

Kennedy v New York City Sch. Constr. Auth.

2014 NY Slip Op 33527(U)

December 10, 2014

Supreme Court, Richmond County

Docket Number: 150497/2013

Judge: Philip G. Minardo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

WESLEY KENNEDY,

Plaintiff,

-against-

NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY and VOLMAR CONSTRUCTION,
INC.,

Defendants.

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 150497/2013

The following papers numbered 1 to 5 were fully submitted on the 25th day of September, 2014.

Papers Numbered

Plaintiff's Notice of Motion for Summary Judgment, dated July 11, 2014, with Exhibits and Supporting Papers _____ 1

Defendants' Affirmation in Opposition, dated August 29, 2014, with Exhibits and Supporting Papers _____ 2

Plaintiff's Reply Affirmation, dated September 16, 2014, with Exhibits and Supporting Papers _____ 3

Defendants' Notice of Motion, dated July 14, 2014, with Exhibits and Supporting Papers _____ 4

Plaintiff's Affirmation in Opposition, dated August 27, 2014, with Exhibits and Supporting Papers _____ 5

Plaintiff WESLEY KENNEDY's ("KENNEDY") motion for summary judgment, pursuant to CPLR 3212, on the issue of liability, pursuant to Labor Law §§240(1) and 241(6), is granted. The

2] motion of defendants NEW YORK SCHOOL CONSTRUCTION AUTHORITY and VOLMAR CONSTRUCTION, INC., for summary judgment, pursuant to CPLR §3212, dismissing plaintiff's complaint is denied.

MURPHY, an ironworker employed by non-party Grace Ironworks, was injured when he fell through an opening on the first floor of a building down to the basement approximately 20 feet below. At the time of the accident, MURPHY was in the process of breaking down a scaffold and, as he was carrying a wooden scaffold platform (approximately 7 feet long by 2 ½ feet wide) over his head, he tripped and fell over a roustabout causing him to lose his balance and fall through the opening.

The first floor of the building had an open area which looked down into the basement and was protected by safety netting which had been removed during the morning of the day of and prior to MURPHY's accident. MURPHY and his co-worker had intended to carry the parts of the scaffold down staircases that were adjacent to either side of the opening. Defendants fail to provide any explanation for the removal of the safety netting.

Relying on the report of its biomechanical engineer, defendants contend that MURPHY's summary judgment motion should be denied because there exists a question of fact as to the veracity of MURPHY's account of his accident. The biomechanical engineer opines that it would have been impossible for MURPHY to trip over the roustabout and fall through the opening as he had described during his deposition. MURPHY objects to defendants' use of the report as this witness was not disclosed to him in a timely manner and was submitted post-note of issue. However, "the fact that disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue does not, by itself, render the disclosure untimely" (*Rivers v. Birnbaum*, 102 AD3d 26, 35).

Accordingly, the Court will consider the report, as the preclusion of this material would “not necessarily advance the court’s role of determining the existence of a triable issue of fact”(*Id.*, at 42).

Labor Law §240(1) imposes on contractors and owners a nondelegable duty to protect workers from elevation-related risks at covered work site (*see Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494; *Lombardi v. Stout*, 80 NY2d 290, 296; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514; *McCoy v. Kirsch*, 99 AD3d 13 [2012]). “Negligence, if any, of the injured worker is of no consequence”(*Rocovich v. Consolidated Edison Co.*, 78 NY2d at 513).

MURPHY has established his prima facie entitlement to judgment, pursuant to Labor Law §240(1) , by presenting undisputed evidence that he fell from a height while working; that there were no safety devices located at the opening; and that the failure of the protective device was a proximate cause of his injuries (*see Kharie v. South Shore Record Management*, 118 AD3d 955 [2014]). Defendants’ biomechanical engineer does not address MURPHY’s undisputed claim that he fell through the unprotected opening while removing the scaffold and the engineer’s claim that MURPHY could not have fallen as he described is merely speculative and conclusory.

“To prevail on a cause of action asserted under Labor Law 241(6), a plaintiff must establish a violation of an implementing regulation that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles” (*Pittman v. S.P. Realty, LLC*, 119 AD3d 846 [2014] (*citations omitted*)). MURPHY contends that defendants violated 12 NYCRR 23-17(b)(1) which provides:

(b) *Falling hazards.* (1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing

constructed and installed in compliance with this Part (rule).

Defendants have not challenged MURPHY's contention that there was protective material in place at the subject opening on the morning of his accident and they do not contend that MURPHY removed the material before he fell. Accordingly, MURPHY has established his prima facie entitlement to judgment, pursuant to Labor Law §240(6) , as the hazardous opening was not guarded by a substantial cover fastened in place or by a safety railing at the time of his accident.

Accordingly, it is

ORDERED, that plaintiff WESLEY KENNEDY's motion for summary judgment, pursuant to CPLR 3212, on the issue of liability, pursuant to Labor Law §§240(1) and 241(6), is granted, and it is further

ORDERED, that the motion of defendants NEW YORK SCHOOL CONSTRUCTION AUTHORITY and VOLMAR CONSTRUCTION, INC., for summary judgment, pursuant to CPLR §3212, dismissing plaintiff's complaint is denied.

This constitutes the decision and order of the Court.

Dec. 10
Dated: ~~November~~ 2014

ENTER


HON. PHILIP G. MINARDO