Garcia v Silver Autumn Hotel (N.Y.) Corp., Ltd
2017 NY Slip Op 31612(U)
August 2, 2017
Supreme Court, New York County
Docket Number: 152073/2014
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 29

----------X

Victor Benicio Garcia and Veronica Aguilar Palma,

Plaintiff,

Index Number:

-against-

152073/2014

Silver Autumn Hotel (N.Y.) Corporation, LTD,
d/b/a The Warwick New York Hotel

Defendants.

----------X

Robert D. Kalish, J.:

Upon the foregoing papers, the Plaintiffs' motion for partial summary judgment on their Labor Law 240(1) claims against the Defendant are granted as follows:

Underlying Allegations

The Plaintiff, Victor Benicio Garcia, alleges in the underlying action that he was a laborer employed by Consolidated Scaffold & Bridge Corp. (a non-party), a scaffolding company that had contracted with the Defendant to erect a scaffold and sidewalk bridge around a building located at 64 West 54th Street in New York City ("Building"). The Plaintiff further alleges that the Defendant controlled, maintained and operated the Warwick New York Hotel from the Building. Plaintiff claims that on or about June 14, 2013, he was injured while working on the scaffold. Specifically, the Plaintiff alleges that he was walking on an elevated plank in order to descend from the scaffold, when said plank collapsed and/or cracked causing him to fall to the ground below. The Plaintiff claims that said accident and his resulting injuries were the direct result of the Defendant's violations of Labor Law §§ 200, 240 and 241, as well as being the direct result of the Defendant's negligence.

The Plaintiff now moves for summary judgment on his Labor Law 240 (1) claim and the Defendant opposes.

Parties' Contentions

In support of the instant motion for partial summary judgment, the Plaintiff argues that he worked on erecting the scaffold and that the Defendant failed to provide him with a safety device (such as a ladder) in order to descend said scaffold. The Plaintiff argues that on the date of the accident, at the conclusion of the work day, other workers descended the scaffold by jumping from the scaffold to a flatbed truck below. The Plaintiff testified that the bottom of the scaffold bridge was approximately 8 feet from the ground. The Plaintiff further argues that because he did not want to jump from the scaffold, a co-worker placed a two-by-eight inch wooden plank from the scaffold to the flatbed truck below. The Plaintiff argues that as he descended, the plank collapsed and he fell to the ground. The Plaintiff argues that the Defendant's failure to provide the Plaintiff with any safe way to descend the scaffold (such as a ladder) constituted a violation of Labor Law 240 (1) and was the direct cause of his accident. The Plaintiff argues in sum and substance that in the absence of any safe means of descending the scaffold, the Plaintiff only had unsafe options available to him.

In opposition, the Defendant argues that the Plaintiff testified that other workers normally got down the scaffold by climbing down the scaffold using the cross-pieces of the scaffold itself. As such, the Defendant argues that the Plaintiff has failed to establish that the "normal" method employed by the other workers (i.e. climbing down the scaffold itself) was inherently unsafe. The Defendant argues that the underlying accident was the result of the Plaintiff not choosing to descend the scaffold by climbing down, and/or his failure to request a ladder.

Oral argument

At oral argument on the motion, Plaintiff's counsel confirmed that the Plaintiff was working to erect the scaffold and that he was not working on the building itself (Oral Argument at 3). Plaintiff's counsel argued that the accident occurred at the end of the day while the Plaintiff was on the scaffold approximately 12 feet from the ground (*id.* at 4). Plaintiff's counsel further argued that there is no dispute that the Plaintiff was not provided with a ladder or any other safe method of ascending or descending the scaffold. In addition, Plaintiff's counsel argued that there were no ladders available anywhere on the premises (*id.* at 4-5). Plaintiff's counsel argued that the Plaintiff fell while he was using a wooden plank to get down from the scaffold to a flatbed truck, and that the reason why the Plaintiff used this unsafe method to get down from the scaffold was because the Defendant failed to provide the Plaintiff with any safe means of ascending or descending the scaffold (*id.* at 6-7).

In opposition, the Defendant did not dispute that the Plaintiff was not provided with a ladder. Further the Defendant did not dispute the Plaintiff's claim that there was no other means to descend the scaffold absent climbing down the scaffold itself. The Defendant argued that the scaffold itself constituted a "safety device" for the Plaintiff to climb down (*id.* at 7). The Defendant reiterated that the Plaintiff testified that other workers at the site "normally" climbed down the scaffold using the scaffold cross-pieces. Defendant argues in sum and substance that other workers safely climbed down the scaffold without getting injured and that the Plaintiff chose not to climb down (*id.* at 7). The Defendant took the position that the scaffold itself constituted a "safety device" that the Plaintiff could have safely climbed down and that it was the Plaintiff's obligation to climb down the scaffold as opposed to being provided with a ladder (*id.* at 9). As such, the Defendant argues that the Plaintiff has failed to establish prima facie that climbing down the scaffold absent a ladder was unsafe, and that there is an issue of fact as to whether or not the scaffold itself constituted an adequate "safety device" for the Plaintiff to climb

down in order to descend the scaffold.

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" *(Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [NY 2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [NY 2012] *internal quotation marks and citation omitted*). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [NY 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Plaintiff is entitled to summary judgment on his Labor Law 240 (1) claim

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 ... 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, 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" *(Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [NY 2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [NY 1993]). "The contemplated hazards are those 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 the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [NY 1991]). Further, the Scaffold Law is to be liberally construed to accomplish its purpose, which is to protect workers against the special hazards and risks involved in elevation differentials, by placing responsibility for safety practices at building construction sites on owners and contractors (*See Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-513 [NY 1991]).

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [NY 1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [NY1985]). "The extraordinary protections of Labor Law 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 915-916 [NY 1999], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [NY 1993]).

To prevail on a Labor Law § 240 (1) claim, the Plaintiff must show: (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity related risks); and (2) that the statutory violation was a contributing or proximate cause of the injuries sustained (*See Cahill v*

Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [NY 2004]; *Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 287-289 [NY 2003]). Upon making such a showing, "[t]he burden then shifts to defendant[s] to establish that 'there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Blake*, 1 NY3d at 289 n. 8).

To defeat the Plaintiff's motion for partial summary judgment, the Defendant must raise an issue of fact as to whether:

> (1) the Plaintiff had adequate safety devices available;
> (2) that he knew both that they were available and that he was expected to use them;
> (3) that he chose for no good reason not to do so; and
> (4) that had he not made that choice, he would not have been injured.

(*Escobar v 271 Mulberry St. Co., LLC*, 147 AD3d 473 [1st Dept 2017], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 [1st Dept 2011]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [NY 2004]). Further, "[w]hen the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group - N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]). However, "[i]f defendant['s] assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment" (*Blake*, 1 NY3d at 289 n. 8). Contributory or comparative negligence is not a defense to absolute liability under the statute (*Jamison v GSL Enters.*, 274 AD2d 356 [1st Dept 2000]; *Johnson v Riggio Realty Corp.*, 153 AD2d 485 [1st Dept 1989]).

Labor Law § 240 (1) applies to both "falling worker" and "falling object" accidents (*See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [NY 2011]). That is "specific gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Fegundes v N.Y. Tel. Co.*, 285 AD2d 526, 527 [2d Dept 2001], quoting *Ross v*

Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [NY 1993]). However, "[n]ot 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 Assocs.*, 96 NY2d 259, 267 [NY 2001]; *see also Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089 [2d Dept 2015]).

Upon review of the submitted papers and having conducted oral argument, the Court finds that the Plaintiff has established prima facie that the Defendant violated Labor Law 240 (1). There is no dispute that the Defendant failed to provide the Plaintiff with a method of descending the scaffold other than climbing down the scaffold itself. Further, there is no dispute that the wooden plank collapsed beneath the Plaintiff as he used it to descend the scaffold. As such, the Plaintiff has established that the plank was not an adequate safety device (*See Duran v Kijak Family Partners, L.P.*, 63 AD3d 992, 994 [2d Dept 2009]; *Ball v Cascade Tissue Group - N.Y., Inc.*, 36 A.D.3d 1187 [3d Dept Jan. 25, 2007]; *Nelson v Ciba-Geigy*, 268 A.D.2d 570 [2d Dept 2000]). The Court finds that the Plaintiff has established prima facie that the Defendant failed to provide the Plaintiff with <u>any</u> safety device in order to allow him to descend the scaffold in a safe manner, and that the lack of a safe means of descending the scaffold was the proximate cause of Plaintiff's accident. As such, the burden shifts to the Defendant to establish an issue of fact on this point.

Further, upon review of the submitted papers and having conducted oral argument, the Court finds that the Defendant has failed to create an issue of fact as to whether or not it provided adequate safety equipment to the Plaintiff in order for him to safely descend the scaffold.

> "The burden of providing a safety device is squarely on contractors and owners and their agents. Section 240 (1) of the Labor Law has unequivocally placed the duty on all contractors and owners to furnish or erect or cause to be furnished or erected, safety devices which shall be so constructed, placed and operated as to give proper protection. Thus, a worker is expected, as a normal and logical response, to obtain a safety device himself (rather than having one provided to him) only when he knows exactly where a safety device is located, and there is a practice of obtaining the safety device himself because it is easily done. "

(*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011] [internal citations, quotation marks and emendation omitted]).

The Defendant's core argument is that the Plaintiff could have safely descended by climbing down the cross-pieces of the scaffold itself. As such, the Defendant must present issues of fact as to the following:

> (1) that the scaffold itself provided a safe means for the Plaintiff to descend to the ground;
> (2) that the Plaintiff knew that climbing down the scaffold was a safe means of descending the scaffold and that he was expected to climb down the scaffold;
> (3) that the Plaintiff chose for no good reason not to climb down the scaffold; and
> (4) that had the Plaintiff not made that choice not to climb down the scaffold, he would not have been injured.

The Court does not find that the Defendant has created an issue of fact as to whether or not climbing down the rungs of the scaffold itself was a safe means of descending the scaffold (i.e. that the scaffold itself constituted an adequate safety device for descending scaffold), that the Plaintiff knew that climbing down the scaffold was safe, or that the Plaintiff understood that he was expected to climb down the scaffold. The Defendant's sole basis for its argument on these points is the Plaintiff's testimony that other employees "normally" climbed down the scaffold. However, the fact that other employees had safely climbed down from the scaffold absent any safety equipment is insufficient to create an issue of

fact as to whether or not this was a safe means of descending the scaffold, that the Plaintiff knew that climbing down the scaffold was safe, or that the Plaintiff understood that he was expected to climb down the scaffold. The Court does not find that the observed behavior of other workers is sufficient in-and-of-itself to create an issue of fact as to the adequacy of safety devices. In point of fact, the Plaintiff indicated that on the date of the accident he had observed workers descending the scaffold by jumping onto a flatbed truck below and that it was another worker who set up the wooden plank for the Plaintiff to descend. Further, the Defendant has not submitted any proof as to the design or build of the scaffold to suggest that workers could safely climb down from it absent any safety equipment such as a ladder.

Labor Law 240 arose from concern over unsafe conditions that beset employees who worked at heights.

> "In promulgating the statute, the lawmakers reacted to widespread accounts of deaths and injuries in the construction trades and, tellingly, fashioned that pioneer legislation to give proper protection to the worker. It embodies the Legislature's intent to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident. Although Labor Law § 240 (1) evolved over time, the phrase give proper protection has remained the heart of the statute and has endured through every amendment. The objective was — and still is — to force owners and contractors to provide a safe workplace, under pain of damages. As a consequence, we have adhered to the bedrock principle that the statute is to be construed liberally to achieve its purpose of protecting workers."

(*O'Brien v Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 35-36 [NY 2017] [internal citations, quotation marks and emendation omitted].)

For this Court to determine that the Defendant created an "issue of fact" as to the safety of climbing down from the scaffold based solely upon the fact that other workers managed to do so without getting hurt would run counter to the legislative intent of Labor Law 240. Such a determination would allow owners to sit back, provide no safe means for workers to safely descend a scaffold and simply hope for the workers to come up with ways to descend absent any safety protections. Creating an issue

of fact as to the safety of climbing down the rungs of a scaffold absent additional safety devices requires more than just referring to the fact that other workers did so without getting hurt.

Finally, any actions that the Plaintiff may have taken in choosing to use a wooden plank to descend the scaffold as opposed to climbing or jumping down does not take away from the fact that the lack of any safety device for descending the scaffold was the proximate cause of the Plaintiff's accident or that the Defendant failed to create an issue of fact as to whether or not it provided the Plaintiff with the necessary equipment to safely descend the scaffold. As such, the Plaintiff's "choice" to use the wooden plank would only go towards comparative fault, which is not a defense to a cause of action brought pursuant to Labor Law 240 (1) (*See Anderson v MSG Holdings, L.P.*, 146 AD3d 401 [1st Dept 2017]).

Conclusion

Accordingly and for the reasons so stated, it is hereby

ORDERED that the Plaintiffs' motion for partial summary judgment is granted as to liability on their Labor Law 240 (1) claim. It is further

ORDERED that within 20 days of the date of the instant decision, the Plaintiff shall serve a copy of the instant order upon the Defendant with notice of entry. It is further

ORDERED that within 30 days of the date of this order, the Plaintiff shall file with the Clerk of the Trial Support Office (room 158) a copy of this judgment with proof of service upon the Defendant, and said Clerk shall cause the matter to be placed upon the calender for a trial upon the issue of damages and the Plaintiff Veronica Aguilar Palma's claim for loss of consortium.

The foregoing constitutes the order and decision of the Court.

Dated: Aug 2, 2017

ENTER:

, JSC
HON. ROBERT D. KALISH
J.S.C.