Neto v Magellan Concrete Structures Corp.

2021 NY Slip Op 33846(U)

July 2, 2021

Supreme Court, Kings County

Docket Number: Index No. 520889/17

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of July, 2021.

PRESENT:

HON. MARK I. PARTNOW,
Justice.

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ADRIANO NETO and LARA GOMES VICENTE,

Plaintiffs,

-against-

MS#4
Index No.: 520889/17

MAGELLAN CONCRETE STRUCTURES CORP., BROOKLYN GC, LLC, and EVERGREEN GARDENS I LLC,

Defendants.

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MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Plaintiff,

-against-

EXTREME BUILDING LLC,

Third-party Defendant.

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The following e-filed papers read herein:	NYSEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	92-93 106
Opposing Affidavits (Affirmations)	116, 125, 129
Affidavits/ Affirmations in Reply	135 138
Other Papers:	

Upon the foregoing papers, plaintiffs Adriano Neto and Lara Gomes Vicente move for an order, pursuant to CPLR 3212, granting partial summary judgment in their favor

with respect to liability on their Labor Law §§ 240 (1) and 241 (6) causes of action against defendants (motion sequence number 4).

Plaintiffs' motion is granted with respect to the Labor Law § 240 (1) cause of action and denied with respect to the Labor Law § 241 (6) cause of action.

BACKGROUND

In this action premised upon common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), plaintiff Adriano Neto[1] alleges that he suffered injuries on September 15, 2017, when a coworker, Emilson Dias Andrade, dropped a reshoring post[2] onto plaintiff's shoulder and neck. At the time of the accident, the coworker had intended to hand the post down to plaintiff from the level above. The accident occurred during the construction of a multistory building that was owned by defendant Evergreen Gardens I, LLC, (Evergreen). Evergreen had hired defendant Brooklyn GC, LLC, (Brooklyn GC) to act as the general contractor on the project, and Brooklyn GC hired defendant/third-party plaintiff Magellan Concrete Structures, Corp. (Magellan), to erect the concrete superstructure of the building. Magellan, in turn, subcontracted a majority of the concrete superstructure work to third-party defendant Extreme Building LLC (Extreme), plaintiff's employer.[3]

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[1] Plaintiff Lara Gomes Vicente's claims are derivative only. All singular references to plaintiff relate to plaintiff Adriano Neto.

[2] Reshoring posts, also referred to as jacks, are used to support decking until the concrete in the support beams and concrete poured onto the decking dries.

[3] Although plaintiff, at the time he worked on the project, was under the impression that he had been employed by Magellan, there does not appear to be any real dispute that plaintiff's employer was Extreme and that plaintiff worked under the supervision of Extreme's supervisors Wellington (who was only known by that name) and Joao Bueno.

Plaintiff was employed as a carpenter for the project, and his tasks included, among other things, building decking, helping with the concrete pours, and stripping the forms from the concrete after the concrete dried. According to plaintiff's deposition testimony, on the afternoon of the accident a supervisor he knew by the name of Wellington directed plaintiff and several of his coworkers to move some of the reshoring posts from the ground floor of the building to the basement where they were needed to build a ramp. In order to do so, two of plaintiff's coworkers would carry the poles from where they had been kept to Andrade, who was at the street level, and who would lower them to another group of workers, including plaintiff, who were in the basement and who would then carry the posts 20 feet or so and lay them onto a cart. After plaintiff had handled 8 to 10 posts in this manner, plaintiff returned to receive another post from Andrade, and just as he arrived to do so, Andrade lost hold of a post and dropped it onto plaintiff's neck and shoulder. At the time Andrade lost hold of the post, it was three to four feet above plaintiff's head.[4] Plaintiff stated that each post was approximately 14 feet long, and weighed approximately 45 to 50 kilograms.[5] Although plaintiff did not testify that Wellington had directed the group of workers to lower the posts in this manner, plaintiff states that Wellington was present on the floor above while the posts were being lowered and observed plaintiff and his coworkers performing the work in this manner.[6]

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[4] At his deposition, Andrade stated that the post fell approximately six feet.

[5] The court takes judicial notice that 45 to 50 kilograms is around 99 to 110 pounds. The court notes that Andrade, in his deposition testimony, stated that the post weighed approximately 30 to 35 kilograms, the equivalent of around 66 to 77 pounds.

[6] In Andrade' deposition testimony, which was submitted by defendants, Andrade stated that it was Joao Bueno, one of Extreme's supervisors, who told him and his coworkers to lower the poles by hand threw a hole in the floor to the level below.

DISCUSSION

LABOR LAW § 240 (1)

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "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.*, 13 NY3d 599, 603 [2009]; *see Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury . . . the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Constr.*

Corp., 139 AD3d 1024, 1027 [2d Dept 2016] [citation omitted]; *see Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]; *cf. Fabrizi*, 22 NY3d at 663).

