Makkieh v Judlau Contr. Inc.
2017 NY Slip Op 32153(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 161493/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **2**

Justice

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MAHMOUD MAKKIEH,

Plaintiff,

- v -

JUDLAU CONTRACTING INC., NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK, METROPOLITAIN TRANSPORTATION AUTHORITY,

Defendants.

INDEX NO. 161493/2015

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document numbers 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46,

were read on these applications for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that **the motion and cross motion are decided as follows.**

In this personal injury action arising from an accident on a construction site, plaintiff Mohmoud Makkieh moves, pursuant to CPLR 3212, for summary judgment on liability against defendant Judlau Contracting Inc. on his claims pursuant to Labor Law sections 200 (common-law negligence) and 240(1). Defendants Judlau Contracting Inc. ("Judlau"), New York City Transit Authority ("NYCTA"), City of New York ("the City"), and Metropolitan Transit Authority ("MTA") cross-move, pursuant to CPLR 3212, to dismiss plaintiff's claim pursuant to Labor Law section 240(1). After oral argument, and upon a review of the parties' motion papers and the relevant statutes and case law, **the motion and cross motion are decided as follows.**

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on August 8, 2015 in which plaintiff Mahmoud Makkieh, a mechanical inspector employed by nonparty Parsons Brinkerhoff ("PB"), was allegedly injured when a metal road plate being moved at a construction site on East 69th Street between Second and Third Avenues in Manhattan fell from the excavator machine hoisting it and bounced into a street sign, causing the sign to strike him in the arm. Judlau, the general contractor at the site, was responsible for "station finishes" and the mechanical, electrical and plumbing systems of the buildings comprising the 72nd Street Subway station, as well as the entrances thereto. Doc. 28, at par. 8.[1]

Plaintiff was a mechanical inspector for PB at the 72nd Street Station on the Second Avenue Subway construction project. Doc. 28, at par. 5. His duties on the job site included overseeing the work of mechanical, electrical, plumbing, and fire protection contractors to ensure that their work conformed to the contract, including the delivery of materials and equipment to the site. Id.; Doc. 29, at p. 9. Plaintiff was to oversee the delivery, by crane, of electrical machinery and equipment to the employees of the electrical subcontractor, Welsbach Electric, at the basement level of the station, approximately 30-40 feet below street level. Doc. 28, at par. 6; Doc. 29, at p. 16-17, 32, 35, 42, 48. To prepare for the delivery of the large, heavy equipment, it was necessary for large steel plates to be placed on 69th Street. Doc. 28, at par. 10; Doc. 29, at p. 23, 32, 35, 48. The road plates were to support the ground on which the crane would be placed. Doc. 29, at p. 35.

When plaintiff arrived at the site, he met with Judlau's superintendent, Killian Tiernan, an engineer, and with Shawn Pierre, Judlau's general foreman, to discuss what preparations needed to be made for the delivery. Doc. 29, at p. 45; Doc. 30, at p. 99. They decided that the area where

[1] Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

the delivery was to be made needed to be cleaned and Pierre and Tiernan directed the workers to do so. Doc. 30, at p. 99.

At approximately 8 a.m., an excavator operated by a Judlau employee carried a metal plate from the east side to the west side of Second Avenue, guided by two Judlau employees who walked on both sides of the plate and held its edges as it was moved. Doc. 28, at par. 11; Doc. 29, at p. 12-13; 23-25, 55, 61; Doc. 30. Plaintiff estimated that the plate was approximately ten by fifteen feet and was about two inches thick. Doc. 29, at p. 60. As the plate was being moved, Tiernan was on the south sidewalk of 69th Street approximately 50 feet west of Second Avenue. Doc. 28, at par. 12; Doc. 29, at p. 33, 45. Plaintiff stood to the west of Tiernan, who had notified him that the delivery would be taking place, leaning on a planter outside a building on East 69th Street and trying to "keep a distance". Doc. 28, at par. 14; Doc. 29, at 29, 32-33. After the plate was moved from the east to the west side of Second Avenue, and as the excavator proceeded westbound on 69th Street just off Second Avenue, the sling holding it, which was attached to the excavator, snapped, the plate fell to the ground, bounced twice, and then came into contact with a pole on which there was a street sign mounted containing the words "no standing any time". Doc. 28, at par. 15; Doc. 29, at p. 54, 58; Doc. 30, at p. 114, 124, 128, 131-132. The sign was "propelled and flew toward" plaintiff, striking him in the right arm. Doc. 28, at par. 15; Doc. 29, at 58; Doc. 30, at p. 110, 113, 132-133.

Although plaintiff did not see how the plate was attached to the excavator prior to the incident, he heard a snap and the plate immediately fell to the ground. Doc. 29, at p. 59, Doc. 30, at p. 108, 110-111. The strap holding the plate had broken and he saw the broken strap on the ground. Doc. 30, at p. 110. Prior to the time the plate fell, plaintiff was standing approximately 25-30 feet from the plate and excavator. Doc. 30, at p. 113. Plaintiff testified that the position of

the plate just seconds before it fell was depicted in the photograph marked as Exhibit B at his deposition. Doc. 30, at p. 114; Doc. 32.

At his deposition, Tiernan stated that Judlau was hired by "[the MTA] [a]cting by the [NYCTA]" to construct part of the Second Avenue Subway. Doc. 31, at p. 15. On the day of the alleged incident, Tiernan was Judlau's safety engineer/safety supervisor. Doc. 31, at p. 21, 54. Several large transformers for power substations were to be delivered to Welsbach at the 72nd Street station that day. Doc. 31, at p. 21, 31. PB was the construction manager for the project. Doc. 31, at p. 25. PB's inspectors advised Judlau if they thought work was not being performed to the contract specifications. Doc. 31, at p. 28.

Tiernan explained that road plates were used to level ground after work was done at or below grade and they provided protection against falling into an opening. Doc. 31, at p. 36. He estimated that the plates were approximately 8 feet by 8 feet, about an inch thick, and weighed about 1000-2000 pounds. Doc. 31, at p. 37-38. The road plates at the site were moved according to the professional engineer's plan for how the crane to be used to lower the transformers should be placed. Doc. 31, at p. 39. The plates were to be placed on 69th Street approximately 50-75 feet west of Second Avenue and an excavator was to be used to move them. Doc. 31, at p. 40, 48-49.

On the day of the incident, the excavator's operator and one or two laborers, all Judlau employees, attached the steel plate to the excavator. Doc. 31, at p. 58, 62, 100. Tiernan did not know what type of sling was used to hold the plate, or if more than one sling was used. Doc. 31, at p. 73. Nor did he know exactly what plaintiff's role at the site was at the time of the incident. Doc. 31, at p. 77-79. Further, he did not recall seeing the plate fall from the excavator but heard a loud bang when it hit the ground. Doc. 31, at p. 83. He admitted that plaintiff had no involvement in attaching the plate to the excavator, transporting the plate across Second Avenue, or instructing

any Judlau employee how to move and/or place the plate. Doc. 31, at p. 87-88. Following the incident, Tiernan was told that the plate fell when the sling holding it snapped. Doc. 31, at p. 90.

Plaintiff commenced the captioned action by filing an amended summons and verified complaint against Judlau, NYCTA, the City, and the MTA on November 9, 2015. Doc. 23. In the complaint, plaintiff alleged that defendants, which owned, or were contractors at, the site, violated Labor Law sections 200 (common-law negligence), 240(1), and 241(6). Doc. 23. Defendants joined issue by filing their verified answer on December 11, 2015. Doc. 24.

On October 28, 2016, plaintiff moved, pursuant to CPLR 3212, for summary judgment against Judlau on its claims pursuant to Labor Law section 200 (common-law negligence) and Labor Law section 240(1). In support of the motion, plaintiff argues that he is entitled to summary judgment pursuant to section 240(1) because the incident was the result of Judlau's failure to provide safety devices adequate to prevent the gravity-related occurrence. Plaintiff further asserts that, since the incident occurred as a result of Judlau's negligence and that the doctrine of res ipsa loquitur should be invoked to establish the negligence of that entity, he is entitled to summary judgment pursuant to Labor Law section 200.

On December 8, 2016, defendants cross-moved, pursuant to CPLR 3212, seeking dismissal of plaintiff's claim pursuant to section 240(1). In support of the cross motion, defendants argue that the alleged incident was not the result of an elevation-related risk. They also assert that the delivery of materials to the site did not constitute "construction" pursuant to Labor Law section 240(1). Further, they maintain that the doctrine of res ipsa loquitur is inapplicable herein. Although defendants also cross-moved pursuant to CPLR 3211 and 3212 to dismiss the complaint as against the MTA on the ground that it was not a proper party, plaintiff has consented to dismissal as against that entity. Doc. 46, at par. 42.

In opposition to the cross motion and in further support of its motion, plaintiff reiterates his argument that he is entitled to summary judgment on his claims pursuant to sections 200 and 240(1).

LEGAL CONCLUSIONS

"[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 eliminate any material issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (internal quotation marks and citation omitted). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Kosson v Algaze*, 84 NY2d 1019 (1995). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

Labor Law Section 240(1)

Plaintiff is entitled to partial summary judgment on his claim against Judlau pursuant to Labor Law section 240(1). Section 240 (1) requires contractors and owners engaged "in the

erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" to provide "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." "Although the statute is meant to be liberally construed to accomplish its intended purpose, absolute liability [is imposed only] where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 33 (2017) (internal quotation marks and citations omitted).

Labor Law section 240(1) was designed to prevent those types of accidents in which a safety device proved inadequate to shield a worker "'from harm directly flowing from the application of the force of gravity to an object or person.'" *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009), *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993). In determining whether an elevation differential is physically significant, a court must consider, inter alia, "the weight of the object and the amount of force" the object is "capable of generating, even over the course of a relatively short descent." *Runner,* 13 NY3d, at 605; *see also Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 (2011). Even where a plaintiff's accident is caused by an elevation-related risk, plaintiff must still establish a "causal nexus between [his] injury and a lack or failure" of a safety device as contemplated by Labor Law section 240(1). *Wilinksi, supra* at 9.

In *Wilinski*, the Court of Appeals held that a worker may recover under section 240(1) even if the object which struck him was on the same level as he was, provided that the risk arose from a significant elevation differential. In that case, pipes which struck plaintiff were at the same level

where he had been standing, but recovery was not precluded under section 240(1) because the pipes, which were about 10 feet tall, fell onto the plaintiff, who was about 5'8" tall.

In *Marrero v 2075 Holding Co. LLC* 106 AD3d 408 (1st Dept 2013), an A-frame cart containing sheetrock and two 500-pound steel beams tipped over onto plaintiff and landed on his leg. The Appellate Division noted that "while the record did not specify the height," the beams "fell a short distance" from the top of the cart to plaintiff's leg. Id., at 409. In granting partial summary judgment to the plaintiff pursuant to section 240(1), the court reasoned that "[g]iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis." Id., at 409 (internal quotation marks and citations omitted).

In *Kempisty v 246 Spring Street, LLC*, 92 AD3d 474 (1st Dept 2012), the Appellate Division held that the IAS court erred in finding section 240(1) inapplicable on the ground that there was no appreciable height difference between plaintiff and the object being hoisted, a four-ton steel block, which crushed plaintiff's foot. The Appellate Division held that the elevation differential could not be considered de minimis where the object being hoisted was able to generate an extreme amount of force.

The language of section 240(1) and the foregoing decisions clearly militate in favor of the granting of plaintiff's motion for partial summary judgment on his claim pursuant to that statute. At his deposition, Tiernan admitted that the plate was lifted by a sling. Both plaintiff and Tiernan heard a snap and then heard the plate fall. Thus, despite the fact that one of the devices enumerated in the statute, a sling, was provided by Judlau, it was clearly inadequate for the work intended. Although the record does not reflect exactly how high the plate was lifted, plaintiff's testimony was that, just seconds before it fell, the plate was in the position depicted in the photograph marked

as Exhibit A at his deposition. Doc. 30, at p. 114; Doc. 32. That photograph shows one end of the plate approximately 2 feet above the ground. The precise location of the other end of the plate, which appears closer to the ground, cannot be discerned from the photograph. Nevertheless, since the plate bounced twice and then traveled approximately 25-30 feet before striking the pole containing the sign which struck plaintiff, this Court finds that the elevation of the plate cannot be considered de minimis given the amount of force it generated when it fell. *See Marrero*, 106 AD3d at 409. This Court further determines that Judlau's failure to properly secure the plate was the proximate cause of plaintiff's injuries.

In asserting that section 240(1) is inapplicable herein, defendants rely on *Melo v Consolidated Edison of New York, Inc.*, 92 NY2d 909 (1998). In that case, a plate which was to be placed over a trench was attached, by means of a chain with a hook at each end, to the shovel part of a backhoe. The plate was raised in a vertical position, with its edge resting on the ground or just slightly above the ground. As the plate was being moved to the trench, a hook became unfastened and the plate fell on plaintiff's foot. In holding that plaintiff's activities did not fall within the purview of section 240(1), the Court reasoned that the plate was not elevated above the work site and thus plaintiff's work did not involve the special elevation risks encompassed by the statute. However, the facts of *Melo* are distinguishable from those herein. As noted previously, although the plate in this case was not elevated high above the ground, it bore such substantial weight that, when it fell, it had the force to bounce twice, travel approximately 25-30 feet, and knock over a signpost onto plaintiff. Given that the plate was capable of generating such intense force despite its relatively short descent, plaintiff herein was clearly exposed to the substantial effect of gravity, thereby invoking the protection of section 240(1). *Runner*, 13 NY3d, at 605.

Although defendants assert that plaintiff is not protected by section 240(1) because "no excavation or demolition was going on" at the time of the incident and because "the delivery [of the transformers] should not be construed as 'construction'" (Doc. 44, at Point II), these contentions are without merit. Plaintiff, a mechanical inspector for PB, was on the site to monitor the work being performed to erect the 72nd Street Subway station. His duties on the job site included overseeing the work of mechanical, electrical, plumbing and fire protection contractors to ensure that their work conformed to the contract, including the delivery of materials and equipment to the site. Id.; Doc. 29, at p. 9. As noted previously, plaintiff was to oversee the delivery of electrical machinery and equipment to Welsbach's employees by crane at the basement level of the station, approximately 30-40 feet below street level. Doc. 28, at par. 6; Doc. 29, at p. 16-17, 32, 35, 48.

The Appellate Division, First Department has stated that:

> employees hired to inspect construction work have been held to be within the class of persons protected by section 240 (1). Partial summary judgment on the issue of liability has been awarded to a civil engineer in charge of bridge construction who fell while inspecting the job site (*Reisch v Amadori Constr. Co.*, 273 A.D.2d 855); an architect who fell while inspecting the construction of a manufacturing plant (*Aubrecht v Acme Elec. Corp.*, 262 A.D.2d 994); an independent consultant hired by the general contractor who fell while inspecting the construction (*Nowak v Kiefer*, 256 A.D.2d 1129, *lv denied in part and dismissed in part* 93 NY2d 887, *rearg dismissed* 93 NY2d 1000) and a supervisor and steel inspector employed by one of the subcontractors on the job who fell while inspecting the work of an employee of another subcontractor (*Iannelli v Olympia & York Battery Park Co.*, 190 A.D.2d 775).

Campisi v Epos Contr. Corp., 299 AD2d 4, 6 (1st Dept 2002).

Since plaintiff was hired to inspect and monitor the erection of the 72nd Street Subway station, he was protected by section 240(1). Additionally, since the delivery of equipment to the site was clearly an integral part of the erection of the station, there is no merit to defendants' claim

that the delivery of the equipment, or the preparation for the delivery by placing the plates, was not work which fell within the scope of the statute. *See Brogan v International Bus. Mach. Corp.*, 157 AD2d 76 (3rd Dept 1990).

In asserting that plaintiff was not engaged in work protected by the statute defendants rely, inter alia, on *Orellana Siguenza v Cemusa, Inc.*, 127 AD3d 727 (2nd Dept 2015). In that case, plaintiff claimed that he was injured while erecting a bus shelter. However, at the time of the alleged accident, work had not yet begun on the construction of the bus shelter, plaintiff's employer was not hired to build the bus shelter, plaintiff was not to actually help erect the bus shelter, and plaintiff's only work at the site involved the demolition and restoration of a sidewalk. Thus, held the Appellate Division, plaintiff could not be considered a person "employed" to perform an activity enumerated under Labor Law section 240(1). However, this case is distinguishable from *Orellana Siguenza* since the construction of the 72nd Street Subway station was in progress when the incident occurred and plaintiff was directly involved in the erection thereof by ensuring that the work was performed properly.

Labor Law Section 200 (Common Law Negligence)

In light of the finding of absolute liability against Judlau pursuant to Labor Law section 240(1), it is unnecessary for this Court to address that branch of plaintiff's motion seeking summary judgment against Judlau pursuant to Labor Law section 200 (common-law negligence), as that issue has been rendered academic. *See Bundo v 10-12 Cooper Sq., Inc.*, 140 AD3d 535, 536 (1st Dept 2016).

Defendants' Cross Motion

Defendant' cross motion for summary judgment dismissing plaintiff's claim pursuant to Labor Law section 240(1) is denied for the same reasons that this Court granted plaintiff's motion for partial summary judgment on liability pursuant to that statute. Since plaintiff has withdrawn his claims against the MTA, there is no need for this Court to address that branch of defendants' motion seeking dismissal of the complaint as against that entity.

CONCLUSION

Given the foregoing, the branch of plaintiff's motion for partial summary judgment as against Judlau pursuant to Labor Law section 240(1) is granted. For the same reasons, defendants' cross motion seeking to dismiss plaintiff's claim pursuant to section 240(1) is denied. As discussed above, the claim against the MTA is discontinued. Given the finding of liability against Judlau pursuant to section 240(1), there is no need to address the merits of that branch of plaintiff's motion seeking summary judgment against Judlau pursuant to Labor Law section 200, as that issue has been rendered academic.

In light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion for partial summary judgment on liability as against defendant Judlau Contracting Inc. pursuant to Labor Law section 240(1) is granted; and it is further

ORDERED that the branch of plaintiff's motion for partial summary judgment on liability as against defendant Judlau Contracting Inc. pursuant to Labor Law section 200 has been rendered academic; and it is further

ORDERED that the cross motion by defendants Judlau Contracting Inc., New York City Transit Authority, and the City of New York to dismiss plaintiff's claim pursuant to Labor Law section 240(1) is denied; and it is further

ORDERED that plaintiff's claim against defendant Metropolitan Transportation Authority is discontinued; and it is further

ORDERED that this action shall continue with respect to plaintiff's remaining causes of action; and it is further

ORDERED that the issue of damages, as well as the liability of defendants other than Judlau, shall be determined at trial; and it is further

ORDERED that this constitutes the decision and order of the court.

10/10/17
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE