Garcia v City of New York
2016 NY Slip Op 30399(U)
March 8, 2016
Supreme Court, New York County
Docket Number: 151954/12
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JOHNNY GARCIA,

Plaintiff,

-against-

THE CITY OF NEW YORK, RIVERSIDE HEALTH CENTER and SUMMIT CONSTRUCTION SERVICES GROUP, INC.,

Defendants.

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THE CITY OF NEW YORK and SUMMIT CONSTRUCTION SERVICES GROUP, INC.,

Third Party Plaintiffs,

-against-

ACT ABATEMENT, LLC,

Third Party Defendant.

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Index No. 151954/12
Motion Sequence 002

DECISION & ORDER

Hon. Sherry Klein Heitler:

Plaintiff Johnny Garcia ("Plaintiff") moves pursuant to CPLR 3212 for partial summary judgment against defendants The City of New York ("The City") and Summit Construction Services Group, Inc. ("Summit") (collectively, "Defendants") on the ground that they are strictly liable for Plaintiff's injuries under New York Labor Law §§ 240(1) and 241(6). Plaintiff further moves for an order setting this matter down for a trial on damages. Defendants oppose and cross-move pursuant to CPLR 3212 for an order dismissing Plaintiff's claims in their entirety.

This action arises from an accident that occurred on July 5, 2011 while Plaintiff was working on the third floor of a construction project for The City and co-defendant Riverside Health Center

("Riverside"). Plaintiff was employed by third-party defendant ACT Abatement, Inc., a demolition and asbestos removal subcontractor hired by Summit for the project. It is alleged that Plaintiff was injured when he fell from an improperly constructed scaffold when the wall upon which he was working collapsed.

Mr. Garcia was deposed on June 11, 2012 and April 28, 2014.[1] Among other things, he testified that the scaffold at issue did not have wheels, was not outfitted with guardrails, handrails, or a safety harness (Exhibit E, p. 23; Exhibit F, pp. 21-22), and that he had previously complained of these issues to his foreman. (Exhibit F, p. 22). On the day of the accident Plaintiff was instructed to climb the eight-foot scaffold in order to demolish large concrete blocks which formed an approximately 15-foot high wall. (Exhibit E, pp. 26, 29; Exhibit F, pp. 25-26). Plaintiff started to perform this work as instructed using an electric chipping gun, but vibrations created by the chipping gun caused the wall to collapse. A number of blocks hit the Plaintiff and he fell backward from the scaffold onto the floor where he was pinned under debris (Exhibit E, pp. 28-30; Exhibit F, pp. 34-38):

Q. So you're chipping the wall, what happened next?
A. The wall there came on top of me and I feel, and the wall came, the wall fell on top of me. . . .
Q. Was this one big piece of wall or little pieces that fell on you or something else?
A. The big blocks . . .
Q. How many of these blocks fell on you?
A. I don't know. . . .
Q. More than ten?
A. Yes, it left me thrown on the floor.
Q. When you were facing the wall before the wall fell on you, behind you on the scaffold,

[1] Copies of Plaintiff's deposition transcripts are submitted as exhibits E and F to the moving papers.

was there any railing behind you on the scaffold?

A. No.

Q. Did you fall off the scaffold after the blocks hit you?

A. Yes.

Q. Did the scaffold fall with you?

A. Yes. . . .

Q. Did the scaffold fall on you, on top of you?

A. I don't remember.

* * *

Q. Now I'm asking you about what happened that caused your accident. You're chipping --

A. That instead of the wall going away from me, it came at me.

Q. Okay. So normally when you would chip the wall, the piece that you were clipping [sic] would fall away from you?

A. We would move it from here to there. We would move the wall forward . . . .

Q. You would push it away?

A. Yes.

Q. And what happened that caused your accident?

A. The top part, I removed it and when I what [sic] placing the chipping gun down I saw that the wall was coming down on top of me and I couldn't do anything.

Q. Which way were you facing when the wall came down on top of you?

A. Towards the wall. . . .

Q. Did the wall come in contact with your hands?

A. No, it knocked me down from the scaffold.

Q. Did the wall hit your face?

A. Yes. . . .

Q. Okay. Were these blocks that you build the wall out of?

A. Yes.

Q. And how many fell on you?

A. The entire wall fell.

Q. From top to bottom?

A. I don't know. They all came down. I stayed there.

Q. Were you knocked off the scaffold?
A. Yes.
Q. Did the scaffold fall over?
A. I think. I don't know.
Q. Did you land on the floor?
A. Yes.
Q. What part of your body hit the ground first?
A. My back.
Q. When you were lying on the ground, were any of these blocks on top of you?
A. Many.

Plaintiff sustained a number of neck, shoulder, knee, and back injuries, and since then has had four surgical procedures, including a left shoulder arthoscopy, left knee arthoscopy, and two lumber fusions,[2] all of which are alleged to be related to the accident.

DISCUSSION

I. Labor Law § 240

Labor Law § 240, known as the scaffold law, imposes a strict liability non-delegable duty upon property owners and contractors for certain elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statute provides, in pertinent part (§ 240[1]):

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

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[2] See NYSCEF Doc. 48, Plaintiff's Amended Verified Bill of Particulars, pp. 5-8.

Labor Law § 240(1) "evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured.'" *Ross* 81 NY2d at 500-501 (quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d at 514). To impose liability under § 240(1), the plaintiff must prove that that the owner or contractor failed to provide adequate safety devices and that such failure proximately caused his or her injuries. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 (2003). Liability is contingent upon the existence of a hazard contemplated by § 240(1) and the failure to use adequate safety devices of the kind enumerated therein. *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 (2001).

Proximate cause is demonstrated by showing that a defendant's act or failure to act was a "substantial cause of the events which produced the injury." *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 (1980). A workplace accident can have more than one proximate cause. *Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 AD2d 384, 385 (1st Dept 2003). Thus, owners and contractors may be subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence (*see Bland v Manocherian*, 66 NY2d 452 [1985]), so long as the plaintiff is not the sole proximate cause of his injuries. *See Robinson v East Medical Center, LP*, 6 NY3d 550, 554 (2006).

Labor Law § 240(1) had for many years been construed to apply only to specific gravity-related risks that involved "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." *Ross*, 81 NY2d at 501; *see also Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001). However, in *Runner v New York Stock Exch., Inc.*, 13 NY3d 599 (2009) the Court of Appeals determined that the court's inquiry should not depend upon

whether the injury resulted from a falling worker or falling object. Instead, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person.*'" *Id.* at 604 (emphasis in original) (quoting *Ross*, 81 NY2d at 501). The Court further explained that "'the dispositive inquiry . . . does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. 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.'" *Runner*, 13 NY3d at 603; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 (2011).

Defendants do not dispute in this case that Plaintiff's scaffold lacked basic safety features such as handrails (*see* 12 NYCRR §§ 23-5.18, 23-5.1, 23-5.3)[3] and a safety harness (*see Gallagher v New York Post,* 14 NY3d 83, 86-87 [2010]; *Gonzalez v Rodless Props., L.P.*, 37 AD3d 180, 181 [1st Dept 2007]), that he complained of these conditions to his foreman, and that the scaffold failed to protect him from falling from an elevated position onto his back. These facts establish Plaintiff's *prima facie* entitlement to summary judgment on the issue of liability under Labor Law § 240(1). *See Vail v 1333 Broadway Assoc., LLC.*, 105 AD3d 636, 637 (1st Dept 2013) (plaintiff's fall from a six-foot scaffold which lacked guardrails established that plaintiff's injuries were proximately

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[3] 12 NYCRR § 23-5.18(b) requires that the "platform of every manually-propelled mobile scaffold shall be provided with a safety railing . . . ."; 12 NYCRR § 23-5.1(j) requires that the "open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings . . . ."; and 12 NYCRR § 23-5.3 requires that "[s]afety railings . . .shall be provided for every metal scaffold."

caused by defendants' failure to provide proper protection against an elevation-related risk"); *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 (1st Dept 2005) (summary judgment properly awarded to plaintiff under Labor Law § 240 where his scaffold had no side rails and no other protective device to prevent him from falling off the side); *Lezcano v Metropolitan Life Ins.* Co., 11 AD3d 303, 303 (1st Dept 2004) (defendants' liability established as a matter of law by evidence that the injured worker had been provided a scaffold without guardrails or other protective devices); *Vasquez-Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828, 829 (2d Dept 2015) ("plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold which lacked safety rails on the sides and that he was not provided with a safety device to prevent him from falling."); (*Moran v 200 Varick St. Assoc.*, LLC, 80 AD3d 581, 582 (2d Dept 2011) ("plaintiff satisfied his prima facie burden of establishing his entitlement to judgment as a matter of law on his Labor Law § 240(1) cause of action by demonstrating that he was engaged in a statutorily protected activity when he fell off a scaffold that failed to provide proper protection because it lacked safety railings.")[4]

Upon Plaintiff having established a *prima facie* case, the burden shifts to Defendants to raise an issue of fact or show that Plaintiff's own acts or omissions were the sole cause of the accident. *See Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 (1st Dept 2008). In this regard, Defendants claim that because the falling blocks caused the entire scaffold to collapse there is a triable issue whether the scaffold's defects can be considered the proximate cause of Plaintiff's injuries. At best this argument is speculative, and in light of the cases cited above (*see Vail,*

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[4] *See also Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490, 491 (1st Dept 2015); *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 412 (1st Dept 2008); *Madalinski v Structure-Tone, Inc.*, 47 AD3d 687, 687-88 (2d Dept 2008).

Vergara, Lezcano, etc.) it is entirely without merit. The fact that the scaffold was seriously defective in the first instance precludes Defendants from availing themselves of a sole proximate cause defense. Even if, as Defendants contend, the wall would not have collapsed had Plaintiff performed his work more carefully and that Plaintiff chose to climb the scaffold knowing it was missing safety equipment, such events are not sufficient to overcome Plaintiff's *prima facie* case. *Melito v ABS Partners Real Estate, LLC,* 129 AD3d 424, 425 (1st Dept 2015) ("Nor can defendants rely upon the defense of sole proximate cause, since they failed to provide adequate safety devices in the first instance."); *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 46 (1st Dept 2014) ("As plaintiff was not provided with an adequate safety device, defendant cannot avail itself of the sole proximate cause defense."); *Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 (1st Dept 2013) ("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 . . . ").

Accordingly, Plaintiff's motion for partial summary judgment on its Labor Law § 240 claim is granted, and Defendants' cross-motion to dismiss Plaintiff's Labor Law § 240 claim is denied.

II. Labor Law 241(6)

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *Ross* 81 NY2d at 501-502. The statute provides, in pertinent part:

> All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and

safety to the persons employed therein or lawfully frequenting such places. The [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith.

Labor Law § 241(6) is not self-executing, and in order to show a violation thereof and withstand a motion for summary judgment, a plaintiff must show that there was a violation of a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*see Ross*, 81 NY2d at 503). To this end, Plaintiff invokes 12 NYCRR § 23-5.18(b), which provides that the "platform of every manually-propelled mobile scaffold shall be provided with a safety railing. . . ." It is settled that this regulation is sufficiently specific to support a claim under Labor Law § 241(6). *Ritzer*, 57 AD3d at 413; *Vergara*, 21 AD3d at 281 (2005).

Plaintiff contends that the scaffold was designed and initially built with wheels and castors but for some unexplained reason they were removed prior to Mr. Garcia's accident. Defendants reply that because the scaffold had no wheels it cannot be classified as being manually propelled under the Industrial Code. The only evidence in this regard is Mr. Garcia's testimony (Exhibit E, pp. 21-22; Exhibit F, pp. 22-23):

Q. What were you doing when your accident happened?

A. They told me to get on top of a scaffold, I said 'cause -- I said I couldn't go up because it didn't have wheels, it didn't have security, I had the chipping gun, chipping gun breaking the upper section between the ceiling and the wall, that's what I was doing.

Q. Was this a Baker scaffold, or what kind of scaffold was it?

A. A big one, I don't know how to say it, blue, color blue. . . .

Q. What did you say was wrong with the scaffold?

A. It didn't have wheels . . . .

* * * *

Q. Were you standing on the floor of the hallway or on something else?

A. On the scaffold.
Q. Who erected the scaffold?
A. I don't know.
Q. Was it employees of ACT?
A. I don't know.
Q. How long had this particular scaffold been on the third floor at the work site?
A. I don't know.
Q. Had you personally worked on that scaffold before that day?
A. No.
Q. What kind of scaffold was this?
A. It was a scaffold. I don't know.
Q. Was it a Baker's scaffold?
A. No, I don't know.
Q. Did it have wheels on it or was it erected without wheels?
A. With wheels on the bottom, but at that time it did not have wheels.
Q. The wheels had been taken off?
A. I don't know about that, either.
MR. PAYNE: Well, were there wheels on it or not?
THE WITNESS: No.

Such testimony does not unequivocally support Plaintiff's claim that the scaffold was manually propelled for 12 NYCRR § 23-5.18(b) purposes. Mr. Garcia was not able to identify the type of scaffold he worked on, and could not describe the scaffold in any relevant detail other than by its size and color. Nothing in the record on this motion shows whether the scaffold at issue was designed to include wheels and/or castors, whether the scaffold as constructed had wheels and/or castors, and whether and by whom such wheels and/or castors were allegedly removed. For these reasons, the applicability of 12 NYCRR § 23-5.18(b) to this matter remains a triable issue of fact.[5]

[5] *Cf. Turner v Home Depot, U.S.A., Inc.*, 2014 NY Misc. LEXIS 4885, *11 (Sup. Ct. Kings Co Nov. 12, 2014, Schmidt, J.).

Accordingly, it is hereby

ORDERED that Plaintiff's motion is granted in part and denied in part; and it is further

ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability in respect of its Labor Law § 240 claim is granted; and it is further

ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability in respect of its Labor Law § 241(6) claim is denied; and it is further

ORDERED that issue of liability in respect of Plaintiff's Labor Law § 240 claim shall be severed from the trial of Plaintiff's Labor Law § 241(6) claim; and it is further

ORDERED that Plaintiff's request for an inquest on damages is granted with respect to his Labor Law § 240 claim, which shall take place concurrently with the trial of the remainder of this action; and it is further

ORDERED that Defendants' cross-motion for an order dismissing Plaintiff's claims is denied in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: March 8, 2016

SHERRY KLEIN HEITLER, J.S.C.