Ward v Uniondale WG, LLC
2015 NY Slip Op 31215(U)
July 14, 2015
Supreme Court, New York County
Docket Number: 151003/2013
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Anthony Ward,

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 151003/2013
Motion Seq. No.: 001

Uniondale WG, LLC, and March Associates Construction, Inc.,

Defendants.

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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

Papers	**Numbered**
Notice of Motion , Affirmation, Exhibits, and Memo of Law	1-11
Opposition Affirmation and Exhibits	12
Reply Affirmation, Memo of Law	13

In this personal injury action, plaintiff moves for an Order, pursuant to CPLR 3212, seeking summary judgment on his Labor Law 240(1) and 241(6) claims.

Factual Background

This is an action to recover damages for personal injuries sustained as a result of a construction workplace accident that occurred on July 12, 2012, when plaintiff allegedly fell off a scaffold while he was moving mortar from a bucket on a hi-lo forklift to a smaller bucket on the scaffold. The plaintiff was employed by Cityview Contracting (Cityview) as a construction laborer. Cityview was a subcontractor hired by March Associates Construction, Inc. (March Associates) to perform the inasonry work and to build the walls of the building which was ultimately to become a Walgreen's drugstore. Uniondale WG, LLC, is the owner of the premises who hired March Associates as the general contractor for the construction job.

At his deposition, plaintiff testified that on the day of his accident, he checked in with his foreman/supervisor Ramon, and then went to the cement mixer to start work. His job was to set up the bricks and mortar for the masons. Around 9:00AM, plaintiff began work on the scaffold, moving bricks and mortar for the masons. The bricks and mortar were raised up to the scaffold by a high-lo forklift, at which point plaintiff would take them off the fork lift and stack them for the masons who were also on the scaffold. The mortar was lifted by the forklift in a large bucket and plaintiff was to transfer the mortar from the large bucket into smaller buckets for the masons. At the time of the accident, plaintiff claims he was moving mortar from the larger bucket into smaller ones, when he moved or turned, fell backwards, and fell off the scaffold. According to plaintiff, the scaffold was 8 to 10 feet high, stationary with wooden planks, and had no safety railings or guardrails. Plaintiff also testified that he was not provided with any safety belts, ropes or harnesses.

Plaintiff testified that his super/foreman, Ricardo (also identified as Ramon), was onsite at the time of the accident, but did not witness his fall. Also on site was Patrick Heaney, a superintendent for March Associates, who also did not witness the fall. When Ricardo heard that plaintiff had fallen he summoned for Patrick, telling him that plaintiff was "grouting, holding the five gallon bucket out, which is very heavy, and when he went to lean forward, he poured it but hurt his back, injured his back, and at that point, he tried to climb down off the scaffolding and he slipped, when he climbed down, and fell on the ground." (Plaintiff's Exhibit B, Heaney's EBT Transcript, pp. 78, lines 18-24).

Arguments

Plaintiff argues that he is entitled to summary judgment because he was engaged in the

types of activity afforded protection by Labor Law 240(1) and Labor Law 241(6), and defendant's violations of those statutes were the proximate cause of the plaintiff's injuries.

Defendants maintain that summary judgment in favor of the plaintiff is not warranted because plaintiff was the sole witness of the alleged accident, and that there is a triable issue of fact as to how the plaintiff's alleged accident occurred. Defendants also maintain that the Industrial Code §§23-1.16, 23-5.3, 23-5.1 violations as cited by plaintiff lack the requisite specificity to support such a claim.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*,

260 Ad2d 201 [1st Dept 1999]).

Labor Law §240(1)

Labor Law §240(1) provides that:

> "[a]ll contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish 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 aim of the statute is to protect workers by imposing liability for the failure to supply required safety devices at construction sites upon those best situated to mandate and implement their use (*see Zimmer v. Chemung County Performing Arts,* 65 N.Y.2d, 513, 520). While the statute is to be liberally construed so as to accomplish this purpose, injuries from hazards other that those falling within the context are not compensable thereunder, even if proximately caused by the lack of required safety devices (*see Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509; *Koenig v. Patrick Constr. Corp.,* 298 N.Y. 313, 319; *Quigley v. Thatcher,* 207 N.Y. 66, 68). For liability to attach under this statute, "'the owner or contractor must breach the statutory duty...to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries'" (*Kerrigan v TDX Constr.Corp.,* 108 AD3d 468, 471 [1st Dept 2013], quoting *Robinson v East Medd.Ctr., LP,* 6 NY3d 550, 554 [2006]). Thus, to prevail on his claim, plaintiff must show (1) a violation of the statute; and (2) that the statutory violation was a contributing or proximate cause of his injuries (*see Cahill v Triborough Bridge & Tunnel Auth,* 2 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of NY City,* 1 NY3d 280, 287-289 [2003]).

Once plaintiff has made the requisite showing, the burden then shifts to defendants to

establish that "'there was no statutory violations and that plaintiff's own acts or omissions were the sole cause of the accident'" (*Kosavick v Tishman Constr. Corp. of NY,* 50 AD3d 287, 288 [1st Dept 2008], quoting *Blake,* 1 NY3d at 289). Defendants may also defeat plaintiff's motion for summary judgment by raising "bona fide credibility issues with respect to [plaintiff's] testimony" as to how the accident occurred (*Weber v Baccarat, Inc.,* 70 AD3d 487, 488 [1st Dept 2010].

In a Labor Law 240(1) case, where the plaintiff is the sole witness to the accident, the plaintiff's summary judgment motion may be denied if the opponent raises a triable issue of fact "relation to the prima facie case or to plaintiff's credibility." (*Klein c City of New York,* 89 NY2d 833, 652 NY2d 723, 675 NE2d 458 [1996]). Where, as here, plaintiff is the sole witness to the accident, "summary judgment is only appropriate if the defendant has presented no evidence of a triable issue of fact relation to plaintiff's credibility or materially different versions of how the accident occurred. On the other hand, mere speculation as to plaintiff's credibility is insufficient to raise a question of fact. (*See France v Jernal,* 280 AD2d 409, 721 NYS2d 51 [1st Dept 2001]). Nor is a credibility issue raised merely because plaintiff's testimony presents various possibilities as to the precise chain of events leading up to the accident. (*See Orellano v 29 E. 37th St. Realty Corp.,* 292 AD2d 289, 740 NYS2d 16 [1st Dept 2002]).

Here, plaintiff has made a prima facie showing of entitlement to summary judgment on his Labor Law 240(1) cause of action. Plaintiff testified that while he was working on the scaffold, he fell backwards and off the scaffold, sustaining injuries to his back. It is undisputed that the scaffold lacked safety rails and/or guardrails. Plaintiff also submits the medical record from an emergency room visit on the date of his accident. The record states in the "Consultant's Report" section" "slp from 6 feet of a [illegible] scaffolding landing between building and

scaffolding. Pt c/o low back pain, denies any other compliant." (Plaintiff's Exhibit G, Emergency Room Medical Records). The record clearly identifies plaintiff as the source of the statement, and is entirely consistent with his account of the accident.

In opposition, defendants submit the testimony of Heaney, who attests that after the accident, he briefly spoke with plaintiff and other workers on site, from which he only gathered that plaintiff had injured his back, possibly from twisting it while he was moving the mortar into buckets. Heaney himself did not witness the accident, nor could he recall if anyone he had spoken to had directly witnessed the accident. Speculation that the accident might have occurred in some other manner is insufficient to defeat worker's motion for summary judgment on issue of liability. (*See Ritzer v 6 East 43rd Street, Corp.*, 57 AD3d 412 [2008]. Here, all defendants have offered is speculation that the accident may have occurred in some other way. It is clear that plaintiff was subjected to an elevation-related risk while working, and defendant's failure to provide him with adequate safety devices was the proximate cause of his injuries. (*See Casabianca v Port Auth. Of New York & New Jersey*, 237 AD2d 112 [1st Dept 1997]). Without a genuine issue of fact, plaintiff is entitled to the protections of Labor Law 240(1) as a matter of law.

Labor Law §241(6)

Labor Law §241 (6) requires that all contractors, owners, and their agents comply with the following requirement:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the

> owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law §241 (6) imposes a "*nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). To establish liability under Labor Law §241(6), the plaintiff must "specifically plead and prove the violation of an applicable Industrial Code regulation," which proximately caused the accident (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012] [internal quotation marks and citation omitted]). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

Plaintiff alleges the following violations of the Industrial Code of the State of New York (12NYCRR23): §§23-1.16, 23-5.3, 23-5.1. In opposition, defendants maintain that all three are inapplicable or lack the requisite specificity to support such a claim.

Plaintiff contends that defendants violated Industrial Code §23-1.16 by failing to provide him with a safety line, harness, tail line or life net while working on the scaffold. However, this section sets forth only the standards for the use of such devices and is inapplicable where, as here, defendants did not provide plaintiff with any such devices. (*See Philip v 525 East 80th Street Condo,* 93 AD3d 578, 940 NYS2d 631 [1st Dept 2012]). Here, plaintiff's allegation is that there were no safety devices provided to him, not that they were available but improperly used in some fashion.

Plaintiff also contends that defendants violated Industrial Code §23-5.3(e) by failing to

provide a safety railing on the metal scaffold. Section 23-5.1(e) sets forth specific, rather than general, safety standards for scaffolds, and is sufficient to support a Labor Law 241(6) cause of action (*see Klimowicz v Powell Cove Assocs., LLC,* 111 AD3d 605, 975 NYS2d 419 [2nd Dept 2013]; *Latchuk v Port Auth. of New York and New Jersey,* 71 AD3d 560, 896 NYS2d 356 [1st Dept 2010]). Plaintiff has established that the scaffold that was used during the accident was a metal scaffold. Further, it is undisputed that the scaffold lacked safety railings as required by the Industrial Code.

Plaintiff also contends that defendants violated Industrial Code §23-5.1(j), which requires a safety railing on all open sides scaffold platforms except for "any scaffold platform with an elevation of not more than seven feet..." (12 NYCRR 23-5.1(j)(1)). Plaintiff testified that when he fell he was working on the staging area, or the top of the scaffold, which was 8 feet high. In opposition, defendants argue that the outriggers upon which laborers worked was only 6 feet high and did not require safety railings. However, according to both plaintiff and defendant's testimony, it was necessary for workers to stand on the staging area when they were shoveling mortar from the buckets lifted by the forklift into smaller tubs, which is exactly what plaintiff testified he was doing when he fell from the staging area of the scaffold. Here, it is undisputed that the staging area of the scaffold, at a height of 8 feet, did not have any safety railings.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on his Labor Law §240(1) claim is granted ; and it is further

ORDERED, that plaintiff's claims under Labor Law §241(6) alleging violations of the Industrial Code §23-1.16 is dismissed; and it is further

ORDERED, that plaintiff's claims under Labor Law 241(6) alleging violations of the Industrial Code §§23-5.1, 23-5.3 shall remain; and it is further

ORDERED that the parties proceed to trial/mediation forthwith.

Dated: July 14 2015

ENTER:

Joan M. Kenney, J.S.C.