Haywood v Metropolitan Transp. Authority
2018 NY Slip Op 32444(U)
September 24, 2018
Supreme Court, New York County
Docket Number: 154769/2013
Judge: Kathryn E. Freed
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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. 154769/2013

DOMINICK HAYWOOD,

Plaintiff,

MOTION SEQ. NO. 002

- v -

METROPOLITAN TRANSPORTATOPM AUTHORITY, THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, THE LONG ISLAND RAILROAD, METROPOLIATN TRANSPORTATION AUTHORITY-LONG ISLAND RAILROAD, MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY CAPITAL CONSTRUCTION COMPANY,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 107

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion and cross motion are decided as follows.

In this Labor Law action, plaintiff Dominick Haywood moves, pursuant to CPLR 3212, for summary judgment against defendants Metropolitan Transportation Authority (MTA), The City of New York (the City), The New York City Transit Authority (NYCTA), The Long Island Railroad (LIRR), Metropolitan Transportation Authority-Long Island Railroad (MTA-LIRR), MTA Capital Construction Company (MTACC), and Metropolitan Transportation Authority Capital Construction Company (Metropolitan TACC) (collectively defendants) on his claim pursuant to Labor Law section 240 (1). Defendants cross-move: 1) pursuant to CPLR 3215 (a) (5), to dismiss the complaint against the MTA, LIRR, and MTACC on the ground that the claims

against them are barred by res judicata and collateral estoppel; 2) for denial of plaintiff's motion; and 3) for summary judgment dismissing the claims against them pursuant to CPLR 3212. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion and cross motion are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on February 25, 2012 in which plaintiff, an employee of nonparty Dragados-USA/Judlau Joint Venture, was injured while working as a "sandhog" laborer on the East Side Access Project in New York, New York, the goal of which was to extend the LIRR to Grand Central Terminal. Doc. 35, at p. 18-19. On the day of the alleged incident, plaintiff was instructed to remove broken "J-hook" pipe hangers, replace them with stronger J-hook pipe hangers, and then rehang the pipe on the new and stronger hangers. P. 81, 107.

At the time of the alleged incident, plaintiff was working on a man-lift as a water pipe 4" to 6" in diameter was being lifted into place by two Bobcat machines with hook attachments. As plaintiff was pushing the pipe onto a J-hanger, a clamp holding sections of the pipe together broke and a 33-foot long portion of the pipe fell 3 -3 ½ feet and landed on his left foot.

On May 29, 2012, plaintiff served notices of claim on the City, NYCTA, MTA, LIRR, MTA-LIRR, MTACC, and Metropolitan TACC. Doc. 92. The notices of claim alleged that plaintiff's accident occurred on February 27, 2012. Doc. 92.

On May 23, 2013, plaintiff commenced the captioned action against MTA, the City, the NYCTA, LIRR, MTA-LIRR, MTACC, and Metropolitan TACC by filing a summons and verified complaint. Doc. 32. In his complaint, plaintiff alleged, inter alia, that he was injured as a result of defendants' violation of Labor Law § 240 (1).

In their verified answer dated June 12, 2013, defendants denied all substantive allegations of wrongdoing and asserted affirmative defenses including plaintiff's failure to comply with the requirements of the General Municipal Law. Doc. 33.

In or about August of 2013, plaintiff moved to file a late notice of claim as against defendants MTA, the City, the NYCTA, LIRR, MTA-LIRR, MTACC, and Metropolitan TACC. Plaintiff sought to file a late notice of claim in order to change the date of the alleged accident to February 25, 2012 instead of February 27, 2012, as alleged in the initial notice of claim. By order and judgment dated August 22, 2013 and entered March 3, 2015, this Court (Mendez, J.) dismissed plaintiff's claims against defendants MTA, LIRR, MTA-LIRR, MTACC, and Metropolitan TACC as time-barred. Doc. 91. Justice Mendez permitted plaintiff to serve a late notice of claim on the City and the NYCTA. Doc. 91.

Plaintiff appeared for a deposition in this matter in March 2015. Doc. 35. At his deposition, he recalled that the incident occurred on February 25, 2012 in an assembly chamber ("the chamber") inside the York Avenue Tunnel. Id., at p. 22, 59-60. When plaintiff arrived at the site on the day of the incident, sandhogs and operating engineers were attempting to install a water pipe. Id., at p. 73-74. At that time, steel pipe with a 6" circumference was affixed to J-hooks drilled into a concrete wall in the chamber approximately 11 feet above ground level. Id., at p. 84, 88-89. The J-hooks cradled the pipe and kept it attached to the concrete wall. Id., at p. 109. He was instructed by his supervisor to remove J-hooks from the concrete wall and replace them with larger J-hooks. Id., at p. 81-84. To perform this work, he was given a manlift, a Hilti drill, and a wrench. Id., at p. 82. The Hilti drill was used to create holes in order to intall the new J-hooks. Id., at p. 82. The new J-hooks were to be used to attach the water pipe to the concrete wall of the tunnel. Id., at p. 83.

In order to drill the holes for the new J-hooks, plaintiff had to use a manlift. Id., at p. 91, 101. He operated the manlift from a bucket on the device, where there were controls to operate it. Id., at p. 112. There was a toe plate about 6" high around the bottom of bucket. Id., at 113-114.

He moved the manlift approximately 15-20 feet to a location where the pipe was disconnected. Id., at p. 106. His walking boss, Martin Patrice of Dragados, instructed him to try to reconnect the pipe with a clamp after raising it higher. Id., at p. 107. Plaintiff and his operating engineer then went into the bucket of the manlift and the operating engineer resealed the pipe. Id., at p. 133-138.

Later that day, 400 feet of pipe fell from the concrete wall and struck the ground, as well as the train deck, which was approximately 4 feet higher than the ground. Id., at p. 140-142. After the pipe fell off of the wall, Patrice told him to get larger J-hooks. Id., at p. 144. After plaintiff got the larger hooks, he took them, as well as his Hilti drill and harness, to the manlift. Id., at p. 144-146. He elevated the manlift approximately 6 feet off of the ground and moved the boom about 5 feet. Id., at p. 147. He removed 5 or 6 smaller J-hooks and then began to drill holes for the larger ones. Id., at p. 147-148.

After he installed approximately 6 large J-hooks, he lowered the machine and spoke to Patrice. Id., at p. 149. Patrice said that the operating engineer was going to "put a strap around the pipe, loop it back through." Id., at p. 149. Plaintiff said that the attachment on the Bobcat had been changed to a hook and that the strap would be wrapped around the pipe and "looped through itself" so that the pipe could be lifted up. Id., at p. 149-151, 154-155.

Patrice of Dragados advised plaintiff that the operator of the Bobcat was going to raise the pipe and that he (plaintiff) was going to push it forward onto the J-hooks. Id., at p. 155. Another Bobcat, approximately 300 feet away, was also to be used to lift the pipe. Id., at p. 165. The

operator of the Bobcat nearest to plaintiff raised the pipe to the level of plaintiff's chest and plaintiff pushed the pipe forward in an attempt to place it onto the J-hooks while it was at that level. Id., ap. 156-157. Plaintiff pushed the pipe approximately 6" and then it broke and a 33-foot section of the pipe fell about 3 ½ feet and struck him in the left foot. Id., at p. 158-165. When the accident occurred, the pipe separated from the strap used to lift it. Id., at p. 159.

At the time the pipe fell, plaintiff's foot was on the toe plate for leverage and approximately half of his foot was protruding over the edge of the floor of the manlift basket. Id., at 161-163. After the accident, plaintiff saw that the portion of the toe plate on the basket of the manlift which faced the concrete wall was bent, but he was not certain whether it was bent due to the occurrence. Id., at p. 116, 162.

Robert Walsh appeared for a deposition on November 4, 2015. Doc. 36. As of the date of the incident, he was employed by Hatch Mott MacDonald, a site inspection company which worked at the project. Doc. 36, at p. 12. He acknowledged that he had previously seen Bobcats used to raise pipe to where it needed to be hung on a wall. Doc. 36, at p. 41.

Plaintiff filed a note of issue on December 29, 2016. Doc. 29. Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants on his claim pursuant to Labor Law section 240 (1). Defendants cross-move: 1) pursuant to CPLR 3215 (a) (5), to dismiss the claims against the MTA, LIRR, and MTACC on the ground that they are barred by res judicata and collateral estoppel; 2) for denial of plaintiff's motion; and 3) for summary judgment dismissing the claims against them pursuant to CPLR 3212.

CONTENTIONS OF THE PARTIES:

Plaintiff argues that he is entitled to summary judgment pursuant to Labor Law § 240 (1) because he was injured when he was struck by a falling object and that defendants failed to provide him with proper safety devices to avoid the accident.

In support of the motion, plaintiff submits the affidavit of Kathleen Hopkins, a Certified Site Safety Manager specializing in accident investigations, including hazard analysis and causation. Hopkins states that, in order to gain leverage to push the pipe, plaintiff stepped on a bent portion of the toe board on the man-lift, his foot was halfway outside of the man-lift basket, and, as a result, when the pipe fell, it fell on his foot. Hopkins opines, within a reasonable degree of engineering certainty, that the injuries sustained by plaintiff were caused by the failure of defendants to comply with Labor Law § 240 (1). Doc. 31, Hopkins Aff., at 6. Specifically, she asserts that plaintiff should not have been provided with a manlift with a defective toe board. Id. Hopkins also opines that two Bobcats with slings were "insufficient in number to hoist such a long piece of coupled pipe" and that "[a]dditional Bobcats should have been provided." Id.

In opposition to the motion and in support of defendants' cross motion to dismiss, defendants argue that, given the order of Justice Mendez dated August 22, 2013, plaintiff's claims against all defendants except the City and the NYCTA are time-barred and must be dismissed on collateral estoppel grounds. Defendants further assert that plaintiff's claim pursuant to Labor Law § 240 (1) must be dismissed "because the pipe clamp – which broke and caused the pipe to fall – is not the type of safety device enumerated" in the statute. Doc. 87, at par. 7. They further maintain that plaintiff conceded that he did not need any other equipment to do his job. Doc. 35, at p. 157.[1]

[1] Plaintiff was actually asked whether he thought he needed any other equipment to push the pipe onto the J hooks. Doc. 35, at p. 157.

In opposition to plaintiff's motion and in support of their cross motion, defendants rely, inter alia, on the affidavit of Martin Bruno, a construction site safety expert. Bruno opines, inter alia, that the accident was caused by the failure of the clamp on the pipe, which is not a safety device included within the scope of Labor Law § 240 (1), and that defendants therefore did not fail "to provide the plaintiff with proper protection under the statute." Doc. 88, at p. 3, 8. He maintains that he disagrees with Hopkins' conclusory statement that additional Bobcats were necessary for plaintiff to do his job safely, especially in light of plaintiff's testimony that he did not need any further equipment to do his work and Hopkins' failure to explain how many more Bobcats were needed and why. Doc. 88, at p. 4, 10. He further opines that plaintiff's own actions were the sole proximate cause of the incident since he intentionally placed his foot on the toe board and extended it past the outside of the manlift platform, thereby placing himself in a position to be struck by the pipe. Doc. 88, at p. 9.

Defendants further assert that the City and the MTA did not own the premises where the incident occurred and thus are not proper Labor Law defendants. Additionally, they argue that, since the pipe fell only 3 ½ feet, there was no appreciable height differential which would trigger Labor Law § 240 (1). They also maintain that Hopkins' affidavit should be disregarded by this Court since it does not contain a certificate of conformity and it contains opinions unsupported by, or contradictory to, evidence in this case.

In a reply affirmation in further support of his motion and in opposition to defendants' cross motion, plaintiff argues that he has established his prima facie entitlement to summary judgment pursuant to Labor Law § 240 (1). Plaintiff argues that, although Hopkins did not specifically state that additional straps were needed to lift the pipe, her opinion that additional Bobcats were needed "refers to the straps." Doc. 105, at par. 8. Specifically, Hopkins maintains

that "[t]he 'straps' that plaintiff testified to were attached to the pipe and hoisted by means of the Bobcats" and they were "clearly a protective device" within the ambit of Labor Law § 240 (1). Id. Plaintiff also withdraws its claims against the MTA, LIRR, MTACC, and Metropolitan TACC.[2] Finally, plaintiff submits a copy of Hopkins' affidavit containing a certificate of conformity.

In their reply affirmation in further support of their cross motion, defendants reiterate their argument that plaintiff's claim pursuant to Labor Law § 240 (1) must be dismissed because his accident occurred due to the failure of the pipe clamp, a device not enumerated in the statute. They further assert that Hopkins' affidavit fails to raise an issue of fact because she fails to specify what safety devices, if any, could have been used to prevent the accident. They further assert that plaintiff disingenuously asserts that Hopkins opined that additional slings and/or ropes were needed due to the length and weight of the pipe when she merely stated that additional Bobcats were needed.

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

[2] Although plaintiff's counsel does not specifically withdraw plaintiff's claims against Metropolitan TACC, such discontinuance is evident from his acknowledgment that the sole remaining defendants are the City and the NYCTA. Doc. 105, at p. 2.

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).

Labor Law § 240 (1) provides, in relevant part, 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.

The Court of Appeals has held that the 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 exists where an owner or general contractor fails to provide a worker engaged in Labor Law § 240 (1) 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). In order to impose liability under section 240(1), plaintiff must establish that the violation of the statute was the proximate cause of the injuries alleged. *Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 (1st Dept 2011).

Plaintiff, a laborer working on a construction project, was instructed by his supervisor to hang steel pipe on J-hooks along a concrete wall in the chamber. Two Bobcats, using hooks with slings attached, and stationed approximately 300 feet from each other, were intended to support

the pipe as plaintiff hung it on the wall. However, as plaintiff attempted to push the pipe onto a J-hook, a pipe connector or clamp failed and a 33-foot long section of pipe fell on his foot, about half of which had been protruding from the basket of the manlift. Plaintiff's "testimony that he was struck by the pipe constitutes a prima facie showing that the appropriate safety device was not used." *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 (1st Dept 2008). Thus, plaintiff has established his entitlement to summary judgment pursuant to Labor Law § 240 (1). Further, Hopkins' affidavit, in which she opines that more than two Bobcats with slings should have been used to hoist the pipe, confirms this conclusion and, therefore, contrary to defendants' contention, it is not conclusory.[3]

The burden thus shifted to defendants to establish that "there was no statutory violation and that [as defendants argue] plaintiff's own acts and omissions were the sole cause of the accident." *Kosavick*, 50 AD3d at 288, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 (2003). However, plaintiff failed to meet this burden. As noted above, defendants argue that plaintiff's own act of placing his foot in a position extending past the edge of the toe board was the sole proximate cause of the incident. However, even assuming, arguendo, that this was a cause of the incident, the pipe fell as the result of an insufficient amount of safety devices, such as Bobcats with slings or hoists attached, as prescribed by Labor Law § 240 (1). Where, as here, "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." *Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 290 (2003).

Although defendants submit the affidavit of their expert, Bruno, whose opinion that Labor Law § 240 (1) was not violated conflicts with that set forth by Hopkins, the conflicting expert

[3] Although Hopkins states in her affidavit that the accident occurred because a pipe connector failed, defendants disregard the fact that she made this statement in conjunction with her conclusion that additional Bobcats and slings should have been used.

affidavits do not preclude the granting of summary judgment in plaintiff's favor. *O'Brien v Port Auth. of N.Y. and N.J.*, 131 AD3d 823, 824-825 (1st Dept 2015).

This Court finds without merit defendants' contention that Labor Law § 240 (1) is not implicated herein because the pipe being pushed by plaintiff was at chest level and thus did not fall from a significant height when it struck his foot. As the Court of Appeals held in *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 (2011), a plaintiff is "not precluded from recovery under section 240 (1) simply because he and the [object] that struck him were on the same level" (*id.* at 10). In determining the significance of an elevation differential, a court must consider factors including "the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent." *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 (2009). Here, a 33-foot long section of steel pipe approximately 4-6" inches in diameter fell approximately 3 ½ feet onto plaintiff's foot. Thus, although the pipe did not fall from a great height, it was clearly capable of generating a great deal of force.

Also without merit is defendants' claim that they are not proper Labor Law defendants. They claim that they have established this defense because they denied any liability under the Labor Law in their answer. However, a review of the complaint and answer reveals that defendants' contention is disingenuous. In the complaint, plaintiff alleges that defendants NYCTA and the City owned the premises where the accident occurred. Doc. 93, at pars. 44 and 56. However, defendants do not deny these allegations; rather, they deny them upon information and belief. Doc. 94, at par. 31. Thus, this argument fails.

In opposition to plaintiff's motion and in support of the cross motion, defendants rely on *Fabrizi v 1095 Ave. of the Americas, LLC*, 22 NY3d 658 (2014). In that case, the Court of Appeals determined that a compression and set screw coupling, which was designed to hold together a box

containing wires affixed to a wall, and was not meant to provide protection against the risk of falling on a worker, did not constitute a safety device as defined by Labor Law § 240 (1), and thus the defendant's failure to provide or use a "more secure" coupling did not constitute a violation of that statute. However, *Fabrizi* is clearly distinguishable from the captioned action. In that case, plaintiff argued that the coupling itself was a safety device, whereas plaintiff in this case does not assert that the clamp or connector on the pipe was a safety device of the type envisioned by the statute. Additionally, since the pipe being hung onto the J-hooks fell while being hoisted by two Bobcats, the facts of this case clearly fall within the purview of Labor Law § 240 (1). *See Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 (2001) (to invoke liability for a falling object under Labor Law § 240 [1], plaintiff must demonstrate that the object fell "while being hoisted or secured, *because* of the absence or inadequacy of a safety device" [citation omitted] [emphasis provided]).

The parties remaining contentions are either without merit or need not be addressed by this Court.

In light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is granted to the extent that it seeks summary judgment as against defendants The City of New York and the New York City Transit Authority; and it is further

ORDERED that the branch of defendants' cross motion seeking dismissal of plaintiff's claims against defendants The City of New York and the New York City Transit Authority is denied as academic; and it is further

ORDERED that the branch of defendants' cross motion seeking dismissal of plaintiff's claims against defendants Metropolitan Transportation Authority, The Long Island Railroad, Metropolitan Transportation Authority-Long Island Railroad, MTA Capital Construction Company, and Metropolitan Transportation Authority Capital Construction Company is granted, based on plaintiff's voluntary discontinuance of said claims, and the said claims are hereby severed from the action, and the remainder of the action is to continue; and it is further

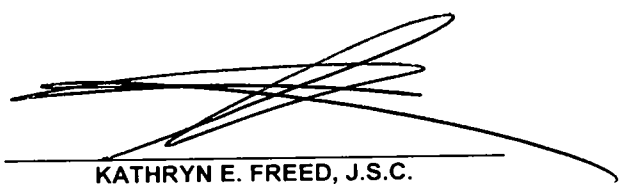
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that since plaintiff is entitled to judgment on liability as against the City of New York and the New York City Transit Authority, and the only triable issues of fact remaining with respect to those defendants relate to the amount of damages to which plaintiff is entitled, a trial of the issues regarding plaintiff's damages shall be had before the court; 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.



9/24/2018
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