O'Connor v HWA 1290 III LLC
2020 NY Slip Op 32125(U)
July 2, 2020
Supreme Court, New York County
Docket Number: 159873/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** — ***Justice*** — **PART** **IAS MOTION 2EFM**

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KENNETH O'CONNOR,

Plaintiff,

- v -

HWA 1290 III LLC, HWA 1290 IV LLC, HWA 1290 V, 555 1290 HOLDINGS LLC, VORNADO REALTY TRUST, VORNADO OFFICE MANAGEMENT LLC, NEUBERGER BERMAN GROUP LLC, and BENCHMARK BUILDERS, INC.,

Defendants.

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INDEX NO. 159873/2016

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 99

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action, plaintiff Kenneth O'Connor (plaintiff) moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) as against defendants HWA 1290 III, LLC, HWA 1290 IV, LLC, HWA 1290 V, LLC (collectively HWA Owners), Neuberger Berman Group, LLC (Neuberger), and Benchmark Builders, Inc. (Benchmark). Defendants oppose the motion. After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises out of a construction site accident that occurred on August 12, 2016 at 1290 Sixth Avenue in Manhattan. It is undisputed that the HWA Owners owned the premises

(NY St Cts Elec Filing [NYSCEF] Doc No. 73). On April 30, 2014, the HWA Owners entered into a lease agreement with Neuberger to lease certain portions of the premises, including the concourse/basement level (NYSCEF Doc No. 84, Dimoulas aff, ¶ 3). On January 1, 2016, Neuberger entered into a construction management agreement with Benchmark for the build-out of the demised floors (NYSCEF Doc No. 86). Benchmark retained PJ Mechanical as a drywall subcontractor for the project. PJ Mechanical, in turn, subcontracted the sheet metal work to FRP Sheet Metal Contracting Corp. (FRP). Plaintiff was employed as a sheet metal worker by FRP. Plaintiff testified at his deposition that FRP was installing duct work on the site (NYSCEF Doc No. 94, plaintiff tr at 27). He received his instructions from FRP's foreman (id. at 26). FRP had weekly toolbox talks, led by the foreman (id. at 29). FRP provided him with "lanyards . . . depending on where you were working, and if there was a height issue, hardhats, safety goggles, gloves. That's about it" (id. at 30). The protective devices were stored in a gangbox (id. at 31). Plaintiff worked with a partner on a daily basis. including Kenneth Archibald (Archibald) (id. at 33).

On the date of the accident, plaintiff was working with a partner named Kenneth Archibald (id. at 33-34). According to plaintiff, he was "[i]nstalling duct work in a mechanical room" in the basement (id. at 34-35). It was the first day that he was working in the mechanical room (id. at 35). The foreman instructed plaintiff to work with Archibald, and showed him "what needed to be done" (id.). In order to perform his work, he needed a ladder, nuts and bolts, screws, a hammer gun, a screw gun, and hand tools (id. at 36). FRP supplied the ladder (id.). Plaintiff was using an eight-foot ladder (id. at 41). Archibald was holding onto the ladder and handing plaintiff tools (id. at 38). He believed that he inspected the ladder before he used it (id. at 39). At the time of the accident, Archibald was not holding the ladder "[b]ecause he was

called away to work with somebody else," and plaintiff continued to work on his own (id. at 42). He did not observe any problems with the ladder, but noticed that it was "a little seasoned," meaning that it was not new; "they wobble all the time" (id. at 42, 45). Plaintiff testified that his accident happened as he was coming down the ladder (id. at 45). His left foot was on the fifth rung, and his right foot was on the sixth rung (id.). He "never made it to the fifth rung" – "[t]hat's when the ladder kicked out to the left and [he] fell on the side" (id. at 45, 46). In other words, the ladder "moved," which caused plaintiff to "kick out and fall" too (id. at 97). He landed on his right foot, twisted his ankle, twisted his knee, hit his knee on the slab, and came down on his back (id. at 47).

Esad Kucevic (Kucevic), Benchmark's superintendent, testified that Benchmark was hired as a general contractor on the 1290 Sixth Avenue project (NYSCEF Doc No. 85, Kucevic tr at 8, 15). Neuberger hired Benchmark to "[b]uild out the construction according to the drawings" (id. at 15-16). Benchmark hired all of the trade contractors on the site (id. at 26). Benchmark subcontracted a portion of the work to PJ Mechanical, which, in turn, subcontracted work to FRP (id.). Benchmark had a project manager who was on site every day (id. at 33-34). Kucevic did not witness plaintiff's accident (id. at 36-37). However, he was notified about the accident shortly thereafter and conducted an investigation (id.). In the course of his investigation, Kucevic spoke with witnesses, including Kevin DeForest (DeForest), a drywall laborer, who was about 20 feet from plaintiff at the time, and a Benchmark laborer (id. at 37, 43). DeForest told him that plaintiff "was pretty close to the ground before he pushed the ladder and [it] twisted out" "[b]ecause the ladder was sitting right next to the wall and he was coming down I guess his shoulder or something, you know . . ." (id. at 59, 60). Plaintiff was installing ductwork above the ceiling, which was about nine feet high (id. at 37-38).

Kucevic further testified that, if he observed a safety infraction involving a laborer, he "would immediately stop [the individual] and remove [him or her] from the project" (id. at 76).

The project schedule was prepared by Benchmark's project manager and the superintendents (id. at 78). Benchmark required its subcontractors to attend safety meetings at the job site (id. at 81). Benchmark also held weekly meetings with the trades, because "Job doesn't get built without meetings" (id. at 82). He testified that "[e]verything starts with safety equipment, manpower, requirements, toolbox talks. You know, anything with the building special specifics with the buildings and typical construction meeting" (id. at 83). All Benchmark "safeties and rules and regulations of the building, that's what we discuss especially at kickoff meetings" (id. at 85). Benchmark did not provide any safety harnesses or lanyards (id. at 90-91).

Benchmark's accident/incident report dated August 17, 2016 reflects that plaintiff was "working on 8 ft ladder above ceiling. After work was done as he was coming about 5 ft down the ladder twisted and fell on the ground" (NYSCEF Doc No. 96).

LEGAL CONCLUSIONS:

"The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*Ryan v Columbia Univ. in the City of N.Y., Inc.,* 96 AD3d 551, 553 [1st Dept 2012]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution"

(*Giuffrida v Citibank Corp*., 100 NY2d 72, 81 [2003]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 240 (1)

Plaintiff argues that he is entitled to judgment as a matter of law under Labor Law § 240 (1) because he fell from an unsecured ladder. In addition, plaintiff contends that the statute was violated because defendants failed to provide scaffolding, safety harness lines, and safety harnesses.

To support his position, plaintiff submits an affidavit, in which he avers that, on the date of the accident, he was performing ductwork in the mechanical room in the basement of the building (NYSCEF Doc No. 75, plaintiff aff, ¶ 4). He was using an eight-foot A-frame ladder (id., ¶ 6). Prior to the accident, Archibald was holding the ladder while he was working on it, but he was called away, so he continued working on his own (id., ¶ 7). Before continuing working of the ladder, he checked the ladder and noticed that the locking bars were in place (id., ¶ 8). While the ladder was not new, it was "seasoned," meaning that it was not new, and, like all the other ladders on the site, "wobbled all the time" (id.). Plaintiff finished the work that he was doing in the ceiling and was coming down the ladder when his accident occurred (id., ¶ 9). According to plaintiff, his accident occurred as follows:

> "While installing the last piece of duct, [he] was standing on the 6th rung of the ladder, which was two rungs down from the top cap of the ladder. When [he] attempted to step down to the 5th rung of the ladder, before placing [his] right foot down on the rung, the ladder kicked out, it moved to the left, and fell to the ground, causing [him] to fall from the ladder and fall to the ground as well"

(id., ¶ 10).

Plaintiff also states that the ladder was in the exact position that it needed to be in order to perform his work (id., ¶ 11). According to plaintiff, no one ever provided him with safety harnesses with safety lines, and there was no place to tie off to (id., ¶ 12). Finally, plaintiff indicates that no one was available to hold the ladder when his accident occurred (id., ¶ 13).

In opposition, defendants contend that there are issues of fact as to whether Labor Law § 240 (1) was violated, and whether plaintiff was the sole proximate cause of his injuries. In this regard, defendants maintain that there are issues of fact as to whether plaintiff failed to use an available safety device, his coworker, to hold the ladder. Furthermore, defendants assert that there are issues of fact as to how the accident happened, and whether plaintiff's own actions undermined the stability of the ladder. According to defendants, Kucevic was told that plaintiff "pushed the ladder and twisted out" before his fall. Defendants also argue that plaintiff's affidavit is tailored to avoid the consequences of his prior deposition testimony. Specifically, defendants contend that his statements in his affidavit that no one was available to hold the ladder, and that the ladder "wobbled all the time," directly contradict his deposition testimony.

Labor Law § 240 (1) provides, in relevant part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to

provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc*., 13 NY3d 599, 603 [2009]). The statute "plac[es] ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor . . . instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). To establish liability on a Labor Law § 240 (1) cause of action, the plaintiff must show: (1) a violation of the statute, and (2) that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). However, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v Triborough Bridge & Tunnel Auth*., 4 NY3d 35, 39 [2004]).

Whether Defendants Are Responsible Parties Under the Labor Law

At the outset, this Court notes that it is undisputed that the HWA Owners owned the premises (NYSCEF Doc No. 93, Iervolino aff, ¶¶ 3-4). "Liability rests upon the fact of ownership and whether [the HWA Owners] had contracted for the work or benefitted from it are legally irrelevant" (Gordon v Eastern Ry. Supply, 82 NY2d 555, 560 [1993]). In addition, Neuberger was a tenant in the building (NYSCEF Doc No. 84, Dimoulas aff, ¶ 3), and hired Benchmark to perform the work (NYSCEF Doc No. 86). Thus, Neuberger may also be found liable under section 240 (1) (*see Crespo v Triad, Inc*., 294 AD2d 145, 146 [1st Dept 2002] [summary judgment was properly granted under § 240 (1) as against a "lessee who fulfilled the role of owner by contracting for the work"]; *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept

1984] [an "owner" encompasses "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit"]).

Defendants have not contested that Benchmark is a responsible party under the Labor Law. "[A] construction manager . . . may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). Moreover, "an entity is deemed a contractor . . . if it had the power to enforce safety standards and choose responsible subcontractors" (*Milanese v Kellerman*, 41 AD3d 1058, 1061 [3d Dept 2007] [internal quotation marks and citation omitted]). Kucevic testified that Benchmark was the general contractor, hired all the trade contractors, and was in charge of site safety (NYSCEF Doc No. 85, Kucevic tr at 15, 26, 64-65). Even though Benchmark's contract identified it as a construction manager, "[t]he label of construction manager versus general contractor is not necessarily determinative" (*Walls*, 4 NY3d at 864). Accordingly, Benchmark may also be held liable under section 240 (1).

Statutory Violation and Proximate Cause

"Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker" (*Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016], quoting *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]).

Here, plaintiff has established prima facie entitlement to summary judgment under Labor Law § 240 (1). Plaintiff avers that, while he was standing on the ladder, "the ladder kicked out, it moved to the left, and fell down to the ground, causing [him] to fall to the ground" (NYSCEF Doc No. 75, plaintiff aff, ¶ 10). According to plaintiff, there was no one available to hold the ladder (id., ¶ 13). Plaintiff was not required to demonstrate that the ladder was defective (*see Montalvo*, 8 AD3d at 174). "The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240 (1) was not met" (*Gordon*, 82 NY2d at 561).

Contrary to defendants' contention, plaintiff's affidavit does not directly contradict his deposition testimony (*see Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 851 [1st Dept 2012] ["it cannot be said that plaintiff's affidavit is self-serving or that it contradicts his deposition testimony" where "plaintiff's affidavit simply provides additional details illuminating his prior deposition testimony"]). Plaintiff's affidavit is consistent with his deposition testimony about how the accident occurred: he testified that the ladder "kicked out," causing him to fall (NYSCEF Doc No. 75, plaintiff aff, ¶ 10; NYSCEF Doc No. 94, plaintiff tr at 46, 97). In addition, plaintiff's affidavit is consistent with his deposition testimony that no one was available to hold the ladder, and that the ladder was "seasoned" and "wobble[d] all the time" (NYSCEF Doc No. 75, plaintiff aff, ¶¶ 7, 8; NYSCEF Doc No. 94, plaintiff tr at 42, 45).

"To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained"

(*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]). However, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

Defendants rely on Kucevic's testimony that DeForest told Kucevic that plaintiff "pushed the ladder and [it] twisted out" (NYSCEF Doc No. 85, Kucevic tr at 59). However, "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*O'Halloran*, 78 AD3d at 537). This statement is the only evidence that defendants offer to show that plaintiff undermined the stability of the ladder. Defendants also do not provide an acceptable excuse for failing to tender evidentiary proof in admissible form (*see Zuckerman*, 49 NY2d at 562). Even if plaintiff pushed on the ladder, as argued by defendants, his actions would constitute, at most, negligence, which is not a defense to liability under the statute (*see Rocovich v Consolidated Edison Co*., 78 NY2d 509, 513 [1991]; *Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 575 [1st Dept 2019] ["because plaintiff established that defendant failed to provide an adequate safety device to protect him from elevation-related risks and that that failure was a proximate cause of his injuries, any negligence on plaintiff's part in placing the ladder near the sheetrock is of no consequence"]; *Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017] ["At most, plaintiff's application of pressure to the ladder while engaged in the work he was directed to do, which caused it to twist, was comparative negligence, no defense to a section 240(1) claim"]). Moreover, "'[p]laintiff's failure to ask his coworkers to hold the ladder while he worked also did not constitute the sole proximate cause of the accident, since a coworker is not a safety device contemplated by the statute'" (*Rodriguez v BSREP UA Heritage LLC*, 181 AD3d

537, 538 [1st Dept 2020], quoting *Noor v City of New York*, 130 AD3d 536, 541 [1st Dept. 2015], *lv dismissed* 27 NY3d 975 [2016] [internal quotation marks omitted]).

Finally, although defendants argue that there are issues of fact as to how the accident happened (*see Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]), defendants have failed to show a different version of the accident for which they would not be liable.

In light of the above, plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1) is granted as against the HWA Owners, Neuberger, and Benchmark.

Labor Law § 241 (6)

Plaintiff also moves for partial summary judgment under Labor Law § 241 (6). Since plaintiff is entitled to partial summary judgment as to liability under section 240 (1), plaintiff's Labor Law § 241 (6) claim is academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]; *Auriemma v Biltmore Theatre*, LLC, 82 AD3d 1, 12 [1st Dept 2011] ["The plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic"]).

Plaintiff's Request to Amend the Caption

Plaintiff also moves to amend the caption to correct the spelling of his last name, O'Conner, in place of O'Connor (NYSCEF Doc No. 75, plaintiff aff, ¶ 14). Defendants did not oppose this request. Accordingly, this Court grants plaintiff's request to amend the caption.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion (sequence number 004) of plaintiff Kenneth O'Conner for partial summary judgment under Labor Law §§ 240 (1) and 241 (6) is granted under Labor Law § 240 (1) on the issue of liability as against defendants HWA 1290 III, LLC, HWA 1290 IV, LLC, HWA 1290 V, LLC, Neuberger Berman Group, LLC, and Benchmark Builders, Inc., with the issue of plaintiff's damages to be determined at the trial of this action, and is otherwise denied; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
KENNETH O'CONNER,

Index No. 159873/16

Plaintiff,

-against-

HWA 1290 III, LLC, HWA 1290 IV, LLC,
HWA 1290 V, LLC, each individually, and as
TENANTS-IN-COMMON of 1290 6th AVENUE,
NEW YORK, NEW YORK; 555 1290 HOLDINGS
LLC, VORNADO REALTY TRUST; VORNADO OFFICE
MANAGEMENT LLC; NEUBERGER BERMAN
GROUP LLC; and BENCHMARK BUILDERS, INC.,

Defendants.
--X

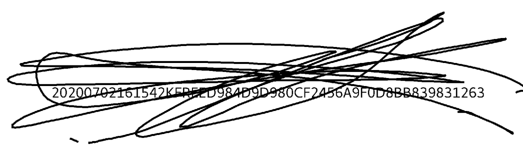
And it is further

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

ORDERED that the plaintiff shall serve a copy of this order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of 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/supetmanh); and it is further

ORDERED that this constitutes the decision and order of the Court.



7/2/2020	KATHRYN E. FREED, J.S.C.
DATE	

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☒ GRANTED	☐ DENIED	☐ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	