Siegel v Delta Air Lines, Inc.
2023 NY Slip Op 32669(U)
August 2, 2023
Supreme Court, New York County
Docket Number: Index No. 161354/2015
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32
Justice

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INDEX NO. 161354/2015

LAWRENCE SIEGEL,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002 003

- v -

DELTA AIR LINES, INC.,V.R.H. CONSTRUCTION CORP., PORT AUTHORITY OF NEW YORK AND NEW JERSEY, VANDERLANDE INDUSTRIES, INC.,PARSONS TRANSPORTATION GROUP, INC.,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 126, 128, 129, 132, 134, 136, 137, 138, 142, 143, 144, 145, 146, 147

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 130, 131, 133, 139, 140, 141, 148

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

Upon the foregoing documents the motion is determined as follows:

In this action brought pursuant to, *inter alia*, section 240[1] of the Labor Law, Plaintiff seeks to recover for injuries allegedly sustained when he fell from an A-frame ladder. Plaintiff, an employee of non-party GMA Electrical ("GMA"), claims at the time of the incident he was performing work as a construction electrician at terminal C of La Guardia Airport in Queens, New York. The premises was owned by Defendant Port Authority of New York and New Jersey ("Port Authority") and leased to Defendant Delta Airlines ("Delta"). Defendant Vanderlande Industries, Inc. ("Vanderlane") was engaged by Delta as a general contractor and its role included constructing the baggage handling system at the Delta Airlines terminal project. Delta also contracted with Defendant V.H.R. Construction Corp. ("VHR") to provide construction management services at the terminal C renovation.

On March 26, 2015, Plaintiff was working at terminal C and was tasked with performing wiring and labeling on an installation of a baggage handling system. To facilitate his work, Plaintiff obtained a ten-foot A-frame ladder that was owned by GMA. Plaintiff acknowledged that he inspected the ladder before using it and found no problems. Plaintiff testified that he erected the ladder, locked it in the open position and placed its feet on a level concrete floor. Plaintiff stated he ascended the ladder to a platform which was not above the reach of the ladder

and stepped onto the platform where he spliced junction boxes. After completing his tasks, Plaintiff returned to the ladder, placed both hands on the sides and began to descend while facing the ladder. Plaintiff averred that he took one or two steps when the ladder fell to his right causing both him and the ladder to fall to the floor. Plaintiff stated that he experienced no problems ascending the ladder, it did not wobble on the way up and that he did not know why the ladder fell to the right. Plaintiff testified that he was not wearing a safety harness at the time of the accident, but that he had worn one on previous occasions at the project. At his deposition he could not recall whether there were tie-off points for a safety harness where he was working. However, in an affidavit in support of the motion he claimed no such points existed. Plaintiff was the only witness to his accident.

Plaintiff commended this action to recover for the injuries he allegedly sustained as a result of the fall and pled causes of action under sections 200, 240[1] and 241[6] of the Labor Law. Defendants Delta, Port Authority, Vanderlane and VHR all filed separate answers.

Now, Plaintiff moves (Motion Seq No 2) for partial summary judgment on liability under Labor Law §240[1]. Defendants Delta, Port Authority, Vanderlane filed joint opposition to Plaintiff's motion. Defendant VHR filed separate opposition and moved (Motion Seq No 3) for summary judgment dismissing Plaintiff's complaint. Only Defendants Delta, Port Authority, Vanderlane opposed VHR's motion.

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As to Plaintiff's motion, "Labor Law § 240(1) imposes 'upon owners, contractors, and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide workers proper protection from elevation-related hazards" (*see Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635 [2d Dept 2020] *quoting Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 [2d Dept 2016] *quoting Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). "The purpose of the statute is to protect workers… 'from the pronounced risks arising from construction work site elevation differentials'" (*Villa v East 85th Realty, LLC*, 189 AD3d 1661 [2d Dept 2020] *quoting Runner v New York Stock Exch., Inc.,* 13 NY3d 599, 603; *see also Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501 [1993]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]). The protections of the statute are triggered where a worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Soto v J.Crew Inc.*, 95 AD3d 721, 722 [1st Dept 2012] *quoting Broggy v Rockefeller Group, Inc.,* 8 NY3d 675, 681 [2007]). "[L]iability 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" (*Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 453-454 [1st Dept 2017] *quoting Narducci v Manhasset Bay Assoc.,* 96 NY2d 259, 267 [2001]). "In order to recover under section 240(1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his or her injury" (*Zoto v 259 West 10th, LLC,* 189 AD3d 1523 [2d Dept 2020], *citing Barreto v Metropolitan Transp. Auth.,* 25 NY3d at 433).

As to which of the individual Defendants are subject to liability under Labor Law §240[1], it is unchallenged that Delta, Port Authority and Vanderlane were either owners or contractors within the meaning of the statute when Plaintiff's accident occurred. However, construction managers, as VRH claimed to be on this project, are "generally not responsible for injuries under Labor Law §§ 200, 240(1), or 241(6), [except] when it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the plaintiff's injury, responsibility will attach" (*Jin Gak Kim v. Kirchoff-Consigli Constr. Mgt., LLC,* 197 AD3d 1289, 1291 [2d Dept 2021]; *see also Walls v Turner Constr. Co.,* 4 NY3d 861 [2005]). A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (*see* Labor Law §§ 200, 241[6]; *Russin v Picciano & Son,* 54 NY2d 311, 318 [1981]). "The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right" (*Santos v Condo 124 LLC.*, 161 AD3d 650, 653 [1st Dept 2018]; *see also Barreto v Metro. Transp. Auth.*, 25 NY3d 426, 434 [2015]).

Defendant VRH was retained by Delta under a contract dated October 12, 2011, to act as "Construction Manager" for certain work "summarized, without limitation," under Article 2 of the agreement. VHR's duties under the agreement included supervision and direction of "the Work" as well as sole responsibility for the means and methods thereof. The project Plaintiff was working on for GMA was not specifically amongst "the Work" listed in the contract. However, Joseph Pointek ("Pointek"), Superintendent for VRH, testified that the work listed in the contract was only part of what VRH was engaged to perform and admitted that VRH hired GMA for some forty projects at Terminal C. Pointek averred that VRH was not involved in the installation of the baggage conveyance system installation GMA and Plaintiff were performing and that VRH's control over the means and methods of GMA's work was limited to those projects it hired GMA to perform. Nevertheless, Pointek testified that he did not know all the jobs GMA performed for VRH and acknowledged that it was "possible that GMA was also doing work on the baggage handling system that was also within the jurisdiction of V.H.R. at Terminal C".

Contrary to VHR's assertion, the above evidence establishes an issue of fact as to whether VHR was a statutory agent of Delta for the injury producing work (*see Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192 AD3d 581 [1st Dept 2021]; *Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782 [2d Dept 2021]).

Concerning Delta, Port Authority and Vanderlane's liability under Labor Law §240[1], Plaintiff established a *prima facie* case that the A-frame ladder he was utilizing failed to provide him proper protection under the circumstances through his testimony the unsecured ladder

moved to his right and caused him to fall (*see Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574 [1st Dept 2019][Where "the ladder tipped over as he sought to steady himself while descending it, plaintiff's testimony established prima facie that defendant failed to provide a safety device to insure that the ladder would remain upright while plaintiff used it to perform his statutorily covered work"]; *Concepcion v 333 Seventh LLC*, 162 AD3d 493, 494 [1st Dept 2018]["Partial summary judgment on the issue of liability was properly granted in favor of plaintiff . . . [where][a]ccording to plaintiff, as he was tightening a bolt, the ladder moved and he fell to the floor"]; *Orellano v. 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [1st Dept 2002]; *see also Rodriguez v BSREP UA Heritage LLC*, 181 AD3d 537 [1st Dept 2020]; *Fletcher v Brookfield Props.*, 145 AD3d 434 [1st Dept 2016]). This result is compelled as "[t]he failure to properly secure a ladder so as to hold it steady and erect during its use constitutes a violation of Labor Law §240[1]" (*Dasilva v A.J. Contracting Co.*, 262 AD2d 214 [1st Dept 1999] *citing Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152 [1st Dept 1998]) and no further evidence of the defective nature of the ladder is required (*see eg Pierrakeas v 137 E. 38th St. LLC*, supra at 575; *Fanning v Rockefeller Univ.*, 106 AD3d 484, 485, [1st Dept 2013]).

In opposition, Defendants' argument that there are issues of fact concerning whether Plaintiff was the sole proximate cause of accident is without merit (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280; *Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018]; *Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589; *Ross v 1510 Assoc. LLC*, 106 AD3d 471, 471 [1st Dept 2013]). At the very least, since the unsecured ladder was partly to blame for the accident, Plaintiff's acts cannot constitute the "sole proximate cause" of his fall (*see eg Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [1st Dept 2004]; *Torres v Monroe College*, 12 AD3d 261 [1st Dept 2004]). The claim that Plaintiff's accident was due to positioning of the ladder or his failure to use a safety harness constitutes comparative negligence which is no defense (*see Latteri v. Port of Auth. of N.Y. & N.J.*, 205 A.D.3d 546 [1st Dept 2022]; *Cardona v New York City Hous. Auth.*, 153 AD3d 1179, 1180 [1st Dept 2017]; *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 434 [1st Dept 2015]; *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430, 430 [1st Dept 2015]).

Similarly, Defendants' assertion Plaintiff was a recalcitrant worker is unavailing. To establish that a plaintiff is a recalcitrant worker, a defendant must establish that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011] [internal quotation marks omitted], *citing Cahil v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993][A recalcitrant worker defense "requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer"]).

Although there is proof there was another safety device on site, a safety harness, there is no proof that Plaintiff expressly refused to utilize that device. Jimmy Hanna ("Hanna"), and employee of Vanderlande testified that it was the subcontractor's obligation to provide such devices and instruction related thereto and no deposition or affidavit from Plaintiff's employer was proffered. Even if evidence existed that Plaintiff was instructed to use a harness, proof "of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant

worker defense" (*Gordon v Eastern Ry. Supply*, supra at 563). Likewise, the mere existence of safety devices located somewhere on a construction site without more will not prove a recalcitrant worker and is insufficient to satisfy the obligation imposed by Labor Law §240[1] (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]; *Laquidara v HRH Constr. Corp.*, 283 AD2d 169, 170 [1st Dept 2001]).

Accordingly, it is

ORDERED that Plaintiff's motion (Mot Seq No 2) for partial summary judgment on liability on his Labor Law §240[1] cause of action is granted as against Defendants Port Authority, Delta and Vanderlande only, and it is further

ORDERED that Defendant VHR's motion (Mot Seq No 3) for summary judgment dismissing Plaintiff's complaint against it is denied.

8/2/2023	FRANCIS A. KAHN, III, A.J.S.C.
DATE	

HON. FRANCIS A. KAHN III
J.S.C.

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