SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

----------X

CARLIX JOHN,

Plaintiff,

-against-

DECISION / ORDER
Index No. 311547/2011

URBAN PATHWAYS, INC., MEGA CONTRACTING GROUP and ROCK SCAFFOLDING CORP.,

Defendants.

----------X

The following papers numbered 1 to 5 read on the below motions noticed on December 13, 2013 and duly submitted on the Part IA15 Motion calendar of **January 31, 2014:**

Papers Submitted	Numbered
Pl. Notice of Motion, Exhibits	1,2
Defs. Opp, Exh.	3,4
Pl. Rely Aff.	5

In an action seeking damages for personal injuries arising out of an alleged construction site accident, the plaintiff Carlix Jo hn ("Plaintiff") moves for partial summary judgment on the issue of liability under New York Labor Law §240(1) against defendants Urban Pathways, Inc. ("Urban") and Mega Contracting ("Mega")(collectively "Defendants"). Defendants oppose the motion.

I. Background

Plaintiff alleges that on December 6, 2011, at approximately 8:00 AM, he was working as a "helper" at a construction project located at 26-46 Second Street in Astoria, New York. At the time of the accident, Plaintiff was working on an exterior scaffold located on the side of a building when a cross beam of the scaffold became detached, causing Plaintiff to fall to the ground below. The accident location was owned by defendant Urban, who hired defendant Mega as the general contractor for the work. Mega hired subcontractors and developed the safety site plan for the project. Mega hired Plaintiff's employer to perform masonry work. Plaintiff's role was a "helper" who assisted the masons. The subject scaffolding consisted of 8-10 double scaffoldings, two floors approximately 15-20 feet high, and was approximately 35-40 feet in

length. At the time of his accident, Plaintiff's supervisor instructed him to work on the subject scaffolding to assist in the mason work. Plaintiff then climbed out onto wooden planks located on the scaffold. Plaintiff and two other helpers were moving the wooden planks from one level to the next to allow the masons to perform work at a higher level. The accident occurred while Plaintiff was moving a wooden plank from one level of the scaffold to a higher level in order to set up a work area for the masons. Plaintiff was standing on a metal cross bracing of the scaffold, with his back resting against the building and holding onto the blue vertical bracing of the scaffold with his left hand. Plaintiff was passing a wooden plank up to the next level when the metal cross bracing became unhooked from the scaffold, causing Plaintiff to fall onto the balcony below. There is testimony that the scaffold became unhooked due to a missing or improperly placed hook/clip connecting the cross-beam to the vertical scaffold pipe. Plaintiff testified that he was not provided with a harness or life line or instructed to wear one while performing his work. Defendant Mega's safety director testified that the subject scaffold was supposed to have guardrails in place for fall protection, including toe boards, mid rails and top rails, however such protection was not in place at the time of the accident.

In opposition, Defendants argue that Plaintiff has not established a "defect" in the scaffold that caused this accident. The scaffold did not collapse, but rather the cross bracing came loose. Defendants argue that Plaintiff should not have been standing on this portion of the scaffolding and there is an issue of fact as to whether he was the sole proximate cause of this accident. Defendants also argue that Plaintiff went to scaffolding training and OSHA training before the accident. Michael Iovine of Mega testified that workers should not be standing on the cross bracing. Plaintiff's direct supervisor testified that Plaintiff was not required to stand on the cross bracing to perform his work, and that it was well known that employees were not to stand on the scaffold's cross-bracing.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v.*

New York University Medical Center, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

Labor Law §240(1) imposes a duty of protection of employees upon owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The duty consists in providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." The foregoing devices are to be furnished in a manner sufficient to give "proper protection" to the workers. Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 [1993]). Specifically, the statute imposes liability in situations where a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 [1991]). The two elements of a 240(1) cause of action are that the statute was violated and that the violation was a proximate cause of the injury (*Blake, supra; Bland v. Manocherian*, 66 N.Y.2d 452 [1985]), *Chacha v. Glickenhaus Doynow Sutton Farm Development, LLC*, 69

A.D.3d 896).

To prevail on a motion for partial summary judgment on a cause of action under Labor Law §240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries. (*Auriemma v. Biltmore Theatre, LLC.*, 82 A.D.3d 1 [1st Dept. 2011][internal citations omitted]). A statutory violation, and thus a prima facie entitlement to summary judgment, is established where the safety device collapses, slips, or otherwise fails to perform its function of supporting the worker and his materials (*Ortega v. City of New York*, 95 A.D.3d 125, 128 [1st Dept. 2012], citing *Morin v. Machnick Bldrs.*, 4 A.D.3d 668 [3rd Dept. 2004]). Accordingly, and contrary to Defendants assertions in opposition, Plaintiff did not have to necessarily show that the scaffolding had a "defect" in order to satisfy his initial burden. Here, Plaintiff has made such a prima facie showing, as that the safety device he was using at the time of the accident - a scaffold - proved inadequate to shield Plaintiff from the harm which flowed directly from the application of the force of gravity to his person (*Kyle v. City of New York*, 268 A.D.2d 192 [1st Dept. 2000]).

In order to defeat such a motion, the defendants must raise an issue of fact as to whether the plaintiff "had adequate safety devices available; that he 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 have not been injured." (*Id.*, citing *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40 [2004]). The burden of providing a safety device is "squarely on the contractors and owners and their agents" (*Id*). Where it has been shown that inadequate safety devices proximately caused the injuries, any negligence on the part of plaintiff does not preclude partial summary judgment in his favor (*Aburto v. City of New York*, 94 A.D.3d 640 [1st Dept. 2012], citing *Blake*) In order for a plaintiff to be considered the sole proximate cause of his injuries, it must be shown that an appropriate safety device was available, but that plaintiff chose not to use the device (see *Robinson v. East Med. Ctr., LP*, 6 N.Y.3d 550, 554 [2006]; *Collins v. West 13th St. Owners Corp.*, 63 A.D.3d 621 [1st Dept. 2009]) .

In this matter, Defendants have failed to raise an issue of fact as to whether Plaintiff was the "sole proximate cause" of this accident by negligently standing on the cross-bracing which was "not designed to be used as a ladder or work platform." Plaintiff testified that he had to

stand on the cross bracing, or "X" piping, in order to complete his work, because there were not enough wooden planks to stand on (Pl. EBT at 97-99, 100-102) and he was provided no other safety device to complete his assigned task (*see DeKenipp v. Rockefeller Center, Inc.*, 60 A.D.3d 550 [1st Dept. 2009]). Accordingly, even if Plaintiff was trained not to stand on the cross - bracing, this action constituted, at most, contributory negligence (*see Hernandez v. 151 Sullivan Tenant Corp.*, 307 A.D.2d 207 [1st Dept. 2003]). Further to the point, "an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely" (*Vasquez v. Cohen Bros. Realty Corp.*, 105 A.D.3d 595 [1st Dept. 2013]; citing, among others, *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920 [1993]). Under these circumstances, defendants have not shown that the Plaintiff engaged in any intentional misuse or other egregious conduct so as to "neutralize[] the adequate protections afforded him" or otherwise establish that Plaintiff was the sole proximate cause of the accident (*Fernandez v. BBD Developers, LLC.*, 103 A.D.3d 554 [1st Dept. 2013], citing *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d at 39, *Allen v. New York City Tr. Auth.*, 35 A.D.3d 231 [1st Dept. 2006]). Moreover, it cannot be said that Plaintiff was a "recalcitrant worker" since there is no evidence that Plaintiff disobeyed an "immediate instruction" to avoid standing on the cross-bracing (*Hernandez, supra.*).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of liability under Labor Law §240(1) against the defendants Urban Pathways, Inc. and Mega Contracting is granted.

This constitutes the Decision and Order of this Court.

Dated: 5/23, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.