

Albuquerque v City of New York
2020 NY Slip Op 30625(U)
March 4, 2020
Supreme Court, New York County
Docket Number: 158426/2015
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X
JOSE ALBUQUERQUE, MARIA ALBUQUERQUE,

Plaintiffs,

INDEX NO. 158426/2015

MOTION DATE 02/06/2020

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 106

were read on this motion to/for

JUDGMENT - SUMMARY

The motion for summary judgment by plaintiff is granted.

Background

Jose Albuquerque ("plaintiff") was injured while he was employed as a laborer by Waterworks, a nonparty to this action. Waterworks was hired by defendants to complete a project on a water tunnel on Amsterdam Avenue and 60th Street in Manhattan. On April 20, 2015, approximately ten minutes before the accident, Julio Coelho, an employee of Waterworks and a foreman of the project, directed plaintiff to enter a water pipe at the bottom of a 10-foot-deep trench in order to check if the pipe was properly welded. Plaintiff went into the pipe as directed and, while he was exiting the pipe, a bracing timber was intentionally dropped into the trench from street-level and struck him. There are some inconsistencies whether plaintiff heard workers from the street level shout "all clear" into the trench before dropping the timber. Plaintiff claims that defendants have violated Labor Law § 240(1) by failing to provide adequate safety devices to lower the bracing timber into the trench.

Defendants argue that Labor Law 240(1) does not apply to intentionally dropped objects, that plaintiff has provided conflicting statements as to whether he heard the “all clear” signal before the bracing timber was dropped and so has raised an issue of fact, and that dropping bracing timbers into trenches is the custom and practice of the profession.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Intentionally Dropped Objects

Defendants' contention that the Labor Law does not apply to intentionally dropped objects is absurd.

The Labor Law applies to gravity related accidents as well as intentionally dropped objects. (*Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593 [1st Dept 2015]). Liability under Labor Law § 240(1) is "contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[A] plaintiff simply needs to show that he or she was injured while engaged in a covered activity, and that the defendant's failure to provide adequate safety devices of the type listed in Labor Law § 240(1) resulted in a lack of protection." (*Ortega v City of New York*, 95 AD3d 125, 126 [1st Dept. 2012]). Lowering timbers from an "8 to 12 foot elevation without the aid of any safety device [is] clearly a hazard implicating [Labor Law § 240(1)]" (*Campanella v St. Luke's-Roosevelt Hosp.*, 247 AD2d 294, 295 [1st Dept 1998]).

Here, it is undisputed that the timber was being thrown into the 10-foot-deep¹ trench. Contrary to law, defendants argue that "Labor Law 240(1) only applies to objects that are being hoisted or secured or require securing for the purposes of the undertaking. Critically, it does not apply to objects that are intentionally dropped." (NYSCEF Doc No. 74).

Defendants are dead wrong. By their reasoning, a construction site would be a free-for-all with tools and timbers and beams and kitchen sinks raining down, and anyone injured on the ground is out of luck. Defendants' claim that Labor Law 240(1) "does not apply to objects that are intentionally dropped" demonstrates a complete ignorance of the Labor Law and its purpose.

¹ Plaintiff and two other workers, Americo Pereira and Julio Coelho, all indicate that the trench was approximately 10 feet deep (NYSCEF Doc. Nos. 76 [transcript of plaintiff's 50-H hearing], 85 [Mr. Pereira's affidavit], and 92 [Mr. Coelho's affidavit]).

It is undisputed that the trench was approximately 10 feet deep and that the bracing timber that was intentionally dropped from the top of the trench, without aid of a safety device, caused plaintiff's injuries. Therefore, plaintiff has successfully demonstrated that his injuries stem from the existence of a hazard contemplated under Labor Law § 240(1). This court finds that there is no triable issue of fact and intentionally dropping a beam into a 10-foot deep trench, without any sort of safety device, is a violation of the Labor Law § 240(1) and plaintiff is granted summary judgment on liability.

Conflicting Statements

Labor Law § 240(1) provides “[a]ll contractors and owners and their agents ... in the erection ... of a building or structure shall furnish or erect ... devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” Courts have interpreted this to mean that “once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker “proper protection”, absolute liability is “unavoidable” under section 240(1)... regardless of the injured worker’s own negligence in contributing to his accident” (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]).

Defendants argue that plaintiff provided conflicting information as to whether he heard the “all clear” signal in his statement taken after the incident and, in doing so, raises a triable issue of fact for the purposes of Labor Law § 240(1).

This court finds that whether plaintiff heard the “all clear” is immaterial to defendants’ liability under Labor Law § 240(1). Defendants were required to provide adequate safety devices while lowering the bracing timbers into the trench and failed to do so. This court finds that calling “all clear” into the trench is not an adequate safety device, so whether plaintiff heard the call or not does not alter defendants’ liability under Labor Law § 240(1).

Customary Procedure

Labor Law § 204(1) ... “imposes an ‘unvarying standard’ independent of any ‘external considerations such as ... custom and usage’” (*Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 499 [1st Dept 2015]).

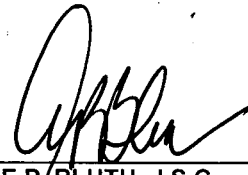
Defendants argue that they did not violate Labor Law § 240(1) because dropping the bracing into the trench was standard procedure. That an unsafe practice is the standard custom does not save the owner or general contractor from liability under the Labor Law § 240(1). It has long been the law that just because everyone is doing it does not make it okay.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted.

3/4/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE