

Jirgal v City of New York
2023 NY Slip Op 35196(U)
March 28, 2023
Supreme Court, Queens County
Docket Number: Index No. 702074/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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THOMAS J. JIRGAL,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,
CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC. and CONSOLIDATED EDISON, INC.,

Defendants.

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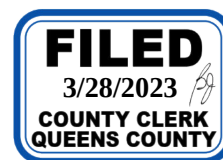
Index No. 702074/2020

Part 6

Motion Date: March 6, 2023

Calendar No. 23

Sequence No. 1



The following papers numbered 1 to 8 read on this motion by plaintiff for summary judgment on the issue of liability pursuant to CPLR §3212 and Labor Law §240(1) and §241(6) against defendants Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....1-6
Affirmation in Opposition.....5-6
Reply Affirmation.....7-8

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff's motion for summary judgment on the issue of liability pursuant to CPLR §3212 and Labor Law §240(1) and §241(6) against defendants Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. (hereinafter referred to as "ConEd") is denied, as plaintiff failed to eliminate all issues of fact in dispute. Plaintiff commenced this action for personal injuries sustained on April 17, 2019, while performing work as an employee of defendants ConEd at the jobsite located in the roadway of 38th Avenue, Jamaica, Queens. Plaintiff filed the Summons and Complaint on February 5, 2020, and issue was joined on March 2, 2020. It is noted that a stipulation of discontinuance with regard to defendants City of New York and New York City Department of Transportation was filed on August 27, 2021.

Plaintiff argues that he is entitled to summary judgment on the issue of liability pursuant to CPLR §3212 and Labor Law §240(1) and §241(6). He presents the pleadings, 50-h transcript, deposition transcripts of the parties, employer injury report, Con Ed injury report, photographs and contract between ConEd and Safeway. Plaintiff testified that while working at the job site, he and a co-worker were manually pushing a 500lb fusion machine up a ramp when he slipped and fell on dirt and debris on the ramp, causing the machine to roll back and strike him. He argues that defendants are liable for his injuries because they failed to provide sufficient safety devices to prevent the machine from rolling back into him.

Defendants ConEd oppose the motion, arguing there are issues of fact in dispute. They argue that Labor Law §240(1) is not applicable, as there was no significant elevation differential based upon the photographs and conflicting testimony between plaintiff and co-worker Higginbotham. Defendants ConEd further argue that plaintiff was exposed to the usual dangers of a construction site and not an elevated risk and therefore failed to demonstrate entitlement to summary judgment under Labor Law §240(1). They also argue that there are issues of fact as to Labor Law §241(6), as there is conflicting testimony as to the location of plaintiff's accident and the condition of the roadway at the time of plaintiff's accident.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

Labor Law §240(1) generally imposes a nondelegable duty and absolute liability upon owners and general contractors "to provide safety devices necessary to protect workers from risks inherent in elevated work sites." (*Ennis v. Noble Constr. Group, LLC*, 207 A.D.3d 703, 704 [2d Dept. 2022]; see also *Riffo-Veloza v. Village of Scarsdale*, 68 A.D.3d 839, 840 [2d Dept. 2009].) Specifically, Labor Law §240(1) requires owners and contractors to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*Rodriguez v. Waterfront Plaza, LLC*, 207 A.D.3d 489, 490 [2d Dept. 2022].) To prevail on a

Labor Law §240(1) cause of action, a plaintiff must establish that the statute was violated, and that the violation was a proximate cause of the injuries. (*Guaman v. 178 Ct. St., LLC*, 200 A.D.3d 655, 657 [2d Dept. 2021].) Although comparative fault is not a defense to the strict liability of the statute, “where the plaintiff is the sole proximate cause of his or her own injuries, there can be no liability under Labor Law §240(1). (*Orellana v. 7 W. 34th St., LLC*, 173 A.D.3d 886, 887 [2d Dept. 2019].) A plaintiff is the sole proximate cause of his own injuries and a defendant has no liability under Labor Law §240(1) when the plaintiff: “(1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice.” (*Cioffi v. Target Corp.*, 188 A.D.3d 788, 791 [2d Dept. 2020].)

Labor Law §241(6) generally requires “owners and contractors and their agents for such work...to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules promulgated by the Commissioner of the Department of Labor.” (*Guryev v. Tomchinsky*, 20 N.Y.3d 194, 198-199 [2012].) The statute requires the plaintiff to allege a violation of a specific and applicable provision of the Industrial Code. (*Devoy v. City of New York*, 192 A.D.3d 665 [2d Dept. 2021].)

Plaintiff failed to present a prima facie entitlement to summary judgment for Labor Law §240(1) and §241(6). Plaintiff argues that Labor Law §240(1) applies because the force of gravity of the excessively heavy and unsecured object caused it to roll down the ramp. However, this is insufficient to qualify as an elevated risk, as plaintiff failed to eliminate all issues of fact as to whether he sustained an injury due to an elevated risk. Plaintiff did not testify with regard to whether he was standing on an elevated ramp, but merely stated that he was on the ramp when he slipped. Non-party Anthony Higginbotham testified that he was plaintiff’s co-worker and plaintiff was standing at ground level and not on the ramp at the time of the accident. The photographs presented do not show a significant height differential, nor did plaintiff present any expert testimony or documentation that would demonstrate the height differential was more than *de minimis*. (*Compare Gutman v. City of New York*, 78 A.D.3d 886 [2d Dept. 2010][plaintiff alleged the rail fell 12-16 inches before landing on his leg, which was not considered *de minimis* in light of the weight of the object and the amount of force it was capable of generating over a relatively short descent].) Plaintiff testified at his deposition that he did not know the speed at which the fusion machine moved into his knee, nor did he know the height of the fusion machine. He also failed to demonstrate that any device could have protected plaintiff from falling, as he testified he slipped on debris, and did not present competent, admissible evidence that a safety device would have stopped the machine from striking him in the leg. (See *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90 [2015].) Further, the employer report and Con Ed report are inadmissible hearsay, as they were not sworn statements, nor did plaintiff identify the writer of these reports to establish their reliability. Based upon the evidence presented, plaintiff failed to eliminate all issues of fact that would warrant summary judgment as to Labor Law §240(1).

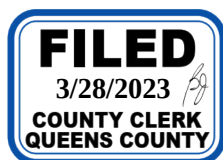
Plaintiff's reliance on *McVicker v. Port Auth. Of N.Y. & N.J.*, 195 A.D.3d 554 (1st Dept. 2021) and *Correto v. Onex Real Estate Partners*, 209 A.D.3d 483 (1st Dept. 2022) is misplaced, as the facts in these cases are not the same as the present case. In *McVicker*, plaintiff was injured because he "inadvertently walked into" the path of a heavy rolling column that other workers pushed down a ramp. In *Correto*, the Court found Labor Law §240(1) to be applicable because the "crane fell from a height, off the ramp and onto plaintiff's foot", unlike the present case where, at best, plaintiff contends the machine rolled down a slight ramp with *de minimis* elevation.

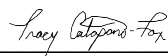
Plaintiff also failed to demonstrate a prima facie entitlement to summary judgment as to Labor Law §241(6). (*See Nankervis v. Long Is. Univ.*, 78 A.D.3d 799 [2d Dept. 2010].) Plaintiff alleges that there was debris in the area where he was pushing the machine in violation of Industrial Code §23-1.7[e](1), but testified at his deposition that he did not make any complaints about the condition of the roadway before his accident. He testified that his left foot slipped on the rear door ramp of the trailer on black gravel, but did not recall seeing it any time before his accident. Higginbotham also testified that plaintiff slipped but did not fall down after his knee was struck by the fusion machine. Based upon the evidence presented, plaintiff failed to present competent, admissible evidence, including expert testimony, to support the claim that debris created a slippery condition that caused his accident in violation of Labor Law §241(6) and Industrial Code §23-1.7[e](1).

Accordingly, plaintiff's motion for summary judgment on the issue of liability pursuant to CPLR §3212 and Labor Law §240(1) and §241(6) against defendants Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. is denied.

This constitutes the decision and Order of the Court.

Dated: March 28, 2023





Hon. Tracy Catapano-Fox, J.S.C.