

Keerdoja v Legacy Yards Tenant, LLC

2017 NY Slip Op 32272(U)

October 25, 2017

Supreme Court, New York County

Docket Number: 157010/15

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

MICHAEL KEERDOJA

INDEX NO. 157010/15

MOT. DATE

- v -

MOT. SEQ. NO. 002

LEGACY YARDS TENANT, LLC et al.

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

This is a labor law action. Plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240[1]. Defendants Hudson Yards Construction LLC ("Hudson") and Tutor Perini Building Corp. ("Tutor" and collectively "defendants") oppose the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore summary judgment relief is available. For the reasons that follow, the motion is granted.

Many of the relevant facts are not in dispute. Plaintiff was injured while working as a Journeyman Union Ironworker employed by non-party W&W Steel Erectors ("W&W") on July 3, 2015 at a construction site located at Hudson Yards in Manhattan. The accident occurred when a steel plate, also referred to as a shim plate, while attached to a crane, became unsecure and fell over ten feet hitting plaintiff. Plaintiff's injuries included numerous fractures to his face, neck and back and brain bleeding.

The following facts are based upon plaintiff's deposition testimony. On the date of the accident, plaintiff was working as a "tagline man" in the raising gang. Plaintiff's foreman, Bradley Kraus, provided instructions at the project. Plaintiff does not remember anything that happened on the date of the accident due to the injuries he sustained.

Kraus witnessed the accident. Plaintiff has provided Kraus' sworn affidavit, wherein he states the following regarding the accident:

...Around 11:00am that day we were setting a vertical leg in between two diagonal pieces of steel. The vertical leg of steel had two shim plates bolted to it from the fabrication shop to hold it in place during transportation. However, the vertical leg could not be installed with the bolts on the shim plates as fabricated, so I instructed one of the welders to come over and remove the bolts, and tack weld the plates to the steel instead. Brian the welder came over and removed the bolts

Dated: 10/25/17

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

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

and put in tack welds to secure the plates. The piece was then hoisted for installation.

The crane hoisted the piece and it got to the connectors. ... In the process of trying to get the piece set, the vertical leg struck the diagonal steel and when it did, one of the shim plates came falling down, striking [plaintiff] in his face and head. ...

The tack welds did not hold the shim plate in place on the vertical leg as it was supposed to at the time of the accident. The impact of the vertical leg into the diagonal steel was not hard and is something I have seen done before on countless other pieces of steel with attached shim plates and never had a shim plate fallen off before.

Plaintiff argues that he has demonstrated a *prima facie* case of liability under Labor Law § 240[1] based upon the undisputed fact that the steel plate fell while only being welded on one side. In turn, defendants contend that Labor Law § 240[1] doesn't apply because the accident didn't occur because of the failure of absence of an enumerated safety device and alternatively that the motion should be denied because plaintiff has not demonstrated that the tack welds were defective. Defendants further argue that there are questions of fact as to whether the steel plate was dislodged because of the contact rather than the inadequacy of the tack welds and otherwise that there are contradictory accounts of how the accident occurred.

Defendants have submitted the affidavits of Scott Lieberman, a principal engineer, and Steven Arndt, an industrial engineer. Defendants' experts opine that the steel plate did not fall because the tack weld failed, but rather, due to the manner in which the steel plate was hoisted and the application of force upon the plate when it hit the diagonal steel. Further, Lieberman opines that the tack welds were sufficient to secure the steel plate to the vertical leg.

On reply, plaintiff has provided the deposition transcript of Brian Moore, the welder/iron worker who welded the shim plate which fell on the plaintiff. Moore testified about the weld he performed on the steel plate as follows:

Q. Well, why don't you describe to me the kind of weld you performed on the shim plate involved in the accident?

A. It was four welds.

Q. The weld itself. The type weld if you would.

A. It was an edge weld. It was more than an inch. Exactly how long? I don't know. But it was a series of four of them on one side.

...

Q. And how were those spaced?

A. 12 to 14 inches on center.

Q. Were each of those welds more than 1 inch?

A. Yes.

Q. Were any 2 inches?

A. I can't be sure.

Moore testified that Kraus told him the length of the welds to place on the steel plate but Moore probably decided himself how many welds to make.

Further, plaintiff maintains that he does not need to show that the tack welds were defective and that Labor Law § 240[1] liability is shown because the tack welds failed. For the first time, plaintiff's counsel posits that the steel plate should have been welded on both sides, as opposed to just the one side, which is the case here.

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]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). 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), 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 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, which applies to both "falling worker" and "falling object" cases, 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]; *Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]). "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, supra*).

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, plaintiff has not demonstrated a *prima facie* case of liability under Labor Law § 240[1]. Plaintiff's injury was clearly related to the effects of gravity; plaintiff was hit with a falling object. Yet, not every

accident at a construction site due to the effects of gravity triggers liability under Section 240[1] (see *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] citing *Narducci v. Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). Here, there is insufficient evidence which would establish that the steel plate was improperly secured, thereby resulting in a violation of Labor Law § 240[1]. Kraus' affidavit establishes that the steel plate struck the diagonal plate in such a manner that the defendants should have reasonably anticipated, and further, that upon the application of ordinary force, the tack welds failed and the steel plate fell. What is missing here is testimony about what the defendants should have reasonably done under Labor Law § 240[1] to prevent plaintiff's accident.

Ortega v. City of New York (95 AD3d 125 [1st Dept 2012]), is informative. In that case, the First Department repeated that "[a] defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability" and that "a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury." In that case, the First Department reversed the trial court's denial of plaintiff's motion for summary judgment because "plaintiffs submitted testimony indicating that the accident could have been prevented had the tremie been secured to the ground."

On reply, plaintiffs' counsel argues that the tack welds on one side of the steel plate was clearly insufficient since it failed, but what plaintiff has failed to provide is testimony about what should have been done to protect him from the risk that the steel plate would fall on him, but wasn't. Further, these arguments advanced for the first time on reply are improperly before the court and are otherwise unsubstantiated.

Relatedly, however, the court rejects defendants' argument that the tack welds do not constitute a safety device within the meaning of Labor Law § 240[1]. The statute expressly contains a catch-all provision designed to encompass all safety devices which protect construction workers from falling objects. Further, assuming arguendo that the tack weld did not constitute a safety device, then plaintiff could still prevail on the theory that there were no adequate safety devices provided, since he was hit with a 200-pound steel plate. However, that need not be plaintiff's theory of the case, since the tack weld was utilized to stabilize the steel plate so that it did not fall while it was hoisted.

Accordingly, plaintiff's motion for partial summary judgment must be denied and defendants' remaining arguments are denied as moot.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment is denied.

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:

10/25/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.