Ung Jin Kim v Twin Deer Group, LLC
2013 NY Slip Op 33200(U)
December 23, 2013
Supreme Court, Queens County
Docket Number: 16322/10
Judge: Janice A. Taylor

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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UNG JIN KIM and JAE SOOK KIM,
Plaintiff(s),

Index No.:16322/10
Motion Date: 7/16/14
Motion Cal. No.:66 &67
Motion Seq. No:4 & 5

- against -

TWIN DEER GROUP, LLC., AVON PLUMBING & HEATING, INC., and CHON ENGINEERING, P.C.,
Defendant(s).

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AVON PLUMBING & HEATING, INC.,

Third-Party
Index No.: 350462/11

Third-Party Plaintiff(s),

- against -

AMKO ELECTRICAL CONSTRUCTION & MAINTENANCE, INC.,

Third-Party Defendant(s).

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The following papers numbered 1 to 20 read on this motion by defendant, Avon Plumbing & Heating ("Avon")seeking an order to restore this matter to the calendar, granting summary judgment, pursuant to CPLR §3212, and dismissing all claims against Avon; motion by defendant, Chon Engineering, P.C. ("Chon"), for summary judgment, pursuant to CPLR §3212, in its favor; cross-motion by plaintiffs, Ung Jin Kim and Jae Sook Kim ("Kim") for an order for summary judgment, pursuant to CPLR §3212, and denial of defendant, Avon's motion.

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Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are decided as follows:

Plaintiffs, Kim, in this negligence/labor law action seek damages for personal injuries sustained on February 3, 2010, at 231-10 Northern Boulevard, in Queens, New York (premises). On said date, plaintiff fell from a ladder while performing electrical work at the premises. Twin Deer Chon Group, LLC (Twin Deer) owns the premises, and had hired Avon as the general contractor on the project. Twin Deer entered into a written agreement with Ching Kuo Chiang, a principal of Twin Deer, to provide design services in connection with the renovation project. Avon moves for summary judgment in its favor on the grounds that "plaintiff cannot establish violations of Labor Law §§ 240, 241(6) or §200 on the part of Avon, and further for summary judgment in its favor on its third-party claims against Amko Electrical Construction & Maintenance, Inc. (Amko). Chon moves for summary judgment in its favor on the ground that it was merely the design engineer with no duty to supervise plaintiff's work. Plaintiff opposes the motions and cross-moves for summary judgment in his favor on his labor law claims. Plaintiff's cross-motion is opposed by both Chon and Avon.

By order dated December 21, 2012, this court denied defendant/third-party plaintiff, Avon's, motion for a summary judgment, with leave to renew, for its failure to annex a copy of the answer served by defendant Chon with its motion. Defendant Avon now moves, pursuant to CPLR §2221, for leave to renew its prior motion for a summary judgment. CPLR §2221[e] mandates that a motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination.

In support of the instant motion, defendant, Avon, submits a copy of defendant Chon's answer to the complaint. Accordingly, the instant motion for leave to renew is hereby granted.

Upon renewal, this court will consider the underlying motion for summary judgment dismissing the complaint and all claims against Avon.

Motion by Avon

The branch of the motion by Avon which is for summary judgment in its favor dismissing the allegations in the complaint which allege a violation of Labor Law §240(1), is denied. Avon failed to make a showing that plaintiff's accident was not proximately caused by a failure to provide adequate safety devices to protect against

a risk arising from a significant height differential. Labor § 240(1) 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."

The Court of Appeals has held that this duty to provide safety devices is non-delegable (*Gordon v Eastern Ry. Supply,* 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian,* 66 NY2d 452, 459 [1985]).

While "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 288 [2003] [internal quotation marks and citation omitted]), the statute "is to be liberally construed" to accomplish its purpose of better protecting "work [ers] engaged in certain dangerous employments" (*Sherman v Babylon Recycling Ctr.,* 218 AD2d 631, 631 [1995] [internal quotation marks and citation omitted]; *see also Harris v City of New York,* 83 AD3d 104, 108 [2011]). Although Labor Law § 240(1) claims are typically grouped into "falling worker" and "falling object" cases, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.,* 13 NY3d 599, 603 [2009]).

Defendant also claims that plaintiff was the sole proximate cause of the subject accident. 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 AD2d 245, 247 [2002]). In other words, "[e]ven if the plaintiff was partially at fault, a worker's contributory negligence is not a defense to a Labor Law § 240 (1) claim" (*Moniuszko v Chatham Green, Inc.,* 24 AD3d 638, 639 [2005] [although plaintiff had temporarily removed his safety harness, the sole proximate cause of the accident was a broken hook which caused the scaffold to fall]; *Crespo v Triad. Inc.,* 294 AD2d 145, 147

[2002]). Neither comparative fault nor assumption of the risk is a defense to a Labor Law § 240 (1) cause of action (*Bland v Manocherian,* 66 NY2d 452, 460 [1985]; *Dos Santos v State of New York* 300 AD2d 434, 434 [2002]; *Hauff v CLXXXII Via Magna Corporation,* 118 AD2d 485, 486 [1986]).

The branch of the motion which is to dismiss the allegations which allege a violation of Labor Law §241(6), is granted. It is well-settled that to support a §241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a specific standard of conduct, and that such violation was the proximate cause of his injuries *(see St. Louis v Town of North Elba,* 16 NY3d 411 [2011]; *Gasques v State,* 15 NY3d 869 (2010); *Fusca v A & S Const., LLC,* 84 AD3d 1155 [2d Dept.2011]; *Forschner v Jucca Co .,* 63 AD3d 996 [2nd Dept.2009]; *Harris v Arnell Const. Corp.,* 47 AD3d 768 [2nd Dept.2008]). "In order to support a claim under section 241(6), however, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna,* 12 NY3d 511 (2009). Here, defendant demonstrated its *prima facie* entitlement to summary judgment and dismissal of Labor Law §241(6) based upon plaintiff's failure to demonstrate the applicability, or allege specific violations of the New York State Industrial Code which were the proximate cause of his injuries.

Each of the Industrial Code regulations relied upon by plaintiff to support its Labor Law §241(6) claim, to wit, 12 NYCRR §23-1.21(b)(4)(ii); 12 NYCRR §23-1.7(d) and 12 NYCRR §23-1.7(e)(2), pertain to slippery surfaces, slipping hazards and tripping hazards. However, there is no evidence in the record that plaintiff's injury occurred as a result of a tripping hazard or resulted from slippery conditions, or due to the ladder slipping, shifting or otherwise moving.

The branch of the motion by Avon which is for summary judgment dismissing so much of the causes of action which allege a violation of Labor Law §200 and common law negligence, is granted. Essential to liability pursuant to Labor Law §200 is the defendant's ability to control or supervise the plaintiff's work (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *Lombardi v Stout,* 80 NY2d 290, 295 [1992]), or actual or constructive notice of the dangerous condition (*see Brown v Brause Plaza, LLC,* 19 AD3d 626, 628 [2005]; *DeBlase v Herbert Constr. Co.,* 5 AD3d 624 [2004]; *Yong Ju Kim v Herbert Constr. Co.,* 275 AD2d 709, 712 [2000]). Here, there is no claim that Avon exercised any control or supervision over the

plaintiff's work, and Avon demonstrated in support of the motion that it had no notice, actual or constructive, of any alleged dangerous condition at the work site. In opposition, plaintiff failed to raise a triable issue of fact.

Avon is not entitled to summary judgment on its third-party claims against Amko because there are triable issues of fact as to whether, *inter alia*, the plaintiff suffered a "grave injury" within the meaning of Workers' Compensation Law § 11 (*see Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 488-489 [2006]; *cf. Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2007]; *Heffernan v Bais Corp.*, 294 AD2d 401 [2002]).

Motion by Chon Engineering, P.C.

"It is well-settled in New York that liability may not be imposed upon an engineer, who is engaged to assure compliance with construction plans and specifications, for an injury sustained by a worker, unless the engineer commits an affirmative act of negligence or such liability is imposed by a clear contractual provision" (*Prado v Bowne & Sons*, 207 AD2d 875 [1994], citing *Brooks v Gatty Serv. Co.*, 127 AD2d 553, 554 [1987]). Chon demonstrated, by evidentiary material consisting of affidavits and deposition testimony, that its only duties with respect to the renovation project were to prepare the plans and specifications for the work and to conduct periodic inspections of the site to determine whether the work was being performed in accordance with those specifications. The plaintiff came forward with no evidence indicating that Chon controlled the manner in which the work was carried out, that Chon committed any affirmative act of negligence, or that any agreement between Chon and the owners or general contractor imposed a duty upon Chon to ensure the plaintiff's safety. Accordingly, the motion by Chon to dismiss the complaint, insofar as asserted against Chon, is granted.

Cross-Motion by Plaintiffs, Ung Jin Kim and Jae Sook Kim

The cross-motion by plaintiffs for summary judgment in their favor is denied. Where, as here, an employee is injured in a fall from a ladder, which is not otherwise shown to be defective, the issue of whether the ladder provided the employee with the proper protection required under this statute is a question of fact for the jury *(see Chan v Bed Bath & Beyond*, 284 AD2d 290 [2001]; *Benefield v Halmar Corp.*, 264 AD2d 794 [1999]; *Rice v PCM Dev. Agency Co.*, 230 AD2d 898 [1996]).

The *Noseworthy* rule is not applicable to the case at bar. The rule in essence is that "in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence" (citations omitted)

(*Noseworthy v City of New York*, 298 NY 76, 80 [date]). The rule, therefore, is applied when there are no eyewitnesses to the occurrence, and the participant is incapable of testifying either because he is dead (*Noseworthy v City of New York*, supra), or amnesiac (*Schechter v Klanfer*, 28 NY2d 228 [1971]; *Wartels v County Asphalt*, 29 NY2d 372, 380 [1972]). In the case at bar, plaintiff did testify. His deposition testimony indicates that he is able to recall many details regarding the work he was performing at the time of the subject accident; in particular details regarding the ladder that he was using, the placement of the ladder, as well as numerous details regarding his residential and employment history, educational background, the details of the project on which he was employed by Amko, details of his prior accident, as well as his finances, activities, physical condition, injury and treatment related to the subject accident. It appears that the only thing he could not recall was how he came to fall from the ladder. An inability to recall one detail of an event, in the context of an ability to recall other details of that event, does not entitle plaintiff to a lesser standard of proof under *Noseworthy* (*see Williams v Hooper*, 82 AD3d 448 [2011]; *Miceli v GEICO Properties*, 215 AD2d 461 [1995]).

Conclusion

The branch of the motion by defendant, Avon, for summary judgment in its favor dismissing the allegations in the complaint which allege a violation of Labor Law §240(1), is denied.

The branch of the motion by defendant, Avon, to dismiss the allegations of a violation of Labor Law §241(6), is granted.

The branch of the motion by defendant, Avon, for summary judgment dismissing so much of the causes of action which allege a violation of Labor Law §200 and common law negligence, is granted. The branch of the motion by Avon which is for summary judgment on its claims for indemnification from Amko, is also denied.

The motion by defendant, Chon, for summary judgment in its favor dismissing the complaint, insofar as asserted against it, is granted.

The cross-motion by plaintiffs, Ung Jin Kim and Jae Sook Kim, for summary judgment in their favor is denied.

Dated: December 23, 2013

JANICE A. TAYLOR, J.S.C.

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