

Powell v URS Corp.
2015 NY Slip Op 30846(U)
April 15, 2015
Supreme Court, Bronx County
Docket Number: 307928/12
Judge: Mark Friedlander
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

HOWARD POWELL,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 307928/12

-against-

URS CORPORATION, TURNER CONSTRUCTION
CORP., SETTLEMENT HOUSING FUND, INC.,
THE NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

Defendants.

HON. MARK FRIEDLANDER

Plaintiff moves for an order: (1) granting plaintiff partial summary judgment on liability, pursuant to Labor Law §240(1); and (2) amending the complaint to allege compliance with Public Authorities Law §744. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on March 14, 2012, while working at a construction site at 1501 Jerome Avenue, Bronx, New York ("The Premises"). Plaintiff alleges that, in addition to being liable for common law negligence, defendant violated Labor Law §§200, 240(1) and 241(6), Rule 23 of the New York State Industrial Code, including §23-1.21(b)(4), §23-1.21(b)(4)(ii), §23-1.15, §23-1.7(a)(1)(b)(1)(i), §23-1.16, §1.7(b)(1)(iii)(a)(b) and (c), §23-1.8, §23-1.32, §23-2.2(b), §23-2.2(c)(3), §23-2.4, §23-3.2, §23-3.3(g) and §23-4.4, as well as The Board of Standards and Appeals, the Administrative Code of the City of New York and OSHA rules.

The branch of plaintiff's motion to amend his complaint to reflect compliance with Public Authorities Law §744, which is not opposed by the defendants, is granted, and plaintiff's

complaint is deemed amended accordingly.

In support of the motion, plaintiff submits, *inter alia*, a copy of the pleadings, transcripts of the deposition testimony of plaintiff, of Yuta Lee (“Lee”), an assistant safety engineer of Turner Construction Corp. (“Turner”), the accident report of Turner, and photographs.

The facts, as culled from the pleadings, deposition transcripts and exhibits, are as follows: The New York City School Construction Authority (“SCA”), is the owner of the Premises. SCA commenced a project in 2009, known as The New Settlement Community Campus, involving the construction of two public schools and a Community Center. Settlement Housing Fund, Inc., was the developer of the project. Turner was the general contractor on the project and URS Corporation served as the “Owner’s Rep.” JTC Painting Corp. (“JTC”) was a subcontractor on the project. Plaintiff was a union painter employed by JTC.

According to plaintiff’s deposition testimony, on March 14, 2012, plaintiff was wearing a T-shirt, painter’s pants and construction boots. Plaintiff brought the materials he needed to paint, consisting of paint, paint rollers and extension poles, brushes and deuces (smaller buckets with a wire handle that can hold about 2-2 ½ gallons of paint), with him. He commenced work at 7:00 A.M. His accident took place in the staircase between the first and second floor of the Premises. The staircase was divided by a handrail, and extended to a “mid-level” landing, at which point it turned to a second set of stairs to reach the second floor. Plaintiff completed painting the stairwells between the fourth and second floors by about 12:00 P.M. He had used a ladder while between the fourth and third floors. The ladder was then brought down to the stairwell between the third and second floor, but he was not sure if it was used there. Plaintiff then took his lunch break.

At about 12:40 P.M., plaintiff returned from lunch and was going to paint the ceiling.

The ladder was leaning against the cinderblock wall on the mid-landing between the second and first floor. The ladder was a straight extension ladder that had wrapping on the top and rubber feet on the bottom. Plaintiff extended the ladder five to six feet, to reach a height of about thirteen to fifteen feet. He made sure the lock on the ladder was secure. Plaintiff positioned the ladder so that the top of it was leaning against the soffit or beam that ran the length of the cinderblock wall. He took the deuce, which was about eight inches in diameter and six to seven inches tall, and put his hand through the handle so that it rested on his wrist. The brush was in the bucket. The deuce was filled with approximately one quart of paint. The ceiling was about fifteen feet high. Plaintiff climbed three quarters of the way up the extended ladder. As he was hooking the deuce onto the ladder, the top of the ladder gave way, kicked out from under him and he fell to the landing, hitting the banister with his left side, his lower back and right knee hitting the steps.

According to Lee's deposition testimony, after learning of the accident, he investigated, spoke to plaintiff, inspected the ladder involved in plaintiff's accident, and filled out a report. Lee, after inspecting the ladder, found it to be "no good." He opined that the condition of the feet would not perform as an anti-skid protection and contributed to the ladder's kicking out and falling. He further opined that the wrapping on the top of the ladder would make it slide when weight was put on it.

Plaintiff has established a *prima facie* entitlement to summary judgment as a matter of law by deposition testimony that the ladder he used kicked out from under him causing him to fall to the ground. *Fernandez v. 213 E. 63rd St. LLC*, 115 A.D.3d 514 (1st Dept. 2014).

With respect to plaintiff's Labor Law §240(1) claim, defendant does not contest the inadequacy of the ladder used by plaintiff. Defendants' sole opposition to plaintiff's motion is

that plaintiff's actions were the sole proximate cause of his accident. More specifically, defendants contend that plaintiff used the subject ladder throughout the morning without incident and that each time plaintiff went up the ladder prior to the subject incident, one of plaintiff's co-workers secured the ladder by holding it, and it was plaintiff's decision not to wait for a co-worker, that was the sole proximate cause of the accident.

Defendants' contention fails to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. It is undisputed that the ladder used by plaintiff was unsecured and that no other safety devices were supplied. Accordingly, plaintiff cannot be held solely to blame for his injuries. *Ranierra v. Hold Constr. Corp.*, 33 A.D.3d 425 (1st Dept. 2006); *Velasco v. The Green-Wood Cemetery*, 8 A.D.3d 88 (1st Dept. 2004). Plaintiff's use of the ladder without a co-worker present amounts, at most, to comparative negligence, which is not a defense to a section 240(1) claim. *Velasco v. The Greenwood Cemetery, supra*. No evidence was submitted that plaintiff was ever instructed not to use the subject ladder or that an adequate safety device was available and plaintiff chose not to use it. *Boyd v. Schiavone Constr. Co., Inc.*, 106 A.D.3d 546 (1st Dept. 2013).

Plaintiff's motion for partial summary judgment against defendants on the issue of liability, pursuant to Labor Law §240(1), is granted.

The foregoing constitutes the Decision and Order of the Court.

Dated: _____

4/15/15



MARK FRIEDLANDER, J.S.C.