

Vega v 60 Hudson Owner, LLC
2020 NY Slip Op 30216(U)
January 29, 2020
Supreme Court, New York County
Docket Number: 158179/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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VICTOR VEGA,

Plaintiff,

- v -

60 HUDSON OWNER, LLC,

Defendant.

-----X

INDEX NO. 158179/2016
MOTION DATE _____
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25-48 were read on this motion for summary judgment.

Plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment as to liability. Defendant opposes.

I. BACKGROUND

By summons and complaint, plaintiff alleges that on September 12, 2016, he was employed by nonparty Northern Bay Contractors, Inc. to perform work at 60 Hudson Street, owned and operated by defendant. He claims that due to defendant's negligence and violations of Labor Law §§ 200, 240, and 241, he sustained a physical injury. (NYSCEF 27).

II. CONTENTIONS

A. Plaintiff (NYSCEF 25-34)

Plaintiff contends that his work falls within the scope of the Labor Law, and that he is entitled to summary judgment absent any dispute that he was struck by a falling, unsecured piece of sheetrock and there were no adequate safety devices provided to prevent it from falling. He offers his deposition, whereby he testified that on September 12, 2016, he was at 60 Hudson

Street patching holes in interior walls. That day, while he was on a scaffold between the 19th and 20th floors reaching out to a wall, a piece of sheetrock fell and struck his head, neck, both shoulders, and right wrist. The “plank of sheet rock” that had hit him continued to fall but got jammed between two of the scaffold pipes. He estimated the plank to be “8 by 8.” Plaintiff did not know from where the sheetrock had fallen or whether someone working above him had dropped it. (NYSCEF 30).

Plaintiff submits the deposition testimony of defendant’s director of security and fire life safety, in which he testified that defendant owns the premises at 60 Hudson Street and that on September 12, 2016, Northern Bay, the general contractor, was installing flues to be used for exhaust for boilers and generators. He explained that the flues travel up through fire-rated shafts which start from the lower levels of the building to the roof. To install the flues, scaffolding was erected in the shafts. He claimed to lack personal knowledge of plaintiff’s accident. (NYSCEF 31).

Plaintiff also offers the affidavit of Jose Sanchez dated April 17, 2019, who states therein that he was working with plaintiff and “Sebastian” on the 18th and 20th floors of an interior shaft at the site. Sanchez saw a piece of sheetrock leaning up against one of the scaffold’s corner supports on the 20th floor. It was neither tied nor secured. When Sebastian started to climb up the scaffold to the 20th floor, Sanchez felt the scaffold shake and saw the sheetrock fall through an opening in the platform. The sheetrock brushed him on his left shoulder and continued to fall through the platform to where plaintiff was working. Sanchez then heard a loud thud and plaintiff’s scream. When he asked whether plaintiff had been hurt, plaintiff said that he had been struck hard on his head and shoulders by the sheetrock. (NYSCEF 32).

B. Defendant (NYSCEF 37-45)

Defendant contends that plaintiff has not met his burden of proof, as the evidence submitted fails to establish how the sheetrock was being used, the size and weight of the piece of sheetrock, and the distance it fell. That a piece of sheetrock fell, absent additional evidence, defendant asserts, is insufficient to meet plaintiff's burden, because not every object that falls on a worker constitutes a labor law violation, even when an accident results from a failure to use a safety device. In such a case, no liability lies absent a "physically significant elevation differential."

Thus, defendant asserts that questions of fact exist as to whether the amount of force generated by the sheetrock was *de minimis* and whether the piece of sheetrock required securing. According to defendant, plaintiff's contention that safety devices were needed is conclusory, and it observes that plaintiff does not offer expert evidence for the claimed need for safety devices.

Defendant submits the affidavit dated July 18, 2019 of Marek Bajor, a Northern Bay foreman at the site, in which he states that shortly after plaintiff's accident, he was called to the scene where plaintiff told him that a piece of sheetrock that was being installed in the shaft had fallen and struck him. Bajor saw the piece of sheetrock and estimates that it was 18 inches by 12 inches and weighed between one and three pounds. Plaintiff also assured him that he was not hurt. Plaintiff continued to work, having refused an offer to call for an ambulance or receive treatment. He also refused to file an accident report.

