Lucero v M&M Realty of N.Y., LLC
2016 NY Slip Op 31693(U)
July 28, 2016
Supreme Court, New York County
Docket Number: 155318/2013
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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PEDRO LUCERO,

Plaintiff,

-against-

M & M REALTY OF NEW YORK, LLC,

Defendant.

---x

Index Number: 155318/2013

Sequence Number: 002

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on Defendant's motion for summary judgment dismissing the complaint and Plaintiff's cross-motion for summary judgment on his Labor Law 240(1) claim:

Papers Numbered:

Notice of Motion – Affirmation – Exhibits 1
Notice of Cross-Motion – Affirmation – Exhibits 2
Affirmation in Opposition to Cross-Motion – Exhibit 3
Reply Affirmation in Further Support of Cross-Motion 4

Upon the foregoing papers, defendant's motion is denied and plaintiff's cross-motion is granted.

Background

On June 4, 2013, plaintiff Pedro Lucero commenced this action against M&M, to recover for personal injuries he allegedly sustained on April 22, 2012 while painting fire escapes at the building located at 411 West 52nd St. in Manhattan ("the Building"). The complaint alleges violations of Labor Law §§ 200, 240(1), 240(2), 240(3), and 241(6). Defendant M&M Realty owns the Building and engaged L&M Restoration ("L&M"), plaintiff's employer, to perform, inter alia, painting work at the Building. The parties completed discovery proceedings and plaintiff filed a note of issue on October 28, 2015.

M&M now moves for summary judgment dismissing the complaint. Plaintiff now cross-moves for summary judgment on his § 240(1) claim; plaintiff has withdrawn his § 200 claim.

On the instant record, the following facts are undisputed, unless otherwise indicated. Plaintiff first painted the fire escapes located at the front of the Buildings along with his fellow workers Peter, Gabal, and his manager, Lazlo Kumar ("Lassie"). Lucero painted

from the inside of the building and did not use a scaffold while his manager, Lassie, used and stood on a scaffold. On the last day of their work, while the team worked on the back of the building, Lucero alleges he fell from roughly 9 to 10 feet above the ground, while utilizing a straight ladder that slipped while he was painting a fire escape. His co-workers were all standing nearby. The ladder belonged to the owner of the building. Lassie was standing directly next to the ladder and had handed Lucero the paint as he worked. Lucero alleges he believed that Lassie was holding onto the bottom of the ladder as he worked. He did not tie off the ladder as the fire escape was still wet with paint and he did not wait for it to dry.

M&M argues that proper safety equipment was provided, including ropes, harnesses, and scaffolds, and Lucero chose carelessly not to utilize it. Lucero argues he was never told to utilize the safety equipment and he always followed his manager's instructions exactly.

Discussion

At the outset, M&M's argument that Lucero's cross-motion should be denied on its face as untimely is unpersuasive as the Court has wide discretion to search the record pursuant to CPLR 3212(b). As necessary, "the court's search of the record [here] . . . is limited to those causes of actions or issues that are the subject of [a] . . . timely motion." Filannino v Triborough Bridge and Tunnel Auth., 34 AD3d 280 (1st Dept 2006). The timely motion by M&M for summary judgment on the § 240(1) claim is sufficient for the purpose of allowing the cross-motion as the "[cross-motion is] largely based on the same arguments [as the timely motion]." Altschuler v Gramatan Mgt., Inc., 27 AD3d 304 (1st Dept 2006). Thus, this court will examine the cross-motion on its merits.

New York Labor Law §§ 240(1) and 241(6)

New York Labor Law § 240(1), commonly referred to as the "Scaffold Law," provides the following:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

To establish liability under Labor Law § 240(1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of his or her injury. Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 (2003). Hence, "the mere fact that [a plaintiff] fell off the scaffolding surface is insufficient, in and of itself, to establish that [he or she was not] provided proper protection." Id. at 762 (quoting Beesimer v Albany Ave./Rte. 9 Realty, Inc., 216 AD2d 853 [3d Dept 1995]).

Labor Law § 241(6) "Construction, Excavation and Demolition Work," provides that,

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

While § 240(1) is a self-executing statute, § 241(6) is only violated pursuant to the New York State Industrial Code. The instant case alleges a violation of § 23-1.21(b)(4)(iv), which requires, in pertinent part,

> [w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means.

