Mceachern v Extell Dev. Co.
2020 NY Slip Op 31314(U)
May 4, 2020
Supreme Court, New York County
Docket Number: 150704/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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JAMES MCEACHERN and JOANNE MCEACHERN,

Plaintiffs,

- v -

EXTELL DEVELOPMENT COMPANY, EXTELL RIVERSIDE LLC, and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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INDEX NO. 150704/2015

MOTION DATE 11/11/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 70, 71

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendants Extell Development Company (EDC), Extell Riverside LLC (Extell Riverside), and Tishman Construction Corporation (Tishman) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The plaintiffs cross-move for partial summary judgment on liability on the portion of the first cause of action in the complaint alleging that the defendants are liable for violating Labor Law § 240(1). In their opposition to the defendants' motion, the plaintiffs discontinue all claims save for the claim alleging a violation of Labor Law § 240(1), and oppose only the portion of the defendants' motion seeking to dismiss that claim. The defendants oppose the plaintiffs' cross-motion. The motion is granted in part and the cross-motion is denied.

It is undisputed that on November 3, 2014, plaintiff James McEachern was a union journeyman ironworker employed as a foreman by Skyline Steel (Skyline), a subcontractor of Tishman, at the construction site located at 40 Riverside Boulevard, Building K (the building) in Manhattan. According to plaintiff James McEachern, Skyline assigned him to install iron ladders on both sides of the wall leading up the doorway of a fuel tank room at the building. Ladders were necessary on the both sides of the wall because the doorway on both sides of the fuel tank room was located four feet above the ground. McEachern installed an iron ladder on the outside of the fuel tank room. Thereafter, he attempted to access the interior of the fuel tank

room to begin installing the ladder on the interior side of the fuel tank room wall. There was no temporary ladder, staircase, or ramp installed on the interior of the door in order to allow him to traverse the four-foot distance between the doorway and the floor of the fuel tank room. Instead, there was a 55-gallon oil barrel located inside of the doorway. Plaintiff James McEachern claims he decided to use it as a makeshift stair to reach the ground level. As such, he first tested its stability by attempting to check it with his feet. He believed it to be safe and attempted to use it descend to the floor of the fuel tank room. The barrel was unstable and allegedly flipped over when he put his full weight on it and caused him to fall four feet to the bottom of the fuel tank room.

The plaintiffs commenced this action on January 22, 2015 alleging two causes of action. In the first cause of action McEachern alleges common law negligence, violations of Labor Law § § 200, 240(1), and 246(1) and various provisions of the Industrial Code. As noted above, the plaintiffs oppose only so much of the motion as seeks dismissal the portion of the first cause of action that is premised on Labor Law § 240(1), and cross-moves for summary judgment on that claim. The second cause of action alleges a cause of action for loss of consortium on behalf of plaintiff Joanne McEachern. The second cause of action is not at issue in this motion except to the extent that, in light of the plaintiffs' partial discontinuance, the plaintiffs would be entitled only to damages for liability in regard to the Labor Law § 240(1) claim. See Royce v DIG EH Hotels LLC, 139 AD3d 567 (1st Dept. 2016). Thus, the only issue before the court is whether either party is entitled to summary judgment on the Labor Law § 240(1) claim.

"On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment." Scafe v Schindler El. Corp., 111 AD3d 556, 556 (1st Dept. 2013), *quoting* Cole v Homes for the Homeless Inst., Inc., 93 AD3d 593, 594 (1st Dept. 2012). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." Ostrov v Rozbruch, 91 AD3d 147 (1st Dept. 2012).

Labor Law § 240 (1), provides, in relevant part, as follows:

> "All contractors and owners and their agents 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."

"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); see also Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991). "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." Ross v Curtis-Palmer Hydro Elec. Co., 81 NY2d 494, 501 (1993). To impose liability under Labor Law § 240(1), the plaintiff must prove a violation of the statute (*i.e.*, that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. See Blake v Neighborhood Hous. Sews. of N.Y. City, 1 NY3d 280 (2003).

"[T]he single decisive question is whether the 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., supra. The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 (1985). It is well established that contractors and owners have a statutory duty to provide adequate safety devices for their workers. The failure to provide a safety device is a per se violation of the statute for which an owner/contractor is strictly liable. See Zimmer v Chemung County Performing Arts, supra at 523-524 (1985); Cherry v Time Warner, Inc., 66 AD3d 233 (1st Dept. 2009). The public policy protecting workers requires that the statute be liberally construed. Id. The plaintiff may recover under § 240(1) if he was engaged in an activity covered by the statute and exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008). There is no bright-line minimum height differential that determines whether an elevation

hazard exists. See Thompson v St. Charles Condominiums, 303 AD2d 152 (1st Dept. 2003); Arrasti v HRH Constr., LLC, 60 AD3d 582 (1st Dept. 2009); Lelek v Verizon N.Y., Inc., 54 AD3d 583 (1st Dept. 2008). Rather, the relevant inquiry is whether the hazard is one "directly flowing from the application of the force of gravity to an object or person." Prekulaj v Terano Realty, 235 AD2d 201, 202 (1997), *citing* Ross v Curtis Palmer Hydro-Elec. Co., supra.

