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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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TIMOTHY NERNEY and FELICIA NERNEY,

Plaintiffs,

-against-

Index No. 159067/12

1 WORLD TRADE CENTER LLC, WTC TOWER 1 LLC, TISHMAN CONSTRUCTION CORPORATION, and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

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Donna Mills, J.:

In this personal injury action which arises from an alleged violation of Labor Law § 240 (1), plaintiffs move for summary judgment in their favor on their section 240 (1) cause of action against defendants.[1]

BACKGROUND

Many of the facts in this matter are contested. On August 11, 2011, plaintiff Timothy Nerney (plaintiff), an experienced elevator mechanic then in the employ of Thyssen-Krupp Elevator (TKE), was engaged in constructing an elevator in the Freedom Tower[2] in lower Manhattan. As he was hoisting a guide rail (the rail) up an elevator shaft, he became entangled in a rope, was lifted into the air, and was injured.

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[1]Although Tishman Construction Corporation of New York is a defendant in this action, it is not a subject of this motion.

[2]The Freedom Tower is now known as One World Trade Center.

Nonparty Port Authority of New York and New Jersey (Port Authority) was the owner of the property. It leased the property to defendant 1 World Trade Center LLC, which assigned its rights under the net lease to defendant WTC Tower 1 LLC. Defendant Tishman Construction Corporation (Tishman) was hired as the construction manager/general contractor to build WTC-Tower One, also known as the Freedom Tower. Tishman hired TKE to install approximately 70 elevators in the building.

While the nature and configuration of the devices used in hoisting the rail are contested, simply put, plaintiff was standing alone on the wooden platform of a Skyclimber on the 47th or 49th floor, employing a complicated pulley system to hoist a 16-foot, several-hundred-pound rail from the 40th or 41st floor to the 49th, 50th or 51st floor, where it would be installed by a two-man team in an adjacent elevator shaft. As the rail was being hoisted, the excess rope could be secured in any one of three ways: it could be (1) coiled in a box or receptacle on the platform, (2) coiled on the platform itself, or (3) hung down the shaft. Plaintiff was coiling the rope on the platform (he was a "coil-on-the-car guy" [Plaintiff's tr at 71), when he perceived that the rail had become caught on an obstruction. When he attempted to give the rail some slack so it could be dislodged from the obstruction, somehow the rope became loose, and ran down the shaft with the rail. At the same time, plaintiff's leg

became entangled in the excess rope. He was lifted into the air, managed to disengage himself from the rope, and fell to the platform. His left leg and ankle were broken.

DISCUSSION

Summary Judgment Standard

"Since summary judgment is the equivalent of a trial . . ." (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]), the proponent of a summary judgment motion

> "is required to demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law. Only when this burden is met, is the opposing party required to submit proof in admissible form sufficient to create a question of fact requiring a trial [internal citations omitted]"

(*Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014]). "In deciding the motion, the court will draw all reasonable inferences in favor of the nonmoving party. If the moving party fails to make a prima facie showing of entitlement to summary judgment, [however,] its motion must be denied [internal citations omitted]" (*Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476, 478-479 [1st Dept 2013]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues . . ." (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in pertinent part:

> "All contractors and owners and their agents . . . in the erection . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, . . . hoists, . . . pulleys, . . . ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). "To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 659 [1st Dept 2012]). Moreover, even if it is found that a plaintiff's negligence contributed to his injuries, "contributory negligence will not exonerate a defendant who has violated the statute and proximately caused a plaintiff's injury" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Dias v City of New York*, 110 AD3d 577, 578 [1st Dept 2013] ["comparative negligence . . . is not a defense under § 240

(1)"]).

"[T]he single decisive question [in determining Labor Law § 240 (1) liability] 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]).

Plaintiff alleges that defendants failed to provide him with adequate safety devices which would have prevented the accident, i.e., a rope lock, a box or receptacle in which to coil the rope, and a safety rail that would not have broken during the incident. Defendants maintain that they provided the proper protections, and that plaintiff himself was the sole proximate cause of his injuries by his failure to follow proper safety protocols.

"[W]here a plaintiff's own actions are the sole proximate cause of the accident or injury, no liability attaches under the statute" (*Barreto v Metropolitan Transp. Auth.*, 110 AD3d 630, 632 [1st Dept 2013], *affd as mod* 25 NY3d 426 [2015]). "The sole proximate cause defense generally applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device" (*Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d

546, 548 [1st Dept 2013]). "However, '[t]he sole proximate cause defense does not apply where [a] plaintiff was not provided with an adequate safety device as required by the Labor Law' [citation omitted]" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 [1st Dept 2014]).

> "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained"

(*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]).

Neither plaintiff nor defendants have produced sufficient evidence to enable a finding on the issue of whether plaintiff was the sole proximate cause of his accident.

Owner/Contractor Liability

It is uncontested that defendants may be liable under section 240 (1) because the WTC defendants were owners and Tishman was a contractor at the site.

The Accident Reports

The Port Authority police and Marianne Santorelli, the Port Authority's senior risk manager at the site, issued separate reports.

Port Authority police detectives interviewed plaintiff

on August 15, 2011, while he was in the hospital.

