Zuraw v New York City Sch. Constr. Auth.
2022 NY Slip Op 31608(U)
May 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 524332/2019
Judge: Consuelo Mallafre Melendez
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 20

TOMASZ ZURAW AND JUSTYNA ZURAW

Index No. 524332/2019
DECISION AND ORDER

Plaintiffs,

-against-

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION and CITY OF NEW YORK

Defendants.

CONSUELO MALLAFRE MELENDEZ, J.:

The court's Decision and Order is based upon consideration of the following papers:

CPLR 2219(a) Recitation: Motion Sequence 3, NYSCEF Numbers: 32-57.

Plaintiff commenced this personal injury action to recover damages against Defendants for violation of Labor Law §240(1). Plaintiff moves for summary judgment pursuant to CPLR §3212(a) on the issue of Defendants' liability under Labor Law §240(1). Plaintiff argues that his injuries were proximately caused by Defendants' failure to provide him with adequate safety devices to protect him against the gravity related risks of falling off an elevated work platform and from falling objects. Defendants oppose the motion arguing that Labor Law §240(1) is inapplicable to the circumstances herein.

The circumstances surrounding Plaintiff's injury are depicted on a worksite surveillance video attached to Plaintiff's motion and corroborated by Plaintiff Examination Before Trial (EBT) testimony: on the date of the incident Plaintiff was working on a parked flatbed truck, approximately five feet from the ground, while he and another worker unloaded 2,500-pound crates containing twenty-five glass window panels. Each glass window panel weighed one

hundred pounds and measured approximately ten feet long and five feet wide. Plaintiff and his co-worker hoisted and lifted each panel from the crate using suction cups. Afterward, a third worker leaned his body against the crate in an attempt to secure the remaining window panels until they returned to remove the next window panel. As Plaintiff and his co-worker attempted to hoist and lift the third window panel from the crate, the approximately twenty remaining window panels began to tip and fall onto Plaintiff causing him to fall five feet off the flatbed platform onto the concrete ground.[1] In rapid succession, the remaining window panels continued to fall and shatter on top of Plaintiff, burying him under the glass shards. The entire accident occurred in matter of seconds.

Plaintiff argues that his injuries were the direct result of Defendants' failure to protect him from the risks of an elevation related injury in violation of Labor Law §240(1). Plaintiff argues that Defendants are liable under §240(1) for failing to protect him from the risk of falling off of the flatbed truck and for failing to protect him from the falling window panels. In support of his motion Plaintiff attaches an expert affidavit from construction site safety consultant, Frank A. Susino who reviewed the same video, Plaintiff's Affidavit, 50h and EBT testimony, contract plans and specifications for the façade repair and window replacement project and the 2009 N.Y.C. School Construction Authority Safety Program & Procedures Manuel. Based on his analysis, Mr. Susino found that Plaintiff was not provided with proper safety equipment to protect him against the risks of gravity related injuries. Specifically, Mr. Susion found that no guard or rail was erected along the perimeter of the flatbed truck to prevent workers and building materials from falling during the unloading process. Further, no device such as a brace or stay was used to secure the remaining panels in the crate and prevent them from falling after Plaintiff

[1] The worker tasked with securing the panels from falling was also knocked to the ground.

and his co-worker removed the outermost panel. Mr. Susino found that these lack of safety measures were in violation of safety standards including Occupational Safety and Health Administration Regulations and the 2009 N.Y.C. School Construction Authority Safety Program & Procedures Manuel.

In opposition, Defendants argue that the purpose of §240(1) is to protect workers from gravity related risk of injury due to a significant elevation differential. As to the fall itself, Defendants' only opposing argument is that the five-foot height differential between the flatbed truck and the ground is insufficient to impute Defendants with liability under §240(1). Defendants do not otherwise dispute Plaintiff's statement of material facts, the findings made by Plaintiff's expert or Plaintiff's general assertions that the glass panels were being improperly unloaded. Defendants also provide no substantive arguments in opposition to Plaintiff's claims of injury caused by the falling glass panels. Defendants only assert that Plaintiff's cannot pursue this claim as it constitutes a new cause of action which Plaintiff failed to plead in his Notice of Claim, Bill of Particulars and Summons and Complaint.

Liability under Labor Law §240(1) applies to injuries sustained in both a 'falling worker' and 'falling object' situation. "With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to 'a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured' " (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 quoting *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514 [1991]). "In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein' " (*Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 662 [2014] quoting *Narducci v. Manhasset Bay*

Assoc., 96 N.Y.2d 259, 267 [2001]). "A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*Narducci v. Manhasset Bay Assoc*., 96 N.Y.2d at 268). "Absolute liability for falling objects under Labor Law § 240 (1) arises only when there is a failure to use necessary and adequate hoisting or securing devices" (*Id*.).

There is no specific height differential from which a person or object must fall under §240(1). In the seminal case, *Runner v. New York Stock Exchange*, the Court of Appeals imposed §240(1) liability for injuries sustained by the plaintiff when moving an 800-pound reel of wire down a height of four stairs (*Runner v. New York Stock Exch*., 13 N.Y.3d 599 [2009]). The slight height differential of four steps was sufficient to constitute "a physically significant elevation differential" because of the risk of injury presented by the weight of the inadequately secured 800-pound reel: "the reel had to be moved from a higher to a lower elevation and *the danger to be guarded against plainly arose from the force of the very heavy object's unchecked, or insufficiently checked, descent*" (*Runner v. New York Stock Exch*., 13 N.Y.3d at 603 [emphasis added]). The significance of *Runner* is the rule that height itself is not the pertinent factor in determining risk of injury from a falling object under §240(1). Rather the relevant inquiry is "whether the harm flows directly from the application of the force of gravity to the object" (*Runner v. New York Stock Exch*., 13 N.Y.3d 599, 604 [2009]).

More recently, in *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp*., the Court of Appeals applied its rationale from *Runner* when it found that §240(1) applied to injuries caused by falling objects that were on the same level as the injured plaintiff (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp*., 18 N.Y.3d 1 [2011]). In that case, ten-foot pipes were left leaning unsecured against a wall when they fell four feet onto the plaintiff who was five feet, eight inches tall. The

Court, quoting *Runner*, held that the height differential was significant under a §240(1) analysis given the amount of force generated by the heavy pipes.

> "the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. *Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential*" (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp*., 18 N.Y.3d 1 quoting *Runner v. New York Stock Exch*., 13 N.Y.3d at 603 [emphasis added]).

In *Treile v. Brooklyn Tillary, LLC*, the Second Department also applied *Runner* in finding that the risk of injury to the plaintiff stemmed from the force of gravity, not the height differential. There, the plaintiff was rolling bundles weighing over 8,000 pounds off of a flatbed truck with a crowbar when the weight of a bundle shifted to a plank of wood upon which the plaintiff stood causing him to be catapulted forty feet into the air (*Treile v. Brooklyn Tillary, LLC*, 120 A.D.3d 1335, 1338 [2d Dept. 2014]. The five-foot height differential between the flatbed truck and the ground was significant given the 8,000-pound bundles "and the amount of force they were capable of generating 'even more over the course of a relatively short decent'" (*Treile v. Brooklyn Tillary, LLC*, 120 A.D.3d at 1338 quoting *Runner v. New York Stock Exch*., 13 N.Y.3d at 605).

Here, based on the ruling of *Runner* and its progeny, the court finds that the five-foot height differential was significant in light of the fact that Plaintiff's injuries were caused by the force of gravity from the two thousand pounds of falling glass. Further, §240(1) was created to provide protection from such pronounced risks of injury: "The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the *pronounced risks arising from construction work site elevation differentials*…there will be no

liability under the statute unless the injury producing accident is attributable to the latter sort of risk" (*Runner v. New York Stock Exch*., 13 N.Y.3d at 603).

Safety devices such as a guard rail against the perimeter of the flatbed platform and a brace to secure the glass panels are required under §240(1) to "give proper protection to a person so employed" in the course of altering and repairing a building. Based on Plaintiff's moving papers and submissions, including the worksite surveillance video and the expert affidavit, the court finds that Defendants failed to provide Plaintiff with adequate safety devices to protect him from the elevation related risk of injury in unloading the unsecured glass panels off of the five-foot platform. Further, Plaintiff established Defendants' violations of §240(1) were the proximate cause of his injuries.

Defendants' argument that §240(1) does not apply due to the minimal five-foot height differential is unavailing. The bulk of cases upon which Defendants rely pre-date *Runner*. Defendants' reliance on the more recent Second Department case, *Eddy v. John Hummel Custom Builders* is misplaced. There the plaintiff was riding in the back of a moving pick-up truck and sitting on top of a 100-pound grate (*Eddy v. John Hummel Custom Builders, Inc.*,147 A.D.3d 16 [2d Dept. 2016]). He was injured when he fell five feet off of the back of the moving pick-up truck and the 100-pound grate landed on him (*Id*.). The Second Department's decision not to apply *Runner* had nothing to do with the five-foot height differential. Rather, the Court found that §240(1) liability did not apply due to serious factual issues: the plaintiff was not engaged in construction work at the time of the accident, his injuries were caused by his own decision to ride in the back of the moving truck and the injuries were not caused by type of foreseeable risk contemplated under §240 (*Eddy v. John Hummel Custom Builders, Inc.*,147 A.D.3d 16). This

case is inapplicable to the facts herein. Defendants otherwise fail to raise an issue of fact in opposition.

Defendants' argument that Plaintiff cannot pursue his falling object cause of action because of a failure to plead is entirely without merit. Plaintiff sufficiently alleged that Defendants' failure to protect him from the risk of a falling object in each pleading. Plaintiff's Notice of Claim alleges that Defendants failed to provide "equipment and/or protection sufficient to properly protect claimant *from the risks of injury by the forces of gravity*…" (emphasis added). Further, the Notice of Claim stated that the accident from which the claims arose is depicted in a worksite surveillance video in Defendants' possession. The Summons and Complaint contains numerous allegations of §240(1) violations: "failing to protect against the risk of gravity…failing to properly secure materials while they are being moved…" (Pl. Exh. F). The claim is also alleged the Bill of Particulars: "failing to secure materials to prevent them from falling…failing to provide necessary and adequate equipment to safely lift, hoist, lower, unload, carry or

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transport heavy materials…" (Pl. Exh. H). Defendants failed to otherwise oppose Plaintiff's falling object claim. The court rejects Defendants' remaining argument that Plaintiff's motion is premature based on their claim of outstanding discovery. Defendants failed to show that the additional discovery sought would lead to any relevant information under CPLR §3212(f).

Based on the foregoing, the court finds that Plaintiff established *prima facie* that Defendants violated Labor Law §240(1) by failing to provide Plaintiff with adequate safety devices to protect him from gravity related risks of injury and that these violations proximately caused Plaintiff's injuries. Defendants failed to raise a triable issue of fact in opposition. Accordingly, Plaintiff's motion for summary judgment pursuant to CPLR §3212 as to Defendants' liability under Labor Law §240(1) is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: May 9, 2022
Brooklyn, NY

ENTER.

Hon. Consuelo Mallafre Melendez
J. S. C.