Young v Retail Project Mgt. of NY, Inc.
2019 NY Slip Op 33305(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 160438/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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PATRICK YOUNG, Index No. 160438/2014

Plaintiff

- against - DECISION AND ORDER

RETAIL PROJECT MANAGEMENT OF NY, INC., SCREAMIN PARTIES OF NANUET, LLC, and BRIXMORE HOLDINGS 11 SPE, LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained August 20, 2014, when he fell from a ladder as he was working at the Rockland Plaza Shopping Center owned by defendant Brixmore Holdings 11 SPE, LLC, in Nanuet, New York, on a construction project for which defendant Retail Project Management of NY, Inc., was the general contractor. Nonparty Best Mechanical Plumbing & Heating, Inc., plaintiff's employer, worked as a subcontractor on the project. Retail Project Management and Brixmore Holdings move for summary judgment dismissing plaintiff's claims. C.P.L.R. § 3212(b). Plaintiff cross-moves for summary judgment on these defendants' liability

for his claim under New York Labor Law § 240(1). C.P.L.R. § 3212(b) and (e).

II. PLAINTIFF'S CROSS-MOTION

While plaintiff's cross-motion lacked a notice of the cross-motion, Retail Project Management and Brixmore Holdings waived this defect when they failed to reject the cross-motion within 15 days after its service on them and failed to indicate any prejudice from the defect. C.P.L.R. § 2101(f); Bank of Am., N.A. v. Brannon, 156 A.D.3d 1, 6 (1st Dep't 2017); Pion v. New York City Hous. Auth., 125 A.D.3d 462, 462 (1st Dep't 2015); Joseph v. NRT Inc., 43 A.D.3d 312, 313 (1st Dep't 2007). See Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019). Plaintiff's failure to serve and file a notice of his cross-motion, which has not prejudiced defendants, who responded to the cross-motion and did not object to the lack of notice, is also a mistake that the court may disregard. C.P.L.R. § 2001; County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y.2d 123, 126 (1977); Hornok v. Hornok, 121 A.D.2d 937, 938 (1st Dep't 1986); Matter of Aetna Cas. & Sur. Co. (Mari), 102 A.D.2d 772, 773 (1st Dep't 1984).

III. LABOR LAW § 240(1) CLAIM

Retail Project Management and Brixmore Holdings contend that plaintiff's Labor Law § 240(1) claim is not viable because he was not engaged in work covered by the statute and was the sole proximate cause of his injury. Plaintiff, the only witness to his fall, was standing on the second rung from the top of a fiberglass A-frame ladder six feet in height. He was holding a drill in his right hand and in his left hand a grille that he was securing to a vent, when the ladder moved sideways to his left, and he fell to his right and sustained injury.

Labor Law § 240(1) covers the installation of heating, ventilation, and air conditioning (HVAC) equipment. Sanatass v. Consolidated Inv. Co., Inc., 10 N.Y.3d 333, 337 (2008); Mananghaya v. Bronx-Lebanon Hosp. Ctr., 165 A.D.3d 117, 126 (1st Dep't 2018). See Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 412 (1st Dep't 2019). Even if plaintiff was not actually installing the vents or other HVAC equipment, he was screwing grilles onto that equipment, which was an integral part of the HVAC installation, also covered by Labor Law § 240(1). Saint v. Syracuse Supply Co., 25 N.Y.3d 117, 126 (2015); Prats v. Port Auth. of N.Y. & N.J., 100 N.Y.2d 878, 881 (2003); Mananghaya v. Bronx-Lebanon Hosp. Ctr., 165 A.D.3d at 123; Wowk v. Broadway 280

Park Fee, LLC, 94 A.D.3d 669, 670 (1st Dep't 2012).

Retail Project Management and Brixmore Holdings base their contention that plaintiff was the sole proximate cause of his injury on the affidavit of Michael Niemann, Best Mechanical Plumbing & Heating's owner and president, attesting that plaintiff caused the ladder to topple by positioning it two feet away from where he was securing the grille. Niemann was absent from the site when plaintiff fell, however, and thus must rely on plaintiff's testimony that he reached forward no more than two feet, the approximate length of his arms, leaning into the ladder and not to his side to secure the grille. Construction work frequently requires a worker to reach in different directions, here no more than an arm's length in front and above. Niemann's conclusions that a deficiency in plaintiff's performance of his work as opposed to the ladder caused his injury is not based on facts in the record and thus speculative. Reif v. Nagy, 175 A.D.3d 107, 125-26 (1st Dep't 2019); Pastora L. v. Diallo, 167 A.D.3d 424, 425 (1st Dep't 2018); Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d 404, 407 (1st Dep't 2017).

