

Anderson v MSG Holdings, L.P.

2016 NY Slip Op 30481(U)

March 22, 2016

Supreme Court, New York County

Docket Number: 154892/12

Judge: Kelly A. O'Neill Levy

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19**

-----X
DAVID ANDERSON,

Plaintiff,

Index No.: 154892/12

-against-

Decision/Order
Mot. Seq. 004

MSG HOLDINGS, L.P. and TURNER CONSTRUCTION
COMPANY,

Defendants.

-----X
Kelly O'Neill Levy, J.:

This is an action to recover damages for personal injuries sustained by an ironworker when he fell from a concrete panel while installing stadium seating at Madison Square Garden in Manhattan (the Premises) on July 21, 2012.

In motion sequence number 004, defendants MSG Holdings, L.P. (MSG) and Turner Construction Company (Turner) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against them.

Plaintiff David Anderson cross-moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants.

BACKGROUND

On the day of the accident, defendant MSG owned the Premises where the accident occurred. Defendant Turner was hired by MSG, pursuant to a construction management

agreement, to oversee the renovation of the Premises (the Project).¹ Turner hired nonparty Helmark Steel to install stadium seating for the Project. Helmark Steel subcontracted out the work to nonparty Falcon Steel (Falcon), plaintiff's employer. Plaintiff was Falcon's foreman on the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that, at the time of the accident, he and his crew were installing precast concrete stadia panels (the Panels) onto large steel beams, or rakers. Stadium seats were to be eventually installed on the Panels. Plaintiff explained that, just prior to the time of the accident, he and his crew were receiving the Panels from a crane located on the floor of the Premises, known as the ice floor. Once the Panels landed on the rakers, plaintiff and his coworkers would use a prybar or a chain fall to make sure that the Panels were sitting properly on the rakers before securing them to the rakers with bolts.

Plaintiff further explained that his partner, Paul Maolini, needed his help in adjusting a panel that had just landed on one of the rakers by a crane. As plaintiff and Maolini utilized the same prybar, plaintiff was caused to slip off the side of the panel and fall approximately 18 feet to the ground below. When asked to describe what caused him to lose his balance, plaintiff replied,

"I was - he was on his side, pushing on the bar this way, and I was on the other side pushing on the bar this way. I went to get on the bar with him to move it together, but before I was ready and did it, he pulled, the piece shifted, went this way or that way, and I was on the edge and wasn't ready, and I went [over the edge]"

¹Turner does not raise any arguments regarding whether or not it was a proper Labor Law defendant.

(defendants' notice of motion, exhibit E, plaintiff's tr at 109). Plaintiff noted that, at the time of the accident, the panel was still "hooked onto the crane" with slings (*id.* at 110).

When plaintiff was asked why the harness that he was wearing at the time of the accident was not tied off, he testified:

"Number one is, nothing provided for me to tie off to, in that spot. There was nothing available. There was no independent lines. There was no elevated independent lines for me to tie off to, and it wasn't provided for - and [I was told that] the job followed subpart R [which required fall protection for work over six feet], as it says. That's two reasons"

(*id.* at 112). Plaintiff also testified that there were "lanyards" and "retractables" on the site, but "it was very hard to find anything on that job" (*id.* at 116).

Plaintiff's Signed Orientation Sheet

Plaintiff signed an orientation sheet entitled "Madison Square Garden Transformation Project Safety Orientation" (Orientation Sheet), wherein he checked off a box next to a line stating, "No exposure to falls over 6-ft/100% protection" (defendants' notice of motion, exhibit F, Orientation Sheet).

Affidavit of Paul Maolini (Plaintiff's Partner)

In his affidavit, Paul Maolini stated that, prior to beginning work on the Project, the members of the Falcon crew were told that their work on the Project would be subjected to OSHA Subpart R, which required them to be tied off at an anchorage point when exposed to potential falls over six feet. In addition, the men were taught never to tie off below their feet, "because if you fall, you can be exposed to a dangerous swing-fall causing the worker to swing violently and strike the structures below" (plaintiff's notice of cross motion, exhibit 7, Maolini affidavit). He also maintained that it was not possible for the workers to attach their harnesses

and lanyards to the hoisting inserts available on the Panels while the Panels were still connected to the cranes. Notably, he also stated that they were not able to attach their harnesses and lanyards to the rakers on the Project, because the rakers were located under their feet.

In addition, Maolini explained that, at the time that he and plaintiff were installing the Panels, “there were no guard rails set up on the leading edge of the panels to prevent a fall; no static lines or independent safety lines above [their] heads to attach a lanyard and harness to; no tail lines or life lines hanging from the ceiling or set up anywhere else for [them] to attach [their] harness and lanyard to” (*id.*). While Maolini had observed tail lines hanging from the ceiling at other locations at the Premises, such safety devices were not set up for them.²

The Affidavit of Brian O’Shaughnessy (Falcon’s Site Safety Manager)

In his affidavit dated May 27, 2014, Brian O’Shaughnessy stated that he was familiar with the requirements of OSHA’s Subpart R and Subpart M, which relate to fall protection. He explained that Subpart R requires the use of fall protection equipment when the potential fall distance is over 30 feet, and when ironworkers are performing steel connection and controlled access zone decking work. In contrast, Subpart M requires the use of fall protection in instances where the potential fall is six feet or higher and applies when ironworkers are doing all other types of work, except steel connection and controlled access decking.

O’Shaughnessy stated that plaintiff was performing precast erection, or installing concrete stadia, at the time of the accident, and, thus, he was instructed to perform his work in accordance with Subpart M. Said instruction was given to those Falcon employees working in

²It should be noted that the assertions made in Maolini’s affidavit were confirmed in the affidavits of plaintiff’s other Falcon co-workers, David Levy, Frank J. Pagliante and Erik Schnier.

precast erection at various toolbox meetings. O'Shaughnessy had previously observed lanyards in use by Falcon ironworkers at the Premises.

O'Shaughnessy also asserted that plaintiff was instructed to tie-off his harness to the concrete inserts that screwed into the Panels. In addition, raker beams were also available for tying off. He further maintained that:

“Appropriate fall protection safety equipment was available to Falcon ironworkers at MSG while performing precast erection, including harnesses, retractables, concrete inserts, static lines and lanyards. The Falcon workers, including Mr. Anderson, were instructed to use this equipment during all precast erection”

(defendants' notice of motion, exhibit I, O'Shaughnessy aff).

It should be noted that, while in his affidavit, O'Shaughnessy stated that the raker beams were available for use by Falcon workers to tie off, during his deposition, O'Shaughnessy conceded that, for a raker to be an appropriate place to tie off to, it would have to be located above the worker's head instead of below his feet.

Deposition Testimony of Rod Caro (Turner's Project Safety Manager)

Caro testified that clip inserts were used as attachment points to connect the crane to the Panels during hoisting. These clips could also be used by ironworkers to attach retractable lines. However, he was aware that once the Panels landed on the rakers, the hoisting clips were no longer available, because they were removed and sent back down to the ground to be used to hoist the next panel. In any event, it is preferred that a worker use an independent point to tie off to, as opposed to the Panels, the very items that they are installing. Caro also noted that OSHA does not recommend tying off at an anchorage point below one's feet.

In addition, Caro testified that there were no life nets installed beneath the work area to

catch workers in the event that they fell, nor were there any independent safety lines dropped from the ceilings at the Premises.

Affidavit of Mark Brundage (Falcon's Project Manager)

In his affidavit, Mark Brundage stated that Subpart M, and not Subpart R, applies to workers engaged in precast erection, like plaintiff in this case. Subpart M requires fall protection when working at a height over six feet. Brundage asserted that all Falcon employees were instructed to and agreed to tie off when working at heights over six feet, and that “[a]ppropriate fall protection safety equipment was available to Falcon ironworkers at MSG while performing precast erection, including harnesses, retractables, static lines and lanyards” (defendants’ notice of motion, exhibit H, Brundage aff).

DISCUSSION

“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 Defendants

Plaintiff cross-moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. 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]).

Here, plaintiff is entitled to judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants, because he has established prima facie that, while subjected to an elevation-related risk, he was injured due to defendants' failure to provide him with proper fall protection. To that effect, while plaintiff was provided with a safety harness, he was not provided with an appropriate place to tie off to.

In support of their motion to dismiss the Labor Law § 240 (1) claim, and in opposition to plaintiff's cross motion, defendants argue that they are entitled to dismissal of said claim against them, because, as he was specifically instructed to comply with Subpart M and use a safety device when working above six feet, and refused to do so, plaintiff was recalcitrant, and, thus, the sole proximate cause of his accident (*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]). "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, defendants have not sufficiently refuted plaintiff's testimony that there were was no place for him to tie off to (*see Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [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"]). As such, defendants' argument

that plaintiff was the sole proximate cause of his accident fails, because they “failed to provide an adequate safety device [i.e.. a device to tie off to] in the first instance” (*Hoffman v SJP TS, LLC*, 111 AD3d at 467).

It should be noted that defendants maintain that plaintiff could have tied off to the insert clips that were screwed into prefabricated holes in the Panels. However, as plaintiff contends, a review of the record reveals that these insert clips, which were also used for hoisting the Panels onto the rakers, were not available for use at the time of the accident. In any event, even if the clips were available, they would have been located on the just-positioned panel located below plaintiff’s feet, and, as O’Shaughnessy and Cara conceded, it is not safe for a harness to be attached to a point below the workers’ feet. It should also be noted that, while O’Shaughnessy testified that workers could tie off to the rakers, he conceded in his deposition that this would only be proper if the rakers were located above the workers’ heads. The raker available to plaintiff in this case was located underneath plaintiff’s feet.

Moreover, in light of the fact that there was no place for plaintiff to tie his harness off to, 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]). “[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”]). Here, plaintiff should have been provided with independent safety lines hanging from the ceiling, guard rails and/or life nets below the work area to protect him against falling.

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 defendants' contention that plaintiff was the sole proximate cause of his injuries]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Accordingly, defendants are not entitled to dismissal of said claim against them.

The Labor Law § 241 (6) Claim

Defendants move for dismissal of the Labor Law § 241 (6) claim against them. Labor Law § 241 provides, in pertinent part, as follows:

"All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or

lawfully frequenting such places.”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code section 23-1.16, plaintiff does not address these Industrial Code violations in his opposition papers, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant’s summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n [3d Dept 2003]). As such, defendants are entitled to summary judgment dismissing those parts of plaintiff’s Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.16

Initially, Industrial Code 12 NYCRR 23-1.16, which applies to the proper use, instruction, maintenance and measurements for safety belts, harnesses, tail lines and life lines, is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept

2009]).

As no tail lines (section 23-1.16 [d]) or lifelines (section 23-1.16 [c], [e] and [f]) were in use at the time of the accident, these provisions of section 23-1.16 do not apply to the facts of this case. In addition, as there is no indication in the record that plaintiff's harness failed in any way, section 23-1.16 (a), which requires that "[s]afety belts, harnesses and all special devices for attachment to hanging life lines shall be approved," does not apply.

However, Industrial Code section 23-1.16 (b) is applicable to the facts of this case. It provides, as follows:

"(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Here, as discussed previously, while plaintiff was provided with a safety harness, he was not provided with a proper place to which to tie off his harness. As such, plaintiff is entitled to summary judgment in his favor as to liability on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b). Accordingly, defendants are not entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims

In his opposition papers, plaintiff does not oppose that part of defendants' motion seeking to dismiss the common-law negligence and Labor Law § 200 claims against them. Thus, as said claims are deemed abandoned, defendants are entitled to dismissal of these claims against them

(see *Genovese v Gambino*, 309 AD2d at 833).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the parts of defendants MSG Holdings, L.P. and Turner Construction Company's (together, defendants) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim deemed abandoned, are granted, and these claims are severed and dismissed against these defendants, and the motion is otherwise denied; and it is further

ORDERED that the parts of plaintiff's cross motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.16 (b) is granted, and the cross motion is otherwise denied.

This constitutes the decision and order of the court.

DATED: March 22, 2016

ENTER:


HON. KELLY O'NEILL LEVY J.S.C.