

Fanning v Rockefeller Univ.

2012 NY Slip Op 32129(U)

August 3, 2012

Supreme Court, New York County

Docket Number: 104435/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 104435/2010
FANNING, DANIEL
vs.
ROCKEFELLER UNIVERSITY
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ | No(s). _____
Answering Affidavits -- Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

decided per the memorandum decision dated 8/3/12
which disposes of motion sequence(s) no. 001 and 002.

RECEIVED

AUG 7 - 2012

FILED

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

AUG 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/12

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
DANIEL FANNING,

Plaintiff,

- against-

Index No.: 104435/2010
Submission Date:
07/25/2012

THE ROCKEFELLER UNIVERSITY and TURNER
CONSTRUCTION COMPANY,

Defendants.

DECISION AND ORDER

FILED

AUG 13 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X

For Plaintiff:
Law Office of James J. McCrorie, P.C.
500 N. Broadway, Suite 151
Jericho, NY 11753

For Defendants:
Cornell Grace, P.C.
225 Broadway, Suite 1400
New York, NY 10007

Papers considered in review of this motion for summary judgment:

Notice of Plaintiff's	
Motion	1
Aff in Opp	2
Reply	3
Notice of Defendants'	
Motion	4
Aff in Opp	5
Reply	6

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiff Daniel Fanning ("Fanning") moves for partial summary judgment on the issue of liability under Labor Law § 240(1) (motion sequence no. 1). Defendants The Rockefeller University

("Rockefeller") and Turner Construction Company ("Turner Construction,") (collectively "defendants") move separately for summary judgment dismissing the complaint (motion sequence no. 2). Motions sequences nos. 1 and 2 are consolidated for disposition.

This action arises from injuries Fanning sustained on March 12, 2009 while performing pipe installation work on a construction project (the "project") at 1248 York Avenue (the "premises") in Manhattan. Rockefeller was the owner of the premises and Turner Construction the project's general contractor. At the time, Fanning was employed with Infinity Mechanical, a subcontractor on the project.

Fanning testified at his deposition that he was injured after falling from the fifth or sixth rung of a ten-foot fiberglass A-frame ladder. According to Fanning, he "got about halfway up the ladder, the ladder started to twist and it threw [him] to the left and the ladder kicked to the right." Fanning testified that he was unable to look and see if there was a problem with the ladder, but that the ladder appeared to be in good condition before he climbed it.

Martin Tobin ("Tobin"), Fanning's co-worker who was with Fanning at the time of the accident, attests that he "observed the ladder suddenly move in one direction and throw [Fanning] in the other direction." Tobin also attests that the ladder was a ten-foot orange fiberglass ladder.

Diane Raetz ("Raetz"), a Site Safety Manager with Turner Construction, was working at the premises on the morning of the accident. Raetz testified that Fanning told

her that he fell from the third rung of the ladder. Raetz saw a six-foot, A-frame wood ladder on its side in the area where Fanning was working. Raetz took that ladder to her office, where it remained at the time of the deposition. According to Raetz, the ladder was “in good shape” and “virtually new, ” though it was too short for the job Fanning was doing.

Fanning commenced this action in April, 2010, asserting causes of action for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

Fanning now moves for partial summary judgment on the issue of liability under Labor Law § 240(1), arguing that Fanning’s uncontested testimony that the ladder twisted under him establishes a *prima facie* violation of § 240(1).

In opposition, and in support of their summary judgment motion, defendants argue that the Labor Law § 240(1) claim fails as a matter of law because there is no evidence that the ladder was defective. Defendants maintain that, in any event, Fanning testified that he lost his balance, not that the ladder gave way under him, and that Fanning and Tobin lack credibility as their testimony is inconsistent with Raetz’s testimony. Defendants contend that a six-foot ladder was too short for the work he was doing when Fanning was injured, thus there is an issue of fact as to whether he fell because he was using inappropriate equipment.

Defendants further argue that the § 241(6) claim should be dismissed because there is no evidence that they violated any Industrial Code provisions. Lastly, defendants

maintain that they are entitled to summary judgment on Fanning's Labor Law § 200 and common law negligence claims because defendants did not supervise or control Fanning's work site, nor did they have notice of any hazard at the work site.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, Fanning has made *prima facie* showing of entitlement to summary judgment on his Labor Law § 240(1) claim. Owners and general contractors are required under Labor Law 240(1) to provide protections against "elevation-related hazards" for workers engaged in the "construction, repair, demolition, painting and alteration of a building or structure." *Jamil v. Concourse Enters.*, 293 A.D.2d 271, 273 (1st Dept. 2002). The parties do not dispute that Rockefeller was the premises' owner, or that Turner Construction was the project's general contractor. Further, Fanning testified that the ladder he was working on twisted and threw him to the left, which constitutes a *prima facie* violation of Labor Law § 240(1) regardless of whether there is evidence that the ladder was defective. *See Jamil*, 293 A.D.2d at 273.

Defendants argue that Fanning testified at three separate times in his deposition that he lost his balance, thus there is no presumption of their liability under Labor Law § 240(1). However, each time Fanning also stated that he lost his balance as a result of the ladder twisting under him.¹ And, although Raetz's testimony that the ladder was six feet tall conflicts with Fanning's testimony, this question of fact is immaterial as defendants have not presented any evidence that rebuts Fanning's testimony that the ladder twisted under him. *See Krejbich v. Schimenti Contr. Co., Inc.*, 94 A.D.3d 668, 668-89 (1st Dept. 2012); *Leconte v 80 E. End Owners Corp.*, 80 A.D.3d 669, 671-72 (2d Dept. 2011). Further, defendants' contention that Fanning may have fallen because the six-foot ladder was too short for the type of work he was doing is speculative and insufficient to raise a triable issue of fact. *See Cill v. Resjefal Corp.*, 16 A.D.3d 339, 341 (1st Dept. 2005). Accordingly, Fanning is entitled to summary judgment on the issue of defendants' Labor Law § 240(1) liability.

In accordance with the foregoing, it is hereby

ORDERED that the motion for partial summary judgment by plaintiff Daniel Fanning on the issue of liability under Labor Law § 240(1) is granted; and it is further

¹Though Raetz testified that Tobin told her that he did not see the accident, which conflicts with his attestation on this motion, Fanning's testimony on its own is sufficient to impose Labor Law § 240(1) liability on defendants. *See McCaffery v. Wright & Co. Constr., Inc.*, 71 A.D.3d 842, 843 (1st Dept. 2010).

ORDERED that the motion for summary judgment by defendants The Rockefeller University and Turner Construction Company is denied; and it is further

ORDERED that the parties are to proceed to trial on the issue of damages.

This constitutes the decision and order of the court.

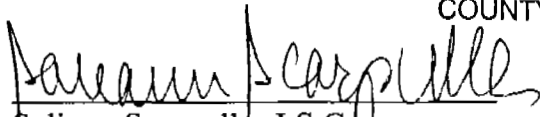
Dated: New York, New York
August 9, 2012

FILED

AUG 13 2012

ENTER:

NEW YORK
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Saliann Scarpulla, J.S.C.