Zylberberg v Tishman Contr. Corp.
2012 NY Slip Op 32062(U)
July 13, 2012
Supreme Court, New York County
Docket Number: 102291/2007
Judge: Paul Wooten
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SCANNED ON 8/6/2012
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN, Justice — PART 7

MICHAEL ZYLBERBERG and LISA ZYLBERBERG,
Plaintiff,

-against-

TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN AND TISHMAN INTERIORS CORPORATION, CONGREGATION EMANU-EL OF THE CITY OF NEW YORK AND FEMENELLA & ASSOCIATES, INC.,

Defendants.

INDEX NO. 102291/07

MOTION SEQ. NO. 003

FILED
AUG - 6 2012
COUNTY CLERK'S OFFICE
NEW YORK

The following papers were read on this motion by defendant Femenella & Associates, Inc., for summary judgment pursuant to CPLR 3212 dismissing the complaint and cross-claims as against it, and plaintiff's cross-motion for partial summary judgment on its Labor Law § 240(1) claim.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4, 5
Reply Affidavits — Exhibits (Memo)	6, 7

Cross-Motion: ■ Yes □ No

This is a personal injury action brought by Michael Zylberberg (plaintiff) to recover damages for injuries allegedly sustained when plaintiff fell from a ladder while repairing a light fixture, behind a stained glass window at The Temple Emanu-El (The Temple), owned by defendant Congregation Emanu-el of the City (Emanu-el), on September 8, 2006. The Temple is located at 1 East 65th Street, New York, New York. Before the Court is a motion by defendant Femenella & Associates, Inc. (Femenella), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and dismissing all cross-claims asserted against it. Plaintiff files opposition to Femenella's motion only as to its claim under Labor Law § 240(1), but does not oppose the portions of Femenella's motion seeking judgment on its claims under

Labor Law §§ 200 and 241(6). Also before the Court is plaintiff's cross-motion, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240(1). All the remaining defendants file in opposition to plaintiffs' cross-motion for partial summary judgment and the plaintiff files a reply.

BACKGROUND

Emanu-el contracted with Tishman Construction Corporation (Tishman Construction) for a major renovation and restoration project of the Temple. Tishman Construction subcontracted with Tishman Interior Contractors (Tishman Interiors), a Tishman company that specializes in interior building renovations, as the general contractor to renovate the interior of the Temple. Tishman Interiors, in turn, subcontracted with Femenella to "restore/repair all the stained glass windows" at the Temple (Exhibit J, contract p. 4, ¶ B[1]). Tishman Interiors also subcontracted with plaintiff's employer, Michael Mazzeo Electric Corporation (Mazzeo),[1] to perform all electrical installation work for the project.

Prior to the accident, plaintiff had worked as an electrician for sixteen years. At approximately 12:30 p.m. on September 8, 2006, plaintiff who was working as an "A" Journeyman construction electrician was assigned by his foreman, Joseph Muscente (Muscente), to either repair a light fixture or replace the light bulb in a glass fixture located behind a large stained glass window on the north wall of the main sanctuary (Notice of Motion, Plaintiff EBT, exhibit E at 25). To open the window it was plaintiff's understanding that "[t]here was a handle on the right side of the window which had to be pulled open as a door" (*id.* at 33). Plaintiff testified that he received no previous instruction in how to remove or open the window. In order to access the window, plaintiff opened a wooden six foot tall A-frame ladder, which belonged to Mazzeo, and placed it approximately a foot away from the sanctuary wall in front of

[1] Mazzeo was impleaded as a second-party defendant, however the third-party action against Mazzeo was subsequently discontinued.

the stained glass window. Plaintiff testified that he moved up to the fourth rung of the six-rung ladder and made multiple attempts to open the window. He had a pair of pliers and a screwdriver with him. Different witnesses give varying accounts of what happened next.

According to plaintiff, he used his left hand, pulled on the handle to open the window while keeping his right hand on the ladder (*id.* at 41). After his first attempt plaintiff told Muscente, who was standing behind him, that the window would not open, to which Muscenete responded by telling him to be careful and not to break the window (*id.* at 42, 44). After trying for the second time to open the window by the handle, plaintiff testified that he turned to Muscente again to tell him it would not open, to which he responded "Watch out" (*id.* at 43). Plaintiff testified that immediately after, "I suddenly turned back around, the ladder shifted and I lost my balance. I started to fall" (*id.*). Plaintiff states that as he was falling he looked up to see that the stained glass window was coming down on top of him, and he "jumped away to make sure that the window [didn't] come down on top of me" (*id.*). Later plaintiff testifies that he was still on the ladder at the time he saw the stained glass window coming down, at which point he jumped off the ladder to the right side, falling to the ground, allegedly resulting in injuries to his right leg and ankle (*id.* at 54). Plaintiff also maintains that from the time he reached the fourth rung of the ladder until the time Muscente yelled "Watch out" approximately a little over a minute had passed (*id.* at 47).

Subsequently, plaintiff commenced this action on February 16, 2009 against defendants asserting claims under Labor Law §§ 200, 240(1), 241(6), and common-law negligence. Plaintiff's wife, Lisa Zylberberg (co-plaintiff) brings an action for loss of consortium. The defendants filed answers thereafter and issue was joined. All discovery is complete and the Note of Issue has been filed.

STANDARDS OF LAW

Summary Judgment Standard

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1)

Labor Law § 240(1), known as the "scaffold" law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993];

Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]). The statute provides in pertinent part:

> "All contractors and owners and their agents . . . 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."

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 NY2d at 501). In *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved

inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*id.* [quoting *Ross*, 81 NY2d at 501]).

DISCUSSION

Femenella's Motion for Summary Judgment

The Court is cognizant of the fact that a non-owner, as in this case a subcontractor, may be held liable as an owner's agent, where it has obtained the authority to supervise or control the work (*see* Labor Law § 240(1); *Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] ["Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"]; *see Taylor v Lehr Construction Corp.*, 57 AD3d 214 [1st Dept 2008]). The liability of the agent depends upon the extent and level of involvement in the construction, demolition or repair. The involvement must consist of the ability to direct, supervise and control the work being performed by the plaintiff, regardless of whether that authority was actually exercised (*see Russin*, 54 NY2d at 318; *see Maria B. Figueiredo, v New Palace Painters Supply Co., Inc.*, 13 Misc3d 1229[A], 2006 N.Y. Slip Op. 52058[U], [Sup Ct, Bronx County 2006]).

In the case at bar, plaintiff testified that Muscente was supervising his work and does not state that the anyone from Femenella had the authority to do so. Here, the Court finds that while Femenella was a subcontractor on the site, it had no ability to direct, supervise or control the work performed by plaintiff, and therefore it cannot be held liable pursuant to Labor Law § 240(1) as an agent of the owner. Additionally, since there has been no showing of wrongdoing on behalf of Femenella regarding its work at the Temple, all cross-claims asserted against it must be dismissed (*see Linares v United Mgt. Corp.*, 16 AD3d 382, 385 [2d Dept 2005]).

Plaintiff's Cross-Motion for Partial Summary Judgment

Defendants, in opposition to plaintiff's cross-motion, assert that a triable issue of fact remains as to whether plaintiff's activity on the day of the accident falls under the purview of

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Labor Law § 240(1). Specifically, defendants' point to inconsistencies in plaintiff's deposition testimony, such as when asked what he was assigned to do, plaintiff at one point answers that he was going to fix a light fixture (Plaintiff's EBT at 22), and at a later point when asked the same question, responds that he was directed to open the stained glass window to see if the light bulbs were out (*id.* at 24-25). Defendants maintain that if plaintiff was told to check whether the florescent light bulbs were out, this type of activity constitutes mere routine maintenance which is not a protected activity.

According to plaintiff's deposition and witness testimony, which is refuted by the defendants' witnesses testimony, the accident could have occurred a number of different ways and thus there are triable issues of fact as to, *inter alia*, whether plaintiff was the sole proximate cause of the accident. Specifically, there are different accounts of what caused plaintiff to fall and whether plaintiff had removed the screws around the frame of the window, causing it to fall as well (*see* Notice of Motion, Muscente EBT, exhibit F; Notice of Motion, Jana Rosilino EBT, exhibit G; Notice of Motion, Benedict Diverde EBT, exhibit H; Notice of Motion, Patrick Baldoni EBT, exhibit I).

The Court accordingly finds that plaintiff has not established its *prima facie* entitlement to judgment as a matter of law on the issue of liability. Since an issue of fact exists as to whether plaintiff was the proximate cause of his injuries, and whether plaintiff's actions fall under the purview of Labor Law § 240(1), summary judgment is inappropriate (*see Abbatiello v Landcaster studio Assoc.*, 3 NY3d 46, 53 [2004] [Plaintiff was involved in the routine maintenance of a malfunctioning cable box, which did not constitute erection, demolition, repairing, altering, painting, cleaning or pointing so as to fall within the protection of Labor Law § 240(1)]; *Esposito v New York Industries Development Agency*, 1 NY3d 526, 528 [2003]). Accordingly, plaintiff's cross-motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is denied.

The Court notes that plaintiff does not oppose the portion of Femenella's motion seeking to dismiss plaintiff's Labor Law §§ 200 and 241(6) claims, and thus those portions of Femenella's motion are granted without opposition.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the portion of Femenella's motion for summary judgment dismissing plaintiff's Labor Law § 200, common-law negligence, and Labor Law § 241(6) claims is granted without opposition; and it is further,

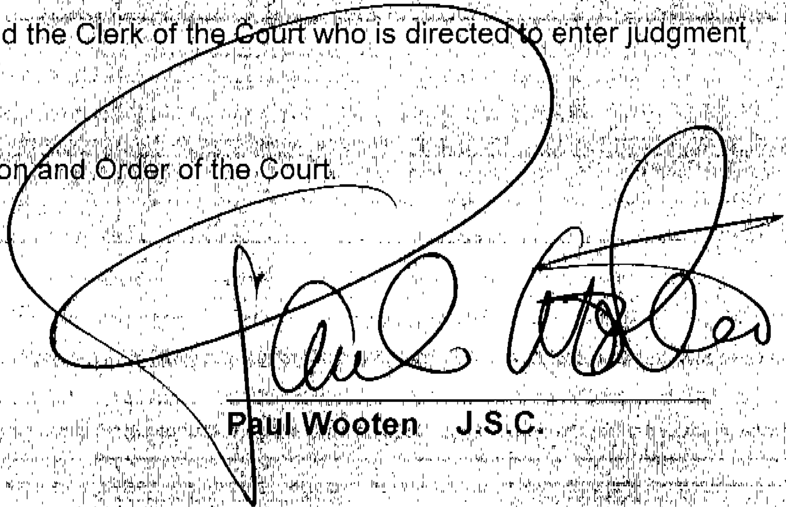
ORDERED that the portion of Femenella's motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's Labor Law § 240(1) claim as well as all cross-claims asserted against it is granted; and it is further,

ORDERED that plaintiff's cross-motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is denied; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that defendant Femenella is directed to serve a copy of this Order, with notice of entry, upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



Dated: 7-13-12

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**