

Farquharson v City of New York

2024 NY Slip Op 32066(U)

June 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 527810/2019

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of June, 2024.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X
UWIN FARQUHARSON and KISSHORI FARQUHARSON,

Plaintiffs,

-against-

Index No. 527810/2019

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION, THE NEW YORK CITY TRANSIT AUTHORITY, LONG ISLAND RAIL ROAD, and JOHN CIVETTA & SONS, INC.,

Defendants.

DECISION & ORDER

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>33-41</u>
Opposing Affidavits (Affirmations)	<u>44-48</u>
Affidavits/ Affirmations in Reply	<u>50</u>

Upon the foregoing papers, plaintiffs Uwin Farquharson and Kisshori Farquharson move for an order, pursuant to CPLR 3212, granting them summary judgment on the issue of liability pursuant to Labor Law § 240 (1) as against defendants City of New York, Metropolitan Transportation Authority (MTA), MTA Capital Construction, the New York City Transit Authority, Long Island Rail Road (LIRR), and John Civetta & Sons (Civetta) (collectively, defendants) (Mot. Seq. No. 2).

In 2019, a construction project involving the rehabilitation of the Atlantic Avenue Bridge and related LIRR substations in Brooklyn was in progress. The work was being performed pursuant to the New York City Department of Transportation's (NYCDOT) contract with the

LIRR for the rehabilitation of Atlantic Ave., Bridge Over LIRR-Atlantic Avenue Branch Project (LIRR Contract No. FAA HBK1201). Civetta was retained by the NYCDOT as general contractor for the project which entailed the production and erection of steel for the bridge. Civetta subcontracted the ironwork to non-party Northeast Structural Steel, Inc. (Northeast). Plaintiff Uwin Farquharson (plaintiff) was a structural steel ironworker employed by Northeast. His work involved removing “false work,” which is a temporary support steel beam or column which would be in place until the final bearings for the bridge were constructed and placed. On June 27, 2019, plaintiff and his coworker were performing this work while standing on the ground of an elevated platform, known as a bench wall, that was adjacent to railroad tracks. The work involved climbing up a ladder and attaching a bridge clamp to a beam, then attaching a choker¹ and hanging a chain fall.² They then removed various bolts which held the column to the bolster, which is the piece the column was sitting on. However, plaintiff and his coworker were unable to remove the column out of the bolster, causing them to summon their foreman, Eric Drepaul, to assist in removing the column. Mr. Drepaul instructed plaintiff to use a sledgehammer to hit the bolster to loosen the column (NYSCEF Doc No. 38 at 101, lines 21-25; at 102, lines 2-5). Plaintiff testified that he hit it approximately 2 to 3 times and on the next swing, he missed causing him to lose his balance and fall headfirst off of the bench wall onto the rail road tracks below (*id.* at 103, lines 14-23). He testified that there was no protection in place to prevent him from falling onto the track below (*id.*, at 88, lines 10-12). Plaintiff was unsure of the exact distance he fell as the height of the platform varied depending on the level of rocks surrounding the train tracks, but he estimated it was between five and six feet (NYSCEF Doc No. 39, at p. 18, lines 22-23). Plaintiff contends that he sustained various injuries.

Plaintiffs commenced this action with the filing of a summons and verified complaint on December 23, 2019. By July 7, 2020, each defendant had joined issue with the service of a verified answer to the verified complaint. Plaintiff was deposed on March 22, 2022, and on April 20, 2022. A witness on behalf of Civetta was deposed on April 21, 2023. Plaintiffs filed note of issue and certificate of readiness on June 16, 2023, and the following timely motion ensued.

¹ “A choker is a sling that’s used to wrap and hold columns and beams.” (NYSCEF Doc No. plaintiff’s tr at 70, lines 5-6).

² “A chain fall is a mechanism to lift heavy objects.” (*id.* at lines 11-12).

Plaintiffs moves for summary judgment on plaintiff Uwin Farquharson's Labor Law § 240 (1) claim as asserted against defendants. Plaintiff Uwin Farquharson contends that he was injured while working in his capacity as a steel worker at a construction project while employed by Northeast. He argues that defendants are strictly liable as the owners and lessees of the premises, and general contractor, as his injuries were proximately caused by a violation of Labor Law § 240 (1). Specifically, plaintiff contends that he was injured as a result of a fall from an elevated work platform that lacked any safety devices.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "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 absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (see *Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d at 853; *Wittenberg v Long Is. Power Auth.*, 225 AD3d 730 [2d Dept 2024]; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]).

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed 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” (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501).

The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*). “A worker’s comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). Therefore, “where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker’s conduct cannot be deemed solely to blame for it” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290).

Plaintiff asserts that defendants’ failure to protect him from falling off of the elevated platform on which he was working, which lacked guardrails or any other safety device, was a prima facie violation of Labor Law § 240 (1) which proximately caused his injuries. In support of the motion, plaintiff points to his deposition testimony which indicates that he was caused to fall off the bench wall and onto the tracks due to the fact that there was no protection in place. Plaintiff testified that it appeared that there had been guardrails at that location at some point but that it had

been removed prior to his accident (NYSCEF Doc No. 38, at 87, lines 9-25; at 88, lines 2-12; at 90, lines 14-24). In further support of the motion, plaintiff submits copies of the various reports that were prepared by his employer Northeast, the NYCDOT and the LiRo Group, related to the accident.

In opposition, defendants argue that the motion should be denied as questions of fact exist as to how the alleged accident happened and whether a violation of Labor Law § 240 (1) occurred. Specifically, defendants contend that there is a question of fact regarding how far the plaintiff fell off of the platform and onto the train track. In this regard, they point to the discrepancy between plaintiff's testimony that he fell between five and six feet and the accident report which indicates that the fall was approximately four and a half feet. Defendants assert that this discrepancy raises the possibility that the alleged accident does not fall under the purview of Labor Law § 240 (1), and therefore summary judgment should be denied. In addition, defendants assert that plaintiff has failed to prove, as a matter of law, that each of the defendants is subject to liability under Labor Law § 240 (1).

Defendants also contend that plaintiff has failed to demonstrate that his alleged accident was due to the absence or inadequacy of a safety device. Specifically, they assert that plaintiff has failed to identify any safety device that could have prevented his accident. Further, defendants argue that plaintiff has failed to retain an expert to opine that a safety device could have prevented the accident. Finally, defendants maintain that there is a question of fact as to whether plaintiff can claim the protections of Labor Law § 240 (1) based on what he allegedly fell off of. Defendants claim that the platform plaintiff fell from was not a scaffold or other safety device intended to protect against gravity-related hazards. They maintain that it was an ordinary and permanent appurtenance of the subway in which work was being performed not subject to the protections of Labor Law § 240 (1).

In reply, plaintiff argues that defendants' contention that the motion should be denied due to the discrepancy in the length of plaintiff's fall lacks merit. Plaintiff notes that he testified that he believed the height was between five and six feet, the accident reports lists a fall height of four and a half feet, while a picture attached to the accident reports shows a measurement of four feet, three inches. However, plaintiff argues that even a fall of four feet, three inches would come within the ambit of Labor Law § 240 (1). Next, plaintiff asserts that he was not required to submit an expert affidavit to demonstrate that a safety device, such as a guardrail, should have been supplied

to prevent the type of accident he experienced. Finally, plaintiff maintains that he has demonstrated his prima facie entitlement to summary judgment on the issue of liability for his Labor Law § 240 (1) claim as against defendants City of New York, New York City Department of Transportation, and Long Island Rail Road, as the owners/lessees of the property, and as against Civetta, as the general contractor for the project. Plaintiffs note that they “have no position regarding the defendants Metropolitan Transportation Authority, MTA Capital Construction and New York City Transit Authority and is amenable to discontinuing against said parties” (NYSCEF Doc No. 50 at ¶ 26).

At the outset, the court finds no merit to defendants’ claim that a triable issue of fact exists with regard to the discrepancy between plaintiff’s testimony that he fell approximately five to six feet, the accident report indicating a four-and-a-half-foot fall and the photograph indicating that he fell four feet and three inches onto the tracks. Although a motion for summary judgment “should not be granted where the facts are in dispute,” the dispute “must relate to material issues” (*Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 671[2d Dept 2011]). While there is no minimum elevation from which a plaintiff must fall in order to determine whether Labor Law § 240 (1) applies (*see Amo v Little Rapids Corp.*, 301 AD2d 698, 701 [3d Dept 2003]), the plaintiff must establish that the fall was due to “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]). Here, whether plaintiff fell five, six or four feet from a platform that lacked any guardrails or other safety device to prevent him from falling onto the train track, the height differential from which the plaintiff fell was sufficient to invoke the protections of the statute (*see Devoy v City of New York*, 192 AD3d 665, 668 [2d Dept 2021]; *Hoyos v NY-1095 Ave. Of the Ams. LLC*, 156 AD3d 491, 495 [1st Dept 2017]) [where plaintiff fell from an elevated loading dock, which had no railing, or other protective safety device to prevent a fall, the court noted that “whether the dock was elevated three or four feet off the ground, plaintiff’s fall therefrom cannot be described as a fall from a de minimus height”]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]).

The court finds that the plaintiff has made a prima facie showing for summary judgment in his favor on his Labor Law § 240 (1) claim. He has established that he was exposed to an elevation-related risk for which no safety devices were provided to prevent him from falling, and that such failure was a proximate cause of his injuries (*see Estrella v ZRHLE Holdings, LLC*, 218 AD3d

640, 643-644 [2d Dept 2023]; *Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 490 [2d Dept 2022]; *Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]; *Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1163 [2d Dept 2020]).

Contrary to defendants' assertion the need for a safety device is shown by plaintiff's testimony regarding the elevation differential at issue, the accident reports, the photographs of the area at which plaintiff was required to work, and the nature of his work (*see Estrella*, 218 AD3d at 643; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *Guaman v Ginestri*, 28 AD3d 517, 518 [2d Dept 2006] [plaintiff made a prima facie showing of entitlement to judgment as a matter of law pursuant to Labor Law § 240 (1) by demonstrating that he fell from an elevated forklift platform as a result of the absence of safety devices while engaged in a work-related activity involving an elevation-related risk], and no expert testimony is required under these circumstances (*see Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]; *Franco v 1221 Ave. Holdings, LLC*, 189 AD3d 615, 615 [1st Dept 2020]; *Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707-708 [2d Dept 2019]; *Ortega v City of New York*, 95 AD3d 125, 128-129 [1st Dept 2012])).

Moreover, plaintiff herein is not required to specify which safety device should have been provided. “[W]hen the evidence establishes the absence of any safety devices . . . the statutes’ [Labor Law § 240(1)] clear dictates have not been met. . . If proximate cause is established, the responsible parties have failed, as a matter of law, to ‘give proper protection’” (*Mejia v 69 Mamaroneck Rd. Corp.*, 203 AD3d 815, 818 [2d Dept 2022], quoting *Zimmer*, 65 NY2d at 524 [citations omitted]; *see Clavijo v Atlas Terms., LLC*, 104 AD3d 475, 476 [1st Dept 2013] [plaintiff entitled to summary judgment where defendant failed to provide any safety devices]; *Reinoso v Ornstein Layton Mgmt.*, 19 AD3d 678, 678 [2d Dept 2005] [plaintiff exposed to elevation-related risks for which no safety devices were provided, which proximately caused his fall established prima facie entitlement to partial summary judgment on the issue of liability under Labor Law § 240 (1)]). Based upon the foregoing, the court finds that plaintiff has demonstrated his prima facie entitlement to summary judgment on the issue of liability for his Labor Law § 240 (1) claim. In opposition, defendants have failed to raise a triable issue of fact (*see Devoy*, 192 AD3d at 668; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 480 [2d Dept 2012])).

To the extent that defendants contend that plaintiff has failed to prove, as a matter of law, that each of the defendants is subject to liability under Labor Law § 240 (1), the Court notes that


plaintiff has submitted a copy of the contract governing the work that was being performed at the time of his accident (NYSCEF Doc No. 36). The contract states that it is between the City of New York, acting by and through the City's Commissioner of Transportation, and the Long Island Rail Road Company, which is a wholly owned subsidiary of the Metropolitan Transportation Authority (MTA) related to the "Rehabilitation of Atlantic Avenue Bridge." Article 1 of the contract provides that the MTA, referred to as "the Company," will "authorize and consent to the entry by the City, its representatives, agents, employees and contractors, upon the Company's lands and premises shown on the plans referred to above for the purpose of performing all necessary work in connection with the construction of the Project by the City . . ." Based upon the contractual terms, it appears that the MTA/LIRR are the owners of the property at which plaintiff sustained his injuries. Further, the City, through the Department of Transportation, is an agent/contractor of the owner for purposes of the work being performed. Plaintiffs have also submitted the deposition testimony of Arduino Montoni, Vice President of Civetta, who testified that Civetta served as that general contractor for this project (NYSCEF Doc No. 37, at 18, lines, 22-24), and that Civetta was hired by the New York City Department of Transportation (*id.* at 20, lines, 24-25; at 21, lines 2-3). Based upon the foregoing, the court finds that plaintiffs have established that defendants the City, the Metropolitan Transportation Authority, the Long Island Rail Road and Civetta are statutorily liable for the accident herein. Accordingly, plaintiffs' motion seeking summary judgment on the issue of liability for the Labor Law § 240 (1) claim is only granted as against the City, the MTA, the Long Island Rail Road and Civetta.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for an order granting summary judgment as to liability in plaintiffs' favor on the Labor Law § 240 (1) claim as asserted against defendants the City, the MTA, the Long Island Rail Road and Civetta is granted.

- To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

This constitutes the decision, order, and judgment of the court.


HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice