Hartley-Scott v City of New York
2016 NY Slip Op 30775(U)
April 25, 2016
Supreme Court, New York County
Docket Number: 156114/12
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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DEXTER HARTLEY-SCOTT and ALTHIA HARTLEY-SCOTT,

Index No.: 156114/12

Plaintiffs,

-against-

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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Joan A. Madden, J.:

In this action arising from an accident at a construction site, plaintiffs Dexter Hartley-Scott (plaintiff) and Althia Hartley-Scott move for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim. Defendants City of New York (the City), Metropolitan Transportation Authority (the MTA) and New York City Transit Authority (the NYCTA) oppose the motion and cross move to dismiss the complaint in its entirety against the MTA, as well as for leave to amend the caption to eliminate the MTA as a defendant. In addition, defendants move to dismiss the common-law negligence and Labor Law §§ 200 and 241 (6) claims. Plaintiffs oppose the cross motion.

BACKGROUND

This is an action to recover damages for personal injuries sustained by plaintiff on May 11, 2012, at about 5:00 am, when, while working as an electrician in a subway tunnel (the Tunnel), as part of the Second Avenue Subway construction project (the Project), he fell from a

pipe that he was using as a makeshift scaffold. Plaintiff was employed by nonparty Shea-Schiavone-Kewitt Contractors (SSK), which maintained the electrical supply for the Project, from the top of the shaft located at East 70th Street and Second Avenue in Manhattan, down to the Tunnel. The complaint alleges that each of the defendants owned the project including the shafts, tunnels and underground locations (Complaint, ¶'s 10, 19, 28) and that each served as a general contractor (Id, ¶'s 14, 15, 23, 24, 32, 33). In response to a notice to admit, the NYCTA admitted that it owned the project.

On the day of the accident, plaintiff's SSK foreman instructed him and a coworker to place four sets of cables on some steel pins with an orange strap made of nylon. The pins, which were installed during a prior shift, were located every five feet along the wall of the Tunnel, approximately eight feet off the ground (plaintiff's dep at 60). The cables each measured about 2,000 feet long (id, . Plaintiff's immediate supervisor, John Duffy, supervised and performed the work, along with plaintiff and his coworker (*id.* at 51, 58, 64).

Plaintiff testified that just before accident, he stood on a round horizontal pipe (the Pipe), in order to reach a spot located approximately two feet above him on the subway wall, where he planned to place one of the cables. The Pipe was part of a "slick line," which was one of three round pipes: one piping air into the tunnel, another taking water to where the tunnel was being drilled and the third removing residue of the drilling and carrying it through the tunnel (*id.* at 66). The pipes, which were located approximately three and one-half feet to five and one-half feet from the ground, ran horizontally, one above the other, and were affixed to the tunnel wall (*id.*).

Plaintiff testified that he could not have reached his work area without standing on the Pipe (*id.* at 73). He also asserted that, before mounting the Pipe, he looked for a ladder or some

other appropriate elevation device to do his work, but he found none (*id.* at 71). To his knowledge, there were no such devices available at the job site *(id.* at 72). Plaintiff testified that his supervisors were aware that the workers stood on the pipes while performing their work (id at 73).

Plaintiff testified that in order to keep from losing his balance while he carried the cables on his shoulder, he held onto a steel pin, which was annexed to the wall of the Tunnel (*id.* at 78). The accident occurred when the steel pin came out of the wall, at which point the weight of the cables swung plaintiff off the Pipe (*id.* at 78-80), causing him to injure his knee, left hip and back.

Plaintiff testified that neither the MTA, the City nor the NYCTA ever instructed him regarding how to perform his work on the Project (*id.* at 81). In addition, he was not provided with any safety devices, such as a ladder, scaffold or other appropriate equipment, to prevent him from falling (*id.* at 71-72). While his employer, SSK, did provide him with a safety harness, he was instructed to wear it only when he was working at a height of five feet or more. In any event, there was no place for plaintiff to tie off to (*id.* at 73-74).

When asked why he chose to stand on the Pipe to perform his work, plaintiff replied, "It was just, do the work, get it done" (*id.* at 69). When asked if anyone specifically instructed him to stand on the Pipe, plaintiff replied, "I see Duffy [working on a pipe], he's my foreman. He started working, I'm not going to let the foreman work and stand around, so I went up and started working" (*id.*). In the past, plaintiff has stood on pipes in order to perform his work "[w]henever needed" (*id.* at 70).

