.

Page 53, Lines 6-10:

Q. Do you have any recollection of where or the positioning of how the ladder ended up after the accident?

A. No, I don't know if it stayed standing or fell over.

Under these circumstances, summary judgment under Labor Law 240(1) is **denied** on the ground(s) that there exist issues of fact and credibility, *including but not limited to*, which ladder Plaintiff utilized on the day of the accident, whether said ladder was missing rubber footing, whether the missing rubber feet, if at all, was a defect and whether said defect was the proximate cause of Plaintiff's accident. Cf.: *Samuel v. Simone Dev. Co.*, 13 A.D.3d 112, 786 N.Y.S.2d 163 (1st Dep't 2004), wherein it was an "undisputed fact that plaintiff was given an unsecured, wobbly ladder." Here, the ladder was not unsecured as Plaintiff made sure the ladder was steady before he went up and started the piping [pg. 136]; he described the floor as "fine" [pg. 129] and was working for five minutes before he fell [pg. 145].

A review of the case law granting summary judgment in Plaintiff's favor pursuant to 240(1) suggests that, at a minimum, there was no issue of fact as to which ladder was at issue and whether the ladder had previously been deemed "steady" by Plaintiff:

Orphanoudakis v. Dormitory Authority of the State of New York, 40 A.D.3d 502, 837 N.Y.S.2d 61 (1st Dept. 2007), concerned a painter for a subcontractor who alleged his ladder "moved and went crooked;" his testimony that the ladder was missing four rubber feet "was unrefuted," unlike Plaintiff's claim herein;

DelRosario v. United Nations Federal Credit Union, 104 A.D.3d 515, 961 N.Y.S.2d 389 (1st Dept. 2013) is not comparable to the instant facts. In *DelRosario* plaintiff's ladder wobbled as he pulled away after being struck in the face by live energized electrical wire;

Rivera v. Dafna Construction Co. Ltd., 27 A.D.2d 545, 813 N.Y.S.2d 109 (2d Dept. 2006) is also inapplicable to the instant facts, as a portion of a ceiling collapsed on Plaintiff, causing his ladder to become unsteady and plaintiff to fall;

In *Lopez v. Melidis*, 31 A.D.3d 351, 820 N.Y.S.2d 210 (1st Dept. 2006) plaintiff was working under the direction of his supervisor, who required plaintiff to stand 12 feet above the ground on a A-frame ladder on the platform of an 8-foot high scaffold. The instant case involves a six feet height differential and no scaffold;

Hart v. Turner Construction Company, 30 A.D.3d 213, 818 N.Y.S.2d 499 (1st Dept. 2006), *Peralta v. American Telephone and Telegraph Company*, 29 A.D.3d 493, 816 N.Y.S.2d 436 (1st Dept. 2006) and *Vega v. Rotner Management Corp.*, 40 A.D.3d 473, 836 N.Y.S.2d 182 (1st Dept. 2007) are similar to *Samuel v. Simone Dev. Co. supra*, in that in all these cases are premised on an undisputed fact that the ladder in question was "unsecured" or "not secured." In *Hart* the Court noted "particularly the absence of any indication that the ladder was secured..." 30 A.D.3d at 214, 818 N.Y.S.2d at 499. In *Peralta* an unsecured 12-foot ladder moved causing plaintiff to lose her balance at a height of 9 feet. In *Vega* plaintiff fell when an unsecured 8 to 10 foot ladder shifted. In *Fernandes v. Equitable Life Assurance Society, et al.*, 4 A.D.3d 214, 774 N.Y.S.2d 4 (1st Dept. 2004), the identity of the ladder was not in dispute, and there were issues of fact as to whether the ladder was broken, insecure or had parts which had worn down.

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors and their agents to

provide reasonable and adequate protection and safety for construction workers. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494(1993) As the duty to comply with the regulation is nondelegable, it is not necessary for the plaintiff to show that a defendant exercised supervision or control over the work-site in order to establish a Labor Law §241(6) claim. *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998); *Ross v. Curtis-Palmer Hydro-Electric Co.*, supra at 502.

Plaintiff contends that Defendants violated sections of the Industrial Code [12 NYCRR §§23-1.21(b) & (b)(3)] which state, in pertinent part:

> (b) *General requirements for ladders.*
>
> (3) *Maintenance and replacement.* All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
> (i) if it has a broken member or part.
> (ii) if it has any insecure joints between members of parts.
> (iii) if it has a wooden rung or step that is worn down to 3/4 or less of its original thickness.
> (iv) if it has any flaw or defect of material that may cause ladder failure.

Plaintiff contends that "the uncontroverted facts" prove that Defendants violated these sections causing the ladder to move [¶37 of Moving Affirmation]. However, as already noted, the parties conducted an on site inspection and are in dispute as to which ladder Plaintiff used; as conceded by Plaintiff at his deposition, he disagrees with his co-worker Mr. Kerrisk as to whether the subject ladder had four rubber feet. Consequently, the facts are not "uncontroverted," and the Court finds that Plaintiff did not meet his burden in establishing entitlement as a matter of law with respect to his Labor Law §241(6) claim. Rather, there exist issues of fact and credibility, *including but not limited to*, which ladder Plaintiff utilized on the day of the accident, whether said ladder was missing rubber feet, whether the missing rubber feet, if at all, were the proximate cause of Plaintiff's accident.

For the foregoing reasons, Plaintiff's motion seeking summary judgment in his favor pursuant to sections 240(1) and 241(6) of the Labor Law is **denied** in its entirety.

Dated: February 18, 2015

Hon. Julia I. Rodriguez, J.S.C.