Melaku v AGA 15th Str., LLC
2020 NY Slip Op 30283(U)
February 3, 2020
Supreme Court, New York County
Docket Number: 153750/16
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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MICHAEL MELAKU,

Plaintiff,

-against-

AGA 15TH STREET, LLC, THE COLLEGE OF ST. FRANCES XAVIER, SKYWARD CM LLC, and RICHTER & RATNER CONTRACTING CORP.

Defendants.

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THE COLLEGE OF ST. FRANCIS XAVIER,

Third-Party Plaintiff,

-against-

PATRIOT ELECTRIC CORP. and CITITEK ELECTRICAL CONTRACTORS, INC.,

Third-Party Defendants.

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Index No. 153750/16
Motion Sequence 05/06

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Motion Sequence 05 (MS 05) and 06 (MS 06) are consolidated for disposition.

In MS 05, Plaintiff Michael Melaku (Plaintiff) moves for summary judgment on his Labor Law 240(1) claim. Defendants AGA 15th Street (AGA) and Skyward CM LLC (Skyward) cross-move for summary judgment dismissing the complaint and all cross-claims against them for contribution and indemnification. In MS 06, defendants The College of Saint Frances Xavier (Xavier) and Richter & Ratner Contracting Corp. (Ratner) move for summary judgment dismissing the complaint in its entirety.

This action arises out of personal injuries Plaintiff allegedly sustained on December 10, 2015 while working at a renovation project involving Xavier High School (35 West 15th Street) in Manhattan. On the date of the accident the building in question was owned by AGA. The entire

[1]

property was being re-developed so that the first six floors would house the high school while the remaining twenty-one floors would be made up of residential units. Skyward, an affiliate of AGA, was the construction manager hired by AGA for the build-out of the building's core and shell. AGA's intention was to transfer the property to Xavier once the project was complete.[1] In fact, once the core was built, Xavier was expressly permitted to take over the project and perform work in the space prior to taking ownership. In this regard, Xavier hired defendant Ratner as its construction manager. Ratner subcontracted with third-party defendant Patriot Electric Corp., who in turn subcontracted with Plaintiff's employer, third-party defendant Cititek Electrical Contractors.

The Plaintiff was deposed on November 5, 2018.[2] On the date of the accident he and two co-workers were on the third-floor of the construction site installing conduit into the 25-foot ceiling. They did this using a scaffold that had two work platforms, a lower platform and an upper platform. To get from the ground to the platform the Plaintiff could either climb a ladder that was built into the scaffold or use a separate 12-foot A-frame ladder (Melaku Deposition, pp. 96-103). Plaintiff testified that immediately prior to his accident he was asked to retrieve a bandsaw from the lower platform. He repositioned the A-frame ladder a few feet from the scaffold, climbed up the ladder and reached for the bandsaw. The ladder then tipped and fell over to the ground (*id.* at 136-37):

> A. I went out to reach the bandsaw on the edge and the next thing I know, the ladder gave way. It – it tilted, and when the ladder gave out, and in a fraction of a second, I realized that I was going to drop, and I went to reach for the ladder, for the rung on the ladder on the scaffold to save me from falling, and I had missed that rung, and that's when I dropped.

Plaintiff testified that there were no issues with either the built-in ladder or the A-frame ladder prior to his accident. He used the built-in ladder to access the scaffold and the A-frame ladder to move

[1] AGA completed the transfer six months after Plaintiff's accident.

[2] Plaintiff's exhibit 6 (Melaku Deposition).

conduit or tools up the scaffold (*id.* at 101-06). Plaintiff acknowledged that he does not know what caused the ladder to tilt over (*id.* at 140).

Frederick Munoz was one of Plaintiff's co-workers. He testified[3] that the Plaintiff could have used a pulley system to hoist the bandsaw to the top platform (Munoz Deposition pp. 35-36):

Q. At any point prior to Mr. Melaku's accident, did anyone instruct him to use the scaffold to bring up materials . . .

A. If he was using it he was sending materials in the bucket.

Q. Why would he use the scaffold if he could just put the materials in the bucket and then have somebody wheel up the materials?

A. That's what I want to know too, I don't understand.

Q. Did anyone tell Mr. Melaku to use the pulley and the bucket prior to his accident?

A. I'm not sure if they told him but I know he's used it before prior to that happening to him.

Q. Did he use it that day prior to the accident?

A. Can't recall but I know we were using it but I can't recall.

One of the construction site's forepersons, Daiana Perreira, confirmed that workers were supposed to use a pulley system to transport materials, but did not know if one was in place on the third floor where the Plaintiff was injured. Mr. Perreira explained[4] that it was important to use such a pulley system for safety reasons (Perreira Deposition pp. 29-31):

Q. . . . Were workers told by someone not to use A-frame ladders that were on the site to get on or off the scaffolds that were at the site?

A. Yes, they was told by OSHA. . . .

Q. And instead, they were supposed to use what? . . .

A. I mean -- they have -- the scaffold has a ladder.

Q. The built-in rungs on the side?

A. Yes.

Q. And the reason for using one as opposed to the other is because of three points of contact?

A. Yes.

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[3] Plaintiff's exhibit 15 (Munoz Deposition).

[4] Plaintiff's exhibit 14, pp. 29-31 (Perreira Deposition).

Q. Can you explain to me, if a worker wanted to go up on a scaffold and get a big tool like a bandsaw or a circular saw and get it from a platform and climb down, how are they supposed to get up, get the tool, and climb down and – with the tool in their hand and – maintain three points of contact?

A. We normally – when we take stuff, we normally pull it up – tug it up; we use a tugging system. Normally – it's a setup. Safety-wise, we would tug it up; we would never try to take it up, because we wouldn't maintain the three points of contact . . .

Q. Were there pulleys on the site on the scaffolds for bringing tools up and down?

A. Maybe the guys who are there, they have it set up, I guess. You know they had known what to do. I don't [know] if they had one.

Q. You don't know if they had one?

A. No, no, no.

The Plaintiff testified that he used the A-frame ladder because he believed it was the safest option and because he observed others do it before him. He also testified that while he was familiar with pulley systems and had used them previously, the area where he was working was not equipped with one (Melaku Deposition pp. 108-109):

Q. What is it about the A-frame ladder that, in your experience, that makes it safer for the transportation of conduit or tools up to higher levels of the scaffold?

A. You're able to easily step and step up forward in height with one-hand on the side of the frame, of the A-frame, and then carry something else and lean forward on the ladder with your weight and, therefore, it is deemed safe and it actually really is safe.

Q. Is that based on your experience, or did somebody tell you that?

A. That is based on experience and me seeing everybody else do it.

Q. Now, was there a pulley system?

A. A – no, there is no pulley system.

Q. Was there ever a pulley system? . . .

A. No.

Defendant AGA retained biomechanist Angela Levitan in this case.[5] She concludes, based upon Plaintiff's testimony, that "the ladder tilted and fell to the right due to the forces exerted upon it when the Plaintiff reached to his left for the band saw" and, therefore, Plaintiff "was the sole proximate cause of the subject incident" (Levitan Affidavit ¶¶ 24-25).

[5] Her affidavit is annexed to AGA's cross motion as exhibit A (Levitan affidavit).

Based upon the foregoing testimony, the defendants argue that there is at the very least an issue of fact whether the Plaintiff was the sole proximate cause of his accident. Defendants Xavier and Ratner separately argue that they are not proper Labor Law defendants.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Applicability of the Labor Law to Xavier and Ratner

Xavier argues that it is not a proper Labor Law defendant because it did not have an ownership interest in the subject property until six months after the accident. While it is true that it did not possess a deed to the property at the time of the accident, and Labor Law 240(1) does not specifically delineate lessees or future owners as responsible parties, this does not necessarily mean Xavier is entitled to summary judgment. *See Ferluckaj v Goldman Sachs & Co.*, 12 N.Y.3d 316, 320 (2009). This is especially true here where there is no dispute that Xavier retained Ratner as its

construction manager and Ratner, in turn, managed the worksite. In other words, Xavier acted as the de facto owner, hired a construction manager, and retained the "the right to control the work being done." *Id.* As such Xavier should be considered an "owner" for Labor Law purposes. *See Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 946 (2d Dept 2019); *Morato-Rodriguez v Riva Constr. Group, Inc.*, 115 AD3d 401, 401 (1st Dept 2014); *Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 (2d Dept 2012).

Ratner argues that it falls outside the scope of the Labor Law because it was a construction manager, not a general contractor. While it is true that construction managers presumptively fall outside the scope of the Labor Law, under certain circumstances a construction manager can be deemed a proper party if it was the "functional equivalent" of a general contractor. *See Rodriguez v Dormitory Auth. Of State*, 104 AD3d 529, 531 (1st Dept 2013). In making this determination, courts should consider the totality of the circumstances, but specifically focus on four things: contract terms, the absence of a general contractor, the construction manager's duty to oversee the construction site and the trade contractors, and the admission by the construction manager that it had the authority to control certain activities and stop any unsafe work practices. *See Walls v Turner Construction Co.*, 4 NY3d 861 (2005). Here the record makes crystal clear that Ratner served as the general contractor despite its self-proclaimed "construction manager" title. Not only did the Xavier representative who was deposed in this action classify Ratner as the general contractor, but Ratner's own representative acknowledged that it was responsible for hiring subcontractors, preparing reports to Xavier, had supervisors on site, and had the authority to rectify unsafe working conditions.[6] No other entity held itself out as the general contractor, and no other entity can be deemed to have taken on such an all-compassing role. *See Pipia v Turner Constr. Co.*, 114 AD3d 424, 427 (1st Dept 2014).

[6] Plaintiff's exhibit 10, p. 36; Plaintiff's exhibit 12, pp. 15, 24-28.

Labor Law 241(6) and Labor Law 200

To recover damages on a Labor Law 241(6) cause of action, Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998). Labor Law 200 claims are generally predicated upon a two-prong showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 (1st Dept 2006).

As a procedural matter, the court recognizes that the defendants' separate motion was not filed in accordance with the time limitations set forth in this court's part rules. However, the motion was filed within the time limitations set forth by *Brill v City of New York*, 2 NY3d 648 (2004), and more importantly, once the Plaintiff moved for summary judgment it became the court's responsibility to search the entire record and limit the scope of trial as necessary. Inasmuch as Plaintiff has stated no substantive reason why these causes of action should proceed to trial, and this court has found no evidence to show that the defendants violated either Labor Law 241(6) or Labor Law 200, these causes of actions are hereby dismissed.

Labor Law 240(1) and Sole Proximate Cause

Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they actually exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Labor Law 240 provides:

> 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.

The "purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility . . . ." *Ross*, 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501.

To establish a claim under Labor Law 240(1), Plaintiff must show that the statute was violated and that the violation proximately caused his injury. *See Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004). This means that Plaintiff cannot recover if he was the sole proximate cause of his injuries. "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained." *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402 (1st Dept 2013).

Despite the defendants' arguments to the contrary, the sole proximate cause defense does not apply here. First, the ladder plainly was not adequate for the task at hand since it fell over while the Plaintiff was using it. *See Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 413 (1st Dept 2019); *Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 583 (1st Dept 2018) ("fall from an unsecured ladder establishes a violation of the statute"); *Hill v City of New York*, 140 AD3d 568, 570 (1st Dept 2016); *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 (1st Dept 2004) (quoting *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]) ("failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law 240(1)"). The ladder was therefore a proximate cause of his injuries, precluding any possibility that Plaintiff was the sole proximate cause of his injuries. *See Blake v*

Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280, 290 (2003) ("[i]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it").

Second, there is nothing in the record to show that Plaintiff was instructed to use the scaffold's built-in ladder, or the rope and pulley system, as opposed to the A-frame ladder in question. In fact, the built-in ladder which defendants' counsel argues Plaintiff should have used was described as too dangerous by Mr. Perreira because it would have prevented Plaintiff from establishing three points of contact. As for the rope and pulley system, the court acknowledges that there is a dispute whether such a device was available to the Plaintiff. Mr. Munoz testified that the Plaintiff had used them before and should have used one to lift the bandsaw, whereas the Plaintiff testified that a pulley system was not available. Still, this factual dispute does not raise an issue of fact as to sole proximate cause since there is no testimony from any of the witnesses that the Plaintiff was directed to use a pulley system for this specific application. *See Gallagher v New York Post*, 14 NY3d 83, 88 (2010); *Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 AD3d 524, 526 (1st Dept 2017); *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 (1st Dept 2012); *Torres v Our Townhouse, LLC*, 91 AD3d 549, 549 (1st Dept 2012). This is borne out in the testimony cited above and in the following (Munoz Deposition, p. 48; Perreira Deposition, pp. 26):

Q. Okay. Did you ever give Michael any instructions on the day of the accident?
A. Not that I can recall, no.
Q. And what about John, do you know if John gave Michael any instructions on the day of the accident?
A. Not that I can remember.
Q. On the morning of the accident, did Dino [Mr. Perriera] come into the auditorium area at any point before the accident happened and give any instructions to either you, John, or Michael?
A. No. I can't remember that.

* * * *

Q. Was there any particular designated method that the workers were told or understood they were supposed to use to get up the scaffold?

A. Told by who?

Q. By you or anyone who was a supervisor.

A. No. We have – we normally have OSHA 10, and the OSHA 10 class that we attend, OSHA 10 told us all the safety mechanism and the manner in which we – when going up a ladder or reaching on the scaffold, all the requirement that you have to have to protect yourself.

Simply put, neither Mr. Munoz nor Mr. Perreira knew whether a pulley system was even available for use on the date of the accident, much less whether either of them had instructed the Plaintiff to use it to move the bandsaw up the scaffold.

The defendants' insistence that the Plaintiff was the sole proximate cause of his accident because he "misused" the ladder is also misplaced. To be sure, Plaintiff admitted there was nothing wrong with the ladder and that he "reached" for the bandsaw, but the Labor Law does not require that a plaintiff be free from negligence or that a plaintiff prove the injury-causing ladder was defective. *See Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 (1st Dept 2008); *Szpilewski v 31 E. 37th St. Corp.*, 2019 NY Misc. LEXIS 2421, *9 (Sup. Ct. NY Co, May 13, 2019, Jaffe, J.) ("Defendants' allegation that plaintiff's accident was caused by his own loss of balance or when he leaned too far to one side does not constitute a defense to a violation of section 240(1)"). It also does not matter that the Plaintiff may have had other options (the built-in ladder and pulley system) available to him since he was never instructed to use them in place of the A-frame ladder. *See Hoyos v NY-J 095 Ave. of the Ams., LLC,* 156 AD3d 491, 496 (1st Dept 2017); *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 (1st Dept 2008).

Contribution and Indemnification

Finally, Xavier and Ratner have not opposed that portion of the AGA/Skyward cross-motion which seeks to dismiss their cross-claims for common-law contribution and indemnification. More importantly, nothing in the record reveals any reasonable basis to sustain them. Accordingly,

Xavier and Ratner's cross-claims against AGA and Skyward for common law contribution and indemnification are dismissed.

CONCLUSION

In light of all of the foregoing, it is hereby

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

ORDERED that the cross-motion by defendants AGA and Skyward for summary judgment and to dismiss all cross-claims against them is granted in part and denied in part; and it is further

ORDERED that the motion by defendants Xavier and Ratner motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that Plaintiff's common law negligence, Labor Law 200, and Labor Law 241(6) claims are hereby severed and dismissed; and it is further

ORDERED that Xavier and Ratner's cross-claims against AGA and Skyward for common law contribution and indemnification are severed and dismissed; and it is further

ORDERED that the remaining claims and third-party claims continue to trial; and it is further

ORDERED that counsel for the parties appear for a conference in Part 30 (60 Centre, Room 408) on April 13, 2020 at 9:30AM.

The Clerk of the Court shall enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 2-3-20

SHERRY KLEIN HEITLER, J.S.C.

[11]