Bruno v Hepworth
2019 NY Slip Op 33946(U)
October 23, 2019
Supreme Court, Orange County
Docket Number: EF004020-2017
Judge: Catherine M. Bartlett

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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BRIAN BRUNO,

Plaintiff,

-against-

AMY HEPWORTH, AMY HEPWORTH FARM, INC., HEPWORTH FARM, LLC and THE HEPWORTH FAMILY LIMITED PARTNERSHIP,

Defendants.

----------x

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

Index No. EF004020-2017

Motion Date: October 18, 2019

The following papers numbered 1 to 5 were read on Plaintiff's motion for partial summary judgment on his claims under Labor Law §§ 240(1) and 241(6):

Notice of Motion - Affirmation / Exhibits - Expert Affidavit 1-3

Affirmation in Opposition / Exhibit 4

Reply Affirmation 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

A. Pertinent Facts

Plaintiff Brian Bruno was injured on January 13, 2017 in a fall from the roof of a building under construction on Defendants' premises in Milton, New York. Plaintiff, employed by Dennis Lounsbury Builders, Inc., was installing roof panels on the building when, he avers, he lost his footing and fell from the eaves of the roof approximately 18 feet to the ground.

He commenced this action asserting *inter alia* claims under Labor Law §§ 240(1) and 241(6). Moving for partial summary judgment, Plaintiff claims that Defendants' violation of Section 240 – in failing to provide him with safety devices so constructed, placed and operated as to give proper protection – proximately caused his injuries. Defendants, in opposition, claim that Plaintiff chose for no good reason not to use an available safety harness that would have prevented his fall, and that his own actions were the sole proximate cause of injury.

1. Deposition Testimony of Plaintiff Brian Bruno

Plaintiff acknowledged that he was an experienced roofer and was aware via OSHA training that he was required to use personal protective equipment when working at a height above six (6) feet. He owned a safety harness which was available on site, in his work truck, on the date of the accident. He was not wearing it at the time of the accident because he was not instructed to use it. He testified:

Q When you took the OSHA 10 course, were you instructed in that course to use those safety devices if you were working at an elevation above 6 feet ?

A Yes.

....

Q So you're saying unless someone physically told you to use those devices, you weren't going to use them ?

A Not by personal choice. The boss made the call.

Q I just want to understand that. So unless the boss told you to wear those safety devices, you weren't going to wear them ?

A Yes.

Q And why is that ?

A Because in order to wear your safety harness, other things have to be done, including like a line being built on the roof.

Q Okay. And explain to me what you mean by that.

A You have to set up brackets, run the safety line.

Q Now, who would do that ?

A James Pine.

.....

Q What safety devices would have prevented you from falling off the roof?

A A lanyard with a safety line.

Q And how would that be set up, a lanyard with a safety line ?

A It hooks on (indicating).

Q Could you explain it to me, what you mean by that ?

A There is a lanyard on your harness with a hook on it, and it hooks onto the safety line.

.....

Q ...Can you just tell me how a lanyard would be installed on...the picture depicting this building ?

A There would be brackets at the beginning of the roof and the end of the roof with a safety line connecting, and then your lanyard. Usually there is another device. I don't know what it's called. But it – a retractable. It's called a retractable. And that would allow you to have ample length to move around.

Q So basically, you would wear your safety harness, and then you'd clip onto the safety line; is that how it would work ?

A The retractable would be in between your safety line and your harness.

.....

Q ...Just explain to me the issue of the retractable. How would that work ?

A That hooks onto the safety line, and it allows it to extend and go back into. But once it goes too fast, it locks.

(*See,* Bruno Deposition, pp. 13, 15, 35, 45, 50-54, 88-90)

2. Deposition Testimony of Jeff Lounsberry

Jeff Lounsberry, Plaintiff's employer, testified that his employees all possessed "harnesses and cable retractors to hook to that they could mount on the roof." He testified:

Q Have you ever set up the harness system on a roof?

A Yeah.

Q Can you just tell us briefly how that's done ?

A It's a plate that you screw to the roof and then this cable system gets hooked to it and then you just hook it to your harness. Any quick movement, like a fall, the cable stops, like a seat belt.

Q Sir, had Brian Bruno been wearing a harness, could this accident have been prevented?

A Yes.

(*See,* Lounsberry Deposition, pp. 19-20, 31-32)

B. Labor Law §240(1)

Subdivision 1 of Section 240 of the Labor Law of the State of New York provides in pertinent part that:

> 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.

Labor Law §240 was designed to place the responsibility for a worker's safety squarely on the owner and contractor rather than the worker. *See, Felker v. Corning Inc.*, 90 NY2d 219 (1997). It imposes absolute liability for a statutory violation that was a proximate cause of the worker's

injury. *See, Barreto v. MTA,* 25 NY3d 426 (2015); ***Blake v. Neighborhood Housing Services of NYC,*** 1 NY3d 280 (2003).

1. Safety Harnesses

As a matter of law, a safety harness is inadequate to provide proper protection against falls from an elevated worksite in the absence of an appropriate anchorage point or place to "tie off." *See, Vetrano v. J. Kokolakis Contracting, Inc.,* 100 AD3d 984, 985-986 (2d Dept. 2012); *Gomes v. Pearson Capital Partners LLC,* 159 AD3d 480, 481 (1st Dept. 2018); *Anderson v. MSG Holdings, LP,* 146 AD3d 401, 402-403 (1st Dept.), *lv. dismissed* 29 NY3d 1100 (2017); *Hoffman v. SJP TS, LLC,* 111 AD3d 467 (1st Dept. 2013); *Phillip v. 525 East 80th Street Condominium,* 93 AD3d 578, 579 (1st Dept. 2012); *Cordeiro v. TS Midtown Holdings, LLC,* 87 AD3d 904, 905 (1st Dept. 2011); *Miglionico v. Bovis Lend Lease, Inc.,* 47 AD3d 561, 564-565 (1st Dept. 2008). *Cf., Guaman v. City of New York,* 158 AD3d 492, 492-493 (1st Dept. 2018).

Accordingly, in *Vetrano v. J. Kokolakis Contracting, Inc., supra,* the plaintiff was awarded summary judgment under Labor Law §240 where there was no safety line to which he could attach his safety harness at the location of the accident:

> The plaintiffs demonstrated their prima facie entitlement to judgment as a matter of law on the Labor Law §240(1) cause of action. In order to prevail on a cause of action pursuant to Labor Law §240(1), a plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his injuries [cit.om.]. Here, the injured plaintiff's deposition testimony established that he had not been provided with appropriate safety devices that could have prevented his fall and that the lack of such devices was the proximate cause of the accident. Specifically, in order to perform his assigned task to establish connections between steel beams, the injured plaintiff walked along the top of a steel beam. He wore a safety harness with a hook that could be attached to a safety line. At the first location where he worked, he attached himself to a safety line. However, as he walked along the beam to a second location, about 20 feet away, no safety lines were available. Moreover, there was no safety netting below.

> The injured plaintiff slipped on what he believed was ice on the beam and fell to the floor below.
> ....
> In opposition to the plaintiffs' prima facie showing, [defendants] failed to raise a triable issue of fact....

Id., 100 AD3d at 985-986.

Anderson v. MSG Holdings, LP, supra, is particularly instructive in the circumstances of this case. The plaintiff therein was awarded summary judgment under Labor Law §240, even though he had been instructed to comply with OSHA's requirement that protective equipment be used at heights above six (6) feet, because the defendants (like the Hepworth Defendants here) did not refute the plaintiff's testimony that there was no place for him to tie off his harness:

> We find that plaintiff was not provided with an appropriate tie-off notwithstanding defendants' claim that he was instructed to follow [OSHA] subpart M. "Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold...or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of gravity to an object or person" [cit.om.]. To prevail on a Section 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of his injuries [cit.om.].
>
> Plaintiff established prima facie that while subjected to an elevation-related risk, he was injured due to defendants' failure to provide him with proper fall protection, namely, an appropriate place to which to attach his harness.
>
> Defendants argue that plaintiff is not entitled to the protection of Labor Law §240(1) because he was the sole proximate cause of his injury [cit.om.]. They contend that plaintiff was instructed to comply with OSHA subpart M, which requires the use of a safety device for work at an elevation of six feet or higher while installing prefabricated concrete panels, and that he refused to attach the harness that was provided. However, defendants have not sufficiently refuted plaintiff's testimony that there was no place for him to tie off the harness [cit.om.].

Id., 146 AD3d at 402-403.

Conversely, in *Guaman v. City of New York, supra,* where the plaintiff was provided with both a harness and safety line and did not follow an instruction to remain tied off at all times, his

own actions were deemed to be the sole proximate cause of injury:

> A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge [cit.om.]
>
> Defendants established prima facie that plaintiff's decedent was the sole proximate cause of his accident with evidence that a harness and safety rope system was in place on the roof, that the decedent had been instructed to remain tied off at all times while on the roof, and that he could not have reached the skylight through which he fell if he had remained tied off. In opposition, plaintiff offered nothing more than speculation....

Id., 158 AD3d at 492-493.

2. Plaintiffs Established *Prima Facie* Entitlement To Summary Judgment Under Labor Law §240(1), And Defendants Failed To Demonstrate The Existence Of Any Triable Issue Of Fact

To establish *prima facie* entitlement to summary judgment under Labor Law §240(1), the plaintiff must establish that a Section 240 violation proximately caused his injury. *See, Blake v. Neighborhood Housing Services of NYC, supra*, 1 NY3d at 289. "Once the plaintiff makes a prima facie showing the burden shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment (*see Klein v. City of New York*, 89 NY2d 833, 835...[1996])." *Blake v. Neighborhood Housing Services of NYC, supra*, 1 NY3d at 280, 289 n. 8.

Under the case authority cited above, Plaintiff's evidence that while subjected to an elevation-related risk, he was injured due to Defendants' failure to provide him with proper fall protection – namely, an appropriate place to which to attach his safety harness – established his

prima facie entitlement to summary judgment under Labor Law §240(1). Defendants in opposition did not refute Plaintiff's testimony that he had no place to tie off his safety harness. Mr. Lounsberry testified that "[i]'s a plate that you screw to the roof and then this cable system gets hooked to it," but there was no evidence that any plate was screwed to the roof at the time of the accident. Moreover, contrary to Defendants' suggestion (Sherwin Aff., p.8), there is no evidence that Plaintiff "had...tie off equipment available to him on site in his work truck." As a matter of law, then, the Defendants violated Labor Law §240(1), and their failure to provide Plaintiff with proper protection was indisputably a proximate cause of his injury. Therefore, Plaintiff's own actions, whether in failing to wear his safety harness, failing to comply with OSHA or otherwise, cannot have been the sole proximate cause of injury. Defendants reliance in this regard on such cases as *Cahill v. Triborough Bridge & Tunnel Authority,* 4 NY3d 35 (2004) and *Gallagher v. New York Post,* 14 NY3d 83 (2010) is unavailing because, as noted above, Plaintiff did not have adequate safety devices available to him.

Consequently, Plaintiff is entitled to partial summary judgment on liability on his claim under Labor Law §240(1). *See, Vetrano v. J. Kokolakis Contracting, Inc., supra*; *Anderson v. MSG Holdings, LP, supra.*

C. Labor Law §241(6)

Plaintiff seeks partial summary judgment on his cause of action under Labor Law §241(6) insofar as it is based on alleged violations of Industrial Code Sections 12 NYCRR 23-1.24(a) and 12 NYCRR 23-1.24(c). However, neither of these provisions applies in the circumstances of this case.

12 NYCRR 23-1.24(a) governs the use of safety devices on "any roof having a slope steeper than one in four inches." *Id. See, Amirr v. Calcagno Construction Co.*, 257 AD2d 585 (2d Dept. 1999). Jeff Lounsberry testified that the roof in question here had a very small slope of just one inch in twelve inches. Plaintiff produced no evidence to the contrary. As a matter of law, then, 12 NYCRR 23-1.24(a) does not apply. *See, Amirr v. Calcagno Const. Co., supra.*

12 NYCRR 23-1.24(c) prescribes the protection required for persons "using roofing machines" on roofs without parapets. There is no evidence that the work Plaintiff was assigned to perform at the time of his accident required the use of "roofing machines." As a matter of law, then, 12 NYCRR 23-1.24(c) does not apply.

It is therefore

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of Defendants' liability under Labor Law §240(1) is granted, and it is further

ORDERED, that Plaintiff's motion for partial summary judgment on his claim under Labor Law §241(6) is denied, and said claim, insofar as it is predicated on alleged violations of 12 NYCRR 23-1.24, subdivisions (a) and (c), is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: October 23, 2019 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE

* TRIAL : DAMAGES ONLY
MAY 11 2020