Jannelli v One Vanderbuilt Owner, LLC
2022 NY Slip Op 33090(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 160062/2019
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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DAMON JANNELLI,

Plaintiff,

- v -

ONE VANDERBUILT OWNER, LLC,SL GREEN REALTY CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant.

---X

INDEX NO. 160062/2019

MOTION DATE 09/07/2022, 09/07/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 67, 70, 71, 75

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 74

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

This litigation arises from plaintiff's work-related accident on October 2, 2018, when he was caused to become injured when an unsecured fuel pipe he was moving fell and struck him. The fuel pipe was supported by hangers, and one of the hangers separated from the ceiling because a thunder stud, which secured the hanger failed, which in turn, caused the pipe to fall and strike the plaintiff.

Tishman Construction Corporation of New York (Tishman) was the construction manager for the project. Vanderbilt Owner, LLC, (Vanderbilt) owned the premises located at 1 Vanderbilt Avenue, New York, New York where the building was being constructed.

PENDING MOTIONS

On July 6, 2022, defendants moved for summary judgment and dismissal of plaintiff's claims as to New York Labor Law §200 and New York Labor Law §241(6), predicated upon alleged violations of Industrial Code Sections 23-1.7(a), 23-3.1, 23- 2.7(a), 23-1.8(c)(1), 23-2.2(a)-(e), 23-2.3, 23- 6.2(a)-(e) and 23-9.6.

On the same date, plaintiff moved for summary judgment as to liability on its New York Labor Law §240(1) claim.

On September 7, 2022, the motions were fully briefed, marked submitted and the court reserved decision. The motions are consolidated herein for disposition.

Plaintiff withdraws his claims that defendants violated Industrial Code §§ 23-1.8(c); 23-2.2(a)-(e); 23-2.3; 23-2.7; 23-9.6. As such that part of defendants' motion seeking dismissal of the Labor Law § 241(6) predicated on said violations is granted on consent.

For the reasons stated below, the court grants plaintiff's motion for summary judgment as to liability on the Labor Law §240(1) cause of action and denies the balance of defendants' motion as moot.

ALLEGED FACTS

Plaintiff was involved in a construction accident on October 2, 2018 between 12:00 and 1:00 PM. On that date, plaintiff was employed by Axis Piping, Inc. (Axis), as a steamfitter, and was assigned to work at the 1 Vanderbilt Project. The subject construction project was the new construction of a big commercial building from the ground up. Axis was retained to perform certain tasks installing pipe at the building under construction.

Plaintiff had worked at this location for a couple of months prior to the accident.

When plaintiff first arrived at the job site that day, he went downstairs to the gang box to obtain his tools and meet with Axis' foreman, Michael Lammy (Lammy). Plaintiff's duties at this construction project included lifting pipes, installing hangers, installing pipes, shifting pipes, and setting rigging.

The accident occurred in one of the basement levels. The only Axis employees at the site on the date of the accident were plaintiff, Lammy and Chris Sosa (Sosa), another steamfitter. Lammy assigned plaintiff to shift pipes that were previously installed in the ceiling, so that additional pipes could be installed. Plaintiff, Sosa, and Lammy previously installed the pipe that needed to be moved a few of days before the accident. Plaintiff was to move previously installed pipes a few inches down to another hanger, and to get the pipes to meet up for welding and sealing the pipes.

As Foreman, Lammy was in charge of assigning the work and ensuring that employees had all necessary materials and tools to perform the job. Plaintiff only received instructions at the subject job site from Lammy.

The pipe plaintiff was handling at the time of his accident was sitting inside hangers that were previously installed in the concrete ceiling. The hangers were installed into the ceiling by drilling a hole, and then installing a required thunder stud into the ceiling to support the hanger. A thunder stud is described as a type of anchor. Plaintiff testified that there are many different levels of thunder studs, and that the building engineers would have decided which level to use for the hangers at the project.

When installing the hangers, the thunder studs are first installed into the ceiling, and then the hangers are secured to the studs. Drills were used to drill into the concrete, and then lump hammers and wrenches were used to set the thunder stud in and tighten them.

On the date of his accident, plaintiff was using a chain block/chain fall to lift the pipes up and put them into the proper location. The end of the chain fall would be connected to the pipe and then the chain would retract so it pulls the pipe closer. The pipe plaintiff was moving at the time of his accident was between 16 and 20 feet in length and weighed a couple of hundred pounds.

In order to move the pipes, plaintiff had to use a scissor lift to get himself up to the ceiling to properly maneuver the pipe. He was on the lift alone at the time of his accident. The ceiling in the area where he was working was 30 feet high, and the pipe he was moving was two feet below the ceiling.

When the accident occurred, plaintiff was working with Sosa. They were both on their own scissor lift. The chain fall plaintiff was using was provided by Axis.

The accident occurred while plaintiff was shifting the pipe using the chain block. The pipe opening caught the hanger and the hanger ripped out of the ceiling. The pipe opening is described as the area where two pipes join. There are two portions of pipe that are connected, and there is a space between them to perform the work that needed to be done. The pipe opening was at least six inches wide. Once the job as completed, a certified welder will come in, weld the connections and close the opening.

When the hanger ripped out of the deck, the pipe fell on plaintiff and the lift. The pipe skimmed his hard hat and hit his shoulder, causing plaintiff to fall backwards onto the platform of the scissor lift. The hanger above plaintiff ripped out because the edge of the pipe caught the hanger and ripped it and because the thunder stud failed.

After the accident occurred, plaintiff observed that no thunder stud was inside the drilled hole, and that the pipe sitting on the lift next to him with the hanger was still attached to the thunder stud.

After the accident occurred, Lammy directed plaintiff to find the onsite medic and fill out a report. The medic gave plaintiff an ice pack and told him to take it easy.

Plaintiff inspected the chain fall before he used it on the date of his accident. He was never directed or instructed to inspect the hanger before attaching pipe to it to make sure it is in place correctly.

Mr. Kolody (Kolody) was employed by Acom-Tishman as a Safety Manager and worked only at the One Vanderbilt project in the four years he has been so employed. Kolody first started working at One Vanderbilt in May of 2017. Kolody's position at this project involved risk management and site safety.

Kolody would perform job site walkthroughs to spot any kind of safety deficiencies. If Kolody observed a safety deficiency, he had the authority to stop the work if he deemed it dangerous. Kolodny testified that every Acom-Tishman employee at this job site had this authority.

Kolody first learned of the subject accident on the date it occurred. After learning of the accident, he went to the field office to fill out paperwork and speak with the onsite medic. The medic told Kolody that Jannelli only wanted an ice pack and that he did not want to undergo outside treatment. Kolody did not really perform any investigation into the subject accident because of the overall nature of the injury.

There is a Construction Management Agreement between Vanderbilt and Tishman which

made Tishman responsible for the safety of all Tishman employees, subcontractors' employees and for initiating and supervising all safety precautions and programs. The contract also required Tishman to administer, manage, supervise, direct and coordinate the work through subcontractors or its own forces. Additionally, Tishman created a site Safety Plan which set forth the procedures and policies for initiating, maintaining and supervising all safety precautions and programs during the performance of the work.

Finally, the subject contract requires Tishman to be solely responsible for and have control over construction means, methods, techniques, sequences and procedures for the Work and for coordinating all portions of the Work under the Contract Documents.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v*

Citibank, N.A., 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff is entitled to summary judgment on liability under Labor Law § 240(1)

The court finds that plaintiff met its initial burden is establishing judgment as a matter of law as to liability under Labor Law § 240(1).

Labor Law § 240(1) is intended to promote safe practices at construction sites and provides statutory protections for workers engaged in the erection, demolition, alteration and repairing of "buildings and structures." Specifically, it requires that owners, general contractors and their agents, at sites where such work is undertaken, furnish "scaffolds, hoists...slings pulleys, braces, irons, and other devices which shall be so constructed, placed and operated as to give proper protection" to construction workers. *See*, Labor Law § 240(1).

Labor Law § 240(1) has long been regarded as an absolute liability statute pursuant to which an injured, protected worker may recover without establishing fault on the part of the owner or contractor. *Koenig v. Patrick Constr. Co.*, 298 N.Y. 313 (1948). Comparative negligence may not be asserted as a defense. *Bland v. Manocherian*, 66 N.Y.2d 452 (1985).

In *Rocovich v Consolidated Edison Co.*, 78 N.Y.2d 509, 514 (1991), the Court of Appeals held that liability under the statute would be applied only in cases arising from "risks related to elevation differentials." In *Ross v Curtis-Palmer Hydro Electric Co.*, 81 N.Y. 2d 494, 501 (1993), the Court held that Labor Law §240(1) liability was limited to "those types of accidents in which the scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield

the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*."

For plaintiff to obtain summary judgment, he must demonstrate a violation of the statute and that the violation was a proximate cause of the injury. *Caceres v. Standard Realty Assoc*., Inc., 131 AD3d 433, 433-434 [1" Dept. 2015]. "The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations", but only that it "proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" (*Soriano v. St. Mary's Indian Orthodox Church of Rockland. Inc*., 118 AD3d 524, 526 [1st Dept. 2014], *quoting, Williams v. 520 Madison Partnership*, 38 AD3d 464, 464-465 [1st Dept. 2007]). *See also, Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]. As the Court of Appeals remarked, "(o)nce it is determined that the owner or contractor failed to provide the necessary safety devices required give a worker 'proper protection', absolute liability is 'unavoidable' under Section 240(1) …" (*Bland v. Manocherian*, 66 NY2d 452, 459 [1985]; *Zimmer v. Chemung*, 65 NY2d 513, 514 [1985]; *Haimes v. NY Telephone Co*., 46 NY2d 132 [1978]).

Here, defendants' liability is based on a falling object theory because the force of gravity, which was generated by the weight of the metal pipe, required that the pipe be sufficiently controlled or secured from falling while it was being moved by plaintiff. *See, Runner, supra*; *Gabrus v. New York City Housing Authority*, 105 AD3d 699 [2d Dept. 2013]; *Naughton v. City of New York*, 94 AD3d 1 [1st Dept. 2012].

In opposition, defendants argue that questions of fact exist as to whether plaintiff was the sole proximate cause of his accident by installing the subject pipe, thunder stud and hanger, and subsequently improperly shifting that pipe after installation.

However, these arguments fail because there was no evidence submitted to establish that the plaintiff solely installed the subject pipe, thunder stud, and hanger and there is no evidence submitted to establish that plaintiff deviated from the instructions received as to how to install the pipe, thunder stud, and hanger. Rather, plaintiff testified that he was part of the crew that installed the pipe. Moreover, whether plaintiff installed the hanger which the subject pipe was attached to, is irrelevant, since the securing device (anchor) and chain hoist (protective device) failed to prevent plaintiff from being struck by an object due to the effects of gravity.

Defendants' argument that there are questions of fact regarding whether plaintiff caused the thunder stud to fail by improperly shifting the subject pipe is without merit. The fact that the thunder stud, a securing device, and chain fall failed to prevent the subject pipe from falling and striking the plaintiff requires a finding that plaintiff's alleged improper shifting of the pipe was not the sole proximate cause of his own injuries. As held by the Court of Appeals "under Labor Law §240(1), it is conceptually impossible for a statutory violation to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation." *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 (2003).

Moreover, "the Scaffold Law does not require a worker to have acted in a manner that is completely free from negligence; if a statutory violation is a proximate cause of an injury, the Plaintiff cannot be solely to blame for it". *See, Hernandez v Bethel United Methodist Church of NY.*, 49 AD3d 251 (1st Dept., 2008).

Here, since the failure to properly secure the pipe is a proximate cause of the subject accident, it necessarily follows that plaintiff cannot be found to be the sole proximate cause of

his own injuries. At best, Defendants' arguments establish plaintiff's contributory negligence, which is not a defense to the cause of action. *See, Morales v. Spring Scaffolding, Inc*., 24 AD3d 42 (2005).

Liability under the Scaffold Law, which applies to falling objects as well as falling workers, requires a showing that safety devices like those enumerated in the statute were absent, inadequate, or defective, and that this was a proximate cause of the object's fall. *See, Narducci v. Manhasset Bay Assocs*., 96 NY2d 259 (2001).

Here, the thunder stud, a device used to secure the pipe, proved inadequate to prevent the subject pipe from falling and striking plaintiff. The chain fall, an enumerated safety device, also proved inadequate to prevent the subject pipe from falling. Since there is no evidence submitted to rebut the conclusion that the failure of both the thunder stud and chain fall were proximate causes of plaintiff's accident, plaintiff cannot be found to be the sole proximate cause of his own accident.

As the court has awarded plaintiff summary judgment as to liability under Labor Law § 240(1), the motion to dismiss the balance of the causes of action under Labor Law §200 and Labor Law § 241(6) are denied as moot.

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment as to liability under Labor Law § 240(1) is granted and defendants' motion for summary judgment is only granted to the extent of dismissing the Labor Law § 241(6) predicated on violations of Industrial Code §§ 23-1.8(c); 23-2.2(a)-(e); 23-2.3; 23-2.7; 23-9.6 and otherwise denied as moot; and it is further

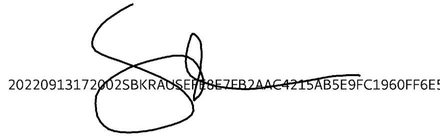
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119);

and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



9/13/2022	
DATE	SABRINA KRAUS, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE