Rand v 28th Highline Assoc., LLC
2021 NY Slip Op 30249(U)
January 27, 2021
Supreme Court, New York County
Docket Number: 159837/2016
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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PATRICK RAND,

Plaintiff,

- v -

28TH HIGHLINE ASSOCIATES, LLC, and RELATED CONSTRUCTION, LLC,

Defendants.

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INDEX NO. 159837/2016

MOTION SEQ. NO. 001

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT.

The order of this Court entered January 19, 2021 (Doc. 48) is hereby vacated and replaced with the following amended decision and order.

In this Labor Law/personal injury action, plaintiff Patrick Rand moves, pursuant to CPLR 3212, for summary judgment on the issue of liability as to defendants 28th Highline Associates, LLC and Related Construction, LLC. Defendants oppose the motion. After consideration 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

Plaintiff commenced the captioned action by filing a summons and complaint on November 22, 2016. Doc. 36. In his complaint, he alleged that, on January 6, 2016, he was injured when struck by "an object which was improperly hoisted and/or secured" while working on a construction project ("the project") at 520 West 28th Street in Manhattan ("the site" or "the

premises"). Doc. 36 at par. 53. He further alleged that defendants 28th Highline Associates, LLC ("Highline") and Related Construction, LLC ("Related"), which owned or managed the premises, or were hired to perform work at the site, were negligent and violated sections 200, 240(1) and 241(6) of the Labor Law. Doc. 36, at pars. 54, 61.

Defendants joined issue by their answer filed January 11, 2017. Doc. 7.

In his bill of particulars, plaintiff alleged that defendants were negligent in, inter alia, failing to provide proper hoisting and other safety equipment to protect him from height-related risks. Doc. 38 at par. 11. He also alleged that defendants violated Labor Law sections 200, 240(1) and 241(6). Doc. 38 at pars. 15-16.

At his deposition, plaintiff testified that, on the day of the incident, he was employed as a laborer by Force Services LLC ("Force"), and that a new building was being constructed at the site. Doc. 40 at 33, 37, 39. His duties included cleanup, garbage removal, organizing the floors, and doing any other jobs which could not be handled by the other trades at the site because they were "overwhelmed." Doc. 40 at 34, 40. His foreman that day was Rob Kaminsky and his equipment included, among other things, a hard hat and gloves. Doc. 40 at 35-36.

On the day of the occurrence, plaintiff was assigned to the 13th floor of the building, where he was cleaning, moving equipment, and preparing to remove garbage. Doc. 40 at 42. There were openings in the ceiling between the 13th and 14th floors and he had to lift materials through such an opening when told to do so. Doc. 40 at 43. That day, he was directed by Kaminsky to pass steel beams from the 13th floor to concrete workers on the 14th floor through a hole in the ceiling which measured about 4 feet long and 3 feet wide. Doc. 40 at 43-45, 47. He said he was asked to pass the beams to the 14th floor because "they wouldn't fit right in the hoist" and also because the concrete workers "were behind and needed help." Doc. 40 at 44-45. The

beams were 12 feet long, 14 inches wide, and 3 inches deep and weighed approximately 100 pounds. Doc. 40 at 45, 51. When asked how the incident occurred, plaintiff responded:

> So I was passing up one of the beams to the two concrete guys and they would grab them and pull them up. They would pull the beam up. And then it slipped, I guess, out of their hands and I threw my hand up and I caught it while it was coming to me.

Doc. 40 at 47.

The beam started to come down towards him after he had already passed it to the concrete workers and it was out of his hands. Doc. 40 at 50. Although plaintiff testified that the beam "must have slipped out of [the concrete workers'] hands", he also testified that he was not certain whether it slipped out of the hands of both men. Doc. 40 at 49, 51. When the beam descended, he caught the bottom of it with his left hand and the weight of the beam caused him to feel a tear down his shoulder towards his back. Doc. 40 at 51-53.

Michael Giuliano, Senior Project Manager for Related, appeared for deposition on behalf of defendants. Doc. 41 at 8, 11. In that capacity, he was responsible for daily activities at the site including, inter alia, budgeting and scheduling. Doc. 41 at 9. He was present at the site approximately 50% of the time and, when there, walked the site and attended meetings. Doc. 41 at 19. Michael Amato, a project manager for Related, was at the site more often than Giuliano and performed similar duties. Doc. 41 at 33-34.

Giuliano represented that the premises were owned by Highline, which hired Related, the construction manager at the site, to "oversee the day-to-day construction of [the] project and manage the subcontractors." Doc. 41 at 9, 12-17. Related had the ability to hire and fire contractors as well as to insist on safety practices. Doc. 41 at 10. There was no general contractor at the site. Doc. 41 at 12, 37-38. He and superintendents and assistant

superintendents for Related had the authority to stop work if they saw an unsafe condition but he denied that he had "the authority to direct the means and methods of how a particular trade did [its] job." Doc. 41 at 75.

Steen Urbom of Construction Realty and Safety Group ("CRSG"), which was hired by Related, was the site safety manager, and he prepared an accident report after the occurrence. Doc. 41 at 23-24, 54. Urbom was to advise Related if he saw an unsafe condition at the site, although he had the authority to stop the work if he saw an imminent danger. Doc. 41 at 73-74. However, Urbom did not have the authority to direct Force's employees. Doc. 41 at 74-75. The accident report prepared by Urbom reflected, inter alia, that plaintiff "was working around form work activities when a piece of form work fell and he caught it and felt a rip in his hand." Doc. 42. The report listed the primary cause of the incident as "[w]orking under overhead activities." Doc. 42.

According to Giuliano, Related hired Force to do "[g]eneral labor and carting services" on the project, including cleaning floors, hauling away garbage, and other various tasks set forth in their contract, including moving materials. Doc. 41 at 39-41. On occasion, Force's work included assisting other trades. Doc. 41 at 64. Related provided Force with tools such as hammers, caution tape, and chipping guns. Doc. 41 at 66-67. He was not aware of any safety equipment provided to subcontractors at the site by Highline or Related. Although Giuliano recalled that Mansfield Superstructures ("Mansfield") was hired by Related to erect the concrete above the foundation floor by floor, he was not aware of any specific occasion on which Force assisted Mansfield. Doc. 41 at 42-44. As of January 2016, Mansfield was "bringing up the concrete" by creating concrete walls, columns and slabs using forms. Doc. 41 at 44. Giuliano was not aware of any witnesses to plaintiff's accident. Doc. 41 at 62.

In a response to plaintiff's notice to admit dated July 27, 2017, defendants' attorney admitted that Highline owned the premises and that Highline hired Related. Doc. 43.

Plaintiff, who filed a note of issue with a jury demand on May 5, 2020 (Doc. 34), now moves, pursuant to CPLR 3212, for summary judgment on liability as against defendants. In support of the motion, plaintiff argues that Highline and Related are both proper Labor Law defendants and that they violated section 240(1) by failing to provide him with any safety equipment.

In opposition, defendants argue, inter alia, that section 240(1) is inapplicable herein because plaintiff does not know what caused the beam to fall, that plaintiff's testimony regarding the cause of the fall was contradictory, that the beam did not fall due to the lack of safety devices, and that the statute is not applicable herein since plaintiff was not working at an elevated worksite.

In reply plaintiff reiterates that he was injured due to a gravity-related risk and that the incident clearly fell within the scope of Labor Law section 240(1).

LEGAL CONCLUSIONS

It is well settled that the movant on 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." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions (*See* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If the moving party meets

its burden, it becomes incumbent upon the non-moving party to establish the existence of material issues of fact. (*Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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]). 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 citations omitted]).

Here, there is no doubt that Highline, the owner of the premises, is a proper Labor Law defendant within the plain meaning of section 240(1). Additionally, Related is a proper Labor law defendant under the statute as a matter of law.

> Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury (*see Russin v Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the

> owner or general contractor" (*Russin*, 54 NY2d at 318). Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]).

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Here, plaintiff testified that his work was supervised by Kaminsky of Force. Although Giuliano testified that Related did not have the authority to direct the means and methods of plaintiff's work, he further stated that, as construction manager, his company oversaw day-to-day construction on the project, managed the subcontractors, had the ability to hire and fire contractors, insist on safety practices, and stop work if an unsafe condition existed. Since "[a] party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law §240(1)" (*Yaguachi v Park City 3 & 4 Apts., Inc.*, 185 AD3d 635, 635 [2d Dept 2020] [citations omitted]; *see also Lind v Tishman Constr. Corp. of NY*, 180 AD3d 505, 505 [1st Dept 2020]), this Court determines that Related is a proper Labor Law defendant.

Additionally, this Court finds that plaintiff is entitled to summary judgment on his claim against both defendants pursuant to Labor Law section 240(1). Despite defendants' contention, inter alia, that there are issues of fact regarding how the incident occurred, they are clearly liable for plaintiff's injuries resulting from the falling beam. Plaintiff testified at his deposition that, as he was handing the beam up to workers on the floor above him through a hole in the ceiling, the beam fell and injured him. Regardless of whether plaintiff dropped the beam, or whether it slipped from the hands of the workers above him, this is precisely the type of accident that Labor Law section 240(1) was intended to prevent. (*See Humphrey v. Park View Fifth Ave. Assoc. LLC*, 113 AD3d 558, 559 [1st Dept 2014]) [defendant liable where aluminum beam fell down from

above and injured plaintiff]; *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [partial summary judgment granted to plaintiff where a wooden plank fell and struck him in the head]).

Defendants argue, among other things, that the motion must be denied because plaintiff merely speculates as to the cause of the incident, and that, since plaintiff had lifted the beams up to the higher floor without incident on numerous previous occasions, there was no need for him to use a safety device. Although Labor Law section 240(1) is triggered where an inadequate safety device is used, the statutory violation herein is even more egregious since plaintiff was not provided with *any* safety device designed to provide overhead protection. Since the beam slipped while being moved between floors of a building under construction, it is evident that the proper protection required by section 240(1) should have been provided in order to avoid an accident (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001] [plaintiff in a Labor Law section 240[1] case must demonstrate that the accident occurred because of "the *absence* or inadequacy of a safety device of the kind enumerated in the statute"] [emphasis added]). Thus, plaintiff is clearly entitled to summary judgment on the issue of defendants' liability.

The parties' remaining arguments are either unpersuasive or need not be addressed in light of the result above.

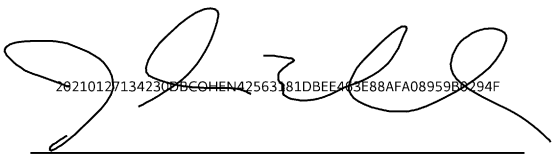
Therefore, it is hereby:

ORDERED that plaintiff Patrick Rand's motion for summary judgment on his claim against defendants 28th Highline Associates, LLC and Related Construction, LLC pursuant to Labor Law section 240(1) is granted, and the Clerk of the Court is directed to enter judgment on liability in favor of plaintiff and against said defendants, jointly and severally; and it is further

ORDERED that since plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, a trial of the issues regarding damages shall be conducted before the court at the earliest possible date; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order, with notice of entry, upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and, given that plaintiff's counsel has filed a note of issue accompanied by a jury demand, said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon 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/supctmanh)].



1/27/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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