

Mayo v Port Auth. of N.Y. & N.J.
2022 NY Slip Op 35138(U)
April 8, 2022
Supreme Court, Bronx County
Docket Number: Index No. 25429/2018E
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5**QUENTIN MAYO and KOWAHNI JACOBS,**

Index No.: 25429/2018E

Plaintiff(s),

Against

Present:

HON. ALISON TUITTJustice**PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, and LaGUARDIA GATEWAY
PARTNERS,**

Defendant(s).

The following papers numbered 1 to 3,Read on this Plaintiff's Motion for Summary JudgmentOn Calendar of 1/14/2021Notice of Motion – Affirmation, Affidavits and Exhibits 1Affirmation in Opposition – Memorandum, Affidavit, and Exhibits 2Reply - Affirmation, Affidavit, and Exhibits 3

Upon the foregoing papers, Plaintiff's motion for summary judgment is granted for the reasons set forth herein.

The within action involves personal injury claims asserted by Plaintiff Quentin Mayo (hereinafter referred to as "Plaintiff Mayo") and his wife, Kohwani Jacobs for loss of consortium. Plaintiff Mayo alleges to have sustained personal bodily injury on January 21, 2018 while working at La Guardia Airport (hereinafter referred to as "Airport") located at Queens, New York 11371. Plaintiff Mayo allegedly sustained injury when a 70 feet long, 27,000 pound steel header fell over on Plaintiff Mayo and crushed his right leg. Defendant Port Authority of New York and New Jersey (hereinafter referred to as "PANYNJ") was the lessor and operator of

LaGuardia Airport and desired massive renovations to be undertaken to the airport. Co-Defendant, LaGuardia Gateway Partners (hereinafter referred to as "Gateway") were permitted to sublease the aforesaid airport for purposes of the new construction. Defendant Gateway hired Skanska/Walsh JV (hereinafter referred to as "Skanska") for Skanska to act as the contractor in charge of the aforesaid work. At the time of the accident, Plaintiff Mayo was in the course of his employment by non-party Skanska and was injured while working as a tagline man.

Plaintiff, Mayo argues that Defendants PANYNJ and Gateway (collectively referred to herein as "Defendants") failed to implement safety measures as required under New York Labor Law § 240(1), which is an absolute liability statute, enacted for the protection of workers involved in *gravity related accidents*. Plaintiff, Mayo argues that sufficient case law supports their application for summary judgment as Plaintiff Mayo was a member of the protected class the statute refers to, and was injured by a "massive 27,000-pound piece of steel that required securing for its undertaking due to the height, weight and gravity involved, and clearly not properly secured, and this fell over onto him at the time." Plaintiff Mayo continues arguing that the violation of the statute was the proximate cause of the accident and injuries he sustained. Lastly, Plaintiff Mayo argues "neither comparative fault nor assumption of the risk is as a defense to a § 240(1) action" warranting summary judgment on the issue of liability to Plaintiff.

In support of their motion, Plaintiff, Mayo submit the testimony of Katarzyna Sek, Defendant Gateway's Operational Readiness and Transition Coordinator, and prior Safety Specialist. Ms. Sek testified that she is familiar with the contract between Defendant Gateway and non-party Skanska to complete construction work on Terminal B, and with the interaction of Port Authority on the Terminal B project. Ms. Sek testified that Port Authority's interaction with the project included overseeing certain aspects of the project by way of hiring safety specialists. She also testified that Skanska hired the superintendents and subcontractors for the project and was responsible for site safety, job site cleanup and the daily activities of the crew. Ms. Sek testified that the safety plans were kept on site, however, she had no personal knowledge of the accident involving Plaintiff.

Plaintiff Mayo testified at his deposition that he was assigned as a tagline man with the ironwork crew that night. While hoisting the 70-foot header, the foreman noticed at about a foot off the dunnage that the header was not centered and instructed the crane operator to

bring the header back down. Before approaching the header, the Foreman, Andy ensured that all the trapped energy was gone, and the header was settled on the dunnage. Plaintiff Mayo testified that he was instructed by Andy to render the chokers on the header, and as he approached the header he noticed the choker was twisting as the header was being raised. The header swung toward Plaintiff, hitting him in the chest and knocking him on his back. The header landed on his right leg. Plaintiff Mayo did not know who instructed the crane operator to raise the header, but he tried to get out of the way. Plaintiff Mayo further testified that the header was eventually hoisted off his leg and he saw his right leg mangled and experienced a lot of pain. Plaintiff Mayo continued that when the ambulance arrived, he was not given any medication until he was seen by the Doctors at Elmhurst Hospital. Plaintiff Mayo testified that he underwent two surgeries within the first 72 hours of his hospital stay as they tried to reconnect his leg and installed a titanium rod. Plaintiff Mayo testified he experienced numerous infections and surgeries to his leg, which resulted in the amputation below his right knee. Plaintiff Mayo now ambulates with a prothesis.

Anthony Iorio, stated in his affidavit that he was employed as a Journeyman but on the night in question he worked as the signal man on the Skansa project. Mr. Iorio stated they were hoisting a 70 feet long header which was not the norm. Mr. Iorio disclosed that they did not receive any plans to work off of nor were any "take 5" meetings held to discuss the work detail for the shift. He explained that the header, when hoisted, was not centered, and was returned to the ground so that the chokers could be re-rendered. Mr. Iorio noted that the ground was "wet, muddy and unstable with lots of holes and depressions and uneven locations." He further stated, though these conditions were complained about nothing was done. Mr. Iorio observed Plaintiff Mayo walking around the header when "suddenly and unexpectedly, the piece shot up in the air and at Quentin, striking him in his chest and falling over on top of him." Mr. Iorio stated that more could have been done at the time of the accident and before the accident to prevent Plaintiff's injuries.

Andrew Denninger, in his affidavit, disclosed that he was the Foreman for Skanska and was in charge of the raising gang working on the header on January 21, 2018. He explained that Plaintiff Mayo was one of the tag line men under his supervision, and that he was following his instructions at the time of the accident. Mr. Denninger stated that Plaintiff Mayo

did nothing improper as he did not get a chance to render or adjust the header. Mr. Denninger stated, that he was not given any work plans for the group nor did they meet to discuss.

Joseph Hernandez testified that he is a Port Authority Police Officer and trained Emergency Medical Technician (EMT) who worked La Guardia Airport on the morning of the accident. P.O. Hernandez testified that he was dispatched to the scene of the accident and witnessed a "beam" next to Plaintiff Mayo and his co-workers around him. P.O. Hernandez testified that he did not perform any medical procedures on Plaintiff Mayo as the ambulance arrived at the same time as he did. P.O. Hernandez further testified that he interviewed witnesses and completed a Port Authority Police Department Non-Criminal Incident Report (NCIR). P.O. Hernandez confirmed that he noted in his report what he was told during the interview with Mr. Paul Strauss, Skanska Super; that "[a] beam secured to crane was being lifted using proper technique, when seconds after lifting, the beam started rolling causing it to hit the spotter, Quentin Mayo, causing injury to his leg (right)." P.O. Hernandez explained that the Port Authority has an Investigation team that goes out to different accidents/incidents and makes a more thorough report, and that his task was limited to the NCIR which he completed.

In opposition to their motion, Defendants argue that issue of fact exist which warrants denial of Plaintiffs' motion as there are facts and credibility issues as to how the accident occurred; whether Labor Law 240(1) applies or was violated; and was the violation the proximate cause of the injuries sustained. In support of their opposition, Defendants use the affidavits of biomechanical engineer expert Jacob L. Fisher, Ph.D., construction site safety expert, Tony Raimo, non-party, Dan Murphy, and non-party, Christopher Golden, all attached as exhibits. Defendants argue that Plaintiff's theory, that the size of the beam equates to *prima facie* evidence that the beam needed to be secured, is not the standard imposed for liability under Labor Law § 240(1). Defendants further argues that the testimony pertaining to the foreseeability of the beam shifting is also an issue of fact as Plaintiff Mayo and Defendants' expert, Tony Raimo's testimony is contradictory to that of Mr. Iorio who states the beam "suddenly and unexpectedly... shot up in the air." Defendants further note that after the accident, an Occupational Safety and Health Administration (OSHA) investigation was completed, and no "citation[s] or violation[s] in any way connected to the rigging of the beam, the crane operation, the dunnage, the ground on which the dunnage was sitting, the absence of a securing device or otherwise" were issued.

Defendants also delineate the counter statements to the material facts presented by Plaintiff Mayo which highlights Plaintiff Mayo's claims are disputed. Specifically, Defendants note the conflicting testimony that the ground in the work or staging area was "all gravel," "hard" verses "wet, muddy, and unstable with lots of holes, depressions and uneven locations." In addition, the crane operator, Richard Hahn testified that he lowered the header/beam on the dunnage and did not move it until after the accident whereas Plaintiff Mayo testified that the header was hoisted as indicated by the choker's twisting prior to the header hitting him in the chest. Furthermore, the height of the header is also in question as conflicting testimony approximates the header as approximately 5 feet off the ground including the dunnage verses 4.5 feet from the ground dunnage included. Contradictory testimony was also given between Mr. Denninger and Mr. Murphy, Senior Superintendent as to whether a work plan was reviewed for the shift and whether a "take 5/pre-shift" meeting was completed. Mr. Murphy also disputes Mr. Iorio's statement that the area was wet and muddy stating there were no ground conditions noted and skid blocks were present at the site as shown in the pictures taken of the site after the accident. Defendants argue that according to their construction site safety expert Mr. Raimo, the dunnage was an "adequate, appropriate, safe and proper means of supporting the header beam for the undertaking at issue" and it was unforeseeable that it would move as "the beam was fully supported, steady and stable upon the dunnage." Defendants also argue that Mr. Raimo observed no violation of Labor Law § 240(1). With the support of their expert biomechanical engineer, Jacob L. Fisher, Ph.D., Defendants argue that Plaintiff's testimony as to the beam being hoisted is "inconsistent with the laws of physics and the geometry of the I-beam." Dr. Fisher also testified that Mr. Iorio's statement that the beam "suddenly and unexpectedly shot up in the air" was unsupported by the "facts and physical evidence of the case."

Plaintiff in their Reply argue Defendants' attempt to "complicate" the case is futile given the relevant case law. Specifically, Plaintiff states that the issue to be addressed within 240(1) statute is whether the securing/protective device is adequate to shield the worker from harm due to the forces of gravity. Given the testimony of all parties, it was not, as Plaintiff was struck by a 27,000 pound steel header that fell on top of him. Plaintiff argues Defendants failed to show that Plaintiff was not the assisting party under the statute nor do Defendants dispute that the crane, the steel choker and the dunnage were devices intended to secure the header. Plaintiff further argues that as determined by the Court of Appeal in Runner v. New

York Stock Exchange, an object does not actually have to be in the process of being hoisted for Section 240(1) to apply. Runner v. New York Stock Exchange, 13 N.Y.3d 599 (2009). Plaintiff states that the crane's operative function was to secure the header and keep it upright and has "long been held to be a safety device for 240(1) purposes." Plaintiff continues stating Defendants fail to understand that case law has determined a 240(1) violation exists, where there is a heavy item that requires securing and the device used to secure it, fails injuring the worker. Plaintiff argues that Defendants' contention that proper protection was provided is misplaced where that securing/safety device fails to satisfy its core objective. Plaintiff argues that Defendants' red herrings do not address that other securing devices could and should have been available as the header was not centered, and that there was a failure of the "rigging and securing device at the time of the accident." Plaintiff concludes arguing foreseeability is not an issue as "there was no collapse of a permanent structure," and it is undisputed that while following his foreman's instructions, Plaintiff was injured by a steel header that was 70 feet long, 27,000 pounds in weight and at least 4.5-5 feet off the ground that fell over on top of him at the time of the accident.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e.,

with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: “[a]ll contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect... 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.” Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York, 716 N.Y.S.2d 50 (1st Dept 2000). Not every gravity related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491 [1995]. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment to workers. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v. Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin at 317. (Although §240 makes these duties nondelegable, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory “agent” of the owner or general contractor.) Thus, the authority to supervise and control the work operates to transform the subcontractor into a statutory agent of the owner or construction manager. See, Kelly v. Diesel Construction Division of Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

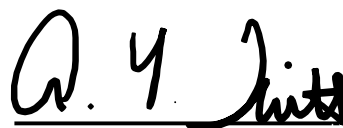
Liability under Labor Law § 240 (1) depends on whether the injured worker's “task creates an elevation-related risk of the kind that the safety devices listed in § 240 (1) protect against” (Broggy v. Rockefeller Group, Inc., 8 NY3d 675, 681, 870 NE2d 1144, 839 NYS2d 714 [2007]). The kind of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate “ ‘scaffold, hoist, stay, ladder or other protective

device' " would have " 'shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person' " (Runner v. New York Stock Exch., Inc., 13 NY3d 599, 604, 922 NE2d 865, 895 NYS2d 279 [2009] [emphasis removed], quoting Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501, 618 NE2d 82, 601 NYS2d 49 [1993]; see Salazar v. Novalex Contr. Corp., 18 NY3d 134, 139, 960 NE2d 393, 936 NYS2d 624 [2011]). "[T]he single decisive question [in determining whether Labor Law § 240 (1) is applicable] 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" (Runner v. New York Stock Exch. Inc., 13 NY3d at 603. Here, Plaintiff allegedly was injured while engaged in a task that entailed an elevation-related risk in that the header was hoisted to be moved to specific locations. Though the Court notes the discrepancies provided by Defendants pertaining to the condition of the ground and whether the header was elevated or static, there is no apparent reason as to why the header shifted in the manner that it did to hit Plaintiff in the chest and fall on his right leg. Thus, a presumption is implied that the devices used by Defendants to secure the header, specifically the crane, the chokers or the dunnage, were not adequate to provide "proper protection" pursuant to § 240(1). Plaintiff has established its prima facie burden. Defendants have not provided any issues of fact demonstrating that Plaintiff's injuries were not caused by the elevation or gravity-related risks encompassed by Labor Law § 240 (1). Though Defendants argue that there are issues of fact relating to the condition of the ground and the position of the header, these are immaterial under the scope of whether the safety materials provided were sufficient for the expected tasks.

Accordingly, Plaintiff Mayo's motion for summary judgment on his § 240(1) claim is granted.

This constitutes the decision and Order of this Court.

April
Dated: February 8, 2022



Hon. Alison Y. Tuitt