Serieux v Throop Wallabout Realty LLC
2017 NY Slip Op 31215(U)
June 6, 2017
Supreme Court, Kings County
Docket Number: 504567/14
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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FELIX SERIEUX,

Plaintiff,

-against-

THROOP WALLABOUT REALTY LLC and HSD CONSTRUCTION, LLC,

Defendants.

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DECISION/ORDER

Index No. 504567/14

Submitted: 5/4/17
Mot. Seq. #3

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for partial summary judgment.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	1-10
Affirmation in Opposition and Exhibits Annexed.....	11-12
Affirmation in Reply and Memorandum.....	13, 14

Plaintiff moves for partial summary judgment based on his Labor Law § 240 (1) cause of action and also asks to vacate the "disposed" marking (for failure to file a Note of Issue), to restore the case to active status, and to extend the Note of Issue date. Defendants oppose the motion as regards summary judgment and consent to the other relief.

This is a Labor Law action. Plaintiff was a laborer employed by non-party Bayport Construction. Defendant Throop-Wallabout was the premises owner. Defendant HSD Construction, LLC was the general contractor.

Plaintiff testified at his EBT that he was a laborer employed by non-party Bayport

Construction, and was injured when he fell approximately nine or ten feet from an unsecured 12 to 13-foot long straight ladder on defendant Throop's premises (398 Wallabout Street, Brooklyn NY). The accident took place on October 2, 2013 at approximately noon.

Plaintiff testified that he had not previously used a ladder in the two to three months he'd been working at the site. He found the ladder he used that day at his worksite and did not know who owned it or who put it there. He did not have any problem with the ladder that day before the accident. He had used a scaffold on previous work days.

Plaintiff said he had been instructed by his employer to lay bricks that day. There were several buildings being constructed. He was working in the basement. The ladder was already leaning against a wall when he arrived at the worksite. Plaintiff said a helper was holding the ladder, but then let go at some point before his accident. At the time he fell, no one was holding the ladder and it was not secured. He fell when one leg of the ladder sunk into the dirt floor beneath him and the ladder shifted. He was given no safety equipment and he had no means available to tie off or secure either the ladder or himself. As he started to descend, the ladder shifted and he and the ladder both fell to the ground. After the accident, plaintiff stated he walked through the building and exited onto the street. Nobody saw him fall.

In plaintiff's affidavit, he goes over the same ground with further details, noting that he was not given any safety devices at all, including belts or safety lines. He says if the ladder were held by a worker, as it was supposed to be, it would not have shifted and he would not have fallen. If the ladder had been tied off or otherwise secured, he would not have fallen. He would not have fallen if he was provided with safety lines and

a safety belt or harness. Plaintiff claims that the failure to ensure that the ladder was adequately held or otherwise secured and the failure to provide safety belts or lines were the proximate cause of the accident.

Shloime Lichtman, a site supervisor for HSD, testified at an EBT on behalf of HSD and admitted they were the general contractor, with authority to control safety, including stopping work for safety reasons and with authority to retain and direct subcontractors, including plaintiff's employer. He confirmed that defendant Throop owned the premises. He said each trade had its own ladders at the site, but that Bayport did not have ladders at the site as they were supposed to use scaffolding. He said there were permanent concrete stairs from the street down to the area where plaintiff had his accident. He said that he believed that the dirt floor in the basement had been entirely replaced by cement prior to the date of plaintiff's accident.

Sanjeev Kumar, a non-party witness who was plaintiff's supervisor, testified at an EBT that he saw the ladder after the accident and he could tell that it did not belong to Bayport, as Bayport did not have any ladders on the site. He said that, after the accident, he saw the subject ladder leaning against the wall and not on the ground. He said that after the accident, he asked plaintiff what he was doing on the ladder and asked why he wasn't using a scaffold. He said plaintiff told him he had used the ladder to come up to the street level from the worksite.

Mr. Kumar testified that he never told plaintiff to use a ladder to go between the street level and the basement or for any other reason. Kumar said that, contrary to Mr. Lichtman's testimony, there were no permanent stairs going to the basement from the street level at the time of the accident. However, he said plaintiff had been told that there was a scaffold/stair tower on the side of the building and that workers were

supposed to use the scaffold and walk through the building to access the area where the accident occurred. There was no reason for plaintiff to have used the ladder.