During his deposition, John Duffy testified that he was covering as SSK's electrical

foreman on the day of the accident. He also testified that SSK did not furnished its workers with any safety equipment, and that plaintiff was not working with any safety equipment at the time of the accident (Duffy dep at 34). When asked who was responsible for making sure that the workers were provided with safety equipment, Duffy replied, "[The workers] should know by themselves" (*id.*). However, just "to make sure" that safety equipment was being used, the SSK foremen would also tell the worker to use safety equipment (*id.*). Duffy did not instruct plaintiff to use any safety equipment prior to the time of the accident or caution plaintiff (or the other men) not to hold onto the pins while walking down the slick lines (*id.* at 34, 40).

DISCUSSION

"'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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

The Labor Law § 240 (1) Claim

Plaintiffs moves for summary judgment as to liability against defendants on their Labor Law § 240 (1) claim and defendants oppose the motion, and seek to dismiss the claim as against MTA on the ground that it is not a proper 240(1) defendant as it is not an owner, contractor or an

agent of an owner or contractor as required under the statute.

Labor Law § 240(1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Significantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related

hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

> "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves"

(*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

At the outset, defendants do not dispute that the City and the NYCTA are owners for the purposes of Labor Law § 240 (1). As for the MTA, defendants argue that MTA is not an owner, contractor or statutory agent subject to liability under 240(1). A contractor qualifies as a statutory agent of an owner or contractor,

> "[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1)] has been delegated to [the contractor, that [contractor] then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

In support of their argument, that MTA cannot be held liable under Labor Law section 240(1), defendants submit the affidavit of Laudwin Pemberton ("Pemberton"), the manager of OCIP Owner Controlled Insurance Program, which provides financial administration for the MTA's Risk and Insurance Management Department. Pemberton states that in his position he is familiar with "the construction of the Second Avenue Subway, which has been undertaken by the NYCTA, including the area where the accident occurred [and that he is] also familiar with the entities that have ownership, management or similar operational interest in the various facilities

that comprise the infrastructure of the New York City transit system" (Pemberton Aff., ¶'s 1, 2) He states that the subject Second Avenue Subway line not at any "time relevant to this action . . . owned, operated, managed or maintained by the [MTA]" (Id, ¶ 5). According to Pemberton, "as it relates to the Second Avenue Subway Construction Project, the stations and their appurtenances are owned by the City of New York and operated by the NYCTA" (Id, ¶ 4). He further states that "MTA was not involved in the day to day construction apparatus and maintained no staff on the Second Avenue Subway Project job site for the purposes of supervising, inspecting or otherwise managing the work being performed or the condition of the job site or the station in general" (Id, ¶ 6).

Based on the statements in Pemberton's affidavit, defendants have made a prima facie showing that MTA is not subject to liability under Labor Law § 240(1) as an owner, contractor or statutory agent, and plaintiffs submit no evidence to the contrary. Moreover, as defendants point out, plaintiff testified that the MTA never instructed him as to how to perform his work, which includes plaintiff's use of the Pipe as a makeshift scaffold. Thus, the MTA are entitled to dismissal of the Labor Law § 240 (1) claim against it.

As to the City and NYCTA, plaintiffs established a prima facie entitlement to summary judgment on the issue of liability on their Labor Law § 240 (1) claim against these defendants, by showing that the Pipe that plaintiff fell from was "the functional equivalent of a scaffold," and, as such, a safety device for the purposes of the statute, and that it "failed to provide adequate protection for the elevation-related work he was performing" (*Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009]; *see also Beharry v Public Stor., Inc.*, 36 AD3d 574, 574 [2d Dept 2007] ["'metal decking' was a 'safety device' within the meaning of Labor Law § 240 (1),"

because it "served as a functional equivalent of a ladder"]; *Keefe v E & D Specialty Stands*, 259 AD2d 994, 994 [4th Dept 1999] [Labor Law § 240 (1) liability where bleachers, which were being used as "the functional equivalent of a ladder," failed to protect plaintiff from falling from his elevated workplace]).

In opposition, defendants argue that plaintiff was the sole proximate cause of his injuries, as he choose to stand on the Pipe to hang the cable. In support of this argument, defendants point to plaintiff's testimony that no one had instructed him to stand on the Pipe, and that he only did so, because he saw his foreman doing it. In addition, as the cable was to be hung about two feet above plaintiff's head, defendants argue that the job could have been accomplished without the use of any elevation device, and, thus, it was unforeseeable that a safety device would even be necessary.

