Rom v Eurostruct, Inc.
2016 NY Slip Op 32628(U)
December 12, 2016
Supreme Court, Bronx County
Docket Number: 300960/2015
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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BRADFORD ROM,

Plaintiff,

- against -

EUROSTRUCT, INC. and St. HILDA'S & ST. HUGH'S SCHOOL,

Defendants.

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DECISION AND ORDER

Index No. 300960/2015

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated September 21, 2016 and the affirmation and exhibits submitted in support thereof; defendants' notice of cross-motion dated November 8, 2016 and the affirmation, affidavits (4) and exhibits submitted in support thereof; plaintiff's affirmation in opposition and reply dated November 23, 2016; defendants' affirmation in reply dated December 6, 2016 and the exhibits submitted therewith; and due deliberation; the court finds:

Plaintiff, who fell from a ladder, moves for partial summary judgment on his Labor Law § 240(1) cause of action on the issue of defendants' liability. Defendants cross-move for summary judgment dismissing the complaint. Plaintiff does not oppose dismissal of the causes of action asserted under Labor Law § 200 and § 240(2) and for common-law negligence. Plaintiff opposes dismissal of the Labor Law § 241(6) cause of action insofar as premised on 12 NYCRR § 23-1.21(b)(3)(i), 12 NYCRR § 23-1.21(b)(3)(ii), 12 NYCRR § 23-1.21(b)(3)(iv), 12 NYCRR § 23-1.21(b)(4)(ii), and 12 NYCRR § 23-1.21(b)(4)(iv). The abandoned claims and causes of action may be dismissed. *See Perez v. Folio House, Inc.*, 123 A.D.3d 519, 999 N.Y.S.2d 29 (1st Dep't 2014).

Plaintiff had ascended an A-frame ladder to perform work overhead when the ladder suddenly "kicked out" from underneath him and he fell. While he was well aware that the preferred practice was not to ascend a ladder without a helper steadying it from below, and he had ascended

the ladder several times earlier with the assistance of a helper, at the time of the accident he chose not to wait for a helper to become available. He testified that the ladder was "in good shape" and that it wobbled "a little" so as to permit the ladder to move approximately one inch. He further testified that the loose cross-braces seen in photographs of the subject ladder were the product of normal wear and tear and produced the wobbling.

Pursuant to Labor Law § 240(1), owners, contractors and their agents "shall furnish or erect, or cause to be furnished or erected . . . devices which shall be so constructed, placed and operated as to give proper protection." Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers from risks inherent in elevated work sites. *See McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011). Plaintiff must demonstrate a violation of the statute and that the violation was a proximate cause of the injury. *See Blake v. Neighborhood Hous. Servs.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). Merely because an item enumerated in the statute might have been useful in preventing the injury does not mean that the injury was a gravity-related one contemplated by the statute. *See Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001).

"[F]ailure to properly secure a ladder to insure that it remains steady and erect while being used constitutes a violation of Labor Law § 240(1)." *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 437, 921 N.Y.S.2d 42, 45 (1st Dep't 2011) (citation omitted). A wholly unsecured ladder would be found inadequate to prevent plaintiff's accident. *See Lipari v. AT Spring, LLC*, 92 A.D.3d 502, 938 N.Y.S.2d 303 (1st Dep't 2012). However, "[a] fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection." *Campos v. 68 E. 86th St. Owners Corp.*, 117 A.D.3d 593, 593, 988 N.Y.S.2d 1, 2 (1st Dep't 2014). "Defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction." *Ellerbe v. Port Auth. of N.Y. & N.J.*, 91

A.D.3d 441, 442, 936 N.Y.S.2d 39, 40 (1st Dep't 2012). A plaintiff's *prima facie* showing, however, does not require a demonstration that the ladder was defective or failed to meet safety regulations; it is enough to show that the inadequacy of the ladder to protect the worker from a fall proximately caused the injuries. *See Nazario v. 222 Broadway, LLC*, 135 A.D.3d 506, 23 N.Y.S.3d 192 (1st Dep't 2016).

Plaintiff's proof adequately established *prima facie* a violation of the statute and its proximate cause of the incident. *See Caceres v. Standard Realty Assoc., Inc.,* 131 A.D.3d 433, 15 N.Y.S.3d 338 (1st Dep't 2015), *lv dismissed*, 26 N.Y.3d 1021, 20 N.Y.S.3d 333, 41 N.E.3d 1149 (2015); *Acosta v. Kent Bentley Apts., Inc.*, 298 A.D.2d 124, 747 N.Y.S.2d 507 (1st Dep't 2002); *Bataraga v. Burdick*, 261 A.D.2d 106, 689 N.Y.S.2d 86 (1st Dep't 1999).

Defendants argue that they did not violate Labor Law§ 240(1) because the ladder was not defective; thus, plaintiff's negligence by failing to employ the assistance of a helper was the sole cause of the accident. The facts that the ladder may have been secured and fully functional are not necessarily dispositive to the issue of a statutory violation and do not necessarily render any additional protective device redundant. Plaintiff's testimony that the ladder wobbled is sufficient, *see Ocana v. Quasar Realty Partners L.P.*, 137 A.D.3d 566, 27 N.Y.S.3d 530 (1st Dep't 2016), *lv dismissed*, 27 N.Y.3d 1078, 35 N.Y.S.3d 300, 54 N.E.3d 1172 (2016); *Picano v. Rockefeller Ctr. N., Inc.*, 68 A.D.3d 425, 889 N.Y.S.2d 579 (1st Dep't 2009), and evidence of normal wear and tear may be sufficient to render a device inadequate to provide proper protection. *See O'Brien v. Port Auth. of N.Y. & N.J.*, 131 A.D.3d 823, 16 N.Y.S.3d 533 (1st Dep't 2015). It is apparent that plaintiff was not prevented from falling by the ladder, *see Yu Xiu Deng v. A.J. Contr. Co.*, 255 A.D.2d 202, 255 A.D.2d 303, 680 N.Y.S.2d 223 (1st Dep't 1998), and that no other protective devices were supplied, *see Hill v. City of New York*, 140 A.D.3d 568, 35 N.Y.S.3d 307 (1st Dep't 2016).

Defendants argue that plaintiff's failure to employ a helper to foot the ladder, a practice

advised by his supervisors and known by him to be the safer method, renders him the sole proximate cause of the accident. "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 A.D.3d 402, 402-3, 963 N.Y.S.2d 14, 16 (1st Dep't 2013); *Kosavick v. Tishman Constr. Corp. of N.Y.*, 50 A.D.3d 287, 855 N.Y.S.2d 433 (1st Dep't 2008). However, "an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device.'" *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 613 N.E.2d 556, 557, 597 N.Y.S.2d 650, 651 (1993); *Vasquez v. Cohen Bros. Realty Corp.*, 105 A.D.3d 595, 963 N.Y.S.2d 626 (1st Dep't 2013).

A co-worker is not a safety device contemplated by the statute. *See Noor v. City of New York*, 130 A.D.3d 536, 15 N.Y.S.3d 13 (1st Dep't 2015), *lv dismissed*, 27 N.Y.3d 975, 31 N.Y.S.3d 451, 50 N.E.3d 919 (2016); *see also Ortiz v. Burke Ave. Realty, Inc.*, 126 A.D.3d 577, 3 N.Y.S.3d 582 (1st Dep't 2015). "Nor, even if plaintiff had disobeyed an instruction to have the apprentice hold the ladder steady for him, would the owners' and general contractor's liability for failing to provide adequate safety devices be reduced." *McCarthy v. Turner Constr., Inc.*, 52 A.D.3d 333, 334, 859 N.Y.S.2d 648, 649 (1st Dep't 2008). Defendants do not dispute that the ladder functioned as a safety device, *see Acosta*, *supra*, and that it failed to protect plaintiff from falling, *see Dhillon v. Bryant Assocs.*, 306 A.D.2d 40, 759 N.Y.S.2d 673 (1st Dep't 2003). Accordingly, there is no dispute regarding a violation of Labor Law § 240(1).

The statutory violation need merely be a proximate cause of the accident, not necessarily the sole cause. *See Hernandez v. Bethel United Methodist Church of N.Y.*, 49 A.D.3d 251, 853 N.Y.S.2d 305 (1st Dep't 2008). Because the accident was caused at least in part by the inadequacy

of the ladder to prevent plaintiff's fall, plaintiff's decision to ascend the ladder alone cannot be the sole proximate cause. *See Henningham v. Highbridge Community Hous. Dev. Fund Corp.*, 91 A.D.3d 521, 938 N.Y.S.2d 1 (1st Dep't 2012). Once the statutory violation and its proximate cause of the accidence are established, "plaintiff's alleged contributory negligence becomes irrelevant." *Tzic v. Kasampas*, 93 A.D.3d 438, 439, 940 N.Y.S.2d 218, 221 (1st Dep't 2012). In the absence of proof that the ladder "would have actually furnished adequate protection, defendants failed to raise an issue of fact whether plaintiff's actions were the sole proximate cause of his injuries." *Miglionico v. Bovis Lend Lease, Inc.*, 47 A.D.3d 561, 565, 851 N.Y.S.2d 48, 51 (1st Dep't 2008).

As to Labor Law § 241(6), defendants assert that the ladder was maintained in good condition, as evidenced by plaintiff's testimony that the ladder was in "good shape." 12 NYCRR § 23-1.21(b)(3), however, goes further than this otherwise general standard of care. Even though plaintiff testified that loose cross-braces are simply a function of wear and tear that permitted the ladder to move approximately one inch, defendants failed to affirmatively demonstrate that loose cross-braces did not constitute a "broken member or part," *see* 12 NYCRR § 23-1.21(b)(3)(i), "insecure joint between members or parts," *see* 12 NYCRR § 23-1.21(b)(3)(ii), or "flaw or defect of material that may cause ladder failure," *see* 12 NYCRR § 23-1.21(b)(3)(iv).

12 NYCRR § 23-1.21(b)(4)(ii), requiring firm ladder footings, is not a basis for liability, as per plaintiff's own testimony that the floor upon which the ladder was positioned was clear and level and plaintiff never raised any facet of the ladders other than loose cross-braces. There is no evidence that the floor was slippery or unstable. *See Artoglou v. Gene Scappy Realty Corp.*, 57 A.D.3d 460, 869 N.Y.S.2d 172 (2d Dep't 2008). 12 NYCRR § 23-1.21(b)(4)(iv) is inapplicable, as by its terms it applies to leaning ladders, and plaintiff was not using a leaning ladder. Also, given that he testified the ceiling was approximately 11 feet high, plaintiff could not have been performing work from rungs higher than 10 feet above the ladder footing.

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendants' liability on his cause of action asserted under Labor Law 240(1) is granted; and it is further

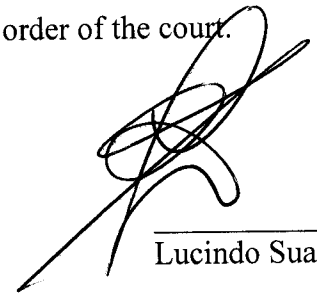
ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff on the issue of defendants' liability on plaintiff's cause of action asserted under Labor Law 240(1); and it is further

ORDERED, that defendants' cross-motion for summary judgment dismissing plaintiff's complaint is granted to the extent of dismissing plaintiff's causes of action asserted under common-law negligence, Labor Law § 200, Labor Law § 240(2) and Labor Law § 241(6) insofar as premised upon regulations **other than** 12 NYCRR § 23-1.21(b)(3)(i), (ii), (iv); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing plaintiff's causes of action asserted under common-law negligence, Labor Law § 200, Labor Law § 240(2) and Labor Law § 241(6) insofar as premised upon regulations **other than** 12 NYCRR § 23-1.21(b)(3)(i), (ii), (iv).

This constitutes the decision and order of the court.

Dated: December 12, 2016



Lucindo Suarez, J.S.C.