Figueroa v Two County Realty, Co.
2015 NY Slip Op 30599(U)
March 27, 2015
Sup Ct, Queens County
Docket Number: 702955/12
Judge: Robert J. McDonald
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

ANDI FIGUEROA,

Plaintiff,

- against -

TWO COUNTY REALTY, CO.,

Defendant.

- x

Index No.: 702955/12

Motion Date: 11/20/14

Motion No.: 60

Motion Seq.: 1

The following papers numbered EF 35 to 59 read on this motion by plaintiff Andi Figeuroa (plaintiff) for summary judgment in his favor on the issue of liability pursuant to Labor Law § 240(1) and on the cross motion for summary judgment by defendant Two County Realty, Co. (Two County) dismissing plaintiff's Labor Law §240(1) claim.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 35-44
Notice of Cross Motion - Affidavits - Exhibits...	EF 45-50
Answering Affidavits - Exhibits.....	EF 51-55
Reply Affidavits.....	EF 57-59

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this case the note of issue was filed on April 24, 2014 and the plaintiff's motion is timely. The court notes that good cause was shown for Two County's late cross motion for summary judgment to be considered because significant discovery was outstanding when the original summary judgment motion was served (*Parker v LIJMC-Satellite Dialysis Facility*, 92 AD3d 740 [2012]) and the issues on the cross motion are identical to the timely motion (*see Lennard v Khan*, 69 AD3d 812 [2010]).

Two County is the owner of a one-story commercial building at 565 Uniondale Avenue, Uniondale, New York. Two County hired Tempest Electrical Lighting (Tempest) to install exterior lighting at the back of the building which was to be placed between ten and twelve feet above the ground. Plaintiff was employed as an electrician by the owner of Tempest, Harry Dounis (Dounis). At the time of the accident, plaintiff was standing on the upper rungs of the separated top half of a 24-foot extension ladder, which had no feet. He was holding onto electrical tape and "snaking" wiring to his co-worker Azad Saour (John) when he felt the bottom of the ladder slip away from the wall, causing him to fall and sustain injuries. Dounis was present at the work site and testified that he was the only one from Tempest to see the job in advance. On the day of the accident the only ladder on the truck tall enough to use was one 24-foot extension ladder which was split as two separate 12-foot ladders were needed to pass electrical wiring simultaneously between plaintiff and John. Two County did not provide any ladders at the site.

In plaintiff's deposition and in Dounis' first deposition, they both stated it was Dounis' idea to split the ladder. In his continued deposition, Dounis testified that he didn't believe or remember that he gave the instruction to split the ladder. Dounis also testified that plaintiff, as supervisor, did not have the sole responsibility to make sure the correct ladders were on the truck because Dounis, not plaintiff, went to all the jobs prior to the commencement of the work. On the day of the accident, plaintiff did not come to the shop and therefore did not pack the truck. Dounis also asserted in his first deposition that there were no conversations concerning returning to the "very far location" of his office to get another ladder. John initially testified that Dounis suggested he drive back to the shop, which was more than a half hour away, to get another ladder, but that plaintiff said no and proceeded to split the extension ladder in two. Later in John's deposition, he provides conflicting testimony denying that Dounis instructed him to drive back to get another ladder, and alleged that Dounis did not tell him and plaintiff to stop working to get a different ladder.

To prevail in an action based upon a violation of Labor Law § 240(1), a plaintiff must prove that the statute was violated and that such violation was the proximate cause of the plaintiff's injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Ordonez v C.G. Plumbing Supply Corp.*, 83 AD3d 1021 [2011]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]). Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured

worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

There can be no liability under Labor Law §240(1) where the plaintiff's actions are the sole proximate cause of his or her injuries (*see Robinson v East Med. Ctr., LLP*, 6 NY3d 550 [2006]). Liability attaches if plaintiff failed to use safety devices which were readily available at the work site and plaintiff knew he was expected to use them but chose not to do so (*see Robinson*, 6 NY3d at 554.) However, where such safety devices are not readily available or that plaintiff knew he was expected or instructed to use them, the plaintiff's actions are not the sole proximate cause of his injuries (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651 [2014]).

Two County fails to raise a triable issue of fact as to whether the plaintiff's actions were the sole proximate cause of his accident. Here, it is undisputed that Dounis saw the job first, knew what equipment was needed and that two men were required to install the lighting. The truck was already packed when Dounis picked plaintiff up and the record is clear that the only ladder tall enough for the job on the truck at the work site was the 24-foot extension ladder. There was no appropriate ladder readily available to plaintiff on the work site that he knew he was expected or instructed to use but chose not to do so (*see Gallagher, 14 NY3d at* 88; *Przyborowski 120 AD3d at* 654).

Furthermore, although there is conflicting deposition testimony regarding whose decision it was to split the ladder, Dounis tacitly approved that decision. Dounis was present at the work site at the time of the accident and was aware that the extension ladder brought to the job was the only ladder tall enough to access the work. Even assuming the plaintiff was negligent in splitting the extension ladder that act alone is insufficient to strip him of statutory protection (*see Rico-Castro v Do & Co New York Catering, Inc.*, 60 AD3d 749 [2009]; *Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rudnik*, 45 AD3d at 829; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879 [2006]) and did not constitute an unforeseeable or extraordinary act which was a superseding cause of the accident (*see Vouizianas v Bonasera*, 262 AD2d 553 [1999]). It was not unforeseeable that plaintiff would separate the ladder since both ladders were necessary to do the job and there were no other appropriate ladders on the truck or readily available at the work site. Where, as here, a violation of Labor Law §240(1) is a proximate cause of the plaintiff's accident, the plaintiff's conduct cannot be deemed solely to

blame for it (*see Blake, 1 NY3d* at 287-288).

Accordingly, plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1) is granted and the cross-motion for summary judgment by Two County Realty, Co. dismissing plaintiff's Labor Law §240(1) claim is denied.

Dated: Long Island City, NY
March 27, 2015

ROBERT J. McDONALD
J.S.C.