Ayala v Dongan Pl. LLC
2015 NY Slip Op 30577(U)
March 13, 2015
Sup Ct, Bronx County
Docket Number: 303328/13
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 303328/13**

Joaquin Ayala,
Plaintiff,

-against- **DECISION and ORDER**

Dongan Pl. LLC, BB and BB Management Corp., and BB Management of New York Corp.,

Present:

Defendants. Hon. Julia I. Rodriguez

----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's motion for summary judgment with regard to liability against Defendant Dongan PL. LLC pursuant to sections 240(1) and 241(6) of the Labor Law:

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Defs. Affirmation in Opposition & Exhibits	**2**
Plaintiff's Reply Affirmation	**3**

Plaintiff commenced this action alleging injuries sustained after an accident at his work site on March 11, 2013, when he fell from a ladder. Defendant Dongan PL. LLC ("Dongan") was the owner of the property where the accident occurred.

Plaintiff moves for summary judgment [CPLR §3212] with regard to liability contending that Dongan is 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 slid out from under him and caused him to fall [Labor Law §240(1)]. Plaintiff further contends that the ladder was in violation of the New York State Industrial Code because the ladder was not held in place by a person stationed at the foot of the ladder and the upper end of the ladder was not secured against side slip by its position or by mechanical means [Labor Law §241(6) and §12 NYCRR 23-1.21(b)(3)].

Defendants oppose the motion alleging that issues of fact exist regarding how, if at all, this accident occurred and whether Plaintiff's actions were the sole proximate cause of the accident.

In support of summary judgment Plaintiff submitted, *inter alia,* Plaintiff's deposition transcript and the deposition testimony of **Robert Bauer**, building manager for Defendant BB Management of New York Corp.

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 fall 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 hazard contemplated in 240(1) and the failure to use, or the inadequacy of, a safety device of the king 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 is a painter and plasterer with approximately 20 years of experience performing this type of work [Plaintiff Transcript pgs. 10, 13]. In general, he works on his own and performs projects when people call him and ask him to

perform work [pg. 10]. Plaintiff was asked by a man named Eugenio Diaz to perform painting and plastering work on the ceiling of a common area in Dongan's building on March 11, 2013 [pg.11, 18]. The ceiling was approximately 20 feet in height [pg. 20]. The Plaintiff was working alone on the date of his accident [pg. 20]. When he arrived at the location, Diaz showed Plaintiff what work had to be performed and provided him with an extension ladder approximately 20 feet high [pgs. 25, 26, 28]. The ladder had no rubber footings on its bottom and had not had rubber footings for a period of eight years prior to the accident [pg. 28]. Three years prior to the accident, Plaintiff informed Diaz that this particular ladder did not have rubber footings on it [pg. 29]. Prior to the accident, the ladder was in a fully extended position leaning against a wall [pg. 30]. Plaintiff had been working on the ladder for five to seven minutes before the accident occurred [pg. 34]. At the time of the accident, Plaintiff was scraping and peeling bubbles off the wall that were formed from a water leak in the roof using his spatula. [pgs. 5, 34, 35]. While Plaintiff was scraping, the ladder "moved" and he fell. [pg. 31]. The ladder "slid backward" and "down the wall" and he fell on top of it [pg. 36]. Plaintiff was about 18 feet high on the ladder when it slid and fell down the wall [pg. 36]. After he fell, a woman from one of the apartments heard the noise and saw him on the floor [pg. 39]. She went downstairs to get Robert, the son of the building's owner [pg. 39]. Robert, the super and a porter came upstairs and found him sitting on the stairs [pg. 39, 40]. The Plaintiff was taken to the hospital in an ambulance [pg. 44].

At his deposition, Robert Bauer testified that he is a building manager working for BB Management of New York Corp. and has worked for the company for fifteen years [pg. 8]. Bauer knows the Plaintiff because the Plaintiff often performed work at the building [pg. 13]. Whenever work needed to be performed in the building, he would call Diaz who sometimes brought the Plaintiff to perform the work [pg. 13, 14]. Diaz would pick up the materials, pick up the paint and bring helpers [pg. 14]. On the date of the accident, Bauer had hired Diaz to touch up the paint in the hallways in a public area of the building [pg. 16]. Bauer did not witness the accident [pgs. 19-22]. He was notified that someone was on the floor upstairs and took the elevator to he sixth floor [pg. 20, 21]. When he arrived on the sixth floor, the Plaintiff was alone

and lying on the floor [pg. 22]. The plaintiff told Bauer that the ladder slipped, he and the ladder fell and that his leg hurt [pg.25].

Under these facts, the Plaintiff contends that Dongan is strictly liable pursuant to §240(1) for failing to provide him with the required safety equipment to prevent him from falling, and pursuant to §241(6) because the ladder was not held in place by a person stationed at the foot of such ladder nor was the upper end of the ladder secured against side slip by its position or by mechanical means in violation of 12 NYCRR 23-1.21(b)(4)(iv), which provides that:

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher that 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

* * * * * * * * *

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. Prospect 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 of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn form the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Aasaf v. Ropog Cab Corp.,* 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 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 has established his *prima facie* entitlement to judgment as a matter of law with respect to his claims pursuant to §§240(1) and 241(6).

In opposition to summary judgment, defendants failed to raise a triable issue of fact. Defendants contend that Plaintiff's testimony that he was alone when the accident occurred [pg. 30], that he "placed" the ladder himself and "tested it before going up" [pg. 31], that the floors were clean and not slippery [pg. 32], and that he does not know what caused the ladder to shift and fall [pg. 32] raise triable issues of fact as to whether the accident occurred and, if it did, whether Plaintiff was the sole proximate cause of the accident.

However, the uncontroverted testimony of both Plaintiff and Bauer establishes that Plaintiff fell and was injured while working on a ladder. And, to raise a triable issue of fact as to whether the Plaintiff was the sole proximate cause of the accident, the defendant must produce evidence that adequate safety devices were available, that the Plaintiff knew that they were available and was expected to use them, and that the Plaintiff unreasonably chose not to do so, causing the injury sustained. *Cahill v. Triborough Bridge & Tunnel Auth.,* 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004); *Gallagher v. New York Post,* 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010); *Nacewicz v. Roman Catholic Church of the Holy Cross,* 105 A.D.3d 402, 963 N.Y.S.2d 14 (1st Dept. 2013). Here, defendants proffered no evidence that adequate safety devices were available to the Plaintiff. Nor is there any evidence to suggest that Plaintiff was negligent or misused the ladder in any way. On the other hand, Plaintiff's unrefuted testimony establishes that the subject ladder was the only ladder offered to him by Diaz [pg. 21], that it had no safety feet [pg.28], that Plaintiff set up the ladder properly [pg. 31], that the ladder slid and fell while he was standing on it [pg. 31], and that Diaz left him alone to perform the work [pg. 26]. Also, Bauer's undisputed testimony establishes that the defendants did not provide any materials or equipment to either Diaz or the Plaintiff [pg.18-19].

Based on the foregoing, Plaintiff's motion seeking summary judgment in his favor pursuant to sections 240(1) and 241(6) of the Labor Law is **granted.**

Dated: Bronx, New York
March 13, 2015

3/13/2015

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