

Ovalles v HP Villa Gardens HDFC, Inc.
2023 NY Slip Op 35283(U)
November 3, 2023
Supreme Court, Bronx County
Docket Number: Index No. 33777/2018E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
JUBENAL ORTEGA OVALLES,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 33777/2018E

HP VILLA GARDENS HDFC, INC., VILLA
204 HP LLC, and ZA DEVELOPMENTS, LTD.,

Motion Sequence No. 2

Defendant(s)
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GUZMAN, J.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on October 12, 2018, while working at a construction project at 16 East 204th Street, Bronx, New York. The project, involving construction of a new apartment building, was undertaken by Defendant HP Villa Gardens HDFC, Inc., the owner of the property, and Defendant Villa 204 HP LLC, the owner of the building under construction (collectively, “Defendants”). At the time of the accident, Plaintiff was employed by non-party Galaxy General Contracting Corp. (“Galaxy”), the general contractor.¹ Plaintiff, who helped with masonry work, alleges that he was injured when a cart containing cement (described by Plaintiff as a buggy) intended for use by Galaxy masons on a higher floor of the structure, fell from the forks of a telescopic forklift as it was being hoisted, striking him and causing injuries to his right foot, right knee, and back.

On this motion, Plaintiff moves for partial summary judgment on the issue of liability on his claim under Labor Law § 240 (1). Plaintiff contends that the evidence demonstrates that the buggy was caused to tilt and fall from the forks of the forklift because it had been improperly hoisted and secured to the buggy, and Defendants failed to provide proper protection from the gravity-related hazard to which Plaintiff was exposed.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact. *Friends of Thayer Lake, LLC v. Brown*, 27 N.Y.3d 1039, 1043, 33

¹ By Stipulation dated March 14, 2019, Plaintiff discontinued this action against ZA Developments, Ltd.

N.Y.S.3d 853 (2016); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, the existence of disputed issues of material facts for trial. CPLR § 3212 (b). Because summary judgment is a “drastic remedy,” it should only be employed “when there is *no doubt* as to the absence of triable issues.” *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974) (emphasis added). Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep’t 2021). Additionally, the court views the evidence in the light most favorable to the non-moving party and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

Labor Law § 240 (1) provides, in relevant part, that “[a]ll contractors and owners and their agents. . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or a structure shall furnish or erect. . . 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.” This section imposes a nondelegable duty upon owners and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites. *Barreto v Metropolitan Transp. Auth.*, 110 A.D.3d 630, 973 N.Y.S.2d 636 (1st Dep’t 2013); *Runner v. N.Y. Stock Exch., Inc.*, 13 N.Y.3d 599, 604-05, 895 N.Y.S.2d 279 (2009). Under Labor Law § 240 (1), “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.” *Id.* at 603. When applicable, Section 240 (1) 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 N.Y.3d 1, 7, 935 N.Y.S.2d 551 (2011). Thus, an owner’s non-delegable duty to comply with Labor Law § 240 (1) does not depend upon its control or direction of the work. See *Toussaint v. Port Auth. of N.Y.*, 38 N.Y.3d 89, 168 N.Y.S.3d 379 (2022); *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 (1st Dep’t 2011) (“Labor Law § 240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was unaware, and therefore over which it exercised no supervision or control”).

Here, in support of the motion, Plaintiff has submitted, *inter alia*, his deposition testimony and photographs used therein; deposition testimony from Aristotle Zervoudis, a project manager for Galaxy; and an expert affidavit from Nicholas Bellizzi, a professional engineer. *See* NYSCEF Docs. 32-48. At his deposition, Plaintiff testified that he filled the buggy with cement inside of the building and then pushed it out to the street, where the “Lull forklift” was situated. *See* NYSCEF Doc. 41 at 40-43. The hoisting process involved him placing the buggy near the prongs of the forklift, at which time the machine operator would move the prongs forward, underneath the buggy, and lift it up to the masons working on the upper floors. *Id.* at 43-44, 46-47. The buggy was not tied or otherwise secured to the forks. Plaintiff stood near the buggy, steadying it and holding it in place with his hands until the operator started to lift it. *Id.* at 47-48. Plaintiff testified that the operator of the machine situated the buggy “the wrong way” on the forks; the operator should have placed the forks under the wide side of the buggy, but instead placed them under the narrow side. *Id.* at 48-50. As the operator began lifting the buggy, about four to five feet off the ground, the buggy fell off the forklift, striking Plaintiff on the right side of his body. *Id.* at 51-52.

In his affidavit, Nicholas Bellizzi states that the telescopic forklift was operated, controlled, supervised, and managed in an unsafe, hazardous and dangerous manner by its operator, and “[t]he proper and safe means to transport the buggy filled with cement up to the higher levels of the building where the masons were working was to place the forks under the long side of the buggy and not into the narrow side as [the operator] had done. The forks also should have been properly adjusted and separated before being placed under the buggy, so as to ensure that the load remained balanced. Bellizzi concludes that the improper and unsafe manner in which the forklift was operated was a substantial factor in causing Plaintiff’s accident and his resulting injuries. *See* NYSCEF Doc. 48.

