Raia v Berkeley Coop. Towers Section II Corp.
2014 NY Slip Op 33851(U)
December 11, 2014
Supreme Court, Kings County
Docket Number: 2760/2010
Judge: Larry D. Martin
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GN 11-161 SB

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December, 2014.

PRESENT:

HON. LARRY D. MARTIN,
Justice.

COPY

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CHRISTOPHER RAIA and IRENE RAIA,

Plaintiffs,

- against -

BERKELEY COOPERATIVE TOWERS SECTION II CORP.,

Defendant.

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DECISION AND ORDER

Index No. 2760/2010

The following papers numbered 1 to 11 read herein:

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Notice of Motion and Affidavits (Affirmations) Annexed	1-2
Opposing/Reply Affidavits (Affirmations)/Memoranda	3, 4, 5, 6, 7, 8
Trial Transcript	9
Plaintiffs' Posttrial Memorandum of Law	10
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At the close of evidence in the liability phase of the bifurcated trial of this action brought by plaintiff Christopher Raia and his wife suing derivatively (hereafter, collectively, plaintiff) against defendant Berkeley Cooperative Towers Section II Corp. (hereafter, defendant), the Court reserved decision on his motion under CPLR 4401 for judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim. Concurrently, the Court also reserved decision on defendant's motion under CPLR 4401 for judgment as a matter of law dismissing, inter alia, plaintiff's Labor Law § 240 (1) claim. The jury found, inter alia, for defendant and against plaintiff on his Labor Law § 240 (1) claim. Post-trial, plaintiff moved under CPLR 4404 to set aside the verdict (Seq. No. 6).

The Accident[1]

Twin connected boilers (#1 and #2) located side by side in an enclosed boiler room were providing domestic hot water to defendant's two cooperative apartment buildings at 5230-5240 39th Drive in Queens (hereafter, the boiler room). Either boiler, when working alone, was sufficient to service both buildings. When boiler #2 sprang a leak in Dec. 2009 (hereafter, the leaking boiler), defendant called in plaintiff's employer, which dispatched to the boiler room a pair of plumbers – plaintiff and his coworker Charles Jordan (hereafter, Jordan) – to repair it. When plaintiff and Jordan arrived at the boiler room on Dec. 18, 2009, defendant had already shut off the leaking boiler, while the other boiler (boiler #1) continued working (hereafter, the running boiler). The repair work was performed outside, and on top of, the boilers. The top of the boilers was about 15 feet up from the boiler room's floor. The space above the top of the boilers was obstructed by horizontal and vertical pipes and valves. The only unobstructed space was a flat ledge without railings in one corner of the top of the boilers (hereafter, the ledge). To climb up to the ledge, the plumbers used defendant's ladder. While standing on the ledge and on the ladder, they repaired the leaking boiler. After they left for the day, however, defendant tested the leaking boiler and found that it was still leaking. In Jan. 2010, plaintiff's employer re-dispatched to the boiler room the same two plumbers, plaintiff and Jordan, with Dean Murray (hereafter, Murray), who was Jordan's brother, having been added as an assistant. When the repair team arrived at the boiler room on Jan. 14, 2010, the leaking boiler remained off, while the other boiler was working. The repair team again used defendant's ladder to climb up to the ledge. The repair was proceeding without an incident until Murray, while standing either on the ledge or on the ladder or both, inadvertently bumped into one or more of the shut-off valves on the running

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[1] The facts are recited in a light most favorable to defendant (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997] ["In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant."]).

boiler.[2] Hot water and steam burst out of the running boiler and scalded Murray. As he was trying to escape by way of the ladder, he lost his footing and fell down. Plaintiff, who was then standing on the ledge, was hit with steam and hot water. He lost his balance, fell backwards off the ledge, and ultimately landed on the boiler room's concrete floor about 15 feet below the ledge. Meanwhile, Jordan, who was standing on the lower portion of the ladder, escaped unharmed. Jordan retrieved a pole with a hook and shut off the valves.

The Lawsuit

Plaintiff brought this action against defendant for the injuries he sustained in the accident. His claims were based on, inter alia, Labor Law § 240 (1), Labor Law § 200, and common-law negligence. The trial was bifurcated, with liability being tried first. Plaintiff's case-in-chief consisted of (1) trial testimony of plaintiff and Murray, (2) a reading to the jury of the pretrial deposition testimony of Jordan who was unavailable for trial, (3) trial testimony of defendant's superintendent, and (4) trial testimony of plaintiff's engineering expert Joseph Zinman, P.E., and one other expert. Defendant's case-in-chief was limited to a reading to the jury of excerpts from the pretrial deposition testimony of plaintiff and Murray. At the close of evidence, plaintiff and defendant each moved for judgment as a matter of law on, inter alia, the Labor Law § 240 (1) claim. The Court reserved decision on both motions and submitted all of plaintiff's claims to the jury.[3]

The jury rendered a mixed verdict. As to plaintiff's Labor Law § 240 (1) claim, the jury found (in response to interrogatories #1, #2, and #3, respectively) that he was engaged in repair (rather than in routine maintenance), that defendant failed to provide him with an

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[2] Each boiler had three parallel shut-off (or ball) valves located on the pipes extending above its ledge. Each shut-off valve operated as a lever through an arc of 90 degrees. In the open position, the lever curved 90 degrees to form a handle that was perpendicular to the arm of the operating lever. In the closed position, the lever formed a handle that was fully aligned with the arm of the operating lever. If the lever was in between these two positions, the valve was partially open. Thus, if a shut-off valve was even partially open, a running boiler was capable of emitting hot water and steam.

[3] In the course of trial, the Court ruled that Labor Law § 241 (6), which plaintiff also pleaded, did not apply to the accident (Trial Transcript, page 439, lines 15-18; *see Bedneau v New York Hosp. Med. Ctr. of Queens*, 43 AD3d 845, 846 [2d Dept 2007] ["the protections of Labor Law § 241 (6) do not apply to the simple repair of an appliance (a boiler) unrelated to construction, demolition, or excavation"]). Post-trial, plaintiff moved, inter alia, to reinstate his Labor Law § 241 (6) claim and, on reinstatement, finding that defendant violated Labor Law § 241 (6) as a matter of law.

adequate safety device, but that such failure was not a substantial factor in causing the accident. Hence, the jury found for defendant and against plaintiff on his Labor Law § 240 (1) claim.

As to plaintiff's Labor Law § 200 claim, the jury found (in response to interrogatory #4) that the workplace was not constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection to plaintiff's life, health, and safety. As to this claim, the jury further found (in response to interrogatory #5) that defendant's failure to provide such reasonable and adequate protection to plaintiff's life, health, and safety was a substantial factor in causing the accident. Thus, the jury found for plaintiff and against defendant on his Labor Law § 200 claim.

Lastly, as to plaintiff's common-law negligence claim, the jury found (in response to interrogatories #6 and #7, respectively) that defendant was negligent in not shutting off the running boiler and that defendant's negligent failure to turn it off was a substantial factor in causing the accident. Hence, the jury also found for plaintiff and against defendant on his common-law negligence claim.

On the issue of comparative negligence, the jury found (in response to interrogatories #8 and #9, respectively) that plaintiff was negligent but that his negligence was not a substantial factor in causing the accident. The jury further found (in response to interrogatories #10 and #11, respectively) that Murray was negligent and that Murray's negligence was a substantial factor in causing the accident. In apportioning the fault for the accident, the jury (in response to interrogatory #12) assigned 10% liability to plaintiff, 40% to Murray, and 50% to defendant.

After reviewing the trial record, trial memoranda, and plaintiff's post-trial motion, the Court requested that the parties brief the dispositive, two-part issue of (1) whether the chain

of events started with Murray's act of tripping the valve(s), and (2) whether Murray's act of tripping the valve(s) was a superseding cause of plaintiff's accident. The Court received memoranda of law from both parties, heard oral argument on Oct. 28, 2014, and reserved decision.

Plaintiff's Labor Law § 240 (1) Claim

CPLR 4401 states, in relevant part, that "[a]ny party may move for judgment with respect to a[n] . . . issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such . . . issue. . . ." "To be entitled to judgment as a matter of law pursuant to CPLR 4401, a plaintiff has the burden of showing that there is no rational process by which the jury could find in favor of the defendant and against the moving plaintiff" (*Galarza v City of New York*, 2014 NY Slip Op 08399, *1 [2d Dept]).

Here, the jury, in addressing plaintiff's Labor Law § 240 (1) claim, found that the statute applied and that it was violated.[4] More particularly, the jury found (in response to interrogatory #1) that he was engaged in repair work covered by the statute, as opposed to routine maintenance, and (in response to interrogatory #2) that defendant failed to provide him proper protection from height-related dangers connected with his work. The unrebutted evidence adduced at trial by plaintiff, a plumber, demonstrated that (1) he was engaged in repair work;[5] (2) defendant, which opted not to call any witnesses or present any evidence at trial (other than the reading of excerpts from plaintiff's and Murray's pretrial deposition testimony), did not provide him with proper protection from height-related dangers connected

[4] Labor Law § 240 (1) imposes on owners a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr.*, 17 NY3d 369, 374 [2011]). "To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries" (*Probst v 11 West 42 Realty Investors, LLC*, 106 AD3d 711, 711-712 [2d Dept 2013]).

[5] See trial testimony of plaintiff's expert Joseph Zinman, P.E., pages 556-557, explaining in detail why the work plaintiff and his team members were performing on the boiler was "a major repair," rather than maintenance.

with his work; and (3) the ledge on which he worked was inadequate to prevent him from falling 15 feet to the floor after getting scalded with steam and hot water in the course of repairing the leaking boiler. Thus, there is no basis to disturb the jury findings (in response to interrogatories #1 and #2) that plaintiff was engaged in repair at the time of the accident and that defendant failed to provide him with an adequate safety device.

On the other hand, there was no rational process by which the jury could find, as it did in response to interrogatory #3, that defendant's violation of Labor Law § 240 (1) was not a substantial factor in causing the accident. To respond to this interrogatory the way the jury did, it had to find that either plaintiff's own negligence, or Murray's act of tripping/bumping into the valve(s), or both, constituted a superseding cause of the accident. As to plaintiff, the jury found (in response to interrogatories #8, #9, and #12) that plaintiff was negligent (assessed at only 10%), but that his negligence was not a substantial factor in causing the accident. This means that the jury did not view plaintiff's conduct alone as the sole proximate cause of the accident.[6]

As to Murray, the jury found (in response to interrogatories #10, #11, and #12) that Murray was negligent in tripping/bumping into the valve(s) and that his negligence (assessed at 40%) was a substantial factor in causing the accident. On the evidence adduced at trial, the jury could not rationally have concluded that Murray's act of tripping/bumping into the valve(s) was a superseding cause sufficient to relieve defendant of Labor Law § 240 (1) liability to plaintiff as a matter of law (*see Morocho v Plainview-Old Bethpage Cent. School Dist.*, 116 AD3d 935 [2d Dept 2014]; *Lopez-Dones v 601 W. Assoc.*, 98 AD3d 476 [2d Dept 2012]; *Losito v Manlyn Dev. Group*, 85 AD3d 983, 984 [2d Dept 2011]; *Cordero v Kaiser Org.*, 288 AD2d 424 [2d Dept 2001]; *deSousa v Dayton T. Brown, Inc.*, 280 AD2d 447, 448 [2d Dept 2001]).

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[6] The jury finding that plaintiff was negligent is irrational and is not based on any evidence adduced at trial. In any event, plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) violation (*see La Lima v Epstein*, 143 AD2d 886, 888 [2d Dept 1988]).

Defendant contends that the accident was caused by the opening of a hot water valve, which is not an elevation related risk as a matter of law" (Defendant's Supplemental Memorandum of Law at 4). According to defendant, "[t]ripping a water valve is an 'ordinary' hazard of construction, not an elevation risk. Nor is a burn an elevation related injury" (*id.* at 7). In support of its position, defendant relies on a federal district court decision in *Eberl v FMC Corp.*, 872 F Supp 2d 250 (WD NY 2012), in which a steamfitter voluntarily jumped off an elevated platform to avoid getting hit with steam. There, the district court held (at page 257) that the accident was "the result of the separate hazard of hot steam condensate emanating from the cut pipe, prompting [p]laintiff's decision to jump from the scissor lift platform." Or "[t]o put it another way, the risk of being burned is not one that Labor Law § 240 is intended to guard against" (*id.*). As precedent, the district court cited to *Fenty v City of New York*, 71 AD3d 459 (1st Dept 2010), which held (at page 460) that the worker's voluntary jump out of a bucket lift to avoid being hit with hot team "was not attributable to the risk arising from the elevation differentials at his work site that brought about the need for the safety device in the first place, but rather was caused by the separate, unforeseeable hazard of hot steam emanating from a ruptured pipe."

Defendant's reliance on the *Eberl* and *Fenty* decisions is unavailing for three reasons. First, the *Eberl* and *Fenty* decisions contradict a long line of the Second Department's holdings, cited above, that the act of one coworker in starting the chain of events which caused the other coworker to fall off an elevation is not a superseding cause (*see Morocho,*[7]

[7] In *Morocho*, the plaintiff was working on a properly placed ladder "without incident for a period of time. At some point, a coworker, while cleaning up the discarded plastic sheeting that was littering the floor [in the room where plaintiff was working], pulled a piece of the sheeting, causing the sheeting to become entangled with the ladder, and causing the ladder, and the plaintiff, to fall to the ground." The Second Department, in reversing the motion court and granting the plaintiff partial summary judgment on liability on his Labor Law § 240 (1) claim, held (at page 936) that the coworker's acts did not constitute a superseding cause sufficient to relieve the defendant of liability.

Lopez-Dones,[8] *Losito,*[9] *Cordero,*[10] *deSousa*[11]). In fact, defendant concedes, as it must, that "no event of a fall in any manner occurred until after Murray hit the valve" (Defendant's Supplemental Memorandum of Law at 4), meaning that the chain of events started with Murray's act of tripping/bumping into the valve(s).

Second, the *Eberl* and *Fenty* decisions do not cite to the Court of Appeals' controlling decision in *Gordon* which narrowly construed the concept of "superseding cause" in the Labor Law § 240 (1) context. There, the Court of Appeals held (at page 562) that "[a]n independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them."[12] Here, Murray's act of tripping/bumping into the valve(s) while working in close spacial proximity to them was not an event of "extraordinary nature" as a matter of law. The

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[8] In *Lopez-Dones*, the plaintiff was standing on an A-frame ladder, working for several hours without anY incident, until an unidentified man pushing a loaded dolly past the ladder caused the dolly to come into contact with the ladder, and the impact caused the ladder to tip. The plaintiff was able to regain her balance, but was injured as a result. The Second Department (at page 479) reversed the motion court and granted the plaintiff partial summary judgment on liability on her Labor Law § 240 (1) claim.

[9] In *Losito*, the Second Department held (at page 984) that the foreman's stepping on the back of the plaintiff's ladder just before it broke was not a superseding cause sufficient to relieve defendants of liability.

[10] In *Cordero*, the plaintiff was installing an HVAC unit that was suspended from the roof rafters of a building under construction. To reach the unit, the plaintiff straddled two exposed ceiling beams. He was not provided with any type of safety device. When the building shook, the plaintiff lost his balance, fell between the beams, and lodged his left leg between the beams but did not fall to the ground. The plaintiff claimed that the roofer was at fault for permitting its employees to throw bags of shingles onto the roof which shook the building, resulting in vibrations that, in turn, caused him to fall. As the Second Department held (at page 426), "the plaintiff's injuries did not result from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance. The risk that the beams could shake [did not] . . . constitute a superseding cause . . ., particularly since the plaintiff was working inside . . . a building that was under construction" (internal quotation marks and citations omitted).

[11] In *deSousa*, a bricklayer was injured when the scaffold on which he was standing began to shake rapidly, causing him to lose his balance and fall to the ground. The movement was apparently caused by a coworker who was attempting to adjust a pin and brace on the scaffold. The Second Department reversed the motion court and granted the bricklayer partial summary judgment on liability on his Labor Law § 240 (1) claim, explaining (at page 448) that "there is no question of fact as to whether the co-worker's actions constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident. The co-worker's acts [did not] . . . constitute a superseding cause. . . ."

[12] In *Gordon* (at page 562), the Court of Appeals held that:

> "[D]efendants' failure to provide plaintiff with a safe scaffold or ladder while he sandblasted the railroad car was a substantial cause leading to his fall and the injuries he sustained. Injury was a foreseeable result of cleaning railroad cars from an elevated position, and *a fall and injury occasioned by an allegedly defective sandblaster used in the process is not of such an 'extraordinary nature' that defendants' responsibility for the injury should be severed*" (emphasis added).

cramped quarters in which Murray and plaintiff were working made such an occurrence foreseeable.[13]

Third and finally, the *Eberl* and *Fenty* decisions have not been widely followed. No court subsequently cited the *Eberl* decision, and only *Eberl*, but no other court, subsequently cited the First Department's decision in *Fenty* for its interpretation of Labor Law § 240 (1).[14]

Accordingly, plaintiff's motion under CPLR 4401 for judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim is granted; conversely, the branch of defendant's motion under CPLR 4401 for judgment as a matter of law dismissing plaintiff's Labor Law § 240 (1) claim is denied (*see Vinasco v Intell Times Square Hotel, LLC*,

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[13] The First Department's decision in *Noble v AMCC Corp.*, 277 AD2d 20 (2000), is on point. There, the plaintiff hit his head on an overhead pipe while working on top of a boiler, slid down the side of the boiler but did not fall to the ground as he was able to hoist himself back onto the boiler, sustaining injuries to his back in the process. The First Department affirmed the motion court's granting of partial summary judgment on liability to the plaintiff on his Labor Law § 240 (1) claim, explaining (at 20-21):

> "Assuming plaintiff's slide down the boiler was caused by his hitting his head on an overhead pipe, the cramped quarters in which he was working made such an occurrence foreseeable, and thus required the provision of a safety device. Moreover, any comparative negligence by plaintiff would not be a defense to the section 240 (1) violation in failing to provide a safety device. *Nor was plaintiff required to present evidence as to which particular safety devices would have prevented his injury*" (internal citations omitted; emphasis added).

[14] Other decisions on which defendant relies are not relevant. In *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 682 (2007), the Court of Appeals held that the injured worker failed to establish that "he stood on the desk because he was obliged to work at an elevation to wash the interior of the windows." Here, however, plaintiff was required to stand on the ledge to perform his work.

Defendant's "falling object" cases are factually and legally inapposite to this action brought by a "falling worker" (*see Fabrizi v 1095 Ave. of Ams., LLC*, 22 NY3d 658, 661 [2014] ["Plaintiff knelt on the floor to begin drilling. . . . (W)hile plaintiff was drilling, the top conduit fell, striking plaintiff on the hand."]; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 842 [1994] ["Plaintiff . . . was injured while dismantling a hoist on the roof of a building owned by defendant. Plaintiff was struck in the knee by a falling steel beam which was part of the hoist. . . ."]; *Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 417 [1st Dept 2014] ["As plaintiff walked by one of the pallets (holding concrete stones), a stone block that was resting on top of it allegedly fell and struck him on the right knee."]; *Carrasco v Weissman*, 120 AD3d 531, 532 [2d Dept 2014] [While plaintiff and his coworker were holding a glass pane, it split in half. "The pieces of glass struck both the plaintiff and his coworker, injuring them."]; *Medina v City of New York*, 87 AD3d 907, 907 [1st Dept 2011] ["Plaintiff was standing on the track bed when a 12-foot section of the rail, unsecured and weakened by saw cuts, suddenly sprang upward and then fell, striking his leg."]; *Sereno v Hong Kong Chinese Rest.*, 79 AD3d 1414, 1414 [3d Dept 2010] ["Plaintiff was standing on the ground while a coworker was lying on the exhaust hood four feet above him. As the coworker handed plaintiff a pressurized bottle containing a chemical used for cleaning, the bottle slipped from plaintiff's hands and, upon impact with the floor, sprayed the chemical into plaintiff's eye."]; *Whitehead v City of New York*, 79 AD3d 858, 859 [2d Dept 2010] ["The injured plaintiff . . . allegedly was injured at a construction site when a load of steel tubes that had just been hoisted by a crane and put down on the eighth floor of a structure began to roll out while the bindings on the load were being removed. The injured plaintiff, who was working on the eighth floor next to the load of steel, tried to run away (but) . . . was struck in his right knee by two steel tubes."]).

2014 NY Slip Op 07497, *1 [2d Dept]; *Preneta v North Castle, Inc.*, 65 AD3d 1027, 1028 [2d Dept 2009]; *Laterra v Rockville Ctr. Union Free School Dist.*, 186 AD2d 789, 790 [2d Dept 1992]).

Conclusion

Plaintiff's motion under CPLR 4401 for judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim is granted, and the branch of defendant's motion under CPLR 4401 for judgment as a matter of law dismissing plaintiff's Labor Law § 240 (1) claim is denied. Considering that only one recovery is available to plaintiff, regardless of the theories pleaded, the other branch of defendant's motion which is under CPLR 4401 for judgment as a matter of law dismissing plaintiff's remaining claims under Labor Law § 200 and for common-law negligence is denied as moot. Plaintiff's posttrial motion in Seq. No. 6 to set aside the verdict under CPLR 4404 is also denied as moot.

In view of the foregoing, the jury finding in response to interrogatory #3, *i.e.*, that defendant's failure to provide an adequate safety device was not a substantial factor in causing plaintiff's accident, is set aside as a matter of law as being inconsistent with the Court's determination. The jury findings in response to interrogatories #8 and #12, *i.e.*, that plaintiff was negligent and that his degree of fault was 10%, are set aside for the same reason.

The bifurcated trial will now proceed to the damages phase. The parties are directed to appear in Part 41 on January 30, 2015, 9:45 A.M. to schedule a trial date on monetary damages.

This constitutes the Decision and Order of the Court.

E N T E R,

DEC 11 2014

Hon. Larry D. Martin
Justice Supreme Court