Diaz v HHC TS REIT LLC
2020 NY Slip Op 30574(U)
January 22, 2020
Supreme Court, Bronx County
Docket Number: 300530/2013
Judge: Donald A. Miles

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8

Index No. **300530/2013**

RAFAEL DIAZ,

Plaintiff,

-against-

HHC TS REIT LLC and LEND LEASE (US) CONSTRUCTION LMB, INC.,

Defendants.

HHC TS REIT LLC and LEND LEASE (US) CONSTRUCTION LMB, INC.,

Third-Party Plaintiffs,

-against-

SJ ELECTRIC, INC.,

Third-Party Defendant

DECISION/ ORDER
Present:
Hon. Donald A. Miles
Justice Supreme Court

Plaintiff Rafael Diaz, moves, pursuant to CPLR § 3212, for an order granting partial summary judgment on the issue of liability on plaintiff's claims under Labor Law §§ 240(1) and 241(6); and for leave to amend the bill of particulars to assert the violation of New York State Industrial Code 23-2.1(a)(1) and 23-1.7(e)(2); Third-Party defendant SJ Electric, Inc., opposes plaintiff's motion and cross-moves for summary judgment in its favor, dismissing plaintiff's complaint and the third-party complaint in their entirety; Defendants/Third-Party Plaintiffs HHC TS Reit, LLC ("HHC") and Lend Lease US Construction LMB, Inc., ("Lend Lease") also oppose plaintiff's motion and the Third-Party Defendant's cross motion and cross-move for summary judgment on their third-party claim. Upon review of the papers, together with the opposition submitted thereto; and after due deliberation, the motions are consolidated and decided as follows.

FACTS AND PROCEDURAL HISTORY

This is an action to recover damages under Labor Law §§§ 200, 240(1) and 241(6) and violations of the Industrial Code for injuries allegedly sustained when three, unsecured metal pipes fell over and struck the plaintiff Rafael Diaz.

In March 2012, plaintiff was employed by non-party Pinnacle Industries, LLC ("Pinnacle") to perform concrete work at the construction site of a 50-story Hyatt Hotel at property located at 135 West 45th Street, New York, which was owned by HHC and under the control and supervision of Lend Lease as Construction Manager. Third-party defendant SJ Electric, Inc. was the primary electrical contractor on the project.

Plaintiff alleges he was working on the 25th floor stripping plywood forms from the new concrete ceiling, putting them on the floor, and then collecting them and putting them in piles. Plaintiff was in the process of removing one last plywood form which had been standing on its edge on the floor between the scaffolding and a concrete column, when plaintiff noticed three metal pipes coming straight down towards his face hitting plaintiff in the back of the head and right shoulder.

HHC and Lend Lease commenced a third-party action against SJ Electric seeking indemnity and/or contribution based on the assertion that the pipes that fell on plaintiff were electrical conduit pipes for which they claim SJ electric was responsible for the stacking and storage.

LEGAL STANDARD

In a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law in its favor, offering sufficient evidence that there is no material issue of fact. CPLR 3212(b) *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the moving party has made a prima facie showing of entitlement to judgment as a matter of law, the opposing party must submit evidentiary proof in admissible form establishing the existence of a triable issue of fact. *Winegrad v New York U. Med. Center*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2D 557, 562 (1980).

The court's function on this motion for summary judgment is issue finding rather than

issue determination *(Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos* 46 NY2d 223 [1978]).

Labor Law § 240(1), known as the "scaffold" law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (see *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 [1993]; *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 [1991]). The statute provides in pertinent 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."

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate a violation of the statute, and (2) that such violation was the proximate cause of his or injuries (see *Blake v. Neighborhood Hous. Serv.,* 1 N.Y.3d 280, 287 [2003]: *Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 236, 885 N.Y.S.2d 28 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (see *Ross*, 81 N.Y.2d at 500, 601 N.Y.S.2d 49, 618 N.E.2d 82), and comparative negligence may not be asserted as a defense (see *Sharp v. Scandic Wall Ltd. Partnership*, 306 A.D.2d 39, 40, 760 N.Y.S.2d 478 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident there is no liability (see *Cahill v. Triborough Bridge & Tunnell Auth.*, 4 N.Y.3d 35, 39 [2004] *Kosavick v. Tishman Constr. Corp.*, 50 A.D.3d 287, 288, 855 N.Y.S.2d 433 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 N.Y.2d at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82). In *Runner v.*

New York Stock Exch., Inc., 13 N.Y.3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is ... that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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' " (id. [quoting *Ross*, 81 N.Y.2d at 501]).

DISCUSSION

Plaintiff's Motion for Summary Judgment on Labor Law 240(1) claim

Both plaintiff and his co-worker Keith Simpson, testified that the heavy metal pipes were approximately 10 feet long and leaning vertically, unsecured , against a support column and that at least six concrete laborers were moving about the area surrounding these pipes as they moved large 8' x 4' plywood forms from the ceiling down to the floor, picked them up, cleaned them and put them in stacks.

Lend Lease's general superintendent , Hamlet Gonzalez testified that it is not general industry practice for any contractors to be allowed to rest conduit piping against a column and that if he had seen unsecured pipes just leaning against a support column, he would have noted that as something that needed to be corrected and would have asked the subcontractor to secure the pipes.

Also, in the affidavit of plaintiff's expert, Frank Susino, a licensed construction site safety project manager, he attests that the presence of the long, heavy 4-inch diameter pipes standing upright and unsecured against a column exposed Plaintiff and his co-workers to the gravity related risk of the pipes falling over and striking them. In his opinion, it was very foreseeable that these tall, heavy pipes might fall over due to vibration or being bumped by an object or a worker, thus triggering Labor Law § 240(1) protection. Mr. Susino concluded that some safety device should have been constructed and placed so as to secure the pipes and prevent them from falling, to give proper protection to plaintiff and his co-workers.

Plaintiff has presented evidence demonstrating *prima facie* entitlement to summary

judgment on the Labor Law § 240(1) claim, that the pipes required securing for the purpose of the work plaintiff was performing. Because no adequate or proper protection was provided in violation of the statute, and such violation proximately caused Plaintiff's injuries, plaintiff has met their burden of showing strict liability under Labor Law 240 (1) against the owner and contractor defendants.

SJ Electric , in moving for summary judgment and opposing plaintiff's motion, has relied on the affirmation of counsel and, without the benefit of an expert, contends that the pipes were not materials that required securing for the purposes of the undertaking at the time they fell. This assertion is conclusory as it is unsubstantiated and fails to demonstrate through testimony or expert affidavit why the pipes did not require securing for the purposes of the form stripping work.

There is undisputed evidence that at least three 4-inch diameter and approximately 10-feet tall metal pipes toppled over, fell approximately 4 feet and struck the head of plaintiff who is under 5'10" tall, sufficient from which to conclude that a physically significant elevation differential existed, regardless of the absence of any definitive measurements of the length and weight of the pipes.

The defendants HHC and Lend Lease, in opposing plaintiff's motion, do not dispute the facts but contend that it was plaintiff's decision to resort to brute force to pull the plywood sheet loose that caused the pipes to fall; that plaintiff's motion should be denied as a question of fact exists as to whether plaintiff caused the pipes to fall and was the sole proximate cause of his injuries. Defendants, however, submit no evidence as to how plaintiff's pulling on the plywood form and failure to ascertain why it was stuck caused the pipes to fall. Assuming arguendo, that plaintiff was negligent in pulling on the plywood form, any negligence on plaintiff's part cannot possibly be the sole proximate cause for the pipes to fall or for plaintiff's injuries.

Not only has defendant/third-party plaintiffs not disputed that the evidence establishes that plaintiff was struck by electrical conduit pipes, but contrary to SJ Electric's arguments, also contend that there is no evidence that the conduit was actually pipe used by the plumber, sprinkler installer or some other trade. Defendants even go further and highlight evidence they claim indicates that SJ Electric conceded that it used conduit, matching the description given by

both Plaintiff and his co-worker, Mr. Simpson.

Finding that plaintiff has demonstrated entitlement to judgment as a matter of law on his Labor Law § 240(1) claim, discussion of his remaining claims is academic as he may only recover once for his injuries. Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment as to plaintiff's Labor Law § 240(1) claim as against defendants HHC TS Reit, LLC and Lend Lease US Construction LMB, Inc., is granted; and it is further

ORDERED, that the cross-motion by defendants/third-party plaintiff's HHC and Lend Lease for summary judgment on the third-party complaint is denied;

ORDERED , that the cross-motion by third-party defendant for summary judgment dismissing plaintiff's complaint and the third-party complaint is denied; and it is further

ORDERED, that any and all remaining motions and cross motions have been considerd and are denied in their entirety.

This constitutes the Decision and Order of the Court.

JAN 2 2 2020

DATE

HON. DONALD MILES, J.S.C.