Doupis v City of New York
2017 NY Slip Op 32504(U)
November 28, 2017
Supreme Court, New York County
Docket Number: 151250/2014
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2
Justice

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JOHN DOUPIS and FAITH DOUPIS,

Plaintiffs,

- v -

THE CITY OF NEW YORK, THE METROPOLITAN TRANSPORTATION AUTHORITY, THE METROPOLITAN AUTHORITY CAPITAL CONSTRUCTION COMPANY, and THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

INDEX NO. 151250/2014

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action arising from a construction accident, plaintiffs John Doupis and Faith Doupis move, pursuant to CPLR 3212, for summary judgment granting them partial summary judgment on liability as against defendants the City of New York ("the City"), The Metropolitan Transportation Authority ("MTA"), the Metropolitan Transportation Authority Capital Construction Company ("MTACC"), and the New York City Transit Authority ("NYCTA") (collectively "defendants") pursuant to Labor Law section 240(1). Defendants oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on November 21, 2013 in which plaintiff John Doupis ("plaintiff"), an employee of nonparty SSK Contractors, JV ("SSK"), was allegedly injured while working in a tunnel in the vicinity of 69th Street and Second Avenue during the construction of the Second Avenue Subway. Doc. 30, at pars. 21, 69.[1]

At his 50-h hearing on February 4, 2014, plaintiff testified that he was last employed on the day of the alleged incident, when he worked for SSK. Doc. 29, at p. 8. During the three years he was employed by SSK, he worked on the Second Avenue Subway project. Id., at p. 9. Plaintiff maintained that, on November 21, 2013, he was injured while working on a "work deck" located inside a tunnel he accessed from 68th Street and Second Avenue. Id., at p.17-18. At that time, he and a crew were preparing for a "concrete pour" to be done the next day. Id., at p. 19. To do so, he and a crew had to "finish tying rebar and then [they] had to move the arch form [a large steel form] in place, tighten it down and start building the bulkhead." Id.

At the time of his accident, plaintiff was on a "platform staircase" ("the stair platform") which was attached to, and moved with, the form. Id., at pp. 20-23, 26. The stair platform, which was steel and suspended with braces, was moved after each pour of concrete as the crew proceeded down the tunnel with their work. Id., at pp. 22-23, 25, 28. When the stair platform was moved, it was folded up and its "wings" were extended out once it was set into position for a concrete pour. Id., at pp. 34-35. When the stair platform was "extended out", the crew "come-alonged it up" to hold it into place. Id., at 35. Plaintiff did not know how the come-along was attached to the stair platform on the day of the incident but it was typically strung around a steel beam which would lift it. Id., at p..36. Prior to his accident, plaintiff was on the ground tightening the legs on the

[1] All references are to the documents filed with NYSCEF in connection with this matter.

form. Id., at p. 32-33. He then climbed up the ladder to the stair platform and fell. Id., at p. 33, 37-38. Although he initially stated that he did not know why or how he fell (id., at p. 39), he then stated that "the platform gave out" and that the next thing he remembered was waking up in the hospital. Id., at pp. 40-42.

Plaintiff commenced the captioned action by filing a summons and verified complaint on February 11, 2014. Doc. 30. In his complaint, plaintiff alleged that SSK was the general contractor on the project. Id., at par. 24. He further claimed that SSK entered into a contract with defendants to perform work at the site. Id., at pars. 25-35. Plaintiff set forth claims of common-law negligence, as well as violations of Labor Law sections 200, 240(1) and 241(6). Doc. 30. Plaintiff Faith Doupis, plaintiff's wife, asserted a claim for loss of consortium. Doc. 30, at pars. 88-90.

Defendants joined issue by filing their answer on March 7, 2014. Doc. 31.

In his bill of particulars dated April 7, 2014, plaintiff alleged that he was injured "when a stair/scaffold/platform" he was standing on "came loose and dropped down causing [him] to fall to the floor below." Doc. 32, at par. 4. He claimed that he was not provided with a proper work platform and that the stair platform was not properly secured. Id., at par. 5.

At his deposition on February 5, 2015, plaintiff essentially reiterated the testimony which he gave at his 50-h hearing. Doc. 36. He also stated that, on the day of the alleged incident, he was a laborer for SSK. Id., at p. 19. That day, his crew was in a Subway tunnel under construction pouring concrete to create arches for the tunnel. Id., at pp. 23-24. A steel form in the shape of an arch was used to pour concrete for this purpose. Id., at pp. 26-27. There was a stair platform attached to the form with nuts and bolts. Id., at pp. 27-28. The stair platform was connected to the top of the form. Id., at pp. 27, 33. The stairs on either end of the platform folded when it was moved and then were extended back out when the platform was set in place. Id., at p.37. The

form was held up by four legs and raised to the ceiling hydraulically. Id., at p. 28-29, 33, 35. A walkway was suspended from the form. Id., at pp. 29-30. The crew went up the stairs in order to build the bulkhead, which held the concrete in place. Id., at pp. 31-32.

Prior to the alleged incident, plaintiff's crew moved the form into place, unfolded the wings of the form, and raised the platform to the ceiling. Id., at p. 32. A come-along was supposed to be attached to a strong beam, such as that on the stairs. Id., at p. 39. After he tightened the legs of one of the wings, he climbed a ladder about 12 feet to work on a "water stop", which was a way of sealing the area between two concrete pours. Id., at pp. 39-42. When he got to the top of the ladder, he climbed approximately 3 steps and, the next thing he knew, he woke up in the hospital. Id., at pp. 43-45.

Amitabha Mukherjee, a manager and engineering consultant for nonparty WSP Parsons Brinckerhoff ("WSP"), appeared for a deposition on behalf of defendants on November 18, 2015. Doc. 37. WSP was hired by MTACC to be the consultant construction manager to oversee the construction contracts on the Second Avenue Subway project. Id., at p. 8. Although WSP was on the site to ensure that the work was performed in accordance with the contracts, SSK did the actual work on that portion of the project involving the 72nd Street Station. Id., at pp. 9-10. WSP also had oversight of job safety at the site. Id., at p. 13.

According to Mukherjee, plaintiff's accident occurred within the 72nd Street Station portion of the project. Id., at p. 19. On the day of the incident, workers were in the process of lining the station caverns with concrete. Id., at pp. 19-20. The swing deck plaintiff worked on could be used by workers to access "various portions of the upper level that they're working on when they're setting the forms." Id., at pp. 51-52. He described a come-along as being like a "turn buckle" which "has chains on both ends" so that it could be tightened "so that what you are trying to secure

stays in place." Id., at p. 52. On the day of the incident, the come-along was used to hold the swing deck in place, thus "allowing access for the people to get up to the upper portion of the arch form" and to place the forms they were working on. Id., at pp. 52-53, 135-136. Mukherjee further stated that, if a worker were standing on a platform and the come-along or its attachment failed, such would constitute a safety hazard. Id., at p. 137.

The note of issue was filed in the captioned action on March 6, 2017. Doc. 35. Plaintiffs now move, pursuant to CPLR 3212, for summary judgment granting them partial summary judgment on liability against defendants pursuant to Labor Law section 240(1). In support of the motion, plaintiffs submit, inter alia, the 50-h and deposition transcript of plaintiff, the deposition transcript of Mukherjee, and the affidavits of witnesses Timothy Kilker, Ian Hintze, and David Cheshire. Defendants oppose the motion.

In his affidavit, Kilker states that he was employed by SSK on the day of the incident. Doc. 45. Although he was not present at the time of the incident, he worked on the shift prior to plaintiff's. On the day of the accident, "the main arch that created the form for the concrete that lined the tunnel was in the process of being moved into place for the next pour. Id. He said that the workers were required to climb on the arch to set bulkheads before concrete was poured. In order for workers to reach the upper level of the form, they had to "climb ladders to get to elevated stairways that [were] hinged to the form." Id.

The stairway/platform was originally secured by sliding a steel bar under it to hold it level. Id. Before the alleged accident, the steel bar became bent and could not properly hold the stairway/platform in its upright position. Instead of fixing the bar, SSK workers secured the stairway/platform in the "up" position by threading a come-along and chain through the stairway risers.

Hintze states in his affidavit that he was employed by SSK and was present at the site on the day of the incident. He responded to the accident scene immediately after the incident occurred. Doc. 46. Prior to the incident, Hintze had seen plaintiff standing on a platform that was on the concrete form for pouring the arch. When he responded to the scene, he saw that the platform had fallen. The platform had a hinge on one end so that the other end could be lowered to serve a dual purpose as a stairway. The mechanism which was supposed to hold the platform in place was broken at the time of the incident. Instead of fixing the mechanism, SSK "jerry-rigged" a come-along and chain to hold the platform in place. After the incident, Hintze saw that the attachment on the come-along's chain had broken and that one end of the platform had fallen. Hintze opined that the incident occurred due to the combination of broken locking mechanism and the improper use of the come-along.

Cheshire, a surveyor employed by SSK and a witness to the alleged accident, states that, at the time of the incident, workers were moving the crown form into position for the next concrete pour. Doc. 47. The crown form was a giant steel structure used to form wet concrete into the shape of a tunnel arch. Steel staircases were component parts of the crown form which were used to gain access to the upper sections of the form. After workers climb the stairs, the stairs are swung up to a position parallel to the floor and locked into place to function as platforms for workers on the upper section of the crown arch.

After the stairways were raised to their platform position, Cheshire saw the stairway/platform plaintiff was standing on drop, throwing plaintiff to the ground approximately 15 feet below. After plaintiff fell, Cheshire learned that the locking mechanism for the stairway/platform was broken and that the stairway was rigged to be held up by a come-along and a chain. The chain had broken from its attachment to the crown form causing the stairway/platform

to drop out from under plaintiff. Cheshire opined that the use of the come-along and chain as a temporary remedy to the broken locking mechanism caused plaintiff's fall.

LEGAL CONCLUSIONS:

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) (internal citations omitted). To defeat the motion, the opposing party must "'assemble, lay bare and reveal his or her proof in order to show that [his or her] defenses are real and capable of being established at trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.'" *Genger v Genger*, 123 AD3d 445, 447 (1st Dept 2014), quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 (1st Dept 1993).

As noted above, plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants. Labor Law § 240 (1) provides, in pertinent part, as follows:

> "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). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed." *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 (2d Dept 2006) (internal citations omitted). To prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 (2004), citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 (2003).

The evidence submitted by plaintiff establishes his entitlement to summary judgment as a matter of law on his claim pursuant to Labor Law section 240(1). Plaintiff testified at his 50-h hearing that, after he climbed onto the platform, it "gave out" and the next thing he remembered was waking up in the hospital. Doc. 29, at pp. 40-42. At his deposition, plaintiff testified that he took about 3 steps onto the stairway/platform and, the next thing he knew, he was in the hospital. Doc. 36, at pp. 43-45.

In his affidavit, Cheshire states that steel staircases were parts of the crown form used by workers to access upper sections of the form. After workers climb the stairs, the stairs are swung up to a position parallel to the floor and locked into place to function as platforms for workers on the upper section of the crown arch. On the day of the incident, Cheshire saw the stairways raised to their platform position, and then saw the stairway/platform plaintiff was standing on drop, throwing plaintiff to the ground below. After plaintiff fell, Cheshire learned that the locking mechanism for the stairway/platform was broken and that the stairway was rigged to be held up by a come-along and a chain. The chain had broken from its attachment to the crown form causing the stairway/platform to drop out from under plaintiff.

Hintze states in his affidavit that SSK "jerry-rigged" a come-along and chain to hold the platform in place and that, after the incident, he saw that the attachment on the come-along's chain had broken and that one end of the platform had fallen.

Kilker states that the steel bar regularly used to hold the stairway/platform in an upright position was not used on the day of plaintiff's accident because it was bent. Instead, SSK workers used a come-along and a chain threaded through the stairway risers to keep the stairway/platform in the "up" position.

Defendants' failure to secure the stairway/platform from which plaintiff fell was a proximate cause of the incident. The stairway/platform from which plaintiff fell functioned as an elevated working platform and its collapse triggered a violation of Labor Law section 240(1). *See Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 (1st Dept 2014), citing *Berrios v 735 Ave. of the Ams.*, LLC, 82 AD3d 552 (1st Dept 2011); *Becerra v City of New York*, 261 AD2d 188 (1st Dept 1999).

Additionally, the come-along, which had been meant to secure the stairway/platform in an upright position, is an "other device" within the scope of Labor Law section 240(1). *See Koumianos v State*, 141 AD2d 189, 191 (3rd Dept 1988). Thus, defendants' failure to ensure that the come-along and chain attached thereto functioned properly was a violation of Labor Law section 240(1). Mukherjee even conceded at his deposition on behalf of defendants that, if a worker were standing on the platform and the come-along or its attachment failed, such would constitute a safety hazard. Id., at p. 137.

Contrary to defendants' contention, any instruction by SSK or its contractors to use the come-along was not a superseding cause of the incident. SSK's "conduct was not 'so far removed from any conceivable violation of the statute' as to constitute a superseding cause of the accident

(*Hajderlli v Wiljohn 59 LLC*, 71 AD3d 416, 416, 897 NYS2d 37 [2010], *lv denied* 15 NY3d 713 [2010])." *Matter of E. 51st Street Crane Collapse Litig.*, 89 AD3d 426, 428 (1st Dept 2011).

In light of the foregoing, it is hereby:

ORDERED that the motion by plaintiffs John Doupis and Faith Doupis for partial summary judgment on liability against defendants the City of New York, The Metropolitan Transportation Authority, the Metropolitan Transportation Authority Capital Construction Company, and the New York City Transit Authority pursuant to Labor Law section 240(1) is granted; and it is further

ORDERED that this action shall continue with respect to plaintiff's remaining causes of action; and it is further

ORDERED that the issue of damages shall be determined at trial; and it is further

ORDERED that this constitutes the decision and order of the court.

11/28/2017
DATE

KATHRYN E. FREED, 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