Devita v Gilbane Bldg. Co.
2016 NY Slip Op 31088(U)
June 9, 2016
Supreme Court, New York County
Docket Number: 156201/14
Judge: Shlomo S. Hagler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

JOSEPH DEVITA and DONNA DEVITA, **Index No.: 156201/14**

Plaintiffs,

-against-

GILBANE BUILDING COMPANY - MCKISSACK & MCKISSACK A JOINT VENTURE, **DECISION/ORDER**

Defendants.

HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for personal injuries sustained by a union sheet metal mechanic when he allegedly fell from a ladder while working at Goldwater Hospital located at 1879 Madison Avenue, New York, New York (the "Premises") on October 7, 2013. Plaintiffs Joseph Devita ("plaintiff" or Devita") and Donna Devita move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants Gilbane Building Company - McKissack & McKissack A Joint Venture.

BACKGROUND

On the day of the accident, plaintiff was employed by nonparty Delta Sheet Metal ("Delta") as a union sheet metal mechanic. Defendants hired Delta as a subcontractor to install HVAC systems at the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that he obtained his "instructions for duty directly from [his Delta foreman] Rob Spinelli ["Spinelli"] (plaintiff's tr at 45). On the morning of the accident, Spinelli assigned Devita the task of installing duct work in the cellar of the Premises. In order to perform

said work, it was necessary for plaintiff to utilize a six-foot A-frame ladder with six rungs, which was provided by his employer.

Plaintiff testified that he "work[ed] by [himself], and [he] set up the ladder" (*id.* at 42). Plaintiff noted that he "placed the ladder in the center of the room underneath the area that the work needed to be performed" (*id.* at 41). Plaintiff described the area of the floor where he set up the ladder as "covered with . . . unsecured protective paper" (*id.* at 46). When asked if the ladder was secured in any manner, plaintiff replied, "No, it wasn't" (*id.* at 42). Plaintiff also maintained that he was not instructed to secure the ladder himself.

At the time of the accident, plaintiff was in full compliance with Delta's rules and directives. Plaintiff also made use of all of the safety equipment made available to him. Plaintiff explained that, as he was not working above six feet, he was not required to use a safety harness. When asked if he had ingested any drugs in the twenty-four (24) hours prior to the accident, plaintiff replied in the negative.

Plaintiff testified that the accident occurred as he was ascending the ladder. Specifically, when Devita reached the second rung of the ladder, approximately two-to-three feet off the ground, the ladder shifted to the left, causing him to fall to the floor. Plaintiff testified, "I had my right foot on the rung of the ladder and I was moving up with my left, and that's when the ladder shifted, causing me to lose my footing, and I fell on my right shoulder" (*id.* at 56-57). While plaintiff ascended the ladder, he was using both hands to hold onto it. He was also fully concentrating on his ascension.

After he fell from the ladder, plaintiff called out for help. However, as he was alone, there was no response. After "a couple of minutes," plaintiff went to Spinelli's office and "told

him that [he] just had an accident, that [he] was going up the ladder, the ladder shifted, causing [him] to lose [his] footing, and [he] fell on [his] right side" (*id.* at 69-70). Spinelli then told plaintiff to sit down, so that they could fill out an accident report.

Affidavit of Robert Spinelli (Delta's Foreman)

In his affidavit, Spinelli stated that, on the morning of the accident, he instructed plaintiff to install duct work at the Premises (Spinelli Aff., sworn to on July 22, 2015, ¶3). After the accident, plaintiff informed him that he was injured when he fell from a ladder that "shifted, causing him to loose [sic] his footing and fall to the ground" (*id.* at 5). Thereafter, he and plaintiff filled out an accident report (*id.* at 7) .

Deposition Testimony of Robert Spinelli

Spinelli testified that he did not witness the incident. However, when he inspected the accident location shortly thereafter, he observed that the room was vacant, nothing "out of the ordinary" (Defendants' Sur-reply, Spinelli tr at 39). When asked whether the room contained a ladder, Spinelli responded, "I do not recall" (*id.*).

The Accident Report

In the "Employer's Report of Work-Related Injury" dated October 7, 2013 (the "Accident Report)", which was filled out by Spinelli and based upon information about the accident provided to him by plaintiff, it is stated that plaintiff was injured when, while installing duct work at the Premises, plaintiff "lost his footing and fell back off of the ladder & onto his right shoulder" (Plaintiffs' Notice of Motion, Exhibit "D," the Accident Report).

Plaintiff's Medical History Under the Care of Dr. Mark Bernstein

Prior to the day of the accident, plaintiff was under the care of rheumatologist, Dr. Mark Bernstein. An August 13, 2013 treatment note from Dr. Bernstein's office states that plaintiff "developed right shoulder discomfort in the last several weeks. No prior episode. No recent trauma . . . pain is elicited on extension of [plaintiff's] right shoulder" (Defendants' Opposition, Exhibit "H," medical records from Dr. Bernstein). A September treatment note reflects that plaintiff returned to Dr. Bernstein's office and received a cortisone shot to his right shoulder that resolved a simple tendinitis in plaintiff's right shoulder, restoring full motion. Treatment notes from Dr. Bernstein's office also reflect that plaintiff was prescribed prescriptions for the medications Xanax and Oxycodone.

Plaintiff's Account of His Right Shoulder Injuries Due to the Accident to First Choice Medical

After the accident, plaintiff sought medical care for his accident injuries from First Choice Medical. At this time, plaintiff informed First Choice Medical that he injured his right shoulder when he fell off a ladder at work. Plaintiff was then prescribed "10 mg oxycodone" (Defendants' Opposition, Exhibit "I," medical records from First Choice Medical).

Plaintiff's Account of His Right Shoulder Injuries to Dr. Frank Segreto's Office and Elite Sports Medicine & Rehabilitation (Elite)

On December 2, 2013, plaintiff sought treatment for his shoulder injury from orthopedist Dr. Frank Segreto. A treatment note from Dr. Segreto's office that day reflects that plaintiff had been having right shoulder pain for about three months that was progressively getting worse. Plaintiff also visited Dr. Segreto on May 27, 2014. A treatment note from that visit states:

> "Today [plaintiff] states that he originally had an injury back on October 7, 2014 [sic] when he fell off a ladder at work, [plaintiff] states she [sic] was too nervous

> to lose his job and was reluctant to tell me this information initially [when] evaluated back on December 2, 2013, however at this point due to the significant findings found during arthroscopy, and due to the patient's significant pain and discomfort he felt [sic] was appropriate to tell the truth as he feels he may be at risk for having discomfort for a long period of time"

(Defendants' Opposition, Exhibit K, medical records from Dr. Segreto's office and Elite).

In addition, a December 4, 2013 narrative report from plaintiff's visit to Elite noted that "[plaintiff] states about 3 months ago [he] developed shoulder pain. No specific trauma. Pain continued. Went to doctor" (*id.*).

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim

Plaintiffs move for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law

(*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

As plaintiffs assert, Labor Law § 240 (1) applies to the facts of this case, because, while he was installing duct work at the Premises, plaintiff was caused to fall and injure his right shoulder when the unsecured ladder that he was ascending shifted. "'Where a ladder is offered as a work-

site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of unsteady ladder, the plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

Important to the facts of this case, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason' [citation omitted]" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]).

In opposition to plaintiff's motion, defendants argue that plaintiffs are not entitled to summary judgment in their favor on the Labor Law § 240 (1) claim, because a review of

plaintiff's deposition testimony, as well as plaintiff's medical records, reveal that genuine issues of fact exist with respect to how the accident occurred, as well as plaintiff's credibility. "Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented" (*Rodriguez v New York City Hous. Auth.*, 194 AD2d at 462).

However, a review of plaintiff's deposition testimony reveals that there is no inconsistency in his statements regarding how the accident occurred. Plaintiff's unrebutted contention is that he fell from the ladder when it shifted (*id.*; *see Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [Court properly granted partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim "since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]). In addition, plaintiff's medical records support, rather than contradict, plaintiff's assertions on the matter. Further, the information contained in the Accident Report, wherein it was reported that plaintiff lost his footing and fell from a ladder, as well as Spinelli's affidavit, wherein he states that plaintiff informed him that he became injured when the ladder he was working on "shifted," also confirm plaintiff's account of the accident (Spinelli Aff at ¶5).

In opposition, defendants have "not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiff's showing or to raise a bona fide issue as to how the accident occurred" (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]). In addition, as noted by plaintiffs, defendants' credibility arguments have nothing to do with whether or not defendants violated their

nondelegable duties under the Labor Law, but rather, at most, said arguments relate to the nature and extent of plaintiff's alleged injuries. It should also be noted that, while it is true that plaintiff was prescribed various medications prior to the day of the accident, defendants have presented no evidence to refute plaintiff's contention that he had not ingested any drugs within the 24 hours prior to the accident.

Finally, contrary to defendants' contention, it would be improper to deny plaintiff summary judgment merely because he was working alone and no other witnesses observed the accident (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290 [1st Dept 2002] [Court granted plaintiff, who was alone at time of accident and fell from an A-frame ladder which had no protective devices while installing a light fixture, summary judgment on his section 240 (1) claim "[r]egardless of the precise reason for his fall"]; *Campbell v. 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2nd Dept 2011] ["The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor"]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, since defendants have not "presented any evidence of a triable issue of fact relating to the prima facie case or to plaintiff's credibility," plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants (*Klein v City of New York*, 89 NY2d 833, 835 [1996]).

CONCLUSION

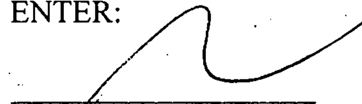
For the foregoing reasons, it is hereby

ORDERED that plaintiffs Joseph Devita and Donna Devita's motion, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants Gilbane Building Company - McKissack & McKissack A Joint Venture is granted; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 9, 2016

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.