Jabbi v Gruda Realty Corp.
2015 NY Slip Op 30805(U)
April 24, 2015
Sup Ct, Bronx County
Docket Number: 311205/11
Judge: Howard H. Sherman
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[* 1] FILED May 05 2015 Bronx County Clerk

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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Mahamadou Jabbi and **Lakeisha Jabbi**

Plaintiff

Decision and Order

-against-

Gruda Realty Corp.,

Defendant

Index No. ~~311206/11~~ 311205/11

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Gruda Realty Corp.,

Third-Party Plaintiff

Third -Party
Index No. 83698/13

-against-
USA Construction Company,
Faseehar Mohammad, ***individually and d/b/a***
USA Construction Company and Amjun Mohammad

Third-Party Defendants
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In this action arising out of a July 16, 2011 accident at a Bronx residential building, plaintiff Mahamadou Jabbi claims injuries as a result of falling off a collapsing suspension scaffold, and he now moves for partial summary judgment against the defendant owner on the issue of liability under Labor Law § § 240(1) , and 241(6), as well as for leave to serve a second amended complaint alleging a claim pursuant to Labor Law 240(3), and supplemental bill of particulars.

The dispositive motion is supported by the deposition testimony of the plaintiff, and that of non-party witness Carlos Gonzalez, and plaintiff's affidavit and that of Scott Silberman, a professional engineer, and certified copies of New York City Department of Buildings Violations placed against the defendant owner with respect to the subject premises on 04/29/11 , and on the date of the accident , and four days later.

It is defendant's contention that an award of summary judgment relief is precluded as there is a material issue of fact as to whether plaintiff is entitled to the protection of the statute because the manager of USA Construction Company, Amjum Mohammed ("Mohammed") , has maintained throughout this action and the related Worker's Compensation proceeding, that Jabbi did not work for him at the building site. While the Workers' Compensation Board ("WCB"), after a contested hearing, issued an award determining that the claimant was employed by Faseehar Mohammed [1] on the date of this accident, the building owner maintains that the WCB determination is not entitled to collateral estoppel effect against him.

The papers in opposition include the transcripts of the deposition testimony of Amjum Mohammad, and that of defendant by its president, Daniel Ivezaj.

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[1] Mohammed's spouse, and the president of the company.

Testimony

Jabbi testified that since 2007, he had been working continuously for Mohammed Fasaheer's ("Mohammed ") company, U.S.A. Construction, on a number of different jobs doing pointing, and brick repair, and tar coating [JABBI EBT: 25-27]. His usual work hours were 8:00 AM to 5:00 PM, six days a week [EBT: 28], and he was always paid in cash [Id. : 25]. U.S.A. Construction employed a total of four or five employees [Id. 26], but he was the only member of the crew to do pointing.

Jabbi first began working at the subject building site in the beginning of June 2011 [Id. 37]. Immediately before this, a sidewalk shed had been erected at the building [Id. 39]. The first job he and the five U.S.A. Construction workers performed was the demolition of a rooftop parapet [Id.; 52].[2] The scaffolding used was supplied by his employer, as was his harness, [Id. 50-52]. On Friday, July 15th, at around 5:00 PM., Mohammed told Jabbi to return to the building the next day, and he did so, arriving on the 16th at 8:00 AM. [58-59]. No other workers came to the building that day [57]. Jabbi used the key he had been provided to open the basement [43-44; 59], and when he saw the building's superintendent, he asked him for the water hose so he could mix cement [60]. After it was mixed, he tied one bucket of cement on a rope, and carried

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[2] Only U.S.A. Construction workers were working at the site at this time.

another up to the roof [3] where he placed it on the scaffold [61-62]. He put on his harness, affixing its attached line to the longer safety line that was tied to "some kind of pipe" on the roof [64; 66], and got onto the scaffold that was hanging above the fifth-floor apartments on the left side of the building [79], [4]and he then "open[ed] the rope and drop[ped] it down to the fourth floor [70] where he began his pointing work [74]. He was working for about three to three and one-half hours , and had moved the scaffold down to the third floor where he was "sponging" , when the rope on the right side connecting the scaffold to the pulley, broke in the middle [77-78;85], and that side of the scaffold collapsed beneath him [87] , and the entire scaffold fell down onto the sidewalk bridge [88-90].

> After the rope broke I fell, the safety line , I have it, the rope drop, then it lock and then I hit the fire escape was next to me , back of my neck I hit the fire escape and the building.
>
> 84:15-19

Jabbi's body was suspended on the safety line at the third-floor level for approximately fifteen to twenty minutes, and he struck the fire escape and the building three or four times [90-98]. He was extricated by a neighborhood deli employee, Carlos, who climbed to the top of the sidewalk bridge, and then to the fire escape onto which he was

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[3] Again, he used a building key to access the roof [Id. 61].

[4] He had used that scaffold by himself for the first time the day before [80-82].

able to pull Jabbi [105-106]. Carlos removed plaintiff's harness, and held Jabbi's hand as they walked down the fire escape to the sidewalk [107-108]. Jabbi observed the building superintendent at the scene [108]. He was taken by ambulance to the hospital where he was treated for a few hours, and then discharged [112].

The day after the accident, Mohammed called him to inquire about the accident, and instructed him to tell the "building department" that he was not working on the side of the building , but was only taking the scaffold down when something dropped [115-116]. Jabbi was never contacted by the Building's Department . He never returned to the building [120], and his wife picked up the $120. 00 cash he had earned for the day from Mohammed [121]. At the Worker's Compensation hearing, Jabbi learned for the first time that Mohammed was denying that Jabbi was working for U.S.A. Construction at the site [117].

Carlos Gonzalez testified that had worked at the deli across the street from the subject building for about eight to ten months before the accident [GONZALEZ EBT: 9], and had seen six workers , including plaintiff , at the building site for about four to five weeks before the incident [Id. 16-17]. He also observed the person he believed to be the boss , whom he later observed at the worker's compensation hearing, on at least twenty occasions , bringing supplies to the site [17-18;78]. Jabbi"usually" came into the deli to get coffee and water , but he did not do so on the day of the accident [94].

During the course of the four-to-five week period, Gonzalez observed Jabbi cleaning bricks in the middle of the building, and placing cement between them, and helping on the roof [17-18]. He saw Jabbi on the scaffold cleaning bricks "sometimes five days a week, sometimes six days a week." [18: 7-8]. [5]

On the day of the accident, Gonzalez had observed Jabbi get out of a car on the side of the building , and later saw him on the scaffold above the third floor to the left of the fire escape, "cleaning the bricks" , and in so doing "taking years off the building ." [59; 15:21-23]. [6] He observed no other workers at the building [83].

Later that day, he was making coffee for a customer when someone screamed that there was a person hanging from the roof of the building across the street [9]. From the deli's window, Gonzalez observed Jabbi hanging from his harness and a rope [9-10], with his head situated by the third-floor window , and his feet extending below the fire escape platform [11]. Gonzalez ran to the fire escape , which was halfway down, and jumped on the frame to get on the ladder, and then climbed to the third floor where he tried to reach plaintiff [62;12]. He was able to do so when he straddled his body "halfway out of the rail " [12:10-11;69]. He pulled Jabbi in, and after removing

[5]Gonzalez testified that he worked "either " five or six days a week .He also testified that before the accident, he had not seen Jabbi working at the building on a Saturday [90-91], nor with the exception of one time in which Jabbi stayed a bit later than other workers, did he ever observe plaintiff to be working alone [92-93].

[6] Gonzalez testified that this was the side on which earlier, a portion of the roof had been removed by the workers [88].

his safety harness, he walked down the fire escape to the sidewalk, with Jabbi following him [13].

Expert Affidavit

Based upon a review of the above testimony, and photographs of the building site, and the Building Department violations marked as exhibits at the depositions of the building owner, and that of the contractor, as well as an inspection of the site conducted April 15, 2013, Scott Silberman, P.E. opines to a reasonable degree of engineering certainty that the platform Jabbi was working on is considered to be a two point suspension scaffold and that it was "inappropriate, unsuitable and inadequate because the ropes suspending it snapped, broke or unraveled", while a safe scaffold would "include suspension ropes that are in good, structurally sound condition, and properly protected from damage while in use."

Because the scaffold collapsed, Silberman concludes that it was unable to support its own weight plus that of plaintiff and his equipment "without any factor of safety" and as constituted on the day of the accident, violated Labor Law §§ 240(3) [7] and 241(6) and Industrial Code § 23-5.1 (c)(1) as well as OSHA regulations and New York City Building Code § 3314.3.1 requiring scaffolds as erected to be capable of supporting its own weight and at least 4 times the maximum intended load to be applied.

[7] No claim under Labor Law 240(3) is interposed in the original complaint.

Silberman further opines that the building owner violated Building Code sections 3314.1.1 because prior to its installation , and /or use , there was no notification to the city agency of the installation and /or use of the scaffolding equipment.

Finally, Silberman opines that the failure to have adequate suspensions ropes , and to inspect for and to maintain their integrity , were departures from good and accepted engineering, construction, and construction safety practices and competent producing causes of the accident.

New York City Department of Buildings Violations

By Violation No. 24890071X dated April 29, 2011, an Order to Correct was issued for 690 East 189th Street for conditions stated as follows.

> Failure to maintain building walls and appurtenances noted parapet on second exposures (Beaumont Avenue) is leaning inward . Recent repointing is failing does not appear to have been raked properly . Pointing is 1/8" thick . Parapet coping crushed at two locations and water seal [illegible].....

The "remedy" noted was to obtain a permit and repair the defects.

On the day of the accident , the department issued a stop work order at the premises to "Sunny Improvement Inc." for after-hours and for scaffold work, without a variance and permit.

On the follow-up inspection of July 20th, a violation was issued to the building owner for facade work in progress under an expired permit, and another stop work order was issued.

Applicable Law - Summary Judgment

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185

AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008]) .

Once this burden is met, the opposing party may defeat the motion with proof "sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). The court is required at this stage to discern whether any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., op.cit at 404).

Labor Law 240(1)

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in pertinent part, that:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Scaffold Law "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers

subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure." (Jock v Fien, 80 NY2d 965, 967-968 [1992]).

In Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc., 1 N.Y.3d 280, 803 N.E.2d 757, the Court of Appeals observed that the term absolute liability

> is"absolute" in the sense that owners or contractors not actually involved in construction can be held liable (see *Haimes v New York Tel. Co.*, 46 N.Y.2d 132, 136, 385 N.E.2d 601, 412 N.Y.S.2d 863 [1978]), regardless of whether they exercise supervision or control over the work (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). Intending the same meaning as absolute liability in Labor Law § 240 (1) contexts, the Court in 1990 introduced the term "strict liability" (*Cannon v Putnam*, 76 N.Y.2d 644, 649, 564 N.E.2d 626, 563 N.Y.S.2d 16 [1990]) and from that point on used the terms interchangeably.
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> Blake, at 287

As pertinent here, it is settled that

> [t]he primary purpose of Labor Law § 240 (1) is to extend special protections to "employees" or "workers" (see *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 577, 563 NE2d 263, 561 NYS2d 892 [1990]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, 482 NE2d 898, 493 NYS2d 102 [1985]). Inclusion in this "special class for whose benefit absolute liability is imposed" requires a plaintiff to "demonstrate that 'he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or their agent'" (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50-51, 814 NE2d 784, 781 NYS2d 477 [2004], quoting *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971, 393 NE2d 1032, 419 NYS2d 959 [1979]). As a result, we have held that the statute does not apply to a volunteer who performs a service gratuitously (see *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d at 971; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d at 577).

