Supreme Court of the State of New York
County of Kings

Part LL1

Index Number 526886/2021
Seqs. 003

DECISION/ORDER

BYRON CORDOVA GUZMAN,

Plaintiff,

against

WEST DEVELOPMENT C LLC., M&H REALTY LLC., NINTH AVENUE CONSTRUCTION GROUP LLC., AND CAPITAL CONCRETE NEW YORK INC.,

Defendants,

WEST DEVELOPMENT C LLC., M&H REALTY LLC., NINTH AVENUE CONSTRUCTION GROUP LLC., AND CAPITAL CONCRETE NEW YORK INC.,

Third-Party Plaintiffs,

against

RC STRUCTURES INC.,

Third-Party Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2–3
Replying Affidavits	4
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 003) is decided as follows:

Introduction & Factual Background

Plaintiff commenced this Labor Law action for injuries he claims to have sustained on July 30, 2021, after he fell from a height while stripping concrete forms at a construction site located at 27 West Street, Brooklyn, New York. Plaintiff commenced this action against defendants West Development C LLC (West Development), M&H Realty LLC (M&H), Ninth

Avenue Construction Group LLC (Ninth Avenue), and Capital Concrete New York Inc. (Capital Concrete) claiming violations of Labor Law §§ 240 (1) and 241 (6). Plaintiff was a carpenter employed by third-party defendant RC Structures, Inc. (RC Structures), the sub-contractor responsible for concrete formwork at the construction site (Guzman first EBT at 18). It is undisputed that the property was owned by West Development and M&H. Ninth Avenue was the general contractor. The parties previously signed and filed a stipulation of discontinuance as to Capital Concrete.

Plaintiff testified as follows: On the date of his accident, plaintiff was stripping concrete forms on the exterior wall level with the sixth floor of the site (Guzman first EBT at 34). Plaintiff was performing the work with his co-worker Jerson Contreras (*id.* at 38). To remove a form, plaintiff contends he was required to step onto the adjacent form (*id.* at 37, 40). The adjacent forms at each floor were held together by fourteen pins on the top and bottom (*id.* at 40). These pins had to be removed in order for the adjacent form to be stripped from the wall (*id.*). Plaintiff at one point testified that he had not removed any of the pins from the form he was standing on (*id.* at 44), but subsequently testified that he had removed all but two of the pins between the form he was stripping and the form on which he was standing (*id.* at 47). Plaintiff was instructed by his foreman to leave two pins in between the forms while stripping them so the stripped form would not fall to the ground below (*id.* at 47).

Plaintiff testified that he reached the forms using an exterior scaffold (*id.* at 36). Plaintiff was elevated four to six feet above the scaffold platform and six stories above the ground when he was standing on a concrete form performing stripping work (*id.* at 48, 65). While performing the work, plaintiff was wearing a harness which was tied off to rebar overhead by a retractable lanyard (yo-yo). Plaintiff was also tied off by a chain to the form adjacent to the one he was

removing (*id.* at 36, 43, 65). It was the common practice, and plaintiff was instructed by his foreman, to hook his chain to a metal portion of the form (*id.* at 50–53). The yo-yo was attached thirty feet above the plaintiff but did not stop him from falling to the scaffold (*id.* at 64). Plaintiff also testified that there was no warning label or sticker on the form stating that he was not supposed to tie off on the form (*id.* at 51–52). Plaintiff was prying the form he was stripping when it dislodged from the wall. However, the form adjacent, on which plaintiff was standing, also became dislodged (*id.* at 37, 45). Plaintiff fell onto the scaffold below him and one of the forms also fell and struck him (*id.* at 61–63).

The plaintiff's foreman at the site was Edgar Molina (Guzman first EBT at 27). Mr. Molina was present at the jobsite at the time of the plaintiff's accident but did not witness the accident (Molina EBT at 17). Mr. Molina further testified that when he had observed plaintiff stripping forms at the site two or three times previously "[Mr. Guzman] did it well" (*id.* at 21, 52). Mr. Molina testified that there is "a specific place *on the forms* which has to be tied off" (*id.* at 22–23; emphasis added). The plaintiff's yo-yo was connected to the plaintiff's back and was the tether that Mr. Molina testified was supposed to be connected to the structure (*id.* at 26–27). The chain was to be connected to the form itself (*id.* at 28–29). The instruction label that was supposed to be on each form about where to connect was printed in English with an illustrative graphic (Molina EBT at 29); notably, the site safety manager held the daily safety meetings in Spanish at 7:00am because most of the workers spoke Spanish (Guzman EBT at 29–30; Molina EBT at 13). Plaintiff testified in and prefers to communicate in Spanish.

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)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute is the proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.,* 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500 (1993)]).

Plaintiff's testimony demonstrates that he was performing covered work (construction) at an elevated height at the time of his accident (*see Panek v County of Albany*, 99 NY2d 452, 457 [2003]). Plaintiff testified that he was provided with a harness, a lanyard (or yo-yo), and a chain. It is unclear whether the lanyard was defective and failed to retract and prevent Plaintiff's fall, or whether the lanyard was designed merely to prevent plaintiff from falling the full six stories to the ground. That said, it is undisputed that the lanyard did not restrain plaintiff from falling to the scaffold (Guzman EBT at 64).

Plaintiff further testified that he was instructed to attach his chain, the second tether with which he was provided, to a metal hook on the form that he was stripping. That anchor point failed when the form detached. As a result, the chain failed to prevent plaintiff's fall to the scaffold below. Providing some safety devices does not absolve defendants of liability if other necessary safety measures are lacking (see *Felker v Corning, Inc.,* 90 NY2d 219, 224 [1997]). Therefore, plaintiff's testimony that he was exposed to an elevation-related risk, and that the safety equipment provided to him failed to prevent him from falling to the scaffold below is

sufficient to demonstrate his prima facie entitlement to summary judgment under Labor Law § 240 (1).

In opposition, defendants argue that the plaintiff was comparatively negligent and also that he was the sole proximate cause of his injuries. The Court of Appeals held that comparative negligence is not a defense to a Labor Law § 240 (1) claim (*see Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]). Defendants rely on Mr. Molina's testimony and the report of injury form signed by Mr. Molina to contend that plaintiff tied off in the wrong place, removed all of the pins from the form when he was not supposed to, and was therefore the sole proximate cause of his accident. However, Mr. Molina's representations are a combination of inadmissible hearsay and speculation. Mr. Molina admitted that he did not witness plaintiff's accident and that each time he had previously observed plaintiff working, plaintiff was properly tied off (Molina EBT at 52). Mr. Molina's testimony that the forms generally had a sticker depicting the proper place to tie off does not contradict plaintiff's testimony that there was no such sticker on the specific form on which he was working. The accident report allegedly signed by Mr. Molina is for an employee named "Byron Cordero Contreras," is for an accident that allegedly occurred on the seventh floor, and is prepared in English despite Mr. Molina's testimony that he can only read and write "very little" English (*id.* at 10).

Moreover, Mr. Molina testified that the report was prepared by Jorge Antunes, not himself (Molina EBT at 48). Similarly, Mr. Molina's contentions that the plaintiff tied off in the wrong place and removed all of the pins from the form are based solely on information allegedly received from Jerson Contreras, plaintiff's co-worker. Neither Mr. Antunes nor Mr. Contreras were deposed or provided affidavits, and the contentions about plaintiff's behavior attributed to them is hearsay. Mr. Molina's speculation about how the accident occurred is not admissible

evidence as to how the accident occurred (*see e.g.* Molina EBT at 55–56). Even if Mr. Molina's account were assumed to be true *arguendo*, he undermines defendant's contention that plaintiff was the sole proximate cause in that he blames Mr. Contreras for causing plaintiff's accident by pulling on the forms (*id.* at 55–56). Although hearsay evidence may be considered in opposition to a motion for summary judgment, it cannot *alone* raise a triable issue of fact (*King v North Shore Long Island Jewish Hosp. at Plainview*, 127 AD3d 928 [2d Dept 2015]). In the absence of more than speculation and hearsay evidence, defendant's submissions do not raise a question of fact as to whether plaintiff was the sole proximate cause of his accident.