Here, plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) cause of action through his deposition testimony that he was struck by the post that was dropped from three to four feet above his head by his coworker. Under these circumstances, plaintiff's testimony that the post was three to four feet above his head demonstrates that he was subject to physically significant elevation differential, even if the post weighed 66 to 77 pounds as asserted by Andrade, rather than the 99 to 110 pounds as asserted by plaintiff (*see Wilinski*, 18 NY3d at 10; *Outar*, 5 NY3d at 732; *Tropea v Tishman Constr. Corp.*, 172 AD3d 450, 451 [1st Dept 2019], *affirming* 2017 WL 6731869, *2 [U] [Sup Ct, New York County 2017]; *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 730-731 [2d Dept 2011]; *Cardenas v One State St., LLC*, 68 AD3d 436, 437-438 [1st Dept 2009]; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506 [2d Dept 2007]; *cf. Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]; *Kuhn v Giovanniello*, 145 AD3d 1457, 1458 [4th Dept 2016]). This evidence further demonstrates that the risks inherent in the work of lowering the posts by hand rendered the need for a section 240 (1) safety device foreseeable and that the post fell because of the absence of a safety device of the kind enumerated in the statute (*see Albuquerque v City of New York*, 188 AD3d 515, 515 [1st Dept 2020]; *Barrios v 19-19 24th Ave. Co. LLC.*, 169 AD3d 747, 748-749 [2d Dept 2019]; *Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707-708 [2d Dept 2019];

Rutkowski, 146 AD3d at 686; *Gikas v 42-51 Hunter St., LLC*, 134 AD3d 987, 988 [2d Dept 2015]; *Pritchard*, 82 AD3d at 730-731; *Mendoza*, 38 AD3d at 506; *see also McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]). The fact that the post was being lowered by hand does not preclude recovery under Labor Law § 240 (1) (*see Gutierrez v Harco Consultants Corp.*, 157 AD3d 537, 537-538 [1st Dept 2017]; *Rutkowski*, 146 AD3d at 686; *Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]; *Gikas*, 134 AD3d at 988; *Pritchard*, 82 AD3d at 730-731; *Van Eken v Consolidated Edison Co. of N.Y.*, 294 AD2d 352, 353 [2d Dept 2002]; *cf. Outar v City of New York*, 286 AD2d 671, 673 [2d Dept 2001], *affd* 5 NY3d 731 [2005]).

Plaintiffs have also shown that defendants are entities that may be held liable under Labor Law § 240 (1). Evergreen, as owner of the premises (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]), and Brooklyn GC, as the general contractor for the project (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Barker v Union Corrugating Co.*, 187 AD3d 1544, 1546 [4th Dept 2020]), are entities covered by the statute. Similarly, Magellan, which was hired by Brooklyn GC to perform the concrete superstructure work, and which subcontracted for Extreme to perform a portion of that work, acted as a statutory agent of Evergreen or Brooklyn GC with respect to such work, and it may be thus held liable despite its delegation of a portion of the work to Extreme and regardless of whether it actually exercised supervision or control of the work at issue (*see White v 31-01 Steinway, LLC*, 165 AD3d 449, 452 [1st Dept 2018]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018]; *Gallagher v Resnick*, 107 AD3d 942, 945 [2d Dept 2013]; *Britez v Madison Park Owner, LLC*, 106

AD3d 531, 532 [1st Dept 2013]; *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]; *Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569-570 [2d Dept 2010]).

Contrary to the assertions of Evergreen and Brooklyn GC in their opposition papers, the need for a safety device is shown by plaintiff's testimony regarding the elevation differential at issue, the weight of the post, and the nature of the work and no expert testimony is required under these circumstances (*see McCallister*, 92 AD3d at 928-929; *see also Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]; *Franco v 1221 Ave. Holdings, LLC*, 189 AD3d 615, 615 [1st Dept 2020]; *Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 1301 [2d Dept 2020]; *Passos*, 169 AD3d at 707-708).

Extreme argues, in opposition, that there are at least factual issues as to whether plaintiff was the sole proximate cause of his accident because plaintiff could have used the staircase to the basement or a crane that was at the jobsite to perform the work. Assuming arguendo that the crane was available or that plaintiff could have used the stairs, the availability of the crane or stairs fails to demonstrate the existence of a factual issue with respect to sole proximate cause because plaintiff's deposition testimony shows that plaintiff was following the lead of his coworkers and acting with at least the tacit approval of his supervisor Wellington in performing the work in the manner he did (*see Portillo v DRMBRE-85 Fee LLC*, 191 AD3d 613, 614 [1st Dept 2021]; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750-751 [2d Dept 2009]; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880-881 [2d Dept 2006]; *see also Biaca-Neto v Boston Rd. II Hous.*

Dev. Fund Corp., 34 NY3d 1166, 1168 [2020]; *Murray v Arts Ctr. & Theater of Schenectady, Inc.*, 77 AD3d 1155, 1156-1157 [3d Dept 2010]). Indeed, in Andrade's deposition testimony, which was provided by defendants' in opposition, Andrade goes further and states that he and his coworkers were specifically instructed by Joao Bueno to lower the posts through a hole in the floor by hand.

