Paul v Judlau Contr., Inc.
2018 NY Slip Op 32204(U)
September 7, 2018
Supreme Court, New York County
Docket Number: 156183/12
Judge: James E. d'Auguste

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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DARRYL PAUL and SHERMA PAUL,

Plaintiffs,

-against-

Index No. 156183/12

JUDLAU CONTRACTING, INC., METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, and THE CITY OF NEW YORK,

Defendants.

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Hon. James E. d'Auguste

The following e-filed documents, listed by NYSCEF document number 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, and 72, were read on the instant motion for summary judgment and cross motion for partial summary judgment.

This action arises out of a work site accident that occurred on April 19, 2012 at the subway station located at 63rd Street and Lexington Avenue in Manhattan. Plaintiff Darryl Paul, an iron worker, alleges that he was injured when the baker scaffold that he was standing on tipped over, causing him to fall to the tracks. Defendants Judlau Contracting, Inc. ("Judlau"), Metropolitan Transportation Authority ("MTA"), New York City Transit Authority ("NYCTA"), and the City of New York ("City") (collectively, "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs cross-move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law Sections 240(1), 241(6) and 200.

BACKGROUND

NYCTA hired Judlau as a general contractor on a subway station construction and reconstruction project at the station located at 63rd Street and Lexington Avenue in Manhattan, New York. On July 8, 2011, Judlau retained nonparty Risa Management Corp. ("Risa") as a metal subcontractor. Paul was employed by Risa on the date of the accident.

Paul testified at his General Municipal Law § 50-h hearing that, on the date of the accident, he was working at the 63rd Street and Lexington Avenue subway station (plaintiff 50-h hearing tr at 11). His work hours were from 7:00 a.m. to 3:00 p.m. (*id.* at 12, 13). Paul's foreman, Isaac Daniels, gave him assignments in the morning (*id.* at 15). On the day before the accident, Paul's team was gathering materials, moving the gang box, and erecting scaffolds (*id.* at 11, 16, 17, 24, 25). They had erected two scaffolds: one baker scaffold and a "regular kind of scaffold" (*id.* at 26). The baker scaffold was eight feet by five feet, had four legs with wheels attached, and had a plank on top (*id.* at 26-28, 31). According to Paul, his foreman told him to lock the wheels of the baker scaffold, which Mr. Paul did (*id.* at 43). However, Paul later stated that the wheels on the track side were locked, but did not recall if the wheels on the platform side were locked (*id.* at 75). His crew was going to perform "grinding to prepare for the welds" (*id.* at 47). Paul testified that "[y]ou use a machine and you grind the place where you're going to weld, you grind the area where you're going to weld so it could be cleaned of debris" (*id.* at 48). His accident occurred after lunch (*id.* at 50). Paul used an A-frame ladder to grind an area that was away from the two scaffolds (*id.* at 53-54). At some point, Mr. Daniels was welding on the baker scaffold, and told Paul to "fire watch" (*id.* at 66). Daniels was having problems getting a clip attached to the ceiling so he told Paul to come up on the scaffold and weld (*id.* at 67-69). Daniels climbed down the side of the baker scaffold on the side of the tracks, and then climbed

down onto the track bed (*id.* at 70). After Daniels descended from the scaffold, Paul climbed the scaffold and was on the scaffold for about 20 minutes, and completed the first clip (*id.* at 71). Paul came down the scaffold on "the long legged side," the track side (*id.* at 72). Paul asked Cappie, his coworker, for help to move the scaffold over to the second clip, about two or three feet away (*id.*). Paul and Cappie moved the scaffold in position under the other clip (*id.* at 73). They "set the scaffold down [and Paul] climbed the scaffold and as [he] was climbing the scaffold [he swung his] leg to get on top of the scaffold and it started to topple over" (*id.* at 74). According to Paul, he fell onto the tracks, and the scaffold fell on top of him (*id.* at 77-78). He stated that he landed on his right foot and ended up on his back (*id.* at 79).

At Paul's deposition, he stated that he checked the baker scaffold and that it was stable (plaintiff deposition tr at 165, 171). When he had almost reached the top of the scaffold, he felt the scaffold moving (*id.* at 173). He tried to get on top of the scaffold platform, but gravity was pulling him down towards the tracks (*id.* at 174-175). As a result, Paul fell onto the tracks, and the scaffold landed on top of him (*id.* at 175). He heard screaming, "Don't move, don't move" (*id.*). Paul further testified that there was a ladder affixed between the track bed and the subway platform about 15 to 20 feet away (*id.* at 166-169). He stated that he had used the fixed ladder every time that he came down from the platform to get down to the tracks (*id.* at 169). Paul indicated that it was safer to use the fixed ladder to get down to the tracks (*id.* at 169-170). He stated that "the reason why [he] climb[ed] the ladder that way is because the ladder, the fixed ladders were all the way far from the scaffold" (*id.* at 172).

Capil Joseph, one of plaintiff's coworkers, testified that, on the day of the accident, they were using a "Frankenstein" scaffold, meaning that that they were using a scaffold that had been pieced together from different scaffolds (Joseph tr at 28). According to Joseph, Paul climbed up

the scaffold from the track side, and then proceeded to get his foot around to step onto the scaffold platform, and "that's when everything went wrong" (*id.* at 47). The scaffold tipped, causing Paul to end up on the tracks and the scaffold to break into pieces (*id.* at 51). Joseph stated that the scaffold was a "little offset" (*id.* at 49). An accident report dated April 19, 2012, which included a witness statement from Joseph, states that "[a]fter relocating the baker, Darryl attempted to climp [sic] the side of the baker from the track level. He got up to about platform height and the baker tipped over" (Knauer affirmation in support, exhibit 9 at 3).

St. Jean Dorceus, Judlau's safety manager, testified that he conducted a safety orientation on April 18, the day before the accident, which covered ladder and scaffold safety and lasted about 45 minutes (Dorceus tr at 7-8, 46). Paul was present at the orientation (*id.* at 46). During the orientation, Dorceus told the workers to "never climb a scaffold unless it has a ship ladder or the tower is there" (*id.* at 109). Dorceus instructed the workers to use either an A-frame ladder or a straight ladder (*id.*). Dorceus stated that he did a walkthrough on April 19, and observed the workers using a pole scaffold that was not erected properly, and instructed them to not use that scaffold (*id.* at 53). The cross bars were missing and there were no plates at the scaffold's base to prevent it from moving (*id.* at 79). He also instructed the workers to make sure that they had a ladder next to the scaffold that they were using (*id.* at 53). However, Dorceus only spoke with Daniels (*id.* at 80). According to Dorceus, the workers had a ladder next to the scaffold at the time (*id.* at 53). During his walkthrough on April 19, he observed Daniels of the Risa crew on the scaffold (*id.* at 78-79). He told Daniels that since he was on the left side of the scaffold, which was away from the tracks, he did not have to be tied off, but when he went to the other side, he had to be tied off (*id.* at 78).

Daniels testified that Paul was at the safety orientation where Dorceus told the workers not to climb the baker scaffold (Daniels tr at 17-18). However, he accessed the baker scaffold platform by climbing up and down the sides of the scaffold closest to the tracks (*id.* at 56).

Joseph Mazza, a safety engineer employed by nonparty Hirani Engineering, testified that he arrived on the scene after the accident while Paul was still on the tracks (Mazza tr at 27-28, 47). However, Mazza did not speak with Paul (*id.* at 47).

Tony Raimo, defendants' site safety consultant, opines that Paul's accident occurred solely because he climbed up the narrow side of the baker scaffold from the track bed (Raimo aff at 2). Raimo points out that Paul testified at his deposition that using the fixed ladder was the safer way to ascend to the subway platform (*id.*). In addition, Raimo states that the A-frame ladder would have been the means to access the scaffold platform from the subway platform (*id.*). Further, Raimo indicates that Paul was told not to climb the scaffold at the safety orientation (*id.*).

William Marletta, Ph.D., CSP, plaintiffs' safety professional, avers that he conducted an inspection of the area where the accident occurred on February 26, 2015 (Marletta aff, ¶ 5). Marletta opines that defendants violated Labor Law Sections 240(1), 241 (6), and 200 (*id.*, ¶ 15). According to Marletta, the scaffold was not adequately tied, braced or secured, since there were no outriggers, sandbags, guy wires or security weights on the scaffold (*id.*, ¶ 21). In addition, the scaffold did not have any anchors, ropes, base plates or other securing devices (*id.*). Also, Marletta asserts that the scaffold did not have a safe or secure base footing (*id.*, ¶ 22). Marletta further states that the scaffold was not set level to the tracks, contrary to good and accepted safe practice (*id.*, ¶ 26).

Plaintiffs commenced this action on September 10, 2012, seeking recovery for violations of Labor Law Sections 240(1), 241(6), and 200 and for common-law negligence. In addition, plaintiff Sherma Paul asserts a derivative cause of action for loss of services, society, and consortium.

DISCUSSION

It is well settled that "[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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). "Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to 'produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Labor Law Section 240(1)

Plaintiffs argue that they are entitled to judgment against all defendants under Labor Law Section 240(1) because the scaffold on which Paul was standing collapsed. In addition, plaintiffs maintain that Paul's climbing up the baker scaffold was not the sole proximate cause of his accident. In this regard, plaintiffs assert that Paul was never instructed not to climb the rungs of the baker scaffold, and that he was not instructed to use an A-frame ladder to ascend and descend from the baker scaffold platform. Thus, Paul was not a recalcitrant worker.

For their part, defendants contend that Paul's failure to use the fixed ladder and A-frame ladder was the sole cause of his accident. Defendants further argue that Paul was a recalcitrant

worker. According to defendants, Paul not only knew of the fixed ladder and had previously used it, but also admitted that it was the safest method of ascending from the track bed. Defendants point out that Paul had used an A-frame ladder, and could have used it to reach the scaffold platform. Nevertheless, Paul decided to climb the narrow side of the baker scaffold, which he had been told not to do. As argued by defendants, Paul's accident would not have occurred if he had used the fixed ladder and the A-frame ladder. Additionally, defendants argue that the MTA cannot be held liable because its functions are limited to financing and planning.

In relevant part, Labor Law Section 240(1) provides that:

> 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 Section 240(1) "imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]). To prevail on a Labor Law Section 240(1) cause of action, the plaintiff must show a violation of the statute, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). However, "[w]here a plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law

Section 240(1) [does] not attach" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [internal quotation marks and citation omitted]).

The collapse of a scaffold is prima facie evidence of a violation of Labor Law Section 240(1) (*Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490, 490 [1st Dept 2015]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]; *Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "[T]his is so whenever the employee is injured as a result of this collapse, regardless of whether the employee was *on* or *under* the scaffold when it collapsed" (*Thompson*, 303 AD3d at 154).

MTA

As a preliminary matter, defendants argue that the MTA cannot be held liable, because its functions are limited to financing and planning. In support of their cross motion, and in opposition to defendants' motion, plaintiffs contend that there is no evidence that the MTA's duties on this particular project were limited to financing and planning. "It is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007] [internal quotation marks and citation omitted]). Plaintiffs' speculation, based on the language of the construction contracts, is insufficient to raise an issue of fact. Therefore, the Court finds that the MTA is entitled to dismissal of the complaint as against it.

City

Defendants conceded that the City owned the subway station at issue (Culhane affirmation in support, exhibit Q [Schloss aff, ¶ 3]). In *Coleman v City of New York* (91 NY2d 821, 823 [1997]), the Court of Appeals held that the City, which owned an elevated train station

where the plaintiff was injured, and leased the premises to the NYCTA, was an "owner" within the meaning of Labor Law Section 240(1). Moreover, the City had a sufficient nexus to Paul, since it leased the premises to the NYCTA, which retained Judlau to reconstruct the subway station (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 341–342 [2008]). As such, the Court finds that plaintiffs have established that the City may be held liable under Labor Law Section 240(1).

Judlau

Plaintiffs argue that Judlau was the general contractor on the site. "A general contractor will be held liable under [Labor Law Section 240(1)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]). In addition, a party may be held liable as a statutory agent if it was delegated the authority to supervise and control the work that gave rise to the injury (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Solano v Skanska USA Civ. Northeast Inc.*, 148 AD3d 619, 619-620 [1st Dept 2017]). Dorceus testified that Judlau was hired as a general contractor on the station reconstruction project, and that it also hired Risa (Dorceus tr at 19). In response to plaintiffs' cross motion, defendants do not argue that Judlau cannot be held liable under the Labor Law. Therefore, the Court finds that Judlau may be held liable under Labor Law Section 240(1).

NYCTA

Plaintiffs contend that the NYCTA may be held liable as an owner. "The term 'owner' within the meaning of article 10 of the Labor Law 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'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). It is settled that, pursuant to a 1953 lease, the City "relinquished possession and control of all of its transit facilities to the [NYCTA]" (*McGuire v City of New York*, 211 AD2d 428, 429 [1st Dept 1995]). Moreover, there is no dispute that the MTA, acting through the NYCTA, hired Judlau on the station reconstruction project (Culhane affirmation in support, exhibits S, V). Accordingly, the Court finds that the NYCTA may be found liable pursuant to Labor Law Section 240(1).

Statutory Violation and Proximate Cause

Paul testified at his 50-h hearing that, as he was climbing the baker scaffold to weld, it toppled over, causing him to fall onto the tracks (plaintiff 50-h hearing tr at 74, 77). In addition, Paul testified at his deposition that he fell onto the tracks when the scaffold tipped over, and that the scaffold fell onto him (plaintiff deposition tr at 174-175). Thus, plaintiffs have established prima facie entitlement to judgment as to liability under Labor Law Section 240(1) (*see Thompson*, 303 AD2d at 154).

Defendants have failed to raise an issue of fact as to whether Paul was the sole proximate cause of his injury.

> "[T]o raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained"

(*McCrea v Arnlie Realty Co. LLC*, 140 AD3d 427, 429 [1st Dept 2016] [internal quotation marks and citations omitted]).

Defendants have not established that Paul knew that he was expected to use other safety devices to access the baker scaffold platform, or that he unreasonably chose not to use them,

even if they were available at the site. Although defendants argue that Paul should have used the fixed ladder, Paul only testified that the fixed ladder was the preferred and safer way to access the subway platform from the tracks, not the scaffold platform (plaintiff deposition tr at 169-170). In addition, while defendants claim that Paul should have used an A-frame ladder to ascend to the scaffold platform, defendants have not pointed to any evidence indicating that he knew that he was expected to use it for this purpose (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012] ["Even if other ladders were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those ladders and for no good reason chose not to do so"]; *Torres v Our Townhouse, LLC*, 91 AD3d 549, 549 [1st Dept 2012] [even if ladder might have been in chassis under truck at the work site, worker was not sole proximate cause of his accident where there was no evidence presented that he knew where the ladder was or that he knew that he was expected to use it and for no good reason chose not to do so]). Indeed, Paul testified that he climbed the scaffold because he was never instructed not to climb the scaffold, and because both Daniels and Joseph had previously climbed up and down the baker scaffold (plaintiff deposition tr at 150, 153, 172). Daniels also testified that he climbed the baker scaffold to gain access to the scaffold platform (Daniels tr at 56). Joseph stated that he climbed the baker scaffold and that he saw other workers do it too (Joseph tr at 53). Dorceus testified that he instructed the workers to "make sure that they had a ladder next to the scaffold that they were using" (Dorceus tr at 53), but did not state that the ladder should be used to get to the scaffold platform. Even if Paul was negligent in climbing the baker scaffold, his actions would, at most, constitute comparative negligence, which is not a defense to liability under Labor Law Section 240(1) (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]).

Although defendants rely on *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]), the Court finds this case to be distinguishable. There, the Court of Appeals held that a worker was the sole proximate cause of his injuries, where he was injured after standing on an inverted bucket to access a motor room, and then jumped down to a roof (*id.* at 806). As reasoned by the *Montgomery* court, "since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one" (*id.*). Defendants have not established that it would have been Paul's "normal and logical response" to get an A-frame ladder to access the baker scaffold platform. Rather, the evidence indicates that the workers climbed the scaffold to reach the platform, and that Paul was following their example.

Moreover, it cannot be said that Paul was a recalcitrant worker, since there is no evidence that he deliberately refused to use safety devices provided by the owner or his employer (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 563 [1993]; *Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403, 403 [1st Dept 2005]).

In view of the above, the branch of plaintiffs' cross motion for partial summary judgment as to liability under Labor Law Section 240(1) is granted as against Judlau, NYCTA, and the City, and the branch of defendants' motion seeking dismissal of this claim on the grounds that Paul was the sole proximate cause of his accident and was a recalcitrant worker is denied. The MTA is entitled to dismissal of the complaint.

B. Labor Law Sections 241 (6) and 200

Since plaintiffs are entitled to partial summary judgment on the Labor Law Section 240(1) claim, the Court need not address his Labor Law Sections 241(6) and 200 claims (*see Berisha v 209-219 Sullivan St. L.L.C.*, 156 AD3d 457, 458 [1st Dept 2017]; *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617 [1st Dept 2014]; *Auriemma v Biltmore Theatre, LLC*,

82 AD3d 1, 12 [1st Dept 2011] ["plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic"]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of defendants Judlau Contracting, Inc., Metropolitan Transportation Authority, New York City Transit Authority, and the City of New York for summary judgment is granted to the extent of severing and dismissing the complaint as against defendant Metropolitan Transportation Authority, and the Clerk is directed to enter judgment in favor of said defendant, and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiffs Darryl Paul and Sherma Paul for partial summary judgment is granted to the extent of granting plaintiffs partial summary judgment on the issue of liability under Labor Law Section 240(1) as against defendants Judlau Contracting, Inc., New York City Transit Authority, and the City of New York, with the issue of damages to await the trial of this action, and is otherwise denied; and it is further

This constitutes the decision and order of this Court.

Dated: September 7, 2018

ENTER: