

Alli v Karim

2021 NY Slip Op 34153(U)

September 28, 2021

Supreme Court, Queens County

Docket Number: Index No. 702537/2018

Judge: Ulysses B. Leverett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
MOHAMED N. ALLI,

Plaintiff,

Index No.: 702537/2018

Motion Seq. No. 8

-against-

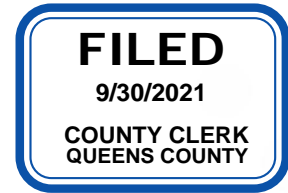
ABDUL KARIM, individually and doing business as
GARCON CONTRACTING, SEAGIRT BLVD LLC,
711 SEAGIRT AVENUE HOLDINGS LLC, SEAGIRT
HOUSING DEVELOPMENT FUND CORP., and HP
SEA GIRT HOUSING DEVELOPMENT FUND
COMPANY, INC.,

Defendants.

DECISION/ORDER

-----X
711 SEAGIRT AVENUE HOLDINGS LLC and HP SEA
GIRT HOUSING DEVELOPMENT FUND COMPANY,
INC.,

Third-Party Plaintiffs,



-against-

HKS CONSTRUCTION CORPORATION,

Third-Party Defendant.

-----X
PRESENT: HONORABLE ULYSSES B. LEVERETT

Notice of Motion-Affidavit/Affirmation-Exhibits
Affirmation in Opposition
Affirmation in Reply

Papers Numbered

EF 113-124
EF 201
EF 202

Upon the foregoing papers, the decision and order on this motion is as follows:

Plaintiff Mohamed N. Alli brings this motion (sequence 8) pursuant to Civil Practice Law and Rules (CPLR) §3212 for an order granting summary judgment on the issue of liability in favor of plaintiff and against defendants 711 Seagirt Avenue Holdings LLC (711 Sea Girt) and HP Sea Girt Housing Development Fund Company, Inc. (HP Sea Girt) pursuant to Labor Law §240(1); per CPLR §602(a) consolidating this action with action: Mohamed N. Alli, Plaintiff v. Tree Top Development of S3 LLC, Treetop Development LLC, and Elite Renovations, LLC, Defendants, under Index No. 700154/2020 (Action 2) and upon consolidation, granting summary judgment in Action 2 on the issue of liability against defendant Elite Renovations, LLC pursuant to Labor Law §240(1).

Plaintiff Alli discontinued this action against Seagirt Housing Development Fund Corp. only pursuant to a stipulation dated February 8, 2019. Plaintiff's motion to consolidate this action with Mohamed N. Alli v. Treetop Development of S3 LLC, Treetop Development LLC and Elite Renovation under Index No. 700154/2020 was granted pursuant to a decision and order of this Court dated April 19, 2021.

Plaintiff commenced this action February 2018 asserting claims against defendant 711 Seagirt Avenue Holdings LLC (711 Seagirt) for alleged violations of Labor Law §§200, 240(1), 241(6) and common law negligence in connection an injury incurred during the course of plaintiff employment with defendant HKS Construction at a jobsite located at 711 Seagirt Avenue, Far Rockaway, Queens, NY.

Defendant 711 Seagirt and Defendant HP Sea Girt Housing Development Fund Company, Inc. (HP Sea Girt) owns the subject premises at 711 Seagirt Avenue, Far Rockaway, NY. Defendant 711 Seagirt is not the deed/title holder of the subject premises but asserts that it is the beneficial owner. Defendant HP Sea Girt asserts that it is only the legal title owner of the Property pursuant to a November 21, 2017 deed, and the Declaration of Interest and Nominee Agreement between Defendant 711 Seagirt and Defendant HP Sea Girt.

Plaintiff alleges that on February 3, 2018 he was working on a construction project at 711 Seagirt Avenue, Far Rockaway, NY, standing at ground level while receiving wooden planks being unloaded from a flatbed truck. The load of planks toppled and broke plaintiff's left ankle. Plaintiff claims that this is a gravity related accident resulting in absolute liability under Labor Law §240(1). The accident happened while plaintiff was employed as a helper for HKS Construction Corp. HKS Construction Corp. was hired to construct scaffolding and sidewalk bridging at the project site by the subcontractor of the construction project, Abdul Karim, doing business as Garcon Contracting. Abdul Karim d/b/a/ Garcon Contracting was hired by Jose Felix Reyes, the Director of Field Operations for Treetop Development and Elite Renovations LLC.

Plaintiff asserts that the capital improvement at the 711 Seagirt project was implemented by Director Reyes and that the extensive work falls within the category of Labor Law §240(1). Plaintiff in its reply affirmation in support of plaintiff's motion consented to the dismissal of his common law/Labor Law §200 causes of action. Plaintiff also consented to dismissal of his Labor Law §241(6) cause of action. However, plaintiff maintains that the remaining Labor Law §240(1) cause of action is subject to summary judgment because this claim arises out of a gravity/elevation related accident resulting in defendant's absolute liability under Labor Law §240(1) as no safety devices were provided.

Labor Law §240(1) provides:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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) imposes a non-delegable duty on all contractors and owners and their agents in the repairing of a building or structure who do not furnish or cause to be furnished inter alia hoists, stays, ladder, pulley, braces, ropes and other devices which give proper protection to a person so employed. The non-delegable duty imposed by Labor Law §240(1) applies only if the listed devices are necessary to provide protection. See *La France v. Niagara Mohawk Power Corp.*, 89 A.D.2d 757 (1982). A defendant's failure to provide adequate protection from reasonable preventable gravity related accidents will result in liability. See *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1 (2011).

The plaintiff must prove [1] that Labor Law §240(1) has been violated by defendant's failure to provide required protection at the site and [2] that the violation was a proximate cause of the injury. See *Barreto v. Metropolitan Transportation Authority*, 25 N.Y.3d 426 (2015), *Chacha v. Glickenhauz Doynow Sutton Farm Development, LLC*, 69 A.D.3d 896 (2010), and *Blake v. Neighborhood Housing Services of NY City*, 1 N.Y.3d 280 (2003). Plaintiff must also show that he was hired to work on a structure or building by someone who was the owner, contractor or their agent.

Defendant's 711 Seagirt and HP Sea Girt in opposition to plaintiff's motion for summary judgment asserts that the evidence established that the accident involved an ordinary construction hazard and not elevation-related risk. Defendant asserts that defendant 711 Seagirt is the beneficial owner of the property and defendant HP Sea Girt is the legal title owner of the property. Owner defendant through its agents Elite Renovation contracted with Abdul Karim d/b/a Garcon Contracting on December 15, 2017 to perform replacement of 400 window lintels on the exterior of the 711 Seagirt Avenue building.

The deposition testimony of Mr. Karim supports that Abdul Karim subcontracted with defendant HKS Construction Corporation (HKS) to construct the sidewalk shed and that plaintiff was paid in cash as an employee of HKS. The wooden planks for the shed arrived at the project site, preloaded strapped and buckled on HKS flatbed trucks. The planks were stacked 8 feet high and the accident occurred while plaintiff was unloading a truck.

Defendants assert that the subject plank stacks constituted ordinary construction hazard as OSHA Regulation §1926.250(b)(8)(iv) provided that lumber piles to be handled manually shall not be stacked more than 16 feet high. Defendant claims that the manually handle planks were at most 13 feet off the ground, well under the OSHA height limit of 16 ft. Plaintiff claims plank and iron gates were stacked higher than 16ft and protection devices were warranted.