In fact, plaintiff placed himself in a more stable position

by reaching slightly in front of him toward the A-frame ladder's center, rather than directly overhead, which would have caused him to lean back, away from the A-frame. Plaintiff's position reduced the danger inherent in using a ladder for a task that required him to work with both hands above him, preventing him from holding onto the ladder with one hand.

To demonstrate that plaintiff was the sole proximate cause of his injury, Niemann further attests only that plaintiff did not complain about the ladder or ask for another ladder or other equipment, not that plaintiff disregarded instructions or failed to use other available equipment more suitable for his task. Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d at 568-69; Keenan v. Simon Prop. Group, Inc., 106 A.D.3d 586, 589 (1st Dep't 2013); Lizama v. 1801 Univ. Assoc., LLC, 100 A.D.3d 497, 498 (1st Dep't 2012). Nor does Niemann suggest that the cause of plaintiff's injury was unrelated to the ladder moving sideways. Keenan v. Simon Prop. Group, Inc., 106 A.D.3d at 589; Lizama v. 1801 Univ. Assoc., LLC, 100 A.D.3d at 498.

The ladder moving sideways and toppling establishes that plaintiff was not the sole proximate cause of his injury. White v. 31-01 Steinway, LLC, 165 A.D.3d 449, 451 (1st Dep't 2018); Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 544 (1st Dep't

2018); Keenan v. Simon Prop. Group, Inc., 106 A.D.3d at 589; Ross v. 1510 Assoc. LLC, 106 A.D.3d 471, 471 (1st Dep't 2013). Plaintiff is not required to show any other defect in the ladder to establish a Labor Law § 240(1) violation. Caminiti v. Extell W. 57th St. LLC, 166 A.D.3d 440, 441 (1st Dep't 2018); Hill v. City of New York, 140 A.D.3d 568, 570 (1st Dep't 2016); Fanning v. Rockefeller Univ., 106 A.D.3d 484, 485 (1st Dep't 2013); Estrella v. GIT Indus., Inc., 105 A.D.3d 555, 555 (1st Dep't 2013). After the ladder toppled, however, plaintiff observed that the spreaders that hold the legs of the ladder open were no longer fully extended, which may have caused its collapse. In any event, whatever the reason why the ladder failed to provide adequate protection, given that failure, plaintiff's positioning of the ladder at most would constitute comparative negligence, which is not a defense to his Labor Law § 240(1) claim. Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 289 (2003); Cardona v. New York City Hous. Auth., 153 A.D.3d 1179, 1180 (1st Dep't 2017); Caceres v. Standard Realty Assoc., Inc., 131 A.D.3d 433, 434 (1st Dep't 2015); Stankey v. Tishman Constr. Corp. of N.Y., 131 A.D.3d 430, 430 (1st Dep't 2015).

IV. LABOR LAW § 241(6) CLAIM

Retail Project Management and Brixmore Holdings further contend that plaintiff's Labor Law § 241(6) claim must be dismissed because plaintiff was not engaged in construction, demolition, or excavation and that his reliance on 12 N.Y.C.R.R. § 23-1.21(b) is misplaced because he admitted that the ladder was free of defects. According to Retail Project Management's president Robert Bonett, plaintiff worked at a construction site where renovation was taking place. Labor Law § 241(6) covers injuries sustained in the context of or in connection with construction or during work integral to a renovation project. Karwowski v. 1407 Broadway Real Estate, LLC, 160 A.D.3d 82, 87 (1st Dep't 2018); O'Leary v. S&A Elec. Contr. Corp., 149 A.D.3d 500, 502 (1st Dep't 2017); McNeill v. LaSalle Partners, 52 A.D.3d 407, 409 (1st Dep't 2008); Roberts v. Caldwell, 23 A.D.3d 210, 210 (1st Dep't 2005). See Esposito v. New York City Indus. Dev. Agency, 1 N.Y.3d 526, 528 (2003); Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 102-103 (2002). In fact, the definition of "Construction work" in the regulations under the statute includes the "equipment installation" in which plaintiff was engaged. 12 N.Y.C.R.R. 23-1.4(b)(13). See Saint v. Syracuse Supply Co., 25 N.Y.3d at 129; Nagel v. D & R Realty Corp., 99 N.Y.2d at 102-103;

Joblon v. Solow, 91 N.Y.2d 457, 466 (1998).

Plaintiff limits his Labor Law § 241(6) claim against Retail Project Management and Brixmore Holdings to a violation of 12 N.Y.C.R.R. § 23-1.21(b)(1) and (3). 12 N.Y.C.R.R. § 23-1.21(b)(1) requires that every "ladder shall be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load intended to be placed thereon." 12 N.Y.C.R.R. § 23-1.21(b)(3) prohibits use of a ladder that has "a broken member or part," "any insecure joints between members or parts," "any wooden rung or step that is worn down to three-quarters or less of its original thickness," or "any flaw or defect of material that may cause ladder failure."

Retail Project Management and Brixmore Holdings present plaintiff's deposition testimony that he weighed about 220 pounds at the time of his injury, that the ladder held his weight, and that he had used it without incident several times before his injury. According to plaintiff, the ladder was equipped with slip prevention at the bottom, and, when he erected the ladder, its spreaders on each side were functioning, and to his knowledge the ladder was not defective in any way.

While plaintiff identified no defect in the ladder before he ascended it, after it collapsed he observed the partially closed

spreaders, indicating these ladder parts were not functioning and and thus may have been broken or defectively constructed so as to have caused the ladder's failure: a violation of 12 N.Y.C.R.R. § 23-1.21(b)(3)(i) or (iv). Hill v. City of New York, 140 A.D.3d at 571; Stankey Tishman Constr. Corp. of N.Y., 131 A.D.3d at 431. See Lopez v. La Fonda Boricua, Inc., 136 A.D.3d 588, 589 (1st Dep't 2016); Campos v. 68 E. 86th Owners Corp., 117 A.D.3d 593, 594 (1st Dep't 2014); Croussett v. Chen, 102 A.D.3d 448, 448 (1st Dep't 2013). Retail Project Management and Brixmore Holdings also fail to show that the ladder supported four times the maximum load it was to bear, as required by 12 N.Y.C.R.R. § 23-1.21(b)(1). As the moving defendants concede, the ladder's collapse indicates that the ladder may have lacked the capacity to support the requisite weight. See Lopez v. La Fonda Boricua, Inc., 136 A.D.3d at 589; Croussett v. Chen, 102 A.D.3d at 449. Therefore the ladder's compliance with those regulatory provisions remains an issue for trial.

V. PLAINTIFF'S ABANDONED CLAIMS

Plaintiff has abandoned his claims for negligence and for violation of Labor Law §§ 200 and 240(2) and (3) by failing to oppose the contentions of Retail Project Management and Brixmore Holdings supporting dismissal of those claims. Henry v. Carr,

161 A.D.3d 424, 425 (1st Dep't 2018); Ng v. NYU Langone Med. Ctr., 157 A.D.3d 549, 550 (1st Dep't 2018); Saidin v. Negron, 136 A.D.3d 458, 459 (1st Dep't 2016); Josephson LLC v. Column Fin., Inc., 94 A.D.3d 479, 480 (1st Dep't 2012). See Landers 1345 Leasehold LLC, 100 A.D.3d 576, 576 (1st Dep't 2012). In any event, the record does not support any claim that Retail Project Management or Brixmore Holdings supervised or controlled plaintiff's work to sustain a Labor Law § 200 or negligence claim. Plaintiff testified and Niemann attested that only Randy Arnold, Best Mechanical Plumbing & Heating Inc.'s foreman, and Niemann instructed plaintiff in his work. Albarado v. French Council LLC, 149 A.D.3d 581, 582 (1st Dep't 2017); Howard v. Turner Constr. Co., 134 A.D.3d 523, 525 (1st Dep't 2015); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607, 608 (1st Dep't 2015). Labor Law § 240(2) and (3) do not apply because plaintiff was injured in a fall from a ladder, not from scaffolding to which those statutory subsections apply. Saint v. Syracuse Supply Co., 25 N.Y.3d at 128-29; Alarcon v. UCAN White Plains Hous. Dev. Fund Corp., 100 A.D.3d 431, 432 (1st Dep't 2012); Pietrowski v. ARE-East Riv. Science Park, LLC, 86 A.D.3d 467, 468 (1st Dep't 2011); Vergara v. SS 133 W. 21, LLC, 21 A.D.3d 279, 280-81 (1st Dep't 2005).

VI. CONCLUSION

For the reasons explained above, the court grants plaintiff's cross-motion for summary judgment on the liability of defendants Retail Project Management of NY, Inc., and Brixmore Holdings 11 SPE, LLC, for violating Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). The court grants the motion for summary judgment by Retail Project Management of NY, Inc., and Brixmore Holdings 11 SPE, LLC, to the extent of dismissing plaintiff's Labor Law § 200 and negligence claims, any claims under Labor Law § 240(2) or (3), and any claim under Labor Law § 241(6) based on a regulation other than 12 N.Y.C.R.R. § 23-1.21(b)(1) or (3), but otherwise denies those defendants' motion. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: October 31, 2019

LUCY BILLINGS, J.S.C.

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