> "When asked if he remembers what happened before he was injured he stated, 'I lost control of the rope and I remember the rope was gaining speed and my leg was pulled up and after that I don't remember anything else.' Asked if the rope pulled his leg up, he answered 'yeah, it pulled my leg up.'
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> [Plaintiff] stated, 'I was holding the rope and it came off the pulley and this is how I lost control of it, after that everything happened so fast I don't remember what happened after that'"

(Port Authority Police Non-Criminal Incident Report, 8/15/11 Follow-Up Report #01). On the following day, the Port Authority police interviewed Dennis Chatfield, plaintiff's foreman. Chatfield stated that, while plaintiff was being treated on the platform after the accident, he asked plaintiff what happened and plaintiff told him, "I was running the philly (machine pulley) and the rope came off and hit me." Chatfield then asked plaintiff what he meant when he said the rope hit him, and plaintiff said, on the ambulance ride to the hospital, that "he could not remember anything after the rope hit him" (Port Authority Police Non-Criminal Incident Report, 8/16/11 Follow-Up Report #02).

The accident report by Santorelli that is in evidence is an August 16, 2011 "First draft" that was updated on September 1, 2011. No copy of the updated report has been submitted to the court.

Santorelli based her report on interviews with TKE management and workers in the area of the incident, the Port Authority detectives' discussion with plaintiff, and a physical examination of the scene and equipment. According to Santorelli's report,

> "[t]he rail was being lifted by Mr. Nerney using the Capstan following typical operating steps . . . The extra rope was being puddled inside the Skyclimber on the floor according to Mr. Nerney and as reported to [the Port Authority Police Department]. During a[] downward adjustment in the lifting process the rope let loose and either partially or totally came off the capstan spool resulting in the puddled rope on the floor to come up and off the Skyclimber floor very quickly, tangling his leg and bringing it up, hitting the guardrail, and shattering the guardrail and his leg. At some point, and in very close succession, the rope end closest to the rail connection either snapped or was cut (perhaps by the rail itself) leaving the rail in a free fall down the shaft. This occurrence also released the pressure and movement on the rope around Mr. Nerney's leg. . . ."

Dennis W. Olson Affidavit

On the day of plaintiff's accident, Olson was a project manager for Vertical Transportation Excellence, which had been retained by the Port Authority to provide site quality control and quality assurance services for the installation of 70 elevators in the Freedom Tower. Those elevators included the elevator shafts at issue here. As project manager, Olson was on site daily, "monitoring and inspecting the work performed by

plaintiff's employer, Thyssen Krupp" (Olson Aff., ¶ 2). He witnessed plaintiff being taken from the scene of the accident and "was involved in an investigation into the accident" (*id.*, ¶ 3).

Olson stated opinions "[b]ased upon my own investigation and the material reviewed in this case" (*id.*, ¶ 4). Within a "reasonable degree of technical certainty," Olson opines that plaintiff's accident probably could not have happened in the way that plaintiff says.

> "Based upon my experience and daily observations of the equipment and methods used to hoist the rails, it is my opinion that it is improbable for a wave of rope to travel up one elevator hoistway, pass through two well wheels and travel down to a capstan with enough force to knock the rope off the capstan"

(*id.*, ¶ 4 [a]). Olson further opines that plaintiff was the sole proximate cause of his injuries because

> "[b]ased on my experience and observations of the equipment and methods used on this project, it is my opinion that the plaintiff failed to control the operation of the capstan and rope in a manner consistent with his training and the known practices and procedures of the industry. Specifically, plaintiff failed to keep sufficient tension on the rope so as to prevent it from coming off the capstan"

(*id.*, ¶ 16). According to Olson, plaintiff was provided with suitable safety devices, which did not fail, and a rope locking device was not "an appropriate device for the installation of

rails in an elevator shaft on this project" for reasons stated in the same paragraph (*id.*, ¶ 18).

With respect to the alleged violation of section 240 (1) because defendants did not provide plaintiff with a box or receptacle in which to coil the rope, Olson noted, based on his observations, that each mechanic could choose the manner by which they would contain and control the excess rope. Boxes were available, and plaintiff could have used one. However, he chose not to use a box because he was a "coil on the car guy" (*id.*, ¶ 20).

William M. Kane, III Affidavit

William Kane, a licensed professional engineer, was retained by defendants to give his expert opinion concerning how the accident happened. After a brief recounting of plaintiff's description, Kane detailed the factors involved, and "[b]ased on my education, training, expertise and research, within a reasonable degree of engineering certainty, for all of the above reasons plaintiff's accident could not have occurred as he claims" (Kane Aff., ¶ 16).

Questions of Fact

Summary judgment in favor of plaintiff's Labor Law § 240 (1) cause of action cannot be granted because multiple questions of fact remain unresolved. Some of those issues follow:

Plaintiff claims that he should have been provided with a rope lock which allegedly would have prevented the rope from going out of control. However, there is conflicting evidence that a rope lock was not an appropriate device for plaintiff's job of hoisting the rail.

Plaintiff asserts that he should have been provided with a box or receptacle in which to coil the rope, but he himself chose to coil the rope on the floor of the platform. This, as well as the issue of whether plaintiff followed proper safety protocols, preclude a determination of the issue of whether plaintiff was the sole proximate cause of his injuries.

There is no evidence that a different safety rail would have prevented the accident or plaintiff's injuries. The top wooden rail broke during the incident, but it did not fail in its objective of preventing plaintiff from falling down the shaft. However, it is not clear whether the rope or the top safety rail broke plaintiff's leg.

The most basic issue of fact is how the accident happened. The accident was unwitnessed. Plaintiff was injured on August 11, 2011. Four days later, he told the Port Authority police detectives that he did not remember what happened after he lost control of the rope, but during his deposition, he was able to describe what happened (Plaintiff's tr at 61-65). Olson, who was on site daily and monitored and inspected TKE's work, and who

based his opinions on his experience and observations of the equipment and methods used "on this project," stated that it was "improbable" that the accident occurred as plaintiff alleges. Defendants' expert, Kane, was even more unequivocal, asserting that "plaintiff's accident could not have occurred as he claims."

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion is denied.

Dated: 11-20-15

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.