

Lahoz-Vargas v Bop Ne LLC

2023 NY Slip Op 31075(U)

March 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 516654/2018

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 516654/2018
Seq. 002

Part LL1

DECISION/ORDER

EDWARD LAHOZ-VARGAS,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed. . . .	<u> </u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Exhibits	<u> </u>
Other	<u> </u>

BOP NE LLC, TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK, AND BOP NE TOWER LESSEE LLC,

Defendants.

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 002) is decided as follows:

Introduction

The plaintiff brought this action pursuant to New York Labor Law § 240 (1) for injuries that he claims he sustained as a result of an accident on July 19, 2018. The plaintiff was employed by non-party Navillus, Inc. (“Navillus”) (Aff. of Stanley Conroy, former carpentry foreman at Navillus, at ¶ 3). Navillus was sub-contracted by the general contractor Tishman Construction Corporation of New York (“Tishman”) to perform concrete super-structure work on the northeast tower of One Manhattan West, which is located at 401 Ninth Avenue, New York, NY (*id.*). It is undisputed that the property is owned by Bop Ne LLC and Bop Ne Tower Lessee LLC (collectively “Bop Ne”).

Factual Background

Mr. Lahoz-Vargas was employed to work the night shift at the construction site, from approximately 3:30 pm to 12:00 am (Lahoz-Vargas EBT at 106, 108, 128). The scaffold on

which the plaintiff was working was already constructed when the plaintiff arrived at the worksite to begin his shift (*id.* at 129–130). Plaintiff was working on the 70th floor and instructed to strip plywood, commonly called “forms,” from the bottom of the concrete 71st floor above him (*id.* at 118, 125). The plaintiff’s co-worker, Jose Lopez, was allegedly on the 70th floor with the plaintiff at the time of his accident, but on a different scaffold (*id.* at 134–135). While stripping the ceiling, the plaintiff testified that he occasionally had to move or remove “metallic [aluminum] beams” (*id.* at 118–119). The metal beams sat below three-by-four planks, which were attached to the plywood (*id.* at 146). The beams were “on top of the scaffold” (*id.* at 147). The plaintiff first lowered the beams and then removed the planks and the plywood (*id.* at 148–149). Ordinarily the beams were “tied down” to the scaffold (*id.* at 151). The plaintiff alleges the following about his accident: While stripping three-by-fours, one of the aluminum beams fell from the scaffold frame approximately eight feet above him and struck him on the right knee (*id.* at 160, 170). The aluminum beam was not secured to the scaffold frame but was rather being supported by the scaffold (*id.* at 161–162). The scaffold moved while the plaintiff was walking across the working platform and the unsecured beam fell (*id.* at 173).

The parties seem to agree that the plaintiff was working on a scaffold produced by a company called Engineered Devices Corporation (“EDC”) (Conroy Aff. at ¶ 6). Technically called a “shoring tower,” this scaffold did have aluminum beams (“stringers”) situated horizontally across the top of the scaffold frame. According to the specifications, the stringers were held in place by adjustable screws (*id.*; *see also* EDC’s Product Sheet). The three-by-four boards adjoined to the plywood forms were resting on the stringers (Conroy Aff. at ¶ 6).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making

a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

“Liability under Labor Law § 240 (1) [is] ‘absolute’ in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 NY2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). That “liability is contingent on a statutory violation and proximate cause” (*id.* at 287). In cases involving a falling object striking a worker, “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”—in essence, “a load that required securing for the purpose of the undertaking at the time it fell” (*Narducci v Manhasset Bay Asssoc.*, 96 NY2d 259, 268 [2001]). The statutorily enumerated safety devices are “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” (NY Labor Law § 240 [1]).

It is undisputed that the plaintiff was engaged in a construction project at the time of the accident, and therefore performing covered work. The plaintiff contends that he was struck by an aluminum beam that should have been secured by stays, slings, blocks, irons, ropes, or another adequate securing device during the period that he was stripping (Aff. in Supp. at ¶ 12). The plaintiff also argues that the metal stringers had to be moved in order to remove the plywood and three-by-fours, and therefore required securing for the purpose of this undertaking. The

plaintiff contends that the failure to properly secure these aluminum beams was the reason that one of the beams fell and struck him, and therefore was the proximate cause of his accident. To support these arguments, the plaintiff provides the expert affidavit of Kathleen Hopkins, CSM, RN, who opines that the beam would not have fallen if it were properly secured, and that the failure to secure the beam was the proximate cause of the plaintiff's accident (Hopkins Aff. at ¶¶ 8–9). On these arguments and upon the record provided, the plaintiff has made out his prima facie case for summary judgment on his claims sounding in violation of Labor Law § 240 (1). The plaintiff's testimony about these events is adequate to make out a prima facie case as “the fact that the accident was unwitnessed does not preclude granting summary judgment to the plaintiff” (*Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010]).¹

In opposition, the defendants first point to the sworn statement of Andy George, the foreman at the site where the plaintiff was working. Mr. George's statement, which was provided to Terrier Claims Services as part of an insurance investigation, states that “[t]he furthest the beam could have fallen was from the area Where [sic] [Mr. Lahoz-Vargas] was stripping down to his knee, approximately three feet” (George Statement at 1, ll. 10–11). Upon this representation, defendants argue that there is a question of fact as to whether the beam fell a *de minimis* distance, which would defeat the plaintiff's claim (Aff. in Opp. at ¶ 4, n. 1).

