

Medrano v Port Auth. of N.Y. & N.J.

2016 NY Slip Op 31414(U)

July 20, 2016

Supreme Court, New York County

Docket Number: 153442/2014

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
FELIX MEDRANO and NATHALIE MEDRANO,

Plaintiffs,

DECISION/ORDER
Index No. 153442/2014

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, TURNER
CONSTRUCTION COMPANY, E.E. CRUZ & COMPANY, INC.,
YONKERS CONTRACTING COMPANY, INC.

Defendants.

-----X
HON. DAVID COHEN, J.:

Plaintiffs Felix Medrano (“plaintiff”) was working as a plasterer when he fell from an unsecured wooden A-frame ladder while working in lower Manhattan at a building known as the World Trade Center Vehicular Security Center (the “Premises”) on August 23, 2013. On the day of the accident, the Port Authority of New York and New Jersey (the “Port Authority”) owned the Premises. Pursuant to an agreement between Port Authority and Tishman Construction Corporation (“Tishman”) (together with Port Authority “defendants”), Tishman served as construction manager on a project at the Premises. The project entailed the construction of a vehicular security center and tour bus facility (the “Project”). Plaintiff was employed as a plasterer by nonparty Island International Enterprises (“Island”). Plaintiffs Felix Medrano and Nathalie G. Medrano move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1).

Plaintiff’s Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Island as a plasterer on the Project. That morning, plaintiff was instructed by one of Island’s foreman assistants to “hand patch[]” the fireproofing on a ceiling beam located on the ceiling at the top of a 10- to-12-foot wall. In order to perform

the subject work, plaintiff utilized a six-foot A-frame wooden ladder, which was provided to him by the foreman's assistant, and which he described as "old . . . loose, and in bad condition" (plaintiff's tr. at 51). Plaintiff maintained that he felt that the ladder was "unsafe . . . [f]rom the very beginning when [he] started working with [it]" (*id.* at 70). However, he used it anyway, because it was the only ladder that would fit in his work area. Plaintiff testified that he "told [the foreman's assistant] four times the problem about the ladder," and that he [plaintiff] did not "have the power or the means to go and find another ladder" (*id.*).

Plaintiff explained that, when he set up the ladder, after fully opening it, he applied the ladder's lock. Plaintiff described the ground where he set up the ladder as being uneven, as it was comprised of [g]ravel and soil" (*id.* at 82). In addition, as some steel bars and a plastic protector protruded from the concrete wall, it was necessary for plaintiff to set up the ladder at a distance from the wall.

Plaintiff testified that he was working from the step just below the top step of the ladder when "the ladder slipped and . . . [he] started falling backwards" (*id.* at 85). Both the ladder and plaintiff then fell to the ground. As a result of the accident, plaintiff injured his back, neck, elbow, right hand and shoulder.

Plaintiff noted that defendants had a policy that required all ladders to be protected against displacement when work was being performed at heights over six feet. In addition, when working at such heights, all workers on the Project were supposed to be provided with some sort of fall protection. That said, plaintiff was not provided with any fall protection on the day of the accident.

Deposition Testimony of Sophia Dounis (Port Authority's Safety Supervisor)

Sophia Dounis testified that she served as Port Authority's safety manager on the day of the accident. As safety manager, she made sure that Tishman complied with the Project's safety plan. The Project entailed the construction of "a concrete rebar structure to the parking garage . . . [t]o screen vehicles coming into the World Trade site" (Dounis tr at 9).

When asked to identify the general contractor on the Project, Dounis replied only that "there were several [prime] contractors, a lot of contractors on the site" (*id.* at 10). She further explained that Tishman's

role on the Project was that of “[c]onstruction manager” (*id.*). As construction manager, Tishman observed the progress of the work underway at the Premises and made sure that the site’s safety plan was complied with. Dounis agreed that a construction manager is different than a general contractor, in that a construction manager “doesn’t direct the contractor’s methods of work” (*id.* at 28). In addition, unlike a general contractor, a construction manager does not “perform[] the work” (*id.* at 29). Dounis testified that it was important that ladders be secured against displacement and placed on an even surface when in use. In addition, fall protection is necessary for workers working at heights over six feet.

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

David Collins testified that he was Tishman’s safety director on the day of the accident, and that Tishman served as a “[c]onstruction manager acting as agent to the Port Authority” (Collins tr at 9). He explained that, in lieu of a general contractor, the Project had a number of prime contractors, including Island, that were hired directly by Port Authority. As construction manager, Tishman coordinated the trades and “had oversight for scheduling and quality of the work,” but it did not hire any subcontractors. Collins noted that it was not Tishman’s job to make sure that the prime contractors worked safely, or that “Labor Law Section 240 (1) was followed on the job site,” as that was the responsibility of “[t]he prime contractors themselves” (*id.* at 19).

While Collins did not witness the accident, he was advised later that plaintiff was injured when he fell from a ladder while patching spray-on fireproofing. Collins testified that, as plaintiff was working a height above six feet, he should have been provided with fall protection. In addition, provided that it fit through the door, a “pipe frame scaffold” would have been a safer alternative to a ladder for plaintiff’s work (*id.* at 98). He maintained that Island had such a scaffold at the site.

Affidavit of Ryan Tortora (Island’s Assistant Foreman)

In his affidavit, Ryan Tortora stated that, as one of Island’s assistant foremen, he oversaw the fireproof spraying work for the Project on the day of the accident. While he was not an

eye-witness to plaintiff's accident, he reported to the accident area afterwards and observed a "six-foot wooden 'A' frame ladder on the ground in a closed position" (Tortora aff). Tortora maintained that it was not Island's ladder, and that he did not know where plaintiff got it. He also asserted that he had never received any complaints about the ladder from plaintiff.

Tortora asserted that no one from Island ever instructed plaintiff to use a ladder to perform his work. In fact, plaintiff's "use of the ladder was unnecessary since he was performing his spray work on August 23, 2013 all day from a standing position on the ground" (*id.*).

Affidavits of Scott Platt (Island's Superintendent) and Chris Chetti (Island's Safety Director)

In their affidavits, Scott Platt and Chris Chetti stated that they were not eyewitnesses to plaintiff's accident. They stated that the wooden ladder that plaintiff was using at the time of the accident was not owned by Island, and that Island had fiberglass ladders available to him. They further stated that there was no need for plaintiff to perform hand patch work on the ceiling on the day of the accident, and, therefore, there was no need for plaintiff to use a ladder.

Affidavits of Jairo Vasquez and Chris Ross (Port Authority Police Officers)

In their affidavits, Jairo Vasquez and Chris Ross, both Port Authority police officers, stated that they did not witness the accident. They also stated that, after the accident, when they arrived at the room where the accident occurred, they noticed that the subject ladder was propped-up against the wall and not fully opened.

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

Plaintiffs move for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against 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, as the owner of the Premises, Port Authority may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined as to whether Tishman may also be liable under the statute as an agent of the owner. Initially, it should be noted that the testimonial evidence in this case establishes that, rather than hire a general contractor for the Project, Port Authority hired many prime contractors. In addition, the testimonial evidence and documentary evidence firmly establishes that Tishman was hired to serve as a construction manager on the Project.

“Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1) [and § 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury”

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

While there is no evidence that Tishman directed or controlled plaintiff's hand-patching work or his methods used in setting up the ladder to do said work, the record is unclear as to which entity provided and maintained the allegedly defective ladder that caused the accident. As it is possible that the ladder was provided and/or maintained by Tishman, a question of fact exists as to whether it had the ability to control the activity that brought about the accident. Accordingly, plaintiffs are not entitled to judgment in their favor as to liability on the Labor Law § 240 (1) claim as against Tishman. Therefore, in the remainder of this decision, the Labor Law § 240 (1) claim will be addressed in regard to Port Authority's potential Labor Law § 240 (1) liability only.

Here, plaintiff's "unrebutted contention" is that, while standing on the ladder and hand-patching the fireproofing on a beam, the ladder he was working on "slipped," causing him and the ladder to fall to the ground (*see Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [Court properly granted partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim "since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]). Therefore, Labor Law § 240 (1) applies to the facts of this case.

Importantly, "[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 the plaintiff was injured as a result of an unsteady ladder, the 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]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason' [citation omitted]" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *aff'd* 11 NY3d 757 [2008]). "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]).

In opposition, defendants have “not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiffs’ showing or to raise a bona fide issue as to how the accident occurred” (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Desouter v HRH Constr. Corp.*, 216 AD2d 249, 250 [1st Dept 1995]). Although defendants submitted identical affidavits from two Port Authority police officers who maintained that they found the ladder propped up against the wall after the accident, these men stated that they did not witness the accident. Moreover, even if their statements are taken as true, they do not raise a triable issue of fact as to how the accident occurred, as they only establish that, at some point in time, the ladder was moved from the ground to an upright position (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [foreman’s affidavit did not “sufficiently challenge the conclusion that the steel beams were not properly secured,” where he “observed the scene shortly after the accident, but did not witness it”]; *Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 [1st Dept 2008] [(“t)he testimony of plaintiff’s supervisor that he saw plaintiff on the top step of the ladder, shortly before the accident, (did) not raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries,” where (“t)he supervisor did not witness the accident”]). In fact, their testimonies are directly contradicted by defendants Island’s own witness, Tortora, who stated in his affidavit that he observed the ladder lying on the ground after the incident.

In addition, it is not necessary for plaintiff to show 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]).

Further, contrary to defendants' contention, it would be improper to deny plaintiff summary judgment merely because there were no 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"]).

Defendants also argue that plaintiffs are not entitled to partial summary judgment on the Labor Law § 240 (1) claim because, as his fireproofing spray work allegedly did not require a ladder, plaintiff's negligence in taking it upon himself, without permission or instruction from anyone, to use the subject ladder constitutes the sole proximate cause of the accident. "When the defendant presents some evidence 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)]).

In any event, plaintiff's chosen method of performing his work in this case is of no consequence in the face of the subject statutory violation, as 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]). It should also be noted that 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]).

Finally, given the nature of the work that he was performing at the time of the accident, and, as plaintiff testified that he could not properly place and secure the ladder due to the uneven nature of the floor and the materials blocking the wall, a ladder was not the proper safety device for the job at hand in the first place. “[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”]). As such, additional safety devices, such as a manlift or a baker’s scaffold, or even fall protection, were necessary in order to prevent plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012]).

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, plaintiffs are entitled to partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against Port Authority.

The court has considered defendants’ remaining contentions in opposition and finds them to be without merit.

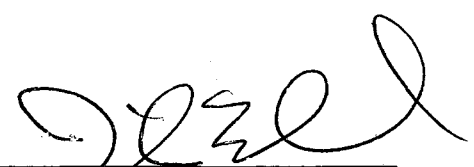
CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Felix Medrano and Nathalie G. Medrano's motion, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants Port Authority of New York and New Jersey is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

DATE: 7/20/2016


COHEN, DAVID BENJAMIN, JSC