While Extreme correctly notes that Andrade's affidavit is inadmissible in the absence of an affidavit from a translator (*see Gonzalez v Abreu*, 162 AD3d 748, 748-749 [2d Dept 2018]; *Saavedra v 64 Annfield Court Corp.*, 137 AD3d 771, 772-773 [2d Dept 2016], *lv denied* 28 NY3d 909 [2016] ; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54-55 [2d Dept 2011]; CPLR 2101 [b]), this defect with plaintiff's proof does not require denial of plaintiff's motion, since, as discussed above, plaintiff's own deposition testimony is sufficient to make out his prima facie showing. Moreover, Andrade's deposition testimony is largely consistent with his affidavit, and nothing in his testimony suggests the existence of factual issues with respect to the happening of the accident.[7] Finally, contrary to Extreme's assertion, there are no material inconsistencies in the testimony of plaintiff or Andrade sufficient to demonstrate a factual issue with respect to their credibility such that the plaintiffs' motion must be denied (*see Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 689-690 [2d Dept 2017]; *Fox v H&M Hennes & Mauritz, L.P.*, 83 AD3d 889, 890-891 [2d Dept 2011]).

[7] Indeed, given the submission of Andrade's deposition transcript, this court need not consider whether the affidavit from the translator submitted by plaintiff on reply was sufficient to demonstrate the qualifications of the translator and the accuracy of the translation (*see Taveras v Cayot Realty, Inc.*, 125 AD3d 754, 755 [2d Dept 2015]).

Lastly, Extreme and each of the defendants oppose plaintiffs' motion on the ground that summary judgment is premature because discovery is incomplete. None of these parties, however, has provided an evidentiary basis to suggest that discovery might lead to relevant evidence or that facts justifying the denial of the motion are within the exclusive knowledge and control of the plaintiff (*see Martin v County of* Westchester, 194 AD3d 1036, 1037 [2d Dept 2021]; *Chen v City of New* York, 194 AD3d 904, 905 [2d Dept 2021]; *Mayorga v 75 Plaza LLC*, 191 AD3d 606, 608 [1st Dept 2021]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying summary judgment (*see Chen*, 194 AD3d at 1037).[8]

In sum, defendants have failed to demonstrate any issue with plaintiffs' prima facie showing and have failed to submit any evidentiary proof demonstrating the existence of a factual issue that would require denial of plaintiffs' motion with respect to the Labor Law § 240 (1) cause of action.

[8] The defendants each assert that they have not had a chance to depose either of plaintiff's supervisors employed by Extreme. The court notes, however, that during the pendency of plaintiffs' summary judgment motion, Magellan obtained an order (Knipel, J.) dated March 9, 2021, requiring Extreme to appear for a deposition by May 18, 2021. This order further provided that a failure of a party to comply with the order "will result in the non-complying party being precluded from offering evidence." As the parties have since notified the court that this deposition did not take place, it would appear that Extreme has been precluded pursuant to the terms of the order. In view of this apparent preclusion of Extreme, there is now no reason to delay determination of the motion based on the lack of discovery even if defendants had shown that the testimony of Extreme's supervisors would lead to relevant evidence.

LABOR LAW § 241 (6)

In seeking summary judgment with respect to the Labor Law § 241 (6) claim, plaintiffs rely on violations of 12 NYCRR 23-1.7 (a) (1) and 12 NYCRR 23-2.1 (a) (2). Section NYCRR 23-1.7 (a) (1), which provides, as is relevant here, that, "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection," and mandates the placement of planks, plywood or other suitable material to protect workers in the area. Here, plaintiffs have presented no evidentiary proof showing that the accident location was an area that was normally exposed to falling material or objects as is necessary to show a violation of section 23-1.7 (a) (1) (*see Crichigno Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]). Additionally, plaintiffs have failed to address whether the provision of the overhead protection required by section 23-1.7 (a) (1) would have been consistent with the objective of the work involving the lowering of the posts through the hole (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]; *Crichigno*, 186 AD3d at 665). Plaintiffs have also failed to demonstrate that a violation of section 23-2.1 (a) (2), which sets requirements regarding the storing of materials, was a proximate cause of the accident since the post that struck plaintiff was not being stored, but rather, was in use at the time of the accident (*see Zamajtys v Cholewa*, 84 AD3d 1360, 1362 [2d Dept 2011]; *Castillo v Starrett*, 4 AD3d 320, 321-322 [2d Dept 2004]; *see also Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574 [4th Dept 2014]). Accordingly, as plaintiffs have failed to demonstrate that either section 23-1.7 (a) (1) or section 23-2.1 (a) (2) was

violated, plaintiffs have failed to make their prima facie showing with respect to their Labor Law § 241 (6) claim, and their motion in this regard must be denied regardless of the sufficiency of the opposition papers (*see Crichigno*, 186 AD3d at 665; *see also Winegrad v New York Univ. Hosp. Ctr.*, 64 NY2d 851, 853 [1985]).

This constitutes the decision and order of the court.

ENTER

J.S.C.

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