According to Bajor, as the piece of sheetrock was being installed, it was not necessary to secure it as doing so would have interfered with and prevented the installation. (NYSCEF 38).

Defendant also offers the affidavit of Sebastian Gajewski, a Northern Bay carpenter at the site, dated July 18, 2019, in which he states that at the time of the accident, he was on the 19th or

20th floor patching the wall or working with concrete. On the day of the accident, at 12:35 pm, he was returning from lunch with Sanchez, a Northern Bay taper, to continue installing sheetrock on the 21st floor. Franklyn Merrick, another Northern Bay employee, was installing sheetrock in the same manner as he and Sanchez had on the 22nd floor, or between the 21st and 22nd floor. As Gajewski and Sanchez climbed up the scaffold, a piece of sheetrock fell from the level on which Merrick was working. The sheetrock “brushed” Sanchez and continued downward. Gajewski did not see the sheetrock hit plaintiff. (NYSCEF 39).

Defendant also submits the affidavit of Merrick, dated July 19, 2019, in which he states that in September of 2016, he was installing sheetrock inside an interior shaft and it was not his custom or practice at the site to leave sheetrock laying around unattended. He did not, however, secure sheetrock while it was being installed because it would have interfered with and prevented him from installing it. (NYSCEF 40).

Also offered by defendant is the affidavit dated July 22, 2019 of Ambrogio Picone, Northern Bay’s general foreman at the site, who states that plaintiff was working on the walls inside an interior shaft while sheetrock was being installed. He denies having received notice of prior incidents or complaints about falling objects including sheetrock in the shaft where plaintiff was working or that it was possible to have more overhead protection in the shaft, as workers were crossing the scaffold and needed access to all parts of the shaft. (NYSCEF 41).

The affidavit of a construction site safety expert is also offered. The expert therein states, as pertinent here, that securing the sheetrock would have hindered the installation and that due to the lack of facts provided by plaintiff, including the dimensions and weight of the sheetrock, the distance it fell, how it was being used at the time, and whether there were prior instances of falling sheetrock, he could offer no conclusion as to whether a safety device should have been

provided. However, relying on the affidavits offered by defendant, he opines that the sheetrock that fell on plaintiff must have been very small, typically one-half inch thick and weighing as little as one pound. Thus, the expert concludes, the sheetrock need not have been secured. Moreover, he states that sheetrock is not tied off or secured while being installed, even when it is temporarily set down during the installation process. Erecting additional overhead protections, he also asserts, would have been impractical as the scaffold was right next to the shaft walls, and he notes, the scaffold platforms themselves served as overhead protections. (NYSCEF 42).

Based on the foregoing, defendant argues that securing the sheetrock while it was being installed was illogical and unnecessary, a proposition supported by plaintiff's coworkers in their affidavits.

C. Reply (NYSCEF 47)

Plaintiff observes that defendant does not dispute that he was hit by an unsecured piece of sheetrock and argues that the elevation differential was significant as the sheetrock on the 20th floor fell to the lower level of the scaffold, where plaintiff was working, and thus, he meets his *prima facie* burden. He argues that defendant's contention concerning *de minimis* elevation differentials applies only where there is no appreciable elevation difference, and thus, evidence as to the weight of the sheetrock in issue is unnecessary. In any event, plaintiff adds, Sanchez stated that the sheetrock had fallen from the 20th floor to the 18th floor and Gajewski stated that the sheetrock had fallen from either the 21st or 22nd floor, thereby establishing a significant elevation differential. Any discrepancies as to where he or the sheetrock were located on the scaffolding does not preclude summary judgment, plaintiff maintains, as he would be entitled to a favorable decision under any set of facts.

To the extent that defendant argues that the sheetrock was being installed, and thus not in

need of securing, plaintiff contends that defendant fails to offer evidence contradicting Sanchez's statement that the sheetrock was not being installed but was leaning against the scaffold. Other affidavits, including that of defendant's expert, he observes, are not based on personal knowledge and thus must be disregarded.

Plaintiff relies on Picone's statement that it was impossible to add more overhead protection as confirmation that the overhead protections in place were inadequate to protect him. He also argues that notice of prior incidents is not required to establish a Labor Law § 240(1) violation and that he need not specify which safety device would have prevented his injury.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Pursuant to Labor Law § 240(1):

All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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(1) requires a showing, in pertinent part, that no safety equipment was provided but should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). In “falling object” cases, as here, the plaintiff must demonstrate, in pertinent part, that the object that fell required securing, or that it fell because of the absence of a safety device. (*Fabrizi v 1095 Ave. of the Am.*, 22 NY3d 658 [2014]). However, where the use of a safety device “would defeat or be contrary to the purpose of the work,” there is no liability for the failure to provide such a device. (*Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]).

While *de minimis* elevation differentials fall outside the scope of Labor Law § 240(1) (*Narducci*, 96 NY2d at 270), there is no specific height from which an object must fall to constitute a section 240(1) violation. (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]). Rather, what is dispositive is whether plaintiff’s injuries were the “direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Here, plaintiff’s evidence reflects that he was no more than one floor below the floor from where the sheetrock fell. Absent evidence of the distance between floors or plaintiff’s height, and drawing every inference in favor of the nonmovant (*Matter of Eighth Judicial Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]), the sheetrock may have fallen a *de minimis* distance before striking plaintiff. (*See e.g., Kuhn v Giovanniello*, 145 AD3d 1457, 1458 [4th Dept 2016] [one-foot fall of 60-pound pipe *de minimis*]).

An injury resulting from an object that falls a small distance may nonetheless be actionable where the weight of the object renders it “capable of generating a significant amount

of force.” (*Harris v City of New York*, 83 AD3d 104, 110 [1st Dept 2011], quoting *Runner*, 13 NY3d at 605). Here, plaintiff’s evidence of the size of the sheetrock, bereft of any indication that he referenced feet and not inches, is insufficient to demonstrate, *prima facie*, that it generated sufficient force to warrant the use of a safety device. Even if it may be inferred that plaintiff’s measurement was in feet, and not inches, Bajor’s testimony that the sheetrock was 18 inches by 12 inches and weighed between one and three pounds raises an issue of fact as to whether the sheetrock was sufficiently large to generate enough force to bring the accident within the scope of section 240(1). (See e.g., *Wright v Ellsworth Partners, LLC*, 173 AD3d 1409, 1410–1411 [3d Dept 2019], *lv denied* 34 NY3d 907 [2019] [five inches that scaffold frames weighing 45 to 50 pounds fell is *de minimis*]; *Kuhn*, 145 AD3d at 1458; cf *Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404, 405 [1st Dept 2018] [half foot that 500-pound steel I-beam fell not *de minimis*]).

Moreover, Bajor states that plaintiff had told him that the piece of sheetrock was being installed, and Merrick and defendant’s expert state that securing the sheetrock during the installation would have interfered with and prevented the installation. Thus, defendant raises an issue of fact as to whether the piece of sheetrock was being installed, and not in need of securing. (See *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 140 [2011] [dismissing section 240(1) claim where protective device “would have been contrary to the objective of the work plan”]). While plaintiff testified that he does not know where the sheetrock came from, and thus whether the sheetrock was being installed at the time, Bajor’s affidavit is sufficient to raise a factual issue. (See *Medrano v Port Auth. of New York and New Jersey*, 154 AD3d 521 [1st Dept 2017] [affidavit of coworker contradicted plaintiff’s version of accident and called into question plaintiff’s credibility, precluding summary judgment for plaintiff]; *Velez v City of New York*, 134 AD3d 447 [1st Dept 2015] [conflicting versions of accident raised credibility issues that could

not be resolved on summary judgment motion]).

IV. CONCLUSION

Accordingly, it is hereby

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

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BARBARA JAFFE, J.S.C.

1/29/2020
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: