Lopez v City of New York
2018 NY Slip Op 31589(U)
July 11, 2018
Supreme Court, New York County
Docket Number: 153272/2013
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------x

ANTHONY LOPEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

----------x

DECISION AND ORDER

Index No.: 153272/2013

Mot. Seq. No. 001

Kathryn E. Freed, J.S.C.

The following documents, filed with NYSCEF, were considered in deciding this motion:

16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, and 41.

This is an action to recover damages for personal injuries allegedly sustained by a carpenter on February 18, 2012, when a portion of an elevated and improperly secured steel bar cage fell onto his feet while he was working at the LI Shaft East Wall Extension of the #7 train located at 41st Street and Dyer Avenue, New York, New York (the premises). Plaintiff Anthony Lopez moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants the City of New York (the City), the New York City Transit Authority (the NYCTA) and the Metropolitan Transportation Authority (the MTA) (collectively, defendants).

BACKGROUND

On the day of the accident, defendants owned and managed the premises where the accident occurred. Prior to the day of the accident, the NYCTA, acting on the MTA's behalf, hired nonparty CCA Civil Halmar International (Halmar), an engineering company specializing in road and bridge work and tunnels, to construct two vent shafts at the premises (the Project). Plaintiff was employed by Halmar as a carpenter foreman.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, the MTA owned the Project, he was working within the scope of his employment with Halmer, and his work was supervised solely by his Halmar supervisor. In addition, plaintiff supervised a crew of carpenters and laborers. Plaintiff explained that he was hired at the "excavation and waterproofing" stage of the Project, which entailed "building the walls for the vents" in a shaft located approximately 100 feet below the ground's surface (plaintiff's tr at 38-39). This stage required multiple layers of concrete to be poured on walls made of "steel and wood" (*id.* at 39).

Plaintiff further explained that, prior to each concrete pour, rebar cages, which were comprised of several layers of vertical and horizontal steel reinforcement bars, and which encompassed all four walls of the shaft, were constructed by trade workers called "lathers" and then hoisted down in front of large Doka forms. Plaintiff maintained that the "[t]wenty to thirty rebars weighed approximately 1 ton" (*id.* at 98-100). The Doka forms, each measuring approximately 9- to 10 feet wide and 20 feet high, were built above ground and then lowered down into the shaft by a crane.

Plaintiff testified that the individual steel bars that comprised the rebar cages were initially attached together and to one another solely by "thin" tie wires (*id.* at 95). After the rebar cages were installed, and before another layer of concrete was poured on the walls to permanently secure them, it was necessary to screw lintels, or threaded metal couplers, into the wooden strips that were placed on the concrete walls. Plaintiff said that "[t]he purpose of the lintel placed inside of that wood was to connect it to [additional] rebar that was going to be installed on the outside of the concrete at a later time" (*id.* at 74). After the lintels were screwed in, another pour sequence was conducted. Plaintiff asserted that "[b]efore the [last] concrete pour, there is nothing that holds the rebar to the wall (*id.* at 103).

On the morning of the accident, plaintiff was instructed by his Halmar foreman to assist two Halmar carpenters, Eddie Castro and Paul Shumko, to install lintels into the wall forms within the shaft. In order to do so, it was necessary for plaintiff to climb onto one of the rebar cages (the cage), which had been previously installed by Halmar lathers. Prior to doing so, plaintiff retrieved a harness, chains and metal positioning hooks from the Halmar equipment trailer. Plaintiff was not provided with any other safety equipment. Plaintiff explained that the positioning hooks were clamped to the rebar cages, so as to secure the workers while they performed their work.

Plaintiff then climbed approximately 15 feet up a ladder and secured himself to the cage with a positioning hook. He described the cage as having two layers of rebar tied together with tie wire. He then stepped into the cage and to his right. At this time, two carpenters were cutting some of the tie wires on the cage, a necessary step to installing the lintels. As plaintiff was showing Castro where to place the lintels, he observed the cage "move . . . [and] it looked like it

rattled" (*id.* at 123). Immediately thereafter, "the whole thing just came down, the whole back side of the cage," falling approximately two feet down and landing on both of plaintiff's feet (*id.* at 123-124).

Witness Statement of Anthony Lacugna (Halmar Carpenter)

In his witness statement, Anthony Lacugna represented that he worked for Halmar as a general carpenter foreman on the day of the accident. Lacugna explained that, in order to move the cage and work on the subject wall, plaintiff and/or his crew had "cut the front of the ties," which "made the cage come down on [plaintiff's] feet" (defendants' opposition, exhibit B, Lacugna's Witness Statement). He concluded, "Apparently, the rebar cage was not tied down properly" at the time of the accident (*id.*).

The Halmar Injury Report

On the date of the accident, an injury report was completed by Halmar's manager, Damas Gabbriellini. In the Injury Report, Gabbriellini stated:

> "[Plaintiff] had climbed up the face of the rebar on the shaft side of the cage to make some adjustments to re-bar to allow pack-out to fit in wall. [Plaintiff] began to cut the ties on 1 vertical piece of rebar which conflicted with the pack-out/installing forms - he was aprox [sic] 14ft [f]rom slab. As he cut the last tie on 9th re-bar, -rebar cage fell approximately 4ft onto his positioning device as well as both of his feet, pinning them in re-bar"

(defendants' opposition, exhibit 9, the Injury Report).

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

Plaintiff moves for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law (*See 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]).

Here, where plaintiff was injured when the backside of the cage fell between two to four feet and pinned his feet, he may recover damages from defendants for their violation of Labor Law § 240 (1) under a falling objects theory because the cage "was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699-700 [2d Dept 2013] [plaintiff entitled to summary judgment in his favor on his Labor

Law § 240 (1) claim where he demonstrated that the load of material that fell on him, while being hoisted to the top of the building, was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

Contrary to defendants' argument, it would be improper to deny plaintiff summary judgment merely because plaintiff has not provided the testimony of other witnesses who observed the accident (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d at 290 [plaintiff, who was installing a light fixture alone and fell from an A-frame ladder which had no protective devices, granted 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"]).

Also contrary to defendants' argument, case law dictates that a falling object need not be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240 (1). It is enough that said object simply needed securing "'for the purposes of the undertaking'" (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and thus was not in the process of being hoisted or secured at the time that it fell on the plaintiff]). Here, the cage needed to be properly and sufficiently secured while it was being installed, even if only for a short time.

Defendants also argue that plaintiff is not entitled to judgment in his favor on the Labor Law § 240 (1) claim against them, because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, plaintiff testified that the cage fell two feet and the Injury Report reflects that it fell four feet.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), a case with similar facts, the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured four inches in diameter. As in the instant case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605); *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Wilinski* to the instant case, plaintiff is not precluded from recovery simply because the cage fell only a few feet and, given the significant amount of force that it generated during its fall, his accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603).

Further, since the stability of the cage was precarious, given that some of the tie wires that secured it had to be cut in order to install the lintels, and since the positioning hooks provided

were designed solely for the purpose of holding a worker in a safe position while working on it, additional safety devices, beyond just tie wires, such as slings or ropes, were needed to prevent the cage from falling while the lintels were being installed. "'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Defendants also assert that, since either plaintiff or his coworkers were responsible for cutting the subject tie wires, thereby causing part of the cage to fall, an issue of fact exists as to whether plaintiff was the sole proximate cause of the accident. "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

However, as noted previously, plaintiff testified that the subject tie wires had to be cut in order to install the lintels. In any event, any alleged negligence on plaintiff's part in cutting the subject tie wires goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a

violation is established (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] ["[e]ven if there were admissible evidence [that the 'plaintiff failed to attach his safety harness to the lifeline in the proper manner'] the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] ["even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] ["even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y.*, 1 NY3d 280, 290 [2003]). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

Further, contrary to defendants' argument, in order to establish a Labor Law § 240 (1) claim, plaintiff did not have to establish that it was foreseeable that the cage was in need of further securing by an additional enumerated device. Plaintiff needs only to establish that he was

injured "when an elevation-related safety device failed to perform its function to support and secure him from injury" (*Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012], citing *Morin v Machnick Bldrs.*, 4 AD3d 668, 670 [3d Dept 2004]).

> "Indeed, it has been firmly established that in order to make out a valid claim under Labor Law § 240, a 'plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable'"

(*id.*, quoting *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]).

Finally, defendants did not offer any evidence, other than mere speculation, that the cage was intentionally dropped, so as to refute plaintiff's showing or to raise a bona fide issue as to how the accident occurred (*see 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]).

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

The Labor Law § 241 (6) Claim

Plaintiff also moves for partial summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against defendants. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Although plaintiff asserts multiple alleged Industrial Code violations in his bill of particulars, he only moves for summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-2.3 (a).

Industrial Code 12 NYCRR 23-2.3 (a)

Initially, section 23-2.3 (a), which deals with structural steel assembly, is sufficiently specific to support a Labor Law § 241(6) claim (see *Gualla v Canarsie Plaza, LLC*, 144 AD3d

1088, 1091-1092 [2d Dept 2016]; *Cardenas v BBM Constr. Corp.*, 133 AD3d 626, 629 [2d Dept 2015]).

Section 23-2.3 (a), entitled "Structural steel assembly," provides:

"(a) Placing of structural members.

(1) During the final placing of structural steel members, loads shall not be released from hoisting ropes until such members are securely fastened in place. Structural steel members shall not be forced into place by hoisting machines while any person is so located that he may be injured thereby.

(2) Open web steel joints that are hoisted singly shall be transferred from their place of storage directly to their permanent location and secured against dislodgement. Such a load shall not be released from the hoisting rope until it is secured. Bundles of such joists shall be so placed as to prevent accidental dislodgement while being hoisted. Immediately upon the release of the ties or straps from such bundles, the individual joists shall be distributed to and placed in their permanent positions and secured against accidental dislodgement.

(3) Loads shall not be placed on open web steel joists until such joists are permanently located and secured including the installation of required bridging."

In opposition, defendants first argue that plaintiff has failed to establish that the cage was a structural steel member, so as to fall within the purview of section 23-2.3 (a). However, plaintiff described the cage as being a box patchwork of horizontal and vertical steel reinforcement bars, several layers thick, with 20-30 bars, each weighing approximately one ton. Notably, defendants do not adduce any evidence establishing, or even suggesting, that the cage is not a structural steel member.

That said, as defendants argue, section 23-2.3 (a) (1) does not apply to the facts of this case because the provision only applies when hoisting ropes are in use for the placing of structural steel members, and there is no indication in the record that such ropes were in use at the time of the accident (*see Gualla*, 83 AD3d at 1092; *Timmons v Barrett Paving Materials,*

Inc., 83 AD3d 1473, 1475 [4th Dept 2011] [section 23-2.3 (a) (1) only applies when hoisting ropes are actually used for the placing of structural steel members]).

In addition, sections 23-2.3 (a) (2) and (3) do not apply, because these provisions only apply to "open web steel joints," and plaintiff has made no argument that the cage was an open web steel joint.

Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-2.3 (a).

In light of the foregoing, it is hereby:

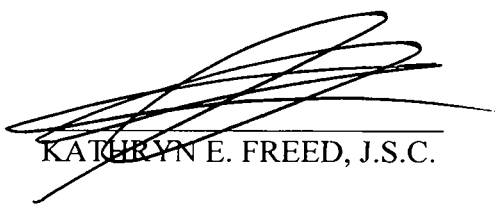
ORDERED that the part of plaintiff Anthony Lopez's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants the City of New York, the New York City Transit Authority and the Metropolitan Transportation Authority is granted, and the motion is otherwise denied; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

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

Dated: July 11, 2018 ENTER:



KATHRYN E. FREED, J.S.C.