Razreshenco v City of New York
2016 NY Slip Op 30338(U)
February 26, 2016
Supreme Court, New York County
Docket Number: 155718/12
Judge: Michael D. Stallman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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PETER RAZRESHENCO,

Plaintiff,

Index No.: 155718/12

- against -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT, SASSON, LLC, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and MTA/NEW YORK CITY TRANSPORTATION AUTHORITY,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

This is an action to recover damages for personal injuries sustained by a laborer, when he fell from an A-frame ladder that was struck by a beam that he was in the process of removing, while working at a construction site located at 539 West 34th Street, New York, New York (the Premises) on April 17, 2012.

Before this Court are two motions. First, in Motion Seq. No. 001, plaintiff moves for a default judgment against defendant Sasson, LLC. Second, in Motion Seq. No. 002, plaintiff moves for partial summary

judgment in his favor on the Labor Law § 240 (1) claim against defendants the City of New York (City) and the New York City Department of Housing Preservation and Development (HPD) (together, the City defendants). This decision addresses both motions.

BACKGROUND

Here, the City defendants do not dispute that the City had acquired title to the Premises through eminent domain as part of the Hudson Yards project (the Project), by virtue of an acquisition order of the Supreme Court of the State of New York, New York County (DeGrasse, J.), dated July 24, 2007, and filed on July 31, 2007. (Heitz Affirm., Ex E [acquisition order].) Neither do the City defendants dispute that the City, by the Department of Housing Preservation and Development, contracted with plaintiff's employer, LVI Services, to perform demolition services. (Heitz Affirm., Ex F.)

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by LVI as a laborer. (Heitz Affirm., Ex C [Plaintiff's EBT], at 8.) At the time of the accident, plaintiff was cutting steel I-beams that were located approximately 12 to 14 feet above the floor. (*Id.* at 14.) The I-beams

spanned 22 to 24 feet in length and weighed over 200 pounds each. (*Id.* at 35-36.) In order to perform this work, LVI provided plaintiff with an eight-foot plastic A-frame ladder, as well as a four-foot-long torch to perform the cutting work. (*Id.* at 15.)

Plaintiff explained that the normal procedure for removing a beam required him to stand on a ladder and cut one end of the beam completely through at a 45-degree angle. The beam is cut at a 45-degree angle, so that "the beam doesn't fall, it rests upon the remainder of the beam in the wall." (*Id.* at 27.) Then, plaintiff would move the ladder to the other end of the beam and cut that end at a 45-degree angle. However, he would not cut this end entirely through, but, rather, he would leave an inch or two of the beam intact, "so that the beam is not loose." (*Id.* at 28.) Plaintiff noted that this one-to-two inch connection, which held the beam to the wall, is called a "stick." (*Id.* at 29.) In order to drop the beam, after moving back over to the fully severed first end of the beam, plaintiff would "take a pipe or two-by-four piece of plank and . . . move the beam off the point that it was resting on, on the free end of the first cut, causing the beam to come down from the remainder part still sticking." (*Id.*)

Just prior to the time of the accident, plaintiff completely severed the

first end of a beam at a 45-degree angle. Without first using a strap, hanger, rope or other securing device to secure the beam to anything, plaintiff then moved his ladder underneath the portion of the beam where he intended to create the stick. As he was attempting to create the stick by leaving one or two inches of the beam intact, the strain placed on the stick caused it to break loose, fall and strike the ladder. At this point, plaintiff fell backwards off the ladder. Plaintiff opined that perhaps vibrations from nearby excavating machines caused the stick to break loose prematurely.

Plaintiff testified that he was wearing a safety harness at the time of the accident. However, the harness was not hooked to anything, because "[t]here was nothing there [to attach it to]." (*Id.* at 32.) When asked why he wore the harness, plaintiff replied, "You couldn't even enter the worksite without a harness." (*Id.* at 32-33.) Plaintiff's supervisor was aware that his harness was not attached to anything.

Plaintiff also testified that, while doing similar work at other sites, he was "given elevating platforms and [he] would attach [his] harnesses, typically, to those elevated platforms" (*id.* at 33). Plaintiff also maintained that, as there were no scissor lifts or elevated platforms available at the site, the workers never asked for them and "worked on the ladders" (*id.*).

DISCUSSION

Plaintiff's Motion for Partial Summary Judgment against the City defendants

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].) If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

The Labor Law § 240 (1) Claim Against the City defendants

Plaintiff moves for partial summary judgment in his favor as to liability

on the Labor Law § 240 (1) claim against the City defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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.'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].)

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*,

49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007].)

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004].)

Initially, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell on the ladder, i.e. the beam that plaintiff was removing, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted].'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that the City defendants' failure to provide an

adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"].)

It should also be noted that, "'[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1).'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998].)

"Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials." (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Peralta v American Tel. and Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided,

warranted a finding that the owners were liable under Labor Law § 240 (1)].)

Here, not only did the ladder fail to prevent plaintiff from falling, given the nature of the work that he was performing at the time of the accident, wherein it was foreseeable that a beam might break loose and fall prematurely, a ladder was not the proper safety device for the job at hand. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures.'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake"], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Dasilva v A.J. Contr. Co.*, 262 AD2d 214, 214 [1st Dept 1999] [where the plaintiff "was injured when the unsecured A-frame ladder he was standing on was struck by a section of pipe he had cut, causing him to fall," the Court found that "the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"].) As such, additional safety devices to

prevent plaintiff from falling were required. (*See Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004].)

In opposition to plaintiff's motion, the City defendants argue that plaintiff is not entitled to judgment in his favor, because he has not shown that the ladder was defective. However, plaintiff is not required to demonstrate that the ladder was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent." (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective].)

In addition, the City defendants argue that an issue of fact exists as to whether plaintiff's improper placement and/or securing of the ladder, as well as his failure to properly attach his safety harness, constitute the sole proximate cause of his accident. "When the defendant presents some

evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist." (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)].)

However, the City defendants' argument that plaintiff was the sole proximate cause of his accident fails, because they "failed to provide an adequate safety device in the first instance." (*Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013].) In any event, plaintiff's alleged conduct goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown. (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"].) "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a

proximate cause of an injury, the plaintiff cannot be solely to blame for it.'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290.)

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support the City defendants' contention that plaintiff was the sole proximate cause of his injuries]).

Further, the City defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so. (*See Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008].) Here, the City

defendants have not put forth any evidence that plaintiff ignored any instruction to use any safety device other than the ladder. Moreover, the City defendants have not refuted plaintiff's testimony that there were no scaffolds or scissor lifts available at the site, and that there were no places to tie off his safety harness (*see Hoffman v SJP TS, LLC*, 111 AD3d at 467 [the plaintiff was not at fault for not tying off his safety harness, where "there was no appropriate anchorage point to which the lanyard could have been tied-off"]). "Finally, even if plaintiff could be found recalcitrant for failing to use a harness, the City defendants 'failure to provide [a] proper safety [device] was a more proximate cause of the accident.'" (*Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011], quoting *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997].)

Thus, plaintiff is entitled to partial summary judgment as to liability on the Labor Law § 240 (1) claim against the City. Although the HPD is also named as a defendant, it is a City agency (NY City Charter § 1800 *et seq.*); it has no separate corporate existence from the City.

Plaintiff's Motion for Default Judgment against defendant Sasson, LLC

Plaintiff's motion for a default judgment against defendant Sasson, LLC is denied. "Some proof of liability is also required to satisfy the court as

to the prima facie validity of the uncontested causes of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts." (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987] [internal citation omitted]; *Feffer v Malpeso*, 210 AD2d 60 [1st Dept 1994].)

Here, in his affidavit of merit, plaintiff stated only that "I was caused to be injured at the premises located at 539 West 34th Street, on the 5th floor, in the County of New York, City and State of New York." (Razreshenco Aff. ¶ 3.) Plaintiff did not provide any details as to how had become injured. Neither did plaintiff submitted any proof to show that Sasson LLC may be held liable for violations of Labor Law §§ 200, 240 (1), and 241 (6) or for common-law negligence.

Although the complaint alleges that Sasson, LLC owned or leased the premises, plaintiff submitted no proof that Sasson, LLC was an owner or lessee of the premises where plaintiff was allegedly injured. Plaintiff, who submitted an affidavit of merit in support, does not appear to have firsthand knowledge of these facts. Plaintiff states, in pertinent part, "It is my understanding that THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT and/or SASSON, LLC, owned this location." (Razreshenco Aff. ¶ 5.) Moreover, as

discussed above, the City defendants did not dispute that the City acquired title to the premises through eminent domain, by virtue of an acquisition order filed on July 31, 2007.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Peter Razreshenco's motion for a default judgment against defendant Sasson, LLC (Motion Seq. No. 001) is denied; and it is further

ORDERED that plaintiff Peter Razreshenco's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants the City of New York and New York City Department of Housing Preservation & Development (Motion Seq. No. 002) is granted in part, and plaintiff is entitled to judgment on liability only in his favor and against defendant City of New York, on that part of the second cause of action as alleges a violation of Labor Law § 240 (1), and the motion is otherwise denied.

Dated: February 26, 2016
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.