Plywacz v 85 Broad St. LLC
2017 NY Slip Op 30112(U)
January 19, 2017
Supreme Court, New York County
Docket Number: 158748/12
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

ARKADIUSZ PLYWACZ and BEATA PLYWACZ,

Plaintiffs,

-against-

85 BROAD STREET LLC, 85 BROAD STREET MEZZANINE LLC and HENEGAN CONSTRUCTION CO., INC.,

Defendants.

Index No.: 158748/12

Motion Seq. No.: 003

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for personal injuries sustained by a journeyman carpenter when he allegedly fell from a ladder while working in the lobby of 85 Broad Street, New York, New York (the "Premises") on September 14, 2012. Plaintiffs Arkadiusz Plywacz ("plaintiff") and Beata Plywacz (collectively, "plaintiffs") move pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants 85 Broad Street LLC, 85 Broad Street Mezzanine LLC (collectively, "85 Broad") and Henegan Construction Co., Inc. ("Henegan") (collectively, "defendants").[1] Defendants cross-move for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' complaint.

BACKGROUND

On the day of the accident, plaintiff was employed by non-party A-Val Architectural Metal III LLC ("A-Val") as a journeyman carpenter. Jones Lang LaSalle Americas, Inc. ("Jones

[1]Plaintiffs' Verified Complaint also asserts causes of action alleging violations of Labor Law §§ 200 and 241(6). At oral argument on March 28, 2016, this Court granted defendants' cross-motion for summary judgment to the extent of dismissing plaintiffs' claims under Labor Law §§ 200 and 241(6) (Tr. of Oral Argument, March 28, 2016 at 4).

LaSalle"), as agent for 85 Broad, hired defendant Henegan to serve as general contractor of a restoration project in the lobby of the Premises (the "Project"). Henegan hired A-Val as a subcontractor to install decorative stainless steel wall paneling in the Premises' lobby. Defendant 85 Broad owned the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that there was a foreman onsite from A-Val named Roman Szkolarski ("Szkolarski") who was directing the work of all A-Val employees at the construction site (Plaintiff's May 28, 2014 deposition, at 28, 43). On the morning of the subject incident, plaintiff was assigned to install stainless steel panels on a wall behind a security desk in the Premises' lobby (*Id.*, at 19, 45-46). The panels were approximately two and one half feet by four feet and plaintiff described the wall as being approximately fifty feet wide and ten feet high (*Id.*, at 26, 45-46).[2] A-Val provided all the equipment such as ladders, suction cups, hammer drills, screw guns and hand tools (*Id.*, at 47, 81). Plaintiff testified that in order to prepare the wall to hang the panels, clips were attached to the wall in a vertical line (*Id.*, at 58).[3] The clips then held a series of panels (*Id.*, at 59). At the time of the incident, plaintiff was installing the "upper most panel, right at the very ceiling" which was approximately eight or nine feet high (*Id.*, at 70, 74-75).[4] The panels were put on clips and then slid from left to right (*Id.*, at 75, 79).

In order to perform said work, it was necessary for plaintiff to utilize a six-foot A-frame

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[2]According to plaintiff, the panels were too heavy for him to carry by himself (*Id.*, at 77).

[3]The clips were "screwed in and glued" to wall studs (*Id.*).

[4]Plaintiff testified that there were two ceilings, a lower ceiling and an upper ceiling (*Id.*, at 74-75).

ladder which was provided by A-Val (*Id.*, at 48, 81). Before the accident, plaintiff set up the A-frame ladder and used its locking mechanism. Plaintiff mounted the ladder on the third or fourth rung, on the right side of the subject panel, and his co-worker "Spike" got on another ladder on the other side (*Id.*, at 80-82, 85).[5] Plaintiff and Spike were installing a panel in the higher portion of the ceiling so extra force needed to be applied (*Id.* at 79-80). They each attached suction cups[6] to the panel, and "at the same time, he [Spike] had to push the panel and I [plaintiff] had to pull it" (*Id.*, at 80, 84). Plaintiff testified further that

> "And once commenced, we pulled it, and at that point the suction cup became detached from the panel. My ladder wobbled. I lost my balance.
> I was trying to get down, one rung down, but I was unable to and I fell on my back" (*Id.).*
>
> "[A]fter this suction cup came off of this panel, you know, I'm a little bit on the heavy side and, you know, we also applied some force. The ladder rocked to the left and to the right and I lost my balance and I dropped down" (*Id.* at 95-96; *see Id.* at 93).[7]

Plaintiff testified that he fell from the third or fourth rung of the ladder, meaning three or four feet (*Id.*, at 122). His left hand, and then his back, backside and head hit the ground (*Id.*, at 100-102).

Plaintiff's Affidavit

In an affidavit, sworn to on September 11, 2015, plaintiff stated that (i) nobody suggested that he use a scaffold; (ii) no scaffold or other device was provided to him to prevent him from

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[5]Spike was pushing the panel and plaintiff was pulling with his right side facing the wall. He and Spike were facing each other (*Id.*, at 84).

[6]A suction cup had a handle for plaintiff to hold, and is affixed to the wall by pressing a button (*Id* at 48, 50).

[7]Plaintiff stated that the accident happened "all at one time". "The suction cup came off. [He] lost his balance kind of. Then the ladder rocked and [he] started falling. [He] tried to brace [him]self" (*Id.* at 100-101).

falling; and (iii) no co-worker steadied his ladder as he was in the process of pulling the stainless steel panel into place (Notice of Motion, Exhibit "E").

Affidavit of Herbert Heller, Jr., P.E.

Plaintiff's expert Herbert Heller, Jr., P.E. ("Heller") opined that a proper device to use under these circumstances would have been a scissor lift, an aerial lift or a bakers scaffold, or that if a ladder was used, it should have been tied off to an anchor point or secured by co-workers holding onto it (Notice of Motion, Exhibit "F").

Deposition Testimony of Thomas Mangan of Henegan

Thomas Mangan ("Mangan"), Senior Vice President of construction of Henegan, testified that he was not aware if A-Val had any scaffolds on site (Notice of Motion, Exhibit "C" at 37).[8] Mangan stated that pursuant to the subcontract between Henegan and A-Val, A-Val was subject to Henegan's construction safety guidelines (*Id.* at 47; *see* Exhibit J").[9] Mangan testified that "it was a means and methods installation, so whatever was required to do their [A-Val's] job (*Id.* at 37).

Deposition Testimony of Tony Cartagine of non-party Jones LaSalle

Tony Cartagine ("Cartagine") was employed by Jones LaSalle. Jones LaSalle entered into an agreement with Henegan on behalf of 85 Broad for the restoration Project of the subject lobby (Notice of Motion, Exhibit "D" at 12). Cartagine acted as coordinator of the Project (*Id.* at

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[8]Mangan did testify that earlier in the Project, a scaffold had been provided in the center section of the lobby by a scaffolding subcontractor (Notice of Motion, Exhibit "C" at 38).

[9]The 'Henegan Construction Safety Guidelines and Forms' provides that each subcontractor shall abide by the guidelines, and that "each subcontractor shall be responsible for all of its employees' [c]ompliance with the project safety requirements" (Notice of Motion, Exhibit "J" at 2-3).

20). Cartagine testified that he was not aware of what equipment A-Val used at the site of the incident, and that neither Jones LaSalle nor 85 Broad were responsible for safety at the Project (*Id.* at 26-27).

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]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

Plaintiffs move for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants. 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]).

As plaintiffs assert, Labor Law § 240 (1) applies to the facts of this case, because while plaintiff was installing stainless steel panels at the Premises, he was caused to fall and suffer injuries when the unsecured ladder that he was ascending shifted. "'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d

173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of unsteady ladder, the plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

Important to the facts of this case, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason' [citation omitted]" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000].

Here, plaintiff has shown as a matter of law that Labor Law § 240 was violated because the safety device provided to him, i.e. the ladder, failed to prevent him from falling. Plaintiff clearly testified that the ladder "wobbled" and "rocked to the left and to the right" (Notice of Motion, Exhibit "B" at 93, 95-96). As the ladder at issue was inadequately secured so as to protect plaintiff while subject to an elevation-related risk, and no other safety devices were provided to him, defendants are liable for his injuries under Labor Law § 240 (1) (*see Peralta v*

American Tel. & Tel. Co., 29 AD3d 493, 494 [1st Dept 2006] ["unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were liable under Labor Law § 240 (1)"]; *Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005]).

In support of their cross-motion and in opposition to plaintiffs' motion, defendants argue that they are not liable for plaintiff's injuries under Labor Law § 240 (1) because plaintiff was the sole proximate cause of his accident. Defendants contend that plaintiff's improper use of the suction cup caused him to fall off the ladder. Defendants further assert that a review of plaintiff's deposition testimony reveals that the subject ladder had nothing to do with the accident.

However, under the circumstances of this case, whether or not plaintiff contributed to the accident by improperly using a suction cup, goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240(1) cause of action because 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]. "[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.*, 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]; *Ranieri v Holt Constr. Corp.*, 33

AD3d 425, 425 [1st Dept 2006] [court found that 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 injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]).

Defendants further argue that they are not liable for plaintiff's injuries under Labor Law § 240(1) because plaintiff has not demonstrated that the ladder was defective in any way. Defendants present an affidavit of their expert, Bernard P. Lorenz, P.E., PP who asserts that the six foot A-frame ladder that plaintiff used at the time of his accident was a proper safety device, and there is nothing in the record to indicate that the ladder was defective (Notice of Cross-Motion, Exhibit "D, ¶7[B]). However, contrary to the assertion of defendants, plaintiff is not required to demonstrate that the ladder was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Id.*; *Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

That said, under the circumstance of this case, the ladder may not have been the proper safety device for the task at hand. "[T]he availability of a particular safety device [i.e. the ladder] will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary measures" (*Nimirovski v*

Vornado Realty Trust Co., 29 AD3d 762, 762 [2d Dept 2006] quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]). For example, plaintiff's expert opined that the proper device to use under these circumstances would have been a scissor lift, an aerial lift or a bakers scaffold, or that if a ladder was used, it should have been tied off to an anchor point or secured by co-workers holding onto it (Notice of Motion, Exhibit "F").

Thus, plaintiff is entitled to partial summary judgment in their favor as to liability on their Labor Law § 240 (1) claim against defendants.

Importantly, 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 citations 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 114, 117 [1st Dept 2001] , quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that the motion by plaintiffs Arkadiusz Plywacz and Beata Plywacz pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants 85 Broad Street LLC, 85 Broad Street Mezzanine LLC and Henegan Construction Co., Inc. is granted; and it is further

ORDERED, that defendants' cross-motion for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED, that the remainder of the action shall continue.

Dated: January 19, 2017

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.