Bartley v 76 Eleventh Ave. Prop. Owner LLC
2023 NY Slip Op 31287(U)
April 21, 2023
Supreme Court, New York County
Docket Number: Index No. 157312/2019
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. PAUL A. GOETZ	PART	47
	Justice		

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PHILLIP BARTLEY, Plaintiff, - v - 76 ELEVENTH AVENUE PROPERTY OWNER LLC,OMNIBUILD CONSTRUCTION, INC Defendants.	INDEX NO. 157312/2019 MOTION DATE 02/24/2023 MOTION SEQ. NO. 001 **DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this Labor Law personal injury action plaintiff Phillip Bartley alleges he was working as a concrete stripper for his employer, non-party SBF Construction, Inc. (SBF), when he was injured by a beam and other construction materials that fell on him during the course of his work at a building owned by defendant 76 Eleventh Avenue Property Owner LLC. Defendant Omnibuild Construction Inc. was the general contractor of the construction project (Statement of Material Facts, ¶¶ 1-2, 6, NYSCEF Doc No 33).

Plaintiff now moves, pursuant to CPLR § 3212, for summary judgment on the issue of liability on his Labor Law § 240 (1) claim (motion seq no 003).

BACKGROUND

Plaintiff's accident occurred on January 24, 2019, while he and his partner, Mac, were stripping wooden forms off of a concrete beam on the twenty-first floor of the building (*id.*). The wooden forms were held in place by adjustable jacks that the carpenters installed at three- or six-foot intervals along the overhead beam before the form was filled with wet concrete (*id.* at ¶ 7).

Positioned underneath the beam, plaintiff lowered one of the form's adjustable jacks slightly and held it steady to allow Mac to strip off the plywood form in that area (*id.* at ¶ 8). Plaintiff had to immediately reshore the bare concrete by raising the jack back up once the plywood was removed to prevent the beam from dropping (*id.*). While plaintiff was stabilizing a form, the overhead beam, ribs, and plywood collapsed onto plaintiff in addition to one of the adjustable jacks striking plaintiff in his shoulder (*id.* at ¶¶ 9-11). As a result of the accident, plaintiff alleges he suffered severe cervical and lumbar spine injuries (*id.* at ¶ 14).

An Employer's Report of Work-Related Injury/Illness (C-2 form) prepared by SBF employee Elizabeth Patunas states that plaintiff "claims while holding [l]eg of [b]eam while partner was stripping the beam, the beam slipped off its [l]egs and [l]egs, beam and [r]ibs fell on him" (NYSCEF Doc No 36, ¶ D.11.). The report adds that plaintiff "[i]njured [his h]ead, [n]eck, back, [l]eft shoulder and [b]oth knees" (*id.* at ¶ D.12.). The report also mentions that SBF has no paperwork to support plaintiff's claim and that plaintiff "was fired for recklessly dropping lumber off side of building" (*id.* at ¶ E.3.). And finally, the report states that "[e]mployee, along with other team member, was fired immediately after [l]umber was improperly handled and thrown off side of building" (*id.* at ¶ I.).

A Workers' Compensation Board Employee Claim (C-3) form, signed by plaintiff, states the accident occurred when plaintiff was "[h]olding leg of beam while partner [was] stripping the beam. The beam slipped off legs . . . [and the l]egs, beam and ribs fell on [plaintiff]" (NYSCEF Doc No 37, ¶ D.5.-6.). The report also states plaintiff injured his "[h]ead, neck, back, left shoulder, [and] both knees" (*id.* at ¶ D.7.).

DISCUSSION

"It is well settled that 'the 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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

> All 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, or cause to be furnished or erected 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.

"The statute imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287-89 [2003]). "[T]he 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotations and citations omitted]). Therefore, Labor Law § 240 (1) should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]).

Plaintiff contends that he is entitled to judgment as a matter of law on his Labor Law § 240 (1) claim because he established by his testimony and defendants' pleadings and document production that defendants failed to secure the beam and construction materials from falling and striking plaintiff, which presented the sort of extraordinary and foreseeable elevation-related risk for which the statute was enacted.

Plaintiff has produced sufficient evidence to meet his prima facie burden by showing that he was engaged in a statutorily covered activity of stripping wooden forms off overhead concrete beams as part of a larger construction project when a beam and its wooden forms collapsed on plaintiff, injuring him as a result. Plaintiff's sworn testimony details how the various construction materials and equipment fell on him (Plaintiff's EBT, pp 67-77, NYSCEF Doc No 34). Plaintiff's testimony establishes defendants' failure to provide plaintiff adequate protection because the beams and wood forms required securing from the jacks, which failed in their core objective of holding it all up (*see Diaz v Raveh Realty, LLC*, 182 AD3d 515, 516 [1st Dept 2020] ["The type of work being performed—dislodging heavy plywood forms from a newly-constructed concrete ceiling—involved a load that required securing."]). Plaintiff's testimony also sufficiently demonstrates a physically significant elevation differential due to the force generated by the materials that fell onto him (*see Runner*, 13 NY3d at 605 ["The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent."]).

Defendants raise a few unpersuasive arguments that do not rebut plaintiff's showing of entitlement to judgment as a matter of law. First, defendants argue that Labor Law 240 § (1) is inapplicable because plaintiff was not struck by a falling object that was improperly hoisted or inadequately secured. Yet, plaintiff is entitled to summary judgment when an object falls from a height and strikes him regardless of whether or not the object was in the process of being hoisted or secured (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-59 [2008] [internal citation omitted] ["'[F]alling object' liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured."]). Next, defendants cite

Buckley v Columbia Grammar & Preparatory, 44 AD3d 263 [1st Dept 2007] and *Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664 [2d Dept 2020], to argue that the use of a safety device would have run counter to plaintiff's work of removing the wood forms from the concrete beam. However, this matter is distinguishable from these cases because the materials were already being held up by safety devices, *i.e.*, the jacks, which eventually failed. Whereas *Buckley*, 44 AD3d 263, involved counterweights in an elevator shaft, and *Crichigno*, 186 AD3d 664, dealt with a separate issue of areas normally exposed to falling debris. Therefore, defendants do not sufficiently show that Labor Law § 240 (1) does not apply to this case.

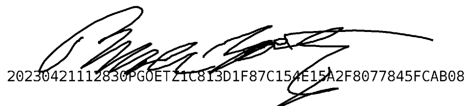
Although attached to plaintiff's papers, though not directly referred to in support of any of his arguments, defendant suggests that the C-2 report creates questions of fact as to plaintiff's credibility because it contradicts plaintiff's version of events by stating plaintiff was fired for throwing lumber off the building. While defendant may rely on hearsay testimony in part on opposition to a motion for summary judgment, it cannot be the sole basis for their opposition (*see Nava-Juarez v Mosholu Fieldston Realty, LLC*, 167 AD3d 511, 512 [1st Dept 2018] [emphasis omitted] ["Hearsay, standing alone, is insufficient to defeat summary judgment."]). In any event, the statement relating to plaintiff's termination is irrelevant as to how plaintiff's injury occurred and the C-2 report does not otherwise contradict plaintiff's version of events. Therefore, the C-2 form does not raise a genuine issue of material fact.

Lastly, defendants' argument that they could not provide adequate protection because they did not have control over plaintiff's immediate work environment ignores Labor Law § 240 (1) "impos[ing] absolute liability on owners, contractors, and their agents for any breach of the statute that proximately causes a worker's injury" (*Ernest v Pleasantville Union Free Sch. Dist.*, 28 AD3d 419, 419 [2d Dept 2006]; *see also Saint v Syracuse Supply Co.*, 25 NY3d 117, 124

[2015]). Therefore, as the owner and general contractor, defendants had a non-delegable duty to protect plaintiff from this accident as required by Labor Law § 240 (1).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim is granted.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4/21/2023		PAUL A. GOETZ, J.S.C.	
DATE			

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
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APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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