Grgas v Lend Lease (US) Constr., LMB, Inc.
2014 NY Slip Op 31609(U)
June 20, 2014
Supreme Court, New York County
Docket Number: 157410/12
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THOMAS GRGAS,

Plaintiff,

-against-

LEND LEASE (US) CONSTRUCTION, LMB, INC. f/k/a BOVIS LEND LEASE, LMB, INC., MOUNT SINAI SCHOOL OF MEDICINE OF NEW YORK UNIVERSITY and THE MOUNT SINAI HOSPITAL,

Defendants.

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Index No.: 157410/12

Motion Seq. No. 002

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries brought under, *inter alia*, New York State Labor Law §§ 240(1) and 241(6), plaintiff Thomas Grgas ("plaintiff") moves pursuant to CPLR 3212 for summary judgment on the issue of liability.

Factual Background

Plaintiff worked as a union (Local 12) insulator/installer at a construction site at which a new 12-story research facility at the Mount Sinai Center for Science and Medicine was being built (the "premises"). The premises are allegedly owned by defendants Mount Sinai School of Medicine of New York University and the Mount Sinai Hospital, and the alleged general contractor for the project is defendant Lend Lease (US) Construction, LMB, Inc., f/k/a Bovis Lend Lease, LMB, Inc. ("Lend Lease").

On March 28, 2012, plaintiff was working on the 11th floor of the premises in a generator room, installing insulation on a generator muffler while on a scaffold.[1] The generator is

[1] The scaffold was allegedly owned by non-party Matura Insulation, which employed plaintiff at the time of the alleged incident.

approximately 35-40 feet long, 12 feet high, and eight feet wide. Since the muffler is elevated from the ground level, the scaffold was required to install the insulation.

Plaintiff and his co-workers on the site constructed the scaffold one or two days before the incident. No guardrails were installed on the sides of the scaffold, purportedly due to the presence of existing duct work, and also because plaintiff's apprentice needed space to hand construction materials to him.

Before beginning the insulation work on the day of the accident, plaintiff or his apprentice set up a harness for plaintiff which contained a retractable lanyard and was subsequently hooked onto a designated tie-off location.

Patrick McAlarney ("McAlarney"), Lend Lease's health and environmental safety manager, testified that the tie-off was unable to be performed at the desired location directly horizontal over plaintiff's head because the finished ceiling had been completed. As a contingency plan, the tie-off location was designated at the muffler supports on the generator itself. McAlarney testified that such supports were capable of supporting weights up to 5,000 pounds. Additionally, McAlarney and plaintiff's foreman implemented a pre-task plan wherein plaintiff and his co-workers were instructed where and how to tie their lanyards off at the muffler supports.

The alleged incident occurred when plaintiff tripped on plastic covering on the scaffold; prior to the accident, protective plastic covering had been placed on and/or over the generator. Plaintiff's lanyard locked, and he fell approximately five feet. While suspended in the air, plaintiff's body was swung and slammed into the generator, which caused injuries to his left knee and left arm. According to McAlarney, plaintiff swung back and into the generator because the

tie-off location was not in a perfect horizontal position over his head.

Arguments

In the moving papers, plaintiff argues that defendants violated New York State Labor Law § 240(1), which imposes absolute liability upon owners and general contractors for injuries sustained by construction workers who fall from heights due to the lack of proper protection. As is relevant, a plaintiff is not required to establish that the owner or general contractor had knowledge of the unsafe condition, since the only two elements of a Section 240(1) cause of action are that the statute was violated, and that the violation was a proximate cause of the injury. Here, defendants violated the section in that the scaffold was inadequate and defective since: (a) it was missing guardrails; (b) there was unsecured plastic covering on the scaffold planks; and (c) defendants failed to provide a proper anchor for plaintiff to affix his harness.

Providing a scaffold without guardrails violates Labor Law § 240(1) and establishes a *prima facie* case for the falling worker. Here, it is undisputed that the subject scaffold was missing guardrails, and it is irrelevant that plaintiff lost his balance prior to falling. Moreover, plaintiff was a "covered worker" performing a "covered activity" under Labor Law §§ 240(1) and 241(6). With further respect to this point, defendants also violated industrial code 12 N.Y.C.R.R. 23-5(j) (the "Industrial Code") due to their failure to provide a scaffold with appropriate safety rails.

Furthermore, the mere fact that plaintiff did not actually strike the ground below him does not affect his entitlement to summary judgment. Here, plaintiff's injuries were a direct result of a gravity-related risk, which became evident due to the lack of a safety rail on the scaffold as well as an improper tie-off location to which plaintiff's harness was attached. McAlarney admitted

the tie-off point which he approved was not horizontally aligned or in the ideal position, and caused plaintiff to swing back into the generator after he fell. Moreover, case law provides that an "almost fall" is not a valid defense to a Labor Law claim, and summary judgment is not precluded in this instance.

Also, plaintiff cannot be considered a "recalcitrant worker" since he was wearing his harness, which was affixed to the designated tie-off location. Likewise, the sole proximate cause defense is inapplicable here because there is evidence that defendants violated the Industrial Code.

In opposition, defendants argue that questions of fact exist as to whether plaintiff's own conduct constituted the sole proximate cause of the accident, and whether plaintiff was provided with an adequate safety device.

It is undisputed that plaintiff himself and his co-workers set up the scaffold, and failed to install the allegedly requisite guardrails. Plaintiff testified, *inter alia*, that either he or his apprentice set up the hooks to which they attached the retractable lanyard plaintiff wore during the incident; and the scaffold could not be completely enclosed with guardrails due to the presence of existing duct work.

McAlarney's testimony demonstrates the existence of an issue of fact as to whether the equipment provided to plaintiff was adequate. McAlarney testified that the identified tie-off points for plaintiff's lanyard were capable of supporting weights up to 5,000 pounds, and that he and plaintiff's foreman implemented a pre-task plan wherein plaintiff and his co-workers were instructed on where to tie their lanyards to, and how to tie them off.

Defendants thus contend that where there is evidence indicating that a plaintiff's

negligent construction of a scaffold/platform cause such a device to fail, the sole proximate cause defense is available. Here, plaintiff admits that he erected the scaffold which was involved in his accident, and that a guardrail had not been installed so his apprentice could hand materials up to him while he was standing on the scaffold.

Likewise, the motion as to the Industrial Code should be denied, as there is adequate evidence of plaintiff's own comparative negligence with respect to: (a) utilizing the scaffold without the proper guardrails in place; and (b) the failure of plaintiff to observe that the plastic which allegedly caused him to stumble and fall from the scaffold.

In reply, plaintiff notes that defendants do not dispute that plaintiff was a "protected worker" engaged in a "protected activity," or that he fell off a scaffold which was missing a guardrail. Additionally, defendants do not raise an issue of fact regarding the missing guardrail being the proximate cause of plaintiff's accident. Plaintiff reiterates his contentions as to the applicable case law, which provide that a scaffold without guardrails is a clear violation of Labor Law § 240(1).

The sole proximate cause defense cannot lie, because once a plaintiff establishes that a violation of Labor Law § 240(1) was a proximate cause of the accident, the plaintiff's conduct cannot be the sole proximate cause as a matter of law. On this note, the clear violation of the Industrial Code provides for absolute liability for both sections 240(1) and 241(6) of the Labor Law.

Defendants' claim that an issue of fact exists regarding sole proximate cause because plaintiff assisted in the erection of the scaffold is meritless because such conduct would, at most, constitute contributory negligence, which is not a defense to a Section 240(1) claim.

And, defendants' cited case law is factually distinguishable, as it concerned a situation in which the plaintiff himself removed the support pieces of the scaffold which resulted in his fall. Here, defendants inspected and approved the manner in which the scaffold was erected. In any event, the First Department has found absolute liability even in cases where the plaintiff was the individual who erected or dismantled the scaffold.

Moreover, defendants fail to address plaintiff's asserted violation regarding the tie-off location. The issue was not the manner in which plaintiff was hooked on, or the weight capacity of the tie-off location, as neither was a factor in the incident. The essential and undisputed issue is that defendants designated a tie-off location that was not directly above the area in which plaintiff worked, which created the very hazard that contributed to the incident. McAlarney admitted that he was aware that the tie-off location was not aligned with the working area, and acknowledged that the reason plaintiff swung back into the generator after falling was because the tie-off location was not aligned with his work location, but rather tied off at the muffler supports.

