Concepcion v 333 Seventh LLC
2017 NY Slip Op 30535(U)
March 22, 2017
Supreme Court, New York County
Docket Number: 156922/2015
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

----------X
BENJAMIN CONCEPCION,

Plaintiff,

DECISION/ORDER
Index No. 156922/2015

-against-

333 SEVENTH LLC,

Defendant.

----------X
HON. CYNTHIA KERN, J.:

Plaintiff Benjamin Concepcion commenced the instant action against defendant 333 Seventh LLC to recover for injuries he allegedly sustained when he fell from a ladder while working at a building located at 333 Seventh Avenue, New York, New York (the "premises" or the "building") on May 1, 2015. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting him partial summary judgment against defendant on the issue of liability pursuant to Labor Law § 240(1). Defendant cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint. For the reasons set forth below, plaintiff's motion is granted and defendant's motion is granted in part and denied in part.

The relevant facts are as follows. In May 2013, defendant, the owner of the premises, retained Buckmiller Automatic Sprinkler Corp. ("Buckmiller") to routinely conduct inspections of and maintain the building's sprinkler system. Plaintiff was an employee of Buckmiller on May 1, 2015, the date of his accident. During his deposition, plaintiff testified that on the date of his accident, he was instructed by Darren Dailey, the building's superintendent, to go to the building's fourth floor to perform work modifying the building's sprinkler system to make the system code-compliant. At the time of his accident, plaintiff was installing a water flow switch and relocating a drain line. Plaintiff was provided with a 6-foot fiberglass A-frame ladder to use for this work. His helper, Mike, opened and positioned the ladder in the

middle of a four-square-foot cubicle. It is undisputed that the ladder was unsecured and that plaintiff was not provided with any safety lines or harnesses to support him while he worked. Although Mike initially held the ladder while plaintiff worked, he left to retrieve a piece of pipe plaintiff needed for his work. While plaintiff was standing on the fourth or fifth step of the ladder and tightening a bolt with a wrench, he felt the legs of the ladder move forward, causing him to lose balance and fall to the floor. As plaintiff fell, his right shoulder hit the lid of a copy machine.

The court first considers plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not 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) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). "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)." *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1st Dept 1998), *citing Schultze v. 585 W. 214th St. Owners Corp.*, 228 A.D.2d 381 (1st Dept 1996). Further, "[i]t is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent." *Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 291 (1st Dept 2002).

In the present case, plaintiff has established his *prima facie* right to partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) as plaintiff has shown that he fell from a ladder that was not properly secured and that defendant failed to provide any adequate safety device to prevent plaintiff from falling to the ground after the ladder he was standing on shifted. Here, plaintiff's injury clearly occurred due to a gravity-related hazard as plaintiff fell from a ladder after it shifted. There is no explanation for the accident other than the fact that the ladder was improperly secured, thus causing it to shift and causing plaintiff to fall and become injured. The fact that the ladder shifted and plaintiff then fell to the floor below is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1).

In response, defendant has failed to raise an issue of fact sufficient to defeat plaintiff's *prima facie* showing of entitlement to partial summary judgment. Defendant's argument that plaintiff's motion for partial summary judgment must be denied because plaintiff has not provided any evidence that the ladder he was using at the time of his accident was defective is without merit. It is well-settled that a plaintiff is not required to show that a ladder was defective in some way as part of his *prima facie* case for summary judgment. *See McCarthy v. Turner Constr. Inc.*, 52 A.D.3d 333, 333-34 (1st Dept 2008). Defendant has also failed to raise an issue of fact based on its argument that the ladder was not defective because it was steady before the accident and did not break during the accident. Evidence that the ladder was structurally sound and not defective is not relevant to the issue of whether it was properly placed or safe. *See Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135 (4th Dept 2008).

Further, defendant's argument that the plaintiff's motion for partial summary judgment must be denied because plaintiff has failed to submit expert testimony that any safety devices were necessary and practical is without merit as there is no requirement that a plaintiff present expert testimony showing the necessity or practicality of specific safety devices to establish liability pursuant to Labor Law § 240(1). *See Vega v. Rotner Mgt. Corp.*, 40 A.D.3d 473, 474 (1st Dept 2007).

In addition, defendant has failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident based on his deposition testimony that he did not inspect the ladder to ensure that it had been properly erected by his helper and did not ask his helper if he had properly erected the ladder. The specific argument that the manner in which plaintiff set up the ladder was the sole proximate cause of the accident is unavailing "where there is no dispute that the ladder was unsecured and no other safety devices were provided." *Vega*, 40 A.D.3d at 474. "It is sufficient for purposes of liability under § 240(1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent," "[r]egardless of the precise reason for his fall." *Orellano*, 292 A.D.2d at 290-91 (granting motion for summary judgment where plaintiff gave several possible explanations as to the cause of his fall from the ladder, including that the ladder shifted when he reached to affix a bolt and that "he may have simply lost his balance").

Similarly, defendant has failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident based on the fact that plaintiff determined how and with which tools and equipment his work would be performed. The mere fact that the ladder shifted and plaintiff then fell to the floor is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1), regardless of the precise reason for his fall. *See Orellano*, 292 A.D.2d at 290-91. Further, defendant has failed to submit any evidence that it provided any safety devices that plaintiff refused to use when performing his work.

Defendant's argument that plaintiff's motion for summary judgment should be denied because plaintiff was engaged in routine maintenance on the date of the accident and thus Labor Law § 240(1) is inapplicable is also without merit. "Labor Law § 240(1) affords protection to workers engaged in 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.'" *Dos Santos v. Consolidated Edison of N.Y., Inc.*, 104 A.D.3d 606, 607 (1st Dept 2013). Routine maintenance falls outside the scope of § 240(1). *See id.*; *Joblon v. Solow*, 91 N.Y.2d 457, 465 (1998). Determining whether a plaintiff is engaged in protected construction work or routine maintenance is a fact-specific inquiry. *See Joblon*, 91 N.Y.2d at 465-66. "It is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of the injury." *Id.* at 465. The Court of Appeals has held that a plaintiff is engaged in altering a building or structure rather than in routine maintenance where a "significant physical change to the configuration or composition of the building or structure" is made. *Joblon*, 91 N.Y.2d at 465. In *Joblon*, the Court of Appeals found that the plaintiff was engaged in altering the building when he brought "an electrical power supply capable of supporting the clock to the mail room, which required both extending the wiring within the utility room and chiseling a hole through a concrete wall so as to reach the mail room." *Id.* However, merely "replacing components that require replacement in the course of normal wear and tear" is routine maintenance. *Esposito v. New York City Indus. Dev. Agency*, 1 N.Y.3d 526, 528 (2003).

In the present case, the court finds that Labor Law § 240(1) is applicable as plaintiff was engaged in altering the building rather than in routine maintenance at the time of the accident. Plaintiff testified during his deposition that on the date of the accident he was "[r]eforging the sprinkler system" and "[b]ringing it up to the city code," which required "[i]nstalling the wheel assemblies, installing water flow switches, relocating drain lines and removing old drain lines." The court finds that this work constituted a significant physical change to the building's sprinkler system. In support of its argument that plaintiff was engaged in routine maintenance at the time of the accident, defendant has only provided the Standpipe Service Estimate and the Sprinkler Wet Service Estimate from May 2013 whereby Buckmiller agreed to routinely test various aspects of the building's sprinkler system and replace the fire hose and air and water gauges after certain

periods of time, which do not even mention the work that plaintiff testified he was performing on the date of the accident.

Therefore, plaintiff's motion for partial summary judgment is granted. The portion of defendant's cross-motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim based on the same arguments defendant advanced in opposition to plaintiff's motion for partial summary judgment, all of which the court has determined are without merit, is accordingly denied.

The portion of defendant's cross-motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is resolved pursuant to plaintiff's voluntary withdrawal of this claim in his opposition papers.

The court next considers the portion of defendant's cross-motion for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims. "Section 200 of the Labor Law 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." *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury.'" *Id.*, citing *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). "[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 504 (1993). "This rule is an outgrowth of the basic common-law principle that 'an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.'" *Id.*, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299 (1978).

In the present case, defendant has established its *prima facie* right to summary judgment dismissing plaintiffs' common law negligence and Labor Law § 200 claims as it has demonstrated that it did not supervise, direct or control plaintiff's activities. Plaintiff testified during his deposition that on the date of his accident, he did not receive any instruction or supervision from any of defendant's employees other than

that the building's superintendent told him which floor he should work on. Further, plaintiff testified that whatever tools he needed to use were provided by Buckmiller, his employer. In addition, the building's superintendent testified during his deposition that he only told Buckmiller's employees which floors they could not work on but did not provide any other instruction or supervision.

In opposition, plaintiff has failed to raise an issue of fact. Although plaintiff contends that defendant's employees did indeed supervise, direct and control plaintiff's activities, such contention is belied by the evidence in this case. Specifically, plaintiff points to his testimony that the building's superintendent would tell him where he should run the sprinkler piping on certain occasions when he was performing work in the building. However, plaintiff testified that the building's superintendent did not provide him with any instructions regarding his work on the date of the accident. Plaintiff also points to the testimony of the building's superintendent that he had inspected Buckmiller's employees' work for quality in the past and that he had the authority to stop work if he saw the workers doing something unsafe. However, the defendant's "mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability" pursuant to the common law or under Labor Law § 200. *Ortega v. Puccia*, 57 A.D.3d 54, 62 (2d Dept 2008). Further, the defendant's authority to stop work for safety reasons is insufficient to impose liability. *See Hughes v. Tishman Const. Corp.*, 40 A.D.3d 305, 309 (1st Dept 2007); *Reilly v. Newireen Associates*, 303 A.D.2d 214, 221 (1st Dept 2003).

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) is granted. Defendant's cross-motion for summary judgment dismissing plaintiff's complaint is denied with regard to plaintiff's Labor Law § 241(6) claim, which has been withdrawn by plaintiff, and his Labor Law § 240(1) claim but is granted with regard to his common law negligence and Labor Law § 200 claims, which are hereby dismissed. This constitutes the decision and order of the court.

DATE : 3/22/17

CK

KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.