SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX – IAS PART26

JOHN DONLON,

Plaintiff,

-against-

Index No. 22047/2015E

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

MEMORANDUM DECISION/ORDER

Defendants.

HON. RUBEN FRANCO

In this action to recover monetary damages for personal injuries allegedly sustained as a result of a fall from a ladder in the workplace, plaintiff moves for summary judgment claiming that he is entitled to judgment as a matter of law under on the issue of liability under Labor Law §240(1).

Plaintiff alleges that while painting a pipe 20 feet above the ground on an unsecured ladder, the ladder slipped and he fell. Plaintiff avers that by not providing safety equipment or safe work conditions, defendants engaged in common law negligence, and violated Labor Law §§200, 240(1) and 241(6), as well as various provisions of the New York State Industrial Code, the Code of Federal Regulations, the New York Building Code and the OSHA regulations.

In plaintiff's affidavit, submitted in support of the motion, he states that on February 7, 2015, while employed as a handyman in a public school building located in Bronx County (the "School"), he was working alone painting a pipe approximately 20 feet above the floor. He located a 40-foot extension ladder stored in a closet at the School, which he rested on a cross beam near the ceiling, with the bottom, unsecured in any manner, resting on a wooden floor. No one was holding the ladder while he was on it. As he was descending the ladder, its bottom

slipped; the top of the ladder, no longer resting on the cross beam, crashed to the wooden floor below while he was holding it.

In opposition to the motion, defendants submit the affidavit of Vincent Gilmore who states that at the time of plaintiff's accident he was employed at the School as a Custodian Engineer. His duties included cleaning, maintenance, supervising and training staff, including plaintiff, and fire safety. At the time of the accident he was plaintiff's supervisor. He further states as follows: that he personally trained plaintiff on several aspects of his work tasks, including the use of safety equipment; that prior to the accident, he advised his staff, including plaintiff, not to use a ladder without the assistance of another staff member; that it was common knowledge among custodial that they should not use a ladder without the assistance of another person; and, that a few weeks prior to plaintiff's accident, the School received a violation from the New York City Fire Department because the sprinkler pipe in the auditorium was not painted in the appropriate color, however, he did not assign plaintiff to address this issue and plaintiff took it upon himself to paint the sprinkler pipe.

Labor Law §240(1) provides:

> 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, 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.

The failure to properly secure a ladder so as to hold it steady and erect during its use, constitutes a violation of Labor Law §240[1] (see Ortiz v. Burke Ave. Realty, Inc., 126 A.D.3d 577 [1st

Dept. 2015]; Estrella v. Git Industries, Inc., 105 A.D.3d 555 [1st Dept. 2013]; McCaffery v. Wright & Co. Constr., Inc., 71 A.D.3d 842 [2nd Dept. 2010]; Siegel v. RRG Greene, Inc., 68 A.D.3d 675 [1st Dept. 2009]; McCarthy v. Turner Constr., Inc., 52 A.d.3d 333 [1st Dept. 2008]; DaSilva v. A.J. Contracting Co., 262 A.D.2d 214 [1st Dept. 1999]).

The fact that plaintiff's accident was not witnessed by anyone is not a bar to summary judgment inasmuch as defendant presents no evidence to contradict plaintiff's version of the accident, or to raise an issue as to his credibility (see Ortiz v. Burke Ave. Realty, Inc., *supra*). And defendants' claim that the motion is premature because discovery has not taken place, is unavailing. Defendants have failed to identify information which is in the exclusive control of plaintiff, and that is essential to the presentation of their opposition to the motion, and showing the existence of an issue of fact such that would warrant denial of the motion under CPLR § 3212(f) (see Erkan v. McDonald's Corp., 146 A.D.3d 466 [1st Dept. 2017]).

Defendants set forth a recalcitrant worker defense. This defense is not available to defeat a claim under Labor Law § 240(1) (see Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555 [1993]). In those instances where the defense is available, there must be a showing that the injured worker was provided with safety devices by the owner or employer, and the worker refused to use them (*Id.* at 562). The affidavit provided by Gilmore is insufficient to raise an issue of fact, in that he neither claims, nor provides proof, that there were safety devices at the School where the accident occurred. Moreover, informing an injured party, as Gilmore claims to have done here, not to use a ladder without assistance from another person, by itself, does not create an issue of fact to support a recalcitrant worker defense (*Id.* at 562).

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability is

granted.

This constitutes the Decision and Order of the court.

Dated: December 12, 2017

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO