SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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JAMES OBROCHTA,

Index No. 160413/2013

Plaintiff,

-against-

CONTI CONSTRUCTION, CONTI OF NEW YORK, LLC, and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants.

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Lebovits, J.:

This is an action to recover damages for personal injuries allegedly sustained by an iron worker on August 12, 2013, when he fell from a ladder while working on a project known as the Staten Island Ferry Terminal Project (the Project) at the St. George Ferry Terminal, Terminal A, Bus Stop 46, on Staten Island (the Premises).

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants Conti Construction (Conti Construction), Conti of New York, LLC (Conti NY, together Conti) and New York City Department of Transportation (the DOT, collectively, defendants).

BACKGROUND

On the day of the accident, the Premises was owned by the DOT. The DOT retained Conti as the general contractor for the Project. Conti hired nonparty Superior Steel Door and Trim to install architectural iron grating at the Project. Plaintiff, a union ironworker, was employed by Superior.

Plaintiff's 50-h Testimony

During his 50-h hearing, plaintiff testified that, on the day of his accident, he was employed by Superior as an iron worker. His duties included installing four-inch thick metal columns for "bays" at the Project (Plaintiff's 50-H tr at 19). The columns were approximately 9-to-10-feet tall. Plaintiff's supervisor on the day of the accident was "Derrick," and his coworkers were Faton Dumani and "Mouse" (*id.* at 17). Plaintiff was solely directed and supervised by Derrick. In addition, all of his tools, equipment and materials were supplied by Superior. Plaintiff noted that his safety equipment consisted of a hard hat, safety glasses, safety vest, boots and gloves.

Plaintiff explained that his work on the project often necessitated the use of a ladder, which he described as a six-foot A-frame ladder, which was provided by Superior. He noted that Superior also had a six-foot baker scaffold at the Project. Plaintiff explained that his work area contained a curb cut, making the ground uneven. Accordingly, he could not use the scaffold, as it could not be used on uneven ground.

At the time of his accident, plaintiff, Dumani and Mouse were installing a column. The installation required plaintiff to climb the A-frame ladder and place a temporary wooden wedge at the top of the column to steady and level it prior to drilling holes in the ceiling to bolt the column. At this time, the base of the column had already been anchored into the concrete, though not fully secured.

Plaintiff testified that the ladder was set up approximately one foot to the right of the column, and that Dumani stood at the base of the column to steady it. Plaintiff then climbed three or four rungs up the ladder, with a hammer in his left hand and a wedge in his right hand. Plaintiff testified as to the events leading up to his accident, in pertinent part, as follows:

> "I put one of the wedges in, and then when I was going to hit the other wedge in, the column moved. My hand was on the column, holding the level, because I can't hit the wedge into place without the level falling off . . . . So, I basically hold the column and the level and I was going to hit it, and then the column moved out. When it moved out, everything just – the ladder kicked out behind me and I went down on to the ground"

(*id.* at 56-57).

Plaintiff's Deposition Testimony

In addition to his 50-h testimony, plaintiff appeared for a deposition, where he testified that the Baker scaffold was, typically, only used when the work required more tools than could be used from a ladder. Otherwise, the ladder was used. He testified that the ladder was "brand new," and that he had read of all the safety information on the ladder (Plaintiff's tr at 24). Plaintiff felt that the ladder was stable and sturdy beneath him.

Plaintiff further testified that, prior to its moving, he was not leaning on the column, because "you can't lean on the column or anything like that, that's impossible because there is no way you can plumb [level] it if you do that" (*id.*, at 39).

Deposition Testimony of Keith Abt (Conti Defendants' Project Manager)

Abt testified that, on the day of plaintiff's accident, he was Conti's project manager on the Project. Abt explained that Conti was the general contractor for the Project, hiring the subcontractors, including Superior. Conti hired Superior to fabricate and install architectural grating between brick panels at the Project.

At his deposition, Abt was shown two witness statements: one from Dumani and one from another Superior employee named Brian Small. Abt confirmed that Dumani's witness statement detailed that "[plaintiff] was on the ladder and he fell while putting a wedge on the top of the column," that "[t]he column moved while putting the wedge in place," and that plaintiff

lost his balance after the column moved (Abt tr at 66-67). He also confirmed that Small's witness statement stated that "[t]he column moved forward. . . . [Plaintiff] reached out to the column, but the ladder kicked out" (*id.* at 74).

Deposition Testimony of Janani Ramkumar (Conti's Project Engineer)

Ramkumar testified that on the day of the accident, she was employed by Conti as the project engineer for the Project. Her duties included managing the subcontractors, ordering materials and monitoring the progress of the work at the Project. She also handled paperwork and "walk[ed] the site" (Ramkumar tr at 7). Although Ramkumar was not a witness to the accident, she, along with Abt, took witness statements and photographs of the accident location. Ramkumar also prepared Conti's incident report.

The Incident Reports

The Conti Incident Report

Conti's incident report (the Incident Report) was prepared by Ramkumar on the day of plaintiff's accident. The Incident Report describes the accident, in pertinent part, as follows:

> "[Plaintiff] climbed up an A-frame ladder to hammer a wedge between the steel tube and the ceiling. While doing so he lost balance and leaned to hold on to the steel tube for support. In the process, the ladder and him both fell down."

(Defendants affirmation in opposition, exhibit B, the Incident Report).

Faton Dumani's Statement (Superior's employee)

In Faton Dumani's witness statement (Dumani's Statement), dated August 13, 2013, the day after plaintiff's accident, Dumani states:

> "[Plaintiff] was on the ladder and he fell while putting a wedge on top of the column. The column moved while putting the wedge in place. [Plaintiff] lost his balance and grabbed onto the column. The ladder kicked out"

(plaintiff's notice of motion, exhibit 10, Dumani's Statement).

DISCUSSION

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

The Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, 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]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Plaintiff has established his prima facie entitlement to partial summary judgment in his favor on the Labor Law § 240 (1) claim, because he has sufficiently established that the ladder that he was working on at the time of his accident failed to protect him from falling, as evidenced by the fact that it "kicked out" from underneath him (plaintiff's tr at 57; Abt tr at 74 [referring to Small's witness statement]; Dumani's Statement).

"'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], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]). Further, "[w]hether 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]).

In opposition, defendants argue that plaintiff is not entitled to judgment in his favor because the condition of the ladder did not cause the accident, rather, plaintiff merely lost his balance (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007] [finding question of fact whether plaintiff "simply lost his footing" or whether the ladder malfunctioned]).

"'[A] mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker'" (*McGill v Qudsi*, 91 AD3d 1241, 1243 [3d Dept 2012], quoting *Briggs v Halterman*, 267 AD2d 753, 755 [3d Dept 1999]). However, here, all of the actual witnesses to the accident agreed that plaintiff's fall was precipitated by the ladder kicking out from under him. To that effect, plaintiff specifically testified that, while he was performing his work on the ladder, which work necessitated the use of both his hands and the exertion of force (the swinging of a hammer), the ladder "kicked out" and he fell (plaintiff's tr at 57). Further, Dumani and Abt both maintained that the ladder "kicked out" from underneath plaintiff.

In addition, in light of the fact that plaintiff's work required the use of both hands to manipulate and level the subject 9-to-10-foot steel column, it was foreseeable that he might lose his balance during the performance of his work. As such, different or additional safety devices, such as a scissor lift, harness and tie-off line, or even an additional steadying pair of hands, were necessary to prevent plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [finding that plaintiff needed additional protections because "[i]t was foreseeable both that plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Bogdanowicz v New York Univ. Med. Ctr. Condominium*, 2014 NY Slip Op 31707 [U], *12 [Sup Ct, NY County 2014]).

The court has considered defendants' remaining arguments and finds them to be unavailing.

Thus, plaintiff is entitled to partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants.

For the foregoing reasons, it is hereby

ORDERED that plaintiff James Obrochta's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants Conti Construction, Conti of New York, LLC and New York City Department of Transportation is granted; and it is further

ORDERED that the action shall continue.

Dated: September 7, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.