Wright v Pennings
2021 NY Slip Op 33304(U)
March 16, 2021
Supreme Court, Orange County
Docket Number: Index No. EF012092/2018
Judge: Maria S. Vazquez-Doles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the 1841 Court House, 101 Main Street, Goshen, New York 10924 on the 16th day of March, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

BRIAN WRIGHT,

PLAINTIFF,

-AGAINST-

JOHN PENNINGS, JR. d/b/a PENNINGS ORCHARD,

DEFENDANT.

DECISION & ORDER

INDEX #EF012092/2018
Motion date: 11/13/20
Motion Seq. #1 & 2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 9 were read on plaintiff's motion for partial summary judgment on the issue of defendant's liability under Labor Law §240(1) and defendant's motion for summary judgment dismissing the complaint. The motions are consolidated for purposes of this decision:

Notice of Motion, Affirmation (Dupee), Exhibits A-J. . . . . 1 - 3
Notice of Motion (Sherwin), Supporting Affidavit, Exhibit A-J. . . . . 4 - 6
Reply Affirmation (Dupee), Exhibits 1 & 2. . . . . 7 - 8
Reply Affirmation (Sherwin). 9

Plaintiff commenced this action against defendant alleging common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The complaint alleges that, on September 15, 2017, plaintiff was an employee of Skyward Electric Company hired for the purpose of installing/wiring a switch box for an indoor/outdoor lighting fixture in the dairy barn located on the premises of 161 State Route 94 South, County of Orange, Warwick, State of New York. Plaintiff was injured while working in the dairy barn when a ladder was caused to fall on his head.

Plaintiff testified that on the date of the accident, he was part of a four-man crew. Immediately prior to the accident, plaintiff was working on the ground installing a switch box to the wall. He stated that Jason Rondinelli, one of the other Skyward Electric employees, was working in the general vicinity of where plaintiff was working just prior to the happening of the accident. Jason was attaching electrical wiring to a ceiling joist using a twenty foot extension ladder provided by Skyward. When asked if he ever used that particular ladder, plaintiff testified that he had previously used that same ladder with no issues and as far as he knew, the ladder was in good operating condition on the day of the accident. Plaintiff's attention was directed to the task he was performing. Without warning, plaintiff was struck on the top of his head by the falling extension ladder. Plaintiff alleges defendant did not provide any safety devices to the Skyward Electric workers as required by Labor Law §240(1).

Jason testified that he was working on the Pennings' property with plaintiff as a foreman for Skyward Electric. Both he and plaintiff were working inside the dairy barn. Plaintiff was installing a switchbox and wires on the inside of the exterior wall of the barn while standing on the ground. Jason was working inside the building roughly 18 to 20 feet away from the plaintiff running wires from switches to light fixtures. In order to perform this task, Jason needed to use a 20 foot extension ladder. As he was performing his work it was necessary for him to climb up the ladder and install a section of wiring and then descend the ladder and move the ladder to another location so as to repeat the task. Jason did this approximately 6 times before the accident occurred. Jason first testified that he would move the ladder from one location to the other by spinning it. (NYSCEF Document #21 pp. 13-14) He later testified that he would lift the ladder by its rungs and move the ladder to its next location. (*Id.* at p.54) When asked how the accident occurred, Jason initially testified that he "misjudged the rafter" and the ladder "had nothing to

lean on." (*Id.* At p. 15) Later on during his deposition, Jason testified that he placed the ladder on a black rubber mat which was on top of a concrete pad in a cow stall and when he stepped on a rung of a ladder to position it, he claims the ladder "...just sunk straight down." (*Id.* at p.66)

The plaintiff has failed to meet his prima facie burden of establishing a violation of Labor Law §240(1), and that such violation was a proximate cause of his accident. (*see Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16 [2d Dept 2016]).

"[T]he protections of Labor Law § 240(1) 'do not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97 [2015], *quoting Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501 [1993]). "'The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances ... that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides'" (*Toefer v. Long Is. R.R.*, 4 N.Y.3d 399, 407 [2005], *quoting Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514 [1991]). "Liability may, therefore, be imposed under the statute only where 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'" (*Nicometi v. Vineyards of Fredonia, LLC,* 25 N.Y.3d at 97, *quoting Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 [2009]).

Here, plaintiff's injury was not the result of an extraordinary elevation-related risk protected by Labor Law § 240(1), but rather, one of the usual and ordinary dangers of a

construction site (*Rodriguez v. Margaret Tietz Ctr. for Nursing Care*, 84 N.Y.2d 841 [1994]). More fundamentally, however, the plaintiff in this case was not engaged in a task that created an elevation-related risk of the kind that safety devices listed in §240(1) protect against. (*Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 A.D.3d 1043, 1045 [2d Dept 2012], *quoting Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681 [2007]). Further, defendant was engaged in moving and positioning the ladder by hand when he lost control of it and it fell on plaintiff's head. The fall of an object carried by hand, unlike the fall of the unsecured object, does not implicate the special protections afforded by Labor Law § 240(1) (*see, Outar v City of New York*, 286 AD2d 671 [2d Dept 2001]). The purpose of §240(1) is "to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Further, while a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury (*see Noble v AMCC Corp.*, 277 AD2d 20 [1st Dept 2000]), the risk requiring a safety device must be a foreseeable risk inherent in the work (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]; *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1096 [2d Dept 2012]; *Balladareas v Southgate Owners Corp.*, 40 AD3d 667 [2d Dept 2007]).

Moreover, even if the plaintiff were exposed to an extraordinary elevation-related risk, he would still not be entitled to recover pursuant to Labor Law § 240(1) because, under the circumstances of this case, any failure on the part of the defendant to provide protection from such an elevation-related risk was not a proximate cause of the accident.

"'[W]here an accident is caused by a violation of [Labor Law § 240(1)], the plaintiff's own negligence does not furnish a defense'; however, 'where a plaintiff's own actions are the

sole proximate cause of the accident, there can be no liability'" (*Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 433 [2015], *quoting Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39 [2004]). Where an "intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" between a defendant's actions or non-actions and the injury suffered by the plaintiff. (*Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 [1980] ; *see Campbell v. Central N.Y. Regional Transp. Auth.*, 7 N.Y.3d 819, 820–821 [2006]; *Niewojt v. Nikko Constr. Corp.*, 139 A.D.3d 1024, 1026 [2d Dept 2016]). "While foreseeability is generally an issue for the fact finder, where only one conclusion can be drawn, proximate cause may be decided as a matter of law" (*Bell v. Board of Educ. of City of N.Y.*, 90 N.Y.2d 944, 946 [1997]; *see Campbell v. Central N.Y. Regional Transp. Auth.*, 7 N.Y.3d 819, 820–821 [2006]; *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315–316 [1980]).

Here, there is no question that plaintiff was performing his work at ground level with no elevation- related risk. There is no question that Jason was using an extension ladder that was in good working condition. There is no question that Jason was moving the ladder to different locations by hand in order to complete his work and that he had moved the ladder at least six times prior to the accident. Immediately prior to the accident, Jason incorrectly positioned the ladder either by not making sure it was firmly on the step-up or by misjudging the distance of the ceiling rafter. Either way, it was Jason's actions that were the sole proximate cause of plaintiff's injuries (*see Robinson v. East Med. Ctr.*, LP, 6 N.Y.3d 550, 554–555 [2006]; *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805, 806 [2005]; *Saavedra v. 64 Annfield Ct. Corp.*, 137 A.D.3d 771, 772 [2d Dept 2016])

For the foregoing reasons, defendant has established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law §240(1) insofar as asserted against it (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). In opposition, the plaintiff failed to raise a triable issue of fact (*see id.* at 324).

With respect to the cause of action alleging a violation of Labor Law § 200 and common-law negligence, defendant has demonstrated its prima facie entitlement to summary judgment dismissing such cause of action by demonstrating that it did not exercise supervisory control over the plaintiff's work, and that they neither created nor had actual or constructive knowledge of any allegedly dangerous condition (*see Hatfield v Bridgedale, LLC*, 28 AD3d 608 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626 [2d Dept 2005]). In opposition, the plaintiff failed to raise a triable issue of fact.

Labor Law § 241(6) provides:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the ... contractors and their agents for such work ... shall comply therewith."

"'[T]o establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of the accident'" (*Creese v. Long Is. Light. Co.*, 98 A.D.3d 708, 710 [2d Dept 2012], *quoting Seaman v. Bellmore Fire Dist.*, 59 A.D.3d 515, 516 [2d Dept 2009]). In opposition to defendant's motion, plaintiff argues there is a question of fact whether defendant violated 12 NYRCC 23-1.8(c)(1) in failing to require plaintiff to wear a hard hat. Such regulation is not applicable to the facts of this case.

Both plaintiff and Jason admit that although safety hats were available for all employees

of Skyward Electric in the shop where their equipment is maintained, as well as in the Skyward Electric vans which transport the electricians to job sites, the plaintiff was not wearing a safety hat. Importantly, the work which was entailed in installing the wiring in the dairy barn was not the type of work where there is a danger of being struck by falling objects or materials. In fact, according to both the plaintiff and his co-worker, plaintiff was working against a wall of the barn installing a switch box and wiring and was approximately fifteen (15) to twenty (20) feet away from Jason at the time of the accident. (NYSCEF Document #34 at p. 66). It is unrefuted that plaintiff was not working under the ladder where Jason was performing his job and as such, there was no danger of him being struck by a falling object or material as required by the statute.

As discussed above, under the circumstances of this case, the sole proximate cause of the accident was plaintiff's co-worker's negligence in losing control of the ladder he was using to complete his work. Thus, any violation of Labor Law § 241(6) is not a proximate cause of the accident. (*see Lin v. City of New York*, 117 A.D.3d 913, 914 [2d Dept 2014]; *Serrano v. Popovic*, 91 A.D.3d 626, 627 [2012]; *Gittleson v. Cool Wind Ventilation Corp.*, 46 A.D.3d 855, 856 [2d Dept 2007])

Consequently, defendant has established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6) insofar as asserted against it (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). In opposition, the plaintiff failed to raise a triable issue of fact (*see id.*).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendants' motion is granted in its entirety; and it is further

ORDERED that plaintiff's Amended Complaint is dismissed as against the defendant, JOHN PENNINGS JR. d/b/a PENNINGS ORCHARD.

This decision constitutes the order of the Court.

Dated: March 16th, 2021
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record via NYSCEF