Section 240(1) was enacted for the "protection of workmen from injury, and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." Quigley v Thatcher, 207 NY 66, 68 (1912). The purpose of both §§ 240(1) and 241(6) is "to protect workers by placing ultimate responsibility for safety practices at building construction sites upon the owners and general contractors, or their agents, instead of the workers who are not in a position to protect themselves." 1969 NY Legis Ann at 407.

> In promulgating § 240(1), lawmakers [were reacting] to widespread accounts of deaths and injuries in the construction trades. Newspapers carried articles attesting to the frequency of injuries caused by rickety and defective scaffolds. In 1885 alone, there were several articles detailing both the extent of these accidents and the legislation directed at the problem...Most tellingly, the lawmakers fashioned this pioneer legislation to 'give proper protection' to the worker. Those words are at the heart of the statute and have endured through every amendment.

Blake v Neighborhood Hous. Servs. of N.Y. City, supra at 284.

I. **Plaintiff is Entitled to Partial Summary Judgment on His § 240(1) Claim**

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor and he must do so by tender of evidentiary proof in admissible form. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993).

Here, Lucero has proved "both that the statute was violated and that the violation was a proximate cause of his injury," to succeed on his § 240(1) claim. Blake v Neighborhood Hous. Servs. of N.Y. City, supra. Lucero has demonstrated that the statute was violated, as his ladder was not properly secured and thus slipped, and that the ladder slipping was the proximate cause of his injuries (as defendant has not pointed to other potential causes). Consequently, Lucero is entitled to "partial summary judgment on his . . § 240(1) claim . . . [because he] established by proof that the ladder provided collapsed under . . . [him] while he . . . was engaged in an enumerated task." Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc., 118 AD3d 524 (1st Dept 2014) (citing Carchipulla v 6661 Broadway Partners, LLC, 95 AD3d 573–74 (1st Dept 2012); Harrison v VR.H. Constr. Corp., 72 AD3d 547 [1st Dept 2010]).

Once this initial burden has been met, the burden then shifts to the party opposing the motion to, produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. Zuckerman v City of New York, supra at 598. "[T]he trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." Szczerbiak v Pilat, 90 NY2d 553, 556 (1997) (citation omitted).

M&M failed to refute Lucero's showing, or to raise any issues of material fact that warrant a trial. While M&M argues that it was Lucero's fault the ladder slipped because Lucero leaned it against wet paint, it is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1). Whether the ladder slipped on its own, or the platform against which it leaned, or may have even been secured, slipped or gave way, makes no difference with respect to M&M's liability. M&M was obligated to ensure that the ladder was secured to something stable. Schultze v 585 W. 214th St. Owners Corp., 228 AD2d 381 (1st Dept 1996) (citing Gordon v E. Ry. Supply, 82 NY2d 555 (1993). Thus, M&M cannot plausibly argue that the ladder was "constructed, placed and operated as to give proper protection to . . . plaintiff". Kijak v 330 Madison Ave. Corp., 251 AD2d 152, 153 (1st Dept 1998).

Sole Proximate Cause

M&M failed to establish that Lucero was the "sole proximate cause" of his accident, or even raise a question of fact on this defense. It is well-settled that, under§ 240(1), contributory negligence is not a defense. Hernandez v 151 Sullivan Tenant Corp., 307 AD2d 207 (1st Dept 2003). To further elucidate, "Absolute liability' in the context of a Section 240(1) claim does not necessarily mean strict liability, but rather that: (1) a plaintiff's recovery will not be reduced due to another party's [or his or her own] comparative negligence; and (2) the statute imposes a nondelegable duty." Guenther v Modern Cont. Co., 561 F Supp 2d 317, 322 (ED NY 2008). Instead, a defendant may argue the plaintiff was the "sole proximate cause" of the accident, which requires that, "adequate safety devices were available[,] . . . the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained." Nacewicz v R.C. Church of the Holy Cross, 105 AD3d 402 (1st Dept 2013); see Gallagher v New York Post, 14 NY3d 83 (2010). Here, M&M asserts that adequate safety devices were present on site; however, it did not establish whether (1) Lucero knew appropriate equipment, such as ropes, were on site, and if so; (2) he knew where he could find them; (3) he knew he was expected to use them; or (4) he unreasonably chose not to use the available equipment at his own peril.

