

Caserta v Triborough Bridge & Tunnel Auth.

2020 NY Slip Op 33475(U)

October 23, 2020

Supreme Court, New York County

Docket Number: 157983/2015

Judge: Barbara Jaffe

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“burning work,” which required that he be provided with the following protective gear: a wrecking torch, respirator, burning glasses, burning jacket, and welding gloves. Plaintiff received none of the gear except for a torch that was shorter than the wrecking torches used by other workers which allow a greater distance between a worker and his work. According to plaintiff, he may have seen at least one such torch on site, but it was mangled. The burning jackets worn by the other workers were fire retardant, and when he asked his foreperson for one, he was told that he was trying to obtain them. Plaintiff wore, instead, two sweatshirts, a jacket, vest, safety vest, jeans, long johns, and boots, none of which was fire retardant.

At least 12 feet below the upper roadway of the bridge was a protective shield, from which plaintiff hoisted himself to a plank he had placed some four feet above. Plaintiff’s employer gave such planks to all of the workers. They were approximately one foot wide, an inch and a half thick, and 10 feet long, and plaintiff brought the plank with him as he went “from bay to bay,” standing on it to perform the burning work.

After working for an hour and a half and as he stood on the plank, plaintiff became aware that his right shoulder was on fire. He dropped his torch and with his left hand, attempted to put out the fire. His right heel, however, fell off the plank and he lost balance, falling and landing on his feet on the protective shield. Plaintiff believes that wind had blown sparks from his work onto him.

Soon after his fall, and having hurt his back, plaintiff unsuccessfully sought to prepare an accident report from the foreperson who had assigned him to do the work. Plaintiff claimed to be “in agony” over the weekend and that on Monday morning, he saw the employee in charge of safety and then went to urgent care.

Plaintiff denied having reported to or received instructions from defendant. Rather, he

communicated only with those employed by his employer. Once every two weeks, however, he saw at the site one of defendant's employees who was responsible for overseeing safety.

(NYSCEF 94).

At an examination before trial, plaintiff reiterated his 50-h testimony, adding that when he fell, he had landed on his left foot and then fell forward, that he did not know how he had caught on fire, and that using a single plank as a work surface is inadequate absent side rails, as it provides too small a space on which to stand. (NYSCEF 95-97).

At his deposition, defendant's director of quality management and project manager of the bridge project testified that plaintiff's employer was hired to, among other things, replace the upper level roadway. To complete the renovation, a protective shield was installed to protect vehicles on the lower roadway and to provide workers with a work surface. (NYSCEF 98).

By affidavit dated February 20, 2020, as pertinent here, the safety manager of plaintiff's employer states that while defendant owned the premises where plaintiff's accident occurred, it neither supplied tools, equipment, and materials nor did it exercise supervision or control over the work, and he denies that his employer registered any complaints to defendant concerning equipment or materials furnished by his employer. He claims to have learned of the accident on March 9, 2015, that plaintiff did not report it on the day that it occurred, and that when plaintiff reported the accident to him, he did not mention having fallen from the plank or that he had been on fire.

The manager explains that all workers, including plaintiff, were told to stand on two planks when performing their work and that he personally conducted weekly talks with plaintiff and others on how to use the planks properly. According to the manager, workers normally mounted and dismounted from the planks by stepping up or jumping off, although the lowest end

of a plank was only a foot above the protective shield and thus, was a good place for accessing and dismounting from a plank. In addition, step benches were available to assist workers in mounting and dismounting. During the safety talks, plaintiff was told to wear fire-retardant clothing and was issued a “standard-length welding torch[] of 18 inches to 24 inches in length” which, he claims, was sufficient for the job. He explains that it is not feasible to build a scaffold for the job.

Attached to the manager’s affidavit is an incident report dated March 9, 2015, which he claims to have filled out after being notified of the accident. It reflects that plaintiff had alleged that he had jumped from the plank, which was approximately two and a half feet above the protective shield, and had felt a “tweak” in his back. (NYSCEF 111).

II. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Supporting evidence

The parties’ deposition testimony, annexed the affirmation of plaintiff’s attorney,

“satisfie[s] the requirements of CPLR 3212 since it serve[s] as a vehicle for the submission of documentary evidence.” (*Branch Servs., Inc. v Cooper*, 102 AD3d 645, 648 [2d Dept 2013]). Consequently, defendant’s contention that plaintiff’s motion must be denied due to his failure to offer an affidavit from a person of knowledge or by an expert is misplaced. (NYSCEF 110).

B. Labor Law § 200 and common law negligence

Defendant denies having exercised control or supervision over the means and methods of plaintiff’s work, and thus, it asserts, it cannot be held liable for plaintiff’s accident. Rather, plaintiff’s employer conducted safety meetings and provided all of the tools and equipment at the site. It also observes that its authority to stop work at the construction site constitutes an insufficient basis for imposing liability. (NYSCEF 110).

Where, as here, plaintiff alleges that his accident arose from the means and methods of his work, and he testified that his employer and not defendant, supervised and controlled his work and provided him with equipment, defendant cannot be held liable under Labor Law § 200 or common law negligence. (*See Astrakan v City of New York*, 184 AD3d 444 [1st Dept 2020] [defendants not liable where they lacked control over means and methods of plaintiff’s work]).

C. Labor Law § 240(1)

Pursuant to Labor Law § 240(1):

All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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) “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.” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute protects workers against “‘special hazards’ that arise when the work site is either elevated or positioned below the level where ‘materials or load [are] hoisted or secured.’” The special hazards are “limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured.” (*Ross*, 81 NY2d at 502). The statute thus imposes a “‘flat and unvarying’ duty upon the owner and contractor despite any contributing culpability on the part of the worker” (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]), and it is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Liability for a violation of Labor Law § 240(1) requires a showing that either defective or no safety equipment was provided and that it should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

1. Contentions

Plaintiff contends that while the plank he used was not defective, it was inadequate for

his work absent safety railings and a sufficient width for safely standing on it when his clothing caught fire. (NYSCEF 88).

According to defendant, plaintiff fails to demonstrate that the plank was inadequate, especially as he admits that it was not defective and does not allege that it had shifted or was on a surface that could not support it. Rather, it observes, plaintiff jumped off the plank, instead of using the available step bench. Moreover, defendant contends, plaintiff was a recalcitrant worker and the sole proximate cause of his accident, not only due to his decision to jump from the plank, but also by failing to walk to the lower end of the plank before dismounting or to sit down on the plank before safely stepping down onto the protective shield. Plaintiff's recalcitrance is apparent from the adequate safety devices that had been provided and from his refusal to follow the instruction he had received as to the proper performance of his work. Defendant additionally argues that having fallen no greater than two and a half feet, plaintiff cannot claim the protections of Labor Law § 240(1), and that it was not feasible for defendant to erect a scaffold. (NYSCEF 110).

2. Analysis

Where, as here, the plank on which plaintiff stood served as the functional equivalent of a scaffold or ladder and was used as a safety device to protect him from a gravity-related hazard, Labor Law § 240(1) applies. (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). Moreover, plaintiff's evidence reflects that, while standing on the plank and absent a device to prevent his fall, he caught fire while performing the burning work and lost his balance and fell, plaintiff demonstrates, *prima facie*, entitlement to summary judgment on the issue of liability. (*See e.g. Viera v WFJ Realty Corp.*, 140 AD3d 737, 738–39 [2d Dept 2016] [awarding summary judgment where plaintiff sustained electrical shock and, as result, fell from scaffold]).

Whether the plank was defective, secured, or moved before plaintiff's fall is immaterial (*see Nieto v CLDN NY LLC*, 170 AD3d 431, 432 [1st Dept 2019] [awarding summary judgment to plaintiff who lost balance and fell from ladder, regardless of whether ladder shook before fall]), and that he had fallen only two and a half feet in these circumstances is of no moment (*see e.g. Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016] [12 to 18 inch-fall sufficient for statute to apply]).

While a plaintiff's negligence is not a defense when the injury is caused by a violation of Labor Law § 240(1), there is no liability if plaintiff's actions are the sole proximate cause of the accident. (*Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 433 [2015]). Here, defendant raises an issue as to how the accident occurred, relying on the safety manager's recounting of plaintiff's statement that he had jumped from the plank with no mention of the fire.

Assuming that plaintiff was on fire, his failure to use a safe alternative means of dismounting the plank is immaterial given his testimony that he had lost his balance and fallen while attempting to put out the fire. It is reasonably inferred from all of the circumstances that the fire deprived plaintiff of an opportunity to respond in such a manner that would not have caused him to lose his balance. (*Cf Montgomery v Fed. Express Corp.*, 4 NY3d 805, 806 [2005] [plaintiff sole proximate cause of accident, as use of inverted bucket as means of climbing up and down four feet height differential, instead of readily available ladders, was not normal and logical]).

A defendant may not be held liable, however, where the plaintiff disregarded instructions on how to perform work in a proper manner and where such disregard was the sole proximate cause of the accident. (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39–40 [2004]). Thus, if plaintiff had not caught fire and instead voluntarily jumped from the plank, his failure to

dismount in the safe manner in which he was instructed would have been neither normal nor logical thus rendering him the sole proximate cause of his accident.

In any event even if the accident happened as plaintiff describes it, as due in large part to his having to work on a single plank, his employer's safety manager testified that two planks were both required and available. Thus, defendant raises a material issue of fact as to whether plaintiff was provided with an adequate safety device, which if used as instructed, would have provided him with an adequate amount of space on which to work and prevent his fall.

D. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating that the defendant violated a regulation setting forth a specific standard of conduct, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

As plaintiff offers no opposition to defendant's cross motion for summary judgment, and does not address 12 NYCRR §§ 23-1.7(b), 23-1.7(c), 23-1.15, 23-1.16(b), 23-1.16(d), 23-1.23(e), and 23-1.25(e) in its motion for summary judgment, they are deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [deeming abandoned industrial code provisions that plaintiff did not address in opposition to summary judgment motion]). Accordingly, only 12 NYCRR § 23-1.25(d), which plaintiff addresses in his motion, is discussed.

Section 23-1.25(d) of the industrial code provides:

Protection of persons. All persons engaged in welding or flame-cutting operations shall be provided where necessary with proper scaffolds installed and used in compliance with this Part (rule). Such persons shall be provided with approved eye protection suitable for the work involved and appropriate protective apparel. When arc welding is performed near other persons, such other persons shall be protected from the arc rays by opaque screens or by approved eye protection.

a. Contentions

Plaintiff contends that section 23-1.25(d) is sufficiently specific to serve as a basis for a violation of Labor Law § 241(6), that the evidence reflects that he was not provided with approved protective apparel as mandated by this section, and that the failure to provide him with adequate equipment allowed his clothing to catch on fire, causing him to fall and sustain injury. (NYSCEF 88).

Defendant denies that plaintiff was provided inadequate equipment for the task he performed and asserts that what is considered "appropriate" depends on the task. It alleges that plaintiff was provided with adequate equipment for his work, as described by his employer's safety manager. Moreover, defendant observes, plaintiff does not allege burn injuries, but a back injury due to his jump onto the protective shield. Consequently, defendant maintains that plaintiff's injury was not caused by the alleged code violation. (NYSCEF 110).

b. Analysis

A plaintiff may not rely on a violation of a “general directive” set forth in the industrial code to support of claim under Labor Law § 241(6). Rather, the regulation violated must set forth a “sufficiently specific, positive command.” (*Garcia v 95 Wall Assocs., LLC*, 116 AD3d 413, 413 [1st Dept 2014]). To the extent that plaintiff alleges that defendant violated section 23-1.25(d) because he was not provided “proper scaffolds,” that aspect of the section is too general to serve as a predicate for a Labor Law § 241(6) claim. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993] [“proper scaffolds” in section 23-1.25(d), as matter of law, too general to give rise to triable claim for damages under Labor Law § 241(6)]).

To the extent that plaintiff relies on the mandate that persons engaged in welding or flame-cutting operations be provided “appropriate protective apparel,” it is sufficiently specific. (*Brady v City of New York*, 52 AD3d 331, 332 [1st Dept 2008] [context of regulation makes clear that appropriateness necessarily depends on task; requirement of appropriate apparel concrete although particular items not set forth]).

As plaintiff’s evidence reflects that the lack of appropriate protective apparel resulted in his clothing catching on fire, which caused him to lose his balance and fall, he satisfies his *prima facie* burden, even if he did not suffer burn injuries. (*See e.g. DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 516 [1st Dept 2013] [plaintiff who fell from ladder after coming into contact with energized and exposed electrical wire entitled to summary judgment based on industrial code provision mandating de-energizing or guarding of circuits]; *Snowden v New York City Transit Auth.*, 248 AD2d 235, 236 [1st Dept 1998] [plaintiff has viable claim under industrial code provision mandating de-energizing or guarding of circuits, where violation of code caused injury, even though he suffered burns, not an electric shock]). However, in

opposition, defendant raises a triable issue of fact as to whether plaintiff was the sole proximate cause of his fall and resulting injuries (*see supra* at II.C.2).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for summary judgment is denied; it is further

ORDERED, that defendant’s cross motion for summary judgment is granted to the following extent: (1) severing and dismissing plaintiff’s cause of action under Labor Law § 200, and (2) severing and dismissing plaintiff’s Labor Law § 241(6) claim, but only as to 12 NYCRR §§ 23-1.7(b), 23-1.7(c), 23-1.15, 23-1.16(b), 23-1.16(d), 23-1.23(e), and 23-1.25(e), and is otherwise denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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BARBARA JAFFE, J.S.C.

10/23/2020
DATE

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	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE