SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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JASON MEDINA and DANIELLE MEDINA,

Plaintiffs,

-against-

43-22 QUEENS STREET LLC, HUNTER GC, L.L.C., and CAULDWELL-WINGATE COMPANY, LLC.

Defendants.

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Index No. 156211/2017

DECISION & ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on June 30, 2017, when, while working at a construction site located at 43-22 Queens Street, in Queens, New York (the Premises), while hoisting a 22-foot long, 1600-pound steel beam, the rigging failed and the beam swung around, striking plaintiff in the leg.

In motion sequence number 002, plaintiffs Jason Medina (plaintiff) and Danielle Medina move, pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law § 240 (1) claim against defendants 43-22 Queens Street, LLC (Queens Street) and Cauldwell-Wingate Company, LLC (Cauldwell) (collectively, defendants).[1]

BACKGROUND

On the day of the accident, Queens Street was the owner of the Premises. It hired Cauldwell to act as the general contractor for a project at the Premises that entailed the construction of the Premises (the Project). Cauldwell, in turn, subcontracted the ironwork at the Project to non-party Ment Brothers Ironworkers (Ment). Plaintiff was employed by Ment.

[1] By stipulation of discontinuance dated September 29, 2017, this action was discontinued as against defendant Hunter GC, LLC. (NYSCEF Doc. No. 5).

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Ment as an ironworker. He was also the "working foreman" for Ment at the Project (plaintiff's tr at 15). A working foreman leads a crew of workers (*id.* at 19 ["I called the shots"]). The working foreman is also in "direct contact" with Ment and the general contractor, Cauldwell (*id.* at 19). His coworkers at the Project were Cleve Hylton and Deshawn James.

On the day of the accident, plaintiff and his team were working on the roof of the 55-story tall Premises, erecting steel support beams for the Premises' water coolers. The company that delivered the steel beams – non-party Park Avenue Construction – "landed [the beams] in the wrong spot" (*id.* at 30). Each beam was 22 feet long, 18 inches high and weighed 1,600 pounds (*id.* at 38).

Since the beams were in the wrong area, plaintiff and his crew were tasked by Ment to "manually distribute" the beams to the proper location (*id.* at 30). They had been in the process of moving the beams for several days and, prior to the day of the accident, they had successfully moved approximately 10 beams without incident.

The process was the same for moving each beam. First, they would attach a "chain fall" – a type of manual hoist – and raise the beam, then they would maneuver the beam horizontally with a "come along" – a different type of manual hoist – before lowering the beam in the proper location (*id.* at 37). To move the subject beams, the crew had to clear a three-foot high "knee wall" before they could reach the installation area. To prepare for lateral movement, the standard procedure for the workers was to anchor the come along to pre-installed threaded rods and bolt the anchor in place before moving the beams to their new location. According to

plaintiff, prior to the accident, Cleve Hylton anchored and bolted a come along (the Come Along) to a threaded rod in this manner (*id.* at 42). Plaintiff, in his role as foreman, inspected the Come Along's anchor prior to commencing work. When asked if it looked satisfactorily secured, plaintiff responded "[y]es" (*id.* at 43). He also confirmed that he never had any issue with the Come Along prior to the accident.

Plaintiff testified that, immediately before the accident, he and his crew were hoisting a beam (the Beam) over the knee wall. Hylton was operating the come along, James was operating the chain fall and plaintiff was responsible for "drifting" or guiding the Beam into place (*id.* at 46). At the time of the accident, the Beam had been successfully hoisted into the air, and was being moved laterally by the Come Along. Plaintiff was "preparing to drift" the Beam when the Come Along "popped [and the] beams came down and swung" striking plaintiff in the leg and pinning him against the wall (*id.* at 40). Specifically, plaintiff explained, the Come Along had come loose from the anchor, causing the Beam to break free and swing "like a pendulum" into plaintiff, knocking him to the ground and pinning him to the wall (*id.* at 59).

At his deposition, plaintiff was shown an accident report prepared by Robert Tillas, the Project's safety manager. Plaintiff did not remember ever speaking with Tillas about the accident. Plaintiff reviewed the report and stated that he did not agree with its characterization of the accident.

Deposition Testimony of Peter DePalma (Cauldwell's Senior Superintendent)

Peter DePalma testified that at the time of the accident, he was Cauldwell's senior superintendent at the Project. Cauldwell was the general contractor for the Project. DePalma's duties included monitoring the construction's progress and scheduling and coordinating the trades' daily activities. He was on site on a daily basis and performed multiple daily visual

inspections of the active areas. DePalma was present at the Premises at the time of the accident, but he did not witness the accident. He learned of the accident over the radio system and arrived at the scene ten minutes later. He never spoke with plaintiff, though he did speak to one of plaintiff's coworkers.

DePalma was shown an incident report for plaintiff's accident and confirmed that it was created by Cauldwell's site safety specialist.

The Affidavit of Cleve Hylton (plaintiff's coworker)

Cleve Hylton avers that he was plaintiff's coworker on the day of the accident. Hylton states that he was the worker that rigged the Come Along, including attaching it to the anchor point – a threaded bolt – via the use of an "angle clip" and a "padhi" or "padeye" (Hylton aff, at 1). Hylton also states that the process he used to rig the Come Along "was the same process we had done on multiple days before" without incident (*id.* at 2).

According to Hylton, plaintiff did not install or rig the Come Along. Hylton also states that after the Beam was four feet in the air, "the come along popped and failed, came off the anchor, causing the piece of steel to fall and then swing" striking plaintiff (*id.* at 1).

The Affidavit of Robert Tillis (Defendants' Site Safety Consultant)

Robert Tillis states that on the day of the accident, he was the senior safety consultant on the Project. According to Tillis, he spoke with plaintiff immediately after the accident, prior to plaintiff's being removed from the site by EMS. He also spoke with Hylton and performed a visual inspection of the accident location. He then prepared an accident report based on his inspection of the accident location and his discussions with plaintiff and Hylton.

In his affidavit, Tillis also states that he "inspected the entire accident location . . . for any objects related to the accident, and no angle clip, padeye and/or unsecured bolts were present in the vicinity of where [plaintiff] and his crew had been working" (Tillis aff at ¶ 14).

The Affidavit of Belinda Tello (Ment's President)

Belinda Tello avers that at the time of the accident she was the president of Ment, the company that employed plaintiff. Tello also was the project manager for the Project. Tello states that plaintiff, as Ment's sole foreman at the Project, was responsible for determining "the methodology for safely moving and installing the beams" and that he was the person who "was responsible for ensuring that all apparatus [were] being used properly" by Ment workers at the Project (Tello aff, ¶ 13). Tello also states that, prior to plaintiff and his crew moving any of the beams, she and plaintiff had "discussed the options for hoisting and setting the beams" (*id.* at ¶ 16).

The Accident Report

Defendants submit an accident report, dated June 30, 2017, related to the accident (the Report) (affirmation in opposition, exhibit f; NYSCEF Doc. No. 63). It was prepared by Tillis, and provides, in pertinent part, the following:

> "[Plaintiff] indicated the Come-A-Long hook slipped off the threaded bolt causing the I-beam to swing towards Shearwall #6. . . hitting [plaintiff] in the lower left leg"

(*id.*).

The Expert Affidavits

The Expert Affidavit of Martin Bruno (Defendants' Site Safety Expert)

Martin Bruno opines that, based on his inspection of the Come Along, it was not defective and remained in good and working order after the accident. Based on this, Bruno

further opines that the accident occurred, not because the safety device failed, but because the device was improperly rigged by plaintiff's crew and because plaintiff did not confirm that it was properly erected before its use.