Discussion

It is well established that the "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 eliminate any material issues of fact" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*see Zuckerman*, *supra*), and the failure

to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v. CAC Business Ventures, Inc.*, 52 A.D.3d 327, 859 N.Y.S.2d 646 [1st Dept 2008]; *Murray v. City of New York*, 74 A.D.3d 550, 903 N.Y.S.2d 34 [1st Dept 2010]).

Labor Law § 240(1) provides that all owners and contractors (including general contractors) involved in construction projects shall furnish, or cause to be furnished, scaffolding, hoists, braces, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to persons working on such projects. The section imposes absolute liability on such entities when their failure to provide an adequate safety mechanism causes a worker's injury due to hazards related to the effects of gravity or elevation (*see Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 [1991]; *Dominguez v. Lafayette-Boynton Housing Corp.*, 240 A.D.2d 310, 659 N.Y.S.2d 21 [1st Dept 1997]).

The duty imposed by the section is non-delegable, and an owner or contractor who breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (*Ross v. Carter–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 [1993]). Moreover, such absolute liability attaches even when the injured worker contributed to the accident (*see Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 [1985]).

To establish a cause of action under Labor Law §240(1), a plaintiff must show that the statute was violated, and the violation was a proximate cause of the worker's injury (*Tounkara v. Fernicola*, 80 A.D.3d 470, 914 N.Y.S.2d 161 [1st Dept 2011] ("Plaintiff made a *prima facie* showing of defendants' liability under § 240(1) by asserting that defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of the accident"); *see*

also Blake v. Neighborhood Housing Servs. of New York City, Inc., 1 N.Y.3d 280 [2003]).

In determining whether Section 240(1) applies, "the dispositive inquiry ... does not depend upon the precise characterization of the device employed. Rather, 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" (*see Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 10 [2011], *quoting Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 [2009]). The Court of Appeals has consistently "observed that the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves" (*Abbatiello v. Lancaster Studio Assoc.*, 3 N.Y.3d 46, 50 [2004], *quoting Panek v. County of Albany*, 99 N.Y.2d 452, 457 [2003]).

Similarly, Labor Law § 241(6) "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Misicki v. Caradonna*, 12 N.Y.3d 511, 515 [2009]). This section imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction (*see Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501-502 [1993]; *Misick v. Caradonna, supra*). As with Section 240(1), in order to recover, the plaintiff need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross,* 81 N.Y.2d at 501-502; *Long v. Forest-Fehlhaber,* 55 N.Y.2d 154 [1982]). Unlike Section 240(1), however, the plaintiff's culpable conduct is relevant (*see Rocovich, supra*).

Moreover, as to Section 241(6), the plaintiff must prove that the owner and/or contractor violated a rule or regulation of the Industrial Code which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81 N.Y.2d at 502-504; *Coyago v. Mapa Properties, Inc.*, 73 A.D.3d 664, 901 N.Y.S.2d 616 [1st Dept 2010] ["A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard"]). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long,* 55 N.Y.2d at 160).

As is relevant herein, 12 N.Y.C.R.R. 23-5.1(j) provides, *inter alia*, that the open sides of all scaffold platforms of at least seven feet high must be provided with safety railings, and a violation of same may be used in support of a Labor Law § 241(6) claim (*see Romanczuk v. Metropolitan Ins. and Annuity Co.*, 2009 WL 889943, * 5, 2009 N.Y. Slip Op. 30636(U) [Sup Ct New York Cty 2009], *citing Crespo v. Triad, Inc.*, 294 A.D.2d 145, 147, 742 N.Y.S.2d 25 [1st Dept 2002]; *see also Macedo v. J.D. Posillico, Inc.*, 68 A.D.3d 508, 891 N.Y.S.2d 46 [1st Dept 2009]).

