SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FRANK GERICITANO,

Plaintiff,

Index No. 156327/2013

-against-

DECISION/ORDER

BROOKFIELD PROPERTIES OLP CO, LLC, ET AL.,
Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition.....	2
Reply.....	3

Plaintiff commenced the instant action against defendants seeking to recover damages stemming from injuries plaintiff allegedly sustained when a transformer shifted and hit him in the head and knocked him off a ladder. Plaintiff now moves for an Order pursuant to CPLR § 3212 for partial summary judgment as against defendants Brookfield Properties Olp Co, LLC and Turner Construction Company on the issue of liability pursuant to Labor Law § 240(1). For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. Plaintiff was a journeyman electrician with Local 3 employed by PE Stone Electric on the date of the accident, where an electrical renovation was being performed on the 32nd floor. When he reported to work on the date of the accident, he was told that he would be completing the installation of a transformer in a closet which was suspended from the ceiling and had been partially installed the previous day. He was assigned to do this work with another electrician, Matthew Schilling. The transformer was hanging from

the cue deck attached to the ceiling by threaded rods on all four sides. There are two different versions of the accident. Plaintiff testified in his deposition that the accident occurred when he was in the process of trimming the rods. He also testified that the transformer hit him in the head as a result of which he was knocked off the ladder and hit his head on the ground, as a result of which he was rendered unconscious. His co-worker, Matthew Schilling, who was the only other witness to the accident, testified that the accident occurred when they were in the process of removing the chain fall that was wrapped around a rod. He further testified that they decided to remove the threaded rod supporting the transformer that the chain fall was wrapped around and then reattach the rod to the transformer support. He stated that plaintiff and he discussed other ways to remove the chain fall such as bringing in equipment to support the transformer independently of the rods such as a mechanical lifting device but that there were no other means of removing the chain fall "readily available on the job." Schilling Deposition at 28. When asked how he knew that, he stated "We had asked the supervision if there was anything else." *Id.* He testified that that there was no type of lifting device that was available in the closet because there was no space permitted for any device to enter the closet. He also testified that he did not recall the ladder being knocked over and that he does not think that the plaintiff struck the ground after he was hit in the head by the transformer.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden 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." *Id.*

Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not 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.

Labor Law § 240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006).

The courts have found that Labor Law § 240(1) applies to both "falling worker" and "falling object" cases. *See Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001). With respect to falling objects, Labor Law § 240 (1) applies when the falling of the object "is related to 'a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured'. Thus, for § 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury

to a worker. A 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. *Id.* at 267-268. Thus, a plaintiff can take the position that there is liability under § 240(1) either because there was a falling object or that there was a fallen worker or that there was both a falling worker and a fallen object. *See Rzymski v. Metropolitan Tower Life Ins. Co.*, 94 A.D.3d 629 (1st Dept 2012) (plaintiff established his right to summary judgment on Labor Law § 240(1) claim by demonstrating that his claims encompass both a falling object which was not adequately secured and a fall from an elevation due to inadequate safety devices).

In the present case, the plaintiff argues that there is liability under section 240(1) because his claims encompass both a falling object which was not adequately secured and a fall from an elevation due to inadequate safety devices. As a result, the court will analyze each of these claims separately. With respect to plaintiff's argument that he is entitled to summary judgment on his Labor Law § 240(1) claim because he fell from the ladder which was not adequately secured, the court finds that he has established a prima facie right to judgment as a matter of law pursuant to Labor Law § 240(1) based on his testimony that he fell from a ladder which was not adequately secured after he was hit in the head by the transformer. However, defendants have raised a disputed issue of fact based on the testimony of his co-worker that he does not recall the ladder being knocked over and that he does not think that the plaintiff struck the ground after he was hit in the head by the transformer. Because this testimony, by a witness to the accident, contradicts plaintiff's testimony that he was knocked off the ladder to the ground after he was hit in the head, plaintiff is not entitled to summary judgment on his labor law § 240(1) claim based on a falling worker. The court notes that there is also recorded testimony form the plaintiff given to the insurance company after the accident in which he states that he was not on a ladder when the incident occurred., which would also create an issue of fact as to

whether plaintiff fell from a ladder. Plaintiff argues that this recording is not admissible because it was not provided in admissible form, which error was subsequently corrected in a supplemental affidavit. The court need not reach the issue of whether it must consider the tape recording as there are disputed issues of fact raised by the admissible testimony pf plaintiff's co-worker.

However, plaintiff is entitled to summary judgment pursuant to Labor Law § 240(1) based on his claim that an inadequately secured falling object, the transformer, struck him in the head. Initially, plaintiff has made a prima facie showing that he is entitled to judgment as a matter of law based on the undisputed testimony that the hoisted transformer was not adequately secured at the time that it hit him in the face.

Moreover, defendants have failed to raise a disputed issue of fact sufficient to defeat plaintiff's prima facie case. Defendants' primary argument that there is an issue of fact as to whether plaintiff was the sole proximate cause of the accident is without merit. "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that 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" *Quinones v. Olmstead Props, Inc.*, 133 A.D.3d 87, 89 (1st Dept 2015).

Even if the court accepts defendants' position that plaintiff's testimony about how the accident occurred when he was in the process of trimming the rods is not credible and that the accident in fact occurred when the plaintiff and his coworker were attempting to free the chain fall, defendants have still failed to create a disputed issue of fact as to whether plaintiff was the sole proximate cause of the accident. The only other person who was in the closet when the transformer hit plaintiff was his co-worker Mr. Schilling. At his deposition, Mr. Schilling testified that he and plaintiff discussed how to free the chain fall and complete the installation of the transformer, that they

discussed the various ways they would be able to support the transformer and remove the chain fall and that they decided to remove one of the threaded rods supporting the transformer that the chain fall was wrapped around and then reattach the rod to the transformer support. Schilling deposition pages 25-26. He further testified that plaintiff and he discussed other ways to remove the chain fall such as bringing in equipment to support the transformer independently of the rods such as a mechanical lifting device but that there were no other means of removing the chain fall "readily available on the job." *Id.* at 28. When asked how he knew that, he stated "We had asked the supervision if there was anything else." *Id.* He testified that that there was no type of lifting device that was available in the closet because there was no space permitted for any device to enter the closet. Based on the foregoing testimony of the only other person in the room when the accident occurred, defendants have failed to produce any evidence that adequate safety devices were available to the plaintiff and his co-worker to secure the transformer while they removed the chain fall and that plaintiff unreasonably chose not to use the safety devices that were readily available. To the contrary, plaintiff's co-worker testified that there were no other devices available to secure the transformer and the supervisor specifically informed them that there were no devices available.

Based on the foregoing, plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) is granted. The issue of damages on plaintiff's Labor Law § 240 (1) claim will be determined at the trial of the action. This constitutes the decision and order of the court.

Dated: 10/20/16

Enter: CK
J.S.C.
HON. CYNTHIA S. KERN
J.S.C.