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Here, defendants' sole proximate cause argument fails, as they point to no evidence to support their argument that no safety device was required for the work plaintiff was engaged in at the time of the accident. Moreover, plaintiff is not recalcitrant for utilizing the Pipe as a makeshift

scaffold, when the evidence establishes that no other safer alternatives were supplied (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11 [1st Dept 2011]).

In any event, as plaintiff's act of using the Pipe as a makeshift scaffold "was caused, at least, in part, by defendants' failure to provide an adequate safety device," his action goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, as the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injur[ies])].

As plaintiffs have provided uncontroverted evidence that plaintiff fell as a result of defendants' failure to provide a safety device required under the statute to protect him from an elevation related injury, they are entitled to summary judgment on the issue of liability under Labor Law § 240 (1) against the City and NYCTA.

The Labor Law § 241 (6) Claim

Defendants cross move for dismissal of the Labor Law § 241 (6) claim against them, and with respect to the MTA, on the additional ground that the MTA is not an owner, contractor or statutory agent under the statute. Plaintiffs oppose the cross motion.

Labor Law § 241 provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502. However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker

safety (*id.*).

With respect to the MTA, as it is not an owner, contractor or a statutory agent, it cannot be held liable under Labor Law § 241 (6), and this claim is dismissed as against the MTA (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Therefore, the Labor Law § 241 (6) will be discussed in regard to the City and NYCTA only. Although plaintiffs list multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.5 (c) (3), plaintiffs do not address these Industrial Code violations in their motion and opposition to defendants' cross motion, and, thus, they are deemed abandoned (*see Rodriguez v. Dormitory Authority of the State of New York*, 104 AD3d 529 [1st Dept 2013]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n 3 [3d Dept 2003]). Accordingly, the City and NYCTA are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 23-1.5 (c) (3)

Contrary to defendants' argument, Industrial Code 12 NYCRR 23-1.5 (c) (3) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). Section 23-1.5 (c) (3) requires that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." However, as there were no safety devices, safeguards or equipment in use at the time of the accident, this Industrial Code provision does not apply to the facts of this case. Thus, the City and NYCTA are entitled to dismissal of the Labor Law § 241 (6) claim.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants also move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over the plaintiff's work, "because the injury arose from the condition of the work place

created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, improper use of the Pipe as a scaffold in this case, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff was injured as he was lifting a beam, and no evidence was put forth that the defendant exercised supervisory control or had any input into the method of moving the beam]).

As noted previously, plaintiff's fall and resulting injuries were caused due to plaintiff's use of the Pipe as a makeshift scaffold, as there were no safety devices more appropriate for the task at hand, such as a man-lift or Bakers scaffold with railings or a harness with a place to tie off to. Accordingly, this case must be analyzed under a means and methods theory.

Here, a review of the record reveals that none of the defendants directed and/or supervised plaintiff's work or instructed him to use the Pipe as a makeshift scaffold. Plaintiff testified that, not only did SSK employees give him all of his work instructions, he was never given any instruction by the MTA, the City or the NYCTA. Thus, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Dexter Hartley-Scott and Althia Hartley-Scott's motion, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants City of New York and New York City Transit Authority is

granted; and it is further

ORDERED that the part of defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety against the defendant Metropolitan Transit Authority is granted, and the complaint is severed and dismissed against this defendant, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the part of defendants' cross motion for leave to amend the caption to eliminate the MTA as a defendant is granted; and it is further

ORDERED that the caption shall be amended as follows:

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DEXTER HARTLEY-SCOTT and ALTHIA HARTLEY-SCOTT,

Index No.: 156114/12

Plaintiffs,

-against-

THE CITY OF NEW YORK and
NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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and it is further

ORDERED that counsel for defendants shall serve a copy of this decision and order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein; and it is further

ORDERED that those parts of defendants' cross motion, pursuant to CPLR 3212, for

summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against defendants the City of New York and the New York City Transit Authority are granted, and these claims are dismissed against these defendants; and it is further

ORDERED that the remaining parties shall proceed to mediation.

DATED: April 5, 2016

ENTER:

J.S.C.
HON. JOAN A. MADDEN
J.S.C.