

McGee v PJS Gen. Constr., Inc.
2019 NY Slip Op 34260(U)
September 19, 2019
Supreme Court, Bronx County
Docket Number: Index No. 21066/2017
Judge: Lucindo Suarez
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Mtn. Seq. # 1

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: PART 19

LAWRENCE McGEE,

Index No.: 21066/2017

Plaintiff,

- against -

DECISION and ORDER

PJS GENERAL CONSTRUCTION, INC., THE
 CITY OF NEW YORK, METROPOLITAN
 TRANSPORTATION AUTHORITY, TRIBOROUGH
 BRIDGE AND TUNNEL AUTHORITY d/b/a
 MTA BRIDGES AND TUNNELS and PAUL J.
 SCARIANO, INC.,

Defendants.

and Third-Party Action.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's partial summary judgment motion is whether he established a *prima facie* case entitling him to judgment on his Labor Law §240(1) claim. The court finds that he has.

Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo 124 LLC*, 161 A.D.3d 650, (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must demonstrate that the injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 959 N.E.2d 488, 935

N.Y.S.2d 551 (2011).

According to Plaintiff, on the day of loss he was employed as a derrickman¹ and his primary responsibility on the construction site involved moving large stones. Plaintiff testified that he was working outside on one of the parapets of a building located at the subject construction site. He further testified that his accident occurred as he and his supervisor, Chris Urban, were attempting to hoist a square granite stone, which weighed approximately five hundred pounds. He testified that because of the unavailability of a mechanical chain fall hoist at the construction site due to a prior incident causing it to become inoperable, he began using the manual chain fall hoist. However, due to the granite stone's size the manual chain fall hoist provided was too small in order to properly hoist it. Plaintiff then testified that he was directed by his supervisor to manually lift the granite stone because of his supervisor's fear of damaging a nearby waterproofing membrane. Plaintiff expressed his disagreement with his supervisor as to the method chosen to move the granite stone. Plaintiff maintained that despite his protestations, he and his supervisor, in tandem, manually lifted the granite stone approximately eighteen inches into the air. Suddenly, Plaintiff's supervisor lost his grip causing the granite stone to fall on Plaintiff's right thumb, thereby, resulting in injuries.

Plaintiff argued that he established his *prima facie* burden that Defendants violated Labor Law §240(1) because of the complete absence of any safety devices. Plaintiff contended that the manual method chosen by his supervisor to move the granite stone was completely inadequate for the task at hand. Instead, he posited that he should have been provided with a mechanical hoist.

¹ A derrickman is a worker who operates a derrick, which is a machine for moving or lifting heavy weights by means of a long arm fitted with ropes and pulleys. Merriam-Webster Dictionary (visited Sept. 19, 2019) <<https://www.merriam-webster.com/dictionary/derrick>>.

Further, Plaintiff's expert witness, Kathleen Hopkins, a certified site safety manager, opined that Defendants should have provided Plaintiff with a webbed sling or a large jaw lifting clamp to properly lift the granite stone by manual means. Therefore, she concluded that Plaintiff was not provided adequate safety devices to properly move the granite stone. In addition, Plaintiff argued that Defendants' own witnesses also testified that manually lifting the subject granite stone was an unsafe method for completing the task. Plaintiff also maintained that these conclusions were also memorialized in the "injury investigation checklist," that was drafted as a result of the accident. Said checklist recommended that rigging equipment with crowbars and metal rollers should have been used to complete Plaintiff's task in a safe manner.

In opposition, Defendants argued that there was no violation of Labor Law §240(1) as Plaintiff was provided with a mechanical chain fall to move the granite stones. Defendants further argued that their expert witness, Charles C. Temple, a Licensed Professional Engineer, opined that Plaintiff was provided the necessary piece of equipment needed to safely perform his task namely a mechanical chain fall. In addition, Defendants contended that Plaintiff was the sole proximate cause of his accident, therefore, lifting any liability under Labor Law §240(1). Lastly, Defendants argued that Plaintiff is precluded from summary judgment because of his own conflicting testimony. They posited that Plaintiff's GML §50H ("50H") testimony differed from his deposition because at the 50H he testified that he did not take direction from his boss as to how to complete his assigned task and later in his deposition he testified that his supervisor directed him to manually move the granite stone that caused his injury.

The court finds that Plaintiff is entitled to the protections afforded under Labor Law §240(1). Here, Plaintiff's injuries derived directly from the application of the force of gravity as a result of a falling object that was improperly hoisted, which squarely falls within the purview of Labor

Law §240(1). *See Marrero v. 2075 Holding Co. LLC*, 106 A.D.3d 408, 964 N.Y.S.2d 144 (1st Dep't 2013). Moreover, Defendants' contention that Plaintiff was provided with an adequate safety device is unavailing.

The court finds that Defendants' expert witness' conclusions that Plaintiff was provided an adequate safety device (i.e., a mechanical chain fall) is of no evidentiary value as it was based on speculation since he was not present on the construction site, nor did he possess firsthand knowledge of what safety devices were present on the day of loss. *See Gomez by Gomez v. NY City Hous. Auth.*, 217 A.D.2d 110, 636 N.Y.S.2d 271 (1st Dep't 1995).

Even if there was a mechanical chain fall in the vicinity of Plaintiff's work area as Defendants claim, the requirement of a worker's "normal and logical response" to get a safety device rather than having one furnished is limited to those situations when workers know the exact location of the safety device, and where there is a practice of obtaining such devices. *See Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dep't 2009). That was not the case here and it cannot be reasonably deduced from the instant record. Therefore, the court disagrees with Defendants that Plaintiff was the sole proximate cause of his injury as the court finds that Defendants failed to comply with their statutory duty to provide Plaintiff with adequate safety devices, which was the proximate cause of his injuries. *See Blake v. Neighborhood Hous. Servs. of NY City, Inc.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003).

As to Defendants' last contention that Plaintiff purportedly contradicted himself during his 50H testimony and at his later deposition testimony is without merit. In both his 50H and at his later deposition, Plaintiff consistently testified that his supervisor required that he move the subject granite stone by manual means rendering the instant argument a red herring.

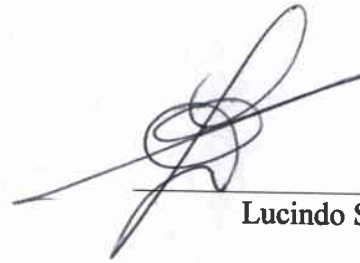
Accordingly, it is

ORDERED, that Plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim is granted; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: September 19, 2019



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.