Calderon v City of New York
2020 NY Slip Op 31160(U)
April 2, 2020
Supreme Court, Kings County
Docket Number: 511674/2017
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

x

JORGE CALDERON and KATHERINA CALDERON,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

x

DECISION / ORDER

Index No. 511674/2017
Motion Seq. No. 1
Date Submitted: 2/20/20
Cal No. 8

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion for summary judgment

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	12-26
Affirmation in Opposition and Exhibits Annexed.....	36-38
Reply Affirmation.....	40

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a December 6, 2016 construction site accident. The plaintiff was working on the renovation of a New York City Department of Environmental Protection (DEP) building located at 356 Flushing Avenue, Brooklyn, NY when he alleges that he fell from an unsecured extension ladder. Plaintiff was employed by the general contractor, non-party Adams European Contracting, pursuant to a contract with the New York City Department of Design and Construction (DDC). Plaintiff claims he put one foot on the ladder in order to descend from the first floor to the basement and the ladder "went backwards" and he simultaneously fell backwards to the ground. An ambulance was called and he was taken to Woodhull Hospital.

Plaintiff claims his fall from an unsecured ladder constitutes a Labor Law §240(1) violation, and a violation of Industrial Code §23-1.21(b)(4)(iv) for purposes of Labor Law § 241(6) liability. Further, he contends that the employees of defendant property owner were present on a daily basis and had the authority to control the activity that brought about plaintiff's injury, for purposes of Labor Law § 200 liability, and, at the very least, had constructive notice of the defective manner that the subject ladder was placed and positioned.

Defendant City opposes the motion, noting that the account the plaintiff gave of the accident in the emergency room records differs in a number of key respects from his 50-h and deposition testimony, raising issues of fact and issues as to his credibility. Defendant's counsel notes that in the emergency room records, plaintiff did not state that the ladder fell but rather that he fell from a ladder, that he fell 10 feet rather than 14 feet, that he was injured on a roof top, and that he missed a step or slipped on a step of the ladder, rather than that the ladder slipped out from under him. Further, defendant contends that the photograph of the accident location raises questions of fact as to whether the ladder could have fallen backward as plaintiff claims. Thus, defendant maintains that questions about how the accident occurred – that plaintiff may have simply lost his balance or missed a step rather than the improper placement or inadequate securing of the ladder – precludes summary judgment on plaintiff's Labor Law §§ 240(1) and 241(6) claims. Further, defendant maintains that since the accident arose out of the means and methods of the work, which the City did not supervise, there is no basis for a Labor Law § 200 or common law negligence claim.

Labor Law § 240(1)

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Jock v Fien*, 80 NY2d 965, 967-968 [1992] [citations omitted]). This statutory duty is not diminished by a plaintiff's contributory fault (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), and is imposed regardless of whether the owner, general contractor, or statutory agent with the authority to control the work actually exercises supervision or control over the plaintiff's work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). "Proper protection" requires that the device must be appropriately placed or erected so that it would have safeguarded the employee (*see Bland v Manocherian*, 66 NY2d 452, 460 [1985]), and that the furnished device itself must be adequate to protect against the hazards entailed in the performance of the particular task to which the employee was assigned (*see Bland v Manocherian*, 66 NY2d at 461; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996] ["Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker"]).

The plaintiff herein has established his prima facie entitlement to summary judgment on liability with regard to his Labor Law § 240(1) claim (*see Vicuna v Vista Woods, LLC*, 168 AD3d 1124 [2d Dept 2019]). As the Court of Appeals explained in *Blake v Neighborhood Hous. Serv. of New York City, Inc.* (1 NY3d 280, 289 n 8 [2003]):

> In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, we have (ever since *Stewart v Ferguson*, 164 NY 553 [1900], *supra*) continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough

> to afford proper protection. *See Panek v County of Albany* (99 NY2d 452, 458 [2003] [summary judgment appropriate for the plaintiff where it was uncontroverted that a ladder collapsed beneath him, causing the fall]); *Styer v Walter Vita Constr.* (174 AD2d 662 [2d Dept 1991]); *Olson v Pyramid Crossgates Co.* (291 AD2d 706 [3d Dept 2002]). Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]).

(*See also Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] ["Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials"]). Thus, plaintiff's fall from a ladder that was unsecured and which shifted underneath him, causing him to fall and sustain injuries, establishes prima facie liability under Labor Law § 240 (1) (*see Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598 [2d Dept 2005], *citing Loreto v 376 St. Johns Condominium*, 15 AD3d 454 [2d Dept 2005]; *Blair v Cristani*, 296 AD2d 471 [2d Dept 2002]; *Guzman v Gumley-Haft, Inc.*, 274 AD2d 555 [2d Dept 2000]).

Defendant opposes the motion with an affirmation of counsel and plaintiff's emergency room records. Defendant claims to have come forward with evidence sufficient to raise an issue of fact as to the happening of the accident and whether plaintiff's fall was caused by the improper placement or inadequate securing of the ladder.

The emergency room records indicate that plaintiff was given a CT scan of his head, chest, cervical spine, abdomen and pelvis in the emergency room. Nothing was found. He complained of pain in his neck, back and thigh, and his left arm was mildly swollen. He is reported to have had bruises and abrasions on his arms and back. He was

given a blood test. The results were normal. He was given an x-ray of his right tibia and fibula bone, of his left elbow and forearm. No fractures were found. He was given an x-ray of his left humerus bone and right shoulder, as well as his right femur and his ribs. No fractures were found. A nursing note states that he was bruised on his back and arms "after falling off the ladder." A neuro consult was requested due to plaintiff's possible head injury, "stat." Dr. Dilip Samantary, the neurologist, states plaintiff told him he had no loss of consciousness, dizziness or black-out before he fell, that he "missed step" which was the reason for his fall. Dr. Samantary concludes that plaintiff could have had a concussion and he had plaintiff admitted to the hospital for 23 hours of observation, with the head CT to be repeated. Dr. Arabia Divine Mollette notes in the emergency room records that plaintiff "says he slipped off from the step of the ladder and fell ten feet onto concrete." Plaintiff told this doctor that he could not remember if he lost consciousness after he fell, but he fell on his back and his head. He said he was wearing a helmet when he fell.

The defendant argues that the mere fact that a worker fell from a ladder is insufficient to establish "that the 'proper protection' required by Labor Law § 240 (1) was not provided" (*Avendano v Sazerac, Inc.*, 248 AD2d 340, 341 [2d Dept 1998], *citing Basmas v J.B.J. Energy Corp.*, 232 AD2d 594, 595 [2d Dept 1996]). Cases involving a ladder that slips and falls while a plaintiff was attempting to do the assigned task, are distinct from situations where a worker simply falls from a standing ladder (*see e.g. Hugo v Sarantakos*, 108 AD3d 744 [2d Dept 2013] ["plaintiff, while standing on the second-highest rung of a 24-foot extension ladder. . . lost his balance and fell to the ground"]; *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 803 [2d Dept 2013] [plaintiff, who was working on a ladder, "lost his balance and fell to the ground"]; *Gaspar v Pace Univ.*, 101 AD3d 1073 [2d Dept 2012] ["In an effort to dislodge the mask from the cable, the

injured plaintiff shook his head back and forth, during which time he lost his balance and fell from the ladder"]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 [2d Dept 2008] ["plaintiff allegedly was injured when he fell off an approximately 20-foot long ladder he was using to access the roof of the defendants' building"]; *Delahaye v Saint Anns Sch.*, 40 AD3d 679, 681 [2d Dept 2007] ["plaintiff allegedly was injured when he fell off a ladder while performing drywall taping work"]).

Plaintiff's attorney argues in his reply affirmation that these seemingly inconsistent entries in plaintiff's emergency room records cannot be used to overcome plaintiff's prima facie case as they are inadmissible hearsay. He also argues that, as plaintiff speaks very little English, and "there is no evidence that any interpretive assistance was provided," that they are unreliable. However, a defendant is permitted to use entries in a plaintiff's medical record if they are relevant to the patient's diagnosis and treatment and are clearly statements attributed to the patient. They may also be used if they contain statements which constitute an exception to the hearsay rule, such as admissions against the plaintiff's interest. Here, the statements were germane to plaintiff's diagnosis and treatment and are properly considered in opposition to plaintiff's motion for summary judgment (see *Kamolov v BIA Grp., LLC*, 79 AD3d 1101 [2d Dept 2010] ["The statements in the records regarding the manner in which the accident occurred were germane to the diagnosis and/or treatment of the plaintiff, and were properly considered as business records"]; *see also Berkovits v Chaaya*, 138 AD3d 1050, 1051–52 [2d Dept 2016] ["Further, if the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is evidence connecting the party to the entry" (internal quotation marks omitted)]).

The court notes that English is not plaintiff's native language, and that he was provided with an interpreter at his 50-h and his EBT. This would undermine the accuracy of the statements in the plaintiff's medical records, and plaintiff disputes their accuracy. The court thus has no way to determine if the entries are accurate. However, they may not be disregarded by the court. As this is plaintiff's motion, the court is required to view the evidence in the light most favorable to the non-moving party, here, the defendant.

Evidence which suggests a different version of the accident, one that would not implicate defendant's liability under Labor Law § 240(1), is sufficient to overcome plaintiff's prima facie showing and raise issues of fact which preclude summary judgment (*see Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] ["Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate"]; *Catalfamo v City of New York*, 205 AD2d 351, 351 [1st Dept 1994] ["questions of fact exist with respect to whether a violation of Labor Law § 240 (1) occurred and, if so, whether the violation was the proximate cause of plaintiff's fall particularly in light of plaintiff's deposition testimony that there was nothing wrong with the ladder (citation omitted)"]). The discrepancies in plaintiff's description of the accident are sufficient to raise issues of fact as they suggest the a problem with the ladder was not the cause of the accident (*see Ellerbe v Port Auth. of New York & New Jersey*, 91 AD3d at 442 [Defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction]; *Manning v Johnson Bldg.*, 303 AD2d 929, 930-931 [4th Dept 2003] [summary judgment denied where plaintiff's foreman testified that plaintiff told him that he had walked off the end of the planking and foreman had inspected the scaffold after the accident and found

nothing wrong]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462 [1st Dept 1993] ["Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented"]).

Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and general contractors to comply with Industrial Code provisions mandating compliance with concrete specifications (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 502, 505 [1993]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300 [1978]). The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation presents questions of law for the court (*see Messina v City of New York*, 300 AD2d 121, 122 [1st Dept 2002]). To establish liability under Labor Law § 241(6), plaintiff must demonstrate a violation by defendant of an Industrial Code rule or regulation mandating compliance with a specific, positive command (*Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]).Violation does not impose per se liability, but may be considered in evaluating negligence (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 522 [1985]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 349-350). Upon proof of negligence, other statutorily responsible parties become vicariously liable without regard to their particularized fault (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 502, n 4). Further, unlike Labor Law § 240(1), comparative negligence may be considered (*see Misicki v Caradonna*, 12 NY3d at 515; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350]).

The same questions of fact bar summary judgment on plaintiff's claim under Labor Law § 241(6) (*Wilson v Haagen-Dazs Co*., 215 AD2d 338 [1st Dept 1995] [worker's conflicting versions of his accident created triable issue precluding summary judgment on his claims under Labor Law §§ 240 and 241]). If plaintiff simply missed a step or slipped and fell while the ladder remained in position, a violation of Industrial Code § 23-1.21(b)(4)(iv), for failing to properly secure the ladder, would not have been the cause of the accident.

Labor Law §200

Defendant has also raised an issue of fact as to whether it provided sufficient supervision or control over the injury-producing work to be liable under Labor Law § 200, inasmuch as the accident arose out of the means and methods of the work and not from a hazardous premises condition (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [implicit precondition to common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work that Labor Law § 200 codifies is that the party charged with that responsibility have the authority to control the activity bringing about the injury]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505-506 [1993][where the dangerous condition arises from a subcontractor's methods or materials, recovery against the general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation]; *Sobenis v Harridge House Assocs. of 1984*, 111 AD3d 917, 918 [2d Dept 2013] [Owner and manager of building were not negligent with respect to worker's fall from ladder, rather, worker's accident was caused by means and methods of his work, his work was directed and controlled by his employer, and owner and manager did not have authority to exercise supervisory control over the work]).

Here, plaintiff testified that he only took direction from his employer and the defendant's witness testified that DEC and DDC had no responsibility for site safety. Defendant, through DDC, may have had a presence on the site to make sure construction was being done to its specifications. However, general supervisory authority at a work site to check progress and inspect the work is insufficient to impose liability for common-law negligence or liability under Labor Law § 200 (*Natale v City of New York,* 33 AD3d 772, 773 [2d Dept 2006]).

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 2, 2020

E N T E R :

Hon. Debra Silber, J.S.C.