Sykes v City of New York
2018 NY Slip Op 32017(U)
August 17, 2018
Supreme Court, New York County
Docket Number: 152962/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 152962/2015

MARCUS SYKES,

Plaintiff,

MOTION SEQ. NO. 002

- v -

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

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted in part and denied in part.**

In this personal injury action, plaintiff Marcus Sykes ("Sykes") moves, pursuant to CPLR 3212, for summary judgment on the issue of liability against defendants the City of New York ("the City") and Metropolitan Transportation Authority ("MTA"). After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 14, 2014, plaintiff Sykes reported to work at the site of a subway construction project underneath the intersection of Second Avenue and 92nd Street in Manhattan. (Doc. 60 at 7.) At the time, Sykes was employed as a carpenter by E.E. Cruz & Tully Construction

Company, which was contracted by the City and MTA to perform demolition, excavation, erection, repairing, and other construction work at the premises. (*Id.* at 13, 15.) Plaintiff was informed as he arrived at work that he was to dismantle scaffolds, beams, and plywood that had been acting as a temporary support structure for the surrounding concrete. (Doc. 58 at 5–6.)

To perform his work, plaintiff was required to stand on planks that had been placed on scaffolds. (*Id.* at 6.) The scaffolds were elevated more than four feet above the ground. (*Id.*) Plaintiff represented at his 50-h hearing that, before the workers could dismantle the beams, they had to remove the wing nuts which were securing the scaffolds and beams in place. (*Id.* at 7, Doc. 64 at 37.) After the wing nuts were removed, the workers pried loose the plywood that was resting on top of the beams with crowbars and then slid the plywood toward the front of the scaffolds. (Docs. 58 at 7, 64 at 39.) The pieces of plywood would be lowered down to other workers standing on the ground, and those workers would then pile them somewhere else at the site. (Doc. 64 at 39.) According to plaintiff, this effort required the teamwork of two or three carpenters due to the weight of the beams and plywood. (Doc. 58 at 8.) Although plaintiff was initially working on removing the support structure with a team, the foreman at the site separated the workers to speed up the pace (*id.*), and plaintiff was ordered to relocate to a different scaffold (Doc. 64 at 45).

When the accident occurred, plaintiff was removing a wing nut while his coworker, Israel Fernandez ("Fernandez"), was in the process of loosening plywood above plaintiff. (Doc. 58 at 9.) Fernandez was working on a scaffold approximately four feet away from plaintiff when a piece of plywood that he loosened fell and struck plaintiff in the head. (*Id.* at 9–11.) Plaintiff was allegedly knocked off his scaffold from the impact. (Doc. 58 at 9–10.) Fernandez later stated in an affidavit that each piece of plywood weighed between 100–200 pounds. (Doc. 68 at 3.)

Nothing other than the beams and scaffolds supported the plywood (Doc. 58 at 8), and there were no railings on the scaffolds to prevent plaintiff from falling (*id.* at 10).

On March 26, 2015, plaintiff commenced this action against the City, MTA, and New York City Transit Authority by filing a summons and verified complaint. (Doc. 60.) The complaint alleged violations of Labor Law §§ 200, 240, and 241, as well as violations of the New York State Industrial Code. (*Id.* at 18–20.) Plaintiff now moves, pursuant to CPLR 3212 and Labor Law §§ 240(1) and 241(6), for summary judgment on the issue of liability against the City and MTA. (Docs. 57–58.)

POSITIONS OF THE PARTIES:

In support of his summary judgment motion, plaintiff argues that the City and MTA fall within the purview of New York's Labor Law because the City owns the premises at the construction site and because MTA was an agent of the City at the time that plaintiff's accident occurred. (Doc. 58 at 17–18.) Plaintiff asserts that defendants violated Labor Law § 240(1) when they failed to furnish proper safety devices that would have protected him from the risks of being struck by the plywood and falling from his platform. (*Id.* at 18–21.) He further argues that defendants do not have a defense to his § 240(1) claim because he was not a recalcitrant worker and his actions did not constitute the sole proximate cause of his accident. (*Id.* at 22–24.) With respect to § 241(6), plaintiff maintains that the City and MTA are liable for his injuries because they violated Industrial Code § 23-1.7(a)(1) by failing to provide him with suitable overhead protection. (*Id.* at 24–25.) In support thereof, plaintiff submits the following: the affidavit of Fernandez (Doc. 68); the deposition transcript of Sirish Musthyala ("Musthyala"), an employee

of MTA (Doc. 69); an accident report produced by MTA Capital Construction ("MTACC") (Doc. 70); and the affidavit of Herbert Heller, P.E. ("Heller"). (Doc. 72).

In opposition, defendants contend that they are not proper Labor Law defendants. They argue that, although the City admitted it owned the premises, it is nevertheless not liable because plaintiff never proved in his moving papers that the incident occurred at the construction site. (Doc. 76 at 3.) They argue that MTA likewise cannot be held liable because plaintiff did not prove the degree of ownership or control that MTA exercised over the construction work. (*Id.*) With respect to plaintiff's § 240(1) claim, the City and MTA assert that there are material issues of fact precluding summary judgment because plaintiff's statements regarding his fall are inconsistent, because the removal of the plywood was an integral part of the work being performed, and because plaintiff failed to establish what safety devices, if any, defendants could have used to prevent the accident. (*Id.* at 4–15.) With respect to § 241(6), defendants argue that Industrial Code § 23-1.7(a)(1) was not violated because they were not required to furnish overhead protection during the removal of the overhead planking. (*Id.* at 15–17.) Moreover, defendants attack the admissibility of the MTACC accident report, upon which Heller's affidavit is founded. (*Id.* at 3–4.)

In response, plaintiff reaffirms his position that the City and MTA are Labor Law defendants and that the MTACC accident report is admissible. (Doc. 80 at 1–3.) Further, plaintiff maintains that there are no inconsistencies between his own testimony, the affidavit of Fernandez, and the affidavit of Heller. (*Id.* at 3–7.) According to plaintiff, these sources establish a violation of § 240(1). (*Id.*) Last, he reasserts that § 241(6) was violated when defendants failed to provide any overhead protection. (*Id.* at 7–9.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Plaintiff Satisfied His Burden of Establishing that the City and MTA are Labor Law Defendants.

Liability under New York's Labor Law for accidents that occur on construction sites is limited to owners and general contractors or their statutory agents. (*See* Labor Law §§ 240, 241.) The term "owner" encompasses "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit." (*Scaparo v Vil. of Ilion*, 13 NY3d 864, 866 [2009].) One who has the authority to supervise and control the work will be deemed an "agent" of the owner or general contractor. (*See Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981].)

This Court finds that plaintiff established that the City and MTA are proper Labor Law defendants. The City admitted its ownership of the real property located at Second Avenue and 92nd Street (Doc. 62 at 3), which was part of a larger effort to construct a subway station at

Second Avenue and 96th Street as part of the Second Avenue subway project (Docs. 58 at 5, 71 at 6, 14, 16). Defendants contend that the City should not be considered a Labor Law defendant because plaintiff did not prove in his moving papers that the accident occurred at the premises. (Doc. 76 at 3.) Their contention is without merit, however, because the notice of claim (Doc. 59 at 2), the amended notice of claim (*id.* at 19), the complaint (Doc. 60 at 7, 13–16), the City's response to plaintiff's notice to admit (Doc. 62 at 3), plaintiff's bill of particulars (Doc. 63 at 2), and the briefs submitted on this motion (Docs. 58, 76, 80) establish that the premises located at Second Avenue and 92nd Street is part of the said subway project, and plaintiff testified in his 50-h hearing that the accident occurred at that location (Doc. 64 at 24).

This Court also finds that MTA is a proper Labor Law defendant in this action. Defendants' opposing argument is that plaintiff has not proved the requisite ownership or degree of control required to hold a party liable. (Doc. 76 at 3.) But plaintiff has submitted three signed safety reports authored by an employee of MTACC, which is a branch of the MTA (Doc. 69 at 9), dated April 10, 11, and 14, 2014 (Doc. 70 at 2–7). The safety reports were written at the site of the Second Avenue subway project. (*Id.*) Plaintiff has further submitted the deposition of Sirish Musthyala, an employee of MTACC, who testified that MTACC hired plaintiff's employer, E.E. Cruz & Tully Construction Company, to perform construction work at the site. (Doc. 69 at 22). These records establish that the MTA had the authority to control the work being done at the Second Avenue subway. (*See Bakhtadze v Riddle*, 56 AD3d 589, 590 [2d Dept 2008] (determining factor in whether an agent can be held liable is whether the party had the right to exercise control over the work, not whether the party actually exercised that right).) Therefore, plaintiff has established that both the City and MTA are proper Labor Law defendants.

b. Admissibility of the MTACC Accident Report.

Defendants argue that plaintiff has failed to furnish the proof necessary to establish his Labor Law claims. Specifically, defendants contend that the accident report allegedly prepared by MTACC constitutes hearsay because it is undated and unsigned. (Doc. 76 at 3–4.)

In summary judgment motions, the movant has the burden of proffering evidence in admissible form. (*See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Accident reports may be admitted into evidence under the business records exception to the rule against hearsay. (*See Bradley v Ibex Constr., LLC*, 54 AD3d 626, 627 [1st Dept 2008].) The business records exception, which is set forth in CPLR 4518(a), provides that a judge may admit a writing or record if the judge finds that it "was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." Adding to these three requirements, the Court of Appeals has stated that the source of the information recorded must be a person with personal knowledge thereof, and that such person be part of the regular business practice in reporting and recording the information. (*See Johnson v Lutz*, 253 NY 124, 128 [1930] ("[The exception] was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto.").

This Court finds that the MTACC accident report which plaintiff proffers does not pass evidentiary muster. The accident report contains an injury report form (Doc. 71 at 6), a contractor investigation form (*id.* at 8), and an MTACC investigation form (*id.* at 11). However, it is impossible for this Court to determine whether the forms were completed at the time of plaintiff's injury or "within a reasonable time thereafter" (CPLR 4518[a]) because none of them are dated. Moreover, even though all three forms indicate who completed them, no evidence has

been furnished establishing the sources' personal knowledge of the information contained therein. Therefore, the MTACC accident report does not fall within the business records exception to hearsay. (*See Harrison v V.R.H. Constr. Corp.*, 72 AD3d 547, 548 [1st Dept 2010] (in Labor Law case, court disregarded an accident report which it deemed as hearsay).)

c. Liability Under Labor Law § 240(1).

Labor Law § 240(1) requires property owners, contractors, and agents 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 construction workers. This statute protects workers from, *inter alia*, construction risks due to (1) the relative elevation at which tasks must be performed and (2) the elevation at which materials or loads must be positioned or secured. (*See Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267–68 [2001].) Thus, this provision has been applied to what are known as "falling worker" and "falling object" cases (*see Toefer v Long Island R.R.*, 4 NY3d 399, 407 [2005]), both of which plaintiff alleges here.

Plaintiff argues that this is a "falling object" case because he was struck by a piece of plywood. (Docs. 58 at 19, 80 at 5.) A plaintiff "must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute." (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001]; *see also Doucoure v Atl. Dev. Group, LLC*, 18 AD3d 337, 338–39 [1st Dept 2005].) "In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object." (*Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011].)

This Court finds that defendants are liable for plaintiff's injuries which resulted from the falling plywood. The descriptions of how the plywood struck plaintiff are consistent. Plaintiff stated that workers were to slide the pieces of plywood down to other workers on the ground once the wing nuts were loosened. (Doc. 64 at 39). It was in the process of loosening a wing nut that plaintiff was struck in the head from above by a piece of plywood. (Doc. 66 at 97–99.) Further, Fernandez, plaintiff's coworker, said in his affidavit: "I was using a crowbar to remove a sheet of plywood from one of the concrete forms when the entire sheet of plywood with concrete attached to it fell and the plywood with the form attached to it struck [plaintiff] on the head . . . . I would estimate the weight of the object that fell and struck [plaintiff] to be between 100–200 lbs." (Doc. 68 at 3.) Defendants have not raised any triable issues of fact in response, and these statements lead this Court to conclude that plaintiff was engaged in an activity covered by § 240(1). Additionally, given its estimated weight, the lowering of the unsecured plywood constituted an elevation-related hazard contemplated by § 240(1) and, thus, a protective device preventing the plywood from falling should have been utilized. (*See Arnaud*, 83 AD3d at 508; *Cardenas v One State St., LLC*, 68 AD3d 436, 437–38 [1st Dept 2009] (securing device necessary when the object to be hoisted or secured is too heavy).) Plaintiff has therefore met his burden of establishing that the plywood fell because of the absence of an adequate safety device.

The fact that the plywood was not being hoisted or secured at the time of the accident does not have any bearing on the outcome. Defendants argue that liability should not be imposed because objects that are deliberately allowed to fall are not objects that are required to be secured by protective devices. (*See Roberts v Gen. Elec. Co.*, 97 NY2d 737, 738 [2002] (intentionally thrown objects do not give rise to § 240[1] liability). However, cases addressing objects which are deliberately thrown are inapposite herein. Although plaintiff's dismantling of the beams,

scaffolds, and plywood was deliberate, no evidence or testimony has been offered by defendants establishing that the falling of the plywood was intentional. In fact, the relevant testimony of plaintiff's 50-h hearing indicates just the opposite: the construction workers were to slide the pieces of plywood down to other workers on the ground. (Doc. 64 at 39.) Thus, the facts of this case are not analogous to those cases in which no liability was found where the falling object was integral to the work being performed.

Plaintiff further claims that this is a "falling worker" case because the platform on which he was standing when he was struck by the plywood had no railings to prevent his fall. (Docs. 58 at 9–10, 80 at 6.) However, this Court need not address this argument given its conclusion that defendants are liable pursuant to § 240(1) under the "falling object" theory.[1]

d. Liability Under Labor Law § 241(6).

Plaintiff asserts that the City and MTA violated Labor Law § 241(6) when they failed to provide him with proper overhead protection to prevent him from being struck by the plywood. Although this contention need not be addressed given that plaintiff has established the absolute liability of the City and MTA pursuant to Labor Law § 240(1), this Court nevertheless considers the same below.

To establish liability under § 241(6), a plaintiff "must specifically plead and prove the violation of an applicable Industrial Code regulation." (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012].) The specific Industrial Code provision relied on must mandate

[1] Defendants argue that plaintiff cannot prevail on summary judgment pursuant to § 240(1) because of inconsistent statements regarding the accident. Specifically, defendants point out that plaintiff did not mention falling off his scaffold when he wrote and signed a statement describing the incident. (Doc. 65 at 14–15.) He also did not report the fall to his doctor. (Doc. 77 at 2.) However, these inconsistencies do not change this Court's outcome because they are germane only to the alleged fall and not to the falling of the plywood, which is sufficient for § 240(1) liability.

compliance with concrete specifications. (*See Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 218 [1st Dept 2003].)

Here, plaintiff relies on Industrial Code § 23-1.7(a)(1) to invoke his Labor Law § 241(6) claim.[2] This provision requires employers to provide workers with suitable overhead protection in "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects . . . ." (Industrial Code § 23-1.7[a][1].) Importantly, this provision, consistent with its language, has only been applied when the plaintiff was injured in an area that is normally exposed to falling objects. (*See Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997]; *Klien v County of Monroe*, 219 AD2d 846, 847 [4th Dept 1995].) However, plaintiff has neither proved, nor even alleged, that the construction site underneath Second Avenue and 92nd Street was normally exposed to falling objects. Plaintiff's only argument for imposing Industrial Code § 23-1.7(a)(1) liability is Heller's opinion that defendants' violation of that provision was a proximate cause of his injuries. (Doc. 80 at 8.) However, Heller arrived at that conclusion without providing this Court any legal or evidentiary basis. (Doc. 72 at 5–6.) Thus, viewing the facts in the record in the light most favorable to defendants, this Court finds that Industrial Code § 23-1.7(a)(1) is inapplicable to this case and therefore that plaintiff has not established his entitlement to judgment as a matter of law under Labor Law § 241(6).

In accordance with the foregoing, it is hereby:

[2] Although plaintiff alleged additional Industrial Code violations in his bill of particulars (Doc. 63 at 4–5), he does not rely on those sections herein, and has therefore abandoned any claim with respect to the same. (*See Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009].)

ORDERED that plaintiff Marcus Sykes's motion for summary judgment against defendants the City of New York and Metropolitan Transportation Authority is granted as to Labor Law § 240(1), and is otherwise denied; and it is further

ORDERED that the issue of damages to be awarded against the City of New York and Metropolitan Transportation Authority, shall be determined at trial; and it is further

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

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, on all parties within twenty days after the entry of this order; and it is further

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

8/17/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE