

De La Cruz Eusebio v 1277 Holdings LLC

2023 NY Slip Op 33681(U)

October 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 504888/2018

Judge: Devin P. Cohen

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

Index Number 504888/2018
Seq. 004

Part LL1

DECISION/ORDER

ABADID DE LA CRUZ EUSEBIO,

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>

1277 HOLDINGS LLC, GATEWAY REALTY HOLDINGS LTD., RAY BUILDERS INC., AND HAMPSHIRE PROPERTIES LLC,

Defendants.

1277 HOLDINGS LLC AND RAY BUILDERS INC.,

Third-Party Plaintiffs,

against

HILINE CONSTRUCTION, INC.,

Third-Party Defendant.

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 004) is decided as follows:

Procedural History and Factual Background

The underlying facts of this case are largely undisputed. Plaintiff commenced this action for injuries he claims to have sustained on November 30, 2017. Plaintiff testified as follows: on the date of his accident, plaintiff was employed as a construction helper by third-party defendant Hiline Construction, Inc. (Hiline) (Eusebio EBT at 17, 23). Plaintiff was tasked with moving construction materials, predominantly blocks on pallets, up a concrete ramp from the street into

the building under construction (*id.* at 34, 43, 47). When plaintiff and his co-workers were approximately five to eight feet up the ramp with a loaded pallet jack, the jack began to roll backwards (*id.* at 56, 60). The jack started to roll backwards because it ran out of battery, and plaintiff felt it start to roll five seconds before the accident (*id.* at 70). The jack, bearing approximately 1,000 pounds of blocks, struck the plaintiff and pushed him into a concrete wall (*id.* at 60, 70). The ramp was wet and had accumulated particulate debris, like sand or pebbles (*id.* at 64).

Joseph Martino, representative of Ray Builders, Inc. (Ray Builders), testified that Ray Builders was the general contractor at the site (Martino EBT at 22), and authenticated a contract identifying 1277 Holdings LLC (1277 Holdings) as the owner of the premises. Mr. Martino described the ramp as approximately fifteen feet long with a two-and-a-half foot incline (*id.* at 62).

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]).

Labor Law § 240 (1)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim. Labor Law § 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from gravity-related risks (*Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). “The 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]). Therefore, the court must ascertain “whether the harm flows directly from the application of the force of gravity to the object” (*id.* at 604). “[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures” (*Conway v New York State Teachers’ Retirement Sys.*, 141 AD2d 957, 958–959 [1988]).

Plaintiff contends that he is entitled to summary judgment due to the weight of the load he and his co-workers were pushing and the failure of the electric power jack to move that load up the ramp. A jack is a safety device within the ambit of Labor Law § 240 (1) (*see Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812, 813 [2d Dept 2015]). Like the device being used in *Runner* to mitigate the effect of gravity while moving a heavy load, here the power jack was being used by plaintiff and his co-workers to mitigate the effect of gravity while moving a heavy load up a long, inclined plane. When the power on the jack failed, the subsequent action of gravity on the heavy load and the jack caused the plaintiff’s accident. Plaintiff has therefore demonstrated his *prima facie* entitlement to summary judgment under Labor Law § 240 (1).

In opposition, the defendants argue that the elevation differential was *de minimis* given the two-and-a-half foot elevation of the concrete ramp. Pursuant to *Runner*, the Second Department has found that even a relatively small height differential can be significant if the weight of the falling object is sufficient (*Kandatyán v 400 Fifth Realty LLC*, 155 AD3d 848, 850–851 [2d Dept 2017]). Even if the ultimate height was two-and-a-half feet, the plaintiff

testified that he and his co-workers had travelled five to eight feet along the fifteen-foot incline of the ramp. Defendants concede that the weight of the load was such that multiple workers were required to move it up the ramp even when the jack was operating with electrical assistance. Following *Runner* and *Kandatyan* in considering that a heavy load and jack, like the pallets and jack in this case, is capable of generating significant force over even a relatively small decline, the height of the ramp in this case cannot be considered *de minimis*. Defendants' argument is therefore unavailing.

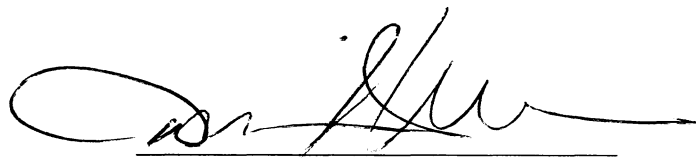
Defendants also argue that the employee injury report from the date of the accident does not mention a failing pallet jack, and instead memorialized the plaintiff's complaint that his co-worker was on her phone and stopped pushing the jack. However, the contents of the report are in English, and the plaintiff testified in Spanish that he barely speaks or reads English (Eusebio EBT at 6). There is no explanation provided as to how Mr. Eusebio's statements, presumably made in Spanish, were translated into English, or how he verified them before annexing his signature. At his deposition, Mr. Eusebio testified that he was told to sign the document before the ambulance could take him away (*id.* at 73–74). For these reasons alone, irrespective of plaintiff's counsel's other arguments, the report is inadequate to resist summary judgment.

Conclusion

Plaintiff's motion for summary judgment (Seq. 004) is granted.

This constitutes the decision and order of the court.

October 12, 2023
DATE



DEVIN P. COHEN
Justice of the Supreme Court