Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium
2018 NY Slip Op 31839(U)
August 3, 2018
Supreme Court, New York County
Docket Number: 155334/12
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL CUTAIA,

Plaintiff,

-against-

THE BOARD OF MANAGERS OF THEJ 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC., MICHILLI INC. and PATRIOT ELECTRIC GROUP,

Defendants.

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MICHILLI CONSTRUCTION, INC. and MICHILLI INC.,

Third-party Plaintiffs,

-against-

A+ INSTALLATIONS CORP.,

Third-party Defendant.

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160/170 VARICK STREET CONDOMINIUM, IMPROPERLY NAMED AS BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM and THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK,

Second Third-party Plaintiffs,

-against-

THE TRAVELERS COMPANIES, INC. d/b/a TRAVELERS INSURANCE COMPANY,

Second Third-party Defendants.

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Index No. 155334/12
Motion Seq. No. 010

DECISION AND ORDER

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THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH-WARDENS, VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC. and MICHILLI INC.,

Third Third-party Plaintiffs,

-against-

ATLAS-ACON ELECTRIC SERVICE CORPORATION,

Third Third-party Defendant.

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THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH-WARDENS, VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, and MICHILLI CONSTRUCTION, INC.,

Fourth Third-party Plaintiffs,

-against-

FIRST QUALITY MAINTENANCE II, LLC and ALEXANDER WOLF & SON,

Fourth Third-party Defendants.

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CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, plaintiff Michael Cutaia moves, pursuant to CPLR 3212, for partial summary judgment as against defendants The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York (Trinity Church), Michilli Construction, Inc., and Michilli, Inc. (together, Michilli) as to liability on plaintiff's Labor Law § 240 (1) and 241 (6) claims.

BACKGROUND

On March 26, 2012 plaintiff, a plumbing mechanic, was performing work at a 12-story building, located at 160-170 Varick Street in lower Manhattan, that is owned by Trinity Church. Michilli, a construction company, was a tenant in a space on the 11th floor of the building and it was performing a build out renovation to prepare the space as its corporate office. Michilli itself served as the general contractor on the project. Michilli hired third-party defendant A+ Installations Corp. (A+ Installations), who employed plaintiff at the time, to install plumbing pipes for the space.

On the day of his accident, plaintiff had been asked to move the location of sinks in the men's bathroom from one location, where they had already been installed, to another (plaintiff's April 2016 tr at 104). To accomplish this, plaintiff had to shut down the water lines, drain them, and cut and reroute the pipes in the ceiling which led to the sinks (*id.* at 110). Immediately prior to his accident, plaintiff was attempting to cut a pipe in the ceiling in order to add a T-joint, so that he could reroute the pipes toward the new sinks. To reach the pipe, plaintiff used a A-frame ladder. However, the ladder, in an open position did not place plaintiff high enough to do his work:

> "I picked up the ladder. Originally, I tried to – I opened the ladder and I was trying to position it where I could get to the pipe that I was working on but I couldn't. So I had to fold the ladder and lean it up against the wall and that's what I did"

(*id.* at 133).

Plaintiff stood on the second rung from the top of the ladder to perform his work and shortly after cutting the pipe and attaching a T-joint, he received an electrical shock:

> "What happened was I put the T on the right side. I grabbed the right side of the pipe, then I went to grab the left side of pipe to push it. When I grabbed the left side of the pipe, that is when I got electrocuted"

(plaintiff's December 2016 deposition at 376).

The next thing plaintiff remembers is being on the ground (plaintiff April 2016 tr at 150). Plaintiff crawled out of the bathroom and screamed for help (*id.* at 151). As to his condition at that time, plaintiff testified: "My face was bleeding, my fingers were bleeding, my side was bleeding" (*id.* at 152). Joseph Renna (Renna), Michilli's project manager on the subject build-out, who came to plaintiff's aid, testified that, after plaintiff was in an ambulance, he went into the bathroom where plaintiff had been working (Renna tr at 47). Renna observed that "in the ceiling there was a yellow wire that was missing a cap" in the vicinity where plaintiff was working and Renna attributed plaintiff's electrical shock to this condition.

Plaintiff filed the complaint in this action on August 9, 2012, alleging that defendants are liable under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence. In this motion, plaintiff seeks partial summary judgment as to the section 240 (1) and 241 (6) claims.

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing*

Alvarez v Prospect Hosp., 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

I. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or

supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Plaintiff alleges that defendants have violated Industrial Code sections 23-1.13 (b) (3) and 23-1.13 (b) (4). 12 NYCRR 23-1.13 (b) (3), entitled "Electrical hazards; Investigation and warning," provides:

> "Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken."

12 NYCRR 23-1.13 (b) (4), entitled "Electrical hazards; Protection of employees," provides:

> "No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

Courts have held that both 12 NYCRR 23-1.13 (b) (3) and 12 NYCRR 23-1.13 (b) (4) are sufficiently specific to serve as a predicate to liability under section 241 (6) (*see e.g., Rubino v*

330 Madison Co., LLC, 150 AD3d 603 [1st Dept 2017]; *O'Leary v S&A Elec. Contr. Corp.*, 149 AD3d 500 [1st Dept 2017]). In *Rubino*, the Court held that the trial court "properly granted plaintiffs' motion for partial summary judgment on the Labor Law § 241 (6) claim," as violations of both regulations "proximately caused the injuries sustained by plaintiff when a metal part of his safety harness contacted a live electrical wire, known as a BX cable, which was hanging down from a top ceiling of a building under renovation" (150 AD3d at 603-604). In *Leary*, the Court upheld the trial court's grant of partial summary judgment on a section 241 (6) claim where a violation of 12 NYCRR 23-1.13 (b) (4) served as the predicate to liability (149 AD3d at 502). The Court reasoned that the fact that the plaintiff was electrically shocked "demonstrated that the circuit was not de-energized, grounded, or guarded by effective insulation" (*id.*).

A clear of violation of both 12 NYCRR 23-1.13 (b) (3) and 12 NYCRR 23-1.13 (b) (4) is present here. The record shows that defendants did not investigate the work area for potential electrical hazards, or warn plaintiff of such hazards in violation of 12 NYCRR 23-1.13. Nor, in violation of 12 NYCRR 1.13 (b) (4), did defendants take steps to protect plaintiff from the uncapped wire involved in his accident by de-energizing, grounding, or guarding it. Moreover, these violations proximately caused plaintiff's injuries, which were sustained as a result of an electrical shock.

Trinity Church and Michilli argue that issues of fact remain that should preclude summary judgment. Specifically, Trinity Churchy and Michilli argue that plaintiff's employer, A+ Installations, should have taken steps to protect plaintiff from the electrical danger which caused his accident. In this argument Trinity and Church and Michilli attempt to shirk their responsibility under section 241 (6), as the owner and general contractor on the subject construction, to maintain a safe workplace. This duty, however, is nondelegable and exists "even

in the absence of control or supervision of the worksite" (*Rizzuto*, 91 NY2d at 348-349). Defendants' argument that the motion is premature is likewise unavailing. As violations of the Industrial Code proximately caused plaintiff's injuries, plaintiff is entitled to partial summary judgment as to his Labor Law § 241 (6) claim against Trinity Church and Michilli.

II. Labor Law § 240 (1)

Labor Law § 240 (1) 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Typically, courts grant summary judgment where plaintiffs fall from an unsecured ladder (*see e.g. Plywacz v 85 Broad St. LLC*, 159 AD3d 543 [1st Dept 2018]). However, the issue is more complicated when plaintiff's accident involves not only a fall from a ladder, but also a

electrical shock which precedes the fall from the ladder (*see Naario v 222 Broadway, LLC*, 28 NY3d 1054, 1055 [2016] [reversing the trial court's grant of summary judgment as to liability under section 240 (1), reasoning that questions of fact remained "as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices"]).

Here, plaintiff is not entitled to summary judgment as he has not made a *prima facie* showing that his injuries were proximately caused by a violation of section 240 (1). Even assuming that the unsecured, unopened ladder was inadequate to protect plaintiff against gravity-related dangers, plaintiff has not shown that those dangers caused his injuries. That is, plaintiff has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received.

The electrical shock, and defendants' violation section 241 (6), is clearly a proximate cause of all of plaintiff's injuries, as the electrical shock both preceded and caused the fall. However, it is less clear which injuries plaintiff would have been sustained, even without the fall, by the electrical shock itself. As plaintiff has not shown, or endeavored to show, that the fall alone caused any of his injuries, he has not made a *prima facie* showing as to proximate causation. Thus, the branch of plaintiff's motion seeking partial summary judgment as to liability under Labor Law § 240 (1) must be denied.[1]

[1] The court notes that A+ Installations submitted papers opposing plaintiff's application for summary judgment on his Labor Law § 240 (1) claim, despite the fact that plaintiff did not move as against A+ Installations.

CONCLUSION

Accordingly, it is

ORDERED plaintiff's motion for summary judgment is granted only to the extent that plaintiff is entitled to partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York, Michilli Construction, Inc., and Michilli, Inc.; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff is to serve a copy of this order, along with entry of judgment, on all parties within 10 days of entry.

Dated: August 3, 2018

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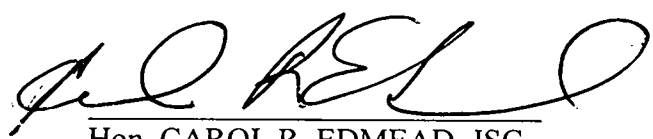

Hon. CAROL R. EDMEAD, JSC
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J.S.C.