

Howard v Westchester Found. for the Disabled, Inc.
2016 NY Slip Op 33187(U)
June 9, 2016
Supreme Court, Westchester County
Docket Number: Index No. 62689/2015
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
KEIR HOWARD,

Plaintiff,

-against-

WESTCHESTER FOUNDATION FOR THE
DISABLED, INC.,

Defendant.

-----X
RUDERMAN, J.

DECISION AND ORDER
Motion Sequence No. 1
Index No. 62689/2015

The following papers were considered in connection with the plaintiff's motion for summary judgment:

Papers	Numbered
Notice of motion, affirmation, Exs. A - D	1
Affirmation in opposition, Exs. A, B	2
Reply, Ex. 1	3

The plaintiff moves for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability on his claim under Labor Law § 240(1) against the defendant. Defendant submits written opposition.

The plaintiff commenced this action to recover damages for injuries sustained in a construction accident which occurred on August 26, 2014, at a building undergoing renovation at 135 Radio Circle, Mount Kisco, New York. According to the affidavit of the plaintiff, at the time of the accident, he was employed by a plumbing subcontractor to drill holes through a wall through which pipes would be inserted. (Notice of motion, Ex. D.) The plaintiff was on an A-frame ladder, working alone. He was standing one step below the top step of the ladder, such that his feet were at a height

of 5 to 6 feet from the floor (Notice of motion, Ex. D, at par. 4.) One or both of the supports bent, causing the plaintiff to fall to the ground. (Notice of motion, Ex. D, at par. 4.)

Plaintiff moves for summary judgment on his claim under Labor Law § 240(1). In opposition, defendant submits the affidavit of its employee who states that he was present on the date of the accident; heard screaming and was told someone fell from a ladder; and that the ladder was not owned by the defendant. Defendant argues that as plaintiff was alone, there were no witnesses, and plaintiff's version of the accident raises issues of fact.

Analysis

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Labor Law § 240(1)

"Labor Law § 240(1) provides exceptional protection for workers against the special hazards that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured." (*Gonzalez v Turner Constr. Co.*, 29 A.D.3d 630, 631 [2d Dept. 2006]). The failure of an owner or an agent of the owner "to furnish or erect suitable devices to protect workers when work is being performed" results in absolute liability against that owner or the owner's agent under the statute. (*Lombardi v Stout*, 80 N.Y.2d 290, 295 [1992]), and the duty to provide a suitable safety device under Labor Law § 240(1) is nondelegable. (*Ross v Curtis-Palmer*

Hydro-Elec. Co., 81 N.Y.2d 494, 500 [1993]). A general contractor is not considered a statutory agent of the property owner for Labor Law § 240(1) liability purposes, unless that contractor had the authority to supervise and control significant aspects of the construction project, such as safety, at the time of the accident. (*Sanchez v. Metro Bldrs. Corp.*, 2016 NY Slip Op 00957 [2d Dept. 2016].)

“To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident.” (*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2d Dept. 2014].) “Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1).” (*Garcia v Market Assocs.*, 123 AD3d 661, 663 [2d Dept. 2014].)

When an A-frame ladder fails or tips over, recovery will be awarded under the statute. (*See, e.g., Casasola v. State of New York*, 129 A.D.3d 758 [2d Dept. 2015] [granting plaintiff summary judgment where unsecured A-frame ladder tipped over]; *Sozzi v. Gramercy Realty Co. No. 2, L.P.*, 304 A.D.2d 555, 556 – 557 [2d Dept. 2003] [granting summary judgment where A-frame ladder on which plaintiff was standing to remove old paint from the ceiling of an apartment broke and collapsed]; *Losito v. Manlyn Dev. Group, Inc.*, 85 A.D.3d 983 [2d Dept 2011] [granting summary judgment to plaintiff who established, prima facie, that the A-frame ladder on which he was standing was defective and collapsed, causing his injuries].)

Nevertheless, “[t]he mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided.” (*Delahaye v Saint Anns School*, 40 A.D.3d 679, 682 [2d Dept. 2007].) “There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff’s injuries. Where a plaintiff falls off the ladder because he or she lost his or her balance, and there is

no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach.” (*Hugo v. Sarantakos*, 108 A.D.3d 744, 745 [2d Dept. 2013] [dismissing claim where plaintiff fell because he lost his balance].)

In *Schlichting v. Elliquence Realty, LLC* (116 A.D.3d 689 [2d Dept. 2014]), the Court denied summary judgment in a Labor Law case where plaintiff, who fell from a ladder, was the sole witness, and had not been deposed. The Court reasoned:

“An award of summary judgment would be premature at this stage of the action. The plaintiff’s motion for summary judgment was made prior to the deposition of the plaintiff. In light of the fact that the plaintiff was the sole witness to the accident, and that his account of the accident has been placed in issue, the defendant should have been afforded the opportunity to conduct his deposition.”

Here, similarly, the defendant should have the opportunity to conduct discovery.

Based upon the foregoing, it is hereby,

ORDERED that plaintiff’s motion for summary judgment is denied with leave to renew upon the completion of discovery, and it is further

ORDERED that all parties appear in the Compliance Part on September 7, 2016 at 9:30 a.m., in room 800 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 9, 2016


HON. TERRY JANE RUDERMAN, J.S.C.