

Celaj v Cornell

2016 NY Slip Op 30895(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 309652/2011

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA- 24

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VETON CELAJ,

Plaintiff(s),

- against -

INDEX NO: 309652/2011

HENRY CORNELL and SMI CONSTRUCTION
MANAGEMENT, INC.,

DECISION/ORDER

Defendant(s).

-----X

HON. SHARON A.M. AARONS

Plaintiff's motion for summary judgment on the issue of liability is granted, and defendants' cross motion for summary judgment dismissing the complaint as against defendant Cornell is granted.

Plaintiff was a painter on a construction project at the home of defendant Cornell. According to plaintiff's deposition testimony, he was using a baker's scaffold that was provided by his employer to paint in a hallway. That scaffold, like the others on the job site, lacked safety rails at its top level (i.e., the platform), save for siderails. Plaintiff claims that he locked the wheels on the manually-propelled scaffold prior to commencing the work he was performing when the accident occurred. Plaintiff climbed to the top level of the scaffold, stood on the platform, and began painting. As he was painting a wall using a roller, plaintiff

“felt that the scaffold was leaning [or moving]”. (Plaintiff’s EBT at 180-182, 186-189). Plaintiff lost his balance and attempted to grab the frame of the scaffold, but he fell, landing on the floor below. As a result of the fall, plaintiff fractured his wrist.

Plaintiff commenced this Labor Law §§ 200, 240(1) and 241(6) action against defendant Cornell and the construction manager for the project, defendant SMI Construction Management (“SMI”). Plaintiff seeks summary judgment against defendants on the issue of liability, asserting that, as a matter of law, defendants violated Labor Law §§ 240(1) and 241(6). With respect to Labor Law § 240(1), plaintiff argues that he was provided with a scaffold that did not provide proper and adequate protection from the elevation-related hazard to which he was exposed, and that defendants’ failure to provide proper protection from that hazard was a proximate cause of his injuries. Regarding his Labor Law § 241(6) cause of action, plaintiff asserts that defendants violated 22 NYCRR 23-5.18(b), and that such violation was a proximate cause of his injuries.

Defendants’ cross-move for summary judgment dismissing the complaint as against defendant Cornell. They argue that defendant Cornell is entitled to the protections of the one - or two-family homeowner’s exemption because he did not direct or control plaintiff’s work, and that exemption insulates him from liability under Labor Law §§ 240(1) and 241(6). They also contend that defendant Cornell is entitled to dismissal of plaintiff’s common law negligence and Labor

Law § 200 claims because he neither created nor had notice of any hazardous condition relating to the scaffold.

In opposition to plaintiff's motion, defendants argue that triable issues of fact exist on the Labor Law § 240(1) cause of action regarding whether the scaffold was an adequate safety device, and whether plaintiff's conduct was the sole proximate cause of his injuries. On the § 241(6) claim, defendants maintain that the Industrial Code provision on which plaintiff relies -- § 23-5.18(b) -- is not applicable to this case.

In reply, plaintiff takes issue with a number of defendants' points, but plaintiff offers no meaningful opposition to the cross motion.

Plaintiff made a *prima facie* showing of entitlement to judgment as a matter of law on his Labor Law § 240(1) cause of action by submitting evidence in admissible form that the statute was violated -- the scaffold did not provide him with proper protection and was not adequate to protect against the hazards entailed by plaintiff's elevation-related work -- and that the violation was a proximate cause of his injuries (see Barreto v. Metropolitan Trans. Auth., 25 NY3d 426 [2015]).

The deposition testimony of SMI's agent (which testimony was submitted in support of plaintiff's motion) indicated that the wheels of the scaffold were not locked before plaintiff began the work that led to his fall and that plaintiff was trying to move the scaffold without getting down from the platform, evidence that

defendants contend suggests that it was plaintiff's own conduct -- not any inadequacy of the scaffold -- that caused his fall and injuries. However, "[p]roximate cause is established as a matter of law by the undisputed fact that plaintiff fell off a scaffold without guardrails that would have prevented his fall, and the precise manner in which plaintiff's fall occurred is immaterial. The claims concerning plaintiff's failure to use the locking devices and his movement of the scaffold while standing on it are not determinative, since contributory negligence is not a defense" (Crespo v. Triad, Inc., 294 AD2d 145, 146-147 [1st Dept. 2002] [internal citations and quotation marks omitted]). Regardless of which version of the events is correct -- plaintiff's version (as expressed in his deposition testimony) or that of SMI's agent -- plaintiff is entitled to summary judgement on the Labor Law § 240(1) cause of action. This is not a situation where varying versions of the accident could lead to different outcomes on the Labor Law § 240(1) claim (cf. Potter v. NYC Partnership Housing Dev. Fund Corp., 13 AD3d 83 [1st Dept. 2004]).¹

In opposition, defendants failed to raise a triable issue of fact. Notably, the conclusory affidavit of defendants' expert was insufficient to raise a triable issue of fact concerning whether the scaffold provided plaintiff with proper and adequate protection. All the expert had to say on that important subject was that

¹ Defendants' assertion that plaintiff gave a version of the accident that involved him falling from a ladder (as opposed to a scaffold) is based on abject hearsay.

“it is my professional opinion, within a reasonable degree of engineering and construction safety certainty, that the manually propelled mobile scaffold used by plaintiff was proper, adequate and was not required to be equipped with safety railings. Therefore, defendants did not depart from good and commonly accepted construction practices, and did not violate Labor Law § 240(1).”

Plaintiff also made a *prima facie* showing of entitlement to judgment as a matter of law on his Labor Law § 241(6) cause of action. Plaintiff submitted evidence in admissible form demonstrating that the Industrial Code provision that serves as the predicate for his § 241(6) claim -- § 23-5.18(b)² -- applies to this situation and was violated. His evidence demonstrates too that the violation of this provision was a proximate cause of his damages. Defendants’ expert’s opinion that § 23-5.18(b) is inapplicable because the scaffold was not a certain height is not persuasive (see Vergara v. SS 123 West 21, LLC, 21 AD3d 279, 281 [1st Dept. 2005] [certain Industrial code “provisions apply to scaffolds in general; however; code provisions applicable to manually propelled scaffolds require safety railings without reference to the height of the scaffold,” citing § 23-5.18[b]] [emphasis added]).

On their cross motion, defendants made a *prima facie* showing that the complaint should be dismissed as against defendant Cornell, the homeowner. Defendants’ evidence established that defendant Cornell, the owner of a one- or

² 23-5.18(b) states, “Safety railing required. The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part Rule.”

two-family dwelling, contracted for but did not direct or control plaintiff's work. He is therefore entitled to the one- or two-family homeowner's exemption applicable to plaintiff's Labor Law § 240(1) and 241(6) claims (see Bartoo v. Buell, 87 NY2d 362 [1996]). Defendants' evidence also established that defendant Cornell neither created nor had notice of the hazardous condition encountered by plaintiff. Therefore, plaintiff's Labor Law § 200 and common law negligence claims are subject to dismissal as against defendant Cornell. In opposition, plaintiff failed to raise a triable issue of fact with regard to defendant Cornell's liability.

Accordingly, it is hereby ordered that plaintiff's motion is granted and plaintiff is entitled to judgment as a matter of law against defendant SMI Construction Management, Inc., on the Labor Law §§ 240(1) and 241(6) causes of action; and it is further,

ORDERED that defendants' cross motion is granted and the complaint is dismissed as against defendant Cornell;

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 13, 2016



Sharon A.M. Aarons, J.S.C.