Dortil v Kenilworth Apts., Inc.
2018 NY Slip Op 30587(U)
March 22, 2018
Supreme Court, Kings County
Docket Number: 511493/14
Judge: Bernard J. Graham
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gSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No.:511493/14
Motion Calendar No.
Motion Sequence No.

WALAXON DORTIL,

Plaintiff(s),

-against-

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

KENILWORTH APARTMENTS, INC.,
GUMLEY HAFT LLC and GUMLEY HAFT KLEIER INC.
N/K/A KLEIER RESIDENTIAL INC.,

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award partial summary judgment against the defendants as to the issue of liability pursuant to Labor Law § 240(1) and cross-motion by defendants to dismiss plaintiff's complaint.

Papers	Numbered
Notice of Motion and Affidavits Annexed......................	1-2
Order to Show cause and Affidavits Annexed............	
Answering Affidavits & cross-motion........................	3-4
Replying Affidavits..	5,6
Exhibits..	
Other:.......(memo)..	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The plaintiff, Walaxon Dortil ("Mr. Dortil"), has moved for an Order, pursuant to CPLR § 3212, awarding partial summary judgment to the plaintiff, as to the issue of liability, based upon the alleged violation of Labor Law § 240(1), against defendants Kenilworth Apartments, Inc. ("Kenilworth") and Gumley Haft LLC ("Gumley Haft"). The defendants oppose the relief sought by the plaintiff in his motion, and have cross-moved to dismiss plaintiff's complaint having alleged that the defendants are not liable for the injuries sustained by the plaintiff. The plaintiff

does not oppose the portion of defendants' cross-motion which seeks summary judgment and a dismissal of those causes of action which are based upon alleged violations by the defendants of Labor Law §§ 200 and 241(6).

Background:

The within action arises from a construction site accident on December 15, 2011, at 151 Central Park West, New York, N.Y. ("subject premises"), in which the plaintiff allegedly sustained serious injuries. The plaintiff alleges that on said date, he was employed by AM&G Waterproofing, LLC ("AM&G Waterproofing"), when he was struck by a piece of loose plywood that was being lowered from the sidewalk shed to an area below while façade work was being performed at the premises. During the course of his employment, the plaintiff is alleged to have been standing without a safety harness, on top of what he has described as a platform or plank, on top of a truck and higher than the roof of the cabin of the truck, when a plywood plank fell onto him causing him to fall and resulting in his injuries.

This action, in which the plaintiff seeks damages for personal injuries, was commenced on behalf of the plaintiff, on or about December 5, 2014, by the service of a summons and complaint against the defendants. The plaintiff, in commencing this action, asserted a cause of action based on defendants' violation of Labor Law §§ 200, 240(1) and 241(6).

On January 7, 2015, the action was discontinued against defendant Gumley Haft Kleier Inc. n/k/a Kleier Residential Inc. On January 23, 2015, defendants Kenilworth Apartments and Gumley Haft interposed an answer to plaintiff's summons and complaint.

At the time of the incident, defendant Kenilworth Apartments owned the subject property and Gumley Haft managed the premises. It is undisputed that the defendant Kenilworth had

entered into a contractual agreement with AM&G Waterproofing for the latter to perform façade repair work at the subject premises.[1]

Thereafter, the parties conducted discovery which included the plaintiff providing responses to defendant's Demand for a Verified Bill of Particulars and the depositions of the plaintiff. Also deposed was Steven Fink, who was employed by Gumley-Haft as a resident manager, and who submitted to an Examination Before Trial on behalf of the defendants. A Note of Issue was filed by the plaintiff on October 20, 2016.

Plaintiff's contentions:

The plaintiff, in support of his motion for summary judgment as against the defendants, relies upon his deposition testimony, as well as that of Stephen Fink, and relevant case law. Plaintiff alleges that on the date of the incident he was working for AMG Waterproofing and had been in their employ since 2006 as a helper. At the time of the incident, plaintiff and his co-workers were working on the exterior of the building. The plaintiff alleges that a sidewalk bridge had been erected around the perimeter of the building and that he along with his co-workers were transferring materials from the sidewalk bridge into a truck which was owned by AMG Waterproofing. The truck had been positioned underneath the sidewalk bridge. The plaintiff testified he was standing on a "platform", a "plank" or "something to step in" on top of the truck which was higher than the roof of the cabin of the truck (see Dortil EBT p. 67-68, 72, 91-92, 98, 102). The plaintiff further testified that his supervisor, (Mr. Holdek), who was positioned on the sidewalk bridge above the plaintiff, was passing materials (plywood planks) from the sidewalk bridge down to the plaintiff, and plaintiff was then passing them back down to another co-worker who was placing them inside of the truck. The planks of plywood that were being passed were

[1] AMG Waterproofing specializes in the renovation of building exteriors and roof restoration.

four-by-eight, loose, and were not tied to anything, and were being used as a platform to raise materials for the bricklayers (see Dortil EBT p. 67-69, 80-82, 99, 102-103).

The plaintiff alleges that after engaging in the activity of receiving and passing loose plywood planks for about one-half hour, a plywood plank fell out of the hands of the supervisor who was situated above him and it hit the plaintiff's knees which caused the plaintiff to fall onto his back onto the roof of the truck (see Dortil EBT p. 67-68, 83,101,106). Plaintiff testified that during the course of his work that day, he was wearing a hard hat which had been supplied by his employer, and was also wearing construction boots, gloves and a sweater (see Dortil EBT p.63). Plaintiff alleges that as a result of the incident he sustained serious injuries to his back and left knee.

Plaintiff asserts that Labor Law § 240(1) imposes absolute liability upon an owner and a contractor where a breach of this statutory duty proximately causes an injury (Rocovich v. Consolidated Edison Co., 78 NY2d 509, 513, 577 NYS2d 219. Labor Law § 240(1) provides for extra safety protection for laborers who are engaged in certain occupational hazards and from such gravity related accidents as falling from a height or being struck by a falling object (see Jacome v. State, 266 AD2d 345, 698 NYS2d 320 [2nd Dept. 1999]). "Falling objects" are associated with the failure to use a different type of safety device (e.g., ropes, pulleys, irons) (see Narducci v. Manhasset Bay Association, 96 NY2d 259, 727 NYS2d 37 [2001]).

Plaintiff maintains that had defendants furnished or erected a proper hoist or other protective device, it would have prevented the plywood plank from falling or striking the plaintiff. Plaintiff contends that he was exposed to an elevation related risk since he was standing without a safety harness on a platform or a plank on top of a truck which was higher than the roof of the cabin of the truck, and defendants failed to furnish any protective safety devices that could have prevented his fall from the platform. Plaintiff asserts that the absence of such devices was a

proximate cause of the plywood plank falling and striking the plaintiff, as well as the plaintiff falling from the platform.

Plaintiff further maintains that the plywood sheets which were being passed manually from above the scaffold bridge down to the plaintiff at the top of the truck, and then down to a worker on the ground, were clearly an object which required securing by way of hoists, ropes and/or similar types of protective devices. Plaintiff further contends that securing the plywood sheets was necessary as there was a foreseeable harm, that as a result of the force of gravity, the plywood would fall down from the sidewalk bridge and injure the plaintiff.

Defendants' contention:

The defendants in support of their cross-motion, and in opposition to plaintiff's motion, maintain that they should not be liable to the plaintiff pursuant to Labor Law § 240(1).

Defendants contend that the plaintiff does not qualify as a falling worker nor does the plywood qualify as a falling object pursuant to Labor Law § 240(1). In asserting this argument, defendants maintain that the plywood sheets were relatively light in weight and easily maneuvered, and thus, should not qualify as a falling object under this statute.

Defendants maintain that a fall from a pick-up truck is likewise not covered by this statute (see Dilluvio v. City of New York, 95 NY2d 928 [2000]). The defendants in attempting to minimize the plaintiff's fall assert that the plaintiff went from a standing position on the flatbed of the truck (or from a platform within it) onto the top of a vehicle cab which is a much smaller distance than if he had fallen to the ground. Defendants further assert that the distance between the back of the pickup or flatbed truck and the ground is so small, that the risk of a worker falling off the back of a pickup or flatbed truck is, as a matter of law, not an extraordinary elevation risk that is protected by Labor Law § 240(1), and is one of the usual and ordinary dangers of a construction site (Toefer v. Long Is. R.R., 4 NY3d 399, 407-409 [2005]).

Defendants maintain that the plaintiff has not met his burden of establishing that the object fell while being hoisted because of the absence or inadequacy of a safety device.

In opposing the motion for summary judgment, defendants maintain that the extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity". (Ross v. Curtis-Palmer Hydro-Elect Co., 81 NY2d 494, 501, 601 NYS2d 82, 86 [1993]).

Discussion:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law, in making this determination with respect to the motion by the plaintiff for partial summary judgment as to the issue of liability, as against the defendants, based upon an alleged violation of Labor Law § 240(1), as well as the cross-motion of the defendants which seeks to dismiss plaintiff's complaint.

Labor Law § 240(1) requires property owners, among others, to provide workers with "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall so be constructed, placed and operated as to give proper protection" to the workers. The purpose of this statute is to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 500; Zimmer v. Chemung County Perf. Arts, 65 NY2d 513, 520 [1985]).

The defendants, Kenilworth Apartments and Gumley Haft do not dispute that they are the owner and managing agent of the property in which the incident occurred. Nonetheless, the

plaintiff in support of his motion, offered the deposition testimony of Stephen Fink, the resident manager for Gumley Haft, (who has been in their employ for twenty-seven years), that his company had retained the services of plaintiff's employer (AM&G Waterproofing) to perform repair work on the façade of the subject premises. While Mr. Fink testified that he did not control the work being performed, he did oversee the work and he was on site while the work was being performed (see Fink EBT p. 16, 18).

The argument of defendants that they had no duty to the plaintiff because they did not supervise or control the work being performed, and thus, Labor Law section 240(1) does not apply to them, is not persuasive. Labor Law § 240(1) imposes a non-delegable duty upon owners and general contractors to provide safety devices to protect workers from elevation related risks. The owner or agent is liable even if the owner had no role in the supervision or control of the work being performed (see Haimes v. New York Tel. Co., 46 NY2d 132 [1978]); Rocovich v. Consolidated Edison Co., 78 NY2d at 513; Santass v. Consolidated Investing Co., 10 NY3rd 333, 858 NYS2d 67 [2008]). Additionally, "it is well settled that the injured's contributory negligence is not a defense to a claim based on Labor Law § 240(1), and that the injured's culpability, if any, does not operate to reduce the owner/contractor's ability for failing to provide adequate safety devices (Bland v. Manocherian, 66 NY2d 452, 460-461 [1985]); Stolt v. General Foods Corp., 81 NY2d 918, 919, 595 NYS2d 650 [1993]).

Additionally, the plaintiff established that he came within the special class for whose benefit absolute liability is imposed, by demonstrating that he was both permitted to or suffered to work on a building or structure (see Whelen v. Warwick Civic and Social Club, 47 NY2d 970, 419 NYS2d 959 [1979]). Plaintiff was a member of the special class of workers entitled to the protections of the Safety Section of Article 10 of the New York State Labor Law as he was either a "mechanic, working man, or laborer working for hire" [Labor Law §2(5)], and that he was "permitted or suffered to work" [Labor Law §2(7)], "at the place of the occurrence."

The type of accident that triggers Labor Law § 240(1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have shielded the injured worker from harm directly flowing from the application of the force of gravity to an object or person (see Runner v. New York Stock Exchange, Inc.,13 NY3d 599, 895 NYS2d 279 [2009]). In Runner, the Court of Appeals expanded the scope of Labor Law Section 240(1), by determining that coverage applies wherever the harm to plaintiff was the direct consequence of the application of the force of gravity to a person or object.