Yet, a scaffold without guardrails is inadequate under Section 240(1) as a matter as a law, irrespective of the scaffold's height (*see Vail v. 1333 Broadway Associates, LLC*, 105 A.D.3d 636, 963 N.Y.S.2d 647 [1st Dept 2013]); *Klapa v. O&Y Liberty Plaza Co.*, 218 A.D.2d 635, 631 N.Y.S.2d 21 [1st Dept 1995]). In other words, proximate cause regarding a violation of Section 240(1) is established as a matter of law when a plaintiff falls off a scaffold without guardrails (*see Crespo v. Triad, Inc.*, 294 A.D.2d 145, 147, 742 N.Y.S.2d 25 [1st Dept 2002]). And, the precise manner in which a plaintiff's fall from a scaffold is immaterial; what is of concern is

240(1) is established as a matter of law when a plaintiff falls off a scaffold without guardrails (*see Crespo v. Triad, Inc.*, 294 A.D.2d 145, 147, 742 N.Y.S.2d 25 [1st Dept 2002]). And, the precise manner in which a plaintiff's fall from a scaffold is immaterial; what is of concern is whether the plaintiff's injuries are at least partially attributable to the defendants' failure to provide adequate protection (*see Laquidara v. HRH Const. Corp.*, 283 A.D.2d 169, 724 N.Y.S.2d 53 [1st Dept 2001]). Moreover, the fact that a plaintiff lost his balance before falling from a scaffold is not a defense to a claim under Section 240(1) (*see Vergara v. SS 133 West 21, LLC*, 21 A.D.3d 279, 800 N.Y.S.2d 134 [1st Dept 2005]).

A partial fall from a scaffold, even one in which the plaintiff does not strike the ground, is still subject to Section 240(1) liability. The essential inquiry, as noted by the *Rocovich* and *Dominguez* cases (*supra*) is whether the incident was related to elevation or gravity (*see Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 919 N.Y.S.2d 129 [1st Dept 2011]; *Dominguez v. Lafayette-Boynton Hous. Corp.*, 240 A.D.2d 310, 659 N.Y.S.2d 21 [1st Dept 1997]); *Prekulaj v. Terano Realty*, 235 A.D.2d 201, 652 N.Y.S.2d 10 [1st Dept 1997]). In other words, the crucial factor is whether the purported elevation-related risk calls for any of the protective devices listed in Section 240(1) (*see Rocovich, supra*).

Based on the the above, controlling case law, plaintiff has established *prima facie* his entitlement to summary judgment under Labor Law §§ 240(1) and 241(6), and under 12 N.Y.C.R.R. 23-5.1(j) of the Industrial Code. It is undisputed that plaintiff fell from a scaffold and from a height of at least seven feet, and that the scaffold lacked guardrails. Moreover, McAlarney testified that the tie-off location (which he approved) was "not ideal" and caused plaintiff to swing into the generator after he fell. And, as to the Industrial Code 12 N.Y.C.R.R.

In opposition, defendants fail to raise issues of fact as to Section 240(1) and specifically, whether plaintiff's conduct was the sole proximate cause of his accident, and whether he was provided with an adequate safety device.

It is well-settled that there are two defenses to a Labor Law §240(1) claim: (1) the recalcitrant worker defense; and (2) the sole proximate cause defense (*see Torres v. 1148 Bryant Ave., Inc.*, 81 A.D.3d 467, 916 N.Y.S.2d 107 [1st Dept 2011]; *Cordeiro v. Shalco Investments*, 297 A.D.2d 486, 488, 747 N.Y.S.2d 194 [1st Dept 2002]).

A defendant wishing to invoke the recalcitrant worker defense must show that the injured worker refused to use the safety devices that were provided by the owner or employer (*see Stolt v. General Foods Corp.*, 81 N.Y.2d 918 [1993] *citing Hagins v State*, 81 N.Y.2d 921 [1993]; *Martinez v. Bovis Lend Lease LMB, Inc.*, 29 Misc.3d 1219(A), 2010 WL 4485856 [Sup Ct New York Cty 2010] ("an owner, general contractor, or construction manager must show a 'plaintiff ... disobeyed any immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device.")).

In the case at bar, it is undisputed that plaintiff was wearing his harness, and was tied-off at the designated location (as established by McAlarney and the site foreman) at the time of his alleged accident. Thus, given plaintiff's factual demonstration, and defendants' failure to address plaintiff's showing in opposition or argue for the defense's applicability, the court finds that the "recalcitrant worker" defense is inapplicable (*see Stolt, supra*).

As to whether plaintiff was the sole proximate cause of his injury, to raise such an issue of fact in a Section 240(1) claim, defendants must present evidence that "adequate safety devices [were] available; that [plaintiff] knew both that they were available and that he was expected to

use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 5, 917 N.Y.S.2d 130 [1st Dept 2011] *citing Cahill v. Triborough Bridge and Tunnel Auth.*, 4 N.Y.3d 35, 40 [2004]). In other words, under the defense, a "defendant can avoid liability under the statute if it can demonstrate that it did not violate the labor law, and that the proximate cause of the plaintiff's accident was plaintiff's own negligence" (*Berberi v. Fifth Ave. Development Co., LLC*, 20 Misc.3d 1106(A), 866 N.Y.S.2d 90 [Sup Ct Bronx Cty 2008], *citing Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003]).

Defendants' claim that plaintiff was the sole proximate cause of his accident in that he was negligent by his and his co-workers' construction of the scaffold without guardrails is ineffective to create a material issue of fact. All of defendants' cited cases as to this issue are from the Second Department and concerned only one factor potentially relevant to the plaintiff's injuries therein -- the plaintiff's own actions. In contrast, the undisputed evidence herein demonstrates that there were at least two potential causes of plaintiff's injuries attributable to defendants, including the lack of guardrails, and position of the tie-off location on the muffler supports.

Furthermore, even assuming *arguendo* that plaintiff's conduct was somehow negligent, defendants concede that the tie-off location, which was "not ideal," contributed to the accident. Thus, logically speaking, plaintiff cannot be the sole proximate cause of his accident; at most, his actions contributed to the incident, which is ineffective to defeat defendants' liability under Labor Law 240(1).

Also, defendants fail to produce evidence in opposition that adequate safety devices were

available, given McAlarney's admission that the tie-off location was not ideal and contributed to the accident (*see Auriemma, supra*). Thus, the motion as to Section 240(1) is granted.

As to Section 241(6) and the Industrial Code, defendants fail to raise a triable issue of fact regarding plaintiff's alleged comparative negligence. The fact that plaintiff used the scaffold despite the lack of guardrails is of no moment, as it is defendants' non-delegable duty under Section 241(6) to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction (*see Ross* and *Misick, supra*). In this respect, defendant improperly attempts to shift to plaintiff the responsibility for creating an adequate safety device (*see Collins v. West 13th Street Owners Corp.*, 63 A.D.3d 621, 882 N.Y.S.2d 85 [1st Dept 2009]).

As to the plastic covering, the testimony establishes that before the alleged accident, the covering was located *only over the generator*; plaintiff *did not step onto the generator at the time of the accident*; plaintiff did not see the covering on the scaffold that allegedly caused him to trip before the accident; and it is unknown how long that covering was present on the scaffold before the accident. Therefore, the claim that plaintiff failed to observe an alleged hazard is unavailing. Notably, nothing in the record indicates that the covering that apparently made its way at least in part onto the scaffold was an "open and obvious" hazard which plaintiff should have observed before the accident (*see Vasquez v. 21-23 South William Street, LLC*, 2010 WL 331961 [Sup Ct New York Cty 2010]).

Accordingly, plaintiff's motion is granted with respect to Labor Law §§ 240(1) and 241(6), and the Industrial Code.

Conclusion

Based on the foregoing, it is hereby

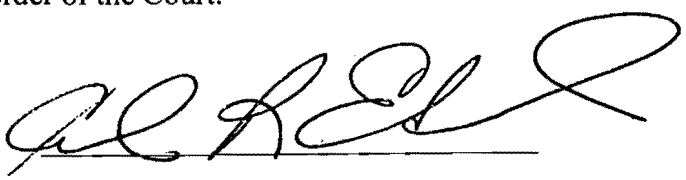
ORDERED that plaintiff's motion for summary judgment as to liability is granted in its entirety; and it is further

ORDERED that plaintiff shall file a note of issue within 30 days of entry of this order, and that the matter be set for a trial on the issue of damages before J.H.O. Ira Gammerman; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry on Maramont and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to J.H.O. Gammerman.

This constitutes the decision and order of the Court.

Dated: June 20, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD