

Sykes v City of New York
2019 NY Slip Op 32292(U)
July 30, 2019
Supreme Court, New York County
Docket Number: 152962/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 21EFM

Justice

INDEX NO. 152962/2015

MARCUS SYKES, MOTION SEQ. NO. 003

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK TRANSIT AUTHORITY, and METROPOLITAN TRANSPORTATION AUTHORITY,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion for REARGUMENT

In this Labor Law action, defendants the City of New York ("the City") and Metropolitan Transportation Authority ("MTA") move, pursuant to CPLR 2221(d), to reargue a prior decision and order of this Court rendered on August 17, 2018. In that decision, this Court decided, inter alia, that the City and MTA were liable for plaintiff Marcus Sykes' ("Sykes") injuries under New York Labor Law § 240(1). The moving defendants on the instant motion seek reargument as to that determination on the ground that this Court misapprehended the underlying facts in its prior order. Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was injured in April of 2014 while he was working at a subway construction project underneath Second Avenue and 92nd Street in Manhattan. (Doc. 101 at 2.) The City and MTA had contracted with plaintiff's employer to perform demolition, excavation, repairing, and

other construction work at the premises. (*Id.* at 2–3.) In its prior decision, this Court described the nature of plaintiff’s work as follows:

Plaintiff . . . was to dismantle scaffolds, beams, and plywood that had been acting as a temporary support structure for the surrounding concrete.

To perform his work, plaintiff was required to stand on planks that had been placed on scaffolds. The scaffolds were elevated more than four feet above the ground. Plaintiff represented . . . that, before the workers could dismantle the beams, they had to remove the wing nuts which were securing the scaffolds and beams in place. After the wing nuts were removed, the workers pried loose the plywood that was resting on top of the beams with crowbars and slid the plywood toward the front of the scaffolds. The pieces of plywood would be lowered down to other workers standing on the ground, and those workers would then pile them somewhere else at the site. According to plaintiff, this effort required the teamwork of two or three carpenters due to the weight of the beams and plywood. . . .

When the accident occurred, plaintiff was removing a wing nut while his coworker, Israel Fernandez, was in the process of loosening plywood above plaintiff. Fernandez was working on a scaffold approximately four feet away from plaintiff when a piece of plywood that he loosened fell and struck plaintiff in the head. Plaintiff was allegedly knocked off his scaffold from the impact. Fernandez later stated in an affidavit that each piece of plywood weighed between 100–200 pounds. Nothing other than the beams and scaffolds supported the plywood, and there were no railings on the scaffolds to prevent plaintiff from falling.

(*Id.* at 3–4 (internal citations to the motion papers omitted).)

Based on the foregoing set of facts, this Court held that the City and MTA were liable for plaintiff’s injuries under New York Labor Law § 240(1), reasoning that:

The descriptions of how the plywood struck plaintiff are consistent. Plaintiff stated that workers were to slide the pieces of plywood down to other workers on the ground once the wing nuts were loosened. It was in the process of loosening a wing nut that plaintiff was struck in the head from above by a piece of plywood. Further, Fernandez, plaintiff’s coworker, said in his affidavit: “I was using a crowbar to remove a sheet of plywood from one of the concrete forms when the entire sheet of plywood with concrete attached to it

fell and the plywood with the form attached to it struck [plaintiff] on the head I would estimate the weight of the object that fell and struck [plaintiff] to be between 100-200 lbs.” Defendants have not raised any triable issues of fact in response, and these statements lead this Court to conclude that plaintiff was engaged in an activity covered by § 240(1). Additionally, given its estimated weight, the lowering of the unsecured plywood constituted an elevation-related hazard contemplated by § 240(1) and, thus, a protective device preventing the plywood from falling should have been utilized. Plaintiff has therefore met his burden of establishing that the plywood fell because of the absence of an adequate safety device.

The fact that the plywood was not being hoisted or secured at the time of the accident does not have any bearing on the outcome. Defendants argue that liability should not be imposed because objects that are deliberately allowed to fall are not objects that are required to be secured by protective devices. However, cases addressing objects which are deliberately thrown are inapposite herein. Although plaintiff’s dismantling of the beams, scaffolds, and plywood was deliberate, no evidence or testimony has been offered by defendants establishing that the falling of the plywood was intentional. In fact, the relevant testimony of plaintiff’s 50-h hearing indicates just the opposite: the construction workers were to slide the pieces of plywood down to other workers on the ground. Thus, the facts of this case are not analogous to those cases in which no liability was found where the falling object was integral to the work being performed.

(*Id.* at 10–11 (internal citations omitted).)

This Court’s prior decision was rendered on August 17, 2018. (*See id.*) The City and MTA now move, pursuant to CPLR 2221(d), for reargument on the prior decision to the extent that this Court granted summary judgment to plaintiff on the issue of defendants’ liability under Labor Law § 240(1). (Doc. 96.)

In support of their motion, defendants assert that this Court misapprehended the facts and, consequently, the controlling caselaw. They claim that the following facts were misstated:

- First, this Court, in writing that Fernandez was loosening a piece of plywood “above plaintiff,” indicated that plaintiff and Fernandez were

working at different elevation heights. (Doc. 97 at 4.) According to defendants, however, that description was incorrect, since plaintiff and Fernandez were actually “working on the same plane just on different scaffolds set-up four feet apart.” (*Id.*; *see also id.* at 8.)

- Second, at the time the accident occurred, the two were not actually lowering the plywood to the ground level to other workers. (*Id.*) Rather, plaintiff was in the process of loosening a wingnut and removing the beams, while Fernandez was prying the plywood from the hardened concrete. (*Id.*) In other words, plaintiff’s work was a multi-step process: The workers were to loosen the beams and detach the plywood from the hardened concrete, and then lower the plywood to the ground level. (*Id.* at 4–5.)
- Third, the prior order indicated that the plywood “was resting on top of the beams.” (Doc. 97 at 5.) However, defendants point out that the plywood was set in the dried concrete, not on top of the beams. (*Id.* at 6.)
- Fourth, while this Court stated that plaintiff was “struck in the head from above by a piece of plywood” (*id.*), defendants assert that the evidence does not actually establish that the plywood came from above, since Fernandez was working on the same level a few feet away from plaintiff, and plaintiff did not actually see the plywood until after he was struck (*id.*).

- Fifth, the decision states that plaintiff had “loosened the wingnut,” which contradicts his deposition testimony that he was in the process of loosening the wingnut. (*Id.* at 7.) Defendants argue this misconception led the Court to mistakenly believe that the plywood was being lowered by plaintiff when he was injured. (*Id.*) They emphasize that, at the time of his accident, it was actually being pried away from the concrete by Fernandez. (*Id.*)
- Sixth, defendants take issue with this Court’s use of the word “plywood” throughout the prior decision. Again, defendants argue that plaintiff did not actually see what struck him (*id.* at 8), and that Fernandez used the word “object” in his affidavit to describe what struck plaintiff, rather than “plywood.” (*Id.*) According to the City and MTA, this is significant because this Court referred to the weight of the plywood in determining that a protective device under § 240(1) should have been used on the site. (*Id.* at 8–9.)

Defendants claim that the cumulative effect of these purported factual inaccuracies resulted in this Court misapplying controlling caselaw. They further insist that plaintiff and Fernandez were not lowering the beam at the time of the incident, but rather were prying it from the concrete when it struck plaintiff in the head. (Doc. 97 at 5.) Defendants assert that, because plaintiff and Fernandez were prying the plywood from the concrete, § 240(1) is inapplicable since the plywood was an object that was being deliberately unsecured. (*Id.* at 10–11.) Further, defendants argue that summary judgment was inappropriately granted because neither plaintiff nor this Court identified what kind of safety device should have been used to prevent his accident. (*Id.* at 12–13.)

In opposition, plaintiff maintains that it makes no difference under § 240(1) that he and Fernandez were working on the same level. (Doc. 103 at 1–2.) What matters, plaintiff argues, is that he was exposed to an elevation-related hazard because Fernandez was removing plywood that was situated above him (*id.* at 4) and because there were no safety devices being used that could have prevented the plywood’s descent (*id.* at 5–6). Further, plaintiff argues that the plywood was a falling object within the scope of § 240(1) because, although it was being deliberately removed from the dried concrete by Fernandez, it was not something that was deliberately dropped. (*Id.* at 7–8.) Thus, plaintiff insists that defendants’ reargument motion must be denied.

LEGAL CONCLUSIONS:

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

This Court determines that the motion must be denied. First, with respect to the underlying facts, defendants argue that this Court’s prior decision was factually incorrect because, *inter alia*, it suggested that a piece of plywood situated above plaintiff fell onto him when (a) plaintiff cannot be sure that the plywood came from above since he admitted to not seeing the plywood until after he was hit and (b) Fernandez uses the word “object” in his affidavit when describing how the accident occurred. (Doc. 97 at 6–8.) Contrary to their assertions, all the evidence strongly indicates

that a piece of plywood fell onto plaintiff as his coworker, Fernandez, was loosening it a few feet away from him. In his affidavit, Fernandez stated:

I was using a crowbar to remove a sheet of plywood from one of the concrete forms when the entire sheet of plywood with concrete attached to it fell and the plywood with the form attached to it struck [plaintiff] on the head . . . I would estimate the weight of the object that fell and struck [plaintiff] to be between 100-200 lbs.

(Doc. 68 at 3.) Moreover, plaintiff testified that he saw the piece of plywood after he got hit: “After I was struck, I looked to see what I got hit by, and I could see it was a piece of plywood.” (Doc. 64 at 71.) When read in conjunction with each other, plaintiff’s and Fernandez’s testimony make it clear that a piece of plywood weighing at least 100 pounds struck plaintiff as Fernandez was loosening it a few feet away. (See Docs. 64; 68.) That the plywood came from above is confirmed by Fernandez’s representation that it fell. (Doc. 68 at 3.) Defendants’ attempts to call this into question are unconvincing. Second, the prior decision was not inconsistent with plaintiff’s testimony that the accident occurred while he was loosening a wingnut. Indeed, the prior decision stated: “It was in the process of *loosening a wing nut* that plaintiff was struck in the head” (Doc. 101 at 10 (emphasis added).) Third, in the prior decision, this Court held that Fernandez was “in the process of loosening plywood” (*Id.* at 3.) Thus, this Court’s decision recognized, as defendants assert in the instant motion, that plaintiff and Fernandez were not lowering the beam at the time of the incident, but rather that Fernandez was in the process of prying it from the concrete. (*See id.*)

Defendants argue not only that this Court misapprehended the underlying facts, but also that it misapplied controlling caselaw in granting summary judgment under New York Labor Law § 240(1) to plaintiff. In lawsuits based on a falling object, plaintiffs must demonstrate a violation of § 240(1) and show that such violation was a proximate cause of injury. (*See Kupiec v Morgan*

Contr. Corp., 137 AD3d 872, 873 [2d Dept 2016].) In doing so, “the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured or required securing for the purposes of the undertaking.” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662–63 [2014] (internal citations and quotations omitted).)

The thrust of defendants’ legal position in this regard is that, because Fernandez was intentionally prying the plywood from the concrete, the plywood does not constitute a falling object under § 240(1). (Doc. 97 at 10–11.) In support of this argument, they cite, *inter alia*, *Scarogni v Metropolitan Transp. Auth.*, 2018 NY Slip Op 31401[U] (Sup Ct, NY County 2018), and *Torres v Al-Stone, LLC*, 2017 WL 6731870 (Sup Ct, Bronx County 2017). (Docs. 104 at 4; 105–06.) Again, although plaintiff’s and Fernandez’s dismantling of the beams, scaffolds, and plywood from the concrete was deliberate, defendants offer no evidence—other than conclusory statements—that the falling of the plywood was intentional. Both *Scarogni* and *Torres* involved situations where falling objects were integral to the work being performed. (*See Scarogni*, 2018 NY Slip Op 31401[U] at *5 (falling tie wire not held to be within the scope of § 240[1] where the wire was being used to secure other materials); *Torres*, 2017 WL 6731870 at *4 (falling plywood not within § 240[1]’s scope when the plywood was meant to fall).) Although the instant action may at first seem analogous to *Torres*, which also involved a falling piece of plywood that had been pried away from concrete (*see Torres*, 2017 WL 6731870 at *4), the court in *Torres* held that § 240(1) was not triggered because the goal of the work was to have the plywood fall (*see id.*). In this case, the evidence strongly indicates that the goal of the work was *not* to have the plywood fall, especially in light of the fact that plaintiff and Fernandez were to deliberately slide the plywood to other workers on the ground. (Doc. 97 at 4–5.) Indeed, defendants admit that this was a “multi-step process which involved the necessary act of prying the plywood from the cured

concrete first before the workers could then hand the plywood down to workers below.” (*Id.*)
Finally, “[b]y submitting an expert affidavit, plaintiff met his initial burden of showing . . . that
statutorily enumerated safety devices could have prevented the accident.” (*Bonaerge v Leighton
House Condominium*, 134 AD3d 648, 649 [1st Dept 2015].) (*See* Doc. 72 at 4–5 (expert affidavit
of Herbert Heller in support of plaintiff’s underlying summary judgment motion).)

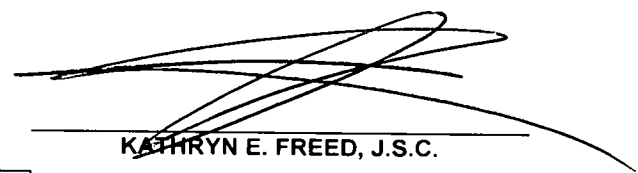
For the foregoing reasons, it is hereby:

ORDERED that defendants the City of New York and Metropolitan Transportation
Authority’s motion for reargument is denied; and it is further

ORDERED that defendants’ counsel shall serve a copy of this order with notice of entry
upon all parties within 30 days of entry; and it is further

ORDERED that this constitutes the decision and order of this Court.

7/30/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
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