

Greenwood v Whitney Museum of Am. Art
2017 NY Slip Op 31889(U)
September 6, 2017
Supreme Court, New York County
Docket Number: 150080/14
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MITCHELL GREENWOOD

INDEX NO. 150080/14

- v -

MOT. DATE

WHITNEY MUSEUM OF AMERICAN ART et al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for <u>restore and for summary judgment</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This is an action for personal injuries at a construction site. Plaintiff moves for an order restoring this action to the active calendar and upon restoration for partial summary judgment on the issue of liability. Defendants Whitney Museum of American (the "owner") and Turner Construction Company ("Turner") oppose the summary judgment motion, only. At the outset, the case is restored to active status.

Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are not in dispute. On December 27, 2013, the date of the accident, plaintiff, a union ironworker, was employed by non-party James F. Stearns, a structural steel contractor, and working at a construction project site at the Whitney Museum of American Art in Manhattan. Plaintiff's accident occurred when he was struck by a 45-pound piece of scrap iron which fell from a lift above him as he was standing at the bottom of an open shaft in which a staircase was going to be installed.

At his deposition, plaintiff testified that immediately prior to his accident, Allison was on a scissors lift approximately 25-30 feet above plaintiff cutting the steel tab. Plaintiff was standing at the bottom of the shaft and acting as a "fire watch" to look out for any fires that might be ignited from sparks from the welding. Allison dropped a flashlight and plaintiff went to retrieve it. As he went to pick it up, plaintiff "got hit with something on [his] back..." That something was a piece of scrap iron which was being used by Allison to hold down a fire blanket. The fire blanket was being used as protection from sparks.

Turner's witness, Harry Harriendorf, the site safety manager, testified at his deposition that it was the worker's choice whether or not to use a piece of scrap iron to weight down a fire blanket. Harriendorf further stated that plaintiff should not have been standing directly underneath the lift

Dated: _____

HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

because he would have been getting hit with sparks.

The owner owns the premises upon which the construction site was situated. The construction itself involved the erection of a new building and Turner was engaged by the owner as the construction manager for the project.

Plaintiff argues that he is entitled to summary judgment on the issue of liability on his Labor Law §§ 240[1], 241[6] and 241-a claims against the owner and Turner. Defendants argue that triable issues of fact preclude summary judgment. Specifically, defendants argue that there is an open question about whether plaintiff had the proper safety equipment for the work he was performing. Further, defendants maintain that plaintiff has failed to meet his burden of proof. Otherwise, defendants argue that the motion as to Sections 241[5] and 241-a should be denied because plaintiff only asserted these claims in a supplemental bill of particulars dated February 3, 2017 which defense counsel received after the instant motion was filed.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 240[1]

Plaintiff's cross-motion for summary judgment on the issue of liability with respect to Labor Law § 241 claim must be granted. Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "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)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective

devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "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 the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Here, there is no dispute that plaintiff was struck by a piece of scrap iron operating as a stay which was used to keep the fire blanket in place. The scrap iron was inadequate for its purpose because it was unsecured and ultimately fell and struck plaintiff. Therefore, plaintiff has demonstrated *prima facie* liability with respect to his Labor Law § 240[1] claim (see i.e. *Beauschesne v. City of New York*, 261 AD2d 491 [1st Dept 1999]; *Rosa v. R.H. Macy's Company, Inc.*, 272 AD2d 87 [1st Dept 2000]).

In turn, defendants have failed to raise a triable issue of fact. They have failed to establish that the scrap iron did not present a significant risk of injury. It is of no moment that the scrap iron could be used in place of clamps at the worker's discretion. Indeed, as plaintiff argues in reply, this is evidence that there were safer alternative methods of securing the fire blanket than by weighing it down with pieces of scrap iron. Nor does plaintiff's position bear on defendants' liability, since comparative negligence is not a defense to a Labor Law § 240[1] claim.

Labor Law § 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure 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 scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that the defendants violated 12 NYCRR § 23-2.5[a][1], which provides in relevant part that "[p]ersons required to perform work in or at shafts, other than elevator shafts, shall be provided with the following protection:

(1) Protection from falling material. A tight covering consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed so as to cover the entire cross-sectional area of the shaft. Such cover shall be located at a point in the shaft not more than two stories or 30 feet, whichever is less, above the level where persons are working.

Here, plaintiff has also demonstrated *prima facie* liability with respect to the Labor Law § 241[6] claim, insofar as there is no dispute that he was standing at the bottom of a stairway shaft when he was struck by the scrap iron and no planking, plywood cover or safety barricades were installed above plaintiff to protect him from falling objects.

Defendants argument that they have been prejudiced by plaintiff's failure to assert a Section 241[6] or 241-a claim in the original bill of particulars is rejected. This motion is pre-note of issue, and defendants do not demonstrate any actual prejudice resulting from the late notice or otherwise argue that summary judgment is premature. The facts underlying these claims have not been unknown to defendants and if plaintiff had moved to amend the bill of particulars, such a motion would have been granted. Therefore, the court rejects this procedural argument.

Substantively, defendants argue that plaintiff has not established that non-compliance with 12 NYCRR § 23-2.5[a][1] was a proximate cause of his accident. The court disagrees. No reasonable fact-finder could conclude that the absence of a "tight covering" covering the cross-sectional area of the shaft was a proximate cause of plaintiff's accident.

Defendants next argue that plaintiff failed to show he could perform the task of fire watch with planking in place obstructing his view. This argument is unavailing because it is not based upon any admissible evidence. Defendants have not come forward with any testimony or other evidence from which a reasonable fact-finder could conclude that compliance with 12 NYCRR § 23-2.5[a][1] would have rendered plaintiff unable to do the job (*cf. McLean v. 405 Webster Ave. Assocs.*, 98 AD3d 1090 [2d Dept 2012]).

Finally, defendants argument that the area plaintiff was standing is was not a shaft within the meaning of the subject Industrial Code provision is flatly rejected as without any evidentiary support on this record.

Accordingly, plaintiff's motion for summary judgment on the issue of liability as to Labor Law § 241[6] is granted.

Labor Law § 241-a.

Section 241-a is entitled "Protection of workmen in or at elevator shaftways, hatchways and stairwells" and provides as follows:

Any men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board.

Defendants argue that Labor Law § 241-a does not apply here since plaintiff was only working in a space that was to become a stairwell. This argument is rejected. The statute plainly applies to stairwells in buildings in the course of construction or demolition and defendants' reading of the statute would leave it with no effect because it would mean that the statute wouldn't apply unless the particular stairwell was fully finished. Such a reading is de hors the legislative purpose of the statute and the cases cited by defendants are inapposite (i.e. *Angamarca v. New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264 [1st Dept 2008] [a skylight opening does not fall under the ambit of Section 241-a despite its proximity to a stairwell]).

Otherwise, based upon the same reasoning set forth by the court in connection with the Section 241[6] claim, plaintiff has established defendants' liability on the Section 241-a claim. Accordingly, plaintiff's motion is granted on this claim as well.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted in its entirety; and it is further

ORDERED that this action is restored to the active calendar; and it is further

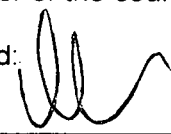
ORDERED that plaintiff is awarded partial summary judgment on the issue of defendants' liability with respect to plaintiff's Labor Law §§ 240[1], 241[6] and 241-a claims; and it is further

ORDERED that the parties are directed to appear for a status conference on October 31, 2017 at 9:30 am in Part 8, 80 Centre, Room 278 so that any remaining discovery can be scheduled; and it is further

ORDERED that plaintiff's time to file note of issue is extended to November 3, 2017.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9/6/17
New York, New York

So Ordered: 
Hon. Lynn R. Kotler, J.S.C.