The Court in *Runner v New York Stock Exch., Inc.* acknowledged that distance fallen is a factor for consideration under Labor Law § 240 (1) (13 NY3d 599 [2009]). Although Defendants appear to cite *Runner* as imposing an additional “calculation [of force]” requirement to “falling object” jurisprudence, *Runner*'s real effect was to expand liability under Labor Law §

¹ Although the plaintiff testified that Jose Lopez was working near him when he had his accident, there is no evidence either from Mr. Lopez or from another party as to whether Mr. Lopez witnessed the accident.

240 (1) in cases where workers are injured by falling objects, even when an object fell a short distance. The Second Department has also recognized distance fallen as a factor in Labor Law § 240 (1) cases, with consistent holdings that an elevation differential of even a few feet is not a *de minimis* fall (see *Harrison v State*, 88 AD3d 951 [2d Dept 2011]; *Outar v City of New York*, 286 AD2d 671 [2d Dept 2001]). Defendants fail to cite any case law in contradiction to this proposition. Therefore Mr. George’s statement, even if accepted as competent evidence and treated as true, is by itself inadequate to defeat Plaintiff’s prima facie case.

The defendants’ second argument is that the plaintiff’s account of the accident is physically impossible. As an initial matter, the defendants’ expert submissions, provided by Martin Bruno, CHST, and Lars Reinhart, MD, rely on diagrams and descriptions of the proper construction and usage of the shoring tower manufactured by non-party EDC. The opinion shared by both experts that the stringers on the scaffold were supposed to be secured, even considering Plaintiff’s testimony that the other stringers were “tied down,” does not logically preclude the plaintiff’s account that the specific stringer under which he was working was not properly secured. Dr. Reinhart’s additional commentary that elements of plaintiff’s account are “contrary to common experience” and “improbable” is too speculative to serve as the basis for denying summary judgment (Reinhart Aff. at ¶ 43).

However, Defendants also supply the affidavit of Stanley Conroy, a carpentry foreman at the construction site on the date of the plaintiff’s accident. Mr. Conroy’s contends that either he or a qualified, designated representative inspected the scaffold on which the plaintiff was working. Specifically, he says the scaffold was inspected at the time that it was constructed and on a daily basis to ensure “installation was consistent with the design drawings” (Conroy Aff. at ¶¶ 8–9). It was “customary for Navillus to conduct the daily inspection of the scaffolding at the

beginning of the day shift” (*id.* at ¶ 10). Workers “would not have been permitted to use the scaffold tower if any defects had been observed during the inspection of the scaffolds hours before his fall” (*id.* at ¶ 10). The defendants argue, therefore, that the plaintiff’s use of the scaffold is evidence that the inspection earlier in the day did not yield any observable defects.

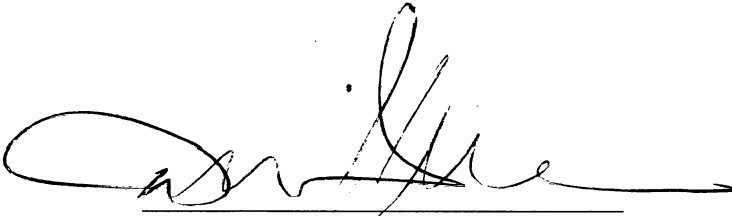
While it is the case that a plaintiff can obtain summary judgment when they are the sole witness to an accident (*see Cardenas v 111-127 Cabrini Apartments Corp.*, 145 AD3d 955, 957 [2d Dept 2016]), that scenario requires the plaintiff’s testimony about the accident to resolve all questions of fact, leaving only issues of law. Here, in the absence of additional testimonial or physical evidence, Mr. Conroy’s affidavit attesting to the practice of daily inspecting the scaffold and preventing its use if a defect was observed is sufficient to raise a question of fact about whether the stringer was properly secured at the time of the alleged occurrence. That question of fact extends to whether the plaintiff’s account of the accident is accurate and whether defendants provided adequate safety equipment. That issue must be resolved by a jury at the time of trial.

Conclusion

In light of the foregoing, Plaintiff’s motion for summary judgment on the issue of liability (Seq. 002) is denied.

This constitutes the decision of the court.

March 31, 2023
DATE


DEVIN P. COHEN
Justice of the Supreme Court