Garley v The Shed
2020 NY Slip Op 31071(U)
April 28, 2020
Supreme Court, New York County
Docket Number: 158737/2017
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

----------X

SHAWN GARLEY,

Plaintiff,

- v -

THE SHED and SCIAME CONSTRUCTION LLC.,

Defendants.

----------X

INDEX NO. 158737/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 59, 66, 67, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Sacks and Sacks, LLP, New York, NY (David H. Mayer of counsel), for Plaintiff.
Fleischer Potash LLP, New York, NY (Andrew D. Harms of counsel), for Defendants.

Gerald Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by an ironworker on September 21, 2017, when, while working on the construction of "the Shed" at the Hudson Yards Project in Manhattan, New York (the Premises), he was struck by a large steel duct that was in the process of being hoisted.

Plaintiff Shawn Garley moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants the Shed and Sciame Construction, LLC (Sciame) (together, defendants). Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

Nonparty Culture Shed Lessee, LLC, hired Sciame to serve as the construction manager for a project at the Premises, which entailed the building of two structures to be used as performing arts spaces: one that would be fixed in place, and one that would be moveable (the Project). Sciame hired nonparty Stonebridge Steel Erectors (Stonebridge) to erect the superstructure for the Project. On the day of the accident, plaintiff was working for Stonebridge as an ironworker. Plaintiff's work on the Project consisted of erecting and installing large steel HVAC ducts in the interior of the Premises. In addition to providing functional air ducts, for air conditioning and heating, these steel ducts were to eventually house performance lighting. The ducts were ornamental in nature and extremely heavy.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was an ironworker employed by Stonebridge. At the time of the accident, he and other members of his work gang were using a 6,000-pound Lull machine (the Lull) to hoist steel ducts and then move them to their installation location.[1] The particular duct that was being moved at the time of the accident (the Duct) was located in the center of the deck area, sandwiched between multiple other steel ducts. The ducts were resting on skids. Just prior to the accident, the Lull's operator, Wendell Nurse, positioned the Lull's front wheels on a wooden ramp.

Plaintiff testified that prior to moving the Duct, at the direction of their foreman, he and some other Stonebridge workers tied nylon straps around the Duct and then connected the straps to the Lull. The Lull was being used to hoist the Duct from the back of a truck to a staging deck. Plaintiff explained that steel chokers (rather than nylon straps) are typically used to hoist heavy steel, but they were not permitted for use on the Project because they might have disturbed the aesthetic finish of the ducts.

Plaintiff testified that the Lull's operator was having difficulty operating it on the day of the accident. In fact, the Lull's operator told him that "[e]verytime [he] boom[ed] up the boom start[ed] to scope in on its own" (plaintiff's tr at 117). Plaintiff maintained that the operator also described the Lull as "a piece of crap" (*id*. at 136).

Plaintiff testified that as he was in the process of guiding the Duct with his right hand, and, when it was about "3 feet . . . from the ground," it suddenly and unexpectedly came down on him in a pendulum type of motion, causing him to become crushed and pinned between it and some other pieces of steel (*id*. at 172). In addition, just prior to the accident, he heard an "awkward sound" and the boom began to shake, causing the Duct to "[swing] down because it rolled in the straps on the Lull" (*id.* at 180, 183). Plaintiff further asserted that the Duct "swung down and hit [him] and pushed [him] into the western part of the steel" (*id*.).

Plaintiff maintained that the Duct came into contact with his body three times. Plaintiff thought "it was okay for [him] to go in between [the] two beams to help guide [the duct] down . . . [b]ecause its been done before by [himself] and other crew members" (*id*. at 175).

Deposition Testimony of Nick Rosa (Stonebridge Ironworker)

Nick Rosa testified that he was a Stonebridge ironworker for the Project on the day of the accident. He was also a member of plaintiff's work crew that day, and the one who placed the nylon straps around the Duct and connected it to the Lull. He explained that the ducts that needed to be moved "were situated right next to each other within inches of each other" (Rosa tr at 49). He maintained that the nylon straps were rigged at the Duct's proper center of gravity.

[1] Lull is the brand name for a type of rigging device that is akin to a forklift, but with an arm that extends and retracts like the boom of a crane.

Rosa explained that the ducts were positioned on dunnage, or skids, and that they were typically "rolled to the east" before being lifted (*id*. at 65). Just prior to the accident, the Lull operator had placed the Lull with two of its wheels on a ramp, but Rosa could not say why. He testified that the accident occurred when the two wheels of the Lull went up in the air "maybe a foot" and the Duct, which was in the process of being hoisted and about three feet in the air, suddenly hit the ground, making "a loud crashing noise" (*id*. at 61, 62). Rosa opined that plaintiff must have also been standing between two ducts at the time of the accident because "[h]e got pinched between the two" (*id*. at 63).

Nick Rosa's Written Statement

In his written statement, Rosa asserted, in pertinent part, as follows:

> "I was working in the raising gang. We were preparing to move a piece to the location where we were going to set it. The Lull had to approach the piece at an oblique instead of straight at it, due to a manlift of another trade congesting the work area. The piece was rigged and in the hook at the time. I was standing near the Lull when I heard the piece rollover. I turned my head and saw [plaintiff] fall overt and cry out in pain"

(defendants' notice of cross-motion, exhibit L, Rosa written statement).

Deposition Testimony of Wendell Nurse (Stonebridge's Lull Operator)

Nurse testified that Sciame was the general contractor on the Project on the day of the accident. Nurse was in charge of operating the Lull that day, and plaintiff was part of the rigging crew. He explained that a Lull is rigging device with an arm that retracts back and forth like the boom of a crane.

Nurse testified that although the front wheel of the Lull was "situated on the ramp," nevertheless, it felt "stable" (Nurse tr at 111, 126). Nurse explained that in order to make it easier to lift the Duct off the dunnage, it was necessary to flip the Duct, which weighed about 1700 pounds. The accident occurred after the Duct had been rotated about 180 degrees, and "as [they] boomed up" (*id*. at 139).

Deposition Testimony of Tim Dreitlein (Stonebridge's Foreman)

Tim Dreitlein testified that he was Stonebridge's foreman on the day of the accident. He explained that for the "situation," a Lull was "the ideal piece of equipment" to transport ducts on the deck, as a crane would have been too big for the subject area, and a forklift did not have "a reach" (Dreitlein tr at 106). In addition, although steel chokers provide for a better grip for moving steel members, where aesthetics are an issue, as in the instant case, nylon straps are often considered a better choice.

Dreitlein further testified that loads that are rigged with nylon straps sometimes experience a shifting of the straps when being moved by machinery. Ironworkers are instructed to avoid "pinch point[s]," as they are dangerous (*id*. at 13, 14, 15). Pinch points occur when one

of two pieces of the load is stationary, while the other piece is moving, often because it has been rigged to heavy machinery.

Stonebridge Accident Report

In the Stonebridge accident report, the accident was described, in pertinent part, as follows:

> "While moving steel duct members with a 6k Lull an asymmetrical piece of duct rolled over while under the control of the Lull and struck [plaintiff's] upper right [thigh]. A . . . rod that was welded to the duct punctured [plaintiff's] thigh when he was caught between an adjacent duct piece"

(defendants' notice of cross-motion, exhibit I, Stonebridge accident report).

DISCUSSION

It is well-established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O'Brien v Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]).

The Timeliness of Defendants' Cross Motion

Initially, plaintiff argues that defendants are not entitled to summary judgment dismissing the complaint against them because their cross-motion is untimely, in that it was made after the expiration of the court's 60-day deadline for bringing such motions.

Here, plaintiff filed the note of issue on June 11, 2019, and filed his own motion for summary judgment on July 30, 2019. Defendants filed the cross-motion on August 30, 2019, past the deadline to file dispositive motions. Defendants have not offered an adequate excuse for the late filing. That said,

> "[a] cross-motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross-motion. An otherwise untimely cross-motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross-motion (CPLR 3212 [b]). The court's search of the record, however, is

> limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth*., 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

As that part of defendants' cross-motion seeking relief on the Labor Law § 240 (1) claim is "nearly identical" to that raised by plaintiff in his motion, the court will consider defendants' request for summary judgment dismissing the Labor Law § 240 (1) claim against them. That said, as plaintiff did not move for summary judgment in his favor on the common-law negligence and Labor Law §§ 200 and 241 (6) claims against defendants, the court will not consider dismissal of these claims.

The Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants. Defendants cross-move for dismissal of said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . 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 so as to give proper protection to a person so employed."

"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 the force of gravity to an object or person" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" *(Harris v City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute also "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] 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]).

Therefore, in order 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 the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

As to the Labor Law § 240 (1) claim against defendants, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that dropped on him, i.e. the Duct, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]*; Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

Defendants argue that in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). They note that in this case, the Duct either rolled onto plaintiff or fell just a few feet down onto him.

However, as set forth by the Court of Appeals in *Wilinski v 334 East 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 7 [2011]), a height differential cannot be considered de minimis if the heavy weight of the object that fell makes it capable of generating an extreme amount of force, even though it may have traveled only a short distance (*see also Harris v City of New York*, 83 AD3d at 110 [where "the slab weighed more than one ton . . . [its] rapid descent of just three feet was capable of generating a significant amount of force"]; *Runner v New York Stock Exch., Inc.* (13 NY3d at 605 [the elevation differential at issue could not "be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent"]; *Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013] ["(g)iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis"]). Here, in light of the substantial weight of the duct, as it weighed at least 1700 pounds, it cannot be said that the height differential in this case was de minimis.

Further, as the Lull's front wheels were positioned on a ramp at the time of the accident, which is an uneven surface, and as nylon straps are known to sometimes slip, it was foreseeable that the hoisting system might fail. Therefore, additional safety devices, such as a tag line, rope

or cable were necessary to further secure the Duct in order to ensure that plaintiff would be safe in the event that the lift became unstable and/or the nylon straps slipped.

"[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake"], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Dasilva v A.J. Contr. Co.*, 262 AD2d 214, 214 [1st Dept 1999] [where the plaintiff "was injured when the unsecured A-frame ladder he was standing on was struck by a section of pipe he had cut, causing him to fall," the Court found that "the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"]).

In opposition to plaintiff's motion, and in support of their own cross-motion, defendants further argue that the accident was caused solely by plaintiff's decision to place himself between a moving duct and a fixed duct, or a pinch point, when it was not necessary for him to do so. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Here, the record reflects that not only was plaintiff following the instructions of his foreman at the time of the accident, the tight workspace dictated where he stood in order to be able to perform his work. In any event, any such action on the part of plaintiff, at most, goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks, citations and brackets omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]).

Moreover, while defendants allege that plaintiff refused to follow a general instruction not to work near pinch points, "even if plaintiff had disobeyed an instruction to [work near pinch points] . . . [defendants'] liability for failing to provide adequate safety devices [would not] be reduced" (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334 [1st Dept 2008]). "[A]n instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely" (*Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993] [noting that "an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device.'" Court found that the recalcitrant worker defense did not apply where the plaintiff disobeyed his supervisor's instructions not to use a broken ladder unless someone was available to secure it for him]).

Finally, contrary to defendants' assertion, any minor inconsistencies in the deposition testimonies as to how the accident occurred do not relate to any material issue, and, thus, they do not preclude an award of partial summary judgment in plaintiff's favor (*Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]; *Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment in his favor on the issue of liability on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to dismissal of that claim. Defendants' remaining arguments on this issue have been considered and found to be unavailing.

Accordingly, for the foregoing reasons it is

ORDERED that plaintiff's motion under CPLR 3212 for partial summary judgment under in his favor as to liability on his Labor Law § 240 (1) claim against defendants is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment under CPLR 3212 is denied; and it is further

ORDERED that the parties shall confer and shall notify chambers (by email to mhshawha@nycourts.gov) as to how they intend to proceed on those of plaintiff's claims that are not resolved by this decision and order.

04/28/20
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE