Singh v 911 LLC
2019 NY Slip Op 33849(U)
December 27, 2019
Supreme Court, Kings County
Docket Number: 509401/2017
Judge: Devin P. Cohen

Supreme Court of the State of New York
County of Kings

Index Number 509401/2017
SEQ#004

Part 91

PARAMJIT SINGH,

Plaintiff,

against

911 LLC,

Defendant.

911 LLC,

Third-Party Plaintiff,

against

NYA CONSTRUCTION, INC.,

Third-Party Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the apers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other	

Upon the foregoing papers, plaintiff's motion for partial summary judgment is decided as follows:

Factual Background

Plaintiff brought this action against defendant for injuries he sustained when he fell from a ladder on premises owned by defendant. Plaintiff asserts claims for negligence, violation of Labor Law §§200, 240(1) and 241(6).

At his deposition, plaintiff testified that he was hired by a company called Manu Construction, owned by a person known to all parties concerned as "Bittu". Bittu employed plaintiff to work at a job at premises located at 911 Walton Avenue, Bronx, New York ("911

Walton"). Plaintiff testified that he was tasked with breaking concrete, filling cracked places and pointing. He further testified that he was part of a team that repaired the roof.

The layout of 911 Walton and its location relative to neighboring properties features prominently in this case. Such detail is found in the affidavit of Mark Neiman, defendant's property manager. In his affidavit, Mr. Neiman states that the building at 911 Walton is located on the side of a hill, on the west side of Walton Avenue. To the rear of the building is a paved yard. Parallel to Walton Avenue, and proceeding down the hill, is Gerard Avenue. The rear of the concrete yard is supported by a retaining wall that abuts the rear of the property facing Gerard Avenue. The rear of the concrete yard is enclosed by a metal "stockade-style" fence. Below the retaining wall is an alley that runs along the rear of the property facing Gerard Avenue.

At his deposition, plaintiff testified that he was tasked with removing a tree stump that was growing out of the concrete yard, whose roots were also growing into the retaining wall. For this task, plaintiff was assisted by a person named Sandip. Plaintiff testified that Sandip placed a ladder in the alley below the concrete yard and leaned it up against the retaining wall. Plaintiff testified that he ascended the ladder and, while standing on the ladder, used both hands on the jackhammer to break up the concrete around the stump. Plaintiff testified that Sandip did not hold the ladder. Plaintiff testified that he had asked for a belt or harness but was not given one. Plaintiff testified that, while on the ladder, about 20 to 25 feet from the ground, he activated the jackhammer and began to use it. Some of the stones were harder than others, which caused the jackhammer to vibrate more, which caused the ladder to also vibrate. As the jackhammer

and ladder continued to vibrate, plaintiff was unable to control the vibration and he fell from the ladder toward his right, while the ladder fell to his left.

Plaintiff also submits affidavits from two of his coworkers, Sandip Singh and Raviinder Singh. Sandip Singh states in his affidavit that his work at the property involved repair and replacement of exterior brick, concrete and windows on the building. He states that, at the time of the accident, he was standing a few feet from the ladder, on which plaintiff stood, 20 to 25 feet above the ground. Sandip Singh states that plaintiff was using a motorized chipping gun to break apart concrete around a tree trunk. He further states that the ladder was not secured or held by anyone. Sandip Singh states that he saw plaintiff fall from the ladder when the ladder began to wobble.

In his affidavit, Raviinder Singh states that his work involved concrete repair, brick pointing and roof repair. He states that, while on a break, he watched plaintiff use a motorized chipping gun to break apart concrete surrounding a tree trunk. He states that he saw that the ladder was not secured or held by anyone, and it did not have footing at the bottom. He further states that he saw that the ladder began to wobble, which caused plaintiff to fall.[1]

Plaintiff also submits a separate affidavit in support of his motion, in which he largely recounts the accident as described during his deposition. In his affidavit, plaintiff also states that the ladder from which he fell did not have any cleats or safety feet at the bottom.

Mark Neiman, the property manager for 911 LLC, testified at his deposition that defendant hired Manu Construction and/or NYA Construction to perform roof repair, brick

[1] Defendant objects to the affidavits of Sandip Singh and Raviinder Singh on the basis that the affidavits are not supported by an interpreter's affidavit which specifies the interpreter's qualifications. To the extent that this omission is fatal, plaintiff supplies such qualifications on reply.

repair, and tree removal at 911 Walton.[2] Mr. Neiman testified that he did not recall visiting the property during the roof repair, brick repair, or tree removal by Manu Construction. He testified that he did not know how Manu Construction was allowed to access the rear of the property to perform the tree removal. He further testified that he did not know if the trees to be removed were coming out of the retaining wall. Finally, he testified that he did not discuss with Bittu how Manu Construction would remove the trees, or what methods or means would be used.

Analysis

Plaintiff moves for summary judgment on his claims for violations of Labor Law §§ 240(1) and 241(6). On a motion for summary judgment, the moving party on bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's Labor Law § 240(1) Claim.

Labor Law § 240(1) imposes upon owners and general contractors a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). In order to receive protection under Labor Law § 240(1), plaintiff must initially show that: (1) he was permitted or suffered to work on the construction project; and (2) he was hired by the owner, contractor or their agent to work at the site (*Gallagher v Resnick*, 107 AD3d 942, 944 [2d Dept 2013]). Plaintiff must also

[2] It is not clear whether Manu Construction and NYA Construction are different companies or the same company. Mr. Neiman testified that he did not know if the companies were affiliated. That said, Mr. Neiman testified that he dealt only with Bittu when he communicated with either

establish that he was engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Ferrigno v Jaghab, Jaghab & Jaghab, P.C.*, 152 AD3d 650, 653 [2d Dept 2017]).

Mr. Neiman testified that defendant hired Manu Construction to perform roof repair, brick repair, and tree removal. Plaintiff testifies that he was hired by Manu Construction and tasked with repairing the roof, breaking concrete, filling cracked places and pointing, as well as tree removal. Accordingly, plaintiff has established, prima facie, that he is protected by Labor Law § 240(1) (*see, e.g., Lombardi v Stout*, 80 NY2d 290, 296 [1992]; *Tamarez De Jesus v Metro-N. Commuter R.R.*, 159 AD3d 951, 952 [2d Dept 2018]).

In opposition, defendant argues that plaintiff's work was not protected under the statute. Referring to Mr. Neiman's deposition testimony and affidavit, defendant contends that the renovation project was split into two parts. One part involved the facade of the building and roof repair, and the other part involved the removal of trees from the concrete yard. Defendant argues that plaintiff worked only in the tree removal portion of the project, which defendant contends is not protected work under Labor Law § 240(1) (*see, e.g., Enos v Werlatone, Inc.*, 68 AD3d 713, 714 [2d Dept 2009]). However, defendant's argument is, at least in part, contradicted by Mr. Neiman's testimony that defendant hired Manu Construction to perform roof repair, brick repair, and tree removal. Plaintiff's testimony supports Mr. Neiman's testimony. Plaintiff testified that he was involved in all three endeavors. Accordingly, the facts do not entirely bear out that the work was separated into distinct phases.

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or both companies. For the purposes of this motion, the court will refer to either or both companies as "Manu Construction".

Even if plaintiff's work involved only the removal of the tree stump, such work qualifies for statutory protection here. The removal occurred in the concrete yard, which is composed of a retaining wall that is at least 20 feet above the neighboring ground, as well as a metal fence. Consequently, the yard is a "building or structure" as used in Labor Law § 240(1) (*McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 15-16 [2d Dept 2012] [noting that a "structure," as used in this statute, "in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner"] [*quoting Caddy v Interborough R.T. Co.*, 195 NY 415, 420 [1909]).

Defendant also speculates that, at the time of the accident, plaintiff may have been working for the neighboring property owner. Defendant bases this argument on plaintiff's testimony that, prior to the accident, Bittu spoke with someone from the neighboring property about something. Plaintiff did not understand the conversation because it was in English. Any speculation about the substance of this conversation is insufficient to raise a triable question of fact (*Martinez v City of New York*, 153 AD3d 803, 806 [2d Dept 2017]).

Similarly, defendant argues that it cannot be held liable as the owner because plaintiff was standing on a ladder whose bottom rested on a neighboring property. As an initial matter, defendant does not establish where the property line exists, and so it has not proven that plaintiff was not, in fact, on defendant's property. In any event, defendant references no case in which a court denied summary judgment to a plaintiff who is standing on another's property but working on the defendant's property. To be clear, I find that plaintiff's mere presence on adjacent property while performing qualifying work on, or for the benefit of, defendant's property would not nullify the protection of Labor Law § 240(1).

Finally, defendant argues that plaintiff's use of a ladder was unnecessary, unauthorized and unforeseeable. The purpose of Labor Law § 240(1) is to safeguard workers from "gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). Mr. Neiman claims in his affidavit that plaintiff could have broken the concrete around the stump and removed the stump while standing on the concrete yard, and without the ladder. However, Mr. Neiman testified that he never observed Manu Construction perform any of its tree removal work, and that he never discussed with Bittu the means and methods necessary to remove the trees. Conversely, plaintiff testified that roots of the tree were growing out of the retaining wall. Accordingly, defendant has no basis to claim that a ladder was not required to complete the job of removing the tree stump.

Because plaintiff has established that he was engaged in activity protected by Labor Law § 240(1), he must next prove that defendant failed to provide him with proper protection, and that this failure to do so was a proximate cause of the accident (*Kupiec v Morgan Contr. Corp.*, 137 AD3d 872, 873 [2d Dept 2016]). "The failure of an owner or an agent of the owner 'to furnish or erect suitable devices to protect workers when work is being performed' results in absolute liability against that owner or the owner's agent under the statute" (*Sanchez v Metro Builders Corp.*, 136 AD3d 783, 786 [2d Dept 2016] [quoting *Lombardi*, 80 NY2d at 295).

Plaintiff submits the affidavit of Scott Silberman, a professional engineer. Mr. Silberman states in his affidavit that he has experience in construction site safety accident investigation, hazard analysis and causation. He states that he inspected the site on September 24, 2018, where

he took photographs and measurements, and that he reviewed the depositions of plaintiff and Mr. Neiman, as well as the affidavit of Sandip Signh and Raviinder Singh.

Based on his review, Mr. Silberman determines that the force applied by the jackhammer, which was not held vertically, created an equal and opposite force that was applied to the ladder. This caused the ladder to wobble, especially because the force was applied at the top of the ladder. Mr. Silberman opines that plaintiff's position on the ladder was made further unstable because plaintiff had both hands on the jackhammer, which was required to operate the jackhammer, and so plaintiff could not use his hands to support himself.

Mr. Silberman explains that proper ladder safety requires that there be three points of contact on the ladder at all times – two feet and one hand, or two hands and one foot. He opines that the ladder was suitable only to provide access to a location, but not as a surface or platform from which to work. Mr. Silberman opines that a pipe scaffold would have provided a suitable and safer working surface. Mr. Silberman concludes that defendant's failure to provide a suitable device violated Labor Law § 240(1), and that defendant's violation caused plaintiff's accident.

Defendant submits no facts contesting Mr. Silberman's expert opinion. Accordingly, I conclude that defendant violated Labor Law § 240(1), and that such violation was the proximate cause of plaintiff's accident.

Plaintiff's Labor Law § 241(6) Claim

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Lopez v New*

York City Dept. of Envtl. Protection, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Plaintiff contends that defendant violated Industrial Code 23-1.21(b)(4)(iv), which states:

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

Plaintiff testified that the ladder extended greater than ten feet, that the ladder was not secured or held by anyone, and that it had no footing. In addition, Mr. Silberman opines in his affidavit that defendant's failure to secure the ladder mechanically or by having a person stabilize it constitutes a violation of Labor Law § 241(6). Defendant does not dispute this. Instead, defendant argues again that plaintiff was not on defendant's premises, and that plaintiff was possibly working on a project for a neighboring property. As explained above, defendant does not offer any meaningful legal or factual support for these arguments. Accordingly, I conclude that defendant violated Labor Law § 241(6), and that such violation was the proximate cause of plaintiff's accident.

Conclusion

For the foregoing reasons, plaintiff's motion for partial summary judgment is granted.

This constitutes the decision and order of the court.

KINGS COUNTY CLERK FILED

December 27, 2019
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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JAN 17 2020
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