McManus v City of New York
2015 NY Slip Op 31176(U)
June 8, 2015
Supreme Court, Bronx County
Docket Number: 307029/12
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

JOSEPH McMANUS,

Plaintiff,

Index No.: 307029/12

Hon. Fernando Tapia

v.

THE CITY OF NEW YORK

Defendants.

DECISION

Plaintiff, Joseph McManus ("McManus"), moves for partial summary judgment with respect to the claim brought under Labor Law Section 240 (1) against the Defendant City of New York. The City cross moves for summary judgment in as much as the Plaintiff's conduct was the sole proximate cause of the injury.

The Court decides the above-referenced motions as follows.

McManus was a steamfitter for Local 638 at the Croton Water Treatment Plant (the "Plant"). He was injured as the result of falling into an opening located at the top of a large, concrete tank which was approximately seventeen feet deep. The interior walls of the tanks were being smoothed for eventual use in water filtration.

The issue presented concerns whether the safety device covering the opening at the top of the tank was adequate or, as the City claims, whether the McManus himself removed the device and inadvertently fell into the hole. Whether the parties specifically agree on what to call the particular device that was in place is irrelevant. The Court finds that for the purposes of this

Decision, it shall refer to the device as a "baker's scaffold". A baker's scaffold consists of two vertical ends connected by a horizontal surface which can be raised and lowered forming a structure in the form of a capital letter H. From the exhibits, it can be described as approximately no taller in height than the average four step, stepladder and wide enough to cover the three foot by three foot opening.

On the day of the incident, McManus claims to have been responding to a coworker's complaint regarding excess silica dust emanating from the opening. He claims this was within his duties as union steward responsible for safety. He claims to have approached the opening to the tank, stepped on the curb surrounding it,[1] and attempted to remove the plastic sheet that was covering the opening when his right foot slipped and he fell into the hole. He claims to have noticed a baker's scaffold near the opening.

This account widely varies from the City's claim that McManus had no business being in the area at the time and that he himself removed the baker's scaffold which was securely placed above the opening and which, had it not been removed by McManus, would have been adequate to safely prevent against this very incident.

The City's contention that McManus was not authorized to be in the area where the injury occurred is completely irrelevant. Furthermore, this claim is not supported by the facts. In any event, the City fails to provide any case law to support its argument. Courts have rejected similar arguments seeking to preclude a Plaintiff from recovery. McManus' motion papers cite to two cases *Luna v. Zoological Society* (101 AD3d 1745 [4th Dept 2012]) and *Ostrowski v. Sutton Hill Capital* (2013 NY Slip Op 32575[U] [Sup Ct, NY County 2013]) where the Courts ruled in

[1] The opening has a curb surrounding it and although accounts differ, it could be as high as eight inches.

favor of the plaintiffs on summary judgment motions despite claims made by the defendants that the plaintiffs should not have been in the area at the time of the injury.

The City seeks to establish that McManus was the sole proximate cause of the injury. It does so by alleging that he moved the baker's scaffold covering the opening to the tank. According to the City, had McManus not done so, he would have avoided injury. Of course this presumes the City is correct. This assumption is permissible in deciding whether or not to grant the Plaintiff's motion for summary judgment, as the facts are to be viewed in the light most favorable to the nonmoving party (*Gurfein Bros., Inc. v. Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]). Proceeding based off this assumption, ultimately, this Court finds the outcome remains the same regardless of whomever it was that moved it.

The "core objective" of the Legislature in enacting the provisions of the Labor Law at issue here, specifically § 240(1), was to ensure that adequate safety devices would be provided to prevent falls and injury to workers (*see e.g.* *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]. As the device, the baker's scaffold, failed to prevent the fall, which is the "core objective" of this section of the Labor Law, Plaintiff established his entitlement to relief. The breach of the City's duty to provide an adequate safety device proximately caused the Plaintiff's injury. Whether it was the Plaintiff or someone else that moved the device, this does not take away or change the fact that the device failed to prevent the fall. Therefore, where under either version, liability results under § 240(1), the plaintiff will be entitled to summary judgment (*Wraclawek v. JNK-Grand LLC*, NY Slip Op 32812[U] at **20 [Sup Ct, NY County 2011]).

Once it is established that the safety device failed, Plaintiff cannot be found to be the sole proximate cause of the injury. This is so regardless of any comparative fault on the part of the Plaintiff (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 289

[2003]). The City has not adduced and this Court does not find any evidence supporting the City's contention that the Plaintiff was the sole proximate cause of the injury. Plaintiff's evidence indeed established that another safety device was available, namely a wooden scaffold used to barricade the opening. Whether this device would have been the better safeguard against injury is not for the Court to decide. While the City maintains questions of fact remain regarding whether § 240(1) was violated, none have been asserted that would lead this Court to find a genuine issue as to liability. It should be noted, both parties offered expert opinions on the matter. The Court relied on neither in making its Decision. Their explanations are speculative and while they may be based on facts, their opinions are not facts. As no other explanation is in sight, this Court can only rely upon the one offered by the Plaintiff which points to the failure of the device as the proximate cause of the injury. The sole issue before this Court, in terms of liability, is whether or not there exists a genuine issue of fact as to whether the device in question, the baker's scaffold, was an adequate safety device. As no fact issue has been presented, Plaintiff's motion for summary judgment on liability is granted. The City's cross motion is denied.

This constitutes the Decision and Order of the Court.

Dated: June 8, 2014

Bronx, NY

Hon. Fernando Tapia, JSC