Similar findings were made by the Court in Gonzalez v. Glenwood Mason Supply Co., Inc., 41 AD3d 338, 839 NYS2d 74 [1st Dept. 2007]. The Gonzalez court determined that the elevation risk fell within the ambit of Labor Law § 240(1) and that summary judgment was warranted where the plaintiff was hit with a load of cinder blocks that became loose and fell on him as it was being hoisted from a flatbed truck by a fork boom and lowered onto a pallet near where he was standing.

Additionally, the Court in Escobar v. Safi, 150 AD3d 1081, 55 NYS3d 350 [2nd Dept. 2017], determined that the plaintiff was entitled to summary judgment on a Labor Law § 240(1) claim, where it was demonstrated that the defendant failed to provide an adequate safety device to protect the worker, and that the failure was a proximate cause of the injuries that were sustained. The Court stated that their findings in this matter with respect to Labor Law § 240(1), where plywood was being hoisted, would be the same in either of the following instances: (1) if the plywood was not properly secured as it was being pulled up to a roof, or (2) whether the sheet of plywood fell from the hands of plaintiff's co-workers as it was being installed or about to be installed.

To recover under Labor Law § 240(1), the plaintiff must demonstrate a violation of the statute and such violation proximately caused his or her injuries. (Poracki v. St. Mary's R.C. Church, 82 AD3d 1192, 1194 [2nd Dept. 2011]). Here, the plaintiff established that the

defendants failed to furnish or erect a proper hoist or other protective device to prevent a loose plywood plank from falling and striking the plaintiff. While the defendants maintain that the plywood was relatively light and easily manageable, that argument fails to properly consider that the plywood could be dropped from an above elevation and fall on the plaintiff who was situated below. This gravity related situation is the type of work-place incident that this statute was designed to address and afford protection.

Additionally, plaintiff was exposed to an elevation related risk, by standing on a platform on top of a truck, without a safety harness and/or other protective device that could have prevented his fall from the platform. It was defendants' obligation to ensure that the plaintiff was provided with an adequate safety device with which to perform his work (see Leconte v. 80 East End Owners Corp., 80 AD3d 669 [2nd Dept. 2011]).

To defeat a motion for summary judgment after plaintiff has set forth a prima facie case for judgment as a matter of law, the opponent must submit some admissible proof to raise a question of fact to deny summary judgment (see Zuckerman v. City of New York, 49 NY2d 557 [1980]; Friends of Animals, Inc. v. Associated Fur Mfrs., 46 NY2d 1065 [1979]). The defendants, as the owner and agent of the property, having failed to establish that there was not a violation of Labor Law § 240(1), the motion for partial summary judgment on the issue of liability, as against defendants Kenilworth Apartments, Inc. and Gumley Haft LLC, as to this statute, is granted.

Conclusion:

The plaintiff's motion for partial summary judgment as to liability is granted as against defendants, Kenilworth Apartments, Inc. and Gumley Haft LLC, due to the defendants having violated Labor Law § 240(1). The cross-motion by defendants Kenilworth Apartments, Inc. and Gumley Haft LLC, which seeks summary judgment and a dismissal of those causes of action of the plaintiff which are based upon alleged violations of Labor Law §240(1) is denied. As to the

portion of the cross-motion which seeks dismissal of plaintiff's Labor Law §§ 200 and 241(6) claims, the plaintiff's claims are dismissed as to those sections.

This shall constitute the decision and order of this Court.

Dated: March 22, 2018
Brooklyn, New York

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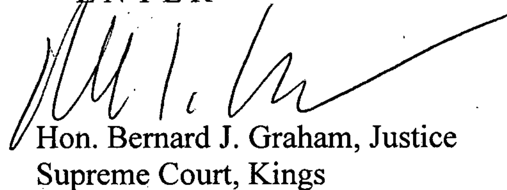

Hon. Bernard J. Graham, Justice
Supreme Court, Kings