Defendant Extell Riverside has satisfied its *prima facie* burden of demonstrating that is was not an owner, contractor, or a statutory agent for the owner of the premises or its general contract, and as such it cannot be held liable for violations of Labor Law § 240(1). See Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981). Extell Riverside submits, *inter alia*, a construction contract dated June 27, 2013 with Tishman Construction Company reflecting that the owner of the premises is an entity named CRP/Extell Parcel K, L.P. (CRP) (the construction contract). In opposition, the plaintiffs make no attempt to demonstrate that Extell Riverside was an owner of the premises, the general contractor or a statutory agent of the owner or general contractor. In fact, the first line of the plaintiffs' memorandum of law states that "Defendant, Extell Development Company, as owner, and Defendant Tishman Construction Corporation, as Contractor, violated Labor Law § 240(1)," without mentioning Extell Riverside at all. Thus, summary judgment is granted as to Extell Riverside dismissing the complaint as against it.

The defendants, however, have failed to establish *prima facie* that EDC is not an owner of the premises. The defendants incorrectly state that EDC cannot be found to be an owner of the premises because the construction contract purportedly names only CRP as an owner of the premises and not EDC. Contrary to the defendants' contention, however, while the construction contract names CRP as an owner of the premises in several paragraphs, Exhibit I to the construction contract also names EDC as an owner of the premises. Thus, there is a triable issue of fact as to whether EDC is an owner of the premises for purposes of Labor Law § 240(1). See Russin v Louis N. Picciano & Son, supra.

Regardless of who owns of the premises, the construction agreement submitted and relied upon by both the plaintiffs and the defendants conclusively establishes that Tishman was the general contractor for the site. As such, Tishman is a proper party under Labor Law § 240(1). However, the submissions raise a triable issue as to whether plaintiff John McEachern was the sole proximate cause of his injuries, which would relieve the defendant from liability under Labor Law § 240(1). Marsullo v 1199 Housing Corp., 63 AD3d 430 (1st Dept. 2009).

Here, the defendants argue that plaintiff John McEachern was the sole proximate cause of his injury because chose to use the oil barrel as a makeshift stair rather than seeking out a ladder or another safer method of ingress. However, plaintiff John McEachern testified that he believed that the 55-barrel oil barrel was stable and a safe means of ingress that others were using to access the room and that obtaining a ladder was a normal and logical means of gaining access to the interior of the fuel room.

In Montgomery v Fed. Express Corp., 307 AD2d 865 (1st Dept. 2003), the Appellate Division, First Department granted summary judgment to a defendant in a Labor Law § 240(1) action where the plaintiff had notice that a stairway to an elevator motor room had been removed and failed to take the "normal and logical" step of "get[ting] a ladder or other appropriate safety device to gain access to the motor room," thereby making him the sole proximate cause of the plaintiff's injury as opposed to the defendants' failure to provide a safe means of descending into the motor room. Id. at 866. The Court of Appeals affirmed the First Department on the grounds that defendant had established there were ladders readily available for the plaintiff to access the space four feet below and he chose not to avail himself of a ladder even though he knew it was the normal and logical step. See Montgomery v Fed. Express Corp., 4 NY3d 805 (2009). However, where there is no evidence that a more stable means of descent such as a ladder was readily available or that obtaining one was not a more logical and normal step of gaining access to a space within a construction site that the one that a defendant chose, the Court of Appeals and the First Department have held that a determination of whether a plaintiff is the sole proximate cause of his injury for purposes of Labor Law § 240(1) is generally an issue of fact. See Miro v Plaza Construction Corp., 9 NY3d 948 (2007); Masullo v 1199 Housing Corp., supra; Cherry v Time Warner, Inc., supra. Where, as here, the parties' submissions do not establish whether there was a safer means of egress readily available or whether obtaining one was a logical and normal alternative, the question of whether the plaintiff was the sole proximate cause of his injury is a matter for a finder of fact to decide. See Miro v Plaza Construction Corp., supra; Masullo v 1199 Housing Corp., supra;

Accordingly, it is,

ORDERED that, upon the plaintiffs' notification of partial discontinuance in their opposition papers, the first cause of action of the complaint is dismissed to the extent it alleges

causes of action for common law negligence, Labor Law § 200 and Labor Law § 241(6), and it is further

ORDERED that the motion of defendants Extell Development Company, Extell Riverside LLC, Tishman Construction Corporation for summary judgment, is granted to the extent that the complaint, as modified, is dismissed in its entirety as against defendant Extell Riverside LLC only and the motion is otherwise denied, and it is further,

ORDERED that the cross-motion of plaintiffs James McEachern and Joanne McEachern for partial summary judgment on liability on the portion of the first cause of action alleging a violation of Labor Law § 240(1) is denied, and it is further,

ORDERED that Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the parties are directed to contact chambers for a settlement conference no later than May 31, 2020.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/4/2020
DATE

NANCY M. BANNON, J.S.C.

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