In view of the above proof, Plaintiff has established a *prima facie* violation of Labor Law § 240 (1). In opposition, Defendants first contend that summary judgment should be denied because Plaintiff was the sole proximate cause of his accident. Defendants argue that Plaintiff failed to step away from the forklift after the buggy had been placed onto the forks of the machine and the operator began hoisting up the buggy. In support, Defendants rely solely on Plaintiff’s deposition, wherein he testified that he was in front of the buggy, steadying it and holding it in place, as the operator of the forklift positioned the prongs of the machine

underneath it and began lifting it. Plaintiff attempted to “jump back” when the buggy fell off the forks, but the accident happened too quickly. *Id.* at 51-52.

As noted above, 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. “[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense” however, “where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability.” *Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 13 N.Y.S.3d 305 (2015), citing *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39, 790 N.Y.S.2d 74 (2004). Under § 240(1), a plaintiff is the sole proximate cause of his injuries if he knowingly and voluntarily chooses to forgo the use of available safety equipment “for no good reason,” causing an accident. *Gallagher v. N.Y. Post*, 14 N.Y.3d 83, 88, 896 N.Y.S.2d 732 (2010); see, e.g., *Calle v. City of New York*, 212 A.D.3d 763, 183 N.Y.S.3d 425 (2d Dep’t 2023) (defendants established that plaintiff's conduct was the sole proximate cause of his injuries where plaintiff exited the excavation by stepping on a wooden cross brace, not intended as a walkway, instead of using a ladder that was provided, and which he had been instructed to use).

Here, Defendants have submitted no proof that Plaintiff had received instructions not to stand within a certain distance of the forklift, how close he was standing to the forklift at the moment that the buggy fell off of the forks, or that he chose to stand near the forklift “for no good reason.” Counsel for Defendants argues in her affirmation that “on the accident date, despite Plaintiff having other convenient options, he decided to put his own safety at risk while the ‘buggy’ was being lifted.” See NYSEC Doc. 56 at 7. Nevertheless, an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance. See *Berrios v. 735 Ave. of the Ams., LLC*, 82 A.D.3d 552, 919 N.Y.S.2d 16 (1st Dep’t 2011) (noting that the affirmation of defendants' attorney, asserting that there were places to which a safety harness could have been tied, has no evidentiary weight). The unrefuted evidence in this case is that the buggy containing cement was not positioned properly on the forks of the Lull telescopic forklift, and was not otherwise secured to the forklift, when it tipped over and fell onto Plaintiff. “[A] defendant is not absolved from liability where . . . a plaintiff's injuries were at least partially attributable to the defendant's failure to provide protection as mandated by the statute.” *Cammon v. City of New York*, 21 AD3d 196, 201, 799 N.Y.S.2d 455 (2005). To the extent that

Plaintiff's own actions played any role in causing the accident, Plaintiff's comparative negligence, if any, is not a defense to the Labor Law § 240(1) cause of action. *See Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003); *Diming Wu v. 34 17th St. Project LLC*, 200 A.D.3d 508, 155 N.Y.S.3d 85 (1st Dep't 2021) ("even accepting as true that the hole to be sealed was two feet away from the chute opening, plaintiff's placement of the ladder directly adjacent to the garbage chute opening at most establishes comparative negligence, which is not a defense to a Labor Law § 240(1) claim"). Thus, Defendants have failed to raise a triable issue of fact as to whether Plaintiff's own conduct was the sole proximate cause of the accident.

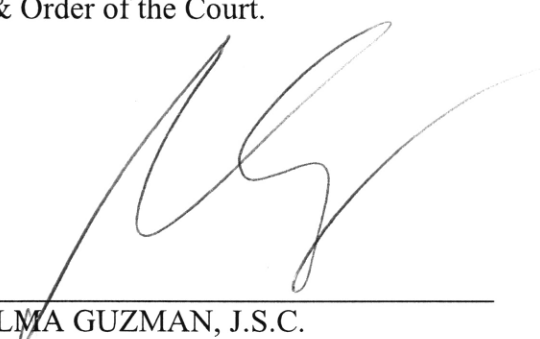
Defendants also contend that HP Villa Gardens, a not-for-profit corporation, was not an owner, general contractor, or agent for purposes of Labor Law § 240(1) and therefore this action must be dismissed against HP Villa Gardens. To the extent that HP Villa Gardens has not cross-moved to dismiss on this ground, this argument is procedurally improper. In any event, Defendants have submitted no evidentiary proof whatsoever establishing that HP Villa Gardens was neither an owner or agent for purposes of the Labor Law. Accordingly, for the foregoing reasons, it is hereby:

ORDERED AND ADJUDGED that the motion filed by Plaintiff Jubenal Ortega Ovalles for partial summary judgment on the issue of liability on his claim based on Labor Law § 240 (1) is GRANTED; and it is further

ORDERED AND ADJUDGED that Plaintiff shall serve a copy of this Decision & Order with notice of entry within twenty days of the date of this Decision & Order.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
November 3, 2023



HON. WILMA GUZMAN, J.S.C.