

Gormon v Tappan Zee Constructors, LLC
2022 NY Slip Op 35063(U)
September 21, 2022
Supreme Court, Richmond County
Docket Number: Index No. 151717/2017
Judge: Wayne Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
BARTHOLOMEW GORMON,

Plaintiff,

-against-

TAPPAN ZEE CONSTRUCTORS, LLC,

Defendants.

-----X
TAPPAN ZEE CONSTRUCTION, LLC,

Third-Party Plaintiff,

-against-

IMPERIAL IRON WORKS, INC.,

Third-Party Defendant

-----X

Part 23

Present:

Hon. Wayne Ozzi

DECISION AND
ORDER

Index No: 151717/2017

Motion No. 003 & 004

The following e-filed documents listed by NYSCEF as (Motion 003) document numbers 66-76, (Motion 004) document numbers 80-84, 87-92, were marked fully submitted on July 28, 2022.

Defendant Tappan Zee Constructors (TZC) moves for an Order pursuant to CPLR 3212 granting partial summary judgment in favor of TZC and dismissing plaintiff's Labor Law 240(1) claim. Plaintiff opposes the motion and cross-moves for summary judgment under Labor Law section 240(1) as well. After a review of the above-captioned papers, defendant TZC's motion is granted and, plaintiff's cross-motion is denied, for the reasons set forth below.

On July 27, 2017, plaintiff alleges that he was injured when he fell into a drainage hole on the Rockland County side of the Mario Cuomo Bridge. At the time, plaintiff was employed by

Imperial Iron Works who had been hired by the general contractor, Tappan Zee Contractors, (TZC).

TESTIMONY

In support of their motion for summary judgment defendant TZB attaches the deposition testimony transcript of the plaintiff, Bartholomew Gormon conducted on February 19, 2019.

Plaintiff testified that his employer, Imperial Ironworks had been hired by TZC to install sound barrier panels on the Bridge. Plaintiff further testified that he was walking backwards with the glass panel in hand, towards a forklift which would then lift it into place. Plaintiff was a couple of steps away from where the panel was to be installed when he fell into the uncovered drainage hole.

Plaintiff also testified that he was aware of the drainage holes throughout the Bridge's surface. He further testified that fell into the drainage hole up to his groin area, as the opening was not big enough for his whole body to fit through. Plaintiff testified that the drainage holes were usually covered with a grate and that he had never seen a drainage hole that was not covered prior to the accident.

Defendant also attached the deposition testimony transcript of Nathan Flowers, the Deputy Safety Manager for TZC. Flowers duties included oversight of the TZC workers and the logging of injuries on the site. Flowers spoke with the plaintiff on the date of the accident. He testified that plaintiff stated that he stepped into a drain scupper and as a result, he injured his hip.

An incident report was also attached as an exhibit. The incident report was completed by a superintendent with Imperial. A diagram attached to the incident report shows a ten-inch vertical drainpipe. The description of the accident reads, "While employee setting up for

rigging/lifting up an acrylate transparent panel walked back into an open grate 10” vertical pipe with right leg.”

In opposition and support of their motion for summary judgment pursuant to Labor Law 240(1), plaintiff also attaches his deposition testimony, but highlights different portions. Plaintiff testified that before he started walking with the glass panel he did not see the hole he fell into until his leg was in it. Plaintiff had seen other holes throughout the Bridge, but he did not know if the spacing was random or unified. He also testified that the holes were usually covered with steel grating. He further testified that the depth of the from the top of the bridge surface to the water below, was more than 100 feet.

Plaintiff also attaches the testimony of the Safety Director, Nathan Flowers. Flowers referred to the OSHA regulations that define a hole as a gap or void two inches or more than its least dimension in a floor, roof or other walking working surface. He further testified that unless a hole is being worked on, it should never be left uncovered. Flowers testified that if the scupper hole had been covered, the accident would not have occurred.

SUMMARY JUDGMENT

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*Valentin v Parisio*, 119 AD3d 854, 855 [2d Dept 2014]). “In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist” (*Rivers v Birnbaum*, 102 AD3d 26, 42 [2d Dept 2012]; see *Ferrante v*

American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion “should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ferguson v Shu Ham Lam*, 59 AD3d 388, 389 [2d Dept 2009]).

As an initial matter, defendant failed to comply with Uniform Rule 202.8-g which requires that a statement of material facts be submitted with a motion for summary judgment. While there is some authority for the proposition that the failure to submit a statement of material facts requires the denial of a motion for summary judgment (see *Alexander v B.N.C.M., Inc.*, 73 Misc 3d 1125 [A] [Sup Ct, NY County 2021]; *Amos Fin, LLC v Crapanzano*, 73 Misc 3d 448 [Sup Ct, Rockland County 2021]). This Court will excuse this failure under CPLR 2001 (see *Disarli v TEFAF NY, LLC*, 2022 NY Slip Op 30029 [U] [Sup Ct, Kings County 2022]).

LABOR LAW 240(1)

Under Labor Law § 240 (1), contractors and owners engaged “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure” must provide “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.” Although the statute is meant to be liberally construed to accomplish its intended purpose, absolute liability is “contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). In other words, “[l]iability may . . . be imposed under the statute only where the ‘plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a

physically significant elevation differential’ ” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

This statute has been construed to apply to a narrow class of specific gravity-related dangers, such a falling from a certain height or being struck by a falling object that was improperly hoisted or inadequately secured.

Therefore, the protections of Labor Law § 240 (1) apply only to a narrow class of special hazards and do not apply to any and all perils that may be connected to the effects of gravity (*Palumbo v Transit Tech., LLC*, 144 AD3d 773 [2d Dept 2016]; *Santoro v New York City Tr. Auth.*, 302 AD2d 581 [2d Dept 2003]). “[T]he relevant inquiry is ‘whether the harm flows directly from the application of the force of gravity to the object’” (*Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848,850 [2d Dept 2017]).

Defendants have established their prima facie entitlement to summary judgment dismissing plaintiff's claims in Labor Law § 240 (1) through evidence that the accident did not involve a gravity or elevation-related hazard (see *Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016]; *Torres v City of New York*, 127 AD3d 1163 [2d Dept 2015]). A hole of this dimension does not present an elevation-related hazard to which the protective devices enumerated in the statute are designed to apply (see, *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1993]; *Piccuillo v. Bank of N.Y. Co.*, 277 AD2d 93 [2000]; *D'Egidio v. Frontier Ins. Co.*, 270 AD2d 763 [2000]; Rather, the hole presented “the type of ‘ordinary and usual’ peril a worker is commonly exposed to at a construction site” (*Misseritti v. Mark IV Const. Co.*, 86 NY2d 487, 489 [1995]).

Additionally, plaintiff's work did not involve “a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker

is positioned” (*Rocovich v Consolidated Edison Co.*, 78 NY2d at 514 [1991]; see *Shipkoski v Watch Case Factory Associates*, 292 AD2d 587, 588 [2d Dept 2002]). A worksite is considered elevated, within the meaning of the statute, where the work must be performed at an elevation, such that one of the enumerated safety devices would enable a worker to perform the required work (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]). Here, even if plaintiff had been provided with one of the safety devices enumerated in Labor Law 240(1), it would not have prevented him from falling into the 10-inch scupper drain, as the cause of the accident appears to be that the drainage hole was not covered with its usual grate. The fact that he was working on a bridge is not relevant, as the cause of his injury was not related to the height differential between the bridge and the ground below.

Plaintiff’s opposition and cross-motion for summary judgment under Labor Law § 240(1) must fail, since it has been determined above, there is no genuine issue of material fact that plaintiff’s injury was a gravity-related injury for which one of the devices enumerated in Labor Law 240(1) would have rectified or prevented.

The court has considered the remaining arguments and finds them unavailing.

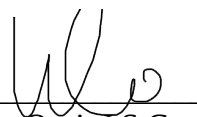
Accordingly, it is,

ORDERED, that defendant’s motion for partial summary judgment as to Labor Law 240(1) is granted and it is further

ORDERED, that plaintiff’s cross-motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of this Court.

ENTER



Hon. Wayne Ozzi, J.S.C.

Dated: September _21_, 2022