Navarro v Harco Consultants Corp.
2016 NY Slip Op 30880(U)
March 12, 2016
Supreme Court, New York County
Docket Number: 153306/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MISAEL NAVARRO,

Plaintiff,

-against-

HARCO CONSULTANTS CORP., and
301–303 WEST 125th LLC.,

Defendants.

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HARCO CONSULTANTS CORP.,
and 301–303 WEST 125th LLC.,

Third-Party Plaintiffs,

-against-

GOLD METAL, INC.,

Third-Party Defendants.

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Index No.: 153306/2014

DECISION AND ORDER

Third-Party Index No. 595809/2015

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff Misael Navarro ("plaintiff") moves for partial summary judgment against defendants Harco Consultants Corp. ("Harco") and 301–303 West 125th LLC. ("301") (collectively, "defendants") on the issue of liability under Labor Law §240 and §241(6), and to set the matter down for trial as to damages.

Factual Background

It is alleged that 301, the owner of the property at issue, hired Harco as General Contractor, regarding a construction project at the property. Third-party defendant Gold Metal, Inc. ("Gold Metal") was engaged to perform framing and sheetrock work at the project. Plaintiff,

an employee of Gold Metal, fell when a scaffold on which he was standing while performing column framing collapsed, causing him injuries.

In support of summary judgment, plaintiff asserts that he and his co-workers were forced to use an inadequate and incomplete scaffold in order to perform the column framing. The manually propelled scaffold lacked safety railings, locking pins and safety brackets to support the two platforms being used on this scaffold. Plaintiff repeatedly complained to his supervisor David Gonzalez ("Gonzalez") that the scaffold was unsafe and missing necessary components, to no avail. Plaintiff was also not provided any fall protection such as a harness, lanyard or safety netting surrounding the scaffold. When the scaffold collapsed, plaintiff fell to the ground and sustained injuries. Plaintiff argues that since his work activities were at an elevated height and related to the performance of the work being done at the accident location, he was engaged in a protected activity under the Labor Law. The make-shift, manually propelled scaffold collapsed, and defendants failed to provide an adequate safety device for plaintiff to perform this work and protect against the elevation hazard of working at least 10 feet above the ground. Thus, the record establishes that defendants violated Labor Law 240(1). And, even assuming defendants show that plaintiff contributed to the happening of his accident, contributory negligence is not a defense to Labor Law 240(1) liability.

Further, defendants' failure to provide a manually propelled scaffold with safety railings was a violation of New York Industrial Code 12 NYCRR § 23-5.18(b) and establishes liability also pursuant to Labor 241(6).

In opposition, Harco argues that plaintiff's motion is premature in that plaintiff's deposition was not completed, and the motion was filed before plaintiff's employer Gold Metal

could appear by counsel. The deposition of Gold Metal may yield highly relevant discovery. In addition, Harco's accident report reveals that plaintiff was abusing and misusing a perfectly safe scaffold by riding on the scaffold while being pushed about by his co-workers. The scaffold was stationary at the time of the accident, and the accident report does not mention any defective pieces or parts. And, according to Harco's expert, Robert O'Connor, P.E. ("O'Connor"), the scaffold described by plaintiff was not defective under any of the applicable statutes or standards, and the scaffold did not require the use of any safety harness or locking pins. Thus, factual issues exist as to whether plaintiff was the sole proximate cause of his accident. Further, as plaintiff's motion is silent as to his Labor Law 200 and common law negligence claims, and Harco and 301 did not direct, supervise, control or oversee plaintiff's activities at the time of the accident, such claims should be dismissed. Plaintiff's motion is also silent as to the other Industrial Code regulations allegedly violated, some of which are general and not actionable, and thus, such regulations should be deemed abandoned. The Court should at least permit defendants an opportunity to complete discovery to properly oppose the motion.

Gold Metal also opposes the motion, arguing that issues of fact exist as to the happening of plaintiff s alleged accident, whether the alleged accident occurred due to plaintiff's recalcitrant and reckless conduct and whether a relevant Industrial Code was violated. Gold Metal submits the affidavit of plaintiff's former supervisor, David Gonzalez, who attests that . Further, issues of fact exist as to liability under Labor Law 241(6), in that plaintiff offers no expert that opines that railings were necessary, while O'Connor opined that railings were not necessary on the subject scaffold. Gonzalez who provided the employees with four brand new baker's scaffolds at the beginning of the subject job, stated that all of the scaffolds he purchased for the job contained

safety railings. Gonzalez denies that plaintiff ever conveyed to him requests for safety items or concerns that the scaffold was unsafe.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]).

Labor Law §240(1)

Labor Law §240(1), also known as the "Scaffold Law," imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452 [1985]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235, 885 NYS2d 28 [1st Dept 2009]). To establish a cause of action under Labor Law §240, a plaintiff must show that the statute was violated, and

the violation was a proximate cause of the worker's injury *(Tounkara v Fernicola*, 80 AD3d 470, 914 NYS2d 161 [1st Dept 2011] ("Plaintiff made a prima facie showing of defendants' liability under § 240(1) by asserting that defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of the accident"); *Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). "The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] [citations omitted]).

Further, "in cases involving ladders or scaffolds that collapse or malfunction, there is a presumption that the ladder or scaffolding device was not good enough to afford proper protection" (*Harrison v V.R.H. Const. Corp.*, 2009 WL 2137147, 3 [Sup Ct New York County 2009]; *Smith v Broadway 110 Developers, LLC*, 80 AD3d 490, 914 NYS2d 167 [1st Dept 2011] (denying defendants' motion for dismissal "when the suspended scaffold that he was straddling swung toward a building and crushed his chest]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 289, n. 4 [2003] [summary judgment appropriate where it was uncontroverted that a ladder collapsed beneath plaintiff, causing the fall]; *Aragon v 233 West 21st Street, Inc.*, 201 AD2d 353, 354 [1st Dept 1994] [holding that the "plaintiff was properly granted summary judgment" inasmuch as the collapse of a scaffold is *prima facie* evidence of a violation of Labor Law §240(1) which shifts the burden to defendants to raise a factual issue on liability"]; *Mata v Park Here Garage Corp.*, 71 AD3d 423, 896 NYS2d 57 [1st Dept 2010] (defendants failed to explain how an A-frame ladder would have provided adequate protection to plaintiff's whose

work entailed the removal of a 300-pound assemblage comprising part of a metal gate and secured above the entranceway of a building or structure]).

As to plaintiff's Labor Law 241(6) claim, 12 NYCRR § 23-5.18(b) provides:

> "The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule)."

Plaintiff testified that the height of the area where he needed to be able to do the framing was approximately 16 to 18 feet high. (EBT, pp. 53-54). In order reach the area "atop," he "needed to assemble" the scaffold (*id*). Gold Metal provided the scaffold, and plaintiff and his co-workers assembled the scaffold (EBT, pp. 53-54). The scaffold had four wheels and brakes; he locked the brakes before using the scaffold and "the wheel brakes were on" at the time of his accident (EBT, pp. 63, 82). Plaintiff stated that Gold Metal had six of the same scaffolds at the site (EBT, p. 71). Plaintiff used a 12 foot A-Frame glass fiber ladder to reach the top platform of the scaffold. (EBT, pp. 65-66).

Plaintiff stated that the scaffold was "never complete" because "safety pins," "[l]ocking pins," and the "safety railing" were missing; further, plaintiff was not provided with harnesses; "higher than six feet, you have to wear a harness." (EBT, p. 66). Plaintiff testified that the locking pins "is to lock one scaffold above the other" "so they don't come off, and also, they don't move so much" and that the scaffold would use four locking pins (EBT, p. 85). However, the scaffold had no locking pins on the date of the accident (EBT, p. 86). Plaintiff also stated that "Extra brackets were missing for the first part of the scaffold . . ." (EBT, p. 85). Plaintiff said there should have been four brackets but this scaffold possessed none. In addition, despite being elevated more than six feet off the ground, plaintiff was not provided with any type of harness,

lanyard, protective vest or any protective railing or netting on the scaffolding (EBT, p. 71).

