Madden v One Bryant Park LLC
2016 NY Slip Op 30129(U)
January 22, 2016
Supreme Court, New York County
Docket Number: 109972/09
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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KEVIN MADDEN and MARIE MADDEN,

Plaintiffs,

-against-

ONE BRYANT PARK LLC, ONE BRYANT PARK DEVELOPMENT PARTNERS LLC, DURST DEVELOPMENT LLC, THE DURST MANAGER LLC, TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, STRUCTURE TONE (UK), INC., REGIONAL SCAFFOLDING & HOISTING CO., INC. BANK OF AMERICA, N.A., and ELEVEN-ELEVEN CONSTRUCTION CORPORATION,

Defendants.

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Index No. 109972/09

Motion seq. no. 009

DECISION AND ORDER

BARBARA JAFFE, J.

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In this action and another, consolidated for trial, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment on their Labor Law § 240(1) claim against defendants. Defendants oppose.

I. BACKGROUND

A. Undisputed facts

This action arises from a gravity-related accident that occurred at a construction site in Manhattan. Defendant One Bryant Park LLC, a joint venture between defendants Bank of

America, N.A. and The Durst Organization, owns the site. Defendant Tishman Construction Corporation of New York is the general contractor that oversaw construction of the core and shell of the building, managed site safety, kept incident reports, and hired plaintiff Kevin Madden's employer to perform electrical work from the basement up through the seventh floor. Defendant Eleven-Eleven, an entity formed by defendant Structure Tone (UK), Inc., is the general contractor that oversaw the fit-out of the interior to be occupied by defendant Bank. It also managed site safety, kept incident reports, and hired Madden's employer to perform electrical work in the fit-out. (NYSCEF 149, 150-151, 156, 158).

Four hoists, used at the site for transporting material and personnel between the lower floors, were installed by defendant Regional Scaffolding & Hoisting Co, Inc., a subcontractor of Tishman. The hoists were designed to be inoperable unless both their stationary, external gate and internal gate were closed; an opened gate triggered a safety switch which disables the hoist. In the event of an accident, the hoist would be removed from service and its operator was expected to remain at the scene. (NYSCEF 149, 156-157).

On October 11, 2007, Madden, an electrician, was injured at the site while riding or attempting to ride a hoist from a loading dock platform at ground level to the sixth floor. Both gates of the hoist were open when it began to ascend, causing Madden to fall a distance of three to five feet onto the loading dock platform below, sustaining injuries. Shortly thereafter, the hoist operator left the scene, and later that day, Madden filed an accident report. The minutes of a safety meeting held by Tishman and its safety manager/subcontractor on October 17, 2007, reflect that safety switches were overridden on the hoists. (NYSCEF 149, 155, 163).

B. Procedural history

On December 7, 2009, plaintiffs commenced this action, alleging negligence and violations of Labor Law §§ 240(1), 241(6), and 200, and a derivative claim for loss of services. (NYSCEF 2). On September 30, 2010, plaintiffs commenced the action against defendants Bank and Eleven-Eleven (Index No. 112851/10), advancing identical claims. Defendants interposed answers in both actions, wherein they admit, as pertinent here, that One Bryant Park is a joint venture between Bank and The Durst Organization. (NYSCEF 150-151).

At an examination before trial (EBT) held on October 11, 2010, Madden testified that his body was fully inside the hoist and his hand was on the hoist's outside gate when it began to ascend. (NYSCEF 155). At an EBT held on January 21, 2011, a union steward employed by Tishman testified that, to his knowledge, the safety mechanism cannot be disengaged. (NYSCEF 181).

At an EBT held on March 25, 2014, a nonparty eyewitness testified that he saw Madden "stepping into the [hoist]" and was not "fully in the [hoist]" when it began to ascend. (NYSCEF 159). The witness elaborated:

> [Madden] was getting in the [hoist] – when he was getting in the [hoist], the [hoist] was on level ground. Somewhere between the point of him getting in with his other foot, the [hoist] went up. He reached to try to grab hold of something, and he put up his hand because he almost hit his head. I don't know if he exactly hit his head, but I know his hand went up and he fell back, he fell backward.

(*Id.*).

II. CONTENTIONS

Plaintiffs contend that the deposition testimony of Madden, the nonparty eyewitness, and members/principals of Tishman, Regional, and Eleven-Eleven establish that all defendants, as

owners and/or contractors, are liable under Labor Law § 240(1) for failing to provide Madden with adequate protection at the job site. They argue that Madden is within the class of persons protected under section 240(1), that the hoist is an enumerated device, and that it was inadequate to protect Madden from gravity-related harm, and that the evidence demonstrates that both Tishman and Eleven-Eleven controlled and/or supervised the use of the hoists at the time of the accident and that both had contracts with Madden's employer. (NYSCEF 149, 168).

In response, defendants dispute plaintiffs' allegations and assert that Madden and the eyewitness testified inconsistently, particularly as to whether Madden had fully entered the hoist when it began to ascend, thereby raising a triable issue. They, moreover, contend that the hoist, admittedly a safety device, was provided to Madden, who offers insufficient evidence that it malfunctioned, as it was never inspected following the accident and, according to the union steward, the safety mechanism cannot be disengaged. Defendants deny that the minutes of the safety meeting are probative absent a reference therein to the hoist at issue, and assert that the surgery Madden underwent in 2010 was due to a condition that predated the accident. (NYSCEF 181).

In reply, plaintiffs argue that because the union steward is not an expert, his opinion is inadmissible. They deny that Madden and the eyewitness testified inconsistently, having each stated that the hoist gates were open at the time of the accident, that Madden fell a distance of at least three feet, that the hoist was subsequently removed from service, and that the operator left the scene. This testimony, plaintiffs contend, along with Madden's accident report and the meeting minutes, establish, *prima facie*, that defendants are liable under section 240(1). They reiterate their remaining contentions. (NYSCEF 188).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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 statute, which is liberally construed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]), imposes absolute liability on building owners and their agents for workplace injuries (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]).

"The policy purpose underlying Labor Law Section § 240 is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), and even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]).

To be deemed an owner pursuant to Labor Law § 240, there must be "some nexus between the owner and the worker, whether by lease agreement or grant of an easement, or other property interest." (*Morton v State*, 15 NY3d 50, 56 [2010]; *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 642 [1st Dept 2013]). One who is neither an owner nor general contractor may nonetheless be liable under section 240 as a "statutory agent" if it has the authority to supervise and control the work performed. (*Walls v Turner Const. Co.*, 4 NY3d 861, 863-864 [2005]; *DaSilva v Haks Engrs., Architects and Land Surveyors, P.C.*, 125 AD3d 480, 481 [1st Dept 2015]).

Here, it is undisputed that One Bryant Park and Bank, the former a joint venture between the latter and nonparty Durst, own the premises and directed the work thereon, and it is also undisputed that Eleven-Eleven and Tishman served as general contractors on the project, supervised safety at the work site, and received reports from subcontractors in the event of an accident. Thus, they may be held liable under Labor Law § 240(1). (*See Moracho v Open Door Family Med. Ctr., Inc.*, 74 AD3d 657, 658 [1st Dept 2010] [general contractor liable under section 240(1) given contractual responsibility for safety precautions at site, selected subcontractor, and received daily reports from it]).

Labor Law § 240(1) "was designed 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). There is no minimum height differential for a violation to occur. (*Auriemma v Biltmore Theatre, LLC*, 82

AD3d 1, 9 [1st Dept 2011]; *Thompson v St. Charles Condominium,* 303 AD2d 152, 154 [1st Dept 2003]).

In order to establish the defendant's liability, the plaintiff must prove that her injuries proximately resulted from a violation of Labor Law § 240(1). (*Blake*, 1 NY3d at 287; *Rocovich v Consol. Edison Co.*, 78 N.Y.2d 509 [1991]). Such a violation occurs not only when a safety device malfunctions, but when the safety device provided did not operate so as to give "proper protection." (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

Thus, in *Rich v 125 West 31st Street Assocs., LLC*, a hoist on which the plaintiff was riding erratically stopped and started, and then free fell into a sub-basement, stopping at the bottom of the hoistway, which undisputedly evidenced abnormal and unsafe operation. Although the safety mechanism had engaged, protecting the plaintiff from falling out of the hoist, he nonetheless was held to have suffered a harm "directly flowing from the application of the force of gravity" and the hoist was held inadequate to protect the plaintiff from a gravity-related harm. (92 AD3d 433, 434 [1st Dept 2012]).

Here too, Madden, employed within the meaning of section 240(1), was injured when he fell from a malfunctioning hoist which exposed him to a gravity-related risk. (*See also Wade v Bovis Lend Lease LMB, Inc*, 102 AD3d 476, 476 [1st Dept 2013] [section 240(1) liability based on injury sustained when plaintiff struck with rail when attempting to exit stalled personnel lift]; *Montero v Myrtle Ave. Bldrs., LLC*, 42 Misc 3d 1219[A], 2014 NY Slip Op 50094, *3 [Sup Ct, Kings County 2014] [plaintiff established, *prima facie*, violation of section 240(1) based on injury sustained in malfunctioning personnel hoist]). Thus, plaintiffs establish, *prima facie*, that defendants failed to provide proper protection to Madden for work involving a gravity-related

risk, proximately resulting in his injuries.

The inconsistent testimony regarding the manner in which Madden boarded the hoist does not raise a triable issue of fact, particularly where, as here, the testimony is consistent as to the dispositive facts. (*See Orellano v 29 E. St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] ["(P)ossible discrepancies in (plaintiff's) description of how or why he fell off the ladder are irrelevant since there is no dispute that his injuries were caused by his fall."]; *Griffin v MWF Dev. Corp.*, 273 AD2d 907, 908 [4th Dept 2000] [differing version of circumstances leading to plaintiff's fall immaterial and did not raise triable issue]). The union steward's testimony also raises no triable issue, as the specific nature of the hoist's defect is irrelevant. (*See Rich*, at 92 AD3d at 434 ["(N)either a lack of certainty as to exactly what preceded the accident nor the fact that plaintiff did not point to a specific defect in the hoist creates an issue of fact."]; *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [same]; *see also Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012] [to establish liability under section 240(1), plaintiff need not present evidence, in first instance, of specific defect in enumerated device]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order granting them summary judgment on their second cause of action (violation of Labor Law § 240[1]) is granted only as to liability against all defendants; it is further

ORDERED, that the issue of the amount of a judgment to be entered on the second cause of action shall be determined at a trial herein; and it is further

ORDERED, that the action shall continue as to the first, third, fourth, and fifth causes of action as against all defendants.

ENTER:

Barbara Jaffe, JSC

DATED: January 22, 2016
New York, New York