Importantly, while it is true that liability under § 240(1) does attach "if adequate safety devices are available at the job site, but the worker either does not use or misuses them," "[t]he mere presence of ladders or safety belts somewhere at the worksite does not establish 'proper protection.'" Robinson v E. Med. Ctr. LP, 6 NY3d 550, 590 1162 (2006); Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 524 (1985). Assuming arguendo that additional safety,devices were available at the worksite, M&M has failed to refute Lucero's showing that Lassie, Lucero's supervisor, set up the ladder without any such safety devices to protect Lucero or the other workers, all of whom had been using to paint the back fire escape.

Furthermore, a standing order to use safety devices does not raise a question of fact that the plaintiff knew that safety devices were available and unreasonably chose not to use them. Gallagher v New York Post, supra at 89. Lucero's use of the ladder was reasonable for two reasons. First, Lucero expected Lassie to hold onto the bottom as he used it, (though he was unsure if Lassie did so), as the top was not tied down. Second, access to the scaffold was blocked. See Auriemma v Biltmore Theatre, LLC, 82 AD3d 1 (1st Dept 2011) (proper to use alternative equipment when access to proper equipment blocked). It is undisputed that the scaffold was in the front of the building and could not be brought through the apartment and Lucero did not know how to bring it in parts over the roof. Rice v W. 37th Group, LLC, 78 AD3d 492, 497 (1st Dept 2010) (defendants offered no evidence that the a baker's scaffold was readily available).

Moreover, where there is evidence a supervisor has instructed a worker to work in a manner that causes him or her injury, he or she cannot be the sole proximate cause of the subject accident. Montgomery v Fed. Express Corp., 4 NY3d 805 (2005); Harris v City of New York, 83 AD3d 104, 109 (1st Dept 2011); see Pichardo v Aurora Contr. Inc., 29 AD3d 879 (2d Dept 2006). "[A] contractor who breaches that duty may be held liable in

damages regardless of whether it has actually exercised supervision or control over the work." Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 (1993) (citing Haimes v New York Tel. Co., 46 NY2d 132 [1978]). The contractor does not even have to be present for liability to attach. See Parsolano v Nassau County, 93 AD2d 815, 826 (2d Dept 1983). Lucero has established that he followed his supervisor's instructions and did not of his "own initiative, take a foolhardy risk which resulted in injury." Fernandez v BBD Dev., 103 AD3d 554, 555-556 (1st Dept 2013). Nor did he employ an "improper and hazardous use of the ladder." Gillet v City of New York, NYLJ, June 14, 2016 at 21, col 1 (Sup Ct Queens County 2016).

Importantly, "[t]he Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding hostile behavior. To place that burden on employees would effectively eviscerate the protections that the legislature put in place." DeRose v Bloomingdale's Inc., 120 AD3d 41, 47 (1st Dept 2014). This is because the court understands "[w]hen faced with an employer's instruction to use an inadequate device, many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods." DeRose v Bloomingdale's Inc., supra at 47.

M&M's contention that Lucero did not wait for the paint to dry, nor did he tie the ladder down, because he was lazy and in a rush to get home and did not believe he would get hurt, remains unsubstantiated. M&M has failed to refute Lucero's showing that Lassie instructed him to use the ladder and did not direct him to use safety equipment. M&M merely asserts in conclusory fashion, that Lassie did not instruct Lucero; M&M does not cite to any depositions by witnesses with personal knowledge of the event or other evidence to support its claim in this regard. Madalinski v Structure-Tone, Inc., 47 AD3d 687 (3d Dept 2008).

Even if M&M was able to raise an issue of material fact, it would also have to prove that the "use of the [straight] ladder was forbidden, or...[that the scaffold was] not only the 'standard way,' but the exclusive way" to paint the building," which it has failed to do. Nacewicz v R.C. Church of the Holy Cross, supra at 403.

Recalcitrant Worker Defense

Nor was Lucero a "recalcitrant worker" who "[d]espite being properly instructed on the use of the protective equipment, which is readily available to [him] . . . obstinately [or recalcitrantly] refuse[d] to use that equipment." Wojcik v 42nd St. Dev., 386 F Supp 2d 442, 452 n 10 (SDNY 2005). The defense has no application where, as here, safety devices were merely present elsewhere at the work site. See Salotti v Wellco, 273 AD2d 862 (2d Dept 2000).

"Unforeseeable, Independent, Intervening Act"

M&M also argues that Lucero's actions were "unforeseeable, independent, intervening act[s] which w[ere the] superseding cause[s] of [the] accident, precluding summary judgment." Vouzianas v Bonasera, 262 AD2d 553 (2d Dept 1999). "An independent

intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of **such an extraordinary nature or so attenuated** from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them." Gordon v E. Ry. Supply, supra at 561 (emphasis added). Cases that have arisen under "unforeseeable, independent, intervening" acts include cases in which a plaintiff cut his own safety rope, another untied the lines that secured his scaffold, and a third removed the cross-braces from his scaffold; these are all extreme cases which stand in stark contrast to the instant case. Ossorio v Forest Hills S. Owners, 251 AD2d 475 (2d Dept 1998); Tweedy v R.C. of Our Lady of Victory, 232 AD2d 630 (2d Dept 1996); Styer v Vita Constr., 174 AD2d 662 (2d Dept 1991).

Accordingly, for all of the foregoing reasons, Lucero is entitled to summary judgment on his Labor Law § 240(1) claim. The issue of Lucero's damages arising from M&M's violation of Labor Law § 240(1) is reserved for trial.

II. There Is a Question of Fact As To Plaintiff's § 241(6) Claim

"To succeed on a Section 241(6) claim, a plaintiff must demonstrate a violation of specific rules and regulations promulgated by the Commissioner of the Department of Labor (the 'Industrial Code') and "the provision must be applicable to the facts of the case". See 12 NYCRR 23 et seq; see Ross v Curtis–Palmer Hydro-Elec. Co., supra; see Singleton v Citnalta Constr. Corp., 291 AD2d 393, 394 (2d Dept 2002). Moreover, the regulations relied upon must "mandat[e] compliance with concrete specifications; alleged violations of regulations that merely 'establish general safety standards' are not actionable under Section 241(6) . . . Lastly, the violation must be a proximate cause of the injury or a substantial factor in bringing about the injury-causing event." Id. at 505; see Locicero v Princeton Restoration, Inc., 25 AD3d 664, 666 (2d Dept 2006); see also Misirlakis v East Coast Entm't Props. Inc., 297 AD2d 312, 312–13 (2d Dept 2002).

Furthermore, "[a] violation of 241(6), unlike a violation of 240(1) is only some evidence of negligence on the part of the owner or contractor." Wojcik v 42nd St. Dev., supra at 453 n 12 (citing Long v Forest–Fehlhaber, 55 NY2d 154 [1982]). This distinction is based upon "the principle, long and firmly established in New York, that the violation of a rule of an administrative agency . . . lacking the force and effect of a substantive legislative enactment, is 'merely some evidence which the jury may consider on the question of defendant's negligence.'" Id. (quoting Teller v Prospect Hgts. Hosp., 21 NE2d 504, 507 [1939]). In addition, contributory and comparative negligence are viable defenses to § 241(6) claims. Id.

"[Duties are] imposed by . . . [§ 241(6)] irrespective of [the owner or contractor having] control or supervision of the construction site". Rocha v State of New York, 45 AD2d 633, (2d Dept 1974). In this case, M&M can be held liable, although Lucero worked for subcontractor L&M Restoration. The general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault. See Allen v Cloutier Constr. Corp., 44 NY2d 290 (1978); see also Monroe v City of New York, 67 AD2d 89, 104 (2d Dept 1979); 1A PJI 2:216A (1997) at 807–809).

In the instant case, Lucero alleges a violation of NYCRR § 23-1.21(b)(4)(iv), which is a specific provision for the purposes of a § 241(6) claim. Fernandes v Equit. Life Assur. Socy. of United States, 4 AD3d 214 (1st Dept 2004); DeOliveira v Little John's Moving, Inc., 289 AD2d 108 (1st Dept 2001); Santamaria v 1125 Park Ave. Corp., 249 AD2d (1st Dept 1998).

The evidence demonstrates that the ladder Lucero worked from was between 6 and 10 feet long and that the accident occurred because the ladder was not tied down and slipped on wet paint. Beyond that, "it will be for the jury to determine whether the equipment, operation and conduct of the work, etc., were reasonable and adequate under the circumstances," thus M&M's motion for summary judgment on § 241(6) is denied. Monroe v City of New York, supra.

Conclusion

For the reasons set forth herein, plaintiff's cross-motion for partial summary judgment on his § 240(1) claim is granted, and the Clerk is hereby directed to enter judgment accordingly; defendant's motion for summary judgment dismissing plaintiff's § 240(1) and § 241(6) claims is denied.

Dated: July 28, 2016

Arthur F. Engoron, J.S.C.