Plaintiff advised Gonzalez about the missing components "five, eight times," but Gonzalez said he "was not able to provide what the scaffolds were missing" (EBT, p. 69) Although the wheel brakes were set on the date of the accident, the scaffold "was moving while [he] was working on it" (EBT, p. 83). Plaintiff advised Gonzalez about this condition in the morning prior to the accident. (EBT, p. 84)

At the time of the accident, plaintiff was standing in the middle of the second level platform of the two-level platform scaffold, "screwing in the studs for the column framing" on the third floor of the building. (EBT, pp. 60-61). As he was "screwing the scaffolding was moving, [swinging] then it collapsed and [he] fell down." (EBT, pp. 61-62). Plaintiff testified that the scaffold "was lying down fully in two pieces, because at the time of the fall, they separated from each other because they didn't have the pins" (EBT, p. 105).

While plaintiff's sole deposition testimony establishes that the scaffold on which was standing while performing his work at an elevated height was not adequate to afford proper protection to plaintiff, and that the scaffold did not have a safety railing, defendants' submissions raise issues of fact as to whether plaintiff was provided with a safe and proper scaffold.

The Harco accident report states that

> "Gold Metal workers were framing @ 3rd floor and as they were moving the[ir] baker scaffold with the injured person on it, jolted & caused the worker to fall off the scaffold and injure his shoulder."

O'Connor's expert affidavit indicates that the scaffold was not required to have outriggers (brackets at the based of the scaffold to increase the scaffold width) or otherwise be secured against tipping over . . ." (¶18), and there is no evidence that the manufacturer of the scaffold

required the use of any pins to secure the upper frames to the lower frames (¶20). Defendants also point out that the deposition of Gold Metal and/or plaintiff's supervisor is required to permit defendants to explore the applicability of the recalcitrant worker defense and/or whether plaintiff was the sole proximate cause of his accident. Importantly, Gold Metal's owner Gonzalez attests that he "purchased new scaffolding to be used by my employees on the job site" and "They all contained handrails and safety pins" (¶¶3, 4). According to Gonzales, "At no point did anyone complain about the safety of the scaffolding" (¶10).

Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability (*Cahill v. Triborough Bridge and Tunnel Author*, 44 N.Y.3d 358, 23 N.E.2d 439790 N.Y.S.2d 74 [2004]; *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 290 [2003]). If adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under 240(1) does not attach (*Cherry,* 66 AD3d at 236). "Cases upholding the so-called 'recalcitrant worker' defense exemplify this rule" (*Cahill, supra*). The recalcitrant worker defense "is . . . limited to circumstances where a worker is injured as a result of his/her refusal to use available safety devices" (*Landgraff v 1579 Bronx River Ave., LLC*, 15 AD3d 200, 202 [1st Dept 2005]). And, an owner who has provided safety devices is not liable for failing to "insist that a recalcitrant worker use the devices" (*Cahill*, 4 NY3d at 39 [plaintiff received specific instructions to use a safety line while climbing, and chose to disregard those instructions], *citing Smith v Hooker Chems. & Plastics Corp.* (89 AD2d 361, 365 [4th Dept 1982]).

Therefore, partial summary judgment under Labor Law 240 and 241(6) is premature, at this juncture.

Defendants' request in their opposition papers that plaintiff's Labor Law 200 and negligence claims, and Labor Law 241(6) claims premised upon Industrial Code violations not mentioned in plaintiff's motion, is denied. Defendants cite no legal authority for the granting of such relief at this juncture.

Further, defendants' additional request for summary judgment dismissing plaintiff's Labor Law 200 and negligence claim is unwarranted, at this juncture, as said request is based solely on the affidavit of defendants' principals, and depositions of said defendants have not been held.

Conclusion

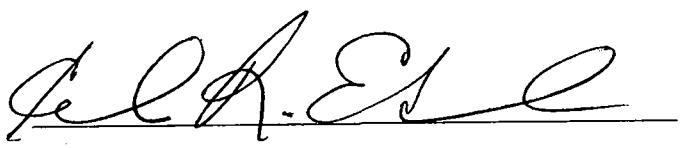
Based on the above, it is hereby

ORDERED that plaintiff's motion for partial summary judgment against defendants Harco Consultants Corp. and 301–303 West 125th LLC. on the issue of liability under Labor Law §240 and §241(6), and to set the matter down for trial as to damages, is denied, without prejudice; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 12, 2016



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.