The Expert Affidavit of William Tintle, P.E. (Defendants' Mechanical Engineering Expert)

William Tintle opines that, based on his inspection of the Come Along, that the Come Along did not fail or break, but rather, was improperly secured. Tintle also opines that plaintiff was the sole person responsible to confirm that the come along was properly secured before use.

DISCUSSION

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 240 (1) claim as against defendants.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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 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]). 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" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010] [in concurrence]). Instead, liability "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]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Here, plaintiff has alleged that he was struck by a falling object – the Beam – due to the failure of a safety device – the Come Along – to provide adequate protection for his safety.

In order to recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, a plaintiff must first demonstrate that the object that fell – i.e., the Beam – was in the process of being hoisted or secured at the time of the accident, or that it "was a load that required securing for the purposes of the undertaking at the time it fell" (*Cammon v City of New York,* 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; *Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 595 [1st Dept 2015]). Here, it is undisputed that the Beam was in the process of being hoisted at the time that it fell.

In addition, plaintiff must establish that the safety device was inadequate to protect him, such that a violation of Labor Law § 240 (1) existed (*Narducci* 96 NY2d at 267). Typically, "[p]roof of a collapse of a safety device constitutes a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker's injuries" (*Dos Santos v State of New York*, 300 AD2d 434, 434 [2d Dept 2002]; *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"]; *see also Cutaia v Board of Mgrs. of the Varick St. Condominium,* 172 AD3d 424, 425 [1st Dept 2019]). Here, because the Come Along failed, causing the Beam to fall onto plaintiff, plaintiff has established his prima facie entitlement to summary judgment.

In opposition, defendants initially argue that a question of fact exists because plaintiff's testimony that the Come Along "popped off" its anchor (plaintiff's tr at 40) is at odds with the Report's statement that the Come Along "slipped off" its anchor (affirmation in opposition, exhibit f; NYSCEF Doc. No. 63).

"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" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; *see also Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007] [denying summary judgment on section 240 [1] cause of action where two credible theories of the accident existed, one where defendant would be liable under section 240 (1), and one where it would not be liable]).

Here, either version of plaintiff's testimony – whether the Come Along slipped off or popped off from its anchor – leads to the same result: a failure of a device to provide plaintiff with protection from a gravity related hazard (*see e.g. Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] ["possible discrepancies in [plaintiff's] description of how or why he fell . . . are irrelevant since there is no dispute that his injuries were caused by his fall"]). Accordingly, plaintiff's testimony as to how the accident happened, as compared to the description of the accident in the Report, does not raise a question of fact sufficient to overturn plaintiff's prima facie entitlement to summary judgment.

Defendants also argue that a question of fact exists as to whether plaintiff was the sole proximate cause of his accident. Specifically, they argue that the Come Along was an adequate safety device if it had been used properly. They further claim that plaintiff was the foreman responsible for ensuring that the Come Along was properly rigged and secured, that he failed to confirm it was properly rigged and secured, and that his failure to do so was the sole reason that the otherwise adequate device failed.

> "Where a plaintiff's actions [are] the sole proximate cause of his injuries, ... liability under Labor Law § 240(1) [does] not attach.

> Instead, the owner or contractor must breach the statutory duty under section 240(1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them"

(*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [internal quotation marks and citations omitted]).

In support of their argument, defendants rely on plaintiff's testimony that he "called the shots" at the site, that he directed Hylton to rig the Come Along, and that he was responsible for inspecting the device before its use (plaintiff's tr at 19). They further rely on Tillis's averment that there were no padeyes or angle clips at the accident site, despite being available at the Project in general, which indicates that the Come Along was improperly rigged. This, defendants argue, supports the position that, by improperly rigging the otherwise adequate Come Along, plaintiff and his crew misused the safety device, and such misuse was the sole proximate cause of the accident.

