Golan v Winthrop-University Hosp. Assoc.

2017 NY Slip Op 31942(U)

September 13, 2017

Supreme Court, New York County

Docket Number: 153634/2014

Judge: Kelly A. O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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JOSEPH GOLAN,

Plaintiff,

- v -

WINTHROP-UNIVERSITY HOSPITAL ASSOCIATION FORMERLY THE NASSAU HOSPITAL ASSOCIATION, WINTHROP UNIVERSITY HOSPITAL SERVICES CORP, LEND LEASE (US) HEALTHCARE DEVELOPMENT, LLC.

Defendants.

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MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this application to/for ______________________________.

This is an action to recover for damages for personal injuries sustained by an electrical apprentice helper when he fell from an A-frame ladder while working at a construction site.

Plaintiff Joseph Golan moves, pursuant to CPLR 3212, for partial summary judgment on his Labor Law § 240 (1) claim against defendants Winthrop-University Hospital Association Formerly The Nassau Hospital Association, Winthrop University Hospital Services Corp. (together, Winthrop), and Lend Lease Healthcare Development, LLC (Lend Lease and, together with Winthrop, Defendants). Defendants oppose.

BACKGROUND

On the day of the incident, Plaintiff was performing wiring and electrical work for B&G Electrical as an electrical apprentice helper as part of a project to erect a five-story research building for Winthrop when he fell while descending an A-frame ladder. Winthrop was the owner of the premises on which the incident occurred, and Lend Lease was hired to erect said research building. While it is undisputed that Winthrop was the owner of the subject premises, Lend Lease contends that it was hired as a construction manager and as such is exempt from Labor Law § 240 (1).

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the incident, he was employed by B&G Electrical as an electrical apprentice helper. Plaintiff was "roughing" out electrical wires, i.e., "laying them out loosely" (Plaintiff's tr. at 20-21). Plaintiff's employer had provided him with a ladder but did not provide him with a safety harness nor did anyone tell him to wear a harness. The ladder was a ten-foot fiberglass A-frame ladder. Plaintiff noticed that "there was surface weathering and that the ladder looked generally older," and he asked his supervisor for a different ladder, but there were no other ladders available for his use (*Id.* at 29-30). As Plaintiff descended the ladder, it "broke at the safety hinge where it is riveted and it twisted" and he fell from a height of six to seven feet (*Id.* at 33).

Lend Lease's Senior Superintendent, Keith Kallmeyer's Deposition Testimony

Keith Kallmeyer testified that he was the senior superintendent for Lend Lease. His responsibilities included developing and maintaining a job schedule and organizing and supervising trades on a daily basis to ensure on-time job completion. He testified that B&G Electrical did not have scaffolds on-site but had scissor lifts "on the job," and he knew that B&G

Electrical was using A-frame ladders during their work up to the day of the incident (Kallmeyer tr. at 83). He further testified that if he had observed an electrical worker performing work on an A-frame ladder at a height above six feet without a harness, he would have deemed that to be an unsafe condition. As a matter of course, "nobody could work above six feet without being tied off [with a harness]," and Mr. Kallmeyer had the authority to stop the work and have the worker use a harness (*Id.* at 84).

Lend Lease's Senior Environmental Health and Safety Manager, Peter Kwaschyn's Deposition Testimony

Peter Kwaschyn testified that he was the senior environmental health and safety manager for Lend Lease. He had the authority to tell any of the workers for any of the trades to not work on a particular ladder if he thought it was damaged and to require a worker working above six feet on a ladder without a harness to stop doing so. He testified that a medical person on the jobsite notified him of the incident. He went to the location of the incident and took several photographs of the subject ladder. He noticed "that the spreader bar [of the ladder] was broken at one point, and there was a lot of rust in the area" (Kwaschyn tr. at 19-20). He did not see any harness in the area. Mr. Kwaschyn also testified that B&G Electrical did not have scaffolds on-site.

DISCUSSION

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*,

49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Plaintiff's Labor Law § 240 (1) Claim Against Defendants

Plaintiff moves for partial summary judgment in his 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 A.D.2d 615, 615 [1st Dep't 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 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 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 N.Y.2d 259, 267 (2001); *Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008); *Buckley v. Columbia Grammar & Preparatory*, 44 AD3d 263, 267 (1st Dep't 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 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224-225 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

Initially, as the undisputed owner of the premises where the incident occurred, Winthrop may be liable for plaintiff's injuries under Labor Law § 240 (1). However, it must be determined whether Lend Lease may also be liable under this section of the Labor Law.

While

> "a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury."

Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-864 (2005); *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981). In addition,

> "[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor."

Russin v. Louis N. Picciano & Son, 54 N.Y.2d at 318.

A review of the record in this case establishes that Lend Lease "maintained sufficient control over [P]laintiff's work" so as to be liable as agent of the owner. *Stankey v. Tishman Const. Corp. of New York*, 131 A.D.3d 430, 430–31 (1st Dep't 2015). At the time of the incident, Plaintiff, while working on a ten-foot ladder, was "throwing electrical wire to the next stage" (Plaintiff tr. at 32). Here, Lend Lease was responsible for the safety and supervision of workers, including those workers working above six feet on ladders, and it had the authority to tell any workers, irrespective of trade, to not use a particular ladder, and had, in fact, done so on

occasions where the ladder appeared damaged. Notably, Lend Lease does not contend that it was not a statutory agent but only argues that it was a construction manager and therefore is not liable under the Labor Law. Lend Lease is to be considered an agent of the owner for the purposes of the Labor Law.

It should be noted that, "'[w]here 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 A.D.3d 173, 174 (1st Dep't 2004) (where plaintiff was injured as a result of unsteady ladder, 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 A.D.2d 152, 153 [1st Dep't 1998]); *Klein v. City of New York*, 89 N.Y.2d 833, 835 (1996); *Hart v. Turner Constr. Co.*, 30 A.D.3d 213, 214 (1st Dep't 2006) (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).

"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 A.D.2d 570, 572 (2d Dep't 2000); *Cuentas v. Sephora USA, Inc.*, 102 A.D.3d 504, 505 (1st Dep't 2013); *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d at 618 (defendant not entitled to dismissal of Labor Law § 240 (1) claim where it failed to establish that the ladder, which had slipped out from underneath the plaintiff, provided proper protection); *Peralta v. American Tel. and Tel. Co.*, 29 A.D.3d 493, 494 (1st Dep't 2006) (unrefuted evidence

that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)); *Chlap v. 43rd St.-Second Ave. Corp.*, 18 A.D.3d 598, 598 (2d Dep't 2005); *Sinzieri v. Expositions, Inc.*, 270 A.D.2d 332, 333 (2d Dep't 2000) (Labor Law § 240 (1) liability where the plaintiff "presented undisputed evidence that, while dismantling the . . . exhibit, he fell when an unsecured ladder upon which he was standing and which had no protective rubber skids, slipped from underneath him").

Here, not only did the ladder fail to prevent Plaintiff from falling, given the fact it appeared worn and, according to Mr. Kwaschyn's testimony, was rusted over, an additional safety device was warranted, such as a harness. "'[T]he availability of a particular safety device 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 devices or measures.'" *Nimirovski v. Vornado Realty Trust Co.*, 29 A.D.3d 762, 762 (2d Dep't 2006) (scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake") (quoting *Conway v. New York State Teachers' Retirement Sys.*, 141 A.D.2d 957, 958-959 [3d Dep't 1988]); *Dasilva v. A.J. Contr. Co.*, 262 A.D.2d 214, 214 (1st Dep't 1999) (where the plaintiff "was injured when the unsecured A-frame ladder was standing on was struck by a section of pipe he had cut, causing him to fall," the Court found that "the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"). As such, additional safety devices to prevent Plaintiff from falling were required. *See Ortega v. City of New York*, 95 A.D.3d 125, 131 (1st Dep't 2012); *Bush v. Goodyear Tire & Rubber Co.*, 9 A.D.3d 252, 253 (1st Dep't 2004).

Moreover, 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." *Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 291 (1st Dep't 2002); *McCarthy v. Turner Constr., Inc.*, 52 A.D.3d 333, 333-334 (1st Dep't 2009) (where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in 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).

Defendants' argument that Plaintiff was the sole proximate cause of his accident fails, because they "failed to provide an adequate safety device in the first instance." *Hoffman v. SJP TS, LLC*, 111 A.D.3d 467, 467 (1st Dep't 2013). In any event, Plaintiff's alleged conduct 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 N.Y.2d 452, 460 (1985); *Dwyer v. Central Park Studios, Inc.*, 98 A.D.3d 882, 884 (1st Dep't 2012); *Orphananoudakis v. Dormitory Auth. of State of N.Y.*, 40 A.D.3d at 502 (where there was no question that the ladder was defective due to its missing rubber feet, plaintiff was not the sole proximate cause of the accident); *Velasco v. Green-Wood Cemetery*, 8 A.D.3d 88, 89 (1st Dep't 2004) ("Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"); *Klein v. City of New York*, 222 A.D.2d at 352). "[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 A.D.3d 251, 253 (1st Dep't 2008) (quoting *Blake v. Neighborhood Hous. Servs. of N.Y.*, 1 N.Y.3d 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 A.D.2d 245, 247 (1st Dep't 2002); *see Velasco v. Green-Wood Cemetery*, 8 A.D.3d at 89 ("(p)laintiff's use of the ladder without his coworker present amounted, at most, to comparative negligence"); *Ranieri v Holt Constr. Corp.*, 33 A.D.3d 425, 425 (1st Dep't 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 A.D.3d 351, 351 (1st Dep't 2006); *Torres v Monroe Coll.*, 12 A.D.3d at 262 (Court noted that, even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident).

Further, Defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so. *See Durmiaki v. International Bus. Machs. Corp.*, 85 A.D.3d 960, 961 (2d Dep't 2011); *Kosavick v. Tishman Constr. Corp. of N.Y.*, 50 A.D.3d 287, 288 (1st Dep't 2008). Here, Defendants have not put forth any evidence that Plaintiff ignored any instruction to use any safety device. Moreover, Defendants have not refuted Plaintiff's testimony that there were no other ladders available at the site nor were there any available safety harnesses and that Plaintiff was not provided any tools other than the A-frame ladder. Mr. Kallmeyer's vague testimony that there were scissor lifts "on

the job" is insufficient to refute Plaintiff's testimony. *See Berrios v. 735 Ave. of the Ams.*, LLC, 82 A.D.3d 552, 553 (1st Dep't 2011) (quoting *Milewski v. Caiola*, 236 A.D.2d 320, 320 [1st Dep't 1997]) ("Finally, even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide [a] proper safety [device] was a more proximate cause of the accident'").

Thus, Plaintiff is entitled to partial summary judgment as to liability on the Labor Law § 240 (1) claim against Defendants.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Joseph Golan's motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants Winthrop-University Hospital Association Formerly The Nassau Hospital Association, Winthrop University Hospital Services Corp., and Lend Lease Healthcare Development, LLC is granted; and it is further

ORDERED that the remainder of the action shall continue.

9/13/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:	[ ] **CASE DISPOSED**			[X] **NON-FINAL DISPOSITION**		
	[X] **GRANTED**	[ ] **DENIED**		[ ] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**			[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **DO NOT POST**			[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	