Stringer v. Musacchia, 11 NY3d 212, 215 [2008]

For purposes of this analysis , this court is required to consider both the "traditional parameters of employer-employee relationships " as well as the clearly articulated legislative intent of the statute to place " 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs , on the owner and general contractor' rather than on the workers themselves " (*Santatass v. Consolidated Inv. Co.*, 10 NY3d 333, 338, 887 NE2d 1125 [2008], quoting Mem of Senator Calandra and Assemblyman Amann, 1969 NY Legis Ann, at 407). Stringer, at 365

Labor Law § 2[5] defines an "employee" as a "mechanic , workingman or laborer working for another for hire ." The Court is *Stringer* further delineates.

> When a person has been hired, at least three factors are usually present. First, there is the voluntary undertaking of a mutual obligation-the employee agrees to perform a service in return for compensation (usually monetary) from the employer, thereby revealing an economic motivation for completing the task. An "employer" is the person who pays the worker's salary or wages. Second, although not an essential factor, an employer may exercise authority in directing and supervising the manner and method of the work. A person is an "employee" if the employer has the right to control the details of work performance. Third, the employer usually decides whether the task undertaken by the employee has been completed satisfactorily
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> Id. at 364-365

To prevail on a motion for partial summary judgment on a Labor Law § 240(1) claim, a plaintiff bears the burden of establishing as a matter of law that he/ she was not provided with proper safety devices (or that the devices actually furnished were inadequate) and that such failure was the proximate cause of his/ her gravity-related injuries (see, Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39, 823 N.E.2d 439 [2004]; Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 9-10, 917 N.Y.S.2d 130 [1st Dept. 2011]). In this procedural context, "[a] lack of certainty as to exactly what preceded plaintiff's accident does not create an issue of fact as to proximate cause (see *Vegarra v. SS 133 W. 21, LLC.*, 21 A.D.3d 279, 800 N.Y.S.2d 1134 [2005]." (Arnaud v. 140 Edgecomb LLC., see also, Heer v. North Moore Developers, L.L.C., 61 A.D.3d 617, 878 N.Y.S.2d 310 [1st Dept. 2009]; Agresti v. Silverstein Properties, Inc., 104 A.D.3d 409, 959 N.Y.S. 2d 915 [1st Dept. 2013]).

Labor Law 240(3)

The statute provides the following.

§ 240. Scaffolding and other devices for use of employees

> 3. All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use

Labor Law 241(6)

Labor Law § 241(6) requires owners to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor, imposing non-delegable duty on property owners, a plaintiff need not show that the defendants exercised supervision or control over the worksite in order to establish a right of recovery under § 241(6). Unlike a violation of an explicit and definite statutory provision which demonstrates negligence as a matter of law, a violation of Labor Law § 241(6) is merely some evidence which the jury may consider on the question of defendant's negligence (see, Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 349, 693 N.E.2d 1068 [1998]). To support such a claim, a plaintiff must allege that the property owner violated a regulation that sets forth a specific applicable positive command, and not simply a recitation of common-law safety principles (see. Ross, 81 NY2d at 504). The predicate regulation relied upon here , 12 NYCRR) § 23-5.1 (c) (1) , has been held to be insufficiently specific for such purpose (Greaves v Obayashi Corp. 55 AD3d 409, 410, 866 NYS2d 47 [2008], lv dismissed 12 NY3d 794, 906 NE2d 1073, 879 NYS2d 39 [2009]; see also, Macedo v. J.D. Posillico, Inc., 68 A.D.3d 508, 891 N.Y.S.2d 46 [1st Dept. 2009]).

Discussion and Conclusions

Upon review of the moving papers herein and on consideration of the applicable law, it is the finding of this court that plaintiff has demonstrated as a matter of law that he was hired for and engaged in a covered activity at the subject building site on July 16, 2011, and that he was provided with a scaffold rope that did not afford proper protection from the elevation risk to which he was exposed resulting in his sustaining gravity-related injuries.

Upon review of the papers in opposition as afforded all favorable inferences, it is the finding of this court that defendant has failed to raise an issue of fact to rebut plaintiff's prima facie showing.

Defendant correctly argues that as a non-party, it did not have a full and fair opportunity to litigate the issue of Mohammed/U.S.A. Construction 's employer status in the compensation hearing, and "had no direct stake in its outcome except for its potential collateral effect on this case" (Tounkara v. Fernicola, 63 A.D.3d 648,650, 883 NYS2d 27 [1st Dept. 2009]), and as a result, the outcome of the hearing , i., e., that Jabbi was an employee of Mohammed/U.S.A. Construction on the date of the accident, does not have preclusive effect upon the owner .

Despite this fact, upon review of the record here, including the testimony of the building owner, and of Mohammed, as afforded all favorable inferences, it is the finding of this court that the contention that Jabbi, a person, who Mohammed acknowledged worked for him on prior occasions, went to the building site on July 16, 2011 as a casual volunteer to perform a random and unsolicited act of pointing, without expectation of compensation of any kind from the contractor (see, Stringer, supra at 216-217) is incredible as a matter of law. It is undisputed that the parameters of the work on the building were established by the building violation sought to be timely cured , and the non-conforming condition included repointing deemed to be "failing." Also undisputed is the fact that plaintiff, not only secured access to the building, but to its locked basement[8] and roof , and eventually, to the scaffold , where he proceeded to equip himself with a safety harness and to fasten its attached line to the safety line. Under these unique set of circumstances, it is the finding of this court that as a matter of law on the date of the accident, plaintiff came to be positioned on a scaffold on the side of the building as an employee of the contractor, entitled to be afforded the special protection of the statute, and that the safety device he was furnished was inadequate to provide that protection resulting in plaintiff's gravity-related injuries.

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[8] IVEZAJ EBT: 17. The owner also testified that he gave the key to Mohammed only [Id. 35-36;78].

It is the further finding of this court that the branch of the motion seeking summary judgment on the Labor Law § 241(6) claim as predicated on 12 NYCRR) § 23-5.1 (c) (1), is denied pursuant to the authority of Macedo v. J.D. Posillico, Inc., *supra.*

The branch of the motion seeking to amend the complaint to allege a violation of Labor Law 240(3) is granted, and as amended, that branch of the motion seeking dispositive relief on the 240(3) claim is also denied, as plaintiff fails to proffer any evidence, other than the expert's bald assertion, to establish as a matter of law that the scaffold could not support four times its weight, a precondition to recovery under that subdivision (see, Kyle v. City of New York, 268 A.D.2d 192, 199, 707 NYS2d 445 [1st Dept. 2000]).

Accordingly, it is

ORDERED that the branch of the motion seeking an award of partial summary judgment on liability on the Labor Law 240(1) claim is granted, and it is further

ORDERED that the branch of the motion seeking an award of summary judgment on the 241(6) claim as predicated on 12 NYCRR § 23-5.1 (c) (1) is denied, and it is further

ORDERED that the branch of the motion seeking leave to serve a second amended complaint alleging a violation of Labor Law 240(3) and a second verified bill of particulars

to add a violation of the New York City Building Code, and to amplify the 241(6) claim of violations of Industrial Code § 23-5.1 with 23-5.1(c)(1) is granted as the amendments sought merely amplify theories of liability already alleged, and it is further

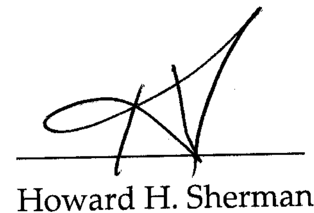
ORDERED that the branch of the motion seeking an award of summary judgment on the Labor law 240(3) claim is denied.

Third-Party Motion

The court is in receipt of the third-party defendant for summary judgment, but the opposition papers of the defendant/third-party plaintiff are not contained within the submissions, though the papers in reply thereto, which incorporates opposition to plaintiff's cross-motion for leave to serve a fifth supplemental bill of particulars, are.

Accordingly , the defendant/ third-party plaintiff is directed to provide the opposition papers served in connection with the motion on the third-party claim to the Clerk of this Part within ten days hereof, and a decision/order on the third-party defendants' motion and the plaintiff's cross-motion will be rendered within ten days of such receipt.

This constitutes the decision and order of this court.



Dated : April 24, 2015

Howard H. Sherman