SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

GUADALUPE PATRON HERNANDEZ, Index No.: 30345/2018E

Plaintiff,

- against - **DECISION and ORDER**

46-24 28TH STREET, LLC,

Defendant.

Hon. Lucindo Suarez, J.S.C.

Defendant moves pursuant to CPLR §3212 to dismiss the complaint. Plaintiff opposes the motion, and cross-moves pursuant to CPLR §3212, seeking partial summary judgment against Defendant 46-24 28th Street, LLC., ("Defendant") under his Labor Law §§240(1) and 241(6) causes of action.

In this Labor Law action, Plaintiff, Guadalupe Patron Hernandez, ("Plaintiff") alleges that he fell off a ladder while performing work at a construction site owned by Defendant.

Plaintiff, an employee of nonparty USA Construction & Painting, Inc. ("USA Construction"), alleges that on Friday, July 20, 2018, at approximately 3:30 p.m., he fell from a ladder while working on the third floor of the premises known as 46-24 28th Street in Long Island City, New York. Plaintiff stated that he was supervised at work by Sanchez, and also by Amir [Razzaq] "the boss." Plaintiff claimed that at the time of the accident, he was assigned the task of removing nails in connection with the demotion of a 15' by 10' wooden platform that was embedded in a brick wall. Plaintiff testified that the platform was 10 feet off the floor. Plaintiff placed a 10-foot leaning ladder against the far wall next to the platform, which he stated had "some rubber" at the bottom. Plaintiff had used the ladder prior to the accident without incident. Plaintiff testified that although the floor was free of debris, the ladder slipped, causing him to fall eight feet to the floor below.

Plaintiff claimed that a co-worker asked him if he was all right after the fall. He testified that, "I said that I was okay. Then I was not feeling well. So I went downstairs because it was almost time to leave, and I changed my clothes." To his knowledge, no accident report was prepared. He worked on some days after the accident. He did not seek any medical treatment until July 28, 2018.

Sanchez, Plaintiff's supervisor at USA Construction, testified as a non-party witness. He stated that plaintiff did not tell him about the accident on the day of the occurrence. He characterized Plaintiff as "always drunk." The day of the accident, Sanchez testified, "That day I paid him his salary and the only thing he said to me was, 'No one knows because he was drunk." He stated that Plaintiff appeared to be intoxicated, because he discovered Plaintiff drinking a Coors beer in the basement, Plaintiff smelled of alcohol, and Plaintiff's eyes were red. Sanchez testified, "He worked on the third floor and he went down to the basement, like, three or four times a day to drink his beer." Sanchez did not observe he accident, and learned of the accident only the following day, when a worker advised Sanchez that Plaintiff had fallen.

Razzaq, who gave instructions and assignments each day to the workers, testified that Plaintiff was fired on July 27, 2018, for showing up to work intoxicated on several occasions after receiving several warnings. Razzaq learned of the accident when he received legal papers from Plaintiff's counsel. Plaintiff never told Mr. Razzaq that he was injured on the job.

Defendant argues that plaintiff was the sole, proximate cause of the alleged accident. Defendant argues that the evidence shows that plaintiff was provided with the appropriate safety devices, set up his own ladder, and was intoxicated on the day of the alleged incident. Sanchez, observed Plaintiff drinking Coors Light on two separate occasions that day, and thus Defendant contends that Plaintiff's intoxication was the sole proximate cause of the accident.

As to the common law negligence and Labor Law §200 cause of action, Defendant argues that they are inapplicable to the facts of the instant case because the alleged accident did not occur as a result of a dangerous or defective condition, and Defendant did not exercise the requisite direction, control and supervision of Plaintiff to warrant liability for these causes of action. As to the claim under Labor Law 241(6), Defendant argues that none of the Industrial Code provisions identified by Plaintiff are applicable.[1]

Analysis

Labor Law §240(1)

Labor Law §240(1) applies where elevation-related risks are at involved in the work. (*Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267 [2001]; *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 [1st Dept. 2011] ["Labor Law §240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was

[1] Plaintiff has alleged violations of the following Industrial Code provisions 12 NYCRR §§1.5, 1.7(f), 1.15, 1.16(a) and (b), 1.17 and 1.21(b)(1), (3)(i), (4)(ii), (4)(iv) and (e).

unaware, and therefore over which it exercised no supervision or control.") The fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law §240(1). (*O'Brien v. Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33, 74 N.E.3d 307, 310, 52 N.Y.S.3d 68, 71 [2017].) To recover under Labor Law §240(1) for injuries sustained in a falling object case, a plaintiff must establish both: (1) that the object was being hoisted or secured, or that it required securing for the purposes of the undertaking; and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential. (*Flowers v. Harborcenter Dev.,* LLC, 2017 N.Y. App. Div. LEXIS 8146, *1, 2017 NY Slip. Op. 08117, 1 [4th Dept. 2017].)

Labor Law §240(1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker." (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 7, 959 N.E.2d 488, 935 N.Y.S.2d 551). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." (*id.* at 7;) "The dispositive inquiry does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential." (*Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 922 N.E.2d 865, 895 N.Y.S.2d 279; *Kandatyan v. 400 Fifth Realty, LLC*, 2017 N.Y. App. Div. LEXIS 8064, *3-4, 2017 NY Slip Op 07984, 1 [2d Dept. 2017] [worker pushing dolly up ramp, injured as object rolled backward, was within purview of Labor Law 240[1].)

"[W]here 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, 823 N.E.2d 439, 790 N.Y.S.2d 74 [2004]).

According to Plaintiff's deposition testimony, the accident occurred when the ten-foot straight ladder slid from its position, causing him to fall. Plaintiff has thus met his initial burden of demonstrating a *prima facie* violation of the statute. (*See Peralta v. American Tel. & Tel. Co.*, 29 AD3d 493, 494, 816 N.Y.S.2d 436 [1st Dept. 2006] ["[u]nrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240(1)"].) "It is well settled that a failure to properly secure a ladder, to ensure that it remains steady and erect while being used,

constitutes a violation of Labor Law §240(1)." (*Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153, 675 N.Y.S.2d 341 [1st Dept. 1998]; *see also Montalvo v. J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174, 780 N.Y.S.2d 558 [1st Dept. 2004]; *Wasilewski v. Museum of Modern Art*, 260 AD2d 271, 271, 688 N.Y.S.2d 547 [1st Dept. 1999]). Moreover, plaintiff is under no obligation to show that the ladder was defective in some manner, or to prove that the floor was slippery. (*see Klein v. City of New York*, 222 A.D.2d 351, 352, 635 N.Y.S.2d 634 [1st Dept. 1995], aff'd 89 NY2d 833, 675 N.E.2d 458, 652 N.Y.S.2d 723 [1996]). To make out a section 240(1) violation, it "was sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling." (*Bonanno v. Port Auth. of N.Y. & N.J.*, 298 AD2d 269, 270, 750 N.Y.S.2d 7 [1st Dept. 2002]).

Despite Plaintiff's *prima facie* on his cross-motion, issues of fact exist which preclude summary judgment in favor of either party under the Labor Law §240(1). In opposition to the cross-motion, and in support of the motion, Defendants raised issues of fact exist as to the manner Plaintiff's accident happened, and as to whether Plaintiff was intoxicated at the time of accident.

The sole proximate cause defense based upon a Plaintiff's intoxication in the context of a Labor Law case may not be based on speculation. Accordingly, in *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 675 N.Y.S.2d 341 (1st Dept. 1998) the defendant failed to raise an issue of fact merely because the plaintiff had alcohol on his breath when he was taken to the hospital after the accident. Moreover, where there is a clear statutory violation, intoxication may only be a concurrent cause which will not constitute the sole proximate cause of the injury. Here, however, the testimony of Sanchez raises issues of fact as to whether plaintiff was habitually drunk, including on the day of the accident. Sanchez was competent to testify that plaintiff was intoxicated based on his observations. In this regard, the law holds:

> "Contrary to the court's ruling, it is well settled that a lay witness may testify regarding his or her observation that another individual exhibited signs of intoxication (see Felska v New York Cent. & Hudson Riv. R.R. Co., 152 NY 339, 343-344, 46 NE 613 [1897]; see also Jerome Prince, Richardson on Evidence § 7-202 [h] [Farrell 11th ed 1995]), and also regarding his or her opinion that another individual was intoxicated (*see Felska*, 152 NY at 344; Bhowmik v Santana, 140 AD3d 460, 461, 33 NYS3d 51 [1st Dept. 2016]; *Burke v. Tower E. Rest*, 37 AD2d 836, 836, 326 NYS2d 32 [2d Dept. 1971]). Although HN2 " '[t]rial courts are accorded wide discretion in making evidentiary rulings [and], absent an abuse of discretion, those rulings should not be disturbed on appeal' " (*Mazella v. Beals*, 27 NY3d 694, 709, 37 NYS3d 46, 57 NE3d 1083 [2016]; see generally *People v. Acevedo*, 136 AD3d 1386, 1387, 25 NYS3d 761 [4th Dept. 2016], lv denied 27 NY3d 1127, 39 NYS3d 109, 61 NE3d 508 [2016]), we conclude that the ruling at issue here was an abuse of discretion." (*Brooks v. Blanchard*, 174 A.D.3d 1362, 1363, 105 N.Y.S.3d 682, 684-685 [4th Dept. 2019]).

In addition, given the fact that Plaintiff allegedly failed to report his accident to his supervisor, and Plaintiff's cryptic statement "who knows," there exist issues of fact and credibility as to the manner in which the accident occurred, thereby, precluding summary judgment in favor of either party.

Labor Law §241(6)

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. To sustain a cause of action pursuant to Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident. (*Yaucan v. Hawthorne Vil., LLC,* 2017 N.Y. App. Div. LEXIS 8088, 2017 NY Slip Op 08035 [2d Dept. 2017].) "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v. State of New York*, 88 AD3d 951, 953, 931 N.Y.S.2d 662 [2d Dept. 2011]). As a prerequisite to a Labor Law §241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. (*DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241[6].)

Given the disputed issues of fact, summary judgment is not warranted on the claims under Labor Law § 241(6). Additional issues of fact exist as to whether he ladder itself was a sufficient safety device, and whether the ladder slipped as claimed by the plaintiff.

Common Law Negligence and Labor Law §200 Claims

An owner may be liable under the common law or under Labor Law §200 for a dangerous condition arising from either the condition of the premises or the means and methods of the work. (*See Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143-144, 950 N.Y.S.2d 35 [1st Dept. 2012]). An owner's liability only attaches for an injury arising from the means and methods of the work if the owner exercised supervisory control over the work (*id.* at 144). Where a dangerous condition in the premises caused the accident, liability only arises if the owner created the condition or had actual or constructive notice of it (*id.*). "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit

defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). However, "constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection." (*Curiale v. Sharrotts Woods, Inc.*, 9 A.D.3d 473, 475, 781 N.Y.S.2d 47 [2d Dept. 2004].)

There is no evidence in this case that Defendant owner exercised supervisory control over Plaintiff's injury-producing work or that the accident arose out of a dangerous condition on the premises that Defendant possessed actual or constructive notice of.

Conclusions

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Defendant's motion is granted in part only to the extent of dismissing the claims based on common law negligence and Labor Law §200; and it is further

ORDERED, that the cross motion by Plaintiff is denied.

This constitutes the decision and order of the court.

Dated: June 16, 2021

Hon. Lucindo Suarez, J.S.C

LUCINDO SUAREZ, J.S.C.