Maldonado v 150 Wooster LLC
2019 NY Slip Op 33064(U)
October 11, 2019
Supreme Court, New York County
Docket Number: 160821/2016
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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SANTIAGO MALDONADO and GIANINA CAZAL, Index No.: 160821/2016

Plaintiffs,

-against-

150 WOOSTER LLC and BRAVO BUILDERS, LLC,

Defendants.

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Robert R. Reed, J.:

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on December 13, 2016 when, while working at a construction site located at 150 Wooster Street, New York, New York (the Premises), he was crushed by an approximately 30-foot long and 3000-pound I-beam that he and his coworkers were manually moving.

In motion sequence number 002, plaintiffs Santiago Maldonado (plaintiff) and Gianina Cazal move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants 150 Wooster LLC (Wooster) and Bravo Builders, LLC (Bravo) (together, defendants).

Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

BACKGROUND

On the day of the accident, Wooster owned the Premises where the accident occurred. Wooster had hired Bravo to serve as the general contractor on a project to construct a multi-story luxury building at the site (the Project). Bravo hired plaintiff's employer, nonparty Parkside

Construction Builders Corp. (Parkside) to serve as the structural steel subcontractor for the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that he was employed by Parkside as a foreman on the day of the accident. Plaintiff testified that his Parkside supervisor gave him his work assignment that day, which entailed moving four large I-beams 25 to 30 feet from one side of the third floor of the building to the other. The I-beams were intended to be used to construct/support a balcony. He explained that, on the days prior to the accident, the I-beams were moved by a crane; however, "[d]ue to the pressure and how fast they wanted to lay concrete . . . and in order not to move some jacks [that] they said would delay the job," the men were instructed to manually move the subject I-beams on the day of the accident (plaintiff's tr at 40-41).

Plaintiff explained that, at the time of the accident, the men were manually hoisting/moving one of the I-beams via a makeshift hoist created by placing the I-beam on top of two pipes. Plaintiff testified that, after moving the I-beam about 10-15 feet, and, as he was "bent down" and holding the I-beam, it suddenly "tilted" (*id.* at 58-59). Plaintiff further explained that, as the I-beam was "very, very heavy, it . . . just went in an instant," striking plaintiff's leg as it fell and knocking him "to the floor" (*id.* at 59, 62).

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 movant'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]).

Whether Defendants' Cross Motion is Timely

Initially, plaintiffs argue that defendants are not entitled to summary judgment in their favor on their cross motion to dismiss the complaint on the ground that it is not timely. To that effect, under the court's rules, the deadline to move for summary judgment was 60 days after the note of issue was filed in this case. Here, plaintiffs filed the note of issue on or about August 7, 2018, and defendants' cross motion is dated December 13, 2018, over two months thereafter.

That said, it should be noted that

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also McCallister v 200 Park, L.P.*, 92 AD3d 927, 928 [2d Dept 2012];

Guallpa v Leon D. DeMatteis Constr. Corp., 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, that part of defendants' cross motion seeking relief on the Labor Law § 240 (1) claim against them is "nearly identical" to that raised by plaintiffs in their motion. Therefore, the court will consider that part of said cross motion seeking dismissal of the Labor Law § 240 (1) claim against defendants, and their cross motion is otherwise denied.

The Labor Law § 240 (1) Claim Against Defendants

Plaintiffs move for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants cross-move for dismissal of said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law (*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) . . . [r]ather, 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, a 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, plaintiffs may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell on him, *i.e.*, the 3000-pound I-beam, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was 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"]).

In addition, in light of the fact that the I-beam was so heavy, it was foreseeable that the men would not be able to control it as it was being moved. Accordingly, additional safety devices

aside from the subject pipes, such as a proper hoist, *i.e.*, a crane, were necessary to secure the I-beam, so as to insure that plaintiff would be safe. "'[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 762, 762 [2d Dept 2006] [scaffold alone, as a safety device, was inadequate to protect the plaintiff, "where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake"], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Dasilva v A.J. Contr. Co.*, 262 AD2d 214, 214 [1st Dept 1999] [where the plaintiff "was injured when the unsecured A-frame ladder he was standing on was struck by a section of pipe he had cut, causing him to fall," the Court found that "the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"]).

It should also be noted that, contrary to defendants' assertion, plaintiff is not required to identify what would constitute proper safety devices for the task at hand, and to require as much "would allow owners and contractors to diminish their obligations under [the Labor Law] and to set their own standard of care for the protection of workers at the worksite" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523-524 [1985]). Further, plaintiff was under no duty to fetch an alternate safety device on his own because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). To that effect, "workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

Also, contrary to defendants' argument, under the facts of this case, wherein the I-beam was so large and heavy that it required more than a couple of men and a makeshift hoist to move it, Labor Law § 240 (1) applies even though the I-beam only fell a few feet onto plaintiff. Defendants maintain that, 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]). However, notably, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis" (*id.* at 9). In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet-tall and measured 4 inches in diameter. In that 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).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the I-beam fell only a short distance, but, given the significant amount of force that it generated during its fall due to its extreme weight of 3,000 pounds, plaintiff's accident "'ar[ose] from a physically significant elevation differential'" (*id.* at 10, quoting *Runner* at 603; *see also Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [in a case where the plaintiff was injured when two 500-pound steel beams fell "a short distance" off an A-frame cart and landed on his leg, Labor Law applied "[g]iven the beams' total weight of 1,000 pounds

and the force they were able to generate during their descent"]; *McCallister*, 92 AD3d at 928-929; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 474 [1st Dept 2012] [court held that "[t]he elevation differential [could not] be considered de minimis when the weight of the object being hoisted [was] capable of generating an extreme amount of force, even though it only traveled a short distance"]).

Finally, defendants have not sufficiently established that plaintiff was the sole proximate cause of his accident in that "(a) [he] had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them, he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *see also Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . ., and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citation omitted]). "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*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

Thus, plaintiffs are entitled to judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to dismissal of said claim against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion by plaintiffs Santiago Maldonado and Gianina Cazal (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants 150 Wooster LLC and Bravo Builders, LLC (together, defendants) is granted; and it is further

ORDERED that defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the remainder of the action continue.

Dated: October 11, 2019

ENTER:

J.S.C.