In opposition, plaintiff argues that he cannot be the sole proximate cause of the accident because he was not the individual who rigged the Come Along. Plaintiff further argues that he inspected the device and did not identify any problems with how it was rigged. Plaintiff claims that a failure to identify such a problem at most consists of comparative negligence when coupled with Hylton's actual rigging of the Come Along, and comparative negligence is not a defense to a Labor Law § 240 (1) violation (*see Orellano*, 292 AD2d at 291, quoting *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 513 [1991] ["[W]here the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, '[n]egligence, if any, of the injured worker is of no

consequence'"]; *accord Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]).

Here, there is a disparity between (1) Hylton's testimony that he rigged the Come Along with an angle clip and a padeye and bolted it down (along with plaintiff's testimony that he inspected the rigging and it looked secure), and (2) Tillis's statement that he inspected the accident site shortly after the accident and found no angle clip, padeye or bolt present (Tillis aff, at 14).

This discrepancy creates a question of fact as to whether the Come Along was misused – i.e. whether it was properly rigged in the first instance. That said, it is undisputed that plaintiff did not physically rig the device. As foreman, though, plaintiff was also responsible for inspecting the device to confirm its safety.

Therefore, the question before the court amounts to whether a foreman who is responsible for inspecting (but not setting up) a safety device prior to its use may be the sole proximate cause of an accident involving that safety device. The recent First Department decision of *Valle v Port Auth. of N.Y. & N.J.*, 189 AD3d 594 [1st Dept 2020] is instructive.

In *Valle*, a carpentry foreman was injured when a stack of cement boards fell on him while the boards were being hoisted from a delivery truck via a pallet jack. The defendants in *Valle* argued that the plaintiff was the sole proximate cause of his accident because he was the foreman who planned the delivery of the material and the hoisting operation, and he was the person who directed the workers to perform the various necessary tasks to move the boards. The court, in determining that there was a question of fact as to whether the plaintiff was the sole proximate cause of his accident, noted the following:

> "Defendants are correct that plaintiff's status as general foreman of the nonparty carpentry subcontractor gave him decision-making

> authority beyond that reposed in the average workman. In his capacity as foreman . . . plaintiff provided instructions concerning the manner in which the boards were to be stacked in the truck, examined the route to the [delivery location] on the day before the accident, inspected the load when it arrived at the work site, ordered his workers to unload the truck after the load became unbalanced, and directed his workers to use a pallet jack to unload the cement boards in the damaged part of the load instead of continuing to unload them by hand using A-frame dollies."

(*id.* at 594-595). These factors, coupled with a question of fact as to whether the safety device itself was insufficient to protect plaintiff, led the First Department to determine that a question of fact remained as to proximate causation.

Accordingly, in limited situations, a plaintiff's status as a foreman with responsibilities for confirming the safety and proper use of the safety device at issue may be considered when determining whether a plaintiff was the sole proximate cause of an accident involving the failure of such safety devices.

In addition, and in line with V*alle*, it has been held that a plaintiff may be the sole proximate cause of an accident where that plaintiff handles a safety device "'in such a manner as to create the condition causing its [failure]'" (*Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 502 [2d Dept 2014]; *quoting Berenson v Jericho Water Dist.*, 33 AD3d 574, 576 [2d Dept 2006]). Such a determination is applicable even where the work in question was performed by "laborers under [the plaintiff-foreman's] supervision" (*Berenson,* 33 AD3d at 576).

Here, based on the conflicting statements of Hylton and Tillis with respect to whether the Come Along was properly rigged, a question of fact exists as to whether the Come Along was an inadequate safety device or whether it was handled by plaintiff (or workers under his direct supervision) in such a manner as to create the very condition of the device's failure. Therefore,

under the very specific circumstances presented here, a question of fact as to sole proximate cause exists.

Thus, as defendants have raised a material question of fact, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants at this time.

The parties remaining arguments have been considered and found to be unavailing.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiffs Jason Medina and Danielle Medina (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law § 240 (1) claim as against defendants 43-22 Queens Street, LLC and Cauldwell-Wingate Company, LLC, is denied.

Dated: March 9, 2021

ENTER:

J.S.C.