Defendants argue that unloading of materials from a truck was not the type of elevation-risk which Labor Law §240(1) was designed to address, but rather the type of ordinary risk inherent in construction work. See *Cabezas v. Consolidated Edison*, 296 A.D.2d 522 (2002). Defendant further states that additional safety devices would be contrary to the work objective of unloading the materials from HKS flatbed truck based upon the practical and common sense approach to

protective devices which prevents the activity in which plaintiff is engaged at the time of the accident. *See Salazar v. Novaley Contracting Corp.*, 18 N.Y.3d 134 (2011) and *Tornabene v. City of New York*, 40 Misc. 3d 992 (Kings County Sup. Ct. 2013).

Plaintiff argues that safety devices were needed for the stack lumber but none was supplied. Plaintiff assert hoist, forklifts or load securement items should have been provided by defendant. Additionally, plaintiff argues that in a Labor Law §240(1) falling object case as this the weight of the falling object is a necessary component in determining whether an elevation differential is physically significant or de minimus. Here, the cumulative weight of the fallen lumber has not been determined. *See Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599 (2009).

Defendants argue that plaintiffs summary judgment motion against defendants Treetop Development of S3, LLC and Treetop Development, LLC (Treetop Defendants) must be denied because they do not own the property nor contracted for any work at the project as required by Labor Law §240(1).

Defendant's also argues that Elite Renovation via Jose Reyes was not the defendants agent for Labor Law §240(1) liability because Elite did not have authority to supervise or control plaintiffs work but rather confirmed reported progress of the work for issuance of payment to contractors. *See Myles v. Claxton*, 115 A.D.3d 654 (2014).

Defendant additionally argues that plaintiffs claim against HP Sea Girt must be denied because defendant HP Sea Girt is not an owner or agent under Labor Law §240(1), in that it does not maintain and equitable and beneficial interest in the property. Defendants do acknowledge that HP Sea Girt holds legal title to the property although on behalf of defendant 711 Seagirt. However, the Court notes that liability under Labor Law §240(1) rest solely on the fact of ownership and not whether the owner contracted for or benefited from the work. *See Sanatass v. Consolidated Investing Co.*, 10 N.Y.3d 333 (2008). Finally defendants argue that plaintiff is not a proper plaintiff under Labor Law §240(1) because plaintiff has not demonstrated that he was hired by the owner, contractor or their agent. Nor has plaintiff produced evidence that its employer HKS was hired to work at the project.

In a motion for summary judgment a party is entitled to summary judgment when it is clear that there are no material issues in dispute requiring trial. The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. If the movant makes a prima facie showing of entitlement to summary judgment the burden shifts to the opposing party to demonstrate by admissible evidence that there is a factual issue requiring trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The Court finds issues of fact of ownership in that both the title holder (HP Sea Girt) and the beneficial owner (711 Seagirt) may be liable under Labor Law §240(1). *See Copertino v. Ward*, 100 A.D.2d 565 (1984). Questions of fact also remain as to the Treetop defendants alleged ownership rights in the subject premises based upon defendants agent Jose Reyes testimony that Treetop owns and manages the property at 711 Seagirt.

The Court also finds while plaintiff established a prima facie showing of entitlement to summary judgment, defendants have provided sufficient evidentiary proofs to demonstrate material issues of fact, including (1) whether plaintiff injuries were a direct consequence of a failure to provide adequate protection against a risk arising from a significant elevation differential under 16ft of manually removed planks considering the weight of the falling objects. *Wilinski v. 334 E. 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1 (2011); (2) whether the alleged incident arising from the unloading of the planks involves ordinary inherent construction hazard and not an elevation related risk. See *Jacome v. State*, 266 A.D.2d 345 (1999) and *Farrington v. Bovis Lend Lease LMB, Inc.*, 51 A.D.3d 624 (2008); and (3) whether any additional safety device would have been contrary to the work objective of unloading the planks from HKS flatbed truck.

Accordingly, plaintiff motion for summary judgment on plaintiff's claim for alleged violation of Labor Law §240(1) is denied.

This is the decision and order of this Court.

Dated: 9/28/2021


Ulysses B. Leverett, J.S.C.

