

Robinson v Natl. Grid Energy Mgt., LLC
2015 NY Slip Op 30478(U)
March 30, 2015
Sup Ct, Suffolk County
Docket Number: 11-198
Judge: Ralph T. Gazzillo
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 8-22-14 (#003)
MOTION DATE 10-23-14 (#004)
ADJ. DATE 1-10-14
Mot. Seq. # 003 - MG
004 - XMD

-----X
JOSEPH ROBINSON and ERIN ROBINSON,
Plaintiffs,

BRODY, O'CONNOR & O'CONNOR, ESQS.
Attorney for Plaintiffs
1350 Avenue of the Americas, 24th Floor
New York, New York 10019

- against -

NATIONAL GRID ENERGY MANAGEMENT,
LLC, T-MOBILE USA, INC., and OMNIPOINT
COMMUNICATIONS, INC.,

AHMUTY, DEMERS & MCMANUS, ESQS.
Attorney for Defendants T-Mobile and Omnipoint
200 I.U. Willets Road
Albertson, New York 11507

Defendants.
-----X

Upon the following papers numbered 1 to 22 read on these motions for summary judgment/amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 20; Answering Affidavits and supporting papers 21 -22; Replying Affidavits and supporting papers ___; Other ___; (and after hearing counsel in support of the motion) it is,

ORDERED the motion by defendants T-Mobil USA, Inc. and Omnipoint Communications, Inc. for summary judgment dismissing the complaint against them is granted; and it is

ORDERED that the cross motion by plaintiff Joseph Robinson for, inter alia, partial summary judgment on the issue of liability with respect to his Labor Law §240(1) claim is denied, as moot.

Plaintiff Joseph Robinson commenced this action to recover damages for personal injuries allegedly sustained on December 28, 2009, when he fell from the aerial bucket of a "boom-truck" while attempting to replace a T-mobile antenna at a National Grid substation located in the Town of Southampton. The accident allegedly occurred while plaintiff was in the process of trying to activate the aerial bucket, which had been stuck in its cradle position on the platform of the truck. After climbing into the bucket and determining that it was still inactive, plaintiff allegedly slipped off its side, as he was

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attempting to swing his legs over the edge of the bucket to exit the device. As plaintiff was falling, his left foot allegedly got caught on the interior step of the aerial bucket, causing him to break his leg, and then fall approximately 12 to 15 feet to the ground. At the time of the accident, plaintiff was employed by Hawkeye, LLC (“Hawkeye”), which had been retained by defendant T-Mobil USA, Inc. (“T-Mobil”) to perform various telecommunication maintenance services. National Grid Energy Management, LLC, the owner of the substation where the accident occurred, and Omnipoint Communications, Inc. (“Omnipoint”), a subdivision of T-Mobil, were also named as defendants to the action. By way of an amended complaint, plaintiff asserts claims for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The complaint also includes a derivative claim on behalf of plaintiff’s wife, Erin Robinson, for loss of services and reimbursement of medical expenses.

Issue was joined by National Grid and T-Mobile. Shortly thereafter, T-Mobile commenced a third-party action against Hawkeye, which was discontinued pursuant to a stipulation entered by the parties on August 8, 2011. Omnipoint joined issue on or about February 7, 2012. By order dated January 18, 2014, this court granted a motion by National Grid for summary judgment dismissing the complaint against it. The action was continued against T-Mobile and Omnipoint (“hereinafter collectively referred to as “T-Mobil”), and the note of issue was filed on March 13, 2014.

T-Mobile now moves for summary judgment dismissing the complaint against it, arguing that plaintiff’s claims under Labor Law §240(1) are not actionable, since the statute does not apply to the routine dangers associated with climbing out of an unelevated aerial bucket, that the task of installing an antenna is not a covered activity, and that plaintiff’s own conduct, rather than any purported violation of the statute, was the sole proximate cause of the accident. T-Mobile further argues that plaintiff’s Labor Law §241(6) claim is predicated upon inapplicable sections of the Industrial Code, and that his claims under the common law and Labor Law §200 should be dismissed, because T-Mobile neither controlled the means or method of plaintiff’s work, nor owned or maintained the subject aerial bucket. Plaintiff does not oppose the branch of the motion for summary judgment dismissing his Labor Law §200 claim, and seeks leave to serve a supplemental bill of particulars asserting additional violations of the Industrial Code. Plaintiff also cross-moves for partial summary judgment on the issue of liability with respect to his Labor Law §240 claim. Plaintiff argues that his task of replacing obsolete antennae was a covered activity, that he was exposed to an elevation-related risk, and that T-Mobil’s failure to ensure that he was provided with adequate safety devices, including an interior liner for the aerial bucket, was a proximate cause of his accident.

Initially, the Court notes plaintiff concedes that he failed to state an actionable claim under the Labor Law §200. Moreover, by failing to address the branches of T-Mobil’s motion for summary judgment dismissing his claims under the common law and Labor Law §200, plaintiff is deemed to have abandoned those claims (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). Therefore, the branch of T-Mobil’s motion seeking summary judgment dismissing plaintiff’s claims under the common law and Labor Law §200 is granted.

The reach of Labor Law § 240(1) extends only to injuries sustained while performing tasks “during the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure” (*Martinez v City of New York*, 93 NY2d 322, 326, 690 NYS2d 524 [1999]). However, “it is not necessary that an employee be actually working on his [or her] assigned duties at the time of the injury” (*Reeves v Red Wing Co.*, 139 AD2d 935, 936, 527 NYS2d 916 [1988]; see *Boncore v Temple Beth Zion*, 299 AD2d 953, 954, 751 NYS2d 337 [2002]), so long as the task he or she was engaged in at the time of the accident was “necessary and incidental” to the work the employee was hired to perform (see *Gowans v Otis Marshall Farms, Inc.*, 85 AD3d 1704, 1075, 925 NYS2d 783 [4th Dept 2014]; *Bagshaw v Network Serv. Mgmt.*, 4 AD3d 831, 772 NYS2d 161 [4th Dept 2004]). Although the installation of an antenna on a building has been determined to not constitute an alteration within the meaning of Labor Law §240(1) (see *Kesselbach v Liberty Haulage, Inc.*, 182 AD2d 741, 582 NYS2d 739 [2d Dept 1992]), under the circumstances of this case, the court finds that the complete replacement of an antenna located on a 60-foot pole constitutes the repair of a structure within the meaning of the statute (see *Nowakowski v Douglas Elliman Realty, LLC*, 78 AD3d 1033, 913 NYS2d 241 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]; *Purdie v Crestwood Lake Heights Section 4 Corp.*, 229 AD2d 523, 646 NYS2d 815 [2d Dept 1996]). Additionally, while falling from the bed of a truck is not the kind of elevation-related hazard contemplated by the statute (see *Toefer v Long Is. R.R.*, 4 NY3d 399, 408, 795 NYS2d 511 [2005]), Labor Law § 240 (1) may be applied to falls from the bed of a truck where some risk-enhancing circumstance creates a significant elevation hazard which implicates the protections of the statute (see *Naughton v City of New York*, 94 AD3d 1, 940 NYS2d 21 [1st Dept 2012]; *Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323, 890 NYS2d 683 [3d Dept 2009]; *Ford v HRH Constr. Corp.*, 41 AD3d 639, 838 NYS2d 636 [2d Dept 2007]).

Nevertheless, “[n]ot 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 failure to use, or the inadequacy of, a safety device of the kind enumerated [in the statute]” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). Further, to prevail on a claim pursuant to Labor Law §240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (see *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). While contributory negligence on the part of the worker is not a defense to a Labor Law §240(1) claim where no or inadequate safety devices are provided (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 771 NYS2d 484 [2003]), liability does not attach where a plaintiff’s conduct is the sole proximate cause of his or her own injuries, such as where adequate safety devices are available at the job site, but the worker either does not use or misuses them (see *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; *Montgomery v Fed. Express Corp.*, 4 NY3d 805, 795 NYS2d 490 [2005]; *Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 160, 760 NYS2d 39 [1st Dept 2003]).

Here, T-Mobil established its prima facie entitlement to summary judgment by demonstrating that plaintiff’s conduct of sitting on the edge of the aerial bucket and swinging his legs over its side in an attempt to exit the device, rather than utilizing its interior steps, was the sole proximate cause of his accident (see *Robinson v East Med Ctr., LP*, *supra*; *Montgomery v Fed Express Corp.*, *supra*; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, *supra*; *Lin v City of New York*, 117 AD3d 913, 986

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NYS2d 225 [2d Dept 2014]; *Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 970 NYS2d 13 [1st Dept 2013]; *Gaspar v Pace Univ.*, 101 AD3d 1073, 957 NYS2d 393 [2d Dept 2012]; *Paz v City of New York*, 85 AD3d 519, 925 NYS2d 453 [1st Dept 2011]; *Misirlakis v E. Coast Entm't Props.*, 297 AD2d 312, 746 NYS2d 307 [2d Dept 2002]). Significantly, during his deposition testimony plaintiff explained that the aerial bucket had both interior and exterior steps – approximately 4 1/2 inches in depth and 12 inches wide – designed for use to enter and exit the device. However, he failed to specify any reason for failing to use the interior steps while he was attempting to exit the device. Instead, plaintiff testified that he sat on the edge of the bucket like he was “sitting on the edge of a boat” and turned himself around on the edge to get to the exterior steps. Moreover, the court is unpersuaded by plaintiff’s contention that the failure to provide him a “dielectric covering” for the inside of the aerial bucket was a proximate cause of his accident. Not only is such a device not among the type a safety devices enumerated by the statute which are designed to prevent a worker from falling, but plaintiff’s own testimony indicates that there was no causal connection between the absence of such covering – designed to prevent electric shock from grounding with utility poles – and his fall from the edge of the aerial bucket. Even assuming, arguendo, that the lack of the covering caused plaintiff’s left foot to get caught on the interior step as he was falling, plaintiff has not set forth circumstantial evidence which permits an inference that the absence of the covering, rather than his failure to use the interior steps of aerial bucket, caused him to slip off the aerial bucket and fall to the ground.

The branch of T-Mobil’s motion seeking dismissal of plaintiff’s claims under Labor Law §241(6) also is granted. Where, as here, plaintiff’s assigned task of repairing the antenna occurred outside of the context of a construction, demolition or excavation project, coverage under Labor Law §241(6) is withheld (*see Nagel v D & R Realty Corp.*, 99 NY2d 98, 101, 752 NYS2d 581 [2002]; *Shea v Bloomberg, L.P.*, 124 AD3d 621, NYS2d__ [2d Dept 2015]; *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]). Furthermore, even assuming, arguendo, that plaintiff’s activity was covered under Labor Law §241(6), since it has been determined that his conduct was the sole proximate cause of his injuries, any alleged violation of the Industrial Code could not also be the proximate such injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra* at 287; *Albert v Williams Lubricants, Inc.*, 35 AD3d 1115, 1117, 828 NYS2d 593 [3d Dept 2006]).

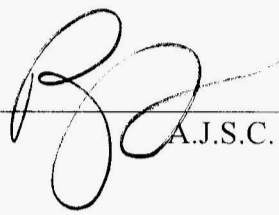
In opposition, plaintiff failed to raise any triable issue warranting denial of the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 497 NYS2d 557, 404 NE2d 718 [1980]). As stated above, the court is unpersuaded by plaintiff’s reference to the alleged absence of the “dielectric liner” as the proximate cause of his injury, and plaintiff failed to identify any other safety device of the kind enumerated in Labor Law § 240(1) that could have prevented his fall (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340, 937 NYS2d 157 [2011]). Although the mechanism meant to lift the aerial bucket was not functioning on the date of the accident, such failure was not the proximate cause of plaintiff’s injuries, since the aerial bucket was in its cradle position on the bed of the truck at all times prior to the accident, and plaintiff would have been required to safely enter and exit such bucket even if the lifting mechanism had been operational. Further, plaintiff’s papers did not address his failure to use the interior steps of the aerial bucket, identify any defect with those steps, or adduce evidence, expert or otherwise, that his conduct of sitting on the edge of the bucket and swinging his legs over its side was an acceptable way of exiting the device.

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Accordingly, the motion for summary judgment dismissing the complaint against T-Mobile and Omnipoint Communications is granted.

Based upon the foregoing, the cross motion by plaintiff for, inter alia, partial summary judgment on the issue of liability with respect to his Labor Law §240(1) claim is denied, as moot. Moreover, having determined that plaintiff's accident was not covered by Labor Law §241(6), the branch of his motion seeking to amend his bill of particulars to assert additional violations of the New York Industrial Code also is denied, as moot (CPLR 3025; *see Longo v Long Island Railroad*, 116 AD3d 676,983 NYS2d 579 [2d Dept 2014]; *Lucido v Mancuso*, 49 AD3d 220, 229, 851 NYS2d 238 [2d Dept 2008]).

Dated: 3/30/15



A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION