

David Ciccimarra v Port Auth. of N.Y.

2016 NY Slip Op 31263(U)

July 6, 2016

Supreme Court, New York County

Docket Number: 159927/13

Judge: Carol R. Edmead

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

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DAVID CICCIMARRA,

Index No.: 159927/13

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY and TISHMAN CONSTRUCTION
CORPORATION,

Defendants.

-----X
Edmead, J.:

This is an action to recover damages for personal injuries sustained by a journeyman carpenter when a baker scaffold that he was working on collapsed while he was at a construction site located in the Helix of the Vehicle Service Center Project at the World Trade Center in New York, New York (the Premises) on May 24, 2013.

Plaintiff David Ciccimarra moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants The Port Authority of New York and New Jersey (Port Authority) and Tishman Construction Corporation (Tishman) (together, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

On the day of the accident, defendant Port Authority owned the Premises where the accident occurred. Defendant Tishman served as construction manager on a project underway at

the Premises, which entailed the construction of a vehicle service center (the Project). Plaintiff's employer, Pullman Shared Systems Technology (Pullman), served as the prime contractor in charge of installing bomb-proof walls for the Project. Plaintiff was injured when the wheel of the scaffold that he was working on broke, causing the scaffold to collapse and tip over.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Pullman as a journeyman carpenter for the Project. Specifically, plaintiff's duties included "bomb proofing the walls inside the Helix" (plaintiff's tr at 27). Plaintiff worked as part of a two-person team with a partner named Cornelius Hanrahan. Plaintiff maintained that he only took direction from his Pullman foreman, and that Pullman provided his tools and equipment.

Plaintiff testified that, when he arrived at the Premises on the morning of the accident, the scaffold that he was to work from was already installed and in place. He described the scaffold as yellow in color and six feet tall. The scaffold had four wheels, each with a locking mechanism, and a wooden plank, which served as a landing. In order to access the scaffold, plaintiff climbed a ladder which was located on its side. Prior to the day of the accident, plaintiff used the scaffold many times.

At the time of the accident, plaintiff was using the scaffold as he patched open spots that were left in some previously installed concrete forms. Plaintiff's employer required that he always inspect the scaffold before using it to make sure that its hinges were connected and locked. Accordingly, on the morning of the accident, plaintiff made sure that the scaffold was safe by checking its hinges. He also made sure that the scaffold's wheels and the gate on the scaffold's safety rail system were locked. During the two hours prior to the time of the accident,

plaintiff did not observe any problems with the scaffold, nor did he have any problems moving it around to his various work areas. Every time plaintiff moved the scaffold, he re-locked the wheels and inspected it before climbing up onto it via the ladder.

Plaintiff testified that, as he was placing a piece of wood against the wall so that he could drill it into the concrete with his hilti gun, “the scaffold dropped from under [him] . . . and [he] went straight down” (*id.* at 53). After he landed on the ground, he observed that the scaffold had “tipped over” and fallen “backwards” (*id.* at 54).

Shortly after the accident, two laborers helped to move the scaffold. At this time, they “noticed that the wheel [of the scaffold] was broken off” (*id.* at 56). Plaintiff testified that he was not aware of anyone noticing anything wrong with the scaffold’s wheel prior to the accident, and that he did not know what caused the wheel to break.

During his deposition, plaintiff was shown a photograph of a scaffold that had “Pullman” written on its side and which had a broken wheel. Plaintiff testified that the scaffold in the photograph resembled the scaffold involved in his accident and confirmed that “Pullman” is the name of his employer (*id.* at 88).

Deposition Testimony of David J. Collins (Tishman’s Site Safety Director)

David J. Collins testified that, as Tishman’s site safety director, he manages all of the public work that Tishman performs at the World Trade Center. He maintained that, pursuant to a contract with Port Authority, Tishman served as construction manager on the Project. He explained that plaintiff’s employer, Pullman, was a prime contractor on the Project specializing in the installation of “blast resistant concrete” (Collins tr at 12). Collins asserted that Tishman never provided construction equipment to its contractors. As such, Tishman did not provide the

scaffold involved in plaintiff's accident. In addition, Tishman was not involved with "the actual means and methods of the work being done by Pullman" (*id.* at 22).

Deposition Testimony of Patrick Donovan (Port Authority's Construction Safety Specialist)

Patrick Donovan testified that he was Port Authority's construction safety specialist on the day of the accident. He explained that Port Authority owned the Premises where the accident occurred, and that Tishman was "the overall general contractor" on the Project (Donovan tr at 12). Tishman's duties included managing subcontractors, keeping the work on track and on budget and maintaining safety representatives on site. After learning of the accident, Donovan went to the accident location where he observed a baker scaffold belonging to Pullman "on the ground" (*id.* at 18). When asked if his inspection of the scaffold revealed the cause of its collapse, Donovan replied that one of the scaffold's "caster wheels" had "broken" (*id.*).

The Pullman Accident Report

A review of Hanrahan's witness statement contained in the Pullman accident report reveals that, after he "heard a crash" and "[ran] over," he "saw [plaintiff] on the floor and . . . the Baker on the floor with the wheel snap[p]ed off" (plaintiff's notice of motion, exhibit L, the Pullman accident report). In the same report, another one of plaintiff's coworkers, Ron Brown, also stated that, after the accident, he observed the scaffold laying on its side, and that the scaffold's "wheel had broke" (*id.*).

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

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants cross-move for dismissal of said claim. 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 partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, because he has sufficiently established through testimonial and documentary evidence that he was injured when the scaffold that he was working on collapsed and tipped over. Important to the facts of this case, “a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions ‘for no apparent reason’” (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289).

“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]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]; *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)]; *Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005]).

While defendants argue that plaintiff is not entitled to judgment in his favor, because he has not established that the scaffold was defective in any way, plaintiff is not required to demonstrate that the scaffold 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]; *Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333 [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, contrary to defendants’ argument, it would be improper to deny plaintiff summary judgment merely because plaintiff has not provided the testimony of other witnesses who observed the accident (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d at 290 [Court granted plaintiff, who was alone at time of accident and fell from an A-frame ladder which had no protective devices while installing a light fixture, summary judgment on his section 240 (1) claim “[r]egardless of the precise reason for his fall”]; *Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2nd Dept 2011] [“The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor”]).

In opposition, defendants further argue that, as plaintiff testified that he was the sole person to manipulate and/or move the scaffold on the day of the accident, plaintiff must have had something to do with the scaffold’s broken wheel, and, therefore, he was 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, defendants’ totally unsupported speculation that plaintiff was somehow the cause of the scaffold’s broken wheel is insufficient to defeat plaintiff’s motion for summary judgment (*see LoBianco v Lake*, 62 AD3d 590, 590 [1st Dept 2009] [speculation as to vehicle driver’s alleged negligence was insufficient to raise a triable issue of fact]; *Desouter v HRH Constr. Corp.*, 216 AD2d 249, 250 [1st Dept 1995]). In any event, any alleged action on plaintiff’s part in regard to the scaffold’s safe use 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”]; *Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996]). “[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.*, 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]).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants, and defendants are not entitled to dismissal of the same.

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 at 501-502. 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 the bill of particulars,

in his opposition, plaintiff does not oppose defendants' cross motion to dismiss any of them, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]). As such, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim against them.

It should be noted that, in his motion, plaintiff seeks only partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. In his reply, which he submitted in further support of his motion, plaintiff requests for the first time that the court also grant him leave to file a motion to amend the bill of particulars to add an alleged violation of Industrial Code 12 NYCRR 23-5.18 (e), or, in the alternative, that the court deem the bill of particulars amended as such nunc pro tunc and grant partial summary judgment in his favor as to liability on that part of the Labor Law § 241 (6) claim based upon this alleged Industrial Code violation. Plaintiff asserts that, as he possesses a viable cause of action regarding section 23-5.18 (e), because it pertains to “[m]anually-propelled mobile scaffolds” and provides that “[c]asters . . . support four times the maximum load intended to be imposed thereon,” the court should overlook his pleading error.

However, as plaintiff's “attempt in [his] reply papers to raise for the first time” an alleged violation of section 23-5.18 (e) “was improper,” plaintiff's request is denied (*Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]).

The Common-Law Negligence and Labor Law § 200 Claims

In their cross motion, defendants also move to dismiss the common-law negligence and Labor Law § 200 claims against them. Notably, in his opposition, plaintiff states that he does not oppose the dismissal of said claims. Thus, defendants are entitled to dismissal of the common-

law negligence and Labor Law § 200 claims against them.

CONCLUSION AND ORDER

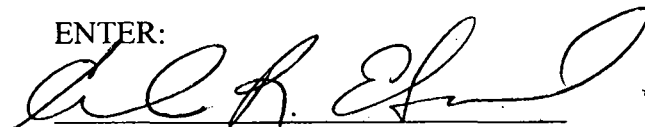
For the foregoing reasons, it is hereby

ORDERED that plaintiff David Ciccimarra's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants The Port Authority of New York and New Jersey and Tishman Construction Corporation (together, defendants) is granted; and it is further

ORDERED that defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted with respect to the common-law negligence and Labor Law §§ 200 and 241 (6) claims, and the cross motion is otherwise denied.

DATED: July 6, 2016

ENTER:



Carol Robinson Edmead J.S.C.

HON. CAROL R. EDMEAD
J.S.C.