Polito v SLG 100 Park LLC
2016 NY Slip Op 32596(U)
December 21, 2016
Supreme Court, New York County
Docket Number: 150726-2012
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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MICHAEL POLITO,

Plaintiff,

-against-

SLG 100 PARK LLC and TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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SLG 100 PARK LLC and TISHMAN CONSTRUCTION CORPORATION,

Third-Party Plaintiffs,

-against-

MICHAEL MAZZEO ELECTRIC CORP.,

Third-Party Defendant.

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Index No. 150726-2012

DECISION/ORDER

Motion Sequence 004

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Attorney's Affirmation & Collective Exhibits Annexed	1, 2, 3, 4
Third Party Defendant's Affirmation In Opposition	5
Notice of Cross-Motion, Attorney's Affirmation & Collective Exhibits Annexed	6, 7, 8
Reply Affirmation	9

By notice of motion dated March 11, 2016, plaintiff Michael Polito (plaintiff) moves pursuant to CPLR § 2221 for leave to renew his prior motion for summary judgment and upon renewal for an order granting him summary judgment on his Labor Law §§ 240 [1] and 241 [6] claims against defendants SLG 100 Park LLC (SLG) and Tishman Construction Corporation

(Tishman) (collectively defednants). Third-party defendant Michael Mazzeo Electric Corp. (Mazzeo) opposes the motion. SLG and Tishman oppose the motion and cross-move for leave to renew their prior cross-motion to dismiss plaintiff's Labor Law § 240 [1] claim and upon renewal for an order granting them summary judgment dismissing plaintiff's section 240 [1] claim.

By order dated May 22, 2014 this court denied plaintiff's prior motion for summary judgment on his Labor Law § 240 [1] on the ground that there was a question of fact as to whether it was foreseeable that the steel grate on which plaintiff was standing at the time of the accident would collapse. The court also denied defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 240 [1] claim on the ground that defendants' failed to establish their prima facie entitlement to summary judgment as their expert's affidavit lacked any probative value on the question of whether plaintiff's accident was foreseeable. The court granted defendants' cross-motion dismissing plaintiff's Labor Law § 241 [6] claim on the ground that the Industrial Code relied upon by plaintiff, section 23-1.7 [b], did not apply to the circumstances of plaintiff's accident.

An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court *(Elson v Defren*, 283 AD2d 109 [1st Dept 2001]). This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 AD2d 260 [2d Dept 1997]; *Vayser v Waldbaum*, 225 AD2d 760 [2d Dept 1996]). The Appellate Division, First Department has held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to "'defeat substantive fairness'" (*Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996] *quoting Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]). Renewal, however, is not available as a "second chance for parties who have not exercised due diligence in making their first factual presentation" (*CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431 [1st Dept]; *Chelsea Piers Mgmt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]). Deposition testimony which had not been elicited at the time of the original motion constitutes new evidence for the purposes of a motion to renew (*Morales v Coram Materials Corp.*, 64 AD3d 756 [2d Dept 2009]; *Sulger v Danica Plumbing & Heating, LLC*, 114 AD3d 929 [2d Dept 2014]). Since party and non-party deposition have been completed since the court's May 22, 2014 order, plaintiff and defendants are entitled to renewal of their respective motion and cross-motion for summary judgment with respect to plaintiff's Labor Law § 240 [1] claim.

Plaintiff testified at his deposition that he was working as an electrician for Mazzeo on May 18, 2011 in the building located at 100 Park Avenue, New York County. Plaintiff and five other workers were standing on a cat walk composed on metal grates. Plaintiff and four of the other workers were pulling wire attached to a rope downward from one pull box to another pull box through a conduit. The other worker was feeding the rope. Plaintiff and the other workers attempted three pulls prior to plaintiff's accident. Plaintiff did not notice any issues with the metal grates during these three pulls. On the fourth pull, as plaintiff and the other workers were pulling the rope downward, plaintiff's feet pushed the metal grate on which he was standing forward. The grate came off an I-beam and dropped. Plaintiff then fell approximately four feet

below the metal grating and struck another I-beam with his mid-section. Plaintiff was able to hold onto the rope and was pulled up back onto the catwalk by the other workers. Plaintiff did not notice the metal grate move during any of his previous attempts to pull the rope. Plaintiff was not wearing a harness or any other fall protection equipment at the time of the accident.

Labor Law § 240 [1] states that: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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) imposes a nondelegable duty upon the owner and contractor to provide proper and adequate safety devices to protect workers at an elevation from falling (*Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [1st Dept 2005]). To establish a cause of action under section 240 [1], a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 803 NE2d 757, 771 NYS2d 484 [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 [1st Dept 2008]).

Plaintiff's submission establishes that the catwalk which he fell through was composed of metal or steel grates that were resting, unsecured, on top of I-beams. The catwalk, therefore, was the functional equivalent of a scaffold which failed to provide adequate protection from the elevation related work he was performing. As SLG's property manager testified, the subject catwalk was installed in the air shaft so as to permit access by workers to the conduits in the building as well as an electrical gear shift room. The fact that the catwalk may be a permanent rather than a temporary fixture of the building does not preclude Labor Law § 240 [1] liability (*De Jara v 44-14 Newtown Rd. Apt. Corp.*, 307 AD2d 948 [2d Dept 2003]). The distinction of permanent versus temporary is merely one aid in determining whether the device in question was a normal appurtenance to a building or a device to protect the worker from elevation-related risks or hazards (*Gallagher v Andron Constr. Corp.*, 21 AD3d 988 [2d Dept 2005]). The subject catwalk was not a normal appurtenance but rather, as SLG's witness testified, a structure specifically installed to allow workers to access and perform work to the building's electrical conduits (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904 1st Dept 2011]). Thus, the catwalk was designed as safety device to protect workers from the elevation-related risks posed by working within the air shaft (*see Brennan v RCP Assoc.*, 257 AD2d 389 [1st Dept 1999]). Because the electrical work being performed by plaintiff at the time of the accident is an activity covered by Labor Law § 240 [1], and because the cause of plaintiff's injury is a device belonging to a class enumerated in the statute, i.e., the functional equivalent of a scaffold, plaintiff has established his *prima facie* entitlement to summary judgment on his Labor Law § 240 [1] claim against SLG.

For the same reasons, upon renewal, the court vacates its prior holding that plaintiff was required to establish not only that he was injured while engaged in a covered activity and that the

defendants' failure to provide an adequate safety device resulted in lack of protection but also that the injury was foreseeable because it occurred as a result of a collapse of a permanent structure. It has been firmly established that in order to make out a valid claim under Labor Law § 240 [1], a "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562, 626 NE2d 912, 606 NYS2d 127 [1993]). In other words, when a worker is performing one of the inherently dangerous activities covered by Labor Law § 240 [1], some injury is foreseeable from the failure of a contractor or owner to provide the worker with proper safety devices (*Gordon*, 82 NY2d at 562). Thus, a plaintiff normally only has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him or her from injury (*see Morin v Machnick Bldrs.*, 4 AD3d 668, 670 [3rd Dept 2004]). However, a plaintiff is required to establish foreseeability in the context of a collapse of a permanent structure because permanent structures are not normally expected to collapse or fail, and the work being performed on them, much like work performed at ground level and not involving the hoisting or securing of materials, does not usually expose a worker to a gravity-related hazard (*Vasquez v Urbahn Asso. Inc.*, 79 AD3d 493 [1st Dept 2010]). Consistent with this theory, the cases in which a plaintiff must establish forseeability generally involve permanent structures such as floors (*Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]), sidewalks (*Espinosa vv Azure Holdings II, LP*, 58 AD3d 287 [1st Dept 2008]) and staircases (*Vasquez*, 79 AD3d 493). Here, the subject catwalk was installed to allow workers to access various electrical components located within the building's air shaft making it, by its very nature, a safety device. The Appellate Division, First Department has refused to the extend the foreseeability requirement to anything other than permanent structures that are not by their nature safety devices and, therefore, expert testimony on foreseeability is not necessary for plaintiff to prevail on his section 240 [1] claim (*Ortega v City of New York*, 95 AD3d 125 [1st Dept 2012]). Since defendants' cross-motion to dismiss plaintiff's section 240 [1] claim is predicated solely on defendants' contention that plaintiff cannot meet the burden of establishing a foreseeable fall risk from the catwalk, upon renewal the cross-motion is denied.

Plaintiff's motion to renew his motion for summary judgment pursuant to Labor Law § 241 [6] is denied as academic in light of the grant of partial summary judgment on his section 240 [1] claim (*Howard v Turner Constr. Co.*, 134 Ad3d 523 [1st Dept 2015]; *Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521 [1st Dept 2012]).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion to renew his motion for summary judgment is granted and upon renewal plaintiff's motion for summary judgment on his Labor Law § 2401 [1] claim is granted against defendants SLG 100 Park LLC and Tishman Construction Corporation. Plaintiff's motion to renew his prior motion for summary judgment on his Labor Law § 241 [6] claim is denied as academic; and it is further

ORDERED that defendants' motion to renew their cross-motion for summary judgment is granted and upon renewal defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 240 [1] claim is denied; and it is further

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

George J. Silver, J.S.C.

Dated: 12/21/16
New York County

GEORGE J. SILVER