Therefore, plaintiff's motion for summary judgment as to his Labor Law § 240 (1) claim against defendants is granted.

Labor Law § 241 (6)

Labor Law § 241(6) requires that owners and contractors provide reasonable and adequate protection and safety to workers. Still, a defendant that is liable under Labor Law § 240 (1) may not necessarily be liable under Labor Law § 241 (6). The former imposes liability when plaintiff suffers harm due to the absence of an adequate safety device or the presence of an inadequate safety device. The latter requires the plaintiff to prove that he suffered harm due to the violation of a sufficiently specific section of the Industrial Code (see *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502 [1993]).

As to plaintiff's Labor Law § 241 (6) claim, plaintiff alleges violations of various Industrial Code provisions, specifically 12 NYCRR 23-1.16 (a–c), 23-2.2 (a–b), 23-1.7 (a) (1–2), 23-1.15. Rule 1.16 (a)–(c) requires that workers be provided with adequate safety belts, harnesses, tail lines, and lifelines. Rule 2.2 (a–b) requires forms, shores, and reshores to be structurally safe and to be inspected regularly. Rule 1.7 (a) requires the installation of overhead

protections in areas "normally exposed to falling materials." Rule 1.15 specifies the dimensions and standards for a safety railing where one is required.

Rules 1.7 and 1.15 are inapplicable here—plaintiff's allegations and the evidence before the court do not indicate that overhead protection or the absence of a safety railing were the proximate cause of plaintiff's fall. Additionally, plaintiff cannot obtain summary judgment on his claim as predicated on a violation of Rule 2.2 because the plaintiff was stripping forms at the time of his accident, and there is therefore at least a question of fact as to whether unsecured forms were "integral" to his work (*see Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982 [2d Dept 2014]).

Finally, plaintiff alleges a violation of Rule 1.16. The lanyard plaintiff was provided with, serving as his lifeline, did not stop him from falling to the scaffold. However, in light of plaintiff's testimony that the lanyard was supposed to prevent him from falling off the scaffold, and the lack of testimony about the proper retractability of the lanyard, it cannot be determined as a matter of law whether the lanyard itself was defective. The chain plaintiff was provided with seems to have been meant to serve the purpose of a tail line, as it was intended to stop the plaintiff from falling distances shorter than the length of his lifeline. Likewise, the chain and harness themselves may not have broken or been defective *per se*, but they failed to protect the plaintiff because the anchor to which the chain was attached failed. Rule 1.16 (b) requires that the tail line and lifeline must be "securely anchored" and must prevent the user, if he should fall, from falling "more than five feet."

That said, it is unclear from the record how far plaintiff fell. Because there is some testimony from plaintiff that the form he was standing on was four feet above the scaffold (Guzman EBT at 43, 144), and the tail-line requirements of Rule 1.16 (b) apply to falls of greater

than five feet, it cannot be determined as a matter of law that the Rule was violated. Therefore, due to the question of fact as to whether plaintiff's fall was a sufficient distance to mandate the provision of a tail line that complies with Rule 1.16 (b), plaintiff's motion is denied as to his Labor Law § 241 (6) claim.

Conclusion

Plaintiff's motion for summary judgment (Seq. 003) is granted as to his Labor Law § 240 (1) claim; the motion is denied as his Labor Law § 241 (6) claim.

This constitutes the decision and order of the court.

August 7, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court