Marines v Delta Air Lines, Inc.
2017 NY Slip Op 30815(U)
January 20, 2017
Supreme Court, Queens County
Docket Number: 89/13
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

ALBERTO MARINES,

Plaintiff,

- against-

DELTA AIR LINES, INC. and V.R.H. CONSTRUCTION CORP.,

Defendants.

ACTION NO. 1
Index No. 89/13

Motion Date August 31, 2015

Motion Cal. No. 105

Motion Seq. No. 5

ALBERTO MARINES,

Plaintiff,

- against -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

ACTION NO. 2
Index No. 20709/13

The following papers numbered 1 to 16 read on this motion by plaintiff for an order, (1) extending the time to move for summary judgment; (2) staying the trial of the above action pending a hearing and determination of the instant motion; and (3) granting summary judgment in favor of plaintiff as against defendants, pursuant to CPLR 3212, on plaintiff's Labor Law §§ 240(1) and 241(6) causes of action; and on the cross motion by defendants, Delta Air Lines, Inc., V.R.H. Construction Corp., The Port Authority of New York and New Jersey, pursuant to CPLR 3212, for an order, dismissing plaintiff's Labor Law §§ 200 and 241(6) claims.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits (Plaintiff).....	1-5
Memorandum of Law in Support (Plaintiff).....	6-7
Notice of Cross Motion - Affirmation - Exhibits (Defendants).	8-11
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Pursuant to CPLR 9002, this matter, that had been pending before the late Justice Duane A. Hart, was reassigned to the undersigned justice.

Upon the foregoing papers, it is ordered that the branch of the motion by plaintiff for an order, extending the time to move for summary judgment is granted. That branch of the motion by plaintiff staying the trial of the above action pending a hearing and determination of the instant motion is denied as academic on the basis that the note of issue, filed on June 5, 2014, was vacated on June 9, 2015.

The remainder of plaintiff's motion for summary judgment and cross motion by defendants, Delta Air Lines, Inc., V.R.H. Construction Corp., The Port Authority of New York and New Jersey, for summary judgment are hereby determined as follows:

The above action arose out of plaintiff's alleged fall from an unsecured scaffold platform during construction work at Delta Air Lines, Inc.'s ("Delta") terminal at LaGuardia Airport on November 27, 2012, at approximately 11:00 p.m. According to plaintiff, the platform was designed for a metal pipe scaffold but no proper scaffolding was provided to plaintiff. In his affidavit in support of his motion, plaintiff stated the platform was not secured against movement and that no safety railings or guardrails were set up around the platform. Plaintiff further stated that he was not provided with a safety harness, lifeline system, or safety netting to prevent his fall. Plaintiff was caused to fall when the platform that he was situated on moved and tipped over causing plaintiff and the platform to fall approximately 10 feet onto the baggage carousel below.

At the time of his fall, plaintiff was employed by Sign Design Group of New York ("SDG"), a subcontractor to defendant, V.R.H. Construction Corp. ("V.R.H. Construction"). In a subcontract between V.R.H. Construction and SDG, SDG was involved with the installation of signage. V.R.H. Construction was allegedly the construction manager for the signage project and was hired by Delta. The Port Authority of New York and New Jersey ("Path"), as tenant, admits in its answer that it operates, maintains and controls LaGuardia Airport.

Plaintiff commenced the above action by filing a Summons and Verified Complaint on January 3, 2013. Issue was joined by the service of an answer by defendant, Delta, on or about March 20, 2013. On or about September 10, 2013, plaintiff filed a Supplemental Summons and Amended Complaint to add V.R.H. Construction as an additional defendant. On or about November 12, 2013, defendants, Delta and V.R.H. Construction, jointly interposed an answer to plaintiff's Amended Complaint. On or about November 12, 2013, plaintiff commenced Action Number 2 by filing a Summons and Complaint against defendant, Path, under Index No. 20709/13. Defendant, Path interposed its answer on or about January 14, 2014. The instant action and Action No. 2 were joined for trial pursuant to an order of Justice Hart, dated May 2, 2014. Discovery demands and responses were served, and depositions went forward. The note of issue was filed on June 5, 2014.

Plaintiff's complaint claims violations of Labor Law §§§ 240(1), 241(6), 200 and common-law negligence. Plaintiff now moves for summary judgment on Labor Law §§ 240(1) and 241(6) causes of action, pursuant to CPLR 3212. Defendants, Delta, V.R.H. Construction, and Path cross-move, pursuant to CPLR 3212, to dismiss plaintiff's Labor Law §§ 200 and 241(6) claims.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

Labor Law § 240 (1) provides, in pertinent part: "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" (*see Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]). It protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" *(Ross v Curtis Palmer Hydro-Electric Company,* 81 NY2d 494, 501 [1993]).

This statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015]; *Zamora v 42 Carmine St. Associates, LLC,* 131 AD3d 531 [2d Dept 2015]), and the duty imposed upon contractors and owners pursuant to it, is non-delegable (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). Liability under the statute is imposed where there is a failure to utilize, or the use of an inadequate safety device enumerated in the statute, and "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]).

"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]). Such statute is not applicable unless plaintiff's injuries result from an elevation-related risk and the inadequacy of the safety device (*see Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658 [2014]). A fall from a ladder, in and of itself, does not establish that proper and adequate protection was not provided (*see Carrion v City of New York*, 111 AD3d 872 [2d Dept 2013]; *Melchor v Singh*, 90 AD3d 866 [2d Dept 2011]).

The record contains, *inter alia*, plaintiff's deposition testimony and the sworn affidavit of Rolando Alvarez. Plaintiff testified that on the date of the accident, he worked for SDG with Julio and Rolando as a three-person team; that SDG provided the tools to use for the project; and that plaintiff's work was directed by either Julio or Rolando. To plaintiff's knowledge, Julio and Rolando provided the tools and the materials for the job. Rolando, in his affidavit, stated that he was employed by SDG and that he ran the job on behalf of SDG at LaGuardia Airport. Rolando further stated that SDG provided safety equipment on site for their employees, including harnesses, which were made available to plaintiff. According to Rolando, plaintiff opted not to utilize the harness. In light of the conflicting evidence in the record, genuine issues of material fact remain, at least, as to whether a violation of Labor Law § 240(1) was the proximate cause of plaintiff's alleged injuries.

Accordingly, plaintiff's motion for summary judgment against defendants on the Labor Law § 240(1) claim, is denied.

Defendants, Delta, V.R.H. Construction, and Path cross-move for summary judgment seeking dismissal of plaintiff's Labor Law § 200 claim and for common-law negligence. Labor Law § 200 "is a codification of the common-law duty for an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). Claims brought under § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Where a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is demonstrated that he or she created the dangerous condition or failed to remedy a dangerous condition of which he or she had actual or constructive notice (*see LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Chowdhury v Rodriguez*, 57 AD3d at 128).

Kim Payne, principal property representative for defendant, Path, testified on its behalf that Terminal C, where plaintiff's accident occurred, was a Delta terminal in November 2012, and that under its lease with Path, Delta was permitted to do renovation projects at the Terminal, but that such projects required approval of Path. Payne specifically testified that it was Path's policy to inspect tenant work that was being done and to take a supervisory role to ensure the work was performed in a safe manner.

Patrick J. Byrnes, project superintendent for V.R.H. Construction, testified on behalf of defendant, Delta, that V.R.H. Construction performs airport construction work and that Path inspectors would come to inspect the work upon V.R.H. Construction's request. Byrnes further testified that Delta supervisors or inspectors came and went as the work was ongoing.

Plaintiff testified that his employer, SDG provided him with all the tools for the job and that the platform or plank that he fell from was owned by, set up by, and placed by his employer. Plaintiff also testified that he was directed where to work by either Julio or Rolando.

Upon review, the conflicting deposition testimonies demonstrate that an issue of fact exists, at least, as to whether defendants had adequate authority to control the injury-producing work (*see Chilinski v LMJ Constr., Inc.*, 137 AD3d 1185 [2d Dept 2016]; *Forssell v Lerner*, 101 AD3d 807 [2d Dept 2012]). Therefore, defendants, Delta, V.R.H. Construction, and Path are not entitled to summary judgment on this branch of their cross motion.

Labor Law § 241(6) imposes a non-delegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting all areas in which construction, excavation or demolition work is being performed (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]; *Miranda v City of New York*, 281 AD2d 403 [2d Dept 2001]). In order to support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation (12 NYCRR § 23-1.1) that is both concrete and applicable given the circumstances surrounding the accident (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d at 350).

In the case at bar, although plaintiff cites numerous sections of the Industrial Code allegedly violated by defendants (e.g. failure to provide a safety net and failure to provide a safety harness), the court finds that most of these sections are not applicable in this action (*see Rau v Bages N Brunch, Inc.*, 57 AD3d 866 [2d Dept 2008]; 12 NYCRR § 23-1.16 and § 23-1.21) which set standards for safety belts and ladders where the plaintiff was <u>not</u> provided with any such devices.

The evidence in the record raises an issue of fact as to whether a safety harness or lifeline system was provided, such that plaintiff's alleged fall could have been prevented. To this end, Section 23-1.16 of the Industrial Code may be applicable to support a Labor Law § 241(6) cause of action.

Accordingly, plaintiff's motion for summary relief on his Labor Law § 241(6) claim is denied. Defendants' cross motion for summary judgment seeking dismissal of plaintiff's Labor Law § 241(6) claim is also denied.

Dated: January 20, 2017

DARRELL L. GAVRIN, J.S.C.