Mr. Kumar did acknowledge that using the scaffold to get to the street level required a worker to walk all the way through the entire basement to reach the courtyard and then walk to the tower, and that instead of doing that, plaintiff had used the ladder as a short cut. Mr. Kumar also stated that the floor where plaintiff was working at the time of the accident was concrete and was not a dirt floor.

Plaintiff's Labor Law § 240 (1) Claim

In support of his motion, plaintiff notes that defendants are subject to liability under the statute inasmuch as they owned the subject job site or hired all of the contractors, including Bayport, his employer. Plaintiff further points to the fact that he was injured during the course of the construction project when the ladder plaintiff was on shifted and fell to the ground, causing plaintiff to fall. According to plaintiff, the failure of the ladder constitutes a prima facie violation of Labor Law § 240 (1) for which defendants are liable as a matter of law.

In opposition to plaintiff's motion, defendants maintain that plaintiff's own actions were the sole proximate cause of the accident. Defendants suggest that plaintiff was using the ladder to access the basement from the street level or the street level from the basement and that he was not working at the time of the accident and that, in any event, he was not supposed to use a ladder to do his work. Defendants aver that a scaffold would have provided him with both the means to access the site and the means to work. Therefore, they argue, he was a recalcitrant worker and that his recalcitrance was the sole proximate cause of the accident. Defendants contend that, at the very least, there are triable issues of fact as to whether plaintiff's failure to follow

the instructions he was given regarding how to do his work and how to enter and exit the worksite was the sole proximate cause of his accident. Therefore, defendants claim, there are issues of fact as to whether plaintiff was a recalcitrant worker inasmuch as he disregarded those instructions.

Labor Law § 240(1) provides, in pertinent part, 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, [or] altering . . . 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 "prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." See, *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]. In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500; *Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]. "The duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500. However, given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to

the effects of gravity. Rather, gravity must be a direct factor in the accident, as when a worker falls from a height or is struck by a falling object. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]. Finally, although comparative negligence is not a defense to a Labor Law § 240 (1) claim, when a plaintiff's own actions are found to be the sole proximate cause of the accident, he or she may not recover under Labor Law § 240 (1). *Blake v Neighborhood Hous. Serv. of New York City, Inc.*, 1 NY3d 280, 290 [2003].

Here, the plaintiff has made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law §240(1). "To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" *Alvarez v Vingsan L.P.*, 2017 NY Slip Op 04241 [2d Dept 2017] quoting *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012]; see also *Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Lopez-Dones v 601 W. Assoc., LLC,* 98 AD3d 476 [2d Dept 2012]. According to plaintiff's deposition testimony, he was standing on an unsecured ladder when the ladder shifted for no apparent reason, causing him to fall to the ground. See, *Alvarez v Vingsan L.P.*, 2017 NY Slip Op 04241; *Goodwin v Dix Hills Jewish Ctr.,* 144 AD3d 744, 747 [2d Dept 2016]; *Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1106 [2d Dept 2016]; *Ramirez v I.G.C. Wall Sys., Inc.*, 140 AD3d 1047, 1049 [2d Dept 2016].

The record indicates that plaintiff was not furnished with any fall-protection devices, such as a belt, harness or lifeline. Since "[a] failure to provide any safety device at all constitutes a statutory violation of Labor Law § 240 (1) as a matter of law,"

plaintiff has "established a prima facie violation of Labor Law § 240 (1) by presenting evidence that no safety devices were provided at the time of the accident." It is well-settled that such failure constitutes prima facie proof of a Labor Law § 240 (1) violation. See, *Ramirez v Metropolitan Transportation Auth.*, 106 AD3d 799 [2d Dept 2013]; *Chabla v 72 Greenpoint, LLC*, 101 AD3d 928 [2d Dept 2012]; *Taeschner v M & M Restorations*, 295 AD2d 598, 599 [2d Dept 2002]; *Elkins v Robbins & Cowan*, 237 AD2d 404 [2d Dept 1997].

Turning to defendants' papers in opposition, the court finds that defendants have presented sufficient evidence to raise a triable issue of fact and overcome the motion. As defendants have established that plaintiff was instructed to use a scaffold to do his work, and that he was instructed how to access the worksite from the street, and in both cases, he was not told to use a ladder, defendants raise the issue of whether plaintiff's conduct was the sole proximate cause of the accident. As previously noted, there are significant differences between the facts stated in plaintiff's testimony and the facts stated in the testimony of the other witnesses.[1] However, in determining plaintiff's motion for summary judgment, "the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be resolved in favor of the non-moving party." *Green v Quincy Amusements, Inc.*, 108 AD3d 591, 592 [2d Dept 2013].

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[1]These differences include whether plaintiff was using the ladder on a dirt floor or a cement floor, whether he had been working on the ladder for some time before he fell with the assistance of one worker who was holding the ladder for him but then left plaintiff alone to continue working, of if he fell only seconds after climbing on the ladder to enter or exit the worksite.

While Labor Law § 240 (1) is intended to be liberally construed, a plaintiff's right of recovery must be within the parameters envisioned by the legislature. *Jastrzebski v North Shore Sch. Dist.*, 223 AD2d 677, 679; [2d Dept 1996], *affd* 88 NY2d 946; *Cannata v One Estate*, 127 AD2d 811, 813 [2d Dept 1987]; *DaBolt v Bethlehem Steel Corp.*, 92 AD2d 70, 75 [4th Dept 1983]. Therefore, the courts have interpreted Labor Law § 240 (1) to provide defendants with a "recalcitrant worker" defense to a statute that otherwise requires strict liability. *Jastrzebski v North Shore Sch. Dist.*, 223 AD2d 677, 679; *affd* 88 NY2d 946; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]. This defense is premised upon the principle that the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it. *Jastrzebski v Dist.*, 223 AD2d 677, 679; *affd* 88 NY2d 946; *Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982]. While an injured worker's comparative negligence is not a defense to a Labor Law § 240 (1) cause of action, the "recalcitrant worker" defense may allow a defendant to avoid liability under the statute "where a plaintiff's own actions are the sole proximate cause of the accident" *Robinson v National Grid Energy Mgt.*, LLC, 2017 NY App. Div. LEXIS 3716 [2d Dept]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015].

A defendant may raise a triable issue of fact as to whether the plaintiff was a recalcitrant worker under Labor Law § 240 (1) by submitting evidence that plaintiff and plaintiff's coworkers were provided with safety devices, that such safety devices were readily available for their use, that plaintiff was instructed to use those devices and that plaintiff disregarded those instructions. *Yax v Development Team, Inc.*, 67 AD3d 1003,

1004 [2d Dept 2009]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290. Evidence that a plaintiff refused to use the adequate and safe scaffolding which had been provided to him and which he was instructed to use raises an issue of fact concerning defendants' liability under Labor Law § 240 (1). See, *Isnardi v Genovese Drug Stores*, 242 AD2d 671, 672 [2d Dept 1997]; *Jastrzebski v North Shore School Dist.*, 223 AD2d 677, *affd* 88 NY2d 946; *Vasquez v G.A.P.L.W. Realty*, 236 AD2d 311 [1st Dept 1997]; *Watso v Metropolitan Life Ins. Co.*, 228 AD2d 883 [3d Dept 1996].

Thus, under the circumstances, there is a triable issue of fact as to whether it was plaintiff's own decision to use a ladder he found at the worksite, either to perform his work or to enter or exit the worksite, whether doing so was in disregard of his supervisor's instructions, and whether plaintiff's conduct was the sole proximate cause of the accident. *Robinson v East Med. Ctr., LP*, 6 NY3d 550 [2006]; *Montgomery v Federal Express Corp.*, 6 NY3d 550 [2006]; *Wahab v Agris & Brenner, LLC*, 102 AD3d 672, 674 [2d Dept 2013]. Accordingly, the branch of plaintiff's motion which seeks summary judgment on his Labor Law § 240 (1) cause of action is denied.

Upon consent of all parties, this action is restored to active status. Plaintiff shall file a note of issue on or before August 7, 2017.

This shall constitute the decision and order of the court.

Dated: Brooklyn, New York
June 6, 2017

ENTER:

Hon. Debra Silber, J.S.C.
Hon. Debra Silber
Justice Supreme Court