

Murphy v Port Auth. of N.Y. & N.J.

2021 NY Slip Op 34001(U)

June 17, 2021

Supreme Court, Bronx County

Docket Number: Index No. 34364/2018E

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 2, 3

TIMOTHY J. MURPHY,

Plaintiff,

- against -

Index No.: 34364/2018E

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
LAGUARDIA GATEWAY PARTNERS, LLC,
SKANSKA USA CIVIL NORTHEAST INC., SKANSKA
USA BUILDING INC., WALSH CONSTRUCTION
COMPANY II, LLC and SKANSKA-WALSH JOINT
VENTURE,

Defendants.

DECISION and ORDER

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
LAGUARDIA GATEWAY PARTNERS, LLC,
SKANSKA USA CIVIL NORTHEAST INC., SKANSKA
USA BUILDING INC., WALSH CONSTRUCTION
COMPANY II, LLC and SKANSKA-WALSH JOINT
VENTURE,

Third-Party Plaintiffs,

- against -

20/20 INSPECTIONS INC.,

Third-Party Defendant.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion (Mtn. Seq. # 2) is whether he is entitled to judgment as to his Labor Law §240(1) claim.¹ This court finds that there are triable

¹ Plaintiff did not oppose the branches of Defendants/Third-Party Plaintiffs' summary judgment motion seeking the dismissal of his Labor Law §§241(6), 200, and common law negligence claims, therefore, same is dismissed and will not be addressed herein.

issues of fact that preclude Plaintiff's application for judgment with respect to his Labor Law §240(1) claim.

According to Plaintiff, on the day of his accident he was employed by Third-Party Defendant 20/20 Inspections Inc., ("20/20") as a Chief Field Supervisor for a construction project located at LaGuardia Airport. Plaintiff testified that on day of his accident, he was performing an audit of his co-worker, Kevin Foote, who was a 20/20 Field Inspector. Plaintiff further testified that the general work area where he and Mr. Foote were located was on top of a steel girder² approximately 15 to 20 feet from the ground below.

In order to reach the top of the steel girder, Plaintiff claims he had to climb piles of dunnage (stacks of wood blocks) that were stacked 4 to 5 feet high. Plaintiff alleges that once he reached the top of the dunnage, he grabbed the steel girder's top flange to climb up onto it. Plaintiff testified that his accident occurred as he was attempting to descend from the top of steel girder. Plaintiff claims that while his feet were on the bottom flange of the steel girder and while he was holding onto steel girder's top flange, he jumped down to ground causing him to sustain injury.

Plaintiff seeks judgment on his Labor Law §240(1) claim. Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo 124 LLC*, 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must

² A girder is defined as a support beam used in construction. It is the main horizontal support of a structure which supports smaller beams. Girders often have an I-beam cross section composed of two load-bearing flanges separated by a stabilizing web, but may also have a box shape, Z shape, or other forms. *See* <https://en.wikipedia.org/wiki/Girder> [last visited June 15, 2021].

demonstrate that his injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

Plaintiff argues that he is entitled to judgment under Labor Law §240(1) because he claims that the evidence in this case establishes that Defendants/Third-Party Plaintiffs Port Authority of New York and New Jersey, LaGuardia Gateway Partners, LLC, Skanska USA Civil Northeast Inc., Skanska USA Building Inc., Walsh Construction Company II, LLC, and Skanska-Walsh Joint Venture (collectively “Defendants”) failed to protect him from a gravity-related risk. Plaintiff contends that Defendants failed to provide him with adequate safety devices in the form of a scissor or bucket lift in order to give him safe access to the top of the steel girder. Plaintiff argues that Defendants’ failure in providing him with adequate safety devices forced him jump from the steel girder’s flange, which was the proximate cause of his injuries.

In opposition, Defendants contend that liability under Labor Law §240(1) should not attach because Plaintiff was the sole proximate cause of his injury. Defendants argue that Plaintiff’s own conduct in choosing to descend from the steel girder by jumping off it, rather than simply walking down it to ground level was the sole proximate cause of his injuries. Defendants support the instant argument via the affidavit of Plaintiff’s co-worker, Kevin Foote, who averred that the location where he and Plaintiff ascended and descended from the steel girder was approximately 3 feet from the ground making unnecessary the need for a ladder or lift. Moreover, Defendants rely upon the affidavit of Defendants’ Quality Control Manager, Stephen Lee, who averred that portions of the steel girder began at ground level. Mr. Lee further

averred that Plaintiff could have stepped onto and off the portions of the steel girder that began at ground level instead of jumping off the steel girder.

Lastly, Defendants posit that Plaintiff was a recalcitrant worker because he was instructed to use a ladder or lift, if needed. Furthermore, Defendants contend that ladders were readily available to Plaintiff, which he refused to request, therefore, making him the sole proximate cause of his accident.

This court finds that Defendants' sole proximate arguments based on their recalcitrant worker defense must fail. Defendants did not demonstrate that Plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." *See Kosavick v. Tishman Constr. Corp. of NY*, 50 A.D.3d 287, 855 N.Y.S.2d 433 (1st Dep't 2008).

Further, this court finds that Defendants did not demonstrate that Plaintiff's "normal and logical response" was to get a safety device rather than having Defendants furnish same as they did not establish that Plaintiff knew of the exact location of the safety devices and that it was his practice of obtaining such safety devices independently from Defendants directing him to do so. *See Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dep't 2009); *see also Robinson v. E. Med. Ctr., LP*, 6 N.Y.3d 550, 847 N.E.2d 1162, 814 N.Y.S.2d 589 (2006).

However, this court finds there is conflicting evidence and testimony concerning the height of the steel girder and whether portions of the steel girder tapered off at the ground level of the construction site. Therefore, this court finds that there are triable issues of fact as to whether Plaintiff was forced to jump off the steel girder due to Defendants' failure in providing adequate safety devices or whether his injuries were proximately caused solely by his own

actions in deciding to jump off the steel girder when he could have walked down same to the ground level of the construction site. *See Cordeiro v. Shalco Invs.*, 297 A.D.2d 486, 747 N.Y.S.2d 194 (1st Dep't 2002); *see also Thomas v. Fall Cr. Contrs., Inc.*, 21 A.D.3d 756, 800 N.Y.S.2d 559 (1st Dep't 2005); *see also Mercado v. NY Univ.*, 29 A.D.3d 496, 815 N.Y.S.2d 546 (1st Dep't 2006).

Accordingly, it is

ORDERED, that Plaintiff's summary judgment motion seeking judgment as to his Labor Law §240(1) claim is denied; and it is further

ORDERED, that Defendants' summary judgment motion seeking the dismissal of Plaintiff's complaint is granted in part; and it is further

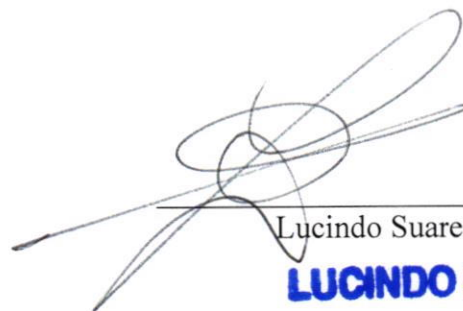
ORDERED, that Defendants' application to dismiss Plaintiff's Labor Law §240(1) claim is denied; and it is further

ORDERED, that Defendants' application to dismiss Plaintiff's Labor Law §§241(6), 200, and common negligence claims is granted, without opposition; and it is further

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

This constitutes the decision and order of the court.

Dated: June 17, 2021



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.