Carlton v City of New York
2016 NY Slip Op 30736(U)
April 8, 2016
Supreme Court, Queens County
Docket Number: 3111/13
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JAMES CARLTON and SUZANNE CARLTON,	Index No. 3111/13
Plaintiffs,	Motion Date November 24, 2015
- against-	
THE CITY OF NEW YORK and TURNER CONSTRUCTION COMPANY/STV INCORPORATED, A JOINT VENTURE,	Motion Cal. No. 22
Defendants.	Motion Seq. No. 1

The following papers numbered 1 to 17 read on this motion by defendants for summary judgment in their favor pursuant to CPLR 3212; and cross motion by plaintiffs for summary judgment in their favor on their claims under Labor Law § 240(1).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Notice of Cross Motion - Affirmation - Exhibits.....	5-8
Affirmation in Opposition - Exhibits.....	9-12
Reply Affirmation.....	13-17

Upon the foregoing papers, it is ordered that the motion and cross motion are combined for disposition and are determined as follows:

Plaintiffs in this negligence/labor law action seek damages for personal injuries sustained by James Carlton in a construction accident on July 24, 2012. The action of Suzanne Carlton is derivative. On the subject date, there was a construction project known as the Police Academy for the New York State Police Department (NYPD) at College Point Boulevard and 30th Avenue, Queens, New York. The project involved the construction of an integrated training facility for the NYPD, on a 35 acre site in College Point, including 700,000 square feet of interior space, divided into multiple buildings. The accident occurred on the third floor of the building which housed the Central Utility Plant (CUP). Defendant, City of New York, was the fee owner of the property where the construction project was underway. Acting through its Department of Design and Construction, the City of New York contracted with defendant, Turner Construction Company/STV Incorporated ("Turner/STV"), to provide "pre-construction/construction/construction management" services for the Police Academy project.

Michael Plottel, of the NYC Department of Design and Construction, testified as follows: Turner/STV was called the construction manager, and was hired by the City to be "responsible for building the Police Academy per the plans, specifications and documents prepared by the architects and engineers." Turner held all of the construction subcontracts and thus had overall responsibility for building the Police Academy. Using its expertise, Turner/STV was required to divide the architect plans into construction subcontracts, and bid those competitively to a pool of bidders that Turner/STV selected. Turner/STV then would contract directly with all of the subcontractors. Turner/STV had overall site safety responsibility, and employed site safety manager Steve White, whose group of safety personnel were responsible for ensuring that the subcontractors performed the work safely.

Daniel Kressler was employed by Turner/STV as a safety manager for the project and he testified as follows: Turner/STV was hired to build the new Police Academy, hire subcontractors and proceed with the completion of the project. Turner/STV had overall responsibility for completing the project and directly hired the subcontractor to perform the actual work of the project. Turner/STV coordinated the work of the subcontractors, held weekly safety meetings for the subcontractors, and conducted safety orientation for all construction workers on the project.

The contract under which the City hired Turner/STV stated that Turner/STV has all of the duties that make it a general contractor and an agent of the owner with respect to the subject construction project.

Turner/STV hired plaintiff's employer, JDP Mechanical, Inc., pursuant to a contract. JDP was a steamfitter contractor, also known as a HVAC Contractor. JDP's work as steamfitters was to erect and install the piping, boilers, all of the HVAC equipment, including chillers, and any equipment that carried fuel or steam. Steamfitters always work in pairs and here, the injured plaintiff, James Carlton was paired with his brother, Brian Carlton, also a steamfitter. Plaintiff is also a certified welder.

The injured plaintiff testified as follows: On the date of the accident, he and his brother were working on the third floor of the CUP. Their job was to tack up 12-inch weld neck flanges. Tacking is temporary fixation, done by welding a few small areas to hold the pieces together until the final weld can be done. Plaintiff and Brian Carlton were tacking a flange to a pipe that was already installed near the ceiling. A flange is a fitting to connect a valve or a piece of pipe to an existing piece of pipe. The flanging is a metal piece that weighs 75 to 80 pounds, and measures approximately 16 inches wide, tapering to 12 inches at the middle, and there are holes for bolts around the outside edge of the flange. The flange was to be attached to the round opening on the bottom of the pipe, near the end of the pipe. The pipe flange was to be attached at an elevation of approximately 16 feet above the floor.

To access the ceiling pipe, plaintiff and his brother used a scissor lift and positioned it so that the flange was in position beneath the suspended pipe. Once they had raised the flange atop the scissor lift, the procedure was to tack-weld the flange on two opposite sites, and then check

to see if the flange was properly aligned on the suspended pipe. If the flange was not properly aligned, the workers would then adjust the level. Once the flange is leveled, the workers would place two more tack welds so that the flange is fully tacked and ready to be welded in place. The final welding can be done immediately, or can be left for other workers to complete at a later time.

Plaintiff and his brother had tacked up several flanges the day before the subject accident, and more on the date of the accident. Immediately prior to the accident, plaintiff had placed the first two tack welds and was waiting a few minutes to let the welds cool. The brothers then lowered the scissor lift a few inches so that they could check to see if the flange was level. Initially the flange remained motionless while they checked the level. They then determined that they needed a grinder to level the flange so they lowered the scissor lift down to the floor. Plaintiff waited in the basket of the scissor lift while Brian Carlton stepped out to get the grinder, which was about five feet away. Brian Carlton testified that he had just retrieved the grinder but had not yet turned around when he heard a crash. He turned and observed the injured plaintiff holding his head and heard plaintiff say that "it came down". The flange had fallen, struck the plaintiff on his head and back, and knocked his welding shield off his head.

In support of the cross motion, plaintiffs provided the affidavit of two engineering specialists who opined that defendants' failure to provide proper protection to plaintiff was the cause of plaintiff's injuries. The experts further opined that tack welds are temporary in nature and that there should always be protection and guarding against unexpected failure or movement.

Defendants produced a witness, a safety manager employed by Turner, who acknowledged that the tack welds were temporary securing devices, and that it would be usual or expected to provide slings or other additional devices to support the flange during the tack welding process, and until the permanent weld was completed

Labor Law § 200 and Common-Law Negligence

The branches of the motion by defendants to dismiss plaintiff's claims pursuant to Labor Law § 200 and common law negligence are granted without opposition, and otherwise on the merits. (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 908 [2d Dept 2011]).

Labor Law § 200 codifies the common law duty imposed on an owner or a general contractor to provide construction site workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d at 1123; *Kajo v E.W. Howell Co., Inc.*, 52 AD3d at 661). When a plaintiff's claims implicate the means and methods of the work, an owner or contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory

control over the work, no liability attaches under Labor Law § 200 or the common law (*see La Veglia v St. Francis Hosp.*, 78 AD3d at 1123; *Ortega v Puccia*, 57 AD3d 54, 60-62 [2d Dept 2008]; *Kajo v E.W. Howell Co., Inc.*, 52 AD3d at 661).

In the instant case, plaintiff's acts were under the sole control of the foreman of the subcontractor who employed him. None of the defendants exercised any control over the means and method by which the plaintiffs installed the flanges onto the water pipe hanging from the ceiling. Accordingly, the branches of defendants' motion for summary judgment dismissing the causes of action under Labor Law § 200 and common-law negligence are granted.

Labor Law § 240 (1)

The branch of defendants' motion for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) is denied. Relatedly, plaintiffs' cross motion for summary judgment on the issue of liability under that statute is granted.

Section 240 (1) requires property owners to provide workers with "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 the workers (Labor Law § 240 [1]). To establish liability under Section 240 (1) based on a falling object, a plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci v Manhasset Bay Assoc.,* 96 NY2d 259, 268 [2001]), or "required securing for the purposes of the undertaking" (*Outar v City of New York,* 5 NY3d 731, 732 [2005]). The statute generally does not apply to objects that are part of a building's permanent structure (*see Narducci* at 268; *Buckley v Columbia Grammar & Preparatory,* 44 AD3d 263, 270 [1st Dept 2007]; *Xidias v Morris Park Contr. Corp.,* 35 AD3d 850 [2d Dept 2006]). Moreover, the plaintiff must show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci* at 268).

Labor Law § 240(1) was enacted "in recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites ... for workers laboring under unique gravity-related hazards" (*Misseritti v Mark IV Constr. Co.,* 86 NY2d 487, 491 [1995]). The Court of Appeals has recognized the hazards as those related to the effects of gravity in two specific construction site situations: first, where there is "a difference between the elevation level of the required work and a lower level"; and second, where there is "a difference between the elevation level where the worker is positioned and the higher level of the material or load being hoisted or secured" (*Rocovich v Consol. Edison Co.,* 78 NY2d 509, 514 [1991]).

The subject accident clearly falls within the purview of the statute inasmuch as plaintiff was struck by a falling object that had been inadequately secured (*Outar v City of New York,* 5 NY3d 731 [2005]; *see also Tavarez v Sea–Cargoes, Inc.,* 278 AD2d 94 [1st Dept 2000] [the purpose of § 240(1) is to safeguard a worker from injury caused by an inadequate protective device designed to shield him from the fall of object or person], citing *Carroll v Timko Contr. Co.,* 264 AD2d 706 [2d Dept 1999] [no § 240(1) liability because "plaintiff was not working at

elevated worksite, nor was he *struck by an object positioned at a higher level* "] [emphasis added]).

Defendants' assertion that the claim should be dismissed because the flange that struck the injured plaintiff was not being hoisted or secured at the time of the accident is without merit since it is based on a misreading of *Narducci* at 267–268 [plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute]. In *Narducci,* the plaintiff was working on a ladder when a large piece of glass from an adjacent window frame that was neither being hoisted nor secured fell and injured his arm. The Court held that there was no viable § 240(1) claim. The full text of its holding in that case states: "the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell.... No one was working on the window from which the glass fell, nor was there any evidence that anyone worked on that window during the renovation. The glass that fell was part of the pre-existing building structure as it appeared before the work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (at 268). In other words, the glass did not qualify as the type of falling object contemplated by the statute because it was not an integral part of the renovation/construction work undertaken by plaintiff that involved the hoisting or securing of objects.

Similarly, in *Roberts v General Elec.,* 97 NY2d 737, 738 [2002], a piece of asbestos that was *deliberately* dropped to the ground, did not qualify as an object accidentally falling due to the inadequacy of a protective device. Neither *Narducci* nor *Roberts* stand for the proposition that an object must fall at the precise moment of being secured during the work process in order for the statute to apply. In any event, even if this court were to apply the narrowest interpretation possible, the facts of this case indicate that this was precisely a situation where the flange was in the process of being secured and therefore " 'where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected' " (*see Roberts,* 97 NY2d at 738, quoting *Narducci* at 268).

In the case at bar, the record establishes that the injured plaintiff was installing the flange onto a pipe near the ceiling which had *not yet* been fully secured, came loose, and fell several feet striking plaintiff in the head and back. At that time, the flange was secured by two tack welds. The record further establishes that tack welds are temporary securing devices to be used during a construction welding project, and that the accident occurred when the tack welds broke when the workers went below to get tools to level the flange. The record further establishes that the standard way of completing the job was to install two tacks until the flange was checked to see if it was level, at which point an additional two tack welds would be added to firmly secure the flange prior to the final welding. It could not be stated more plainly that, if the additional two tacks were not finally added, and the item welded, then the flange which the tacks were securing were not completely "secured" within the meaning of § 240(1) of the Labor Law. Pursuant to the provisions of Section 240(1) the flange should have been completely "secured" or some safety device should have been used in the meantime to prevent the "special hazard" of a gravity-related accident such as "being struck by a falling object that was improperly hoisted or inadequately secured" (*see Ross v Curtis–Palmer Hydro–Electric Co.,* 81 NY2d 494,

500–501 [1993]). The securing devices that were actually in use, were insufficient, and failed to prevent the force of gravity from causing the flange to fall; therefore plaintiff has established a violation of Labor Law § 240(1).

Defendants' own witness, a safety manager employed by Turner, acknowledged that the tack welds were temporary securing devices, and that it would be usual or expected to provide slings or other additional devices to support the flange during the tack welding process, and until the permanent weld was completed. Notably, slings are one of the securing devices named in Labor Law § 240(1). The undisputed fact is that the flange was not adequately secured, and thus became a falling object for purposes of Labor Law § 240(1).

Defendants incorrectly argue that "since the flange had already been hoisted and secured before it fell, it was part of the pre-existing building structure [within the meaning of *Narducci*]," and not something that needed securing. Defendants' argument ignores the fact that the tack welds are temporary fixation devices and that only half the required number of tacks were present when the flange fell. The evidence is clear that the flange had only a partial and temporary fixation; it could not have been deemed permanently installed. Indeed, a witness for the defendants acknowledged that the flange could fall as long as it was only tack-welded and should have been secured against falling through the use of slings, until the permanent welds were completed.

The holding in *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824 [2d Dept 2009], is not to the contrary. In *Marin*, plaintiff had fully and permanently installed metal brackets to fasten the top of a vertical drain pipe on the exterior of the building and then was installing lower metal brackets at the base of the drain pipe. One of the fully installed brackets fell from the top and struck plaintiff. The worker had completed installation of that upper bracket, and had no further work to do to install it; the court therein held that the fallen bracket had become a permanent part of the building and no longer required construction-related securing devices; thus there was no violation of Labor Law § 240(1). In the instant case, the flange had only two of the four tack welds and none of the permanent welds when it broke; the existing tack welds left the flange unlevel, the work had to be ground down with the grinder, the full number of tacks had to be applied and finally, the permanent welds had to be applied. The tack welds broke due to the force of gravity and the only other support for the flange was provided by the scissor lift, which had to be lowered to the ground. Although the tack welds held when the scissor lift was first lowered, they broke a few minutes later, causing the flange to fall onto the plaintiff.

The court finds that as this statutory violation was a proximate cause of plaintiff's fall, plaintiff's own actions cannot be the sole proximate cause of his fall (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n.). Assuming *arguendo* that the injured plaintiff failed to wear his hard hat in performing the subject work, his actions would render him contributorily negligent, a defense unavailable under this statute (*see Castillo v 6225 30th Ave. Realty, LLC*, 47 AD3d 865 [2d Dept 2008]).

Accordingly, the motion by defendants for summary judgment in their favor dismissing plaintiffs' claims under Labor Law § 240(1), is denied; and the cross motion by plaintiffs for summary judgment in their favor on their claims under Labor Law § 240(1), is granted.

Labor Law §241(6)

The branch of the motion which is for summary judgment in defendants' favor dismissing plaintiffs' claims pursuant to Labor Law § 241(6), is denied. The cause of action alleging a violation of Labor Law § 241(6) was based, *inter alia*, on alleged violations of 12 NYCRR 23–1.8 (c). Triable issues of fact exist as to liability pursuant to Labor Law § 241(6) with respect to an alleged violation of 12 NYCRR 23–1.8 (c). This code requires proof that the job was a " 'hard hat' job" (*Spiegler v Gerken Bldg. Corp.,* 57 AD3d 514, 517), and that the plaintiff's failure to wear a hard hat was a proximate cause of his injury (*see McLean v. 405 Webster Ave. Associates*, 98 AD3d 1090, 1095 [2012)]; *Modeste v Mega Contr., Inc.*, 40 AD3d 255, 255–256; *Prince v Merit Oil of N.Y.,* 238 AD2d 561, 562). Here, the undisputed record indicates that the injured plaintiff was not provided with a welding shield that permitted him to wear a hard hat while he was welding. Plaintiff was supplied with a hard hat, and told to wear it at all times. However, as a steamfitter/welder, the injured plaintiff could not wear the hard hat while performing his welding work. Therefore, there is a triable issue of fact as to whether the plaintiff was provided with an "approved safety hat" which he could have worn at all times on the job.

Conclusion

The branches of defendants' motion for summary dismissal of plaintiffs' common law negligence and Labor Law§ 200 claims, are granted.

The branches of the motion which are to dismiss plaintiffs' claims under Labor Law §§ 240(1) and 241(6), are denied.

The cross motion by plaintiffs for summary judgment in their favor on their claims pursuant to Labor Law § 240(1), is granted.

The branch of the motion which is for summary judgment in defendants' favor dismissing plaintiffs' claims pursuant to Labor Law § 241(6), is denied.

Dated: April 8, 2016

DARRELL L. GAVRIN, J.S.C.