Gonzalez v Weill Med. Coll. of Cornell Univ.
2018 NY Slip Op 30980(U)
April 18, 2018
Supreme Court, Bronx County
Docket Number: 21083/15E
Judge: Lizbeth Gonzalez

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NYSCEF DOC. NO. 152 RECEIVED NYSCEF: 04/20/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Jorge Gonzalez and Maribel Gonzalez,

Plaintiffs,

-against-

Weill Medical College of Cornell University, Tishman Construction Corporation, Tishman Construction Corporation of New York, AECOM Technical Services, Inc., AECOM Technical Services Northeast, Inc., AECOM USA, Inc., Select Safety Consulting Services, Inc. and Select Safety LLC,

Defendants.

Weill Medical College of Cornell University, Tishman Construction Corporation, Tishman Construction Corporation of New York,

Third-Party Plaintiffs,

-against-

York Scaffold Equipment Corp.,

Third-Party Defendant.

DECISION AND ORDER

Index No. 21083/15E

TP Index No. 43032/16E

Plaintiff alleges that because of defendants' negligence, he was injured in an elevation-related accident on 1/18/14 at a construction project located at 413 East 69th Street in New York County. Plaintiff moves for partial summary judgment against defendant Weill Cornell Medical College of Cornell University ("Weill Cornell") as to liability pursuant to CPLR 3212 and Labor Law § 240(1). Defendant opposes the motion on the ground that the Labor Law § 240(1) is inapplicable because the plaintiff was performing routine cleaning work.

In support of his motion, plaintiff Jorge Gonzalez submits his deposition transcript; photographs; his attorney's reply affirmation and reply affidavit; the 3/17/10 contract between Weill Cornell and Select Safety Consulting Services Inc. ("Safety Services") designating it as the site safety manager for the project; Safety Services 1/23/14 investigation report, with photographs; Tishman's 1/18/14 incident report form; Remco's C-2 employer's report of work-related injury/illness; and other exhibits.

In opposition, defendant Weill Cornell submits an attorney affirmation.

Summary judgment is warranted when a movant shows through admissible evidence that the opposing party has no defense to the cause of action or that the cause of action has no merit (CPLR

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3212; *Martin v Briggs*, 235 AD2d 192 [1st Dept 1997]). There must be no doubt about the existence of a triable issue of fact since summary judgment deprives the litigant of his or her day in court (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]; *see Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185 [1st Dept 1996], *affd* 90 NY2d 953 [1997]).

Labor Law § 240(1) sets forth the responsibilities of contractors, owners and their agents for employees exposed to elevation-related hazards (*Panek v County of Albany*, 99 NY2d 454 [2003]; *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]).

> §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. 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.

Plaintiff testified that on 1/18/14, he was employed as a helper by Remco Maintenance Company ("Remco") as part of a construction project to construct the Biomedical Research Building located at 413 East 69th Street in New York County. The property is owned by Cornell University. Plaintiff worked for Remco, a maintenance company that does cleaning, painting "and marble," for 31 years prior to the accident.

On the date in question, Remco foreman Tony Garcia directed plaintiff and non-party co-workers Max Arroyo and Juan Carlos Garcia to assemble a scaffold so they could clean the gates for the loading dock.
The gates were approximately 14'-15' above the ground.

Plaintiff testified that he had previously assembled this type of scaffold on many occasions. The two-level aluminum scaffold measured 3' x 4-5' x 12.' It had an integrated ladder and wheels. The scaffold's first level was approximately 6' off the ground and its second level was 6' feet higher, for a total height of 12'. At its highest point, it was approximately 12'-15' off the ground. Foreman Garcia and a man wearing a hard hat watched as plaintiff and his co-workers assembled the structure.

Upon completion, the three helpers checked the scaffold's wheels to make sure they were locked. Plaintiff Garcia and Mr. Arroyo then climbed the scaffold to clean the loading dock gates using buckets, ammonia, pumice stone, scotch pads, water and soap. They were provided gloves and danger signs but no other safety devices.

Since the men were performing different tasks, plaintiff asked Mr. Arroyo to step down so he could have more space to work. Plaintiff stood on the top level of the scaffold approximately 12' up, facing the building. As Mr. Arroyo descended, the scaffold suddenly collapsed. Although plaintiff tried

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to grab an aluminum bar, he fell. Plaintiff's photographs establish that the scaffold broke at the ladder portion of the scaffold. Plaintiff testified that the ladder was not broken prior to the accident.

Select Safety Consulting Services - Weill Cornell's site safety manager - prepared an accident/incident investigation report which states that the accident was caused by a "defective scaffold." One of the photos attached to the report bears the notation: "Another scaffold in use with identical wear marks between the 2nd and 3rd run where the one in question snapped."

The Tishman incident reporting form states that "the ladder broke causing the scaffold to come down."

Remco's C-2 employer's report of work-related injury/illness states that plaintiff's accident was caused when the "ladder broke and the scaffold came down."

Labor Law § 240(1) was enacted to "minimize injuries to employees by placing ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents" (*Martinez v City of New York,* 93 NY2d 322 [1999]; *see Vera v Low Income Marketing Corp.,* 145 AD3d 509 [1st Dept 2016]). Defendants reference *Torres v St. Francis Coll.*, 129 AD3d 1058 (2d Dept 2015) in support of their argument that the type of cleaning performed by plaintiff places him outside the ambit of Section 240(1). In *Torres*, the Second Department set forth four elements to consider:

> An activity cannot be considered "cleaning" under the statute if it: "(1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project" (*Soto v J. Crew Inc.*, 21 NY3d at 568; *see Collymore v 1895 WWA, LLC*, 113 AD3d 720, 721 [2014]). The factors are to be considered as a whole, and the " 'presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other' " (*Pena v Varet & Bogart, LLC*, 119 AD3d 916, 917 [2014], quoting *Soto v J. Crew Inc.*, 21 NY3d at 568-569).

The reasoning in *Torres* militates against defendants. Here, the scaffold's 12' – 15' height was significant and not comparable to the elevation inherent in typical domestic or household cleaning. Second, the cleaning required specialized equipment, to wit, a scaffold was required to reach the loading dock gates situated 14'-15' above the ground. Third, the cleaning was not part of the ordinary maintenance and care of a commercial premises. Lastly, the cleaning was related to ongoing construction work.

After careful consideration, the court finds that plaintiff Jorge Gonzalez met his burden. Defendant Weill Cornell Medical College of Cornell University failed to meet its shifting burden of proof.

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The court accordingly grants plaintiff's motion for partial summary judgment against defendant on the issue of liability.

A copy of this Order with Notice of Entry shall be served within 30 days.

Date: 18 April 2018

So ordered,

Hon. Lizbeth González, J.S.C.